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# A SHORT HISTORY OF POVERTY LAWYERS IN THE UNITED STATES

*Deborah J. Cantrell\**

## INTRODUCTION

Since at least the late 1800s, lawyers in the United States have worked for the poor without charge. These lawyers have been known by many labels: legal aid lawyers, progressive lawyers, legal services lawyers, and poverty lawyers. This article uses the label “poverty lawyer” to include all lawyers, at any time, who have focused on using law, the legal system, and other methods of advocacy, to try to change political and social institutions in ways that ensure every person has her basic needs met for shelter, food, clothing, and, if able, work. A poverty lawyer primarily focuses on issues of wealth and class, distinguishing her from other lawyers working with the poor who focus on issues such as race. A poverty lawyer today likely helps her clients with such matters as maintaining welfare benefits, challenging changes in food stamp regulations, lobbying her state legislature to increase funding for free medical care for poor children, and suing a real estate developer for failing to include the appropriate number of affordable units in a new housing complex.

Through the years, poverty lawyers have faced a continuing challenge – how to help the poor change their conditions. Poverty lawyers have had to consider what tactics will work: litigation, legislative lobbying, social protest, or some other method. They have also faced a continuing dilemma – whether to focus on the individual client and solve the specific problem she has, or focus on changing the political and social structures that create and enforce poverty. Further, poverty lawyers have to consider the interplay between their tactics and their style of working with clients.

This article will first briefly sketch the history of poor people’s lawyers from the late 1800s to the early 1960s, when in 1964, for the first time, the federal government allocated substantial funding to lawyers for

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the poor. The article will then focus on the work of lawyers in the 1960s, examining their strategy to create a constitutionally-based "right to live." Finally, the article will discuss the demise of that strategy and poverty lawyers' subsequent assessment of more effective ways to practice law for poor people.

The work of poor people's lawyers remains vital today. Poverty lawyers currently have a larger number of poor clients than their predecessors, as the disparity in income between the poor and the wealthy continues to expand, and the current political climate is at best indifferent to the needs of the poor. Poverty lawyers continue to struggle with how best to serve the poor.

## EARLY PROVISION OF LEGAL SERVICES TO THE POOR

The organized provision of legal services to the poor in the United States developed in the last quarter of the nineteenth century, with the onset of full-scale industrial society. The earliest legal services for the poor almost exclusively came through private or municipally-funded legal aid societies.<sup>1</sup> Legal aid societies operated in several large cities and some smaller cities, but seldom in rural areas. The organizations generally worked without consulting their counterparts, and there was no national or coordinated structure for legal assistance to the poor.

The earliest legal aid society was established in New York City in 1876 and provided, as its original mission, free legal assistance to poor German immigrants.<sup>2</sup> It called itself, simply, the Legal Aid Society. By 1889, it had expanded its services to all poor persons. The Legal Aid Society exemplified the poverty law practice of the day. It focused on serving individual clients with respect to whatever legal problem was presented by the client. It did not attempt to survey the poor community to determine what its most pressing problems might be or whether the law might present any opportunity for systematic change.

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1. See generally EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* (Greenwood Press 1951); see also William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 242-46 (1998).

2. MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973*, 11 (Yale University Press 1993).

Consequently, the scope and content of the Society's legal work was random, driven by the specific problems brought in by clients. Further, the Society relied heavily on financial contributions from lawyers in private practice and, as such, was reluctant to venture into legal areas that might either offend the political sensibilities of its financial supporters or appear to be in direct business competition with them.<sup>3</sup> On the other hand, it was reluctant to solicit municipal funds as it did not want to be subjected to the "uglier side of New York politics" – rampant cronyism.<sup>4</sup> The Society wished to retain its attorneys solely based on "fitness".<sup>5</sup> In other words, it wanted to hire an attorney because she wished to work with the poor, not because her uncle held an important position in city government.

Settlement houses developed at around the same time as legal aid societies.<sup>6</sup> Settlement houses solicited college educated- men or women to live in poor neighborhoods with the "laboring classes" so the college-educated could better understand the conditions of the poor and the need for reform.<sup>7</sup> Settlement house members generally were not lawyers.<sup>8</sup> However, as they worked with neighbors on issues of unemployment, child labor, and women's health, members quickly saw the need for, and role of, law reform.<sup>9</sup> Unlike legal aid societies, settlement houses focused on structural change and relied on political and social organizing.<sup>10</sup> Further, settlement house members advocated for more balanced lives for their neighbors and encouraged them to participate in recreation and art.<sup>11</sup> The settlement house interest in promoting cultural and physical-health opportunities for the working class, in addition to improving economic status, distinguished it from other social service organizations at the time.<sup>12</sup>

The contrast between a legal aid society's work on individual cases on a first-come, first-served basis and a settlement house's selective case work

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3. DAVIS, *supra* note 2, at 15; see also Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805, 808 (1967) (remarking that many legal aid societies relied on Community Chest or United Funds and "because landlords and merchants are likely to be important contributors to these charities, a Legal Aid attorney who acts aggressively against such persons jeopardizes the society's income").

4. JOHN M. MAGUIRE, *THE LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY 1876-1926*, 255-56 (Fred B. Rothman & Co. 1982).

5. *Id.* at 255.

6. DAVIS, *supra* note 2, at 13.

7. *Id.* See also JANE ADDAMS, *FORTY YEARS AT HULL HOUSE (1935)* (describing her life at Hull House in Chicago from the late 1800s to the early 1900s).

