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Abstract
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LEGAL AID IN THE UNITED STATES:
THE PROFESSIONALIZATION AND
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BY CARRIE MENKEL-MEADOW*

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I. INTRODUCTION: HISTORICAL ANTECEDENTS TO CURRENT TRENDS

Legal Services for the poor1 in civil matters2 in the United States have been marked by three distinct historical periods: private legal aid (1880-1965), government support, through the War on Poverty's Office of Economic Opportunity (1965-1974) and government support of an independent financing corporation, the Legal Services Corporation (1974-present). In recent years, since the change of the political regime in Washington in 1980, it has become apparent that legal aid may be

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1 This report focuses on problems of access to justice for the poor. In the United States access to justice remains a problem for the working and lower middle classes as well, but this report deals primarily with access issues for those who would be eligible for government supported legal aid. The term “legal aid” has been used both generically and specifically to refer to a particular period in the development of legal aid in American history. The term “legal services” has increasingly come to be used to describe the present programme for provision of legal aid to the poor. See text accompanying note 36, infra.

2 This report focuses primarily on the availability of civil legal aid. Although the report deals briefly with legal aid for the indigent in criminal matters, generally supplied by the state as a result of American constitutional principles, it is issues of the access of civil justice that forms most of the present controversy.
entering a fourth period, the resolution of which may be crucial in defining the goals and purposes of legal services in the United States. The issues which have been raised in this fourth period are a blunt confrontation of the underlying philosophical debates about legal services which have been waged during the last three periods. Whether there will be a resolution of these issues remains to be seen, but it is clear we are at a crossroads in the development of legal services for the poor in the United States.

The development of legal services programmes in the United States has been sufficiently long-standing and sophisticated to have produced a variety of types of legal services delivery systems as well as a relatively rich body of literature and commentary on the evaluation of such programmes and interpretations of the meaning of these developments. In addition, there have been some empirical studies of what it is that legal services for the poor are actually doing. This paper will report interpretively on trends in the delivery of legal services to the poor and the issues these trends raise for further elaboration and development of the legal aid concept.

The basic theme of this paper is that the currently dominant form of delivery — the staff programme — has resulted in two seemingly inconsistent, but quite logical, trends: the professionalization of legal services lawyers and the politicization of the legal services programme. By professionalization, what is meant is the development of a sophisticated, separate group of lawyers whose primary function is the provision of legal services to the poor, with concerns and socialization that differentiate them from other lawyers and servants of the poor. Politicization means that the legal services programme has become, once again, an issue of partisan debate because of its perceived role as an instrument of social, as well as legal, change.

These trends are quite understandable, given the controversies which have emerged in the three historical periods. There are five such controversies. First, is the debate over private versus public funding for legal aid. Second, there have been discussions of equal access to justice (availability of lawyers to represent individual clients) versus social change (ameliorating the conditions of poverty) models of the purpose of legal services. This controversy is reflected concretely in the debates about neighbourhood law offices versus law reform centres and judicare versus centralized staff offices. Third is the issue of segregated versus integrated notions of the legal needs of the poor, evidenced by disputes about developing expertise in "poverty law," both substantively (welfare law) and procedurally (community organizing, group litigation). Fourth are the questions of the effectiveness (however defined) of deliv-
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A fifth controversy is seen in the ongoing, but at times hidden, dispute about whether the provision of legal services to the poor is an obligation, with a corresponding right inhering in members of the poor classes, or an act of charity, experienced as a privilege by members of the poor classes, by an otherwise well-endowed society. Because the history of legal services has been so well canvassed elsewhere, it will be reviewed only briefly here. The purpose of this brief review is to underscore the historical antecedents of current trends and issues in legal services as they have come to affect several different constituencies — the poor, their lawyers, other lawyers, policy makers and the public.

II. CHARACTERISTICS OF AMERICAN LEGAL AID

In reviewing trends in the development of legal aid in the United States it is essential to note those characteristics of legal aid which are peculiarly American. In 1977, Clinton Bamberger, then a member of the Legal Services Corporation national staff, identified three “immutable characteristics” of the American legal aid system: 1) public financing, 2) law reform (rule changes) for the poor and 3) full-time salaried staff lawyers, specializing in poverty law.

To these characteristics, two more could be added. First is the employment of paralegals, who are legal assistants, trained especially to aid in providing services to the poor and many of whom were drawn from the indigenous poverty community. The second is the use of explicitly political forms of advocacy to better the conditions under which poor people live. These include community organizing and lobbying, national research or “back-up” centres, specializing in certain areas of law affecting the poor, and the

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6 Bellow, Turning Solutions into Problems: The Legal Aid Experience (1977), 4 NLADA Briefcase 6.


The United States Constitution provides for the provision of an attorney in all criminal matters with the potential for incarceration. This constitutional principle was finally developed, after many years of litigation over the issues in Argersinger v. Hamlin, 407 U.S. 25 (1972). See also Gideon v. Wainwright, 372 U.S. 335 (1963). On the civil side, however, the Supreme Court has not shown itself as hospitable to a claim that a lawyer should be paid for by the state if the individual litigant cannot afford to pay for a lawyer, except in a few particular areas. See Lassiter v. Department of Social Services, 452 U.S. 18 (1981).


7 Bamberger, id.
use of peculiarly American legal constructs to fight the legal battles of
the poor — the class action, group plaintiffs and American constitu-
tional theory as a device for expanding both substantive and procedural
legal rights.\(^8\)

In recent years the legal services “movement” in the United States
has also been characterized by another American institution — the
professional union — as increasing numbers of legal services lawyers,
paralegals and staff form their own unions or join with other existing
unions.\(^9\) Related to this phenomenon is the increasing “management”
of legal services by American business management and economic prin-
ciples, evidenced by the use of “cost-benefit” analyses of the effective-
ness of programme designs or specific delivery mechanisms\(^10\) and the
addition of a management section to the national legal services journal,
the *Clearinghouse Law Review*.\(^11\)

Finally, the organized bar, in the form of the American Bar Asso-
ciation, has come to support the legal services movement in a series of
heated political debates in Congress. This support, a continuation of an
eyear history of establishment bar support for legal aid, has become
stronger in recent years. Some see recognition of the expansion of law-
ner’s work in general as the reason for this support and others see the
support as emanating primarily from big firm lawyers who, in the strat-
ification of the American legal system, have little to lose in the way of
competition from legal aid lawyers.

It may be all too easy to identify these modern American charac-
teristics of legal aid since they have, all too quickly, become taken for
granted in the legal services world. But these characteristics are accu-
rate only for the most recent periods of legal aid development since the
Office of Economic Opportunity [hereinafter OEO] programme began,
amidst much controversy, in 1965. Because these “immutable charac-
teristics” are less than twenty years old, they are very much at issue in
the current political debate about legal services. The present adminis-
tration advocates a return to the earliest historical period of legal aid,
characterized by voluntary, private and charitable provision of legal
services by lawyers who are not necessarily engaged full time in legal
work for the poor.

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\(^8\) See Dooley and Houseman, *Legal Services in the 80’s and Challenges Facing the Poor* (1982), 15 Clearinghouse L. Rev. 704.


\(^10\) Legal Services Corporation, *Delivery Systems Study* (1980).

III. THE LEGAL AID ERA: 1876-1965

For the first one hundred years of the American legal system poor people depended on the "charity" of lawyers to take their cases for free or at reduced fees. The organized bar encouraged such activity as part of the duty of the individual member of the profession to the public at large. As others have noted, the legal system was thought to be working well and lawyers played a smaller part in it than in other countries, at least in the early years marked by small towns and frontier justice. Although portions of the Constitution could have been read to require a lawyer, such interpretations of the Constitution did not occur until late in the twentieth century. Work done for individual indigents was called pro bono publico, for the public good. Legal charity work, like other forms of charity, was considered useful because it released the rest of society from its worries about or obligations to the poor. As Auerbach noted in his history of the legal profession, Unequal Justice, the legal profession in the United States was stratified by social class and national origin. Thus, it is not surprising that the first successful effort in providing legal aid to the poor was organized by the German Society in New York City in 1876 to provide aid to recent German immigrants who were being taken advantage of by a variety of merchants, landlords and others who used complex legal processes.

The second legal aid group founded in the United States arose out of another charitable concern — the reported debaucheries of young girls in Chicago. This legal services group, however, can be seen as the first legal aid organization with a "reformist" purpose. Formed as an adjunct to the "Women's Club" of Chicago in 1886, its purpose was the "protection of women and children." It eventually led to the formation of a legal aid organization, available to any poor person regardless of gender or nationality, that also attempted to "reform" law, generally by proposing legislative changes.

