2007

Legal aid and governmentality: Beyond neo-liberalism

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LEGAL AID AND GOVERNMENTALITY: BEYOND NEO-LIBERALISM

By

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A Thesis
Submitted to the Faculty of Graduate Studies
through Sociology and Anthropology
in Partial Fulfillment of the Requirements for
the Degree of Master of Arts at the
University of Windsor

Windsor, Ontario, Canada

2007

Your file Votre référence
ISBN: 978-0-494-34960-1
Our file Notre référence
ISBN: 978-0-494-34960-1

ABSTRACT

The evolution of Ontario's legal aid program has followed the trajectory of broader discursive shifts, beginning from charity to rights and towards fiscal responsibility. Such discursive developments have been imagined by governmentality scholars as indicative of specific historical governmental strategies. Within this field, rationalities of welfarism and neo-liberalism have dominated the ways in which government has been analysed. This paper examines how representative the shift from welfarism to neo-liberalism is of actual programs and to what extent these dominant discourses structure the current legal aid program in Ontario, Legal Aid Ontario (LAO). Through discourse analysis, I critically examine programmatic texts such as. manuals and policy guidelines to draw out the discourses which operate in these documents. The findings suggest that the governmental rationalities that inform LAO cannot be neatly categorized as neo-liberalism; rather, there is evidence of a multiplicity or complexity of rationalities that have shaped LAO.

ACKNOWLEDGEMENTS

I would first like to thank my advisor, Randy Lippert for inspiring me to continue onto graduate studies and helping through this process. Without his guidance, dedication, and insight, this paper would not have reached completion. In addition, I would like to thank my second reader, Glynis George, who challenged me to think in different ways and to be a better student. I am grateful to my external reader, Brian Mazer for contributing his time, efforts and knowledge to this paper. I must also thank the graduate secretary and other professors in the department for being so helpful and always having so many kind words of encouragement. I would like to acknowledge the unconditional love and support of my sister, parents and family members, who have always stood behind my goals and had faith in me, even when I had none in myself. To my friends, new and old, who have always lent a patient ear to my musings and melodramas, and kept me grounded. And finally, to Pat, his understanding, optimism, and love are unparalleled; thank you for making this whole journey worthwhile.

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CHAPTER ONE

INTRODUCTION

A recent press release from the Law Society of Upper Canada (LSUC), the governing the legal profession in Ontario, declared: "Since the Ontario Legal Aid Plan was founded in 1967, the Law Society has recognized that legal aid should be considered a right, not a charitable gift, and that individuals are equal before the law only if they are assured the option of legal representation" (The Law Society of Upper Canada, 2007). This statement illustrates the evolution of Ontario's legal aid program through three discursive shifts, one based on the ideal of charity to one based on entitlement through rights and finally one based on the freedom of choice. This development of legal aid seems to mirror the trajectory of other governmental programs. With such shifts in mind, a generation of academics has sought to map a history of our present. At the head of this academic 'movement' is Michel Foucault, who imagined such programs as part of a larger 'how to' of government, termed 'governmentality'. Governmentality is the way in which we think about how to govern over the conduct of individuals. These discursive systems of thought, or rationalities, are specific to particular historical moments. Scholars have proceeded to examine governmentality and its multiple forms, with most analyses showing that shifting rationalities that inform governmental programs such as legal aid are indicative of a greater shift from a liberal to an advanced liberal style of governing, one which is commonly referred to as a change from welfarism to neo-liberalism.

The purpose of this thesis is to explore how representative the widely-assumed shift above is of actual programs. More specifically, I will critically examine the governmental discourses that shape the current legal aid program in Ontario, Legal Aid Ontario (LAO). I think there is a possibility that the governmental rationalities that inform LAO cannot be neatly

categorized as neo-liberalism and that the development of LAO has not been wholly characteristic of the much-discussed shift from welfarism to neo-liberalism. As such, other rationalities may be informing and shaping this program in our present. This thesis may refine general assumptions in the governmentality literature that neo-liberalism is already the dominant rationality of our time. To be sure, I do not wish to suggest neo-liberalism and its potential for deleterious effects on people's well-being is not present in LAO. Rather, my research question concerns to what extent it has purchase and the possibility that other governmentalities currently shape LAO. By problematizing a totalizing image of neo-liberalism through the case study of legal aid, I wish to encourage an alternative view of governmentality, as well as challenge the current organization of legal aid delivery with the aim of opening up the possibility for progressive change in this realm.

Historical Development of Legal Aid

Prior to examining the governmentalities which currently shape legal aid, the program must be located historically to understand how and through what influences the program has developed. This provides the necessary background to begin to locate discourses within governmental strategies. While the present model of LAO is organized around a mixed-model system – a combination of certificate and clinic services – in considering the historical development of legal aid policy, the focus of this paper will be heavily based on the trajectory of the certificate system. While community legal clinics and Student Legal Aid Services Societies (SLASS) are funded by LAO, they are independent corporations and thus their governance mechanisms are different and separate from the certificate side. Therefore, albeit intertwined, each part of the model has its own distinctive history and is permeated with different discourses, which is arguably the reason they continue to be practised separately. The analysis of the

development of the legal aid program will be explored through three basic eras: early legal aid, the first organized structure of legal aid, legal aid in the 1980s to the present structure of legal aid.

Early Legal Aid Provision

Early provisions for legal aid in Ontario date back to the 1920s where services were provided on an *ad hoc* basis, contingent upon the charity of lawyers and their perception of who was needy (Reilly, 1988). The legal provision of *in forma pauperis* – in which a presiding judge had the discretion to waive court fees – was the only formal legal assistance available to the poor (Zemans, 1978). In the 1930s, the pressures of the Depression created a substantial increase of individuals who suffered from economic and social dislocations, particularly in urban areas, which placed a heavy demand on the existing measures of legal aid. In order to cope with the increase of those who were destitute, the Board of Control in Toronto requested the York County Law Association to provide a lawyer on a voluntary basis to staff an office providing free legal aid for welfare recipients (Reilly, 1988: 87). While the Association agreed to participate, they rejected the terms of organization. Rather, participation was to be contingent upon the Board adopting an organizational model in which possible recipients would be given a list of lawyers willing to give free legal advice and in their own offices rather than one provided by the city (Reilly, 1988: 87). The scope of possible recipients of legal aid was limited in that it dealt only with emergency situations and excluded the working poor. The terms of organization and the definitions of eligibility mirror the emergence of a liberal form of government which is concerned with governing through the needs of subjects. However, needs are a particular take or strain of this type of government structure which also includes the governance of the social through a welfare state. The emergence of which can begin to be seen in the legal aid structure in the 1940s.

The late 1940s was the first time the legal profession in Canada, the Canadian Bar Association, officially acknowledged it was part of their duty and social responsibility to provide legal aid services to those in need. In part this was a response to critiques that suggested legal aid should be a permanent structure and that lawyers had a professional duty to Canadian society to ensure access to the legal system existed (Reilly, 1988). However, it was also a governance strategy to authorize state intervention into formally private activities through the knowledge of experts. These experts legitimated the problematization of social life, linking political objectives and personal conduct (Rose, 1999: 149). The responsibility for legal aid arrangements was placed on the expertise each provincial governing body, the LSUC formed a Special Committee to determine the form of legal aid in Ontario. Various surveys illustrated that while agreement among lawyers varied in regards to the need for a formalized and permanent system of legal aid, particularly between urban and rural lawyers, there was a consensus among lawyers that government intervention should not be an option and should be circumvented. While seemingly at odds with the dominant thrust to have government intervention in society at the time, this maintenance of authority over the legal aid program by the LSUC was typical of other professions at the time which wished to maintain autonomy due to their expertise (Rose and Miller, 1992). Based on the recommendations of the Special Committee, the LSUC applied to the Ontario legislature to have the legislation passed (Reilly, 1988; Zemans, 1978). The *Law Society Amendment Act* was passed in 1951 which allowed the LSUC to establish and regulate a plan to provide legal aid services, called the Ontario Legal Aid Plan (OLAP). The OLAP maintained the voluntary basis of legal aid provision, covering both civil and criminal proceedings for those who met the financial eligibility requirements based on annual income,

number of dependents, and a discretionary needs test (Ministry of Attorney General, 1996). The *Act* laid the groundwork for the organization of legal aid in Ontario for the next forty years.

By the 1960s it became evident that the voluntary system was inadequate to satisfy the existing needs for legal aid. The Attorney General of Ontario established a Joint Committee to report on the existing OLAP and to make recommendations for the future. The report, tabled in 1965, commented on the increasing gap between demands for legal aid and actual services due to limited financial resources. It also criticized the lack of comprehensive coverage and the unreasonable expectations that lawyers provide free services rather than the government taking responsibility for funding (Zemans, 1978 and Chouinard, 1985). The report, however, also suggested that the administration of legal aid should continue to be the responsibility of the LSUC as they had a particular expertise of legal aid. Most pertinent to this discussion, one of the recommendations from the Joint Committee was that the provision of legal aid should be considered a right, not a charitable gift, and as such lawyers should be paid fees to deliver legal aid uniformly across the province (Thornley, 1983; Ministry of the Attorney General, 1996). This conclusion was in line with other governmental initiatives of the time which advocated an extension of state responsibility to ensure the well-being of citizens through funded programs such as the Canada Assistance Plan, *The Medical Care Act*, the Canada Pension Plan and welfare legislation (Ministry of the Attorney General, 1996). Legal aid seems entirely consistent with shift to govern the economy based on a centralized system of economic planning (Miller and Rose, 1990).

The Ontario Legal Aid Plan: 1967 – 1970s

The provincial government accepted the Joint Committee's recommendations and passed the *Legal Aid Act* in 1967. The main feature taken from the report was the maintenance of the

administration of the program by the LSUC. The certificate model was adopted in which the lawyer is remunerated by the OLAP at a rate of 75 percent of a normal solicitor. No full-time lawyers would be employed by the Plan to provide services (Taman, 1976; Thornley, 1983). In addition, the range of services covered was broadened to include administrative tribunals. Also introduced was the concept of duty solicitors or counsel members in which private lawyers were paid to be present in court to provide services to those unable to retain counsel or qualify for a certificate. These services would be funded by the province on an open-ended, demand-driven basis with the province agreeing to fund any shortages past annual projections (Zemans, 1978). Despite the adopted changes, the OLAP had many challenges, such as those put forth by poverty law activists lobbying for community legal services as well as fiscal pressures of an open-ended funding scheme. The challenges related to funding highlight the broader concerns of government at the time on matters relating to fiscal control and accountability. These challenges also created tension in the OLAP, ultimately inspiring the creation of a taskforce to review the legal aid plan.

The Osler Task Force on Legal Aid was created in 1974 with the objective to "determine the parameters of the future direction and development to ensure that it has the capacity to meet its objectives in the years ahead" (Zemans, 1978: 686). One of the most significant results of this report was the recommendation that the governing body of legal aid should no longer be the LSUC, but rather a new non-profit corporation to be named Legal Aid Ontario. The conflict of interest between the LSUC and the administration of legal aid was addressed in the report which states:

> A number of briefs were delivered and submissions made to us representing that the position of the Law Society under the present scheme involves a conflict of interest. The public good must be the sole purpose of the Legal Aid Plan, whereas The Law Society is by statute the governing body of the legal profession and must be primarily concerned with its welfare.... Nevertheless, it is impossible to perceive the direction of the Legal Aid Plan as being sufficiently single-minded if it is left in the hands of a Committee of

> The Law Society, reporting to Convocation, the governing body of that Society, both groups being composed overwhelmingly of lawyers (Taman, 1976: 377).

This report demonstrates the increasing motivation to breach the professional authority of lawyers effectively rendering them governable which is reflective at the time of an emerging broader discourse of accountability. The use of experts to legitimate governance over the social through state intervention had the negative effect of establishing themselves as a crucial resource and within each expert enclosure there were specialized sets of knowledge and technical skills (Rose and Miller, 1992). However, mechanisms to displace the LSUC from their governance over legal aid would not be realized for another two decades, illustrating the struggle between rational planning and expert powers indicative of this specific period. Thus, while the recommendation was not taken up, it was the first time the governance of the program by the LSUC was questioned. Maintaining the LSUC as the head of legal aid was significant to the development of the program in that it sustained the authority of the certificate side of legal aid. The taskforce proposals were illustrative of a more general problematization of welfare state governance (Rose and Miller, 1992).

The Ontario Legal Aid Plan: 1980s to Present

There were significant developments to the OLAP in the 1980s and 1990s. The range of services offered through legal aid was expanded to include most traditional areas of law, such as criminal and family, and other civil proceedings. The growth of the certificate system was coupled with a growth in clinics which provided aid for poverty law cases (Ministry of the Attorney General, 1996). The 1980s also experienced changes in the financial eligibility requirements. The principle of the ability to pay was replaced by a gross income test where people with actual financial commitments exceeding the specified maximums, were found to have the monies available to pay for legal aid, regardless of whether the money was actually

available (Social Planning Council of Metropolitan Toronto, 1983). Despite the fact that this change seriously undermined the principle of right to legal representation and access to justice, it was legitimated by the concern to control the costs of the OLAP (Social Planning Council of Metropolitan Toronto, 1983).