8. DAVIS, *supra* note 2, at 14.

9. *Id.*

10. *Id.*

11. ADDAMS, *supra* note 7, at 342-99.

12. *Id.* at 125-27.

with the goal of structural reform represents a conflict regarding the role of poverty advocates in society that has endured throughout the history of poverty work. Under the legal aid society model, lawyers should meet the poor person's individualized legal problems.<sup>13</sup> The greater problem is not so much that social or political institutions are improperly set up or unavailable to the poor, but that the poor lack legal counsel necessary to maneuver through the institutions.<sup>14</sup> The role of poverty lawyers is to guide their clients through the system and help them follow the rules.<sup>15</sup> Thus, the poor gain access to those benefits to which they are entitled – nothing more and nothing less.<sup>16</sup> Under the settlement house model, advocates, including lawyers, should challenge the basic social and political institutions because those institutions are created and operated by people unconcerned with the lives of the poor and uninterested in changing conditions for the poor.<sup>17</sup> The problems of an individual client are important only to the extent that they illustrate the underlying problem with a social or political institution.<sup>18</sup> Legal advocacy is part of a larger strategy that has as its goal systemic reform.<sup>19</sup> Lawyers work with organizers, social workers, and lay advocates for coordinated change in many different arenas.<sup>20</sup>

In the early 1900s, many settlement houses aligned themselves with the Progressive political platform, which included support for labor unions, women's suffrage, and limitations on child labor.<sup>21</sup> Wealthy patrons of the settlement houses were displeased with such an alignment and cut financial support to the houses.<sup>22</sup> Many settlement houses were unable to find replacement funding and closed.<sup>23</sup> After that, legal aid societies were often the primary providers of services to the poor and, thus, its model of individual client service predominated.<sup>24</sup> However, in the early 1960s, the model of lawyer as grand strategist came forward once again in New York. Not surprisingly, it sprung from a settlement house.

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13. DAVIS, *supra* note 2, at 11.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 2-3.

18. *Id.* at 14.

19. DAVIS, *supra* note 2, at 14.

20. *Id.* at 3.

21. *Id.* at 14-15.

22. *Id.* at 15.

23. *Id.*

24. *Id.*

## LEGAL SERVICES DURING THE WAR ON POVERTY

One of the original settlement houses was Henry Street Settlement, serving the lower east side of New York. It opened in 1893 as a visiting nurse program run by two nurses, Lillian Wald and Mary Brewster.<sup>25</sup> By 1895, Wald had garnered a patron who agreed the nurses' work needed to expand to include other community work, and purchased Wald and Brewster a house on Henry Street.<sup>26</sup> The house became a neighborhood center for reform campaigns concerning tenement conditions, children's health, workers' rights, women's suffrage and other issues raised by neighbors.<sup>27</sup> Henry Street Settlement flourished under Wald's direction, and, after her retirement, under the direction of Helen Hall, who came to Henry Street in 1933.<sup>28</sup>

In 1957, the staff at Henry Street crafted a detailed juvenile delinquency prevention plan that moved away from the prevailing model of mental health casework, and proposed instead a model to create opportunities for at-risk youth to participate constructively in their community.<sup>29</sup> True to its settlement house history, the plan envisioned organizing and mobilizing the community through its parents, teachers, recreation sponsors and the like to alter the social structure.

The program was funded as Mobilization for Youth (MFY) in 1962 with a combination of federal, city, foundation, and private funds.<sup>30</sup> MFY did not originally include legal services, but its staff quickly saw the clients' need for legal advice along with social services. By 1963, MFY added a legal unit and hired Edward Sparer as its legal director.<sup>31</sup>

Sparer came to MFY with a background as a labor organizer. He

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25. BEATRICE SIEGEL, LILLIAN WALD OF HENRY STREET 31-42 (Beatrice Siegel, 1983).

26. *Id.* at 42.

27. *See generally* SIEGEL, *supra* note 25.

28. *See generally* HELEN HALL, UNFINISHED BUSINESS (1971).

29. *See* DAVIS, *supra* note 2, at 27-28.

30. *Id.*

31. *Id.* at 28-29. The Ford Foundation provided funding for the legal unit and in addition to funding MFY, it funded three other similar programs placing legal services within a larger multiservice social agency. The three programs were located in Boston, New Haven, and Washington, D.C. *See* Alan W. Houseman, *Political Lessons: Legal Services for the Poor - A Commentary*, 83 GEO. L.J. 1669, 1672 (1995).

dropped out of college in 1949 to pursue labor organizing on behalf of the Communist Party.<sup>32</sup> He left the Communist Party in 1956 after learning the details of Stalin's murderous purge in the Soviet Union during the 1930s and 1940s.<sup>33</sup> He then enrolled in Brooklyn Law School (the administration was willing to admit him without a college degree) and was graduated in 1959.<sup>34</sup> He remained passionate about union organizing and committed to social activism, and had a strong vision of the role of the lawyer in that activism. For Sparer, a lawyer was not

merely a technician whose function was to help the . . . system conform to what the elected representatives of the majority had decreed it should be. [The lawyer's] mission was to utilize the legal process to help change the very nature of the . . . system and, thereby, to change the ground rules of American society.<sup>35</sup>

Sparer saw MFY as the perfect place to start his structural reform work and welfare laws. Given its prominent role and institutional responses to poverty, it was the perfect target.

