

Who Will Litigate Constitutional Issues for the Poor?

By ALLEN REDLICH*

But winds change; they always have, and doubtless they always will The way I want to see thought reformed is by our ceasing to view the elimination of poverty as a sentimental matter, as a matter of compassion, and our starting to look on it as a matter of justice, of constitutional right.¹

Charles L. Black, Jr.

Until the creation of the Legal Services Program² in 1965, the poor

* Professor of Law, Albany Law School. I would like to acknowledge the efforts of my colleagues Stephen Gottlieb, Katheryn Katz, Alex Seita, Bernard Harvith, Patrick Borchers, and Serena Stier whose comments on early drafts were time consuming and helpful; the special efforts of Stephen Wasby who both read the draft and gave me invaluable advice; the efforts of my research assistant Gina Campano; and also the fiscal assistance and other support provided by the Law School. And finally, I would like to acknowledge the emotional support of a class of 75 students who took a course in Law and the Disadvantaged and whose enthusiasm washed away my despair.

The views expressed here derive from my experiences in a legal services program that litigated welfare cases with intensity. See James J. Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U. L. REV. 836, 872-74, 877-89 (1968). It was a program designed to provide service to the community, but issues of constitutional dimension arose and were litigated. I confess a continued reluctance to classify cases as "service" or "law reform," and continue to believe that the client's interests, not society's or mine, should dictate whether or not litigation should be instituted.

1. Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, Address Before the Columbia University Law School (Mar. 20, 1986), in 86 COLUM. L. REV. 1103, 1115 (1986).

2. The major contemporary writings dealing with the early years of the Legal Services Program and the related legal problems of the poor include PATRICIA WALD, *LAW AND POVERTY* (1965); EARL JOHNSON JR., *JUSTICE AND REFORM, THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974) [hereinafter JOHNSON, *JUSTICE AND REFORM*]; *THE LAW OF THE POOR* (Jacobus tenBroek ed., 1966); EMORY BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951 & Supp. 1961); JAMES E. CARLIN, JAN HOWARD & SHELDON C. MESSINGER, *CIVIL JUSTICE AND THE POOR* (1966) [hereinafter CARLIN, *CIVIL JUSTICE*]; *JUSTICE AND THE LAW IN THE MOBILIZATION FOR YOUTH EXPERIENCE* (Harold H. Weisman ed., 1966); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Jerome E. Carlin & Jan Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381 (1965); Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964) [hereinafter Cahn & Cahn, *War on Poverty*]; A. Kenneth Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROBS. 211 (1966) [hereinafter Pye, *Role of Legal Services*]; Geoffrey C. Hazard, Jr., *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969); Daniel H. Lowenstein & Michael J. Waggoner, Note, *Neighborhood Law Offices: The*

had very few lawyers and none with the resources to engage in the appellate process where constitutional doctrine is fashioned. As a result, among the unfulfilled legal needs of the poor were several issues of constitutional dimension, such as the existing right to due process,³ the right to privacy,⁴ and the necessity of establishing rights to subsistence, to adequate housing, and to an education. These issues were brought before the Supreme Court during the first "war against poverty" by legal serv-

New Wave in Legal Services for the Poor, 80 HARV. L. REV. 805 (1967) [hereinafter *Neighborhood Law Offices*]; Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970); Lawrence A. Sullivan, *Law Reform and the Legal Services Crisis*, 59 CAL. L. REV. 1 (1971); Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. REV. 361 (1965); Justine Wise Polier, *Problems Involving Family and Child*, 66 COLUM. L. REV. 305 (1966); James J. Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U. L. REV. 836 (1968); Carol R. Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URB. L. 217 (1969) [hereinafter Silver, *Imminent Failure of Legal Services for the Poor*].

After the initial years, literature critiquing the performance of the Office of Economic Opportunity (OEO) lawyers, or addressing current problems include SUSAN LAWRENCE, *THE POOR IN COURT* (1990); Samuel Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211 (1973) [hereinafter Krislov, *Judicial Process*]; Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985); Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282 (1982); Robert C. Cramton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670 (1976); Elizabeth Hollingsworth, *Ten Years of Legal Services for the Poor*, in *A DECADE OF FEDERAL ANTIPOVERTY PROGRAMS: ACHIEVEMENTS, FAILURES AND LESSONS* 285 (Robert H. Haveman ed., 1977); Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977); Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337 (1980); Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978).

3. Professor Law relates her experiences while working for Mobilization for Youth, sponsor of a New York City legal services program:

In 1966, few administrators in the Department of Social Services knew that recipients had a "right" to a hearing when aid was denied. By 1967 we had educated the Department to the fact that they had to schedule a hearing. I would get all my "fancy" proof in order. Then, most of the time, at the last minute, the recipient would drop her claim because her case worker told her that if she went to the hearing, her grant would be terminated. . . . Not only did poor people have no process in the 1960's, but in a fundamental sense, they had no law.

Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805, 806 (1990).

I have termed the right to due process as an existing right, not one that resulted from *Goldberg v. Kelly*, 397 U.S. 254 (1970). Professor Law agrees, stating: "No one, except for Justice Black in dissent, disputed the assertion that the eligible individual's interest in continued receipt of welfare constituted a form of property that triggered the need for due process scrutiny." Law, *supra*, at 809.

4. See Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1254 (1965); Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

ices lawyers who at first achieved substantial successes,⁵ but soon thereafter suffered bruising defeats.⁶

The time will come, as Professor Black predicts,⁷ when there will be attempts to relitigate the constitutional battles that were lost twenty years ago. Of course, the attempts will fail if Bork,⁸ Epstein,⁹ and Winter¹⁰ correctly view the Constitution. The present composition of the Supreme Court gives no reason to believe otherwise. But poverty erodes the nation, and one day we will realize that we pay a dear price for our Elizabethan era treatment of the poor.¹¹ Hopefully, Professor Chayes's suggestion that the prohibitions expressed in the Fourteenth Amendment

5. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding unconstitutional certain statutes that conditioned eligibility for welfare benefits on a year's residence within the jurisdiction); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that procedural due process required that welfare benefits could not be terminated prior to the holding of a hearing); *Thorpe v. Housing Auth. of Durham*, 386 U.S. 670 (1967) (holding that tenants in public housing projects could not be evicted without notice of the reasons thereof and an opportunity to respond); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that access to the courts could not be denied to indigent women who sought dissolution of their marriages and lacked funds to pay certain costs).

6. *Dandridge v. Williams*, 397 U.S. 471 (1970) (holding allocation of welfare resources a matter of state concern and refusing to apply a heightened level of scrutiny to state actions challenged as denying equal protection to welfare recipients); *Lindsey v. Normet*, 405 U.S. 56 (1972) (upholding state eviction procedures against due process attacks); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (declining to hold school financing scheme that resulted in disparate educational opportunities violative of the Equal Protection Clause).

7. Black, *supra* note 1, at 1115.

8. Robert Bork, *The Impossibility of Finding Welfare Rights in The Constitution*, 1975 WASH. U. L.Q. 695.

9. Richard A. Epstein, *The Uncertain Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201.

10. Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41. Winter's essay begins as a tight, tough refutation of Professor Frank Michelman's Rawlsian perspective before the feared ascent into economic equations. *Id.* at 75. He mentions "legal services" as among those that might better be distributed, not in the provision of the service, but by monetary transfer with the freedom to choose or not choose the service. Of course, the question of whether this would benefit the poor could be answered by cases like *Sullivan v. Zebley*, 493 U.S. 521 (1990), which resulted in a judgment worth billions of dollars. See *More Poor Children Eligible for Disability Benefits*, N.Y. TIMES, Feb. 11, 1991, at A8; Spencer Rich, *Freeing Aid to Disabled Youngsters: New Rules May Help Tens of Thousands*, WASH. POST, Dec. 17, 1990, at A9. Rawls and Michelman might point out that the lack of any criticism of the Court's decision or concern over the cost of compliance supports the position that there are societal "notions of justice in distributive shares."

11. See 43 Eliz. 1, c. 2 (1601); Bernard L. Diamond, *The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare and Punitive Sanctions*, in THE LAW OF THE POOR, *supra* note 2, at 33, 43, (stating some twenty-five years ago: "We, as a nation, are strong enough in our economic and social development to permit us to relinquish our ambivalent attitudes toward the recipients of our welfare aid. . . . Our national ego is strong, and we can afford to give up our social neuroses.").

See also Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 257 (1964); GILBERT STEINER, SOCIAL INSECURITY

have a "positive spin"¹² will eventually prevail. Professors Michelman,¹³ Edelman,¹⁴ and others¹⁵ set forth legitimate legal justification for constitutional change, which should in due course be presented to the Court.

One would expect that when these issues are relitigated, legal services lawyers, the paid lawyers for the poor, would do the litigating. In the earlier days of legal services, its leaders, Edward Sparer,¹⁶ Harold Rothwax,¹⁷ Gary Bellow,¹⁸ Jim Lorenz,¹⁹ and a host of others, were in

RITY (1966); Jacobus tenBroek & Richard B. Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 UCLA L. REV. 237, 264 (1954).

12. Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026, 1037 (1988).

13. Frank I. Michelman, *The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Michelman suggests a constitutional underpinning to some form of minimum subsistence, or "welfare rights" based upon the premise that "deprivation can be a great evil, especially where the inequalities are neither marginal in significance nor randomly distributed . . . [becoming] gravely prejudicial to one's chances for a decent life. . . ." *Id.* at 7. He then notes that the Court's "egalitarian" interventions are "a vindication of a state's duty to protect against certain hazards which are endemic in an unequal society, rather than vindication of a duty to avoid complicity in unequal treatment." *Id.* at 9. See also Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659.

14. Peter B. Edelman, *The Next Century of the Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). Edelman's position is that the Constitution mandates "survival" income. He does not argue for a court-ordered end to "poverty." *Id.* at 3. He suggests two alternate theories; first, that the doctrine has existed unrecognized in our constitutional structure all along, an argument he suggests is substantive due process. Alternatively, he asserts that it derives from "the government's historic and continuing complicity in economic arrangements that foreseeably resulted in the current maldistribution," which he describes as "equal protection." *Id.* at 5-6. He also presents the appalling economic facts concerning the growing level of poverty in this most affluent of nations. *Id.* at 8-19.

15. In 1966 Albert M. Bendich wrote in *Privacy, Poverty and the Constitution*, in THE LAW OF THE POOR, *supra* note 2, at 96-97:

The most fundamental needs are clearly for food, shelter, and clothing. To what extent are they merely luxuries and to what extent are they not only biological and social but also *constitutional* necessities? . . . Moreover, if the answer here is in the affirmative and the state is under a constitutional obligation to provide persons with housing, are there not some minimal requirements which must be adhered to so that the right is meaningful? . . . [I]f the state must provide housing for those who would otherwise be without shelter, it obviously need not be the governor's mansion, but it must be minimally consistent with basic standards of health and decency. . . . If rat infested, dilapidated, oppressive slum dwellings can produce disease, depression, and other mental disorders and render privacy even in the sense of access to reasonable seclusion meaningless, such dwellings do not constitute housing. . . .

See C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983).

16. The Director of Mobilization for Youth's demonstration legal services project, the founder of the Center on Social Policy and Law, and later Professor of Law at the University of Pennsylvania Law School.