Both of these organizations set the stage for legal aid societies for many years. They were private organizations, financed by private charitable contributions and controlled by boards of directors, virtually indistinguishable from other charitable organizations. Legal services were "doled" out frequently because of moral merit, rather than legal right, and controversies developed early in prohibiting the provision of divorce

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18 Auerbach, id., Handler and Johnson, supra note 6.
14 Supra note 5.
15 See Katz, supra note 12.
services that would divide families and possibly increase the drain of poverty on society. Legal aid societies, as they first developed, consisted either of referral systems to private lawyers who would take cases for a small or no fee, or of small staff programmes, the lawyers of which were, in terms of ethnicity and legal training, different from the profession as a whole. The boards of directors remained composed of white, male Anglo-Saxons.18

A big expansion in legal aid occurred in 1919 with the publication of Reginald Smith’s *Justice and the Poor* which documented the cost of legal services and access to the legal system. The book was significant because it aroused the American Bar Association enough that it formed a standing committee on legal aid, to be headed by Smith. This later led to the founding of the National Legal Aid and Defender Association, an association of legal aid, legal services and public defender programmes that survives into the present and has been currently active in the political battles facing the legal services movement. As a result of Smith’s work, many state and local bar associations began forming legal aid associations and societies, modelled on the first programmes founded in the large cities. In 1914, the first legal aid programme affiliated with a law school was founded in Denver, providing legal services for the poor and clinical training for law students at the same time. Some commentators have argued that while the development of legal aid can be applauded as one of the first in the western world, Smith’s message, published in 1919, was heard by others as a centrist gift to the immigrant masses which would prevent the gap in access to the legal system from being connected to a gap in economic access that might lead to more revolutionary developments.17

There was slow growth in the number of legal aid organizations for the next few decades as the depression of the 1930s and the lack of available paying work for lawyers served to limit both economic and human resource support for legal aid. Only when Great Britain instituted its government financed Legal Aid and Advice Scheme in 1949 was there a resurgence in American activity. Again, some commentators18 view these developments as centrist or conservative reformist attempts at staving off more radical actions — in this case, governmental or public support of legal aid for the poor.

By the end of this first period in 1962, there were 236 legal aid organizations, 110 defender offices (providing legal services for the

18 *Supra* note 12.
17 See Auerbach, *supra* note 12.
categorically accused) and a total national budget of just under four million dollars.\(^9\) Even so, these numbers were woefully inadequate to meet the demands for legal services of millions of poor people. A study completed in the mid-sixties\(^20\) revealed that three out of four applicants for legal aid received nothing more than a single brief consultation and there was some evidence for concluding that many potential applicants for legal aid never bothered to apply. In addition, pressure from business and "moralistic" or religious members of the boards of directors were successful in prohibiting legal assistance for bankruptcies, evictions and divorces, even though laws clearly provided for the exercise of these legal rights. Furthermore, high staff turnover and low salaries made it difficult, if not impossible, for the programmes to develop any continuity, sense of purpose or analysis of the legal structural factors which contributed to the experience of poverty. Indeed, as that study concluded, Legal Aid had become "a captive of its principal financial supporters."

It is important to highlight some of the characteristics of this early period. Although others see the creation of the OEO programmes as a radical departure from the Legal Aid movement, there are some important historical continuities, which have come to haunt us, particularly in recent times. First, the source of funding for legal aid has always been problematic. If private financiers can capture a programme and limit the cases it takes, so can public financing, as evidenced by statutory limitations on the case types that can be handled by government funded legal services programmes. The Legal Services Corporation statute currently prohibits representation in school desegregation, abortion and other areas.\(^21\) Far more stringent limitations have been recently proposed and passed, most notably that legal services lawyers will be prohibited from suing the government in class actions and from representing aliens and homosexuals.

Furthermore, the early philosophical underpinnings of the Legal Aid movement of providing individual representation for "deserving" cases continues to affect legal services delivery systems today. With more demands for services than can possibly be met, programmes must establish priorities and decide who is to receive some of the available, but limited resources. Some continue to argue that the most "deserv-

\(^9\) Id.
\(^20\) Carlin, Howard and Messinger, *Civil Justice and the Poor* (1966).
The basic impetus for developing legal aid programmes in the first place, providing access to the legal system, remains the rhetorical basis for legal services to the present, and was its fundamental principle in the third stage where an access goal of two lawyers for every 10,000 poor was the objective of programme managers. Issues of board of director control, staff turnover and composition of the early Legal Aid programmes sound remarkably familiar to those reading modern evaluations of the Legal Services programmes. The early Legal Aid referral plans look remarkably like the judicare referral programmes currently advocated by some.

There are some historical discontinuities as well. Legal Aid, unlike legal services, attracted lawyers who wanted to avoid or who could not enter traditional practices and they tended not to have political commitments to their work. Legal Aid work was low-profile charity work, seldom, if ever, resulting in litigation at all and if litigation, then infrequently rule change litigation. Poor people were seldom, if ever, personally involved in governing legal aid societies or having input into what kind of work would be done.

The significance of these early legal aid developments in the United States must be underscored in the present climate of attempts to disembowel legal services for the poor. First, legal services for the poor was, from the beginning, a political phenomenon. Smith argued that the provision of legal services to the poor was essential to preserve “American democracy.” Without access to the legal system, the poor might rebel. Second, the ambivalence of the organized bar to a programme that provides the profession in general with more work, but invites a purportedly unsavoury group of non-establishment lawyers to the practice (which in turn provides difficulties for the clients of establishment lawyers) serves to exacerbate the stratification within the non-legal services portion of the bar. Third, private voluntary financing of legal aid affects the type of case and legal strategies that can be employed. This principle motivated the early founders of Legal Aid as

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22 See Breger, Legal Aid for the Poor: A Conceptual Analysis (1980), 60 N. C. L. Rev. 281.
25 Supra note 4.
26 See Handler, supra note 6, and Katz, supra note 12.
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much as it motivates those who seek to return legal services to the private sector today. Fourth, legal aid programmes were, for the most part, locally supported and operated. This form of local control has persisted to the present day. Even though the federal Legal Services Corporation distributes grants, the grants are received and utilized by local programmes with local boards of directors. While legal services has become federalized in some respects, it remains in other important respects a local programme. Those who urge modification of the programme want to return to an even narrower form of local control.27

Finally, and perhaps most important, while they were private, moralistic, paternalistic, ineffective, individualistic and badly supported, Legal Aid societies at least developed the notion that provision of legal services for the poor was a legitimate, if not necessary, function of the American legal system. Compared to other “charitable” developments of the late nineteenth century, it has had a remarkable staying power. The significance of the Legal Aid movement is that it was a beginning. The danger is that the present political administration seeks to return the provision of legal services to privately funded, voluntary, local programmes that will individually represent moral or deserving poor, without attempting to change or expand the law. The current debate is remarkably reminiscent of the debate which marked the transition from the first historical period to the second.

IV. THE OFFICE OF ECONOMIC OPPORTUNITY: 1965-1974

In the early 1960s a controversial book by Michael Harrington, The Other America28 which documented the extent of American poverty, caused poverty to become a national issue. A “War on Poverty” was declared in 1963 and made the basis for legislation that was to draw the federal government into funding a variety of social programmes that would eliminate poverty. This “War on Poverty” had some new characteristics: the poor were to participate in the governance of programmes which affected them, and the causes of poverty were to be attacked structurally and comprehensively with a combination of cash

27 The present proposals to radically reorganize legal services contemplate more local control in the sense of state control. One proposal would give governors the right to veto programs. Another would attach legal services to block grants to be divided at the state level with a variety of social programmes competing for the same money. Although legal services presently is “locally” organized and controlled, the money remains federally controlled. The Reagan proposals contemplate a different locality, the states, which some see as far more conservative and potentially hostile to social programmes like legal services. See Erie, Rein and Wiget, Women and the Reagan Revolution: Thermidor for the Social Welfare Economy (unpub. paper presented at the Annual Meeting of the Western Political Science Association, San Diego, Cal., 1982).

transfer programmes and social programmes which delivered services to the poor; one of those programmes included legal services.

As a result of private funding by the Ford Foundation of some small demonstration projects of neighbourhood community-based legal services offices, a new philosophy of legal services for the poor was developed. This new philosophy viewed the law as simultaneously an opportunity to serve the poor and a tool for oppression of the poor. The opportunity lay in compelling enforcement of laws that benefitted the poor or made them "more equal" to other members of society. The oppression lay in rules which hurt the poor as a class, either substantively or procedurally, by limiting their access to courts and other societal institutions. The new philosophy, explicated by Edgar and Jean Cahn and Edward Sparer\(^{29}\) involved using the law, by effecting law reform, either by rule change or rule enforcement, to achieve social justice. Lawyers for the poor were urged to use available legal forms and arguments, such as the class action for aggregations of claims, and to develop new modes and novel constitutional arguments, such as the right to travel, to achieve a broader based social justice than the simple individual representation model of lawyering that dominated legal aid programmes.

When it became clear that one of the new "War on Poverty" programmes, located in the OEO, was to fund legal services for the poor, a controversy raged between those who advocated supporting the already existing structure of legal aid programmes and those who advocated support for the newer and broader based neighbourhood legal services programmes. The National Legal Aid and Defender Association passed a resolution seeking to limit the awarding of OEO funds to already existing programmes. The Cahns, who had been working in the Kennedy Administration, however, were successful with the help of several other notable and devoted people, in obtaining American Bar Association support for the new OEO programme.