Sparer had sympathetic anti-poverty colleagues in Jean and Edgar Cahn, two politically active lawyers in Washington, D.C. The Cahns both were graduated from Yale Law School in 1962 and remained in New Haven to establish Community Progress, Inc. (CPI), a Ford Foundation-funded pilot project in New Haven.<sup>36</sup> CPI was designed as a community-based social services program and included a "neighborhood law office" staffed by Jean Cahn and another lawyer.<sup>37</sup> The Cahns moved to Washington D.C. in 1963, where Edgar worked as special counsel and speech writer to Attorney General Robert Kennedy.<sup>38</sup> As President Johnson announced his War on Poverty, the Cahns began an astute campaign to include funding for legal services in the developing anti-poverty legislation.

Jean and Edgar Cahn were adamant that any new legal services delivery system actively include a "civilian perspective".<sup>39</sup> The Cahns

32. DAVIS, *supra* note 2, at 23.

33. *Id.* at 24.

34. *Id.* at 24-25.

35. Edward V. Sparer, *The Right to Welfare*, in THE RIGHTS OF AMERICANS – WHAT THEY ARE, WHAT THEY SHOULD BE 84 (Norman Dorsen ed., Pantheon Books 1971).

36. Biography of Jean and Edgar Cahn, available at <http://nejl.wcl.american.edu/cahnarticle.html>.

37. *Id.* The other lawyer was Frank Dineen who continues his work today in New Haven as a poverty lawyer. Dineen is currently the deputy director of New Haven Legal Assistance Association and an adjunct clinical professor at Yale Law School.

38. See [http://www.timedollar.org/About%20us/About\\_Edgar\\_Cahn.htm](http://www.timedollar.org/About%20us/About_Edgar_Cahn.htm).

39. Edgar S. & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317

believed that poverty could not be ended solely by “a war – fought by professionals on behalf of the civilian population,” but that civilians needed to be trained and encouraged to become “indigenous leaders” in order to empower their own communities.<sup>40</sup> The Cahns emphasized citizen involvement, rather than impact litigation, out of concern that attorneys pursued litigation without client involvement or input.<sup>41</sup>

The Cahns knew the Johnson administration included a handful of social scientists brought on during the prior administration of John F. Kennedy, including Leonard Cottrell. Cottrell strongly believed that local communities must be involved in designing and implementing social services.<sup>42</sup> His sociology research was the basis for Henry Street Settlement House’s juvenile delinquency prevention plan. He was also the chairperson of the federal grantmaking agency providing funds to MFY in 1962. Cottrell joined the Kennedy administration in 1960 to work on a nascent anti-poverty program being developed under the rubric of juvenile delinquency prevention.<sup>43</sup> In fact, it was the work of Cottrell and his colleagues that formed the basis for President Johnson’s War on Poverty.<sup>44</sup>

Ultimately, Johnson’s anti-poverty legislation passed in 1964 and created the Office of Economic Opportunity (OEO). The new head of the office was Sargent Shriver, the brother-in-law of deceased President John F. Kennedy. Jean and Edgar Cahn then convinced Shriver that certain OEO funds should be earmarked for legal services, and by 1965, he had a separate Legal Services Program within the OEO.<sup>45</sup> By 1966, OEO had committed \$27.5 million to legal services programs throughout the country, in large and small cities as well as in rural areas.<sup>46</sup> OEO funded some existing legal aid societies, but most of the programs it funded were newly created by poverty lawyers. By 1967, funding had increased to over \$40 million to 300 legal services programs.<sup>47</sup>

For the first time, the United States had an integrated system of legal services for the poor. The legal services guidelines issued by the OEO reflected both the Cahns’ vision of neighborhood legal offices, grounded in

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(1964).

40. Cahn, *supra* note 39, at 1329-34.

41. *Id.* at 1321-22.

42. DANIEL KNAPP & KENNETH POLK, SCOUTING THE WAR ON POVERTY: SOCIAL REFORM POLITICS IN THE KENNEDY ADMINISTRATION 26-29 (1971).

43. *Id.* at 13, 53-57.

44. *Id.* at 13.

45. HOUSEMAN, *supra* note 31, at 1673-76; *see also* note, *Neighborhood Law Offices*, *supra* note 3, at 806.

46. Note, *Neighborhood Law Offices*, *supra* note 3, at 806.

47. Quigley, *supra* note 1, at 248.

local communities, and Edward Sparer's vision of poverty lawyers as social reformers.<sup>48</sup> The guidelines called for each neighborhood legal program to have community members on its board and encouraged programs to represent poor persons' organizations.<sup>49</sup> As the director of the Legal Services Program stated in 1965:

Lawyers must be activists to leave a contribution to society. The law is more than a control; it is an instrument for social change. The role of [the] OEO program is to provide the means within the democratic process for law and lawyers to release the bonds which imprison people in poverty, to marshal the forces of law to combat the causes and effects of poverty.<sup>50</sup>

In a further effort to coordinate local legal services work and to help support law reform, the OEO also created and funded a new kind of legal services program: the support center.<sup>51</sup> Support centers canvassed field programs for possible test cases that could be used to raise systemic challenges to poverty. Support centers also provided technical assistance and training to advocates in field programs and acted as clearinghouses to ensure that local and regional developments were shared across the country.<sup>52</sup>

Additionally, the OEO created fellowships to support one to two years of work by new poverty lawyers. The fellowships were named after Reginald Heber Smith, a one time legal aid lawyer and then private practitioner in Boston. In 1919, Smith published the results of an extraordinarily comprehensive nationwide study of the system used to deliver legal services to the poor.<sup>53</sup> Smith concluded in his survey that the poor were not receiving adequate legal services and that poverty lawyers would make more of a difference if they focused on broad legal reforms.<sup>54</sup> Smith's survey did not lead to radical restructuring of legal services for the

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48. When Edgar and Jean Cahn finished their work on the OEO legislation they remained in Washington D.C. In 1972, they founded Antioch School of Law, the first clinical law school in the country. They left Antioch in 1980 after a dispute with Antioch University over fiscal autonomy for the law school. In 1987, the Cahns founded the Time Dollar Institute which supports community efforts to create service exchange programs (one hour of community service equals a "time dollar" that can be exchanged for another time dollar of some other community service). Jean Cahn died in 1991 and Edgar Cahn continues his work with the Institute. See [http://www.timedollar.org/About%20us/About\\_Edgar\\_Cahn.htm](http://www.timedollar.org/About%20us/About_Edgar_Cahn.htm).