Even with the tightening of eligibility requirements, legal aid in the 1990s continued to face increased demand for services due to economic recession, the Supreme Court of Canada ruling (*R. v. Askov)* that persons must be brought to trial within a reasonable time, the increased prosecution of spousal abuse cases and awareness of impaired driving cases (Lawson, 1998). The increased costs and spending on the legal aid certificate program alerted the government to find a way to curb spending. In 1994, the provincial government announced for the first time it would not fund the cost of the OLAP. Ultimately, the LSUC was forced to sign a four-year Memorandum of Understanding (MOU) with the provincial government which created a capped funding system and resulted in drastic changes to the program (Lawson, 1998). The MOU limited coverage to only include those charges that would face probable jail sentences. Whereas coverage in the past was linked to the potential harm a charge could have to a person's livelihood. In addition, the financial eligibility criteria were tightened again and there was an enhanced use of duty counsel for family law issues (Lawson, 1998: 253-254). Furthermore, in November 1995, Convocation voted to cut the number of certificates from 155,000 to 100,000. Tariffs maximums were reduced resulting in a cut equivalent to a 22% reduction from the then current average case cost. Block fees were eliminated and replaced by prescribed hourly maximums (Lawson, 1998: 254). In general, all services were prioritized so that vital legal services could be preserved in each area of law while less essential legal services effectively eliminated.

This fiscal restructuring led to discontent among lawyers to the extent that some were refusing to take certificates. In September 1995, in response to lawyers starting to revolt against unpaid accounts and lengthy waiting times for the payment of accounts, the Attorney-General's office released a statement which dismissed these rising concerns. It stated:

> "[T]he law society has to realize that it has reached the end of the road. The money promised by the former government is all that is available. 'There is no question they're going to have to live within the memorandum of understanding. There is no more money for them'" (Mittelstaedt, 1995: A9).

This cut back in funding and strict audit requirements was symptomatic of a general shift in government programs aimed at governing through the logic of the market and economics (Rose and Miller, 1992).

In 1997, then Attorney General Charles Harnick asked John McCamus to undertake a review of legal aid with the eye to "remodel the system to make it fiscally responsible, efficient and accountable to government" (Makin, 1997: A1). The official mandate of the review was:

> The review will consider all legal aid programs in the province with the objective of identifying aspects that should be reduced, maintained or enhanced including new ideas in the management and delivery of legal aid in order that the current and future legal needs of low income residents of Ontario can be met in the most effective and efficient way possible within the existing funding allocation (Lawson, 1998: 259).

Among other things, the report recommended the need to create a mechanism to make the legal profession accountable and thus provided the impetus for the creation of Legal Aid Ontario, as prescribed years earlier by the Osler report. However, this recommendation would effectively remove the LSUC from control over legal aid, finally breaching the power of legal expertise and rendering them governable through the new expertise of economics (Rose and Miller, 1992). The *Legal Aid Services Act* was passed in 1998 and took up most of the recommendations of the McCamus report, namely the creation of Legal Aid Ontario (LAO) an arms-length body to govern over legal aid.

LAO creates and governs the policy and guidelines surrounding the administration of the program. Through this structure, LAO provides various types of legal services. The primary services are via the certificate system where clients are given a certificate to take to any lawyer of their choice. The lawyer must then agree to and authorize the certificate officially with LAO. Another service offered to the public is the Duty Counsel program. This program consists of a Supervisory Duty Counsel and Duty Counsel members. Supervisory Duty Counsel are salaried lawyers who manage the program and Duty Counsel are lawyers paid on a per diem basis to attend court and provide legal services to litigants who come unrepresented (Legal Aid Ontario, hereinafter LAO, 2002b). Related to the duty counsel program is the advice lawyer program. This is an out of court assistance for clients who have general inquiries or wish to have their legal documents reviewed. Lawyers are scheduled for three or four hours and paid on a per diem basis to attend these programs, such as the Family Law Information Centres. In addition to these services, LAO also staffs Family Law, Criminal Law and Refugee Law Offices and specialty clinics although these services are not available in every jurisdiction.

In order for lawyers to participate in legal aid delivery, they must meet the minimum experience and professional development requirements to be on and remain on a legal aid panel. The panels include Criminal, Family, Refugee, Duty Counsel, and Consent and Capacity Boards. Each panel has different standards that lawyers must meet to remain empanelled, otherwise face potential removal from the panel, however, not indefinitely. Mechanisms to ensure that the panel standards are met are based on self-report (see LAO, N.d.c; N.d.d; N.d.e; N.d.o). Empanelled lawyers, particularly those who work on certificates, must submit a detailed summary of their hours to legal aid in order to receive payment for services. Also, lawyers are only allowed to bill a maximum number of hours per certificate, regardless if they work beyond

the allotted time. The rates of pay or tariffs are based on the number of years of experience that the lawyer has obtained.

Legal aid coverage spans across cases under the categories of criminal, family, and refugee law matters. All of the services offered by LAO require that the client meet financial eligibility requirements as set out in the guidelines. These requirements are based on an income and asset assessment in which standard allowances, set by legislation, are given on basic living costs (LAO, 1999). In cases where the client does not meet the eligibility requirements, the Area Director makes the final decision about whether the client is considered able to pay for some or all of their legal services (LAO, 2006a).

In addition to financial eligibility requirements, the client's legal merit must also be taken into consideration. In the case of criminal matters, the area director alone makes the determination of legal merit. In family or refugee matters where merit is uncertain, the area director can issue a two-hour certificate. The client takes this certificate to any lawyer who then assesses the merit of the legal issue and writes an opinion letter based on this review. While criminal matters are solely decided based on the discretion of the Area Director, opinion letters can be authorized in cases where the lawyer requests additional services to be covered by an existing certificate (LAO, 2006a). The role of the Area Director is to oversee the administration and provision of legal aid services in a specific region.

This brief history of the certificate side of legal aid highlights the broader rationalities that have influenced the development of the program to what it is today. Gleaned mostly from general policy statements and secondary accounts, this development seems to be in line with other social policy development over the same period – a shift from pastoral to welfare and finally to neo-liberal strategies of rule. However, before assuming that the current legal aid

program befits a neo-liberal program, closer study is required. A governmentality analysis will allow us to more closely study and identify how power is translated and practiced within legal aid.

CHAPTER TWO

A GOVERNMENTALITY APPROACH

The notion of the problematic of government was first presented to us by Foucault (1991) in his lecture, "Governmentality". Government in this sense is not limited to political notions of the State, rather, government is defined as the "conduct of conduct" (Dean, 1999: 10) or as "any attempt to control or manage any known object" (Hunt and Wickham, 1994: 78). Foucault examined how government has become problematized since the 16th Century, with the regulation of population and apparatuses of security as its objective. In short, Foucault explains governmentality as the art of government, that is, how we think about governing or the mentalities of government (Foucault 1991). However, to govern is not only to govern others. Rather, government also consists of how we govern ourselves, things, and entities (Dean, 1999: 12; Foucault, 1991: 93). Therefore, problematics of government pose questions concerning some aspect of the conduct of conduct. Problematization has been defined as "a way in which experience is offered to thought in the form of a problem requiring attention" (Rose and Valverde, 1998: 545). Rationalities are these questions of how to better govern, through which government is initially problematized. These are the mentalities of government derived from the human sciences (Dean, 1999; Hunt and Wickham, 1994) and grounded upon expert knowledge. They constitute what is good or proper, ideal or virtuous, appropriate or responsible conduct (Rose and Miller, 1992: 179; Dean, 1999: 12). Rationalities are translated into programs which seek to address the problems of government and create an illusion of government as self-evident or taken for granted (Dean, 1999: 16).

Thus, government is fundamentally a problematizing activity (Rose and Miller, 1992). Programs are created to try to "make things better" (Dean, 1999: 33). They are informed by the

experts as to how to deal with the emergence of a problem that requires some form of response. Programs "make the objects of government thinkable in such a way that their ills appear susceptible to diagnosis, prescription and cure by calculating and normalizing intervention" (Rose and Miller, 1992: 182). Programs require the implementation of technologies, or assemblages of diverse forces which have the role of instantiating rationalities of government. Governance is stabilized when the assemblages of techniques become persistent forms of repeatable instructions of how to conduct oneself. It must be noted, however, that every attempt to govern is almost always incomplete or a failure and therefore must continually be problematized (Hunt and Wickham, 1994; Rose, O'Malley and Valverde, 2006; Foucault, 1991a). This creates the constant need for reflexivity and experimentation with new technologies and programs. Therefore modern government is reliant on different techniques (new and old) informed by prevailing rationalities and translated into programs to govern the population (Rose and Miller, 1992).

One of the interesting aspects of government that is pertinent to this thesis is regulation through morality. Dean states "government is intensely moral in that it seeks to engage with how both the 'governed' and the 'governors' regulate themselves" (1999: 12). It has been suggested that moral regulation is typically initiated by the middle classes through projects of self-governance which become taken up by policy makers at the state level in the form of legislation and thus become projects of governing others (Hunt, 1999: 2). Complicated with moral regulation of government is law and legal discourse which are used as techniques of governance. Legality thus becomes "intrinsically intertwined with problematics of the norm or of supporting and authorizing the power of the norm" (Rose and Valverde, 1998: 548). On one hand, laws are created in a response to a 'moral panic' and on the other hand, law is a resource or

a tool used in reform movements (Hunt, 1999: 12). Examples of such moral regulation programs can be found in Levi's (2000) study of Megan's law or Moore and Valverde's (2002) study of date rape drugs. There is an indication, however, of a shift in the form of law and moral regulation; from state sponsored policies to a "pluralism of authorities" (Hunt, 1999: 4). Individuals are now responsible for actively engaging in their own self-formation rather than their self-control. This shift in the individual's role in ensuring optimization of life has also been theorized as a more general shift in government rationalities from welfarism to neo-liberalism.

Many scholars have encouraged the view that we are currently in an advanced liberal mode of rule, which has also been translated as the shift from welfarism to neo-liberalism (see Dean, 1999; Ericson and Doyle, 2004; Levi, 2000; Moore and Valverde, 2002; Pratt, 2005; Rose, 1999; Rose and Miller, 1992). Welfarism as a rationality was seen to command the first half of the 20th Century. This rationality is characterized as social government where adjustments were made to the fiscal policies to establish security for the population "from the cradle to the grave" through programs such as national health care, education and welfare provisions (Dean, 1999: 150). Welfarism thus advocates a mutual responsibilization of the state and individual, where the state has a responsibility to provide the general means for the population's well-being and the population is responsible for behaving as good citizens (Rose, 1999: 139). The key innovation of welfarism was the effort "to link the fiscal, calculative and bureaucratic capacities of the apparatus of the state to the government of social life" (Rose and Miller, 1992: 192) with the goal of centralizing this process. Thus, the outcome was the welfare state that regulated the lives of the citizenry via social insurance programs which bound citizens into a moralized system of "solidarity and mutual inter-dependency" (Rose and Miller, 1992: 196).

However, this welfare state regulation was deemed to be an unstable, assorted and sometimes an antagonistic mix of elements (Dean, 1999: 150; Rose and Miller, 1992: 193). Welfare strategies became problematized as having too much control over society and the Keynesian style economics of welfarism was increasingly seen as unable to deal with inflation and recession. Neo-liberalism moves beyond the paternalistic interventionist state to a transformation of the governmental discourse based on individual freedom. This neo-liberal mentality of rule is distinct from welfarism at the level of moralities, explanations, and vocabularies (Rose and Miller, 1992: 198). It seeks to shift responsibility for social conditions that are risky to the citizen, now termed 'the client' (Garland, 1999: 24), away from the state. Responsibilization in the neo-liberal rationality is placed on the individual instead. Thus, we see an increase of programs that motivate responsibility based on individual choice and active entrepreneurship or empowerment (see, for example, Cruikshank, 1999; Hannah-Moffat, 2000; Kesby, 2005). This individuality is exemplified in what Rose and Miller (1992) argue is a focus of neo-liberalism: "the proliferation of strategies to create and sustain a 'market', to reshape the forms of economic exchange on the basis of contractual exchange" (199).

Rationalities Beyond Neo-Liberalism

More recently it has been suggested that this shift has not been as clearly delineated as once thought (Lippert, 1998; 2005; O'Malley, 2001; 2002, Larner, 2000a; 2000b; Rose, O'Malley and Valverde, 2006). As Rose (1999) writes: "[W]e need to avoid thinking in terms of a simple succession in which one style of government supersedes and effaces its predecessor" (142). O'Malley (2002) goes on to suggest that welfare techniques have been translated into otherwise neo-liberal programs rather than there occurring a simple replacement of one rationale by the other. Along with refusing a simple replacement, O'Malley argues that the neo-liberal

governance strategy itself is not universally applied. These arguments are illustrated in a comparison of what are widely claimed to be typical neo-liberal regimes - the U.S. and Australia/New Zealand in their use of risk in the application of 'actuarial' justice. This form of justice is based on calculative and systematic risk technologies grounded upon expert knowledges to create a high degree of efficiency, for example, via curfews and 'three strikes' laws (O'Malley, 2002: 207). O'Malley (2002) found that while both are responses to welfare state politics, the U.S. uses risk in actuarial justice as a means of exclusion whereas Australian and New Zealand governments employ a neo-liberal inclusionary justice. He argues that some of the more disciplinary and coercive practices such as boot camps and the death penalty in the U.S. are more evidentiary of a conservative politics which has become allied with neo-liberalism. Whereas neo-liberalism in the Australia and New Zealand experience is moderated by a history of social welfare principles:

> The direction taken by this neo-liberal hybrid has been not so much hostility to welfare collectivism aimed at dismantling it. Rather there has been a push to render it more economically 'responsible' and accountable, more 'enterprise'-based and more compatible with discourses of the 'active subject' and enterprise (O'Malley, 2002: 217).