17. The successor to Sparer at Mobilization for Youth and now a New York State Supreme Court judge.

the thick of such constitutional litigation. But now, legal services are in a sorry state. Legal services today have become staid and settled, controlled in large part by the Legal Services Corporation, a public corporation²⁰ that distributes funds to provide lawyers for the impoverished throughout the land, including Guam and Micronesia. The Corporation's priority is to accumulate a large volume of "clients" and "cases." It shows no interest in success or quality of representation.²¹ The typical local program features low pay, constant turnover in staff, and an overwhelming case load.²² Common sense and experience tells us that young lawyers need leadership and direction to develop the skills and will to undertake major litigation. But for the most part, leadership and direction are absent. As a result, litigation has become a lost art for almost all legal services programs.²³ The situation is most acute in our poverty stricken major cities, where with a few exceptions, there has been virtually no reported federal litigation by legal services programs during the last ten years.²⁴ Perhaps two illustrations will suffice to make the point. Legal services program in South Dakota, with 18 lawyers,²⁵ have engaged in far more reported federal court litigation since 1980 than the legal services programs in Atlanta, Detroit, Birmingham, Houston, Los Angeles, Miami, Memphis, New Orleans, or San Francisco.²⁶ The second illustration is that the clinics of Brooklyn Law School and New York University Law School each engage in more federal court litigation than the legal services programs of almost all our major cities.²⁷

With legal services programs that are less and less capable of handling litigation, today's dilemma is two-fold. First, the capacity to do quality lawyering and litigating must be restored. Second, other avail-

18. Co-founder of the effective and controversial California Rural Legal Assistance Program (CRLA), involved in the creation of the National Legal Service Program, and now a Professor at Harvard Law School.

19. Co-founder and first Director of CRLA.

20. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. §§ 2996-2996l(1988)).

21. The Legal Services Corporation's massive 1988-1989 FACT BOOK [hereinafter FACT BOOK] never mentions either word. While it does segregate cases by category and has a category called "litigated cases closed" into which it placed 230,889 cases in 1988, and states that 125,459 cases were closed after "court decision," by implication, all cases were of equal importance.

22. See *infra* text accompanying notes 107-12.

23. See FACT BOOK, *supra* note 21, Table A.

24. *Id.*

25. *Id.* at 52.

26. See *id.* at p. 32.

27. Washington Square Legal Services, the New York University clinical program, has 43 reported appearances in federal courts since 1981. Brooklyn Law School's clinical program has 20 appearances in federal courts.

able resources—this nation's larger law firms and its law schools—must be utilized in an effective manner to provide support for the major litigations necessary to seek to eliminate systemic abuses and to achieve change. This Article will propose that the American Bar Association encourage and direct these activities.

Part I of this Article will briefly review the situation as it was before the creation of the Legal Services Program, the program's beginnings, and the many constitutional litigations undertaken during the first "war against poverty." Part II will describe the events during the Nixon and Reagan presidencies that led to the deterioration of the Legal Services Program, and set forth data strongly suggesting that legal services programs are unable to handle constitutional litigations on behalf of the poor. Finally, Part III will offer a variety of suggestions as to how the existing situation can be improved.

I. The Rise of the Legal Services Program

A. The Origins and Development of the Legal Services Program

When the "war against poverty" began, the poor saw the law as a part of the criminal justice system, as a hostile organ of government, or as a tool used by the landlord or creditor. Lewis Powell, then President of the American Bar Association, said: "Of . . . long-range importance is the attitude of the poor towards the law. Many of them have come to regard the law as an enemy."²⁸ What little organized civil legal representation the poor received came from legal aid societies that failed to provide meaningful services²⁹ because of sparse resources and a charity-oriented perspective³⁰ that accepted and never challenged the systemic practices that adversely affected the poor. A 1964 survey spoke of legal aid attorneys with annual caseloads of 1678 cases.³¹ The heavy caseload

28. Lewis S. Powell, Jr., *The Response of the Bar*, 51 A.B.A. J. 751, 752 (1965).

29. CARLIN, *CIVIL JUSTICE*, *supra* note 2, at 50, describes the "services":

Three out of four accepted applicants for legal aid receive only a single brief consultation; only a minimal amount of time is given to the investigation of fact, to legal research and drafting of legal documents, and to court work. Many offices are incapable of handling cases that require extensive investigation or time-consuming litigation. The situation is further aggravated by low salaries, high turnover in personnel and inadequate direction. . . . There is little time or incentive to enter into a contest over legal principle, to make or alter a law, or to combat institutionalized sources of justice.

30. Community mores and the mores or interests of contributors to the society often dictated both the types of cases handled by a legal aid society and the attitudes of its lawyers. Clients of legal aid were recipients of charity, perceived and treated no differently at legal aid than they were perceived and treated at the local welfare office. See *Neighborhood Law Offices*, *supra* note 2, at 808-09; JOHNSON, *JUSTICE AND REFORM*, *supra* note 2, at 50.

31. Pye, *Role of Legal Services*, *supra* note 2, at 213, states:

meant there was no time to do research, to investigate the facts, or to litigate.³² At best, the legal aid lawyer could rush to the courthouse to delay an eviction. Even this tiny bit of defensive litigation would disappoint a waiting room filled with others in need.

In 1964, Charles Reich published *The New Property*,³³ noting the growth of government grants of "largesse," such as licenses, subsidies, contracts and income maintenance expenditures, and government conditioning of these grants,³⁴ sometimes on a waiver of the grantee's constitutional rights.³⁵ Reich suggested that government "largesse" had become so important to the social order³⁶ that it deserved the procedural and substantive protection afforded to the holders of property rights.³⁷ This perspective, namely that one has a right to largesse, became the bedrock of the litigations that would be brought in the late 1960s and early 1970s on behalf of the poor. Shortly before Reich's article was published, demonstration projects had begun in New York City,³⁸ New Haven,³⁹ and Washington,⁴⁰ where lawyers were assigned to social agencies to assist the agencies' clients. The New York City program was operated by a social agency called Mobilization for Youth, located in the mostly Puerto Rican slums of New York City. This program was the most publicized of these projects due to the talents of its director, Edward V. Sparer, who would soon become the "war's" most respected spokesman and strategist.⁴¹ At this time, Edgar and Jean Cahn published another seminal

In thirty-three offices the average caseload per full time attorney was 1678 new cases each year. Twelve other offices had average caseloads of 1090 cases. Only twenty-five of seventy offices reporting had caseloads of less than 1000 cases each year. The average salaries for professional personnel were well below the levels of government, business or private practice.

32. See CARLIN, CIVIL JUSTICE, *supra* note 2, at 50; *Neighborhood Law Offices*, *supra* note 2, at 807, and Silver, *Imminent Failure of Legal Services for the Poor*, *supra* note 2, for a thorough discussion of the caseload problem.

33. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). For some of the other seminal works in this area see Charles A. Reich, *Individual Rights and Social Welfare*, 74 YALE L.J. 1245 (1965); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); John D. French, Comment, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234, 236-37 (1961); and Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154-55 (1958).

34. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739-40, 756-57 (1964).

35. *Id.* at 760-64.

36. *Id.* at 774-79.

37. *Id.* at 779-86.

38. JOHNSON, JUSTICE AND REFORM, *supra* note 2, at 23.

39. *Id.* at 25-26.

40. *Id.* at 27-32. The beginnings of the Washington program are described in Pye, *Role of Legal Services*, *supra* note 2, at 231-37.

41. Professor Sylvia Law, who worked with Sparer at Mobilization for Youth, at the Columbia Center on Social Welfare Policy and Law, and at the University of Pennsylvania Law

article, *The War on Poverty: A Civilian Perspective*,⁴² which advocated establishment of neighborhood law firms to represent poor communities “with an eye toward making public officials, private service agencies, and local business interests more responsive to the need and grievances of the neighborhood.”⁴³ The congruence of Reich’s theory of entitlement, Sparer’s success, the Cahns’ call for “neighborhood law offices,” and President Johnson’s “war against poverty” resulted in a call for federally funded legal services for the poor. A memorable Law Day speech by Attorney General Robert Kennedy at the University of Chicago Law School,⁴⁴ a series of conferences on the subject,⁴⁵ and the support of the prestigious American Bar Association,⁴⁶ led to a decision by the newly created Office of Economic Opportunity to establish and fund a Legal Services Program.⁴⁷

By September of 1966, the handful of pre-existing legal aid offices had been augmented by hundreds of federally funded offices staffed by more than a thousand lawyers, with more to come.⁴⁸ The national staff of the Legal Services Program (LSP) and its advisory committee quickly adopted “law reform” as its principal goal. Legal services programs were, in the course of serving clients, to use the law to achieve social change.⁴⁹ They did so with a passion. Hundreds of major litigations began and flourished. One student of the subject, Susan E. Lawrence, concluded, “During its nine-year tenure, 1965 through 1974, the LSP sponsored 164 cases before the Supreme Court, 119 of which were accepted for review. The eighty LSP cases that received plenary consideration represent 7 percent of all written opinions handed down during this era.”⁵⁰

School, states that Sparer “set the agenda for welfare rights advocacy for the next decade.” Sylvia A. Law, *In Memoriam Edward V. Sparer*, 132 U. PA. L. REV. 425 (1984).

42. Edgar Cahn & Jean Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964).

43. *Id.* at 1334.

44. Address Before the University of Chicago Law School (May 1, 1964), in Cahn & Cahn, *War on Poverty*, *supra* note 2, at 1336-37.

45. See, e.g., U.S. DEP’T OF HEALTH, EDUC. & WELFARE, THE EXTENSION OF LEGAL SERVICES TO THE POOR (1964) (Proceedings of Conference on the Extension of Legal Services to the Poor, Nov. 12-14, 1964, Washington, D.C.); PATRICIA WALD, LAW AND POVERTY (1965) (National Conference on Law and Poverty, June 23-25, 1965, Washington D.C.).

46. See JOHNSON, JUSTICE AND REFORM, *supra* note 2, at 49-64.

47. Essentially, the program began with the appointment of a director on September 24, 1965. See *id.* at 66-69.

48. See *Neighborhood Law Offices*, *supra* note 2, at 806.

49. See JOHNSON, *supra* note 2, at 132-34.

50. SUSAN LAWRENCE, THE POOR IN COURT 9 (1991).

B. The Constitutional Litigations

The literature discussing the major constitutional litigations instituted by legal services lawyers generally discusses only the leading cases, *Shapiro v. Thompson*,⁵¹ *Goldberg v. Kelly*,⁵² *Lindsey v. Normet*,⁵³ *Dandridge v. Williams*,⁵⁴ *San Antonio Independent School District v. Rodriguez*,⁵⁵ and *Wyman v. James*.⁵⁶ This approach tends to overlook other related constitutional issues raised by legal services lawyers. For example, in addition to deciding *Shapiro v. Thompson* on equal protection grounds, the Court utilized equal protection on other occasions. In *United States Department of Agriculture v. Moreno*,⁵⁷ the Court invalidated a provision of the Food Stamp Act that denied "unrelated" members of households access to the program. In *Graham v. Richardson*,⁵⁸ aliens were protected against state welfare statutes that subjected them to durational residency tests. *James v. Strange*⁵⁹ precluded states from attempts to recover the costs of legal defenses provided indigents. *Jimenez v. Weinberger*⁶⁰ invalidated a statutory provision that denied Social Security disability benefits to certain categories of illegitimate children. In *Pease v. Hansen*,⁶¹ recipients of non-categorical assistance, or "poor relief," were afforded the same constitutional protections as recipients of federally funded welfare. In *Williams v. Illinois*,⁶² the Court used equal protection to limit the length of imprisonment for involuntary nonpayment of fines.