49. HOUSEMAN, *supra* note 31, at 1676-77.

50. Quigley, *supra* note 1, at 246.

51. *Id.* at 248; see also Houseman, *supra* note 31, at 1682-83.

52. Alan W. Houseman, *Can Legal Services Achieve Equal Justice*, at <http://www.clasp.org/pubs/legalservices/dialogue.htm>.

53. DAVIS, *supra* note 2, at 16.

54. *Id.*

poor, but he is widely credited as the “father of modern legal aid.”<sup>55</sup> The “Reggie” fellowships, as they were known, were prestigious and attracted applicants who were bright, energetic, and zealous.<sup>56</sup> During the first two years of Johnson’s War on Poverty, the Reggies, the new legal services programs, and the support centers combined to create a new network of poverty lawyers across the country. The OEO encouraged the new network to provide direct client services, reform litigation, client education, and community outreach.

This was the setting in which Edward Sparer and others developed their legal strategy to create what they referred to as a right to live. Sparer conceived of the “right to live” as a fundamental opportunity for every person in the United States to have enough resources to feed, clothe, and house herself. If people could not do that on their own, then the government had a constitutional obligation to provide such necessary support. Sparer’s right-to-live strategy culminated in the case *Goldberg v. Kelly*.

### GOLDBERG V. KELLY

In 1967, John Kelly was a twenty-nine-year-old disabled, homeless, black man receiving welfare in New York.<sup>57</sup> His welfare worker had ordered him to move into a single room occupancy hotel<sup>58</sup> Kelly knew was full of drunks and addicts.<sup>59</sup> Kelly moved into a friend’s apartment without his caseworker’s permission, resulting in the cancellation of his welfare benefits.<sup>60</sup> Kelly’s only financial resource had been his welfare checks, and without them he was unable to cover his share of the apartment rent or pay for food.<sup>61</sup> He was forced to sleep on the street.<sup>62</sup>

Although welfare regulations did not permit the caseworker’s actions, Kelly had no way of challenging them before his benefits were terminated. His only option was to challenge his caseworker’s actions afterwards and

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55. See 1998 Reggie Reunion, *excerpted at* <http://www.equaljusticelibrary.org.cnhost.com/alumninews.asp>.

56. See 1998 Reggie Reunion, *excerpted at* <http://www.equaljusticelibrary.org.cnhost.com/alumninews.asp>.

57. Complaint of John Kelly, et al. v. George K. Wyman, Civ. No. 394-1968 (United States District Court for the Southern District of New York), *excerpted in* R. COVER, O. FISS & J. RESNIK, *PROCEDURE*, 61-64 (1st ed. 1988) (hereinafter *Kelly Complaint*).

58. Single room occupancy (SRO) hotels are mainly used as temporary housing by those who are homeless and are often characterized by their marked dilapidation.

59. *Kelly Complaint*, *supra* note 57, at 64.

60. *Id.*

61. *Id.*

62. *Id.*

hope to have his benefits reinstated,<sup>63</sup> a process that could take anywhere from a month to almost a year.<sup>64</sup> During that time, Mr. Kelly would have no source of income.

John Kelly's case was not unique. He went to the MFY office, told his story, and learned MFY attorneys were looking for plaintiffs like him. The lawyers wanted to challenge the welfare department's practice of terminating benefits the moment a caseworker determined a recipient ineligible. Rather, they wanted to allow the recipient an opportunity to challenge the ineligibility finding before benefits were terminated. Poverty lawyers throughout New York City had reported that the welfare department used the threat of termination as a powerful weapon to cow recipients and discourage them from complaining about the treatment they received from their caseworkers.<sup>65</sup> MFY's lawyers reasoned the first step in creating a right to live was to have procedural safeguards in place to prevent improper termination of welfare benefits.<sup>66</sup>

MFY argued that the Fourteenth Amendment of the United States Constitution prohibited New York from terminating welfare benefits without first providing a hearing at which the recipient could challenge the action.<sup>67</sup> The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property, without due process of law . . ."<sup>68</sup> MFY argued that welfare benefits were property, just like land or a car.<sup>69</sup> If MFY could convince a court that welfare benefits were property, then existing case law would support the proposition that due process required a hearing before welfare benefits could be deprived by termination.

At the time the case was being developed, the notion that welfare benefits constituted a legal property right was novel.<sup>70</sup> Unlike land, a car, or even patents, welfare benefits were considered by many lawyers and lay persons to be charity. As largess, welfare could be given or taken away arbitrarily, even at the whim of a mean-spirited case worker. However, legal scholars had recently challenged that view.

In 1964, law professor Charles Reich, published an article entitled

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63. See DAVIS, *supra* note 2, at 86.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 96.

68. U.S. CONST. amend. XIV, § 1.

69. DAVIS, *supra* note 2, at 84-86.

70. *Id.* at 85-86.