Lewis Powell, then president of the American Bar Association, and now Justice of the Supreme Court, was instrumental in this alliance between the establishment bar and the "radical" legal services reformers. Earl Johnson, one of the early staff members of the OEO programme, has called Powell a "visionary realist" for his support of legal services. Powell's reasons can be read, in light of subsequent events, as prophetic. Powell was concerned, particularly after a line of Supreme Court decisions\(^{30}\) had made clear that alternative forms of

\(^{29}\) See Johnson, *supra* note 6, for a much more complete version of this history.

delivery of legal services might be constitutionally permissible, that, if the legal profession did not broaden its client base and methods of structuring the delivery of legal services, it was likely that the legal profession’s control over its own diminishing business was to be abrogated by others. Although Powell initially focused on a class of lower middle class clients to be assisted by other forms of bar service, it was not difficult for him to make a transition to support for poor people’s programmes in order to increase the legal profession’s client base.

The crucial principle extracted from the support of the American Bar Association was the recognition that poor people’s lawyers were to be able to do for their clients what rich clients’ lawyers did for them. Known now by the epithet of “hired gun,” this principle, that poor people’s lawyers would be governed by rules no different from those of their brethren in private practice (the Code of Professional Responsibility), has become one of the foundations of modern legal services practice, though it remains one of the controversial features of the present programme.

Related to this concern was the final issue of OEO poverty law office structure — whether a lawyer’s programme would be controlled by non-lawyer government bureaucrats, in the OEO’s Community Action Program. By 1965, the new organization’s structure was in place, with a director, Clinton Bamberger, who had come from private law practice. Bamberger successfully achieved, after a difficult campaign, the support of local bar associations and the old legal aid programmes. The OEO programme was to award financial grants, on a local level, to programmes that submitted grant proposals supported by the local bar and local community groups. In achieving this support, Bamberger was successful in changing the sense of mission about legal services for the poor and the accompanying rhetoric. Bamberger, with his private practice experience, was able to persuade legal aid groups and local bar associations that the role of the poverty lawyer had to be an activist one. Bamberger saw the 1960s as a time in which social change was going to come. The only question was whether lawyers would be involved or not.31

The process of funding local OEO offices raised all of the issues again. Grant proposals required the participation of such diverse groups as already established legal aid offices, local bar associations, poverty groups and community input. Disputes arose among establishment bar groups, rank and file lawyers, minority lawyers, community activists,

31 Johnson, supra note 6, at 80.
bar associations and local government entities over control of the programmes. Ted Finman has illustrated elsewhere\(^3\) how these different groups and their respective ideologies affected the funding process. In some communities, older legal aid societies received grants. In most communities new groups were formed and funded, and eventually in most but not all cities, the Legal Aid societies either were transformed into legal services programmes with a change of personnel or they were simply swallowed or merged. By the end of fiscal year 1966, over one hundred grants had been made to local communities and law schools running legal service programmes, at a total expenditure of over twenty-five million dollars.

The programmes initially funded were diverse, from very small programmes to major metropolitan programmes, with multiple offices. What characterized these OEO offices and made them different from the legal aid societies was their clear eligibility standards, their boards of directors which were required to have local poverty community members, a national support system which eventually provided training for lawyers on a national level, a staff which seemed to be more explicitly committed to a law reform agenda\(^3\) and some new legal theories and strategies with which to do their work.\(^4\) Of course, perhaps most significant was the era itself. The 1960s in the United States was a time for social change and political activism. Whatever controversies the activist lawyers found themselves in, their actions were mild when compared with other things that were happening simultaneously in the larger society.\(^5\)

Once again, while the OEO period was heralded by some as a radical departure from the past, it tended to preserve some important features of the old programmes. First, despite the national financing structure, grants were made to local programmes and the programmes remained subject to local control. Second, although the philosophy of law reform resulted in some highly publicized big legal victories, most often in the context of welfare litigation, the day to day business of most OEO legal services offices was individual representation, usually defensively, in evictions, consumer matters, domestic relations matters

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\(^6\) Keniston, *Young Radicals: Notes on Committed Youth* (1968).
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...and public benefits. The only difference was a stratification that began to develop in legal services offices between neighborhood offices which tended to perform the individual case work and central offices, primarily in the urban programs, which tended to do the larger law reform or rule change cases. Third, clients were still seen based on their "dessert." Strict financial eligibility requirements substituted for moral dessert, but the effect was still to segregate the poor as a separate class for purposes of delivering legal services.

The major differences between the old and new programs, trivial as they might seem, are best represented in the change of name which occurred in 1965. From that time on, programs receiving their financial support primarily from the federal government (there continued to be some local and municipal funding) called themselves "legal services" rather than "legal aid." The new breed of lawyers saw themselves as providing a service their society required, rather than charity workers "aiding" the morally needy and deserving.

More important for the subsequent development of legal services, the establishment in 1965 of the OEO program began a massive infusion of federal funds into the legal services for the poor programs. Accompanying the federal money was a sense of participation in a legal services "movement" that was larger than individual service cases and that began a national network for lawyers committed to working for some common goals. Attorneys working in legal services were full-time salaried staff attorneys, working together in offices throughout the country, toward common goals. The goals remained dual — individual service on legal cases and law reform — but the emphasis on case specialization and law reform, either in the form of rule change or rule enforcement, had begun to change the underlying ideology of legal services to one of using the law to eliminate poverty and the conditions which produced it and exacerbated it. A few programs even began using non-legal techniques, banding together with community organizations and social protest movements to organize other ways to change the laws or ameliorate poverty.

Indeed, the use of a few, but highly publicized new tactics or lawsuits produced the virulent criticism from without and occasionally,

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There is still some scholarly dispute about whether these new lawyers differed substantially from their counterparts in legal aid or other forms of practice. See Erlanger, supra note 24; Katz, supra note 12, and Meadow and Menkel-Meadow, "The Origins of Political Commitment: Background Factors and Ideology Among Legal Services Attorneys" (paper presented to the Law and Society Assoc., June 3-6, 1982, Toronto, Canada).


Agnew, What's Wrong With the Legal Services Program? (1972), 58 A.B.A.J. 930.
from within\textsuperscript{39} that began the move to create yet a third form of legal services delivery that would "depoliticize"\textsuperscript{40} legal services both from the politics of its lawyers, internally, and from both national and local governments, externally. Thus, in the early 1970s the Legal Services Corporation was born out of still another controversial debate about legal services that raised many of the same issues and a few new ones.

V. THE LEGAL SERVICES CORPORATION: 1974-1980

The early 1970s ushered in a time of Nixonian backlash to the social ferment of the 1960s. The legal services programme was one of the targets of this backlash. Then Vice-President Agnew criticized the programme by calling its lawyers "ideological vigilantes."\textsuperscript{41} The then governor of California, Ronald Reagan, attempted to terminate the California Rural Legal Assistance Program, one of the most aggressive law reform programmes and which was tied in the public mind with Caesar Chavez's farm worker unionization drive among migrant workers in California fields. Nixon appointed Howard Phillips, a director of OEO, who was publicly hostile to legal services, and who eventually fired the director of the legal services programme.\textsuperscript{42} Between 1971 and 1974 the programme experienced a thirteen percent decrease in the number of attorneys, a four million dollar drop in funds and a forty percent drop in the number of offices.\textsuperscript{43}

Why was all of this political attention directed at one of the lowest budgeted federal programmes? Several reasons have been offered by a variety of insiders, scholars and commentators.

A. Law Reform

First, although there has always been a dispute about how much "law reform" activity the programme actually engaged in, several major lawsuits brought a great deal of attention to the programme. Lawsuits brought by OEO offices included those which established a constitutional right to a procedurally fair hearing at any welfare termination, a constitutional right to have welfare benefits granted without a waiting period, statutory rights to have only actual income counted for purposes of considering welfare eligibility (rather than "assumed contributions"

\textsuperscript{39} See Bellow, supra note 3.
\textsuperscript{40} See Greene et al., supra note 21.
\textsuperscript{41} Supra note 38.
\textsuperscript{42} Johnson, supra note 6.
\textsuperscript{43} Supra note 3.
from relatives or live-in companions, for example), constitutional and statutory rights were established for children, prisoners and the mentally ill and the institutionalized. Tenants were permitted to withhold rent if their housing was sub-standard. The significance of these lawsuits is that they were successful. As a result of the new programmes (and a few lawyers in them), the poor were able to establish, as a matter of constitutional or statutory principle, that they had rights, not privileges, coming to them in the form of many of the social welfare programmes.44

Following the success of the early lawsuits, many legal services lawyers spent much of their time attending the procedural due process hearings they had won for their welfare clients. It was clear that the latter was simple "individual representation," but it was derived from the victories of the earlier larger lawsuits. Thus, opponents of the programme had to limit the type of activity that, by its very success, would create a series of important but basic, and soon to become mundane (in the number of welfare hearings), rights that would also become established claims. Thus, this first attempt to "integrate" the poor, by giving them some of the same rights as others received routinely, was viewed as a direct threat to the social order.