In the area of due process, Justice Brennan held in *Goldberg v. Kelly*⁶³ that welfare benefits could not be terminated unless the recipient first was offered a hearing satisfactory to the essential elements of due

51. 394 U.S. 618 (1969) (holding unconstitutional certain statutes that conditioned eligibility for welfare benefits on one year residence within the jurisdiction).

52. 397 U.S. 254 (1970) (holding that procedural due process required that welfare benefits could not be terminated prior to the holding of a hearing).

53. 405 U.S. 56 (1972) (upholding state eviction procedures against due process attacks).

54. 397 U.S. 471 (1970) (holding allocation of welfare resources a matter of state concern and refusing to apply a heightened level of scrutiny to state actions challenged as denying equal protection to welfare recipients).

55. 411 U.S. 1 (1973) (declining to hold school financing scheme that resulted in disparate educational opportunities violative of the Equal Protection Clause).

56. 400 U.S. 309 (1971) (holding the conditioning of welfare benefits on consenting to home visits by caseworkers by appointment within normal working hours not violative of Fourth Amendment's proscription of unreasonable searches).

57. 413 U.S. 528 (1973).

58. 403 U.S. 365 (1971).

59. 407 U.S. 128 (1972).

60. 417 U.S. 628 (1974).

61. 404 U.S. 70 (1971).

62. 399 U.S. 235 (1970).

63. 397 U.S. 254 (1970).

process.⁶⁴ He reasoned that without a continuation of benefits, the recipient would not survive, survival was necessary for a meaningful hearing, and due process thus mandated that the hearing precede the termination.⁶⁵ The Court also invoked due process on other occasions. *Fuentes v. Shevin*⁶⁶ invalidated a state prejudgment replevin statute. *Goss v. Lopez*⁶⁷ gave a modicum of process to public school students threatened with suspension. *O'Connor v. Donaldson*⁶⁸ upheld the due process rights of persons improperly committed to state mental institutions. *Stanley v. Illinois*⁶⁹ upheld the due process rights of natural fathers threatened with loss of custody of their children. The Court also invalidated a number of state statutes that conflicted with federal law, asserting that the state laws were preempted, sometimes relying on the Supremacy Clause.⁷⁰

The Court also acted in the area of access to justice. In *Boddie v. Connecticut*,⁷¹ the Court held a destitute woman need not pay publication costs as a prerequisite to divorcing her missing spouse. But the Court refused to go farther, holding in *United States v. Kras*⁷² that bankruptcy filing fees must be paid, even by the indigent; and in *Ortwein v. Schwab*,⁷³ the Court held an appeal from a welfare department decision could be conditioned on payment of the court's filing fee.

The Court refused to use equal protection in many instances. More precisely, the Court applied the rational or reasonable basis⁷⁴ test to state actions or inactions. In *Dandridge v. Williams*,⁷⁵ the Court held states could "cap" welfare grants, which in effect meant each child in a large family would receive less than a child in a smaller family. The Court accepted the state's argument that the cap provided a work incentive,⁷⁶ because welfare allotments higher than one could earn working at the

64. *Id.* at 266.

65. *Id.* at 264.

66. 407 U.S. 67 (1972).

67. 419 U.S. 565 (1975).

68. 422 U.S. 563 (1975).

69. 405 U.S. 645 (1972).

70. *Lascaris v. Shirley*, 420 U.S. 730 (1975); *Perez v. Campbell*, 402 U.S. 637 (1971) (per curiam); *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973); *Townsend v. Swank*, 404 U.S. 282 (1971).

71. 401 U.S. 371 (1971).

72. 409 U.S. 434 (1973).

73. 410 U.S. 656 (1973).

74. Posner's antitrust argument that applying the "Rule of Reason" rather than the per se rule was "little more than a euphemism for nonliability" seems appropriate here. Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on the "Sylvania" Decision*, 45 U. CHI. L. REV. 1, 14 (1977).

75. 397 U.S. 471 (1970).

76. *Id.* at 486-87.

minimum wage were a disincentive to work. The Court announced, in the best tradition of Pontius Pilate, that allocation of state resources in the area of public assistance was not a matter of judicial concern.⁷⁷ The Court also threw up its hands at the thought of involvement in school financing, stating there was no constitutional right to a public school education.⁷⁸ In *Lindsey v. Normet*,⁷⁹ the Court declined future involvement with housing.

Dandridge shattered the hopes of those who thought social change could quickly be achieved in the courts. The decision came at a moment when everything seemed to be going particularly well. In the spring of 1969, the State of New York had enacted a statute that sharply reduced welfare benefits. *Rosado v. Wyman*,⁸⁰ a major, complex challenge to the state plan, was quickly commenced. Months later, *Rothstein v. Wyman*⁸¹ was instituted, as an afterthought, when *Rosado* floundered.⁸² While

77. *Id.* at 486.

78. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

79. 405 U.S. 56 (1972).

80. 304 F. Supp. 1356 (E.D.N.Y.), *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

81. *Rothstein v. Wyman*, 303 F. Supp. 339 (S.D.N.Y. 1969), *vacated*, 398 U.S. 275 (1970).

82. *Rosado v. Wyman*, 397 U.S. 397 (1970), was instituted after New York enacted legislation slashing welfare grants and costs. The statute cut grants for suburban residents of New York City more than for city residents. *Rosado* presented a double-barreled challenge to the state legislation. The major attack was that the state scheme was in direct conflict with section 402(a)(23) of the Social Security Act, which mandated that the states adjust their standards of need "to reflect fully changes in living costs since such amounts were established."

The second claim was that the lower benefits provided Nassau County plaintiffs denied them equal protection. Joinder was necessary because at the time the federal question jurisdictional statute, 28 U.S.C. § 1331, required that the matter in controversy be in excess of \$10,000 and the decision in *Snyder v. Harris*, 394 U.S. 332 (1969), prevented aggregation of claims, thus presenting a scenario whereby no federal court could obtain jurisdiction to decide a case involving the interpretation of a federal statute that involved the expenditure of hundreds of millions of federal dollars. However, 28 U.S.C. § 1343(a)(3) provided jurisdiction where under color of state law a plaintiff would be deprived of a constitutional right, a solid jurisdictional basis for the claim of the Nassau plaintiffs. By joining the two claims, the attack based on non-compliance with the Social Security Act could be decided by the Court under the doctrine of pendent jurisdiction. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The case was fast moving and complex. A chronology of court actions during the litigation is provided *infra* note 174. Suffice it to say, that at a low point a strategy meeting was held at the Columbia Law School with about 40 to 50 attenders, including attorneys from Texas and Louisiana (who were conducting similar litigation), Lee Albert, Paul Dodyck (author of the first Poverty Law casebook), Edward Sparer, Norman Dorsen, and Hal Rothwax. To the best of my recollection, Sylvia Law, Carl Rachlin, David Diamond, Cesar Perales, and Mort Cohen were also present. All of 30 seconds time was devoted to the question of my Nassau clients' plight and it was agreed that I begin an action on their behalf with the assistance of the Center on Social Policy and Law.

Rosado, the carefully planned litigation,⁸³ sat on a Supreme Court docket, a three-judge district court in *Rothstein* held that the state's disparate treatment of residents of New York's suburbs violated the Equal Protection Clause of the Fourteenth Amendment.⁸⁴ Rejecting the state's assertion that the "higher social cost of living" in New York City⁸⁵ justified the differential, the Court stated:

Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to "insure domestic tranquility" and "promote the general Welfare." Implicit in those phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both federal and state, is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless. . . . It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business on Sunday or to extract gas from subsoil. We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting fundamental constitutional rights.⁸⁶

Sparer's strategy⁸⁷ had envisioned attacks on substantive and proce-

83. Stephen L. Wasby, *How Planned is "Planned Litigation,"* 83 AM. B. FOUND. RES. J. 83 (1984).

84. *Rothstein v. Wyman*, 303 F. Supp. 339 (S.D.N.Y. 1969), *vacated*, 398 U.S. 275 (1970).

85. *Id.* at 348-49. The Court said:

At first blush there might appear to be something to the proposition that the plight of the welfare recipient living in grim and dismal quarters in a New York City ghetto is so miserable and frustrating that he is led to make greater use of parks, beaches, museums, recreational and cultural centers than is the recipient in the City's suburban counties, particularly since these facilities are within easier reach in New York City. . . .

. . . We question whether the aged, blind and disabled are able, in view of their physical handicaps, to make any appreciable use of many of the facilities described by the defendant, such as beaches and museums. . . . [D]efendant erroneously assumes that welfare recipients in the suburban counties live in more pleasant and less frustrating surroundings than those in New York City. The picture of suburban welfare recipients living in garden apartments (the term used on [sic] oral argument), located on the edge of a park, is an unreal one. It ignores the existence of many rundown tenements in the slum districts of our surrounding suburban counties, which unfortunately provide the principal housing facilities for welfare recipients.

86. *Id.* at 346-47.

87. See Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 REC. 320, 335-38 (1974); Krislov, *Judicial Process*, *supra* note 2, at 223-34. It was personally described to me by Edward Sparer in the early 1970s. I suspect it was less of a

dural flaws in state welfare programs, followed by challenges to the adequacy of state-wide benefit levels, implicitly based on a constitutional right to subsistence. Finally having achieved those goals, the poor would demand a national welfare system or, at the very least, a national standard of benefits. State welfare systems had already been battered by thousands of cases. The constitutional challenge to the level of benefits provided by particular states had arrived swiftly, but just as swiftly was resolved by the Court in *Dandridge*; the battle, but not the war, was over.

II. The Demise of the Legal Services Program

A. The Nixon and Reagan Years

President Nixon, on taking office, began a lengthy multi-faceted war of attrition aimed at legal services. Nixon's appointed Director of the Office of Economic Opportunity frequently attacked the program and its personnel⁸⁸ in concert with numerous other administration officials and supporters led by his Vice-President.⁸⁹ Attacks by state officials directed at various local programs, such as the attack on California Rural Legal Assistance (CRLA) by then-Governor Reagan and other California officials, were only grudgingly rebuffed,⁹⁰ as internal attacks on the program continued.⁹¹ After a few years, the administration and the program's supporters, recognizing neither side could win the battle,⁹² agreed to "depoliticize" legal services by setting up a public corporation to be funded by the federal government.⁹³ After a three-year political battle over the details, the Legal Services Corporation Act was passed.⁹⁴ The ravages of inflation during the dispute over the terms of the Act, when the level of program funding had been frozen,⁹⁵ led to large decreases in the number

"plan" than a vision of what might have been. Certainly, the disjointed manner in which cases were brought, each by attorneys whose primary goals were to achieve what they could for their own clients, made planning an orchestrated sequence of cases impossible.

88. Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681, 693-95 (1976) [hereinafter George, *Development*].

89. *Id.* at 694; Spiro Agnew, *What's Wrong With the Legal Services Program*, 58 A.B.A. J. 930 (1972).

90. See Jerome B. Falk & Stuart R. Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services*, 24 HASTINGS L.J. 599 (1973) [hereinafter Falk & Pollak, *CRLA*].

91. See George, *Development*, *supra* note 88, at 689-90.

92. *Id.* at 690.

93. *Id.* at 690-91.

94. *Id.* at 695-96.