“The New Property.”<sup>71</sup> He argued that individuals were becoming more dependent on objects such as driver’s licenses, professional licenses, government contracts, agricultural subsidies, veteran’s benefits and welfare as means of support.<sup>72</sup> Reich asserted that if our society continued to depend on these objects, then it must be willing to grant the status of “property” to ensure the government did not abridge important individual rights and freedoms. Reich argued that the granting of largess gives power to a government, and that if power is not checked, such as by the Bill of Rights, then the power increases to such an extent that individuals become powerless.<sup>73</sup> As Reich noted:

[T]he growth of government power based on the dispensing of wealth must be kept within bounds. . . . [T]here must be a zone of privacy for each individual beyond which neither government nor private power can push – a hiding place from the all-pervasive system of regulation and control. Finally, it must be recognized that we are becoming a society based upon relationship and status – status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other. Status must therefore be surrounded with the kind of safeguards once reserved for personality.<sup>74</sup>

John Kelly’s attorneys incorporated Reich’s analysis into Kelly’s lawsuit. If the lawsuit were successful, and the court were to find that welfare benefits were property deserving of procedural protection, then a major social shift would follow. The creation of a substantive property interest would ensure procedural protections. The orderly use of procedure would then protect welfare recipients from arbitrary demands of their caseworkers. Orderly process would fuel the welfare rights movement.

The case was filed in federal district court on January 29, 1968, and included five other plaintiffs who had stories similar to Kelly’s.<sup>75</sup> After some preliminary maneuvering by both sides, the case was assigned to a

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71. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

72. *Id.* at 734-37.

73. *Id.* at 746-56.

74. *Id.* at 785.

75. The five other plaintiffs all arbitrarily had their welfare benefits terminated. Their stories are detailed in the Kelly Complaint, *supra* note 58, at 61-72. The case was captioned, John Kelly et al. v. George K. Wyman. Wyman was then the commissioner of the State of New York Department of Social Services. Also named as defendants were the commissioner of the Department of Social Services for the City of New York and all members of the State of New York Board of Social Welfare. When Wyman was replaced by Jack Goldberg as state commissioner, Goldberg was substituted as the defendant. Thus, when the state ultimately appealed the case to the United States Supreme Court, it was known as Goldberg v. Kelly.

special three-judge panel at the plaintiffs' request.<sup>76</sup> The court granted the request for the unusual process, recognizing the case raised an important constitutional issue. On November 26, 1968, the three-judge panel issued its decision finding that welfare recipients were entitled to a hearing before their benefits were terminated.<sup>77</sup> It was a monumental success for plaintiffs.

The defendants quickly appealed the case to the United States Supreme Court.<sup>78</sup> Although the Supreme Court refused to stay the lower court's ruling pending the appeal, the pendency of the case left the new right to a pre-termination hearing in doubt.<sup>79</sup> The case was argued to the Supreme Court in November 1969, almost a year after the original decision was issued.

As part of the case presented to the Supreme Court, the Solicitor General of the United States submitted a brief in support of the State of New York, opposing pre-termination hearings.<sup>80</sup> The Solicitor General's brief was replete with statistics about the number of requests for pre-termination hearings filed by welfare recipients across the country. As one of the participating poverty lawyers noted, the Government clearly intended for the Court to read the recitation "as evidence of turmoil that must be staunched."<sup>81</sup> The Government hoped the Court would be unwilling to risk that social turmoil.

The Supreme Court issued its decision on March 23, 1970.<sup>82</sup> Justice Brennan wrote the majority opinion, joined by six other justices. Citing Reich's "The New Property" as one of several bases for the decision, Brennan agreed with the lower court that "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance" for a pre-termination hearing.<sup>83</sup> Brennan stated that the government did have a legitimate interest in keeping down the costs of administering welfare, but concluded that the Government "is not without weapons to minimize these increased costs. Much of the drain on fiscal and

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76. See *Notice of Motion for Preliminary Injunction, Convening of Three-Judge Court and Class Action Order*, reproduced in R. COVER, O. FISS & J. RESNIK, *PROCEDURE* 81-82 (1st ed. 1988).

77. *Id.*

78. *Id.*

79. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Because no stay was granted, New York was obligated to provide pre-termination hearings during the pendency of the case.

80. *Kelly v. Wyman*, 294 F. Supp. 893, 895 (1968).

81. Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 *BROOK. L. REV.* 805-08 (1990).

82. *Goldberg*, 397 U.S. at 266, citing *Kelly*, 294 F. Supp. at 904-05.

83. *Goldberg*, 397 U.S. at 266, in *Kelly*, 294 F. Supp. at 904-05.

administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities.”<sup>84</sup>

Brennan further stated: “Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.”<sup>85</sup> Under Brennan’s analysis, welfare had an important role in creating social change, and procedural due process would be used to ensure that social change was orderly.

## THE JUDICIAL RESPONSE TO *GOLDBERG v. KELLY*

With the *Goldberg* decision, poverty lawyers hoped they had gained important support for their ultimate claim of a right to live. However, only one month later, the Supreme Court issued another welfare-related decision in *Dandridge v. Williams*.<sup>86</sup> At issue in *Dandridge* was whether a state could set a maximum amount to its welfare grant at a level that was clearly less than the federally-determined standard of need for the recipient children.<sup>87</sup> Under the maximum grant rules, the size of the grants to recipient children could vary depending on the size of the family.<sup>88</sup> A family with eight eligible children received the same amount of money as a family with seven children, so the children in the larger family had smaller grants.<sup>89</sup> In *Dandridge*, the grant amount for each child in the larger family was less than the standard of need. If there were ever to be a right to live, then the Court in *Dandridge* would have to hold unconstitutional grants that were less than the standard of need.