In addition to O'Malley's findings of hybrid forms of neo-liberal applications, Larner (2000b) found similar forms of hybridity in the New Zealand policy document "Towards a Code of Social and Family Responsbility". While the premise of the Code was immediately neo-liberal, focusing on governance through community and portraying active citizens accountable for their conduct, it also relies on neo-conservative conceptions of family and authoritarian disciplinary practices which have the goal of creating these kinds of individuals. Even within the same country, neo-liberal practices are not applied evenly as highlighted by the argument that "while recent social policy initiatives represent a cluster of 'post-welfare state' political projects, close inspection would likely reveal significant differences within and between them" (Larner,

2006b, 251). Thus, neo-liberalism may be present in certain governmental domains as a hybrid with other rationalities rather than as a totalizing presence or reflective of rapidly moving toward such a complete shift. The analysis of the rationalities shaping legal aid programs will further explore and possibly cast doubt on the notion of "neo-liberalism as the unstoppable colonizer of all social processes" (Walby, 2005: 665).

Governmentality work has been concerned more with the process of proving that neo-liberalism is a rationality with purchase; as actually occurring and empirically grounded (O'Malley, 2001: 14). There has been a tendency to see neo-liberalism as a broad governmental theme or a 'master category', and placing governmental programs into this theme or category irrespective of the 'mundane' or 'messy actualities' of their existence (Rose, O'Malley, Valverde, 2006). O'Malley (2001) suggests that this process of systematisation produces these perfect knowledges and forgets to ask how these knowledges have come to be. Neo-liberalism is problematized here as a closure in theory, in effect not allowing room for other mentalities to arise (Lippert, 1998; O'Malley, 2001; O'Malley et al., 1997). Governmentality analysts of the past have tended to reify these rationalities. The consequence, then, as stressed by O'Malley (2001: 18) is:

> The nature, pervasiveness and impact of other rationalities are virtually ignored, so that the representation of contemporary government becomes a process in which advanced liberalism ascends or unfolds unopposed, or has already advanced over previously existing mentalities of rule.

There is growing, but still very limited attention being given to other rationalities beyond neo-liberalism. Two such rationalities that have begun to be explored are neo-conservatism and pastoralism.

The neo-conservative rationality has been charted as one which suggests that order is essential for sustaining the social good (O'Malley, 2001). Law is given the utmost importance in

state policy, and ranks above the market. This means that "for neo-conservatives the law may 'interfere' in all manner of 'private' spheres, including contracts, family relationships, personal morality and so on, and if need be must possess severe and ultimate penalties" (O'Malley, 2001: 22). Furthermore, there is a return to the idea of obligation to others, to loyalties, as a given, rather than part of a negotiated contract. However, this does not mean neo-conservatism as a rationality is unconcerned with economics. In fact, this is where neo-liberalism and neo-conservatism meet in that they are both criticisms of welfare rationality. Welfarism is particularly problematized by neo-conservatism as "welfare interventions tend toward the elimination of inequalities that for conservatism are the essential index and mechanism of Darwinian social selection" (O'Malley, 2001: 22).

The second rationality, pastoral power, has been less widely discussed by governmentality scholars. However, pastoral power has been taken up in substantive areas as varied as sanctuary practices (Lippert, 1998; 2005), alcoholism (Valverde, 1998), and workplace organization (Bell and Taylor, 2003). Foucault (1982) traces the origin of pastoral power techniques to past Christian institutions where salvation is seen as the key technique of governance. Pastoralism is metaphorically characterized by Foucault as "constant kindness, for the shepherd ensures his flock's food; everyday he attends to their thirst and hunger... for the shepherd sees that all sheep, each and every one of them, is fed and saved" (as cited by Lippert, 1998: 381). Services based on charity, philanthropy and volunteering are most often associated with pastoralism and generally with welfare societies (Dean 1999; Foucault, 1982). Pastoralism also maintains that the shepherd must also know all aspects of the sheep's actions, good and bad. As Foucault (1982) states: "this form of power cannot be exercised without knowing the inside of people's minds, without exploring their souls, without making them reveal their inner most

secrets. It implies a knowledge of the conscience and an ability to direct it" (783). Therefore, the knowledge of the individuals' 'public sins' (Lippert, 2005) is necessary in order to lead them to salvation. While this rationality was initially centered on the Christian ideal of salvation in the afterlife, Foucault (1982) states that this political mentality deals with ensuring salvation for this world in areas such as health, sufficient standards of living, and security. This rationality is linked to the welfare state in that they are both particular parts of liberal welfarism. Pastoral power, however, became "institutionalized as the welfare state provision for individuals' needs" (Lippert, 2005: 6). As such scholars have had the tendency to subsume pastoral power and the welfare state under the umbrella of welfarism.

Since the literature cited above has found currency in neo-conservatism and pastoralism in the domains studied, they will be the starting point for my study of the possibility of multiple rationalities in LAO and how they currently shape the operation of LAO. As Larner (2000a) argues, and as the discussion of neo-conservatism and pastoral power above illustrates, without such engagement, we are limiting our imagination and restricting our potential to imagine political alternatives. O'Malley (2001) furthers this argument:

> [T]he importance of these observations... is to re-establish the heterogeneous and multivocal nature of politics... that has been reduced to expression of one unified advanced liberal rationality... By pitting one ideal type against another... it makes clear the status of advanced liberalism as a second order construct and it moves governmentality into active engagement of the messy actualities of political relations, although, it has to be said that there is marked resistance to such an interpretation of governmentality work (23-25).

Thus, it can be speculated that past governmentality studies may have mistakenly applied some of Foucault's ideas on government, as the goal of governmentality is not to understand how a broad rationality unfolds unopposed. Rather, "it consists of analyzing power relations through the antagonisms of strate*gies*" (Foucault, 1982: 780; emphasis added; see also Lippert, 1998).

By refusing to reduce governance to neo-liberalism, it allows us to open up the field for exploration of the possibilities that might enhance social well-being (Larner, 2000a: 21). Therefore, recognizing and helping to fill this gap in governmental theory will contribute to the development of a governmentality analysis and a critical analysis of legal aid.

CHAPTER THREE

PREVIOUS RESEARCH ON LEGAL AID

There are no governmentality studies of the development of legal aid in Canada. There are, however, other studies which take various standpoints on legal aid. For example, Hoehne (1989) traces the development of legal aid in Canada in three stages: from the period of individual coping to charity to collective coping, in short from charity to policy (1-3). This 'diachronic view' (Hoehne, 1989) allows for critical analysis of policy development as opposed to one solely concentrated on the final stage of social policy. Hoehne's (1989) analysis focuses on the relationship between the federal and provincial levels of policy making in legal aid, though only specifically analyzes legal aid in Nova Scotia. Other studies have illustrated the innovative changes to legal aid programs, examining the structural and administrative advancements across provinces (see Brook, 1977).

A more recent and insightful analysis of legal aid in Canada is described by Mossman (1993). This work re-examines policy rationales for legal aid in Canada, arguing that the traditional rationale of needs is ill-defined and has normative implications in that it determines what individuals perceive their legal needs to be. Mossman (1993) instead offers an alternative 'social indicator' approach which requires that definitions of the program objectives be created first, followed by the identification of accurate indicators to measure needs. It is suggested that this approach would be more fruitful in targeting populations and their needs for legal aid services. These analytical frameworks provide an important contribution to legal aid practice and policy. However, they lack reference to contemporary social theory in investigating the development of the legal aid program in Ontario and the rationales behind any or all of its

elements. Additionally, a study of legal aid in a specific province can account for provincial differences in administration and program development.

Policy-oriented research on legal aid generally takes the approach of providing an overview or comparative analysis of programs across Canada. The general goal of these projects is to make recommendations for changes or future directions of legal aid. These reports, while informative, are not specific to the Ontario experience. For example, the reports by Currie (1999) and Tsoukalas and Roberts (2002), both funded by the Department of Justice Canada, examine legal aid models across Canada. They specifically look at cost efficiency and the quality of delivery models, analysing varying financial eligibility criteria and coverage restrictions across jurisdictions. Other literature particularly relevant to the Ontario experience is relatively dated and/or tends to neglect linking social theory with program rationales (see for example, Chouinard, 1985, 1989; Monahan, 1997; Taman, 1976; Thornley, 1983; Zemans, 1978).

An important theoretically-informed contribution to this study is Chouinard's (1989) research on legal aid and legal clinics in Ontario. While dated, this research adopts a Marxist theory of state formation and struggles over law which essentially argues that structural changes in the capitalist state were the result of a contest between effective class and sub-class conflict. The struggle over legal relations and rights was met with a greater tendency toward legal regulation. However, these tendencies inadvertently increased the possibilities for challenges rooted in the subjection of individuals as the reach of state regulation was seen to be extended through social programs (Chouinard, 1989: 329-332). This view links the development of legal aid clinics to important structural changes in the Canadian economy and state. The expansion of social programs led to further individuals' dependency while at the same time increasing the possibility for legal aid struggles over the rules and rights within these programs (e.g. rent issues,

overpayments) (Chouinard, 1989: 336). Simultaneously, poverty was being rediscovered by activists committed to increasing the capacities of local communities to contest and 'demystify' state law to try to create a more socially just and equal landscape. The article concludes that the precise form of Ontario's present mixed-model legal aid system has been the outcome of class and sub-class struggle over how legal services will be delivered and controlled.

While Chouinard (1989) provides an interesting critical account of how legal aid and legal clinics have developed, it simplistically views the state as being equivalent to class power and repression (Hunt and Wickham, 1994: 34). This view does not see, for example, that power has the capacity to be productive. As discussed earlier, government can be based on non-repressive forms of governance, not only stemming from the state but also other organizations and programs at arms length from the state and, as noted above with regard to empowerment programs, individuals can also self-govern. The present analysis moves away from taken-for-granted assumptions about the state, power and class and provides a means to think about state programs such as legal aid in ways that might allow a more complex and nuanced picture to emerge.

Feminist legal scholars have also offered important contributions to the study of legal aid (see Addario, 1998; Beaman, 2002; Gavigan, 1999; Mossman, 1993). One of the themes in this literature is the consideration of law and legal discourse and its tendency to silence the voices of women. By disregarding their particular experiences, feminist legal scholars argue that legal discourse has the effect of impeding their access to justice. The argument has been made that clients of legal aid are not a "generic, gender-neutral category of unfortunate souls" (Gavigan, 1999: 213). Rather, they are most often women, and their legal needs generally stem from their interactions with the welfare state and cannot be adequately dealt with by traditional legal

services. This scholarship begins from the premise that there is a systemic inequality between criminal and civil legal aid provision, a consequence of deeply entrenched biases in legal institutions more generally (Addario, 1998; Mossman, 1993). It is argued that women have had to shape their experiences to coincide with these statutory interpretations, consequently giving into the power of the law in organizing and defining women's lives (Beaman, 2002). The literature also focuses on illustrating the ways in which legal discourse is in fact biased and most importantly how it affects women's access to justice. Feminist legal scholars have also examined certificate coverage categories and found that they do not reflect women's legal aid problems (Gavigan, 1999). Rather they focus on criminal legal issues, effectively neglecting civil legal aid, an area which women require the most legal services.[1] A glimpse into the rationality surrounding the certificate side of legal aid would potentially allow us to identify and open up possibilities for change.

The existing literature has had very real effects on legal aid policy by highlighting contentious issues within the program. They have, however, narrowly focused on particular subjectivities reproduced by a neo-liberal problematic. Much of the current feminist legal scholarship has tended to emphasize the effects of neo-liberal policy in entrenching the disparities in service between criminal and civil legal aid. This body of work has made important contributions to the overall conceptualization of legal processes. However, focusing almost exclusively on illustrating the inadequate representation of women's needs in legal aid has neglected to challenge the actual organization of legal aid and is thus narrow in scope. Missed is the opportunity to examine how broader statements of governance have come to shape the discourses that guide the legal aid program. Rather than responding to what has been

[1] Approximately two thirds of civil legal aid certificates are given to women, primarily for family law matters (Gavigan, 1999).

generalized as neo-liberal tactics in Ontario, an analysis is required of how law and legal discourse coupled with governmental programs try to reconstitute subjects of governance.

Evidently there is a gap in governmentality theory and in the substantive legal aid literature. This thesis proposes a governmentality approach in studying the constitution of legal aid in Ontario. The research question guiding this study asks, what are the rationalities that inform and shape LAO?

CHAPTER FOUR

METHODOLOGY

The methodology adopted in this thesis is a critical discourse analysis, the goal of which is to attempt to study the relationships between discourse and social and cultural developments (Jorgensen and Phillips, 2002; Luke, 2002). A distinguishing feature of this methodology is the emphasis on understanding texts through some theoretical lens – in this case a governmentality approach - which seeks to explain power, social relations, and historical change. Within the field of critical discourse analysis, there are several different approaches and techniques. One approach that has significant bearing on this project is the critical discourse analysis as theorized by Fairclough. Central to this methodology is the idea that discourse is both "constitutive and constituted" (Jorgensen and Phillips, 2002: 66). Discourse as a way of speaking, gives meaning to experiences from a particular perspective as such the goal of critical discourse analysis is to investigate links between language use and social practice (Jorgensen and Phillips, 2002: 66-69). Thus discourse can be a practice which maintains a dominant social order or it can be used to form a new discursive order.

Similar to governmentality studies, Fairclough's analysis is derived from a post-structuralist epistemology which views discourse as a mechanism of reproduction or a challenge to power (Jorgensen and Phillips, 2002: 65). Foucault conceptualized discourse as power as it relates to the production of systems of knowledge which provide the language in which to talk about them (Atkinson, 1999: 60). In this way discourses provide us with "the 'possible', attempting to steer thought and action in a particular direction congruent with that discourse" (Atkinson, 1999: 61). This broader notion of discourse illuminates the operation at a societal level while Fairclough's analysis examines the particular processes which operate within the

context of the dominant discourse. By taking on both conceptions of discourse, this analysis allows for a better understanding of governmental programs, specifically legal aid. This methodology moves away from the conventional governmentality analysis as it focuses on discursive registers without neglecting their effect on program text.