95. *Id.* at 699. Congress, expecting the imminent creation of the Corporation, funded Legal Services Program through continuing resolutions at \$71.5 million per year during what turned out to be a four-year period. *Id.*

of program offices⁹⁶ and lawyers,⁹⁷ massive attorney turnover,⁹⁸ and a decline in the availability and quality of necessary support services.⁹⁹

There was also a change in program goals. The Corporation now spoke of "equal access to justice," rather than of "achieving social change."¹⁰⁰ The Corporation distributed its largesse based primarily on the number of potential clients in a program's geographic area. One observer, noting the new corporate language ("[l]ocal programmes became 'recipients' . . . clients became 'applicants' . . . attorneys became employees"), commented that "the terminology changes reflected a subtle bureaucratization or management orientation of the programme."¹⁰¹ The voluminous and incredibly detailed statistical reports compiled and issued by the Corporation¹⁰² tell the reader nothing about the program's accomplishments other than the number of cases handled and clients served, evidencing its lack of concern about quality.

The Nixon experience was heavenly compared to co-existing with President Reagan, who remembered his prior defeats in California.¹⁰³ His bare-knuckled attacks on CRLA while governor of California¹⁰⁴ were a predictor of his performance as President. The budgets he submitted to Congress never requested any funds for the Legal Services Corporation, forcing its Congressional supporters to fight, year after year, to

96. *Id.*

97. *Id.* George, citing congressional hearings, states that the number of staff attorneys dropped by about 13% during the battle and that 40% of neighborhood offices were closed. He also asserts that other offices had to curtail services.

98. *Id.* George states that the salary gap led to a turnover of 40% per year since 1972.

99. *Id.* George states: "fixed funding for this extended period—one marked by high inflation and increasing unemployment—reduced the quantity of service available to the poor, threatened its quality, and produced an unacceptable level of lawyer turnover." He continues, "[w]orking conditions in some programs—lack of privacy for client interviews or insufficient funds for essential activity such as discovery—have failed to meet requirements of the Code of Professional Responsibility."

100. Alan W. Houseman, *Community Group Action: Legal Services, Poor People and Community Groups*, Special Issue, CLEARINGHOUSE REV., 392, 396 (Summer 1985), states: "The LSC managers in 1984 attempted . . . to require programs to provide substantially equal access to all clients in the programs' service areas, a position inconsistent with the goal of allocating resources to address substantive goals and objectives."

101. Carrie Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's*, 22 OSGOODE HALL L.J. 29, 49 (1984).

102. FACT BOOK, *supra* note 21, published by the Corporation contains 419 pages composed almost entirely of tables with an occasional graph. There are only eleven pages of text, six of them containing definitions of terms used in the accumulated data.

103. *Rivera v. Division of Indus. Welfare*, 71 Cal. Rptr. 739 (Cal. Ct. App. 1968) (establishing agricultural workers' right to a minimum wage); *Castro v. State*, 466 P.2d 244 (Cal. 1970) (invalidating requirement that voters be literate in English); and *Morris v. Williams*, 433 P.2d 697 (Cal. 1967) (invalidating cutbacks in medical care for the poor).

104. See Falk & Pollak, *CRLA*, *supra* note 90.

secure enough funds for LSC's survival. One year the program's funds were reduced by 25 percent.¹⁰⁵ Salaries for legal services attorneys, already low, suffered in comparison with salaries earned by other attorneys in both the public and private sectors.¹⁰⁶ The decision by the Corporation to create programs in the South and Southwest¹⁰⁷ increased the number of potential clients at the same time the disintegrating salary structure led to massive staff turnover.¹⁰⁸

As early as 1977, Gary Bellow¹⁰⁹ commented that "despite their commitment to avoid the kind of cautious, detached, client controlling services that so many public bureaucracies—public housing authorities, welfare departments—seem to provide . . . this is precisely the kind of service our clients are receiving."¹¹⁰ Bellow listed typical traits of legal service programs such as routine processing of cases, low client autonomy, narrow definitions of client concerns, and "inadequate" outcomes.¹¹¹ Bellow, seemingly echoing descriptions of mid-century legal aid, noted:

105. FACT BOOK, *supra* note 21, at 17.

106. *See infra* note 113.

107. *See* FACT BOOK, *supra* note 21, at 17, detailing funding provided the several states each year from 1976 to 1989. The additional funding for some states increased dramatically between 1976 and 1977. Some examples:

	1976	1977
Alabama	307,610	1,310,055
Arkansas	182,200	783,313
North Carolina	443,000	1,610,500
Oklahoma	500,255	915,214
South Carolina	469,000	1,112,041
Tennessee	756,100	1,660,378
Texas	2,608,363	4,912,871
Virginia	533,800	1,308,094

108. *Id.* States in other areas did not fare as well:

	1976	1977
California	13,481,553	15,749,960
New York	9,928,167	11,485,872
Maine	605,857	677,269
Massachusetts	4,028,880	4,684,648
New Jersey	3,263,178	3,670,645

According to the Legal Services Corporation, 1000 of its lawyers, representing about one-third of its staff attorneys, left in 1976. Legal Services Corporation, 1976 ANNUAL REPORT 11 (1977). In 1977, the Legal Services Corporation saw the same rate of departure and reported that 80% of its staff attorneys stayed less than three years. Legal Services Corporation, 1977 ANNUAL REPORT 20 (1978). The FACT BOOK, *supra*, note 21, establishes that 1164 of the 2536 staff lawyers in the nation's legal services programs have less than three years experience.

109. Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977).

110. *Id.* at 108.

111. *Id.*

When one learns, from the limited empirical work available on legal aid practice, that legal services attorneys are regularly handling caseloads of one hundred and fifty ongoing cases, generally seeing their clients only once in the course of an entire representation, and spending an average of twenty minutes per interview on the client's substantive legal problems, it seems a certainty that the cases are being superficially and minimally handled.¹¹²

A law firm that staffed its litigation department with law school graduates, paid them less than competing firms,¹¹³ trained them in a cursory manner, did not expose them to the work habits and ethics of experienced litigators, and saw them leave after one or two years to be replaced with a new group of graduates would have a short existence. Unhappily, this is the manner in which most legal services programs have operated during the past years.

B. Litigation and Its Relationship to Good Lawyering

Lack of involvement in litigation by legal services programs evidences a failure to provide quality services to their clients. Most of the cases that confront poverty lawyers require advice, referral, or other non-litigative approaches. This is not to denigrate legal services lawyers engaging in these activities or representing clients before administrative tribunals or local courts.¹¹⁴ Many of the problems of the poor, however, can be resolved only through litigation.¹¹⁵ Others cannot be resolved in

112. *Id.* at 109.

113. The average salary for staff attorneys with less than one year experience in 1988 was \$19,995. FACT BOOK, *supra* note 21, at 51. Studies of starting salaries of law school graduates in 1986, two years earlier, show starting average salaries to be \$31,517 or \$32,997. Ronald G. Ehrenberg, *An Economic Analysis of the Market of Law Students*, 39 J. LEGAL EDUC. 627, 631 (1989) (Ehrenberg notes that the starting salary for federal government lawyers who customarily were hired at the GS-11 rank was \$27,000 in 1986).

In New York, a law school graduate can enter the State Civil Service as an Attorney Trainee I at a base salary of \$28,533, with provision for an additional \$1000 premium if in the top third of his class and an automatic \$701 salary differential if appointed to positions within New York City or its suburbs, for a potential total compensation of \$30,234. The salary levels and titles are periodically increased so that two years after admission to the bar, one automatically becomes a Senior Attorney, with a beginning base salary of \$43,080 together with premiums and salary differentials as noted above. (N.Y.S. Nos. 20211-20-211-Legal Specialties-Legal Careers, N.Y.S. Dep't Civil Serv.).

On the legal services job market, 25 CLEARINGHOUSE REV. 58-63, 193-95 (1991), lists law school graduate salaries ranging from \$19,400 to \$23,000.

114. See Allen Redlich, *The Art of Welfare Advocacy: Available Procedures and Forums*, 36 ALB. L. REV. 57 (1971) (listing the numerous alternatives available to legal services attorneys and suggesting that they "use the variety of existing administrative and litigation pressures . . . so as to enable the client to survive." *Id.* at 58.).

115. I am not speaking of "law reform," "impact litigation," "test cases," or class actions, but of the problems facing the individual client who has intractable problems. Whether or not litigation is the appropriate means to achieve social change has been the subject of discourse

an appropriate manner without a *credible* threat of litigation. When litigation is the appropriate option and it is not undertaken, the client is effectively abandoned by the attorney. Even where there is complete disclosure of the litigation option and the client is told that it will not be exercised, there is a betrayal because unlike a corporate client, the poor cannot seek out other counsel. The need to litigate occurs when the adversary is a government agency bound by statutes, rules, regulations, interpretations, and policies that preclude an agency official from making a reasonable attempt to settle a dispute, even when the official is not disinclined to do so.¹¹⁶ Litigation is necessary when proceedings before administrative agencies fail to resolve the client's problem in a just and lawful manner.¹¹⁷ The need to litigate also exists when the statute or policy is itself unlawful.¹¹⁸ Many problems of poor clients are either-or situations where the client either loses or wins. Welfare eligibility is a good example: It cannot be parsed. Litigation is also necessary when the negotiation process fails to achieve a fair and just outcome. The poor rarely have bargaining power¹¹⁹ matching that of the government and other perennial adversaries of the poor. Since bargaining power dictates the outcome of negotiations, the poor generally do not do well.¹²⁰

for a generation and will not be discussed here although the author would answer the question in the affirmative. For the differing views, see Pye, *Role of Legal Services*, *supra* note 2; JETHRO LIEBERMAN, *THE LITIGIOUS SOCIETY* 189-90 (1981); Wexler, *supra* note 2; Hazard, *Social Justice Through Civil Justice*, *supra* note 2; Falk & Pollak, *supra* note 2, at 606 n.14 (noting that only 8% of CRLA's cases involved litigation.)

116. *Bernstein v. Toia*, 373 N.E.2d 238 (N.Y. 1977) is a good example. The state pointedly removed the power of local welfare departments to deviate from local rent schedules where the local agency believed such action was warranted.

117. Judicial review of decisions of administrative agency actions is a principle function of state and federal courts.

118. The adequacy of the local rent schedules involved in *Bernstein*, 373 N.E.2d 238 (N.Y. 1977), has been challenged in New York State courts. The plaintiff's complaint has been upheld and the case is currently being tried in the lower courts. *Jiggets v. Grinker*, 553 N.E.2d 570 (N.Y. 1990).

119. SAMUEL B. BACHARACH & EDWARD J. LAWLER, *BARGAINING: POWER, TACTICS AND OUTCOMES* 42 (1981). ("[T]he task of a bargaining party is to convince its opponents that it controls resources . . . and that it is willing to use power. These manipulative actions ultimately determine bargaining power.") See also Aviel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 *ECONOMETRICA* 97 (1982).

Since the poor client generally has nothing to lose, the only cost of litigation is the actual cost of the litigation, a cost which is not the responsibility of the client. Thus, most decisions not to litigate require a cost benefit analysis by the lawyer rather than the client. This clearly presents ethical problems which will not be pursued here.

120. Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1076 (1984).