The plaintiffs in *Dandridge* relied on the Equal Protection Clause of the Fourteenth Amendment, which provides that a state cannot “deny to any person within its jurisdiction the equal protection of the laws.”<sup>90</sup> They argued that the clause barred a state from treating large needy families

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84. *Goldberg*, 397 U.S. at 266.

85. *Id.* at 265.

86. 397 U.S. 471 (1970).

87. *Dandridge*, 397 U.S. at 473-75.

88. *Id.* at 473.

89. *Id.* at 473-75.

90. U.S. CONST. amend. XIV, § 1.

differently than smaller needy families.<sup>91</sup> However, the Court rejected the plaintiffs' argument.<sup>92</sup> Although the Court had held that welfare recipients were entitled to a pre-termination hearing, it now held that a state had no constitutional obligation under the Equal Protection Clause to provide a certain minimum amount of welfare.<sup>93</sup>

The *Dandridge* decision shocked poverty lawyers, coming so soon after *Goldberg* and without any change in the membership on the Court. Sparer, by then teaching at the University of Pennsylvania Law School, felt particularly disturbed by the result in *Dandridge* and believed that the possibilities for a right to live that had been present in decisions before *Dandridge* were now "aborted."<sup>94</sup> He noted later that a

contrary result in *Dandridge* would have permitted wholesale challenges to the barriers created by state legislatures and Congress to deny welfare assistance to groups of needy people . . . . The equal protection clause would have become the main vehicle for establishing a constitutional guarantee of human life . . . [and] could have led to a different America.<sup>95</sup>

During the following Supreme Court term in 1971, the Court further stunned poverty lawyers with its decision in *Wyman v. James*.<sup>96</sup> In *Wyman*, the Court considered whether a welfare recipient could refuse to allow her caseworker to search her home without losing welfare benefits.<sup>97</sup> The lower court had ruled that a case worker who searched a recipient's home without a warrant violated both the Fourth Amendment (prohibiting illegal searches) and the recipient's right to privacy under the Fourteenth Amendment.<sup>98</sup> The Supreme Court reversed.<sup>99</sup> The plaintiff, Barbara James, raised her Fourth and Fourteenth Amendment claims at her pre-termination hearing, and the hearing officer ruled against her.<sup>100</sup> The Court held that since the City of New York provided Ms. James with a pre-termination hearing, it had satisfied the requirements of *Goldberg v. Kelly*.<sup>101</sup>

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91. *Dandridge*, 397 U.S. at 483.

92. *Id.* at 486.

93. *Id.*

94. SPARER, *supra* note 35, at 82.

95. *Id.*

96. 400 U.S. 309 (1971).

97. *Id.* at 310.

98. *Id.* at 312-13.

99. *Id.* at 326.

100. *Id.* at 313.

101. *Id.* at 313-14.

The Court then considered whether the Fourth Amendment protection against unreasonable searches prohibited New York from requiring its welfare recipients to consent to a home visit in order to maintain benefits.<sup>102</sup> The Court concluded that although the home “is one of the most precious aspects of personal security,” a home visit was not unconstitutional.<sup>103</sup> The Court stated the search was reasonable, in part, because “[o]ne who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same.”<sup>104</sup> Thus, one year after *Goldberg* had recognized government benefits as property and mandated procedures to protect it, the Court spoke once again of government largess.<sup>105</sup>

In 1972, the Court yet again made clear that it would not embrace a constitutional right to live and reaffirmed that states have discretion to determine how to administer their welfare programs. In *Jefferson v. Hackney*,<sup>106</sup> the Court considered whether Texas could constitutionally pay a lower amount of welfare benefits to recipients in the AFDC program than it did to recipients in the aged, blind and disabled welfare program. Plaintiffs argued the Texas distribution plan was racially biased since most AFDC recipients were black or Hispanic, while most recipients in the aged, blind and disabled program were white.<sup>107</sup> The Court concluded that the statistics presented by the plaintiffs showing racial differences between recipients in the programs did not establish that the state was intentionally discriminating against non-white welfare recipients.<sup>108</sup> The Court stated that it was “not irrational” for Texas to conclude that the aged, blind and disabled needed more assistance than did AFDC recipients and “[w]hether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.”<sup>109</sup>

In later reflections on *Goldberg* and its progeny, one of the lead plaintiffs’ attorneys, Sylvia Law, discussed the alternative legal theories the

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102. *Wyman*, 400 U.S. at 316.

103. *Id.*

104. *Id.* at 319.

105. Justice Douglas dissented in *Wyman* and started his dissent with a citation to Reich’s *The New Property* noting that the “central question [in the case] is whether the government by force of its largess has the power to ‘buy up’ rights guaranteed by the Constitution.” *Id.* at 327-28. Justices Brennan and Marshall jointly dissented as well, writing separately from Douglas. *Id.* at 338.

106. 406 U.S. 535 (1972).

107. *Id.* at 538.

108. *Id.* at 549.

109. *Id.*

*Goldberg* attorneys had considered and why they chose a rights-based argument.<sup>110</sup> One of the primary reasons was that

our clients [the *Goldberg* plaintiffs] liked “rights”. They trusted “rights” more than [the legal concept] “fundamental fairness”. . . . Ours is a culture that values rights, and poor people share the values of our culture . . . . Vulnerable people have good reason to prefer the harder edge of rights to the hope that others whose lives are very different will be able to empathize with them.<sup>111</sup>

Nonetheless, as welfare recipients and their attorneys learned from *Goldberg* and its progeny, establishing a right in court one day does not mean that the next day the government cannot take that right away or so encumber the right to render it meaningless.