These conceptualizations of discourse befit my research question as they refer to *any* form of discourse that can be discerned, thereby not limiting itself to neo-liberalism. While I was aware of the class, race and gendered discourses that intersect with governmental rationalities, my analysis predominantly examined LAO texts for indications of neo-conservative, pastoral and neo-liberal discourses.[2] In particular, the types of language or keywords that I was looking for include, but were not limited to those that refer to or invoke tradition, discipline, and morality (neo-conservative), charity, salvation and need (pastoral), and choice and the market (neo-liberal), respectively. The documents to be analysed were chosen based on their real application to the provision of legal aid services in order to illustrate how the program is constituted and guided in practice. It is my contention that by critically seeking out and analysing the discourse evident in these kinds of documents – those which are more likely to be actually used by practitioners and the program's subjects – a better evaluation can be made about the rationalities that govern this program. This was an intentional move away from governmentality orthodoxy which tends to examine broad programmatic statements (such as White Papers, policy statements, or the preamble to new legislation) (e.g., Rose and Miller, 1990) and thus perhaps create ideal-types of governance where they may not be present or at least not to the extent suggested.

[2] This does not mean that other rationalities cannot be found in a given set of programmatic texts. Rather, I acknowledge, as O'Malley et al. (1997: 505) have pointed out that there are various voices and discourses that are subjected to governance but do not neatly fit into the rationalities of neo-liberalism, neo-conservatism, and pastoral power.

The texts were chosen based on their reflection and applicability of the different positions of interest within the LAO structure – Area Director, Area Office Administrator, Duty Counsel Supervisors/lawyers, certificate lawyers, and the clients. The Area Director manages the delivery of all LAO services and programs while the Area Office Administrator is responsible for the functioning of the office. In the temporary absence of the Area Director, some jurisdictions require that the Area Office Administrator act on behalf of the Area Director, however, in a limited way. As stated earlier, the Supervisory Duty Counsel oversees the Duty Counsel program which has the objective to provide legal advice, court representation and other legal assistance through a mixed *per diem*/full-time program. In the preceding chapters, certificate lawyers are members of the private bar who provide legal services to clients at a reduced rate. Legal aid clients are constituted as low-income individuals whose income falls below set standards and thus require assistance in financing their legal services.

While the relevance of these texts to each position are overlapping, they were grouped in the following manner: Area Director and Area Office Administrator: *Area Office Policy Manual* (LAO, 2006a), *Financial Eligibility Criteria for Certificate Policies and Procedures Manual* (LAO, 1999), *Complaints Policy* (LAO, 2002a), *Quality Service Principles* (LAO, N.d.n), and *A Guide to Legal Aid Ontario for Area Committee Members* (LAO, 2001); Duty Counsel Supervivsors/lawyers: *Duty Counsel Manual* (LAO, 2002b) and *Duty Counsel Panel Standards* (LAO, N.d.d); certificate lawyers: *Legal Aid and You Partners in Justice* (LAO, N.d.h), panel standards (LAO, N.d.c; N.d.e; and N.d.o), *Tariff and Billing Handbook* (LAO, 2002c), post-payment examination policies (LAO, N.d.i; LAO, N.d.j; LAO, N.d.k; LAO, N.d.l; and LAO, N.d.m), and *Practice Manual: Representing Claimants Before the Refugee Protection Division* (LAO, 2003); and finally for clients: *Can I Get a Legal Aid Certificate?* (LAO, N.d.b), *Financial*

Eligibility (LAO, N.d.f), *Unhappy With Our Services? Talk to Us* (LAO, N.d.p), and *You and Your Lawyer* (LAO, N.d.q). In addition to these documents, texts that illustrated the internal discourses that affect management levels of legal aid were examined. These included *About Legal Aid* (LAO, N.d.a), *Historical Overview* (LAO, N.d.g), *Business Plan 2006/2007* (LAO, 2006b), *2005 Annual Report* (LAO, 2005), and the *Quality Service Office: Annual Report 2005-2006* (LAO, 2006c). In light of the different structure of community clinics and the lack of critique of the certificate system in the past legal aid reviews, documents were only chosen based on the services provided by private lawyers via certificates and per diems.

In addition to studying texts, the chosen methodology places importance on the analysis of spoken language or oral discourses (Jorgensen and Phillips, 2002: 65; see also Holstein and Gubrium, 1995; Lippert, 2005; Stenson and Watt, 1999). These forms of discourse are occasions in which meaning or knowledge is constructed. Interviews are a particular method of examining discursive practices and contestations in ways that the text does not. Specifically, semi-structured interviews provide flexibility to probe beyond initial responses to questions and allow discussion to proceed in a conversation-like manner (Berg, 2004: 80). To facilitate this, interview questions were very broad and primarily focused on the LAO program's purposes and current challenges and specific duties of the interviewee, effectively allowing them to expand on their experiences. Thus the interviews were not used merely as evidence of governmentality but rather to contrast with the texts the extent to which the discourse actually filters through to the narrative.

Following ethics clearance, I conducted five semi-structured interviews with persons experienced with the administration of LAO, including one Area Director, one Area Office Administrator and one Supervisory Duty Counsel. In addition, two lawyers who currently

participated in the certificate program were interviewed. While interviews were meant to contribute analytically through the inclusion narrative experiences, they also contributed practically to my research. The interviews were extremely helpful in that they allowed me to become familiar with the legal aid program itself, something that could not be accomplished by exclusively looking at documents. In addition, they served the purpose of referrals to other interviewees and easier access to them.[3] The interviewees also provided me with references to particular policy manuals or statements relevant to their LAO responsibilities. Interactions with the LAO staff also allowed me to access a list of lawyers who participate in the certificate side of legal aid, which would have been unlikely otherwise. The choice of lawyers to interview was based on the area director's indication of who had been working with legal aid certificates the longest, and if they were unavailable, lawyers were called more or less randomly from the list.

[3] While this referral made the experience of obtaining willing interview subjects easier, the downside was the subjects interviewed, particularly from the legal aid offices, were alerted to my presence and potentially effecting their responses.

CHAPTER FIVE

RESULTS

Undertaking a governmentality analysis of the LAO program allows for an in-depth examination of what legal aid is attempting to accomplish. While it is clear that legal aid is reflective of liberal government, through what rationalities, technologies, and subjects governance is carried out is not as clear. The analysis illustrates that answers to questions of governance are not straightforward or systematic as theorized. Rather the program is comprised of complex elements of governance with the central aim of reproducing normative discourse that imagines both clients and lawyers in particular ways. The following analysis examines these complexities in the policy manuals and guidelines of LAO.

Legal Aid and Neo-Liberalism

At first glance, we can see that LAO reflects what is understood to be a neo-liberal form of government. The broader mandate of Legal Aid Ontario as set by the *Legal Aid Services Act, 1998* is:

> The purpose of this Act is to promote access to justice throughout Ontario for low-income individuals by means of, (a) providing consistently high quality legal aid services in a cost-effective and efficient manner to low-income individuals throughout Ontario; (b) encouraging and facilitating flexibility and innovation in the provision of legal aid services, while recognizing the private bar as the foundation for the provision of legal aid services in the areas of criminal law and family law and clinics as the foundation for the provision of legal aid services in the area of clinic law; (c) identifying, assessing and recognizing the diverse legal needs of low-income individuals and of disadvantaged communities in Ontario; and (d) providing legal aid services to low-income individuals through a corporation that will operate independently from the Government of Ontario but within a framework of accountability to the Government of Ontario for the expenditure of public funds. (c. 26, s. 1.)

Within this statement, there are various instances where neo-liberal discourse of arms-length governance is used, for instance, terms and phrases such as 'cost-effective', 'efficient', 'operate independently', and 'framework of accountability'. In addition to this mandate, changes made to

legal aid to ensure better accountability have been widely discussed and are plentiful in public and media discourse since 1998. For instance, LAO's website states:

> In 1998, the Ontario government enacted the Legal Aid Services Act in which the province renewed and strengthened its commitment to legal aid. The Act established Legal Aid Ontario (LAO), an independent but publicly funded and publicly accountable non-profit corporation, to administer the province's legal aid program. (LAO, N.d.a)

Furthermore, then Attorney General, Charles Harnick, who called the 1997 review of legal aid, comments that the changes made to the program will serve to "make legal aid more accountable and efficient" (The Ottawa Citizen, 1998: A2).

In practice, we can also see many instances where neo-liberal rationality has trickled down. For instance, in the *Duty Counsel Manual* (LAO, 2002b) and the *Tariff and Billing Handbook* (LAO, 2002c) there are 673 instances of 'client', 75 instances of 'individuals', 7 instances of 'choice', 54 instances of 'responsibility', 12 instances of 'accountability' and 50 instances of 'efficient/effective'. While this is not an exclusive list of neo-liberal terminology, it does illustrate the movement of the neo-liberal thrust of broader policy statements into texts that more closely shape LAO practice. One example of a LAO practice that is reflective of neo-liberalism is the introduction of the Post Payment Examination (PPE) policy in 2005. The policy was enacted to "ensure accounts paid through Legal Aid Online are valid and properly billed" (LAO: N.d.i). The key change that this policy brings is the elimination of the need to examine every account each time it is submitted by a lawyer. Rather, randomly chosen accounts will be reviewed to ensure accuracy. The rationale behind the new examination policies are as follows:

> The new post-payment examination process is part of Legal Aid's goal to *simplify and streamline* the way we do business to make it easier for lawyers to do legal aid work. In contrast to our previous investigations process, where we conducted detailed reviews of every account paid during a two-year period for a lawyer, post-payment examination will *randomly select individual accounts for examination.* Lawyers who bill frequently may expect that three or four accounts per year may be selected for examination (LAO, N.d.i; emphasis added).

Simplification and streamlining are synonymous to discourses of efficiency and fiscal responsibility of neo-liberalism which displaces the 'internal logics of expertise' (Rose, 1999: 154) linked to welfarism. Neo-liberalism calls upon the lawyers to be prudent and thus document their actions so that they may be justified in the future. These are elements which are indicative of the neo-liberal 'regime of distrust' (Rose, 1999: 155). Lawyers can be further subjected to a more detailed 'targeted examination' should their random examinations flag problems with their account submissions:

> A targeted examination may be initiated where a random examination identified issues that *support an expanded scrutiny of accounts* paid to a lawyer, or where the nature and / or extent of identified suggest that there are merits to conducting a review of additional accounts submitted by the lawyer and may include such factors such as: complaints; repeated pattern or errors or high incidence of errors; disparity in account information in comparison to a peer group; or high billing amounts (LAO, N.d.k; emphasis added).

This policy is indicative of neo-liberal regulation of the legal profession, who, in the welfare state were not governable due to their particular expertise. The neo-liberal rationality was systematized through the discourse of economics. One lawyer who had been working with legal aid for five years echoes this 'truth' of accountability as a means to justifying the more rigorous calculation measures or regulations that lawyers have to consent to when working with legal aid. The lawyer states:

> There are certain parameters that you have within which you have to work if you are willing to accept legal aid certificate. First parameter is there's a limit on the hourly billing rate, the second parameter is that when a bill is rendered, there are *very careful controls that go into the process*. You have to account for every six minutes. And if the period of time that you are billing for, individual time on a bill exceeds half an hour, half an hour or more, you have to put down the times of day that the half hour covers. *And there's very good reasons for that and it comes out of abuses in legal aid in the past. So it's a safeguard, it's public money.* The third parameter within which you have to work is the payment cycles. So when you submit a bill you have to abide by whatever their payment, their turnaround is, paying an account. Part of the agreement I signed is to not, basically sue legal aid if they chose not to pay one of my accounts or if they chose to delete stuff from an account and not pay it at all (Interview 5; emphasis added).

These controls, while on the surface were about controlling the abuses, also creates a new way to govern over the enclosure of the legal profession. Through techniques of audit a governance strategy is created in which lawyers are responsibilized for their own governance. For instance, the PPE policy states:

> The detection of errors in a targeted examination may result in an investigation in circumstances where the nature and/or extent of errors identified suggest a significant *lack of care* in preparing the accounts, advertent errors, or other factors that suggest that merit exists for a closer scrutiny of the lawyer's accounts (LAO, N.d.k; emphasis added).

The discourse in this instance – 'lack of care' – signals an instance of a lack of prudence on the part of the lawyer, stating that they are not being a good neo-liberal subject and problematizing the lawyer who does not behave appropriately. 'Lack of care', however, also departs from neo-liberalism in that the problematization is not quite based on efficiency and effectiveness but rather, there is something more 'draconian' (Larner, 2000b) that is behind the matter. A closer look across policy implementation will provide a better understanding of how neo-liberalism tends to be nuanced with other rationalities and is practiced differently compared to similar neo-liberal programs.

As stated earlier, several authors have found the co-presence of neo-liberal and neo-conservative rationalities in governmental programs across different countries. The close interaction between these discourses has made it difficult to clearly delineate where neo-liberalism stops and neo-conservatism begins. While neo-liberalism governs through the economic obligations and responsibilization of individuals, neo-conservatism governs through kinship obligations. The neo-conservative rationality imagines the discourse of family as re-establishing parental subjectivities and familial bonds that go beyond financial responsibility and individual lifestyle choices (Larner, 2000b: 256). The legal aid documents which govern the

family law coverage regulations and financial eligibility requirements, illustrates the coupling of neo-liberal and neo-conservative rationalities as a negotiation.