Many lawsuits . . . concern a struggle between a member of a racial minority and a municipal police department over alleged brutality, or a claim by a worker against a large corporation In these cases, the distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining pro-

Despite these myriad situations that require litigation and despite Legal Services Corporation's claim of 1,421,805 closed cases in 1987,¹²¹ 1,430,053 cases in 1988,¹²² and about 1,400,000 cases in 1990,¹²³ there was little reported litigation during those years. The Westlaw data banks reveal that in 1987 there were 389 state court and 151 federal district court appearances, for a total of 540 court appearances.¹²⁴ The year 1988 saw a decline to 361 state court and 103 federal district court appearances, for a total of 464.¹²⁵ In 1990, while the total number of closed cases remained constant, there were only 95 appearances in federal district court and 273 in state court, for a total of 368¹²⁶ or about one reported litigated case in every 3,800. The decrease from 1987 to 1990 was 172 or 31.9 percent. The decrease from 1981, when there were 564 state court and 174 federal district court appearances for a 1981 total of 738 reported appearances,¹²⁷ was 370, or just over a 50 percent decrease.

When representing people whose financial position is precarious, litigation is necessary to achieve even modest fiscal gains or to avoid modest financial loss. For example, a welfare department's decision to "recoup" a small prior overpayment by deducting a small amount from a family's monthly grant causes hardship. If the decision to recoup is erroneous as a matter of law, as is often the case, and negotiation and administrative procedures fail, litigation would seem to be the only option consistent with the "zealous" representation called for by the ethical standards of the profession.¹²⁸

cess, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.

See also Julie J. Bisceglia, Comment, *Practical Aspects of Directors' and Officers' Liability Insurance—Allocating and Advancing Legal Fees and the Duty to Defend*, 32 UCLA L. REV. 690, 709 (1985) ("Settlements work only if the two bargaining parties are roughly equivalent in power, and each can credibly threaten the other with a court fight if the settlement does not materialize.").

121. FACT BOOK, *supra* note 21, at 10.

122. *Id.*

123. 1990 ANNUAL REPORT, LEGAL SERVICES CORPORATION 2 (1991).

124. See *infra* Table 2 and Table 8.

125. *Id.*

126. *Id.*

127. *Id.*

128. See Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990) (describing a case where the welfare agency conceded during the administrative process). In most instances there is no concession and litigation is necessary.

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981), dealing with problems arising from funding cutbacks, states:

The Model Code of Professional Responsibility emphasizes duties owed by a lawyer to existing clients, including a duty of adequate preparation (DR 6-101(A)(2)) and a duty of competent representation (DR 6-101(A)(1) and (3)). Each of these

One sometimes hears that a program does not litigate because of success in negotiation. A legal services program may argue that a good relationship with a particular agency's personnel makes litigation counterproductive and that to preserve a "relationship" with an agency, a poverty lawyer should consider the "sacrifice" of a "client" for the sake of future clients.¹²⁹ Negotiation is a serious business, however, and the

mandatory obligations is applicable to all lawyers, including legal services lawyers. See ABA INFORMAL OPINIONS 1359 (1976) and 1428 (1979).

...
 ... In order to comply with the requirements of DR 6-101(A)(2) and (3), forbidding a lawyer from handling "a legal matter without preparation adequate in the circumstances" and neglecting "a legal matter entrusted to him," it is already recognized that in the face of limited resources, legal services offices must establish priorities for handling matters and accepting new clients. ABA Informal Opinion 1359 (1976).

...
 II. *Ethical Obligations of Remaining Lawyers after Funding Cutbacks Have Reduced Available Services So Drastically That Existing Clients Cannot Be Served in a Competent Fashion*

...
 Under these circumstances, it is our view that the lawyers remaining in the legal services office must, with limited exceptions, decline new legal matters and must continue representation in pending matters only to the extent that the duty of competent, non-neglectful representation can be fulfilled.

...
 With respect to existing clients of the legal services office, the Committee is of the opinion that only those matters that can be handled consistent with each lawyer's duty of competent, non-neglectful representation should be continued. When faced with a workload that makes it impossible for the remaining lawyers to represent existing clients competently, legal services lawyers should withdraw from a sufficient number of matters to permit proper handling of the remaining matters.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1359 (Use of Waiting Lists or Priorities by Legal Service Office) (1976) states:

However, in an office with finite resources, failure to institute priorities may limit the quality although not the quantity of legal aid.

Notwithstanding the argument that fairness and reason are best served by giving all indigents some although perhaps inadequate legal advice, Formal Opinion 334 requires any limitation be "in a manner consistent with the requirements of the Code of Professional Responsibility." Disciplinary Rules 6-101(A)(2) and (3) forbid a lawyer's handling "a legal matter without preparation adequate in the circumstances" or "neglect[ing] a legal matter entrusted to him." The refusal to set up priorities is improper if it causes a violation of DR 6-101.

...
 The refusal by directors of legal services offices to establish priorities could result in Code violations if it causes "inadequate preparation" or "neglect" by a staff lawyer within the meaning of DR 6-101. A priority system or other caseload limitation may be established if it is a fair and reasonable method of making maximum legal services available to the indigent and not inconsistent with the Code. The policy must be established before a staff attorney accepts representation of a particular client so that the lawyer's judgment regarding the representation in pending matters will not thereby be affected. See [MODEL CODE OF PROFESSIONAL RESPONSIBILITY] EC 5-23, EC 5-24, EC 6-3, EC 6-4.

129. Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1147 n.158 (1990).

likelihood of litigation, its cost and its risks, not personal charm and relationships, are the factors which determine the benefit of a settlement.¹³⁰

Melvin Belli, a well-known litigator, once said, "I have to maintain my advocacy in court on trial in order to keep up my settlement value."¹³¹ Knowledge of the strengths and weaknesses of the other party's position, including its ability and willingness to litigate if dissatisfied with proposed settlements, is essential to a competent negotiator.¹³² When one party to a negotiation concludes litigation will not occur if that party makes no concessions, then any concessions made are gratuitous, and what one calls a "negotiation" is really a supplication.¹³³ It

130. Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1823 n.64 (1986), states:

A mandatory delay of 50 years between filing and trial would not increase settlement rates. Instead, it probably would reduce these rates substantially. From a purely economic perspective, an infinite queue would leave a defendant with no reason to settle (apart, that is, from the prospect that the plaintiff would throw a rock through his window or otherwise resort to self-help).

See also, Jonathan R. Macey & Jeffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 505 n.135 (1987). ("The standard economic theory of litigation posits that lawsuits are brought and not settled when the parties have differing views on the probable outcome of the case or the probable judgment if the plaintiff prevails.")

131. Melvin M. Belli, *Pre-Trial: Aid to the New Advocacy*, 43 CORNELL L.Q. 34, 44 (1957).

132. Stephen M. Bundy, *Commentary on "Understanding Pennzoil v. Texaco": Rational Bargaining and Agency Problems*, 75 VA. L. REV. 335, 338 (1989) ("But both also know that bargaining is risky. In particular, it may convey to the opponent useful information about the course of any future litigation or about one's willingness to settle.")

133. *Id.* at 337-38 (after noting that under accepted economic theory each party will settle if he perceives that the proposed settlement has a greater value than the "expected outcome at judgement" and that this perception includes "his estimate of the probability of a finding of liability," adds "each disputant's estimates are strategic, in that they depend importantly on a prediction of what the opponent will do." *Id.* at 337 n.5).

Assume that claimant C asserts a claim against X. The following possibilities will arise.

1. Institutional policy may prevent X from making any concession. The non-litigator will never succeed in securing anything for client C.

2. X may believe the suit is entirely without merit. X may make an offer if he expects C to litigate to save some of the costs of litigation. See Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971). Absent expectation of litigation, no offer will be forthcoming. Again, the non-litigator obtains less.

3. X believes there is risk of loss should there be litigation, but believes C will not litigate. X will not make a realistic offer unless and until C does something to change X's perception because if C will not litigate, X is not at risk. See Alex Waldrop, *Enforcement of the Fair Housing Act: What Role Should the Federal Government Play?*, 74 KY. L.J. 201, 207 (1985-86) (describing HUD conciliation procedures and noting that when "it is evident that the complainant is unrepresented by counsel, conciliation often collapses. There is no credible threat of 'consequence' should the respondent refuse to cooperate." (quoting Patricia Harris, Secretary of HUD)). See also Note, *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1506 (1986) (criticizing the Environmental Protection Agency's negotiated settle-

follows that the paucity of litigation by legal service programs, despite the many cases where litigation is called for, makes negotiation a sham and evidences the absence of quality lawyering. The price paid includes not only a poor result for the particular client, but less than satisfactory results in negotiations for other clients.

C. The Data

The data reveal not only appallingly low numbers of reported litigations, but a snowballing decline in what little litigation took place during the last three years. To provide the broad picture of what has happened in the past and is currently happening, I have examined litigation by legal services programs for the ten-year period 1981-1990, utilizing Westlaw data banks and assuming the broad scope and depth of the data would overcome the argument that reported cases are not an accurate sampling of unreported cases. Problems in interpreting data obtained from Westlaw and LEXIS data banks have been discussed in the social science literature.¹³⁴ The major concern is whether the outcomes of re-

ments and noting that one cause was "the EPA's inability to maintain a credible enforcement presence") (citing Jeffery Miller, *EPA Superfund Enforcement: The Question Isn't When to Negotiate and When to Litigate, But How to Do Either and How Often*, 13 *Envl. L. Rep. (Envl. L. Inst.)* 10,062, 10,063 (1983)).

4. Same as 3 except X believes C will litigate based on C's reputation or X's experiences with C. X will make an offer calculated to lead to a settlement without litigation. *See* Bundy, *supra* note 131. The litigating propensities of C result in a substantial offer *even where C's assessment of the case has led C to conclude that the case is not worth litigating or where C does not wish to chance an adverse judgment. Id.* at 338. This occurs in situations where C's conduct or reputation has caused X to miscalculate.

One common factor in all these scenarios is a lack of perfect information. There are uncertainties and differing perceptions. But one perceived as weak in terms of ability and propensity to litigate is in an inferior bargaining position, compared to one perceived as strong. Thus the literature when discussing threatened litigation quite often notes that the threat must be credible. *See* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 *GEO. L.J.* 1001, 1028 (1986) (noting a scenario where "the threat of litigation will not be credible," adding that the process ends "if the defendant realizes that the plaintiff is bluffing and will fold his case if the defendant does not pay"); George F. Hammond, Note, *Notification of Breach Under Uniform Commercial Code Section 2-607(3)(a): A Conflict, a Resolution*, 70 *CORNELL L. REV.* 525, 546 n.121 (1985) ("A highly credible threat [of litigation] increases the chances of settlement."). This is all a part of strategic behavior, or more generally, of game theory. *See* ERIC RASMUSSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989). *See generally* MORTON D. DAVIS, *GAME THEORY* (rev. ed. 1983) (a nontechnical introduction to game theory); ROBERT D. LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS* (1957) (a readable though mathematical introduction to game theory); JOHN VON NEUMANN & OSCAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (3d ed. 1953) (a complex mathematical discussion of game theory); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982) (business negotiations).

134. *See* Peter Siegelman & John J. Donohue, III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 *LAW &*

ported cases in the federal district court data bank fairly represent the results of the unreported cases. As this Article deals only with the number of cases, not their outcomes, this problem is not present.¹³⁵ The data assembled here make, at the very least, a solid prima facie case. The data are more than sufficient to persuade others that, absent some fairly persuasive evidence to the contrary, litigation on behalf of the poor community has disappeared.