Second, law reform meant several different things. The use of class actions gave legal services attorneys the opportunity to use a provision of the civil law to aggregate claims and sue more expeditiously for a number of people affected by the same rule. The class action legal form, however, served in some cases to organize people with common interests beyond their lawsuits. Client groups, such as the National Welfare Rights Organization, served as plaintiffs in lawsuits, organizers of their clients who wanted to protest, and as a service organization, providing advice for people who needed to learn how to navigate the deep waters of the welfare system. These groups were available to serve as plaintiffs whenever an attorney spotted an injustice in the rules which needed legal correction. What disturbed the opponents of legal services here was the notion that lawyers would act proactively in spotting legal issues, searching for clients and then bringing lawsuits. To the legal services attorneys who regarded themselves as on "retainer" to their group clients, they were doing nothing more than law firm lawyers who sought rule changes for their corporate clients or who lobbied against adverse administrative rulings or regulations in Washington. They were simply monitoring the legal terrain for their clients as any

lawyer would do for his client. Opponents of legal services, however, felt that legal services lawyers should be more limited in what they could do for their clients, thus seeking to segregate not only the poor, but their lawyers as well.

Third, law reform consisted of several different legal activities. The term has been imprecisely used since the beginning. One form of law reform was rule change, most commonly the voiding of a statute affecting the poor because of its unconstitutionality. The requirement of fees for the court monopolized access to the fundamental right of divorce is one such case. Establishment of new rights, such as those listed above, are another example. But "law reform" is interchangeably used with "impact litigation," a term which may include rule changes but which also includes aggregated claims and rule enforcement. By using class actions or other forms of claim aggregations, for example, requests for preliminary injunctions, legal services lawyers were able to have an impact on large numbers of people without representing each one. Employment discrimination cases were commonly brought this way. It was infrequent that a rule would be changed, but fact situations arising out of patterns and practices of discrimination in certain industries (the trucking industry being a classic example) could be litigated at one time with remedial orders affecting large numbers of minority and women employees at once. Finally, law reform or impact work was at its most successful when it was used to enforce rules which already existed but which were not being enforced, frequently to the detriment of the poor. Examples of this include suits forcing hospitals granted federal Hill-Burton funds to treat, free of charge, poor patients as a little-enforced condition of the federal grant, and suits to enforce police action for inter-spousal violence, "family" problems which occur disproportionately among the otherwise disadvantaged.

Thus, law reform became a new, if limited activity, of the new legal services programmes and the tip of the iceberg attracted most of the attention. The hostility which law reform activities provoked must be seen as a concern not so much for the rule changes which were effected, although these were and still are significant and costly for the governments, but for what they meant about the change of structure in legal services. First, the source of funding was public and many of the lawsuits were against governmental agencies, both federal and state, particularly in the area of legal rule enforcement. Many oppo-

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ments of legal services felt it was inappropriate for the programmes to bite off the hands that were feeding them, much as the business interests on the original Legal Aid boards did not want to be sued or defended by the lawyers they were supporting. Second, the lawyers broadened their vision of what it meant to be a lawyer for the poor. Many were proactive, rather than reactive (indeed, some feel the greatest difference between legal aid and legal services lawyers was that the former usually represented defendants and the latter more often represented plaintiffs). More importantly, they saw their role as monitoring or advising their clients about how the law affected them in ways which they saw to be no different than the way other lawyers behaved. Even if the poor were not to be truly integrated in society, their lawyers would at least attempt some integration of function within their profession. This did not please some members of the profession and many outside it.

Third, this new form of activity developed in legal services attorneys an expertise in a new subject called "poverty law," which included substantive areas (welfare law, as complex as a taxation specialization) and procedural law (many of the legal services attorneys became the most sophisticated federal and constitutional litigators). The development of this expertise was supported, in the late 1960s and early 1970s by the formation of federally supported national "back-up" centres which did legal research and supported law reform efforts and occasionally became involved in lobbying efforts, on both a national and state level for rule changes or rule monitoring. The development of this expertise fed into the continuing debate about the proper forms of delivery of legal services because, to the extent expertise was necessary to represent the poor, it became more difficult to employ a judicare system which referred cases to private and less expert lawyers. Finally, and perhaps most importantly, although there was tension within the programme between "downtown or law reform lawyers" and neighbourhood office "field workers," the visibility of law reform work organized legal services lawyers around a common vision and commitment that began to "professionalize" the commitment to legal services and to nationalize it, while the programmes remained local. As Katz has argued, the sharing of law reform pleadings and job announcements in the national legal services journal tended to develop a sense of common purpose and community among legal services attorneys around the country.

48 Katz, supra note 12.
49 Id.
B. Nationalization of the Programme

Aside from the law reform efforts, other factors contributed to these developments. Many legal services lawyers were recruited from the VISTA and Reginald Heber Smith fellowship programmes, which gave them training periods, however short, that united and socialized them with other legal services lawyers. And, once the initial period of OEO funding was regularized, the national legal services programme began training lawyers in regional and national meetings that brought legal services attorneys together. Training programmes became even stronger and more national with the creation of a training centre in the central Washington office.

C. Increased Individual Service Work

At the same time, it must be remembered that the bulk of the legal services work was day to day service for clients in matters dealing with public benefits, family law, consumer transactions, employment and housing. What was notable was that the bulk was increasing. By 1971, 1,237,275 individual applicants had been seen by a legal services office, up from only 426,457 in the first year of OEO operation, 1965.50 Although this development never received as much press, it was just as significant in the opposition to the OEO programme. The large numbers of cases handled persuaded some members of the bar that there were clients available for private bar and arguments for judicare type programmes became loud and strident.51 In addition, even the individual cases were costly to governments. Many of these cases resulted in increasing the number eligible for a variety of public benefit programmes and the procedural hearings which were now almost routinely required, increased government personnel costs. As a result of their legal representation in individual matters, both clients and lawyers learned to deal with government bureaucracies and private merchants and each became more aggressive and adept at dealing with systems that otherwise preferred docility.52

D. Client Involvement and Participation

Client involvement on legal service's boards also created more active participation, occasionally causing tension within programmes among clients, boards and staff lawyers. Clients formed their own na-
tional organization to work with Legal Services (National Clients Council), a group that was then able to become active in continuing lobbying efforts for the preservation of legal services.

Because of these and other complaints about legal services, there were yearly efforts, during the Nixon administration, to eliminate legal services in Congress. Without repeating the Congressional arguments and legislative history here, a compromise was finally reached in 1974 when a new act created yet a new form of legal services delivery through the Legal Services Corporation.

E. The Legal Services Corporation Act

The purpose of the new Act was to depoliticize legal services. Compromise was possible because, while the opponents of legal services wanted to restrict the activities which could be engaged in by legal services attorneys, those on the inside were happy to remove the legal services programme from the OEO structure which subjected it to executive and legislative politics. The new Act created, in 1974, an independent entity called the Legal Services Corporation ("the Corporation"), governed by an eleven member Board of Directors, appointed by the President, with the approval of the Senate. There are some limitations on political party control. The Corporation, like the OEO, was essentially a funding organization, with its primary purpose being the disbursement of federal funds to local programmes. In this respect, there was little discontinuity with the old programme. However, the Legal Services Corporation Act attempted, quite controversially, to limit the activities of legal services lawyers. They were prohibited from taking cases having to do with school desegregation and abortion for no other reason than these were the only two successful substantive law limitations in the Congressional debates. They were also restricted in the political activities they could engage in (no picketing, striking, lobbying or working for political campaigns). In addition, to meet the demands of the judicare lobby, the Corporation was required to undertake a delivery systems study to fund and then evaluate the feasibility of alternatives to the staff attorney model of delivery. In most other respects, OEO innovations were preserved. For example, the back-up centres, class actions, law reform suits and legislative advocacy were all left untouched.

There was some initial controversy over the membership of the

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63 See George, Development of the Legal Services Corporation (1976), 61 Cornell L. Rev. 681.

64 Greene, et al., supra note 21.
original Board. After a Board consisting of several moderate law professors, prominent attorneys and the mandatory client members was constituted, however, the controversy subsided. The first Director of the Corporation, former Dean of the Stanford Law School, Thomas Erhlich, transformed the official rhetoric of the programme. Instead of publicly advocating the activist role of legal services lawyers who are to “uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and assign new social, legal and political tools and vehicles to move poor people from deprivation, depression and despair to opportunity, hope and ambition,” the goal of the new Legal Services Program was “equal access to justice.” The focus of legal services, at least in the Corporation’s public pronouncements, was to achieve minimum access for the poor to the legal system by making available two attorneys per 10,000 poor. The Corporation realigned its funding priorities so that new programmes, primarily rural programmes and those in the South and Southwest, which had received disproportionately little funding under OEO, were funded. Only time will tell whether this “access” goal was a brilliant political tactic to defuse the national attention given to legal services activities so that the local programmes could continue to go about their work quietly, or a conservative shift to a neutral and relatively easily attained and, some have argued, meaningless goal.