Family law certificates cover a broad range of legal issues including child protection matters, initial separations and/or court appearances, variations, divorces and adoption. Certificates are issued based on four criteria: Safety and Conflict, Financial Eligibility, Merit, and Coverage Guidelines. The Safety and Conflict criterion deals with ensuring the protection of the spouse, same-sex partner or child, or to protecting an established parent/child bond. Financial Eligibility is based on the criteria as set out by the *Financial Eligibility Criteria for Certificates Policies and Procedures Manual* (LAO, 1999). Merit is loosely based on a test which considers if an individual of modest means would choose to use their money to fund the litigation. The coverage guidelines are set out by the legislation and have been listed above. These services are provided via certificates or adjunct programs run by the LAO office such as information brochures, duty counsel, advice lawyers and Family Law Information Clinics.

When examining the Family Law Coverage Guidelines section of the *Area Office Policy Manual* (LAO, 2006a), neo-liberalism is evident in the way in which standardization and transparency of decision making are specifically outlined. The guidelines go as far as indicating when an Area Director is authorized to apply their discretion. In addition to these regulatory measures, neo-liberalism also reveals itself in statements relating to relationships of responsibility. For instance eligibility criteria for legal aid certificates (including family law cases) define responsibility in the following terms:

> s. 2 of the Legal Aid Services Act defines a "person responsible" with respect to another person to mean a person responsible for contributing towards the costs of legal aid services provided to the other person (LAO, 1999: Section 1: 1).

Thus neo-liberalism imagines responsibility along economic lines rather than based on kinship or care. In fact, neo-liberalism only acknowledges the family as a site of governance insofar as it serves as provision of economic support and management away from the state (Larner, 2000b).

Within the discourse of family law coverage guidelines, there seems to be a presence of another discourse, one which draws on more traditional conceptions of family. For instance under the coverage guidelines for legal aid certificates under child protection matters, the *Area Office Policy Manual* (LAO, 2006a: 4.3) states:

> As such proceedings involve an attempt by the state to remove parental control of a child, LAO policy is to *assume that there is sufficient merit to justify legal representation for the parents. Most parents* of modest means would attempt to maintain contact with a child and would develop an alternative plan of care to that proposed by a state agency. There is usually no need for an initial opinion letter unless there is uncertainty about the nature of proceeding.

The justification for merit here transcends economic responsibility. Rather, merit is based on protecting the obligation between parent and child and their familial bond. Furthermore, child protection cases which are at the stage of trial are deemed to have merit for a certificate if the parent puts forth a plan of care as set by the Children's Aid Society:

> The area director should require an opinion letter on the merits, before authorizing a trial (FA045). *If a parent puts forward a plan of care, regardless of its viability, merit is established.* This policy complies with the policy directive contained in the Supreme Court of Canada decision of *JG.* Only where their lawyer suggests that there is absolutely no merit (e.g.: no plan of care proposed and the client has not made any attempt at rehabilitation) should the area director consider refusing to authorize a trial (LAO, 2006a: 4.4, emphasis added).

There is an assumption that child care is a parental responsibility and accordingly is reinforced through the issuance of a legal aid certificate. This is further reinforced when examining how non-custodial relations are taken up within the texts. For instance, in children's protection cases, *Area Office Policy Manual* includes the stipulation that certificates can be issued to non-custodial relations other than parents who seek care or access to a child:

> Certificates may be issued to relatives other than parents, who seek to care for a child who is in temporary care of the CAS, or who merely seek access to a child who is in temporary care of the CAS. *Merit is not assumed at the outset and an opinion letters should be obtained* (CFSA01) before authorizing further services (LAO, 2006a: 4.4; emphasis added).

These examples illustrate the presence of neo-conservatism within neo-liberal rationality. Not only does this presence in the discourse illuminate the fact that neo-liberalism is tempered with other '-isms', but it also shows that without analysis of these kinds of texts, one could easily assume only neo-liberalism was present or that there was no tension among co-existing rationalities, effectively closing down the analysis and creating theoretical coherency where it does not exist.

Return to Welfarism?

While neo-conservatism and neo-liberalism differ on how and through which techniques the subject should be governed, they are to a great degree in alliance against techniques of the welfare state, a specific mutation of pastoral power. The coupling of the welfare state and pastoral power discussed as a welfarism has made it amenable to neo-liberal and neo-conservative criticisms. A major criticism of the welfare state was the lack of accountability of experts partially due to "the discretionary scope that welfare system accorded to professionals and bureaucrats" (Rose 1996: 330). The solution to the problem of arbitrary discretion was to apply more rules and laws to render decisions predictable. For example, the proliferation of manuals and policy guidelines created a measure of accountability as they generally limit the scope of discretionary practices. The creation of new programming techniques curb the amount of power that experts and bureaucrats have and allow for the governance of these previously ungovernable enclosures (Rose, 1999: 142). The hierarchical structure of legal aid allows for accountability measures as well as ensuring that discretion is limited to only a small number of

individuals within the program. For example, the *Area Office Policy Manual* suggests that Area Directors should exercise discretion conservatively and that they

> [s]hould be prepared to justify their discretionary decision. It is a good practice to keep a memo on file or record and Encounter Note to support the decision (LAO, 2006a: 8.4).

However, an analysis of the texts reveals that discretionary powers are not contained to specific positions within the hierarchal structure of LAO. Rather, there is evidence that the discretionary powers of legal professionals continue to have the force in determining the administration of legal aid. For instance, Area Directors unsure of legal merit are granted the authority to issue an opinion letter certificate. Discretion over the access to legal aid services is handed off to lawyers as their opinion on the case is given immense power within the text. The *Area Office Policy Manual* states:

> In general, the more information the lawyer provides with regards to the facts, the nature of the proceedings and unusual circumstances, the more helpful the letter is to the area director. *The critical part of the letter is generally the lawyer's position on the merits of the case or the client's position* (LAO, 2006a: 9.5; emphasis added).

In addition to the discretionary powers certificate lawyers have in determining eligibility, duty counsel lawyers also exercise discretionary powers outside of the structure of legal aid:

> In terms of qualifying for our service, we do a similar type of financial application but not as detailed. I mean essentially, if in the course of the interview with a client that you're about to help at court, it becomes apparent that they are on assistance because they say so, in fact we don't even worry about administrating a financial eligibility test because we know that they qualify.... And now generally speaking, having said that, *if someone is there and needs some summary, kind of process related advice that we can give in ten or fifteen minutes we will still help them.* We just try to administer that [financial application] when we're getting in deep (Interview 4).

This statement by a legal aid duty counsel member illustrates the contested nature of discourse presenting an alternative discourse that cannot be accounted for by neo-liberalism. Furthermore, the provision of *Rowbotham* applications, problematizes the regulatory mechanisms of accountability and efficiency. *Rowbotham* was a 1988 ruling by the Ontario

Court of Appeal that outlined certain circumstances where it is a constitutional right to have access to publicly funded counsel. It applies in situations where the court determines on a balance of probabilities that representation by a lawyer is essential to ensure a fair trial, particularly in complex cases where the accused lacks the resources to retain counsel privately (LAO, 2006a: Appendix 4.1). *Rowbotham* illustrates a way out of neo-liberal techniques, as a way to question this rationality and rather evokes a welfare type rationality in which the state rather than individuals has the role of ensuring that the needs of individuals are met.

These practices within the legal aid program have several implications. First, the lawyer has a large amount of power in determining if the client is deserving of a certificate. In addition, to qualify for the position of area director the individual is required to be a member of the professional bar association (LAO, 2006a). Although LAO was created as a means to deal with LSUC's conflict of interest in the governance of the program, it seems that the program remains to be heavily influenced by the LSUC. These points show the incompleteness of neo-liberal attempts to puncture enclosures via employing managers or non-experts to oversee the provision of governmental programs (Rose and Miller, 1992). Secondly, the client is imagined quite differently from a neo-liberal subject. Determinations of merit for obtaining a lawyer, and hence determining the best interests of the client, are made by the lawyer rather than the responsibilized, autonomous client. In fact, obtaining an opinion letter to verify merit assumes the client cannot make a prudent or responsible decision about whether or not it is worth seeking legal advice and the general merit test – "'would a reasonable client of modest means choose to use his/her own money to fund the litigation?'" (LAO, 2006a: 4.1) – no longer applies. What is most interesting about the findings is that it does not seem to follow that these measures are merely

overextensions of welfarism, rather, there seems to be an indication that another discourse or rationality is coming to bear upon the legal aid text.

Pastoral Power

The examination of the programmatic statements illustrates that the assumptions of pastoralism are not completely absent, contrary to what might be expected. The client remains governed based on the idea that the lawyer is the only one who can provide their 'salvation' and guidance in such a way as to create a needy subject. In order for them to achieve 'salvation', the client must let the lawyer know their 'deepest secrets' (Foucault, 1982). For example, in the brochure, *You and Your Lawyer*, subjects are instructed as follows:

> Tell your lawyer as much as possible about your legal problem even though you may feel uncomfortable or embarrassed. Your lawyer understands this and is not there to judge you. *Lawyers need to know all the facts so that they can help you.* Answer the lawyer's questions completely and truthfully. Be clear with the lawyer about what you expect. If the lawyer knows exactly what you want, he or she will be able to help you better (LAO, N.d.q; emphasis added).

It goes on further to state:

> Your lawyer may not always tell you what you want to hear or be able to fix every problem, but he or she is the best person to advise you about what to do. Even though your friends may have had a problem like yours, your case is probably different (LAO, N.d.q).

However, this encouragement to obey your lawyer (who is distinguished from and therefore is not foreseen as a 'friend') is premised on the individuals' capacity to choose the best lawyer the first time around, thus placing the ultimate responsibility for the consequences on the client. As the brochure, *Can I Get a Legal Aid Certificate* states:

> Make sure you are comfortable with the lawyer you choose. It is unlikely that you will be allowed to change lawyers (LAO, N.d.b).

This is further reinforced in the *Area Office Policy Manual*, which states:

> The change of solicitor policy is rooted in the client of modest means test. It is recognized that a change in solicitor costs LAO approximately $1,000 in duplicated effort. Accordingly, the policy is to encourage the careful choice of counsel and to discourage the change of lawyer once proceedings are undertaken. It is LAO policy to advice all clients orally and in writing of the importance of selecting counsel wisely and the difficulty that they will encounter in the event that they wish to retain a second counsel (LAO, 2006a: 9.6).

The image of needy clients is reproduced in the broader context of a needs-based system. Part of the mandate as stated by LAO is "assessing and recognizing the diverse legal needs of low-income individuals and disadvantaged communities" (LAO, 2006a: 1.1). By imagining the client as needy, it legitimates the obligation of lawyers to provide guidance, thus creating a space where pastoral discourse flourishes. We can see that neo-liberalism, in its discourse of individual responsibility and enterprise is not fully coherent, as clients are constituted here as unable to make their own choice which signals the discourse of pastoral power. While LAO includes in their mandate the assurance of equality through choice, there is recognition among some lawyers that many clients are incapable of making a good choice. One lawyer when asked how clients choose to contact them as their legal aid lawyer, responds:

> For people who are say, from the States, or who really don't hang with the criminal crowd, they're given the [lawyer] list and they just [say], "Oh that looks like a nice name" (Interview 2).

The lawyer thus reproduces a subjectivity that is contested by neo-liberalism. In part, the brochure *You and Your Lawyer* was created to deal with this deficiency in the client's ability to choose, stating:

> The lawyer you choose should be sensitive to your needs, so make sure you are completely comfortable with the lawyer you choose. Think about the kind of lawyer you would like to work with. Do you prefer a man or a woman? You should try to find a lawyer who has experience with your kind of legal problem. It may also be a good idea to get a lawyer who speaks your language and who will help you understand your choices. Ask the legal aid office to give you a list of lawyers who take legal aid cases. They should have a list of lawyers who deal with cases like yours (LAO: N.d.q)

It can be observed, then, that lawyers and clients are to be constituted in particular ways that are outside of neo-liberal governance and rather evoke a pastoral power. For example the *Tariff and Billing Handbook* states:

> If you feel that the client needs services that the certificate does not cover, request an amendment from the area director in a timely fashion before performing any services. If you wait until after the services are complete, the area director may require evidence of the client's continuing eligibility to add services to the certificate that were not previously authorized. The area director may not approve the additional services pursuant to legal aid policies. *If the client does not attend at the area director's office to prove continuing eligibility, or cannot be located, your requested amendment might not be granted* (LAO, 2002c: 1-5; emphasis added).

The client's salvation is thus intimately linked to the care of the lawyer. In addition, the position of lawyers as gaining intimate knowledge of the client consistent with pastoral power is exploited and used as mechanism of governing the client on the basis of a discovered absence or decline of need. For instance, regarding a change in the client's circumstances, in particular financial situation, lawyers are advised in the following way:

> Clients might tell you that their financial circumstances have changed, or you might discover it yourself. In either case, you must notify the area director. You must also notify the area director if you find any of the following: the client may have misrepresented his or her circumstances in applying for legal aid; the client failed to make full disclosure at the time of applying for legal aid; and anything that indicates that the client may no longer be entitled to the certificate (LAO, 2002c: 1.8).

Nevertheless there is a distinct form of governance that creates an ideal lawyer in the position of the pastoral shepherd, thus ethically cultivating a willingness to give (Dean, 1999: 96). For example in the brochure for potential legal aid lawyers entitled, *Legal Aid and You: Partners In Justice*, qualities of legal aid work are highlighted. For instance, the brochure states:

> Legal aid work offers significant benefits to new lawyers. It provides an opportunity to contribute toward improving Ontario's justice system by helping some of our society's most disadvantaged people (LAO, N.d.h: 3).

These statements are complemented by profiles of the experiences of other lawyers already working with legal aid. One example is Michael, a lawyer working with immigration cases. He states

> "Legal aid makes it possible to represent people who would not otherwise have access to a lawyer," he says. "Immigration can be a very big deal. In some cases, it can be life or death." Helping new Canadians is a particularly rewarding part of his work says Michael. "You can help them stay in Canada – they wouldn't have had a shot if you hadn't been there" (LAO, N.d.h: 6).