Soc'Y REV. 1133 (1990) and the authorities cited therein. The authors do point out that certain districts, namely New York, Chicago, and Philadelphia, publish a higher percentage of discrimination cases than other districts, and "seem to publish an unusually high share of all civil cases." *Id.* at 1144. But the higher percentage mentioned in the article would not affect this study's conclusions. As a precaution, I examined total cases, class actions, and constitutional cases in the district courts of the First, Fifth, and Sixth Circuits. They are consistent with the published tables.

135. For example, if a study of reported cases concluded that the defendants in negligence cases prevailed on the issue of contributory negligence 60% of the time, one would recognize that judges rarely write opinions affirming jury verdicts or settled cases. They are more likely to write opinions when they overturn a jury verdict, finding contributory negligence as a matter of law.

Table 1
Urban Legal Services Program's Involvement in Federal Litigation,
1988

Area	Budget ¹³⁶ (000s)	Court of Appeals ¹³⁷	District Courts ¹³⁸	Total Federal Litigation
Boston	\$5,405	13	19	32
New York City	15,360	51	129	180
Philadelphia	6,684	64	75	139
Baltimore	7,924	17	20	37
Atlanta	3,013	5	4	9
Miami	2,714	3	4	7
New Orleans	1,711	6	2	8
Houston	3,474	6	2	8
Birmingham	944	2	4	6
Memphis	1,445	4	2	6
Detroit	3,067	3	4	7
Cincinnati	1,927	9	16	25
Cleveland	4,113	5	9	14
Chicago	6,981	19	52	71
Denver	2,226	10	14	24
Los Angeles	7,744	6	6	12
Oakland	1,950	4	10	14
San Francisco	1,703	2	5	7
Total	\$78,385	229	377	606

Reported federal court litigations in eighteen representative major urban areas from 1981 to 1990 are shown in Table 1. Table 1 shows the extent to which most of the urban programs have shunned the federal courts. While the district court cases in the Westlaw data bank are only a portion of district court decisions, and are to a degree dependent on the decisions of individual judges to submit their opinions for publication, and while there may be differences in the percentage of opinions reported

136. The budget data in Table 1, as in other tables, is the sum of the amounts attributed to the various programs for 1988 in Appendix A and Appendix E of the Legal Services Corporation's FACT BOOK, *supra* note 21.

137. The circuit court data is that contained in the CTA data bank of Westlaw.

138. The district court data is obtained from the DCTR data bank of Westlaw, which contains cases reported in the Federal Supplement, Federal Rules of Decision, and the Bankruptcy Reporter. The Bankruptcy Reporter cases are excluded from these columns, because the unpublished cases found in other Westlaw data banks are mostly from New York (311) and Pennsylvania (414). An additional 51 cases come from Kansas, Oregon, Missouri, and Massachusetts, leaving 49 cases for the other 44 states. Bankruptcy cases are excluded because, at least for the indigent, they seem to be much simpler than other federal court litigation, and their inclusion, in the author's view, distorts the data.

from different parts of the country,¹³⁹ these variations do not explain away the low number of appearances in so many urban programs. Moreover, the defense of an inaccurate sample cannot be made with respect to court of appeals decisions. The poor performance of many programs in the district court is mirrored by an equally poor performance in the court of appeals. A comparison of the performance of these large urban programs with the clinical programs of four law schools is illuminating. New York University's clinical program (Washington Square Legal Services) during 1981-1990 had twenty-five district court and fifteen court of appeals appearances. Only New York, Philadelphia, and Chicago's multimillion-dollar programs had more appearances. Yale's program had twenty district court and twelve court of appeals appearances, outperformed by only four urban programs.¹⁴⁰ Brooklyn Law School's clinic had twelve district court and eight court of appeals citations, outperforming eleven of our major cities.¹⁴¹ Finally, the clinic operated by the University of Chicago's law school appeared nine times in district court and had seven circuit court appearances, outperforming the programs of eleven major cities.¹⁴² The cumulative totals of these law school clinics, sixty-six district court and forty-two court of appeals appearances, is 16 percent of the cumulative totals of the eighteen urban programs.

Table 2
State Appellate Cases, 1981-1990

Year	Legal Aid Services ¹⁴³	Legal Services	Total
1981	118	446	564
1982	110	346	456
1983	90	312	402
1984	103	275	378
1985	99	304	403
1986	83	314	397
1987	93	296	389
1988	70	291	361
1989	94	250	344
1990	64	209	273

139. *See supra* note 134.

140. *See* Table 1.

141. *Id.*

142. *Id.*

143. Because legal aid societies often represent indigent criminal defendants, screening out criminal cases required separate treatment of those organizations.

Many commentators, including the author, have suggested increased civil litigation in state courts.¹⁴⁴ To expand our picture and to see if there was simply a shift from one court system to another, we looked at the number of state appellate cases in which all legal services programs were involved during the past ten years. Table 2 reveals that legal services programs in 1981 appeared in 564 state appellate cases, the number declining to 273 in 1990. This confirms the consistent and accelerating decline in legal services program involvement in major litigation.

Table 3
Class Actions, 1981-1990

Year	Federal District Court		State Appellate Court	
	Total	Legal Services	Total	Legal Services
1981	538	80	376	24
1982	552	75	341	19
1983	569	69	389	18
1984	513	95	361	11
1985	532	74	340	10
1986	548	60	319	16
1987	479	65	357	22
1988	481	50	308	16
1989	426	45	296	14
1990	425	42	324	7

We turn to examine class actions, an accepted indicia of aggressive and substantive litigation.¹⁴⁵ As Table 3 indicates, during a period when the total number of federal district court class actions fell from 538 to 425 or 21 percent, the number of legal services appearances declined from a range of 74 to 95 in 1981-1985, an average of 78.6 annually, to a range of 65 to 42, an average of 51.6 during 1986-1990, or 34.2 percent and in 1989-1990, to 45 and 42 cases, or a decline of 44.8 percent. Total class actions in state appellate courts declined from 376 cases in 1981 to 324 cases in 1990, a decline of 14.3 percent. During 1981-1985, legal services programs appeared in 16.4 cases a year, declining to fifteen cases a year during the years 1986-1990. This decline is in line with the overall figures, but the number of cases in 1989 and 1990, fourteen and seven, show a marked and accelerating decline.

144. See Redlich, *supra* note 114, at 58.

145. But see Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 344-51 (1988).

Table 4
Legal Services Program Involvement in Constitutional Law District Court, 1981-1990

Year	Total	Legal Services
1981	1147	85
1982	1208	87
1983	1221	62
1984	1236	61
1985	1210	64
1986	1290	65
1987	1255	63
1988	1243	47
1989	1206	44
1990	1177	48

The number of legal services programs' appearances in federal district court in cases raising due process or equal protection issues averaged 71.8 per year during 1981-1985, and dropped to an average of 53.4 cases per year during 1986-1990. The major drop occurred during 1988-1990 when appearances were below fifty each year. During the same period, the number of these cases brought by all parties showed no appreciable change.

Table 5
Class Action Constitutional Law District Court, 1981-1990

Year	Total	Legal Services
1981	193	37
1982	219	40
1983	175	31
1984	168	33
1985	178	36
1986	180	37
1987	148	24
1988	141	17
1989	117	18
1990	113	17

Tracing the incidence of class actions involving constitutional law issues over the period reveals a decrease somewhat larger than the decrease in the total number of these cases. This may be explained by a

very large number of similar cases relegated to the DCTU data bank,¹⁴⁶ very few of which were taken by legal services programs.¹⁴⁷

Table 6
Statewide Program's, 1981-1990

State	Budget (000s)	Court of Appeals	District Court	Total
Indiana	\$3,226	10	8	18
Iowa	2,821	10	7	17
Maine	1,873	6	38	44
Alaska	3,154	17	11	28
Washington	5,670	9	15	24
Oregon	3,125	8	13	21
Montana	1,203	9	6	15
Total	\$21,072	69	98	167

To determine if the problem was confined to urban legal services programs, other types of programs were examined over the ten-year period. Table 6 establishes that statewide programs with funds approximating 26 percent of the urban budget made 27.5 percent as many federal court appearances as did the sample of urban areas. There was a far greater degree of uniformity in program importance. Perhaps of greater importance, there was no single program with the litigation record of Community Legal Services of Philadelphia to prop up the performance of these programs. A transfer of that program's \$6,684,000 budget to the statewide programs would result in a cumulative budget of \$27,765,000 as compared to an adjusted urban budget total of \$71,700,000. Transfer of its 180 federal court appearances would result in a total of 347 appearances, compared to the remaining 426 federal court appearances of the other urban programs or 80 percent as many at less than 40 percent of the cost!

146. The DCTU data bank contains cases that are not published in the Federal Supplement, the Federal Rules of Decision, or the Bankruptcy Reporter.

147. The DCTU data bank contained 389 cases during the 10 year period, most from 1985 to 1990. During those six years, the numbers ranged from 44 in 1985 to 74 in 1990. During the 10 years, legal services programs were involved in 21 cases, five in 1986, four in 1987, and three per year in 1988-1990.

Table 7
Wide-Area Programs

Program ¹⁴⁸	Budget (000s)	Court of Appeals	District Court	Total
Nassau/Suffolk	\$2,704	8	13	21
Prairie State	2,920	6	4	10
Legal Action Wis.	2,423	10	12	22
Legal Servs. Ala.	5,029	41	25	65
Tex. Rural	1,473	27	18	45
Fla. Rural	3,126	14	22	36
Central Ohio	1,543	0	00	00
Colo. Rural	1,701	9	11	20
Cal. Rural	5,805	6	14	20
Total	\$27,724	121	119	240

Table 7 presents a similar compilation of data concerning nine programs that covered large geographic areas. With 34 percent of the urban funding, wide-area programs appeared in federal court 39 percent as often. Once again, there was greater consistency; once again, there is no Community Legal Services of Philadelphia to soften the poor performance of these programs.

Table 8
Total District Court Civil Cases, 1981-1990

Year	Total District Court Cases ¹⁴⁹	Legal Services
1981	4,896	174
1982	5,118	161
1983	5,420	168
1984	5,842	178
1985	6,165	151
1986	6,340	136
1987	6,391	151
1988	6,323	103
1989	6,124	99
1990	5,909	95

148. Nassau/Suffolk Law Services Committee (N.Y.); Prairie State Legal Services (Ill.); Legal Action of Wisconsin; Legal Services Corporation of Alabama; Texas Rural Legal Aid; Florida Rural Legal Services; Central Ohio Legal Aid Society; Colorado Rural Legal Services; California Rural Legal Assistance.

149. This data bank consists of cases printed in the Federal Supplement, Federal Rules of Decision, and Bankruptcy Reporter.