The major trends in legal services delivery from this new form will be reviewed below, but it is useful, once again to review the continuities and discontinuities from the earlier periods. First and most importantly, a visitor to a legal services office in 1975 would hardly notice a difference in the office from the earlier OEO period. Except for forms from the national office requesting statistical information on caseloads, now labelled “LSC” rather than “OEO” there was little to mark the change. The new administrative regulations, consistent with the statute, defined client eligibility (125 percent of the Federal Office of Management and Budget Poverty line), impermissible lawyer activity (picketing), procedures for processing client grievances, procedures for arriving at programme priorities where the resources were inadequate to meet the needs and procedures for the filing of grant proposals and financial requests. The Corporation had itself become, debatably, one of the government agencies that it had argued, in other contexts, were required to provide procedural due process when refusing aid or service.

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55 Supra note 23.
56 Legal Services Corporation Annual Report (1975-76).
57 Supra note 23.
to a potential client. Class action lawsuits were to be approved by project directors, but seldom were. In short, the work remained the same with a slight increase in the amount of federal bureaucratic intervention. Programmes were subject to evaluation from regional offices, but there was not much change in these procedures from earlier OEO days. Indeed, as Congressional appropriations for programmes increased, more programmes were created, without much of a corresponding increase in Corporation staff, so there were fewer people available to monitor and evaluate an increasing number of programmes.

By 1978, there were over 335 programmes nationwide with over 5,000 lawyers and 1,300 paralegals, funded at a level of over $250 million. The programmes remained local with their own hiring authority, local boards of directors or community advisory boards, but with a national backbone to support and protect them with money, rhetoric, training programmes and occasionally, legal services. Some local programmes were occasionally sued for what they did and the national staff stepped in to assist in representation of the programme.

Differences from the OEO programme were quite subtle. Once again the language changes are interesting. Instead of "legal services," the programme became known as "the Corporation" an ironic use of terminology considering the purpose of the programme, however unarticulated, to redistribute wealth and represent individuals, frequently against corporations. Local programmes became "recipients" (of the federal grants) or LSP's (Local Service Programmes) or "applicants" (for funds); clients became "applicants" (for service); attorneys became employees, "project directors," managers or senior counsel. In short, the terminology changes reflected a subtle bureaucratization or management orientation of the programme. This was not all bad. To some it signified the coming of age and legitimacy of the programme and some urged that legal services lawyers be treated more like members of the increasing army of federal government lawyers. Others have argued that this attempt to depoliticize the programme was dangerous, a dormant volcano, ready to explode (prophetic in light of recent events) because of the inherently political character of the work and the potential unconstitutionality of restrictions on the programme. The delivery systems study loomed quietly in the background. Some feared it would recommend dismantling of staff attorney programmes and others criticized it as "captured" by the proponents of the staff delivery system. There was some discussion of whether the access goals of funding were

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59 Greene, et al., supra note 21.
spreading insufficient funds too thin, with turnover being a constant problem in legal services and proposals for salary increases in competition with the funding of new programmes. But, the major developments which have taken hold with the new Corporation, are those with which this paper started, the professionalism of the attorneys in the 1970s and the politicization of the programme in the 1980s.

VI. PROFESSIONALIZATION OF LEGAL SERVICES LAWYERS: THE 1970s

One of the most significant developments in legal services in the 1970s was the professionalization of legal services. Several things are meant by this. First, the legal services programme had developed sufficient stability and legitimacy that lawyers could consider themselves committed to a long career in legal services work. Second, the work itself had been done for a sufficiently long period that it had become rationalized, predictable and some, like Gary Bellow would go so far as to say, routinized, so that being a legal services lawyer consisted of a regularized set of tasks. Third, training and socialization of legal services attorneys conducted on national, regional and local levels permitted legal services attorneys to learn their trade and the ideologies and tasks which comprised it. Fourth, the work of legal services lawyers became sufficiently complex and specialized that it comprised its own body of knowledge and practice, distinguishing or segregating legal services lawyers from other members of the bar. Fifth, while seemingly contradicting the fourth development, legal services lawyers gained acceptance by the rest of the bar, participating in bar activities and generally became more accepted by some, though certainly not all, parts of the establishment bar. In addition, one could say that the programmes themselves became more professionalized, regularized and bureaucratized as they employed more paralegals, specially trained to work in certain fields and developed systemized ways for dealing with client's problems (computerized pleadings, intake protocols and programme wide systems for establishing case priorities). In short, the offices became more and more like other law offices, which just happened to be funded by the government. Indeed, many programmes received and spent funds to refurbish their offices and in many communities the "neighbourhood" office was replaced by centralized offices which achieved economies of scale using modern law office technology.

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These observations can be made because the legal services programme of the 1970s was the subject of much study. Since the *Legal Services Corporation Act* authorized the delivery system study, a variety of lawyers, law professors and social scientists were invited to look at legal services programmes to supplement the usual cadre of internal evaluators. This "invited" study was accompanied by a variety of other studies done by interested, as well as disinterested, observers.61

The picture that emerges from these studies is that of the legal professional who, having become acclimated to his work, is not engaged, at least not day to day, in the political struggle of attacking those who create poverty or in redistributing wealth, that is the bogeyman of the legal services opponents. According to Gary Bellow, former legal services attorney and presently law professor and teacher of legal services lawyers, the practice of legal services lawyers in the 1970s was characterized by routine case handling, frequent case settlements, low client autonomy, encouragement rather than discouragement of the passive dependence of poor clients62 and narrowed definitions of client needs.63 Bellow attributed much of this lawyer behaviour to the crushing pressure of high caseloads,64 the complexity of cases and the emergency quality of so many of the cases. Bellow has noted:

The increasing amount of regulation and law-governed activity in the United States makes the possible number of cases in any given poor population extremely large, if not unlimited. Every conflict in the family, at school, at work or with a vast array of governmental institutions has some legal aspect — that is, it is capable of being handled in whole or in part by a lawyer. Moreover, it is now reasonably well established that demand for legal services increases with supply. The more lawyers who are available, the more clients who will seek their help.66

Thus, for Bellow, the practice that now characterizes many legal services offices (his work is based on reviewing hundreds of files and offices) is an organized and highly bureaucratized practice, in which

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61 For the major studies of legal services programmes to date see, *supra* notes 3, 6, 12, 23 and 24. As well, see, Handler, Hollingsworth and Erlanger, *Lawyers and the Pursuit of Legal Rights* (1978); Hosticks, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality* (1979), 26 Soc. Problems 599; Menkel-Meadow and Meadow, *Resource Allocation in Legal Services: Individual Decisions in Work Priorities* (1983), 5 Law & Pol. Q. 237. This list of studies in not meant to be exhaustive, but is confined primarily to empirical studies of what was and is occurring in the LSC legal services offices.


63 *Supra* notes 3 and 23.

64 Average caseloads hovered between 100 and 400 cases per lawyer per year: Auerbach Corp., Office of Legal Services Individual Project Evaluation Final Report (1971).

short cuts are pursued and established routines are followed in many cases. The legal services lawyer of this description is little different than the personal injury lawyer, who handles many claims routinely, or from the new legal clinic lawyers who hope, by systematizing everything, that they can increase their volume and income. Lipsky and Hosticka have called this form of practice a “street level bureaucracy” which prevents the client from distinguishing the legal services lawyer from the welfare bureaucrat the lawyer is supposed to be fighting.

Looking at a different group of legal services attorneys, Jack Katz has observed a similar phenomenon. For him, the class action litigators of the 1960s and 1970s have become the “managers” of the poverty industry. That is, in their efforts to reform the welfare system and other governmental systems, the activist lawyers have served to rationalize the welfare rules and bureaucracies and, in the course of so doing, have legitimated the treatment of the poor as a separate class with a need for their own specially trained lawyers and other professionals to manage their programmes. According to Katz, the ultimate legacy of legal services lawyers has been their role in “legalizing poverty,” making reform activity in the form of litigation a “professional, apolitical matter.” This reform litigation has itself become a routine matter as attorneys send, cross-country, for each other’s legal pleadings and attend conferences to discuss legal strategies as would any law firm’s litigation department. Law suits, which once commanded front page headlines, are now replicated regularly from one jurisdiction to another. The effect of this form of practice, says Katz, has been for the legal services machinery to stabilize, regularize and insulate programmes for the poor in separate, but legally monitorable, government agencies. One reason for this development is the demise of supporting and energizing social movements in the 1960s. The social movements of the 1960s were replaced with a professional interest in maintaining and improving working conditions for the lawyers themselves. Without the political and social battles to motivate them, legal services attorneys have turned inward.

This is borne out by the development in the 1970s of a unionization movement in legal services with the stated goals of limiting caseloads, increasing salaries and rationalizing professional development and advancement criteria. At the time of this writing, there were legal services unions operating in many of the major urban and state wide programmes, with a national union of legal services workers being

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67 Katz, supra note 12.
organized from New York, by the organizers of the first successful legal services attorneys strike. This concern with working conditions and hostility to management are signs of the growing pains of a programme that, as of 1980, had come of age.

In 1980, there were over 6,200 attorneys and 2,800 paralegals working in the programme and $321 million had been allocated to it. In a programme that had been committed to equality, the sheer numbers had produced the need for the management and hierarchy that so many legal services attorneys had rejected ideologically in the early years of the programme.