*Goldberg* and its companion cases illustrate the challenges of a rights-based strategy. Nonetheless, advocates, politicians, judges, and presidents have continued to look to the creation of rights as a way to address systemic social problems. For example, in recent years, the Equal Pay Act has guaranteed women the right to the same level of pay as men.<sup>112</sup> The Age Discrimination in Employment Act (ADEA) has promised workers forty years or older the same right to employment as younger employees.<sup>113</sup> Finally, the Americans with Disabilities Act (ADA) has promised people with disabilities the right to have an employer accommodate those disabilities on the job.<sup>114</sup> However, the challenges and risks of a rights-based strategy have not dissipated.

Under the tenure of Chief Justice Rehnquist, the Supreme Court has issued several decisions making it extremely difficult for individuals to sue state governments for violations of rights created by the statutes identified above. For example, the Court has held that state governments may not be sued in federal court for violating the ADEA or ADA.<sup>115</sup> The Court reasoned in both cases that Congress improperly abridged a state’s right to sovereign immunity under the Eleventh Amendment.<sup>116</sup> The Court’s

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110. LAW, *supra* note 81, at 805.

111. *Id.* at 816.

112. 29 U.S.C. § 206(d).

113. 29 U.S.C. § 621 et seq. (1967).

114. 42 U.S.C. § 12101 (1990).

115. *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (addressing the ADEA); *Bd. of Trustees, Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (addressing the ADA).

116. The Eleventh Amendment provides that the “[j]udicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

decisions only invalidated federal lawsuits against state employers: both statutes apply to employers other than a state government and both permit lawsuits in state courts as well as federal courts. Nonetheless, the Court's rulings demonstrate its close scrutiny of individual rights created by legislation.

### THE POLITICAL RESPONSE TO *GOLDBERG* AND THE STRATEGY OF TEST CASE LITIGATION

The establishment of OEO and nationwide federal funding initiated explosive growth in law reform work. In the 89 years before the OEO, not one legal aid society attorney took a case to the United States Supreme Court.<sup>117</sup> In the first five years of federally-funded legal services, funded attorneys argued 219 cases to the Court and won seventy-three of them.<sup>118</sup> The success in *Goldberg* and other litigation seeking to establish rights and structural reform on behalf of the poor fueled the test case strategy and caught the attention of state and federal politicians. The political response, in turn, disheartened poverty lawyers.

Governors in Arizona, California, Connecticut, Florida, and Missouri took steps to cut off state legal services funding to poverty programs in their states that had successfully promoted law reform.<sup>119</sup> The efforts of then-Governor Ronald Reagan to deprive California Rural Legal Assistance (CRLA) of funding developed into a public fight.<sup>120</sup> In 1967, CRLA had successfully sued the State of California to restore \$200 million in funds improperly removed from California's Medicaid program.<sup>121</sup> Reagan, consequently unable to fulfill his campaign pledge to balance the state budget, vindictively sought to end CRLA's federal funding.<sup>122</sup> Ultimately, in 1970, Reagan vetoed the California grant from OEO, blocking funds to CRLA. Through negotiations, the OEO grant was restored, but Reagan would hold dear the animosity he felt towards federally-funded legal services programs.<sup>123</sup>

Legal services activities had also caught the attention of President Nixon, whose gaze was less than adoring.<sup>124</sup> In 1971, supporters of OEO introduced federal legislation to create a legal services program independent

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117. Quigley, *supra* note 1, at 250.

118. *Id.*

119. *Id.* at 250-51.

120. *Id.* at 248.

121. *Id.* at 248-49.

122. *Id.* at 248-50.

123. Quigley, *supra* note 1, at 250-51.

124. *Id.* at 252.

of OEO, in the form of a federal corporation.<sup>125</sup> They hoped that the proposed corporation could better insulate legal services from political pressure.<sup>126</sup> Nixon opposed the legislation.<sup>127</sup> He offered his own version, under which legal services programs would be barred from representing groups, legislative lobbying, and other potentially broad impact activities.<sup>128</sup> Congress did not pass any legislation, and the debate continued.

The next year, Vice President Spiro Agnew wrote an article in the *American Bar Association Journal* entitled "What's Wrong with the Legal Services Program."<sup>129</sup> The article stated the Nixon administration's position on the role of federally-funded legal services. Agnew repeated Nixon's demand that Congress "create an agency 'which places the needs of low-income clients first, before the political concerns of either legal services attorneys or elected officials.'"<sup>130</sup> Agnew argued that law reform work did not adequately respect the attorney-client relationship because it gave too much control to the attorney.<sup>131</sup> Instead, Agnew argued, legal services attorneys were improperly using federal money to engage in a "systematic effort to redistribute societal advantages and disadvantages, penalties and rewards, rights and resources."<sup>132</sup> Agnew then asked:

Is this simple advocacy? Or is it social engineering on a grand scale and without accountability to anyone? . . . As it operates now, it is a public project but without public direction or public accountability."<sup>133</sup> He concluded that "basic attitudes within this [the legal services] program should be changed. So long as individual attorneys conceive their role to be that of social engineers, they will continue to exacerbate community tensions and undermine the very purposes they were hired to accomplish."<sup>134</sup>

Although Agnew argued that poverty lawyers should put their clients' needs first, his vision was not the "civilian perspective" articulated by Jean and Edgar Cahn, under which clients were to be encouraged to become community leaders. Instead, Agnew argued for a return to the practice of the old legal aid societies under which an attorney's role is to help the poor

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125. Quigley, *supra* note 1, at 252.