The number of appearances in federal district court rose very slightly between 1981 and 1984 and then began a precipitous decline in 1985, accelerating in 1988. The number of appearances in 1990 is the lowest in twenty years. The lowest number of published cases had been 105 in 1971.¹⁵⁰

D. Assessment of Data

Usually one attempts to explain one's findings and to construct a model to cure what the numbers reveal. The findings above were predictable both from the observations of the programs in operation, and from simple logic. The years of fiscal neglect and political attacks have taken their toll. Just as the cause is apparent, so the model already exists. The most successful of all legal services programs is Community Legal Services of Philadelphia, whose 139 federal court appearances compares with 467 appearances by the other seventeen urban programs. Funded at \$6,684,000 or 9.3 percent of the funds available to those programs, Community Legal Services made 29 percent as many appearances in federal court! Its sixty-four court of appeals citations exceed the cumulative appearances by legal services programs in Houston (six), New Orleans (six), Atlanta (four), Miami (three), Los Angeles (five), Memphis (four), San Francisco (two), Detroit (three), Cleveland (six), Cincinnati (nine), Oakland (one), and Denver (ten). The cases handled by Community Legal Services dealt with the interpretation of state and federal statutes and regulations,¹⁵¹ preemption by federal law of state statutes,¹⁵² interpretation of the bankruptcy laws,¹⁵³ nonacquiescence by the Social Security Administration of the law of the circuit,¹⁵⁴ challenge to eviction of tenants from property forfeited to the United States under drug statutes,¹⁵⁵ the validity of liens under state and federal statutes,¹⁵⁶ and the validity of certain welfare practices.¹⁵⁷ Many of the cases influenced practices that affected or could affect significant numbers of persons.

150. If bankruptcy court appearances are eliminated, the picture is even darker. During 1981-1983, there were a total of nine bankruptcy court appearances. Despite the significantly lower number of cases during 1988-1990, the number of bankruptcy court appearances rose to 30, or 10 per year.

151. *In re Johnson-Allen*, 871 F.2d 421 (3rd Cir. 1989) (dealing with bankruptcy laws); *Robinson v. Block*, 869 F.2d 202 (3rd Cir. 1989) (Food Stamp Act).

152. *Ayers v. Philadelphia Hous. Auth.*, 902 F.2d 1184 (3rd Cir. 1990); *Smith v. Fidelity Consumers Discount Co.*, 848 F.2d 907 (3rd Cir. 1990).

153. *McLean v. Philadelphia Water Revenue*, 891 F.2d 474 (3rd Cir. 1989).

154. *In re Sullivan*, 904 F.2d 886 (3rd Cir. 1990).

155. *United States v. Stazola*, 893 F.2d 34 (3rd Cir. 1990).

156. *Gaglia v. First Fed. Sav. & Loan Ass'n*, 889 F.2d 1304 (3rd Cir. 1989).

157. *Bennett v. White*, 865 F.2d 1395 (3rd Cir. 1989).

Last year, the program celebrated two victories in the Supreme Court,¹⁵⁸ one of which, *Sullivan v. Zebley*,¹⁵⁹ involved more money than any case in legal services' history, dwarfing *Morris v. Williams*¹⁶⁰ and *Rosado v. Wyman*,¹⁶¹ which cost California and New York hundreds of millions of dollars. The *New York Times*¹⁶² estimated that \$2.5 to \$3.5 billion would go to the hundreds of thousands of disabled children affected by this class action lawsuit in the next five years. The *Washington Post*¹⁶³ predicted the cost would reach \$7 billion. Only the much publicized *Texaco*¹⁶⁴ case rivaled *Zebley*, and *Texaco* was eventually settled for far less than the judgment.¹⁶⁵

Community Legal Services' most conspicuous characteristic, other than its successes, is its wealth of experienced and talented litigators, many of whom had appeared in federal court for the program before 1980. Seventeen different program lawyers were involved in federal litigation in 1988-1990 alone.¹⁶⁶ From this, two conclusions can be drawn. First, major litigation can be undertaken by urban legal services programs. Second, the presence of experienced litigators can turn younger lawyers into litigators.¹⁶⁷

III. Proposals for Change

A solution to the problems of poor communities' need for representation in future constitutional litigations is not simple. The legal needs of the poor can never be met in full,¹⁶⁸ but it is apparent today, as it was in 1965, that resources must be available for litigations that can bring change, however those litigations are described. But finding resources is not a simple task.

158. *Sullivan v. Zebley*, 493 U.S. 521 (1990); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990).

159. 493 U.S. 521 (1990).

160. 433 P.2d 697 (Cal. 1967).

161. 397 U.S. 397 (1970).

162. *More Poor Children Eligible for Disability Benefits*, N.Y. TIMES, Feb. 11, 1991, at A8.

163. Spencer Rich, *Freeing Aid to Disabled Youngsters; New Rules May Help Tens of Thousands*, WASH. POST, December 17, 1990, at A9.

164. *Pennzoil v. Texaco*, 401 U.S. 1 (1987).

165. The case was settled for \$3 billion. *In re Texaco Inc.*, 84 B.R. 893 (S.D.N.Y. 1988).

166. The most prominent are Jonathan M. Stein, Richard P. Weishaupt, and David A. Searles.

167. I spoke with the program's director, who agreed with my conclusion, and when asked about caseload, noted that the program's attorneys were unionized and that their contract authorized attorneys who felt they could not take new cases to request a panel decision if the administration disagreed. When caseload requires, the program declines to take clients, making referrals to the local bar if possible.

168. See Breger, *supra* note 2, at 362.

One cause of the problem is the structure of legal services. Legal services litigators whose time is not occupied by ongoing and planned litigation must return to performing service functions.¹⁶⁹ The size of most legal services programs inhibits the formation of "law reform" units within particular programs. Another factor is that creating a specialized unit to handle the "big case" influences many aspects of a legal services program's structure and manner of operations. The initial problem is staffing the new unit. In the abstract, one selects the best people. Practically, this may mean raiding local offices for their best lawyers. In a sense, it is a message to those not chosen that serious litigation is no longer their responsibility. The staff attorney feels confined to low level work, and lawyers who will not be involved in litigating impact cases may not search for them. Dynamics tend to create a staff hierarchy and elitism with all its pitfalls.¹⁷⁰

A. Utilization of Available Resources

Quality lawyering, in the course of dealing with clients, uncovers cases that could result in social change. This does not mean that each program should or could be so structured as to have the capacity to litigate, by itself, all the cases it discovers. An essential component of the major constitutional litigations that took place during the "war against poverty" was the Backup Center. The best known and most effective of these institutions was the Columbia Law School-based Center on Social Welfare Policy and Law, founded by Edward Sparer, whose successor, Lee A. Albert, was in charge of the Center in 1969 when numerous welfare-related litigations were commenced or were en route to the Supreme Court. Some cases like *Rothstein v. Wyman*¹⁷¹ were relatively simple. All that was required was the drafting of a complaint, marshalling of necessary evidentiary materials, taking of depositions, preparation of motion papers and supporting documentation, and preparation of briefs and memoranda of law on complicated constitutional issues. For even a mid-

169. A good example was Carl J. Nathanson, Nassau County's premier litigator. He argued *Hagans v. Lavine*, 415 U.S. 528 (1974), an important case involving jurisdiction before the Supreme Court as well as *Johnson v. New York State Educ. Dep't*, 409 U.S. 75 (1972). He also handled several cases before New York's highest tribunal and, by my count, 38 "service" litigations, winning 27. No case or client was more important than any other. As memory serves, he declined the opportunity to handle *Rothstein v. Wyman*, 303 F.Supp. 339 (S.D. N.Y. 1969), *vacated*, 398 U.S. 275 (1970) because of the needs of his other clients (which, in passing, is how I got to be a "constitutional" lawyer).

170. See George, *supra* note 88, at 711 ("Development of sufficient expertise within each legal services project was not the answer, for it would . . . have forced dramatic cutbacks in the caseload—something LSP could ill-afford.")

171. 303 F.Supp. 339 (S.D.N.Y. 1969).

size program, finding attorney time to do all of these tasks would be difficult. Having a resource with extremely talented lawyers to do the briefing and legal research was invaluable, both in terms of time and the quality of work presented to the court. There are also cases that last the better part of a decade and require a long-term commitment of costly resources.¹⁷² Finally, cases like *Rosado v. Wyman*¹⁷³ are resource-intense and compressed into a short time frame.¹⁷⁴ The ability of the Center to engage in this type of litigation is even more remarkable considering its other activities during the same period. *Goldberg v. Kelly*¹⁷⁵ was en route to the Supreme Court, and the Center was also engaged in numerous

172. In *Zebley v. Sullivan*, No. 83-3314, 1991 WL 65530 (E.D. Pa.), Community Legal Services' fees were set at \$550,000 in a Stipulation of Settlement approved by the court. *Koster v. Perales*, 903 F.2d 131 (2d Cir. 1990) was commenced in 1982; see *Koster v. Webb*, 598 F.Supp. 1134 (E.D.N.Y. 1983) sustaining the complaint and *Koster v. Perales*, 108 F.R.D. 46 (E.D.N.Y. 1985) granting class certification. The litigation ended when Nassau County and New York State stipulated that they would begin to provide shelter to the homeless when they applied, instead of telling them to return at a future date. The Nassau/Suffolk Law Services Committee, Sullivan & Cromwell, and O'Melveny & Meyers were awarded \$326,678 in attorney's fees. In the earlier district court proceedings, plaintiffs were represented only by Nassau/Suffolk Law Services and by Robert Hayes representing the Coalition for the Homeless.

173. 397 U.S. 397 (1970).

174. This history begins on March 31, 1969, and continues until the end of June of that year. It omits the dates of some oral arguments, court appearances, and a myriad of minor procedural matters that did not result in official court action. All matters were thoroughly briefed. The complex substantive and jurisdictional issues in *Rosado* are mentioned in note 82.

March 31 - New York enacts statute effective July 1, 1969.

April 24 - Judge Jack B. Weinstein issues a temporary restraining order and requests convocation of a three-judge district court to determine constitutional issues pursuant to 28 U.S.C. § 2284.

May 9 - Three-judge court takes testimony and hears motions for summary judgment.

May 9 - Governor signs law amending statute, moots constitutional issue.

May 12 - Three-judge court dissolves, case returned to Judge Weinstein who issues temporary restraining order, preventing state from implementing statute.

May 15 - Judge Weinstein issues preliminary injunction based on the statutory claim and denies state application for stay.

May 21 - Second Circuit grants preference to appeal from preliminary injunction and denies state application for stay.

June 4 - Appeal argued before Second Circuit.

June 11 - Second Circuit stays preliminary injunction pending disposition of appeal.

June 16 - Second Circuit denies plaintiffs' motion to vacate stay and denies state application to stay district court proceedings.

June 16 - Plaintiffs (1) file appeal to the Supreme Court from the order dissolving the three-judge court, (2) petition the Supreme Court for a writ of certiorari before judgment, and (3) ask the Supreme Court to vacate stay of preliminary injunction.

June 18 - Judge Weinstein grants summary judgment for plaintiffs and issues permanent injunction, stay is denied.

June 19 - Second Circuit stays permanent injunction.

June 24 - Supreme Court dismisses appeal from order dissolving three-judge court, denies petition for certiorari before judgment, and declines to vacate Second Circuit stays.

175. 397 U.S. 254 (1970).

other litigations including *Jefferson v. Hackney*,¹⁷⁶ and *Wyman v. James*.¹⁷⁷

But expecting the centers to play a major part in oncoming constitutional litigation is unrealistic, as the Legal Services Corporation, frightened by earlier opposition to the centers,¹⁷⁸ sharply limited their resources and downplayed their role. The sixteen backup centers, now called National Support Centers, received a total of \$7,129,943 in 1988 from the Corporation. Although the LSC notes that they have completed 30,493 requests for service,¹⁷⁹ it acknowledges that "services ranging from brief phone advice to complex litigation were weighed equally."¹⁸⁰ In any event, during the past ten years, support centers have been involved in seventy-six reported federal cases as compared to 137 in the years prior to 1981.