This cultivation of the willingness to give legitimates the sacrifices made by the shepherds who look over the flock. The sacrifices are often 'mundane' and absorbed by the shepherd with the sheep's best interest in mind, rather than in the interest of the shepherd (Lippert, 2005: 120). One of the administrators of legal aid interviewed commented that it is a particular type of person who is willing to provide criminal and family law services both privately and through a certificate:

> Quite frankly, family is seen as sort of the, how do I put this eloquently, criminal and family are the low class law. You know, family is not attractive to most people. "Why would you want to do that stuff?" And I think, it does take special person but that's why not everyone does it... It's all your personal [preference]. Even when I was in practice, I was never good at the business side of it. Because [the client] is sitting across the desk from me and she has $200. She either buys groceries or she pays me. Often time, she bought the groceries (Interview 4).

This sentiment echoes ideas of the shepherd that Lippert (2005) found in his sanctuary research whereby "pastoral power enlists persons 'to do something'" (114). Within the legal field, this dates back to the beginning of legal aid, in which the inception of a permanent program was legitimated by the acknowledgement of the LSUC that it was their social responsibility. This responsibility or obligation is observed in the texts and interviews. As one testimony from a criminal lawyer illustrates:

> Well you know obviously people in jail or whatever, you're not going to just let them [pauses] it's essentially the government taking advantage of us feeling bad for people in

> jail and you know we're going to take care of them, and we're not going to get paid for it (Interview 2).

The notion of sacrifice is supported within the organizational structure of legal aid. When lawyers authorize certificates for legal aid clients, payments for services far from equal what lawyers would be able to obtain in private practice. This is illuminated when a lawyer was asked what they charge private clients. The lawyer stated:

> Privately? Whatever you can get really. But at my skill level, 12 years going on 13, I can charge anywhere from 250-300. Say my account is taxed, which is, assessed, say I did work and the person doesn't like the fact that I'm charging this amount, the assessment officer during the assessment hearing will uphold a rate of between 250-300 for me. If I charged 500 dollars an hour he'd laugh at me, if I charged 100, I'm way underneath what I should be (Interview 2).

In contrast, legal aid lawyers with the highest level of experience make under $100 an hour for their services. Administrators of legal aid, while salaried, also recognize the monetary sacrifices made by lawyers who take certificates. One administrator states:

> And the reality is, I mean they still have to pay a secretary and overhead and hydro and all those things are going up. So can they honestly afford to say to this client who [was] assisted by a legal aid certificate "I can afford to take your case." I mean I worked for a senior lawyer a few years who had a joke about how we charge whatever it was; say $325 on every real estate deal; we only lose $25 on every deal. Well if you're losing money on very file you take, how do you keep the store open? (Interview 4).

Furthermore they recognized their own position of sacrifice for the work they do as even their salaried position is not comparable to other administrative positions with the justice system. For instance a duty counsel lawyer states:

> "I don't know this for certain, but I have [it on] pretty good authority that a lawyer of my level of experience, for example, if I was working at the Crown's office which is around the hall, I would probably make $40,000 more than I do. But you know..." (Interview 4)

While it has been evidenced here that there are elements of pastoral power that are deeply entrenched in the legal aid texts and reproduced in the interviews, it cannot be ignored that they exist alongside neo-liberal discourse which continually constitutes lawyers and clients as

enterprising and also responsible for their own well being. For example, *Legal Aid and You: Partners in Justice* states:

> Legal aid is also an excellent way to make professional contact and gain courtroom experience, and for many lawyers, the flexibility of legal aid work is an attractive career and lifestyle choice (LAO, N.d.h: 3).

Furthermore, a criminal lawyer who was interviewed stated:

> Especially when you are young [and] you're starting off it's a good way to make some money and get some experience. . . . when you're young your practice is essentially 80-90 percent legal aid... It puts food on the table. There's no way as a young lawyer you are going to make a go of it without legal aid clients (Interview 2).

In response to the changes that were made to the program as a result of the MOU, the lawyer goes on further to state:

> But you know it's hard for you. I've got a couple hundred clients, there's no way I can say, well because you know I'm getting less money now, I'm not going to represent you. You . . . have a relationship with these people and what it came down to is we're the ones who, I can't say suffered but, we're the one who absorbed the loss (Interview 2).

Just as neo-liberalism and neo-conservatism were on some grounds pivoting on issues of the family, pastoral power and neo-liberalism seem to overlap and work together. Neo-liberal discourse creates the conditions of possibility for pastoral discourse of the shepherd and the sheep to flourish and "the demands of advanced liberalism for individual enterprise and autonomy highlight the deficiencies of, and in a sense create, needful sheep for whom shepherds can provide and sacrifice themselves" (Lippert, 2005: 168).

Rights and Governmentality

At the beginning of this analysis, a count of neo-liberal discourse was undertaken based on two LAO texts - *Duty Counsel Manual* (LAO, 2002b) and the *Tariff and Billing Handbook* (LAO, 2002c). On a frequent basis, these neo-liberal terminologies were found coupled with a discourse of rights and access. For example, there are 49 instances of 'rights' and 67 instances

of 'access' in these two texts. Rights discourse has been taken up by Lightman and Riches' (2000) who argue that social rights, defined as rights which granted equal access to social services, are illustrative of the welfare state. Furthermore, these social rights were granted based solely on need and thus eligibility for social assistance programs were not conditional upon the individual's successful employment or fulfilling other requirements in order to receive support (Lightman and Riches, 2000). However, they argue that these rights are increasingly becoming commodified. Neo-liberal projects have changed the discourse of rights from universal entitlement to conditional entitlement, where rights have become contingent upon the individual's actions to earn (or pay for) them. The shift in Ontario's policy discourse, from welfare to workfare, provides evidence of the how notion of rights has been taken up as part of a neo-liberal discursive strategy (see Pratt, 2005).

Rights are constituted by neo-liberalism as a privilege, as a material good that can be given or taken depending on the fulfilment of responsibilities on the part of the client. The economic logic of neo-liberalism thus utilizes rights as a technique through which to govern, linking them to responsibility; however, has the effect of undermining the ideals of human rights (Lightman and Riches, 2000). In the legal aid text we can find evidence of this articulation of neo-liberal rights. For example, some manuals include the following statement in their introduction:

> Lawyers and Legal Aid Ontario: The certificate and duty counsel programs are a form of public-private partnership in serving low-income individuals throughout Ontario. LASA obliges LAO to recognize the private bar 'as the foundation of legal aid services in the areas of criminal and family law' – this maintains the fundamental right of choice of counsel for poor people (LAO, 2002b and LAO, 2002c).

Furthermore, the brochures for clients indicate that the purpose of legal aid is to ensure equality between legal aid clients and those of modest means. For example, one notes:

> You have the rights to the best service possible, whether you are on legal aid or paying out of your own pocket (LAO, N.d.q).

It is evident that the legal aid texts are producing an image of the legal client as a rights bearing subject. Constituting their subjectivities in this manner gives way to neo-liberal technologies of governance. For instance, *You and Your Lawyer (*LAO, N.d.q) is a brochure for legal aid clients which instructs them of appropriate conduct when communicating with a lawyer. The brochure states:

> Your time with your lawyer may be limited and costing you money so use your time carefully. Every phone call with your lawyer is using up time. If you are on a legal aid certificate, understand that the lawyer is only allowed to spend so much time on your case. Be prepared for your meetings with your lawyers. Write down your questions before you go. ... Don't expect to see your lawyer without an appointment. Your lawyer is very busy and may not be in the office all the time. Call ahead if you can't keep an appointment and don't forget to schedule another one. Keep a file or envelope with all your papers in it and bring it to every meeting with your lawyer. Read all the materials that your lawyer gives you. Bring a notebook with you to each meeting so you can make notes of what your lawyers says (LAO, N.d.q).

The discourse of this text indicates ways in which legal aid clients can be more responsible and efficient with the use of time on certificate. Therefore, by defining rights as part of the individual's freedom to choose and consequently be active in their own development and self-realization, the logic of neo-liberal governance prevails.

Narrative expressions of rights, however, provide an interesting contrast to this textual shift in the discourse of rights. For instance, lawyers and administrators expressed in interviews a sense of frustration with clients who evoked a sense of rights that were not in line with neo-liberalism. For example, a family lawyer stated:

> You asked me from a client's perspective. I have to tell you, most of the people; and this is going to sound judgemental, stereotypical; they are not grateful for the support they are given. They do not recognize that I don't work for free. Somebody's paying me. And indirectly, they're paying me, every time they buy something in the store and it goes to provincial sales tax. *But because it does not come directly out of their pockets, they don't recognize that they're publicly funded and that it is a limited resource. They can be the*

> *most demanding clients; they can be the least grateful clients. Because they have no vested interest, they have no stake in the process.* And if I would propose a change to legal aid, it would be that. Have them have some kind of a stake in the process. Let it have some meaning for them, [an understanding] that someone is making sacrifices for them, be it through the taxes, be it through the lawyers who accept the legal aid certificates, somebody else is making a sacrifice for you and you better well appreciate it. And most of them do not have any appreciation for that (Interview 5; emphasis added).

The reproduction of this contested subjectivity provides evidence that the neo-liberal rationality is not absolute. This representation of a client narrative is in direct contrast to the way in which neo-liberalism constitutes rights bearing subjects. Responsibility that comes with pursuing rights is not taken up by clients', rather their subjectivities are constituted by the older version of what rights are – an unconditional entitlement based solely on need and equality. As stated earlier, these are ideas which have been linked to welfarism. Thus, neo-liberal subjectivity is not being translated onto the subject, which potentially provides an opening for resistance or contestation. However what the narrative is and in which ways the subject is being constituted through what rationalities and governmental techniques requires further analysis and explanation. Future research should include interviews of clients to examine the extent to which this contested narrative is reproduced in a client's narrative.

Therefore not only does the notion of rights bring up questions about the applicability of broad rationalities actual effect on programs, but it also highlights the way in which subjectivities are constantly being produced and re-produced. This is illustrative of the way in which texts are not independent of human interpretation but are continually being produced by people through their narrative. Assumptions that programs have coherency along specific rationalities mask the realities of individual programs hindering critical analysis and possible sites of contestation.

CHAPTER SIX

CONCLUSIONS

This paper has contributed to the existing research in two ways: theoretically to governmentality scholarship and it also provides the basis for new directions for legal aid studies. Theoretically, this analytic of government has illustrated that rationalities are not simply broad types that manifest themselves in practice. Rather they are complicated, overlapping, and sometimes contradictory, manifesting themselves in varied ways. Furthermore, this research has also made clear that neo-liberalism is not the only governing rationality that exists in the domain of legal aid. Rather, there is an unfolding of multiple rationalities whereby neo-liberalism variously complements and conflicts with others. As governance is never a complete process, the existence of one rationality in some instances creates the conditions for another rationality to emerge in another, though not as ideal types. As such, neo-liberalism looks different in practice and across programs. The presence of multiple rationalities within the realm of legal aid points to the possibility that there are more complicated arrangements that prevail in other governmental domains and in the governance of society in general. Future studies should engage in this governmental analysis to determine what rationalities are performing in a particular realm. The multiplicity of rationalities would not have been as clear without the methodological approach taken in this thesis.

This research suggests the importance for future governmentality studies to move away from its conventional analysis of broad policy statements. Future analysis should follow this methodology and adopt a critical discourse analysis of *both* policy oriented texts and interviews. The methodology taken up in this paper has contributed in two ways. On one hand, the examination of multiple policy oriented texts elicited a more thorough analysis of the ways in

which political rationalities constitute themselves across the legal aid program. Furthermore, the discourse analysis of these particular types of texts – policy manuals, guidelines and brochures – allowed for a closer inspection of neo-liberalism as a political rationality. This inspection revealed the existence of tensions within the neo-liberal logic thus questioning the extent to which broader governmental rationalities are actualized in practice. On the other hand, the of use interviews drew attention to the performative capacity of narratives in the constitution of the governmental subject. The interviews revealed that the rationalities that appear in the texts are not perfectly translated to create subjectivities of the legal aid client. Rather, the terms of governance, the way in which clients choose to conduct themselves, are constantly being contested and negotiated. The critical discourse analysis of policy oriented texts and interviews provides a complex and open ended analysis that does not privilege neo-liberalism as the guiding governmental rationality of our time. This research has had the effect of opening up the theoretical discussion of governmentality and potential avenues for political action.

The results of this study have several implications for future directions in legal aid research. While the results reveal that neo-liberalism is not the only rationality which informs the legal aid program, I would like to acknowledge here the real deleterious affects that neo-liberalism has had on the legal aid program. For instance, efforts to make legal aid and the legal profession calculable and thus governable justified the severe changes to the program via the Memorandum of Understanding. The effects of this 'monetarisation' (Rose and Miller, 1992) of legal aid were real. The area director that was interviewed experienced the effects of the MOU:

> I had just become an area director and it changed it in the sense that my job used to be say "Yes". Within two months of getting the job, my job was then to say "No. I can't issue [a certificate]". We had open ended funding, we had open ended certificates, we covered a lot of stuff and it ended. So for example, into that MOU in order to meet the capped funding we had to claw back the type of criminal certificates we would issue. So we used to issue [certificates] for things like, if the conviction would affect the ability to

> get a job, go to school, and there were a couple of other factors. So you weren't going to jail, but having a record would negatively impact you, we would issue a certificate. Now the only time [a certificate is issued] is a probability of going to jail (Interview 1).