While the programme fought new battles internally, its lawyers generally banded together when confronted by an external enemy. This "insularity," criticized by Bellow as rigidifying the programme's approach to problems, coupled with the access formula for funding purposes, prevented experimentation with new legal forms or ways of practice. Indeed, the Legal Service Delivery System study concluded that the structured staff attorney programme was the most cost-effective form of delivery of legal services, especially law reform, due to the "professional expertise" that such offices had developed. The study acknowledged the possibility that some judicare programmes were more effective in rural areas or with respect to particular types of cases, such as family law or wills. These are cases less likely to be within the "poverty managing" repertoire of the legal services programmes. Thus, in the "quiescent" 1970s, the lawyers seemed to be shrinking from innovation and conflict and working toward standardizing their work products, with the internal control over their own work product that characterizes professional work. The programme attempted to codify standards of practice for civil lawyers for the poor.

The most troubling aspect of this "professionalization" or normalization of legal services work is its bureaucratic quality which was noted by Bellow, Hosticka and Katz. In empirical work on how legal services lawyers allocate their resources over an almost unending demand for service, it was found that the lawyers spent an average of twenty minutes on a task and were engaged primarily in routine, non-visible tasks. Legal services lawyers claimed to be in control of their work, because of their commitment to professional ideals, but their time

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**Supra** note 11.

sheets indicated otherwise: they were frequently subject to interruptions and demands by clients and others.

If this picture of professionalization and routinization of the practice is accurate, what can account for it? Are legal services lawyers of the 1970s less politically committed than their older brothers and sisters of the 1960s? The data on this question is conflicting. Earlier studies by Erlanger found, in a national sample, that legal services lawyers of the 1960s were no different from their colleagues in other forms of practice, in terms of political identification, activities, schools attended, socio-economic background. At the same time, Erlanger found that whatever it was that motivated a legal services attorney to become a lawyer for the poor, he or she was likely to remain in a career path committed to a broad conception of "the public interest" even if he or she left legal services. Data, at least for one limited area, seem to indicate that the legal services lawyers of the 1970s were indeed highly politically active and motivated and came disproportionately from the more elite schools of their area, along with an expressed purpose of making legal services their permanent career.

The increased routinization and professionalization of the programme testifies to its success. For much of the 1970s, the programme seemed well-established and during the Carter administration, substantial funding increases were almost automatic. Legal services lawyers achieved a fair amount of respectability and for those who wanted to make a career of it, the desire for seniority, longevity and predictability in work is understandable. What legal services lawyers did not receive in salary they sought to compensate for in job security. To the extent that some of the conflict with the outside world had subsided, some of the conflict has turned inward in the form of unionization and hierarchical disputes. Most of the easy-to-win lawsuits (for procedural due process, and constitutional entitlements) had been brought. The change in the composition of the United States Supreme Court made victory, in more complex suits, more difficult. Indeed, the research arm of the Corporation commissioned studies from law professors in an attempt to forge new theories to strike back at the limitations on access for the poor to federal courts begun by the conservative Burger Court. Cases were still being won at the lower federal levels and, increasingly, legal services lawyers turned to state courts and legislative advocacy. The continually expanding client rolls (over 1.5 million clients were seen in

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90 See Erlanger, supra note 24.
91 Cramton, supra note 6, at 530 and Katz, supra note 58.
92 Meadow and Menkel-Meadow, supra note 36.
1980) and other evidence, such as increasing unemployment, made it difficult for attorneys to think that they were participating in an effort which was actually decreasing poverty in the United States.

Thus, attention seemed turned away from the mission of ameliorating or eliminating poverty, to becoming the most effective possible lawyer for poor clients. This was an ironic turn of events considering the next major development in legal services. While some have labelled the quiescent period of professional development in the 1970s as a sort of personal “survivalism”, it simply foreshadowed the programmatic survivalism which characterized the next era in legal services.

VII. THE POLITICIZATION OF THE LEGAL SERVICES PROGRAMME: THE 1980s

With the election of President Reagan in 1980, the quiescence was over. Reagan and his conservative think tank, the Heritage Foundation, recommended a total dismantling of the programme attributed, by most observers, to Reagan’s own personal dissatisfaction with the legal services activism of the California Rural Legal Assistance Program while he was governor of California. With this, the fourth period of legal services development in the United States began, one which will likely be called the “Survival Era” when the final history is written.

From proposals that recommended total abolition of the programme, to recommendations that legal services compete with other social programmes on the state level for “Block Grant funding”, to a vast array of substantive limitations on what a severely gutted programme would be permitted to do, the issues were again joined. Many attorneys abandoned the programme. In Los Angeles alone, almost one-half of the programme’s attorneys accepted a “golden boot” bonus of severance pay that would enable some to set up solo practices. Many who remained were demoralized, but for those who organized and reactivated themselves, debate on the old issues was pursued with a vengeance and with a difference. Now armed with statistics of their victories and accomplishments, legal services attorneys formed alliances with their clients, the establishment and organized bar and learned how to master the complex Congressional budget process and lobby for the continuation of the programme. Ironically, the entire programme was scheduled for legislative reauthorization in 1981, as well as the usual reappropriation process, and to his good fortune President Reagan had all eleven national Board appointments to be made in his first year of office, even if the programme survived the Congressional budgetary process.

A brief review of the political issues surrounding the refunding
and reauthorization process will make clear how continuous the issues surrounding legal services for the poor are in the United States. It is too early to formulate final conclusions about this period; indeed at this writing the process has begun anew for fiscal year 1983. This fourth period of legal services development will, if it has not already done so, make clear the permanently political nature of legal services for the poor in the United States. The resolution of the political disputes this time may radically change the character of legal services. It has already politicized, in a more conventional party politics way, the legal services lawyers. At issue are the controversies with which this paper began:

1) Should funding for legal services be public or private?
2) Should the role of legal services be to provide access to the legal system for the poor on the same individual case basis as others or should legal services have a role in promoting distributive justice through commutative justice?\footnote{Hazard, Social Justice Through Civil Justice (1969), 36 U. Chi. L. Rev. 699.}
3) Should the poor have the same lawyers as the non-poor and be integrated in legal and other systems with the non-poor or should they have their own expert advocates and social systems?
4) What is the most effective (cost and efficacious) system for delivering legal services to the poor?
5) Should the poor be given legal services at all, as a matter of right, or as a gratuity for which they must be deserving and grateful?

At the time of Reagan's inauguration in January of 1981 the Legal Services Corporation was funding 323 local programmes throughout the country, at a total cost of $321 million. This money served one and half million poor people in all fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Micronesia and Guam. These funds paid the salaries and costs of mostly full time staff attorney programmes. Financial standards of eligibility, determined by national poverty level budgets, provided that in order to receive free legal service, an individual could earn no more than $5,388 annually and a family of four could earn no more than $10,463. Distinguishing the American system, from many other delivery systems for the poor, there is no independent determination of eligibility. In most offices, the client must simply sign a form indicating what his income is and neither the attorney nor any other body is expected to certify or verify this data. Con-
troversial as this procedure is, causing some critics to accuse clients of receiving free service unjustifiably or under false pretenses, it is one of the factors which accounts for the programme's low administrative costs. Less than two percent of the entire annual budget is spent on programme administration (most of it on national office salaries and expenses), with another two percent being used for programme evaluation and monitoring. In 1980, in addition to the staff attorney programme, the Corporation funded over twenty judicare projects and fifty contract arrangements under which private attorneys were paid for providing services to the poor. Many of these projects were designed to test alternative delivery systems in areas that were not amenable to staff attorney programmes such as in remote rural areas.

This funding and variety of delivery systems provided services in the following matters to the poor people of America who were able to reach a legal services office:

<table>
<thead>
<tr>
<th>Service</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family matters</td>
<td>30.3%</td>
</tr>
<tr>
<td>Housing</td>
<td>17.6%</td>
</tr>
<tr>
<td>Income Maintenance</td>
<td>17.2%</td>
</tr>
<tr>
<td>Consumer/Finance</td>
<td>13.7%</td>
</tr>
<tr>
<td>Employment</td>
<td>3.1%</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>2.9%</td>
</tr>
<tr>
<td>Juvenile</td>
<td>0.9%</td>
</tr>
<tr>
<td>Education</td>
<td>0.5%</td>
</tr>
<tr>
<td>Health</td>
<td>0.2%</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>11.7%</td>
</tr>
</tbody>
</table>

The ethnicity of those served was:

<table>
<thead>
<tr>
<th>Ethnicity</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>54.8%</td>
</tr>
<tr>
<td>Black</td>
<td>26.3%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>16.6%</td>
</tr>
<tr>
<td>Native American</td>
<td>1.6%</td>
</tr>
<tr>
<td>Asian or Pacific Islander</td>
<td>0.7%</td>
</tr>
</tbody>
</table>

The programme served a clientele that was primarily adult (only three percent of those served were under eighteen with 12.5 percent of those being served were over sixty). Data on the specific accomplishments of this work is scarce. Some have attempted measures of the income actually redistributed as a result of lawsuits brought. But, little is ac-

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74 The author is not aware of any data which support such charges.
75 Data taken from Legal Services Corporation Annual Report (1980).
76 See Johnson and Stumpf, supra note 6; Katz, supra note 12; Carlin et al., supra note 20;
tually known about the aggregate effects of successes of the programme. Unfortunately, this has permitted the debate to be waged with little edification and dooms the issues to conclusory and very partisan arguments. Thus, Reagan was able to appeal, in his efforts to defund this "socialistic" programme, to two traditional values of the American polity. The government should not give something for nothing, at great public expense, in a nation committed to free market mechanisms, however modified that free market might be in 1982, and individuals should help themselves out of the conditions of poverty as so many of our forebears, including President Reagan, have done. The Reagan critique focused on several aspects of the programme: 1) its "political activism," 2) its character as a "lawyer's programme," providing cash for lawyer salaries rather than for poor people directly, and 3) its "economic inefficiency." These critiques are essentially linked by Reagan's notions that individuals should act for themselves, directly and alone, to achieve financial security in the United States.