The centers are only one of the resources available to assist legal services programs with major litigation. Among the other entities available are law school clinical programs, public interest law firms—some closely associated with particular interest groups, some not—and major law firms. Indeed, in the New York City area there is considerable interaction between all of these entities. Outside of New York there is some but far from enough. Law schools and law firms ought to be encouraged to lend support to legal services programs conducting major litigations. For the major law firm, this uses its talents in an effective manner. For the law student who needs to develop writing and drafting skills, it provides a useful educational experience, more meaningful than interviewing clients.¹⁸¹

What is needed is an organization with the resources, the ability, and the prestige to direct *pro bono* activities in the direction of major litigation and act as a clearinghouse so that law firms and law schools willing to contribute their skills are matched with legal services programs in need of such assistance. That organization is the American Bar Asso-

176. 406 U.S. 535 (1972).

177. 400 U.S. 309 (1971).

178. The "Green Amendment," added to the Legal Corporation Act, allowed the Corporation to undertake backup center functions "but not by grant or contract." While the sole explicit purpose of the Amendment was, in the words of Congresswoman Green, "to stop the research and advocacy in the backup centers . . ." and "to get rid of the backup centers," 119 CONG. REC. 20,717 (1973), the Corporation retained the power to fund backup centers and did so. For a detailed account of backup centers from their origination until the mid 1970s, see George, *supra* note 88, at 709-20.

179. FACT BOOK, *supra* note 21, at 61.

180. *Id.* at 57.

181. At the Albany Law School, the Disabilities Clinic, which involves students in a wide range of litigations, is perceived by many as the school's best clinical experience.

ciation.¹⁸² In a sense, I suggest a national referral service, but it can be more. Just as the ABA directly or indirectly funds research in various areas, so can it gather and distribute funds voluntarily contributed by those members of the bar who support this type of activity. This kind of voluntary bar involvement in major litigation on behalf of the poor makes far more sense than proposals for mandatory *pro bono* programs that are both flawed and poorly received by many of the same lawyers who would assist the program suggested here. The structure for this kind of activity already exists. The ABA Private Bar Involvement Project has for many years encouraged law firms to place attorneys with legal services programs. But for the most part, this activity has been misdirected. Using the resources of major law firms to assist in legal services programs' day-to-day service activities is well meaning but hardly an effective use of what in military terms would be termed "elite forces" that should not be consigned to trench warfare. With the growing prospect of mandatory *pro bono* programs facing us,¹⁸³ recall Robert Moses, the "planner" who devised and built Long Island's traffic-congested highways. The Moses' solution to traffic congestion was never mass transportation, or building parking facilities near the railroads leading to the city, or extending the subway system to where it could be utilized by residents of the Island. Instead, it was always to build another lane, or another highway, or in his last years, another expressway. This always made the traffic congestion worse, because the new roadway made the trip to New York City a bit quicker; so, as a result, housing development was encouraged further and further out on the Island, leading city residents who had used the city's mass transport facilities, to drive, usually into Manhattan Island, whose road system could not be enlarged and whose parking facilities were overwhelmed. One result was

182. Yolande Prevost, a first-year law student, suggested to me that the American Bar Association should take a leadership role in test litigation in view of the political problems in securing adequate federal funding for this type of activity. Her idea was the genesis of this proposal.

183. See COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (1990); Barlow F. Christensen, *The Lawyer's Pro Bono Publico Responsibility*, 1981 AM. B. FOUND. RES. J. 1, 3 n.5; ABA HOUSE OF DELEGATES RESOLUTION ON PUBLIC INTEREST LEGAL SERVICES (1975); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON THE LAWYER'S PRO BONO OBLIGATIONS, TOWARD A MANDATORY CONTRIBUTION OF PUBLIC SERVICE PRACTICE BY EVERY LAWYER 11 (1980); Steven B. Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255 (1981); Joseph L. Torres & Mildred R. Stansky, *In Support of a Mandatory Public Service Obligation*, 29 EMORY L.J. 997 (1980); cf. David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1990).

a new word, "gridlock."¹⁸⁴ Mandatory *pro bono* activities of the bar will have the same effect if they follow the wrong Moses. If thousands of compulsory volunteers appear at legal services offices to handle service cases, there will always be enough clients to greet them. There will also be gridlock in our lower civil courts, or at least they will have to undergo massive and costly expansion. The quality of justice will not be enhanced.¹⁸⁵ The initial determination that the poor's need for lawyers can never be met because it is so vast, was correct in 1965 and still is, due to the increased number of poor, the deterioration of their housing, the elimination of employment opportunities by technology, and the inevitable disruption of more and more families by economic pressures.¹⁸⁶ The solution is to utilize the resources of the bar wisely, not thoughtlessly.

B. Improving Structure

Positive steps that the Legal Services Corporation can take are to renew its demands that programs consolidate and to eliminate programs whose small size and location make them both expensive and ineffectual. For example, upstate New York is a model of structural inefficiency. Seventeen mostly very small separate programs dot the upstate New York horizon, each with its own Director and Board of Directors. Some are rationally placed in upstate urban areas, while others are scattered almost randomly. A rational consolidation would permit economies of scale, the freedom to adjust to changing patterns of needs, and presumably improved legal services to the poor in the area.

New York is not unique. There are 113 programs funded by the Corporation with grants of less than \$500,000¹⁸⁷ whose fiscal worth is questionable.¹⁸⁸

184. See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974). The Moses era ended as a result of his attempt to build a bridge over Long Island Sound, and divert traffic into Southern Connecticut and Westchester County. Moses ignored those who suggested that truck traffic from New England would use the bridge to attempt to avoid New York City. His undoing was not based on his refusal to consider alternatives like mass transportation. Rather, it was his 'egalitarian' insistence that the extensive approaches to the bridge were to be built in the most prestigious portion of Nassau County's "North Shore" which would have destroyed some of the most affluent "bedroom" communities in America, where many of the partners and clients of New York City's major law firms resided.

185. See Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, *YALE REV. L. & SOC. ACTION*, Spring 1971, at 4.

186. See Edelman, *supra* note 14.

187. *FACT BOOK*, *supra* note 21, Appendix A.

188. There were 113 programs funded by Legal Services Corporation for less than \$500,000. *Id.* The total Legal Services Corporation funding was \$33,724,000. These programs received from other sources an additional \$21,271,000 for a total of \$54,995,000. See *id.*

C. Rewards and Sanctions

Rather than watch the disintegration of local legal services programs and their level of performance at all levels, the Legal Services Corporation should insist that local programs meet certain goals. But one does not "order" quality. A grantor can, however, insist that attempts be made to bring entering salaries into line with those of state governments over a period of a few years, and induce compliance by offering to provide matching funds. A similar approach can improve the status of senior staff, modernization of office equipment, structural changes to aid efficiency, and formation of interorganizational relationships with other legal services programs and public interest organizations. And finally, significant victories such as *Sullivan v. Zebley*¹⁸⁹ could be publicly acknowledged by the Legal Services Corporation as a component of its goal of "equal access to justice."

D. Evaluations

Legal Services Corporation can also have competent and knowledgeable persons make field audits and evaluations of its grantees. It would be foolish to request a return to the "war against poverty" era when program ideology and dedication to "law reform" was allegedly one of the components of the Office of Economic Opportunity's annual evaluations.¹⁹⁰ Scrutiny of ideology by the Legal Services Corporation today, divided in its perspectives, would not be desirable.

Conclusion

In a quarter century we have almost come full circle, from a frugally funded handful of local legal aid attorneys unable to provide real services to their clients to a massive national program that is rapidly becoming equally ineffectual. Reversing the trend to assure competent legal repre-

Appendix J. Sixty-three of these programs made no federal court appearances during 1981-1990. Thus, 63 programs have not found a client whose legal needs required resort to the federal courts. My studies show that another 11 found one such client in a decade, and 14 more programs found two such clients. The Empress Catherine, could she view the scene, would appreciate today's Potemkin's villages—now called "equal access to justice." Of course, Potemkin did not lavish huge amounts of funds year after year on his make-believe villages. Nor did he convince himself that they were real.

189. 493 U.S. 521 (1990).

190. The author evaluated numerous programs in the Northeast in the late 1960s. Most of the evaluation was non-ideological, directed at competence as perceived by all levels of the community, including the local bar, judiciary, local government, community leaders, members of the Board of Directors, staff, and clients. Despite about a score of such evaluations, I encountered none where ideology was a determinant of a recommendation to reward or sanction a program.

sentation in all areas, including the necessary demands for constitutional change, will involve serious political and fiscal problems and tensions. No goal other than the provision of quality services is ethically appropriate,¹⁹¹ nor would any formulation other than increased-quality aid in performing either the “service” mission or handling future constitutional or other major impact litigation be ethically acceptable. But today, it would be myopic to articulate these demands. Under the fabric of “equal access to justice” we must, on behalf of our adopted constituents, demand movement — slow, patient movement in the direction of quality. While I wish, and my students demand, an immediate return to a golden era, I truly fear that such demands, while justified, are untimely and would today be counterproductive.

The accumulated data is sorry enough, but one unemphasized fact is that the deficiencies in legal services are acquiring momentum. While I have concentrated on a ten-year period, every chart that has year-by-year data shows vastly decreased involvement during the years 1988-1990.

191. For a comprehensive analysis resulting in this conclusion, see Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 354-57 (1978). Referring to the impulse to “help” all clients the authors state:

Implicit in this position is the notion that a publicly financed lawyer cannot or should not turn away anyone in need and that under representation is preferable to attempts to find criteria for deciding who will not be served. In its most extreme form, this may mean: (1) permitting caseloads to rise, usually without any conscious choice being made by the attorney; (2) providing routine, minimal service, primarily oriented to defusing crises; (3) trading off affirmative actions or claims—often without a careful assessment of their worth—for “time” or a long-term payment schedule; (4) not informing clients of the minimum level of service they are receiving . . . and (5) making no effort to bring to the client’s attention legal matters on which the client has not requested assistance

Despite our sympathy with this desire to help . . . nothing in the Code sanctions such conduct. In fact, it would be hard to find a set of practices so flatly in violation of its provisions.

The authors note that Canon 6 obligates attorneys to provide competent representation, adding, “DR 6-101 (2) and (3) provide that a lawyer should not ‘handle a legal matter without preparation adequate in the circumstances. . . .’ A recent Committee opinion squarely supports this position . . . stat[ing] ‘the refusal by directors of legal services offices to establish priorities could result in Code violations if it causes ‘inadequate preparation’ or ‘neglect by a staff lawyer’” *Id.* at 356 (quoting ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1359 (1976)).

The authors also believe that Canon 5, which requires lawyers to exercise “independent professional judgment,” is violated when caseload overwhelms an office, as is Canon 7’s obligation of loyalty to a client. Finally they cite Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805, 813 n.14 (1971) (“glossing over injustice, even in the best of motives, perpetuates it.”). See ABA Standards for Providers of Civil Legal Services to the Poor, Standard 6.1 (1986), which the ABA has interpreted (ABA Formal Opinion 334) as permitting limitation of services to a client “only to an extent and in a manner consistent with the requirements of the Code”

Organizations, like human beings, have endurance based on intangibles. But organizations, like human beings, can take only so many insults before they expire. I sense in the accelerated decline, old age or perhaps a speeded-up version of "the one horse shay." If something is not done to restore sustenance to the body of legal services, the soul, passionate as it is, may no longer be willing to continue a desperate battle.