In practice this meant 'a lot of unrepresented' clients and 'a lot of secretaries put out of work' with lawyers being the ones who 'absorbed the loss' (Interview 2). So the clients of legal aid were not the only affected individuals. Lawyers were subjected to restrictive rules for billing hours in addition to the 22% reduction in tariffs and hourly maximums. The Area Director interviewed comments on the impact of controlling costs and general economic management of LAO:

> Especially in family and CFSA, we have very few lawyers who willing to take on those cases, because they are very challenging, the clients are challenging, and we don't pay. And the court time takes them away from their paying client is really intensive. So keeping lawyers taking certificates has been a big challenge. (Interview 1).

The responses to controlling costs and ultimately the denial of access to legal aid have been limited to reside within the rubric of neo-liberalism. For instance, in an effort to assist those clients who have cases not covered by legal aid certificates or are not financially eligible for the services, they began to be provided with self-help guides to help them navigate the system. The duty counsel supervisor interviewed said:

> [I]n a less formal way, the counter staff at the family counter is part of this in that they hand out forms people need. If they come in saying "I want to apply for custody" ok "Here's all the forms you need, here are information guides." We've also developed some things to try and recognize that there's no stop gap. We have these *self-help checklists* that we've created that we can hand out to clients who don't qualify financially but can say "Look, here's the forms you need, here's the *self-help checklist*". [So there are mechanisms to help them out to try and deal with the system?]. A little bit. But it's not perfect. You know, I recognize that, that's for sure." (Interview 4; emphasis added).

The term 'self-help' invokes neo-liberal notions of the responsibilized client, empowered in their own knowledge to optimise the quality of their lives. However, following the research of scholars such as Cruikshank (1999), Hannah-Moffat (2000), and Kesby (2005), these forms of

empowerment, while perhaps well-intentioned, have been appropriated in the program's application by working through the subjectivities of clients to reinforce neo-liberalism. Future studies of legal aid should examine how these technologies constitute and regulate the political subjectivities of legal aid clients. However, examination of the productive forces of government should not be limited to discussions of neo-liberalism or legal discourse sensibilities or legalistic discourse.

Future research should examine how the current analysis evaluates the gaps in representation evidenced in this paper, such as the position of women in legal aid. Traditionally, feminist legal studies have examined how discourse of law and choice has served to marginalize women's experience, hindering their access to legal aid. Future research on the subjectivities of women should reflect the conclusion that there are multiple rationalities that inform the legal aid program in Ontario. For example, the finding of a pastoral rationality in the legal aid text should encourage the analysis of the performative possibilities of discourse such as salvation via legal experts. How does pastoralism rather than neo-liberalism shape how women experience the legal aid system? To what ends does salvation reconstitute the subject of legal aid as well as the legal aid lawyer? By assuming that neo-liberalism is the guiding rationality, we see the certificate program as preoccupied with the reproduction of a client who should be responsible and actively engaged in carrying out legal services and thus concerned with choosing a lawyer, recounting testimonials in strictly legalistic terms, effectively creating a client who should also be cost-conscious. However, if we see pastoralism as having a particular influence we can question how the ethos of the desire to give and sacrifice, actually recreate the client as needy. Furthermore, how can this cultivation of the obligation to give be productive in creating a more

inclusive policy for legal aid? Thus future research might look to how intersecting rationalities work to reproduce women's unequal access to justice.

A particular area that feminist legal research should examine is the relationship between the cultivation of the willingness to give and community clinics. Primarily, as this research was not a universal representation of legal aid in Ontario, an examination of the rationalities that have affected the development and shape the community legal aid services programs should be undertaken. This specific analysis should take into account how these rationalities have interacted with gender discourses, as this is where women's legal issues are concentrated. Legal aid clinics existed unsystematically until the 1970s when funding was formally issued to manage these programs. Evidence of a multiplicity or complexity of rationalities would indicate that a different approach to tackling legal aid policy is necessary to make it truly accessible.

More generally, I suggest that discovering alternative discourses within the assumed generalized framework of neo-liberalism allows for future research to focus on new perspectives in policy domains. It means our responses and solutions to complex problems of rationalities and governance need 're-jigging' if they are to be more comprehensive and progressive. Governmentality analysis is an integral part of the analytical toolbox for examining policy. This process of mapping the sources of difference in governance

> counters the tendency to subsume government under on ascendant rationality; creates spaces in which alternative governmental forms maybe identified and contests facilitated; opens up the possibilities for recognising hybridization, adaptation and change; in short, returns to political analysis the fluidity and contingency of relational political without abandoning the characteristic analysis of governmentality (O'Malley, 2001: 25).

In addition to turning research into policy relevant studies, governmentality analysts need to return to the original task of their Foucauldian analytic; asking questions of how conduct is

conducted, through what rationalities, programs and techniques, and the complex ways in which subjects are being imagined in the process.

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APPENDIX A: ETHICS APPLICATION

REB #_____

UNIVERSITY OF WINDSOR
APPLICATION TO INVOLVE HUMAN SUBJECTS IN RESEARCH
FOR STUDENT RESEARCHERS

Please complete, print, and submit **four (4) copies (original plus three (3) copies)** of this form to the **Research Ethics Coordinator, Office of Research Services, Chrysler Hall Tower, Room 309**

CHECKLIST

Title of Project: **Legal Aid and Governmentality: Beyond Neo-Liberalism?**

Student Investigator: **Grace Park**

Faculty Supervisor: **Dr. Randy Lippert**

Please attach the following items, if applicable, in the following order at the back of the Application.

☐		Decisions Needed From Other REB Boards
☒	B.3.c.i.	Questionnaires and Test Instruments
☐	B.3.d.	Deception (If deception is going to be used, your application will go to Full Review)
☐	B.3.e.	Debriefing Letter
☐	B.6.b.	Letters of Permission Allowing Research to Take Place on Site
☐	B.6.d.	Recruitment Materials: Advertisements, Posters, Letters, etc.
☒	E.1.	Consent Form
☒	E.2.	Letter of Information
☐	E.4.	Parental/Guardian Information and Consent Form
☐	E.5.	Assent Form
☒	F.2.	Consent for Audio/Visual Taping Form
☒		Certificate of completion of on-line ethics tutorial (MUST BE COMPLETED BY **ALL** STUDENTS)

** Please make sure that all necessary signatures have been provided and that you are using the most recent version of this form (see www.uwindsor.ca/reb).

[2] FACULTY SUPERVISOR ASSURANCE

Title of Research Project: Legal Aid and Governmentality: Beyond Neo-Liberalism?

Student Investigator: Grace Park

I certify that the information provided in this application is complete and correct.

I understand that as principal Faculty Supervisor, I have ultimate responsibility for the conduct of the study, the ethical performance of the project and the protection of the rights and welfare of human participants.

I agree to comply with the Tri-Council Policy Statement and all University of Windsor policies and procedures, governing the protection of human subjects in research, including, but not limited to, the following:

- $ performing the project by qualified and appropriately trained personnel in accordance with REB protocol;
- $ implementing no changes to the REB approved protocol or consent form/statement without notification to the REB of the proposed changes and their subsequent approval of the REB;
- $ reporting promptly significant adverse effects to the REB within five (5) working days of occurrence; and
- $ submitting, at minimum, a progress report annually or in accordance with the terms of certification.

Signature of Faculty Supervisor: _____ Date: _____

A. PROJECT DETAILS

A.1. Level of Project

☐ Ph.D. ☒ Masters ☐ Undergraduate ☐ Post Doctoral

☐ Other (specify):

Is this research project related to a graduate course? ☐ Yes ☒ No
or to your thesis/dissertation? ☒ Yes ☐ No

If yes, please indicate the course number: n/a

Please explain how this research project is related to your graduate course. n/a

A.2. Funding Status

Is this project currently funded? ☐ Yes ☒ No

If **NO**, is funding to be sought? ☐ Yes ☒ No

A.3. Details of Funding (Funded or Applied for)

Agency:

☐ NSERC ORS Application Number:

☐ SSHRC ORS Application Number:

☐ Other (specify):

ORS Application Number:

Period of funding: From: To:

Type of funding:

☐ Grant ☐ Contract ☐ Research Agreement

B. SUMMARY OF PROPOSED RESEARCH

B.1. Describe the purpose and background rationale for the proposed project.

The purpose of this exploratory study is to examine the governmental discourses that are present in Legal Aid Ontario's legal aid program. Legal Aid Ontario was created in 1998 to provide for the delivery of legal aid to low income Ontario residents. Through the use of critical discourse analysis, I will be examining the program's texts (i.e., manuals, reports, and policies) for the presence of neo-liberal, neo-conservative and pastoral governmental discourses and how they articulate with one another. As a supplement to this discourse analysis of texts, the study will include between 5 and 7 open-focused interviews with individuals who have experience administering and/or overseeing Legal Aid Ontario's services. The interviews will potentially provide a link between the use of language in the programmatic texts and how it translates into social practice, and thus shed light on whether and how governmental texts and discourse may become translated into everyday discourse or 'talk'. This will contribute to the refinement of governmentality theory. More generally, the interviews will lend insight into the governmental discourses that shape Legal Aid Ontario and how it is currently administered.

B.2. Describe the hypothesis(es)/research questions to be examined.

The research question I seek to explore is "What are the rationalities that inform and are articulated in Legal Aid Ontario?"

B.3. Methodology/Procedures

B.3.a. Do any of the procedures involve invasion of the body (e.g. touching, contact, attachment to instruments, withdrawal of specimens)? ☐ Yes ☒ No

B.3.b. Does the study involve the administration of prescribed or proscribed drugs? ☐ Yes ☒ No

B.3.c.i. Specify in a step-by-step outline exactly what the subject(s) will be asked to do. Attach a copy of any questionnaires or test instruments.

Once obtaining consent from subjects to be interviewed, I will ask interviewees open-focused questions based primarily on Legal Aid Ontario's program purposes and challenges. The subjects will be encouraged to speak freely about any topic within legal aid that they feel is relevant. Questions will also be asked regarding legal aid guidelines and policies on which they will be allowed to elaborate. A copy of interview questions is provided (see attached Appendix A).

B.3.c.ii. What is the rationale for the use of this methodology? Please discuss briefly.

The interviews and their analysis are essential to (1) supplement the analysis of legal aid texts by potentially providing further insight into the governmental discourses that shape Legal Aid Ontario and how it is administered that cannot be gleaned from texts alone, as well as to (2) shed light on whether and how the governmental discourses revealed in the textual analysis are also present in the everyday discourse or 'talk' of those with experience administering the program.

B.3.d. Will deception be used in this study? ☐ Yes ☒ No

If **YES**, please describe and justify the need for deception.

n/a

B.3.e. Explain the debriefing procedures to be used and attach a copy of the written debriefing

n/a

B.4. Cite your experience with this kind of research. Use no more than 300 words for each research.

For a Master's level course, Qualitative Methodology (48-506), I was required to obtain ethics approval to conduct interviews for my course project titled "Governance of Legal Aid in Windsor and the Implication for Lawyers." After receiving ethics approval, I interviewed a subject with experience with legal aid in Windsor. I went through the processes of creating and sending an information letter and obtaining consent from the subject. The interview transcripts were also analysed for the course project. I have also researched the development of legal aid in Ontario since its inception and have become familiar with the program texts and legal aid issues.

B.5. Subjects Involved in the Study

Describe in detail the sample to be recruited including:

B.5.a. the number of subjects

5-7

B.5.b. gender

male and female

B.5.c. age range

30-65

B.5.d. any special characteristics

Subjects must have experience with administering or overseeing (not receiving) legal aid in Ontario. An area director as well as private lawyers who accept legal aid clients will be interviewed.

B.5.e. institutional affiliation or where located

Subjects should be affiliated with Legal Aid of Windsor, the Community Legal Clinic in Windsor, Legal Aid Ontario, or more generally the Law Society of Upper Canada.

B.6. Recruitment Process

B.6.a. Describe how and from what sources the subjects will be recruited.

Subjects will be recruited via contact information provided on Legal Aid Ontario's website, the University of Windsor Faculty of Law website, and a listing of private lawyers who provide legal aid services compiled by Legal Aid of Windsor. Cold calls will be made to the subjects describing my research interest. A letter of information will be sent to the subjects after receiving preliminary interest. Subjects will then contact me if they are interested in participating in the project.

B.6.b. Indicate where the study will take place. If applicable, attach letter(s) of permission from organizations where research is to take place.

Subjects will be interviewed at a location convenient to them, separate from their workplace.

B.6.c. Describe any possible relationship between investigator(s) and subjects(s) (e.g. instructor - student; manager - employee).

I do not forsee there will be any relationship between the subjects and I.

B.6.d. Copies of any poster(s), advertisement(s) or letter(s) to be used for recruitment are attached. ☐ Yes ☒ No

B.7. Compensation of Subjects

B.7.a. Will subjects receive compensation for participation? ☐ Yes ☒ No

If **YES**, please provide details.

n/a

B.7.b. If subjects (s) choose to withdraw, how will you deal with compensation?

n/a

B.8. *Feedback to Subjects*

Whenever possible, upon completion of the study, subjects should be informed of the results. Describe below the arrangements for provision of this feedback. (Please note that the REB has web space available for publishing the results at www.uwindsor.ca/reb. You can enter your study results under Study Results on the website. Please provide the date when your results will be available)

Subjects will be notified of the study results by email when a report of the findings becomes available or through mail if e-mail is unavailable.

C. POTENTIAL BENEFITS FROM THE STUDY

C.1. Discuss any potential direct benefits to subjects from their involvement in the project.

Potential benefits to the subjects include development of an awareness of how language (or discourse) affects how legal aid is practiced. Subjects could potentially be empowered by this awareness, which could result in personal and professional growth. Subjects could also potentially benefit from the personal satisfaction of knowing they are

contributing to the production of socio-legal research and possibly providing insight into progressive change in relation to the delivery of legal aid in Ontario.