The obvious criticism of the critique will not be belaboured here. As others have argued elsewhere, lawyers have always been utilized by those with the resources to use them to further their individual and collective interests. To the extent that the taking of any legal action is itself a political act in a free society, permitting an individual to use a public forum to ask for the redress of grievances against either a public or private entity or individual, inevitably results in some transfer of funds or power (damages or injunction); the use of legal services by the poor, whether in an individual case or a class action is no different a "political act" than that of a corporation suing for a breach of contract.

Nevertheless, armed with its "mandate of the 1980 election" the Reagan administration developed three strategies for the destruction of legal services: 1) termination, 2) statutory limitation, and 3) political interference. The effect of these proposals on the legal services community was to re-ignite the political activism of those who believed in the purposes of the programme and to develop some more sophisticated thinking about how to deliver its service. The first two battles were fought in the halls of Congress in 1981. Without reporting more fully on the entire debate, it can be summed up by looking briefly at the Congressional budget battles. Several budget proposals provided for no

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Cramton, supra note 6.

Id. and Auerbach, supra note 12.
federal funding for legal services at all, others lumped federal governmental support for legal services with all other social services to be allocated by the states in a competitive block grant process, still others proposed substantially reduced funding which would have cut the programme by over two-thirds. These proposals were all part of the annual reappropriation process. At the same time, the enabling legislation for the Corporation, due to expire in 1981, had to be reauthorized if the programme was to continue. Proposals ranged from no reauthorization to several substantive limitations on what the programme could do that would essentially eliminate most of its functions. These restrictions included:

1) prohibition on class action suits against federal, state and local governments;
2) prohibition on virtually all legislative or lobbying activities;
3) prohibition on the use of any funds to provide legal assistance to promote defend or protect homosexuality;
4) limitations on those categories of aliens eligible for legal assistance;
5) requirements that the local governing boards of legal services programmes be appointed from or approved by local bar associations, subject to gubernatorial control;
6) transfer of the functions of the local staff attorney projects either to the private bar or, as suggested by Reagan’s Presidential Advisor and a former law professor, Edwin Maese, to the law schools, with law students providing assistance to the poor under some attorney supervision.

Taken together the intention of these proposals was to eliminate, or at least, severely curtail public or governmental support for legal services for the poor, segregate the poor by giving them either no legal service or legal services that were substantially different from those available to those who could pay, and limit service to individual casework for those morally deserving (not aliens or homosexuals), which was thought to be the bare minimum legal service necessary without effecting any substantial political or social change.

The United States had come full circle to the proposals for legal aid that began this history one hundred years ago.

VIII. THE POLITICAL NATURE OF LEGAL SERVICES FOR THE POOR

The response to these proposals makes clear one of the themes of the development of legal services in the United States — it is an essen-
tially political process, for it is a political matter to provide legal justice for the poor. Whatever the temporary success of the neutral "equal access to justice" goal in the 1970s, the change of a political regime made clear the lack of national consensus about the importance of this value. The response of the legal services community, which as described above, has now become a sufficiently stable, professional, and bureaucratic structure of its own, was to organize politically to defeat the proposals and retain its existence. The individualistic survivalism of the 1970s was channelled into a collective survivalism of the 1980s, which at the time of this writing has proven relatively successful, though not without its costs.

As the Reagan proposals were architected, several new groups were formed in response to this effort to eliminate the programme. The Advocates to Save Legal Services was formed as a national lobbying group with former Vice-President Mondale at its head, demonstrating the political partisanship of the issue. The Coalition for Legal Services, comprised of members of the legal services community, staff attorneys, paralegals, other lawyers and friends, served as a clearinghouse to monitor legislative and budgetary developments. The Alliance for Legal Services was formed, primarily by client-eligible constituents to perform similar functions. Most importantly a massive lobbying effort was begun nationwide to deal with both the appropriation and reauthorization process. Probably most visible and influential in this process was the support of the established bar. Leaders of the American Bar Association and the most significant state and local bar associations held press conferences, flew to Washington and actively lobbied in the Congress. The result of this active political participation was relatively successful. Appropriations were passed for $241 million for the fiscal year 1982, representing only a twenty-five percent cut and a temporary resolution authorizing continued functioning did not change the substantive limitations on operations that had been in existence since 1980.

The victory may be temporary, however. At the conclusion of the budgetary process President Reagan began making his appointments to the eleven member Board of Directors and appointed several individuals who were publicly hostile to the concept of legal services for the poor. In a "midnight raid" on New Year's Eve 1981, members of the new Board voted not to distribute the funds appropriated by Congress to the local programmes. This action was later rescinded. Debate then turned once again to the Congressional floors as confirmation hearings of the new Board members resulted in some of the most acrimonious hearings which ever occurred on the Senate floor. A lawsuit was filed to challenge the constitutional propriety of these appointments.
At the time of this writing, this entire process is about to repeat itself. The Congressional budget for the fiscal year 1984 has not been passed and once again proposals range from termination to transformation. It is unclear whether the legal services community can withstand annual political struggles of the magnitude necessary just to maintain the programme at marginal levels of effectiveness. With a new national staff, appointed by an unsympathetic Board it is unclear what direction will be emanating from the centre of power in Washington.

The politicization of the programme in the last few years has left in its wake some important by-products that may change the direction of legal services. These by-products are a mixed bag and it is difficult to predict, at the present time, how they will be used in the coming year. First, and potentially most significant, the legal services community became involved and skillful in the mainstream partisan political process. There is an irony in this in that the attorneys, criticized for their "political activism" have in fact become more active and visibly involved in the political process. Some would say that it is political activity in the legislative domain that is more appropriate, but this activity has led to the development of skills in lobbying and budgetary processes that may easily be transmitted to substantive claims for the poor (to wit, the current political struggles over Social Security and Medicare). Second, the established bar has reaffirmed its support for legal services. It is potentially problematic because this powerful lobby could easily be transformed into support for judicare programmes, although this has not yet happened. At the same time, as some have pointed out, the most successful lobbying came not from the beneficiaries of the programme, the client-eligible poor who are losing countless other benefits in this era of Reaganomics, but from lawyers, lending support to those who argue that the Legal Services Corporations Act is essentially a full-employment-for-lawyers act. There may also have been a lost opportunity for working with clients to build the community organizing strategies, useful in other contexts, advocated in the 1960s. The failure of clients to participate actively in this battle, however, may signify the importance of legal services. Less than twenty years after the founding of modern legal services, the poor are no more able to represent themselves efficaciously in the public arena than they were when the "War on Poverty" was first declared.


Sadly, this "successful" lobbying effort was not without its costs. Without final results, it can be reported impressionistically, from time studies of legal services lawyers during 1981, that for many individual attorneys, and for some whole programmes, time spent on the survival effort involved a substantial part of the work effort. In addition, because of fears that the programme would be cut, many attorneys left the programmes in anticipation of lay-offs. Most major programmes were forced to close some offices, suspend client intake altogether and eliminate whole classes of case service. In Los Angeles, for example, the family law center was closed, providing no free service for divorce (reminiscent of 1880). Thus, while the legislative termination proposals were not successful, Reagan may have been successful in sufficiently crippling the programme with his strategy to essentially suspend meaningful client service. One by-product of this fallout, however, seems promising. Many of the attorneys who left legal services took the opportunity to continue their work in other forms, continuing their commitment to access to justice work. It can be reported that of the attorneys in legal services programmes who I have been studying for two years, approximately one-third of them left in this period, the vast majority of whom went into sole or small practices with other legal services attorneys to continue their work on a low fee basis. If the judicare systems replace staff attorney programmes, these are the attorneys (former legal services attorneys) who will seek such funds. That process is likely to be extremely political and the lessons learned in the present era may be quite relevant.

Furthermore, those programmes that remain have begun to explore alternative forms of financing. Some programmes are exploring the legal clinic structure, with a small fee-for-service payment in volume practices going to finance other forms of work. Other programmes have started to seek private funding from foundations and corporations. (Once again we return to the history of 1880.) What these attorneys have learned is that government financing may have some of the same limitations of private funding — ebbs and flows depending on the political and economic climate and substantive limits on the work that can be done with private financing.

There are two possible interpretations of these developments. One is that a more creative period of finance and work structure has begun with a balance of private and public funding to support different types of work in different types of formats. This is the more hopeful view.  

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81 Erlanger, supra note 24.
The other is that legal services is faced, in 1982, with the same dilemmas it faced in 1880 — a lack of commitment to the principle of legal services for the poor. For, in their present search for private funds to cushion the loss of public funds, legal services attorneys hope, perhaps naively, that they will receive private support with no strings attached. In a recent presentation to one legal services programmes’ Board of Directors, one well-known foundation confidentially suggested, that the programme “package” its cases and present pieces of its litigation for financing to those who found the causes “worthy”. Cases involving the plight of handicapped children were considered worthy. But would lawsuits against employers for discriminatory hiring or unsafe working conditions fare as well? Thus, this new era has us facing the same questions with which we began. More poor people have received legal services, but the number of poor in the United States is increasing, due to social programme and cash payment cuts, at the same time that public commitment to legal services for the poor seems to be decreasing. The time is certainly ripe for the exploration of other alternatives.

VIII. DEVELOPMENTS IN LEGAL AID OTHER THAN LEGAL SERVICES

Although this report has been concerned primarily with the provision of legal services for the poor in its most common form in the United States, the legal services programme, it is important to review briefly, however, other developments that may have some bearing on the poor’s access to legal justice. There were two significant developments in the area of civil justice in the late seventies and early eighties. The first was a short-lived proposal that would have made pro bono publico (free legal services for public good) work mandatory for all attorneys. The Kutak Commission on the Revision of the Code of Professional Responsibility proposed a Model Rules of Professional Conduct provision which would have required all American lawyers to devote a stated amount of time on an annual basis to providing free legal services. The proposal was extremely controversial both in terms of defining the permissible categories of work (for example, would service on boards of hospitals, charities and school boards count?) and enforcement. After an intermediary proposal which first, decreased the number of hours and then made the proposal optional and voluntary, the proposal was dropped. Although some argued that it was essential to communicate the public service aspect of our publicly chartered but privately controlled profession by requiring all lawyers to do some public service, most found this proposal to be counter to the American principles of individual freedom and free (meaning you must pay for
what you want) enterprise. Had this proposal been adopted it would have represented a truly revolutionary development in the access to justice movement, though it remained unclear how securities lawyers would have delivered services to welfare clients. Although it was ultimately unsuccessful, the fact that this proposal became a topic on the public agenda of American lawyers suggests that it may become a possibility at a future time.

The second development has also yet to be realized. In a case involving the termination of parental rights of a woman prisoner, the Supreme Court held that there was no constitutionally mandated right to counsel in such civil cases. Yet some commentators have suggested that this case will eventually be limited to its special facts and the case has set the stage for a possible future holding that lawyers will become a matter of constitutional right in civil matters. Lawyers already are required in some civil proceedings — legal victories that were won in the era of procedural due process reform of the sixties and seventies.

In the civil area, public interest and legal rights organizations such as the Center for Law and Social Policy, the NAACP, ACLU and the Women's Legal Defense Fund, continued to bring cases on behalf of the underrepresented in American society, primarily in the form of test cases, financed by private contributions and special government grants. Unfortunately, as legal services programmes and other social action programmes began to join the competition for funding, some of these programmes began to fall on hard times. The Council for Public Interest Law was formed as a consortium of public interest firms searching for ways to maintain a stable source of funding and presence in the American legal arena. Ironically, the vagueness of the term "public interest" has permitted the founding of such organizations as the Pacifica Foundation and the Mountain States Legal Defense Fund, on the same basis as the older organizations, where the purpose is to protect conservative business and anti-labour, anti-environmental interests.

In other civil developments, law schools continued to supply an additional source of legal services for the poor as clinical education grew in many American law schools. In such programmes, law students perform the tasks of lawyers, usually under the supervision of a law pro-

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83 Lassiter v. Dept. of Social Services, supra note 5.
85 See Weisbrod, et al., supra note 73.
ional professor. Such services have been offered to those unable to pay for lawyers on the assumption that no one who could pay would want a law student lawyer. Unions and teachers and other employee groups began in the late 1970s to provide group and pre-paid legal service plans to their members, but this phenomenon has not yet proven as popular as first imagined and given the present economic recession it appears unlikely that such benefit programmes will increase in the short run. The legal clinic movement appears quite visible in the United States with volume, low-fee-for service offices opening up in department stores and other locations. To the extent that anything is known about clinics at this time, and there is little hard data, clinics appear to be serving a working class to low middle income clientele. Even at their lower rate, fees are still too high for those on fixed government benefit incomes. Furthermore, there is no firm evidence that legal clinic fees are in fact lower than those charged in more conventional practices.

There have been other efforts to increase access to the legal system by decreasing the costs of access. In some states pleadings and packages legal documents are sold commercially so that individuals can proceed without a lawyer at all, usually in such matters as non-fault divorce or small claims courts. In addition, Neighborhood Justice Centers and other experiments in mediation have attempted to eliminate the cost of judges, formal pleadings and other aspects of the formal justice system. Increasingly, however, developments such as these are criticized on the basis that the poor must accept a cheaper, second justice that the better off would never choose and that prevents any real confrontation of social and political injustice in the formal justice system, which is best able to order rule changes.

Legal assistance for indigent criminal defendants remains the province of localities. Because the United States Constitution requires the “effective assistance of counsel” in all criminal matters, the prosecuting jurisdiction must supply lawyers for the defendants. The most common form of criminal legal aid is the local Public Defender programme, a full-time salaried staff programme that resembles the legal services office. Some localities contract with members of the local bar to provide all or some of the criminal legal services (but in other localities, only major felonies are contracted out). Politically there has always been an alignment or affinity between legal service and public

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86 Supra note 64.
87 See Abel, id.
defender lawyers and programmes but, except for the voluntary membership National Legal Aid and Defender Association, there are no formal ties between the two programmes. In recent years there have been several proposals to create a national independent funding organization, similar to the Legal Services Corporation, for criminal legal aid, as a way to standardize and nationalize the services provided. In the present political climate, however, it seems unlikely that such a proposal will succeed.

IX. SUMMARY AND CONCLUSIONS: THE POLITICS OF LEGAL AID

This report has outlined three distinct historical periods of the development of legal aid for the poor in the United States and has suggested that a fourth has begun. Yet, despite the existence of some form of legal aid for the poor for at least one hundred years, the notion that legal aid should be as a matter of right, and not privilege, in as legalistic a society as the United States, is not yet widely or publicly accepted. There are now many more lawyers and other forms of legal professionals providing such services and the expenditures on such programmes have increased exponentially over the years. There is now an establishment of poverty lawyers who are sophisticated and specialized in what they do. Yet, the surprising thing is the continuing presence of the same issues which faced legal aid in the early years. Whoever or whatever provides funds, legal aid will want control over what it does. In this respect the poor are different from others who receive legal services who are able to decide for themselves, with their lawyers, what it is that they want done, whether it be lobbying, lawsuits or general business advice. It is clear that without the ability to pay for your own legal service in the United States, you cannot control what will be done. (This can be contrasted, in many respects, to the provision of medical services to the poor, where some choices remain with doctor and patient.) Why is this so?

Going to court is a political act. Contesting a governmental action that threatens to terminate benefits is a political act. Demanding that a landlord maintain a home in habitable condition as a condition of being paid is a political act. All of these acts are assertions or expressions of power or of a right. Some powers or rights can be given or shared without necessarily diminishing other people’s enjoyment of them: other forms of power or rights are necessarily competitive. Thus, providing those without power or resources with the means to attempt to obtain some is as much a political issue as the protection of those with power and resources. The debate surrounding the substantive limitations of
what legal services attorneys can do poses this issue at its most extreme. Why else would opponents of class actions or suits against governmental entities fight so hard to prohibit these forms of legal action unless they feared they might be successful? If the legal system itself were not political what would these opponents have to fear from decisions by neutral and learned judges? At their most powerful, attorneys are nothing more than advocates for their clients and a disinterested judge, ironically, politically appointed or elected, will determine the merits of the cause. The American Code of Professional Responsibility for lawyers permits advocacy for the extension or change of a rule of law. This advocacy, it seems, must be purchased. And, the question now is who will pay for it?

This report may seem polemical, but in 1984, in the United States, the question of what legal services will be available for the poor is highly polemic. Because the American legal system provides some unique procedural and substantive devices for access to justice and rule change, it is that much more controversial because of the role legal change may play in social change. Thus far, the United States has provided primarily one answer to that question. Publicly funded, professional staff attorney programmes which segregate the poor from others in receipt of their legal services supplemented by some private funding and some few alternative delivery models are the norm. Whether there could be other answers to that question, in the form of a greater diversity of legal services delivery must depend, to a large extent, on the fund available for this purpose. This issue is both a political issue and a professional one. Will enough funds be allocated, and with sufficient freedom to provide adequate legal services at all, let alone in new forms? Will the professional poverty lawyers maintain the commitment to their clients to do what is best for poor people, rather than for themselves? These are the issues which will emerge in what is hoped will be a new era of legal aid.