C.2. Comment on the (potential) benefits to (the scientific community)/society that would justify involvement of subjects in this study.

The major benefit of the study and its involvement of interview subjects will be to refine governmentality theory by showing how Legal Aid Ontario is shaped by several government discourses and possibly how these discourses appear and are translated into the everyday 'talk' of those who administer or oversee the program. The study's findings may also affect how legal aid is practiced in a beneficial way by throwing the governmental rationales for the program's various aspects into relief and thereby more generally improving access to justice. In summary, the potential benefits include refinement of existing governmentality theory and progressive change within the delivery of legal aid services in Ontario.

D. POTENTIAL RISKS OF THE STUDY

D.1. *Are there any psychological risks/harm?*
(Might a subject feel demeaned, embarrassed, worried or upset?) ☐ Yes ☒ No

D.2. Are there any physical risks/harm? ☐ Yes ☒ No

D.3. Are there any social risks/harm? (Possible loss of status, privacy, and/or reputation?) ☐ Yes ☒ No

D.4. Describe the known and anticipated risks of the proposed research, specifying the particular risk(s)/harm associated with each procedure or task. Consider physical, psychological, emotional, and social risks/harm.

None.

D.5. Describe how the potential risks to the subjects will be minimized.

The investigator will ensure the confidentiality of the subject by coding interview tapes and the use of pyseudonyms in the transcripts as well as the final report. All interview tapes and coding documents will be kept in a secure location where only the investigator will have access to them. Upon completion of the study, tapes, transcripts, and coding documents will be destroyed. In addition to these measures, subjects will be notified at the beginning of the interview that at any time during the interview they can refuse to answer a particular question or withdraw their participation with no consequences to them. Subjects will also be notified that they have the right to refuse to answer any questions as well as the right to withdraw their participation at anytime without consequence to them.

E. INFORMATION AND CONSENT PROCESS

If different groups of subjects are going to be asked to do different things during the course of the research, more than one consent may be necessary (i.e. if the research can be seen as having Phase I and Phase II).

E.1. Is a copy of a **separate Consent Form** attached to this application? ☒ Yes ☐ No

E.2. Is a copy of a **separate Letter of Information** attached to this application? ☒ Yes ☐ No

If written consent WILL NOT/CANNOT be obtained or is considered inadvisable, justify this and outline the process to be used to otherwise fully inform participants.

n/a

E.3. Are subjects competent to consent? ☒ Yes ☐ No

If not, describe the process to be used to obtain permission of parent or guardian.

n/a

E.4. Is a **Parental/Guardian Information and Consent Form** attached? ☐ Yes ☒ No

E.5. Is an **Assent Form** attached? ☐ Yes ☒ No

E.6. Withdrawal from Study

E.6.a. Do subjects have the right to withdraw at any time during and after the research project? ☒ Yes ☐ No

E.6.b. Are subjects to be informed of this right? ☒ Yes ☐ No

E.6.c. Describe the process to be used to inform subjects of their withdrawal right.

The subjects will be notified of their rights to withdraw on the letter of information as well as on the consent form provided prior to the commencement of the interview.

F. CONFIDENTIALITY

Definitions: **Anonymity** - when the subject cannot be identified, even by the researcher.
Confidentiality - must be provided when the subject can be identified, even if only by the researcher.

F.1. Describe the procedures to be used to ensure anonymity of subjects and confidentiality of data. Explain how written records, video/audio tapes and questionnaires will be secured, and provide details of their final disposal.

Confidentiality will be ensured by coding interview tapes and the use of pyseudonyms in the transcripts as well as the final report. All interview tapes and coding documents will be kept in a secure location where only the investigator will have access to them. Upon completing of the study, tapes, transcripts, and coding documents will be destroyed. In addition to these measures, subjects will be notified at the beginning of the interview that at any time during the interview they can refuse to answer a particular question or withdraw their participation with the assurance that none of the information provided will be used in the final report.

F.2. Is a **Consent for Audio/Video Taping Form** attached? ☒ Yes ☐ No

F.3. Specify if an assurance of anonymity or confidentiality is being given during:

F.3.a. Conduct of research ☒ Yes ☐ No

F.3.b. Release of findings ☒ Yes ☐ No

F.3.c. Details of final disposal ☒ Yes ☐ No

G. REB REVIEW OF ONGOING RESEARCH

G.1. Are there any specific characteristics of this research which requires additional review by the REB when the research is ongoing? ☐ Yes ☒ No

If **YES**, please explain.

n/a

G.2. Will the results of this research be used in a way to create financial gain for the researcher? ☐ Yes ☒ No

If **YES**, please explain.

n/a

G.3. Is there an actual or potential conflict of interest? ☐ Yes ☒ No

If **YES**, please explain for researchers who are involved.

n/a

G.4. Please propose a continuing review process (beyond the annual **Progress Report**) you deem to be appropriate for this research project/program.

Continuous review will be undertaken by the faculty supervisor.

Please note that a **Progress Report** must be submitted to the Research Ethics Coordinator if your research extends beyond one year from the clearance date. A **Final Report** must be submitted when the project is completed. Forms are available at www.uwindsor.ca/reb.

H. SUBSEQUENT USE OF DATA

Generally, but not always, the possibility should be kept open for re-using the data obtained from research subjects.
Will, or might, the data obtained from the subjects of this research project
be used in subsequent research studies? ☒ Yes ☐ No

If **YES**, please indicate on the Consent Form that the data may be used in other research studies.

I. CONSENT FORM

If a Consent Form is required for your research, please use the following sample **Consent Form** template. If you wish to deviate from this format, please provide the rationale. Print out the **Consent Form** with the University of Windsor logo. The information in the Consent Form **must** be written/presented in language that is clear and understandable for the intended target audience.

J. LETTER OF INFORMATION

If a Letter of Information is required for your research, please use the following sample **Letter of Information** template. If you wish to deviate from this format, please provide the rationale. Print out the **Letter of Information** with the University of Windsor logo. The Letter of Information **must** be written/presented in language that is clear and understandable for the intended target audience.

Revised June 2006

APPENDIX B: LETTER OF INFORMATION

LETTER OF INFORMATION FOR CONSENT TO PARTICIPATE IN RESEARCH

Title of Study: **A Study of Legal Aid Policies and Practices**

You are asked to participate in a research study conducted by **Grace Park**, a graduate student from the **Graduate Studies Department of Sociology and Anthropology** at the University of Windsor. The results will be contributed to a Masters thesis.

If you have any questions or concerns about the research, please feel to contact Dr. Randy Lippert, Faculty Supervisor, during daytime hours at 519-253-3000 x 3495 or via email at [redacted].

PURPOSE OF THE STUDY

This study will be critically analyzing the language that is used in the Legal Aid Ontario program. The purpose of this analysis is to find whether or not the language used fits with the current literature on how society is governed. The interviews will potentially provide a link between the program language and how people talk about legal aid. The research will contribute to the refinement of theory that deals with how society is governed as well as lend insight into the possibility of different types of languages shaping how Legal Aid Ontario is administered.

PROCEDURES

If you volunteer to participate in this study, we would ask you to do the following things:

You will be asked a series of questions regarding the Legal Aid Ontario program. You will also be asked to elaborate on your experience with legal aid in general as well as speak freely about any topic you feel is relevant to the discussion. Interviews will last approximately 45-60 minutes in length. You may be requested to be contacted for a follow up or clarification interview.

POTENTIAL RISKS AND DISCOMFORTS

None.

POTENTIAL BENEFITS TO SUBJECTS AND/OR TO SOCIETY

Potential benefits to the subject could be the development of an awareness of how language (or discourse) affects how legal aid is practiced.

PAYMENT FOR PARTICIPATION

You will not receive payment or remuneration of any amount for your participation in the study.

CONFIDENTIALITY

Any information that is obtained in connection with this study and that can be identified with you will remain confidential and will be disclosed only with your permission.

The tapes and transcripts of the interview will be coded so that any identifying characteristics will be kept confidential. No identifying details will be used in the final report without your consent. Upon completion of the project, all tapes and coding documents will be destroyed. An anonymous copy of the interview transcript will be kept on file for possible future research by the investigator. At any time you can request a copy of the interview materials.

PARTICIPATION AND WITHDRAWAL

You can choose whether to be in this study or not. If you volunteer to be in this study, you may withdraw at any time without consequences of any kind. You may also refuse to answer any questions and still remain in the study. The investigator may withdraw you from this research if *circumstances arise which warrant doing so.*

FEEDBACK OF THE RESULTS OF THIS STUDY TO THE SUBJECTS

A copy of the study results can be found on the University of Windsor's Research Ethics Board website by April 2006. The website is [illegible].

SUBSEQUENT USE OF DATA

This data may be used in subsequent studies.

RIGHTS OF RESEARCH SUBJECTS

You may withdraw your consent at any time and discontinue participation without penalty. If you have questions regarding your rights as a research subject, contact: Research Ethics Coordinator, University of Windsor, Windsor, Ontario, N9B 3P4; telephone: 519-253-3000, ext. 3916; e-mail: lbunn@uwindsor.ca.

SIGNATURE OF INVESTIGATOR

These are the terms under which I will conduct research.

_____ _____

Signature of investigator Date

APPENDIX C: CONSENT TO PARTICIPATE IN RESEARCH

CONSENT TO PARTICIPATE IN RESEARCH

Title of Study: **A Study of Legal Aid Policies and Practices**

You are asked to participate in a research study conducted by **Grace Park**, a graduate student from the **Graduate Studies Department of Sociology and Anthropology** at the University of Windsor. The results will be contributed to a Masters thesis.

If you have any questions or concerns about the research, please feel to contact **Dr. Randy Lippert, Faculty Supervisor, during daytime hours at 519-253-3000 x 3495 or via email at** [redacted].

PURPOSE OF THE STUDY

This study will be critically analyzing the language that is used in the Legal Aid Ontario program. The purpose of this analysis is to find whether or not the language used fits with the current literature on how society is governed. The interviews will potentially provide a link between the program language and how people talk about legal aid. The research will contribute to the refinement of theory that deals with how society is governed as well as lend insight into the possibility of different types of languages shaping how Legal Aid Ontario is administered.

PROCEDURES

If you volunteer to participate in this study, we would ask you to do the following things:

You will be asked a series of questions regarding the Legal Aid Ontario program. You will also be asked to elaborate on your experience with legal aid in general as well as speak freely about any topic you feel is relevant to the discussion. Interviews will last approximately 45-60 minutes in length. You may be requested to be contacted for a follow up or clarification interview.

POTENTIAL RISKS AND DISCOMFORTS

None.

POTENTIAL BENEFITS TO SUBJECTS AND/OR TO SOCIETY

Potential benefits to the subject could be the development of an awareness of how language (or discourse) affects how legal aid is practiced.

PAYMENT FOR PARTICIPATION

You will not receive payment or remuneration of any amount for your participation in the study.

CONFIDENTIALITY

Any information that is obtained in connection with this study and that can be identified with you will remain confidential and will be disclosed only with your permission.

The tapes and transcripts of the interview will be coded so that any identifying characteristics will be kept confidential. No identifying details will be used in the final report without your consent. Upon completion of the project, all tapes and coding documents will be destroyed. An anonymous copy of the interview transcript will be kept on file for possible future research by the investigator. At any time you can request a copy of the interview materials.

PARTICIPATION AND WITHDRAWAL

You can choose whether to be in this study or not. If you volunteer to be in this study, you may withdraw at any time without consequences of any kind. You may also refuse to answer any questions and still remain in the study. The investigator may withdraw you from this research if circumstances arise which warrant doing so.

FEEDBACK OF THE RESULTS OF THIS STUDY TO THE SUBJECTS

A copy of the study results can be found on the University of Windsor's Research Ethics Board website by April 2006. The website is

SUBSEQUENT USE OF DATA

This data may be used in subsequent studies.

RIGHTS OF RESEARCH SUBJECTS

You may withdraw your consent at any time and discontinue participation without penalty. If you have questions regarding your rights as a research subject, contact: Research Ethics Coordinator, University of Windsor, Windsor, Ontario, N9B 3P4; telephone: 519-253-3000, ext. 3916; e-mail: lbunn@uwindsor.ca.

SIGNATURE OF RESEARCH SUBJECT/LEGAL REPRESENTATIVE

I understand the information provided for the study, **Legal Aid and Governmentality: Beyond Neo-Liberalism?**, as described herein. My questions have been answered to my satisfaction, and I agree to participate in this study. I have been given a copy of this form.

_____
Name of Subject

_____ _____
Signature of Subject Date

SIGNATURE OF INVESTIGATOR

These are the terms under which I will conduct research.

_____ _____
Signature of Investigator Date

APPENDIX D: CONSENT FOR AUDIO TAPING

CONSENT FOR AUDIO TAPING

Research Subject Name:

Title of the Project: **A Study of Legal Aid Policies and Practices**

I consent to the audio-taping of the interview.

I understand these are voluntary procedures and that I am free to withdraw at any time by requesting that the taping be stopped. I also understand that my name will not be revealed to anyone and that taping will be kept confidential. Tapes are filed by number only and store in a locked cabinet.

I understand that confidentiality will be respected and the viewing of materials will be for professional use only.

_____ _____

(Research Subject) (Date)

VITA AUCTORIS

Grace Park was born in 1981 in London, Ontario. She graduated from John Paul II Secondary School in 1999 and completed her OAC year in 2000. She began her post-secondary education in 2000 at the University of Western Ontario and completed the first year towards a Bachelor's of Arts degree in Psychology. She transferred to the University of Windsor in 2001 and completed a Bachelor's of Arts, Honours in Psychology and Criminology in 2004. She is currently a graduate candidate for the Master's Degree in Sociology at the University of Windsor and hopes to graduate in June 2007.