126. *Id.*

127. *Id.*

128. *Id.*

129. Spiro Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A.J. 930 (1972).

130. *Id.* (quoting President Nixon's veto comments on the 1971 legislation to establish the Legal Services Corporation).

131. *Id.* at 931.

132. *Id.*

133. *Id.*

134. *Id.* at 932.

move smoothly through the system, not change it. For poverty lawyers energized by their law reform work, Agnew's words were a bitter portent.

Congress established the new federal Legal Services Corporation (LSC) in July 1974 after much haggling and compromise over its structure.<sup>135</sup> In the end, the LSC structure was fundamentally the same as the OEO legal services program.<sup>136</sup> LSC would receive an annual congressional appropriation and would then grant money to local legal services programs and state and national support centers.<sup>137</sup> For the remainder of the 1970s, LSC operated under relative calm and saw its appropriation rise from \$90 million to \$300 million in 1980.<sup>138</sup> The election of Ronald Reagan as president in 1980 marked a change in fortune for the LSC.

Reagan's enmity for legal services had not abated since his fury at CRLA as California's governor. Reagan supported efforts to defund and dismantle LSC and, during his tenure, LSC funding either declined or remained relatively commensurate with the 1980 funding level.<sup>139</sup> Thus, funding did not keep pace with inflation or other cost increases. Further, Congress restricted LSC-funded programs from undertaking certain activities including legislative lobbying, representing aliens, and accepting certain types of fee-generating cases.<sup>140</sup>

During this time period, legal services programs continued to bring and win lawsuits that brought about systemic changes in government institutions serving the poor. For example, the result of one such lawsuit in California was to prohibit counties from refusing to provide general assistance benefits to the homeless because the homeless lacked a permanent address.<sup>141</sup> Poverty lawyers also helped their clients successfully challenge a practice of forcing an indigent into a county-run facility before the person could receive benefits, even if the person had a permanent home.<sup>142</sup>

Although Reagan successfully curtailed some of the law reform work of legal services programs, he was unable to eliminate it.<sup>143</sup> However, some

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135. Houseman, *supra* note 31, at 2.

136. *Id.* at 5.

137. *Id.*

138. See Quigley, *supra* note 1, at 255; see also *LSC Statistics: Annual Appropriations 1980-2001*, available at [http://www.lsc.gov/press/pr\\_aLSCa.htm](http://www.lsc.gov/press/pr_aLSCa.htm).

139. *Id.*

140. *Id.* at 258.

141. *Nelson v. Board of Supervisors*, 190 Cal. App. 3d 25 (1987).

142. *Robbins v. Superior Court*, 695 P. 2d 695 (Cal. 1985).

143. Quigley, *supra* note 1, at 256.

members of Congress shared Reagan's concerns, and in 1995, long after Reagan had left office, Congress took up the issue of LSC funding. The 1995 Congress passed legislation reducing the LSC appropriation by thirty percent and further restricted the kinds of cases that could be handled by LSC-funded programs.<sup>144</sup> Programs were barred from: initiating class action lawsuits, a common vehicle for law reform; pursuing claims for attorneys' fees, a common source of additional program financing; and seeking to reform federal or state welfare systems.<sup>145</sup> Further, Congress entirely defunded the support centers, many of which had created strong reputations as leaders in structural reform litigation.<sup>146</sup>

The debate in Congress was venomous, as debates often are on issues related to social reform. For example, one opponent contended that LSC was "one of the most reckless and irresponsible agencies to have ever been created by the federal government"<sup>147</sup> and that it had "an appalling and inexcusable record of all too often taking money from law-abiding, hard-working taxpayers and then giving it to the likes of convicted felons, delinquent fathers, illegal aliens and drug dealers."<sup>148</sup> Supporters countered that legal services programs were essential to a fair justice system and that poverty lawyers were "highly dedicated professionals with widely recognized records of achievement in their work... [and] the characterization of such individuals as political ideologues or militant crazies is simply ludicrous . . . ."<sup>149</sup>

The cut-backs took force in 1996, and, as a result, legal services programs lost almost thirteen percent of their staff and almost thirteen percent of legal services field offices were forced to close.<sup>150</sup> Support centers were decimated. Many kept their doors open only with skeletal funding and staffs.<sup>151</sup>

Since 1996, federally-funded legal services programs have continued to operate, but most have been unable or unwilling to focus on work other than individual services to individual clients. In some areas, the boards and staffs of federally-funded programs have decided to spin off a counterpart

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144. Houseman, *supra* note 31, at 4; Quigley, *supra* note 1, at 261-63.

145. Quigley, *supra* note 1, at 261-62.

146. *Id.*

147. *Legal Services Corp. Reauthorization: H.R. Jud. Subcomm. Commercial and Admin. Law*, 104th Cong (1995) (statement of Rep. Robert K. Dornan), WL 1995 F.D.C.H. 446736.

148. *Id.*

149. *Legal Services Corp. Reauthorization: H.R. Jud. Subcomm. Commercial and Admin. Law*, 104th Cong. (1995) (statement of John McKay, Chairman, Wash. Equal Justice Coalition), WL 1995 F.D.C.H. 365851.

150. Houseman, *supra* note 31, at 4.

151. *Id.*

organization whose charge is to do “unrestricted” work – represent immigrants, challenge welfare laws, and lobby. However, many of the spin off organizations are tightly funded, limiting their ability to go pursue expensive and time-consuming social reform litigation. Further, splitting organizations up into “restricted” and “unrestricted” camps has renewed the tension between legal services attorneys as providers of individualized technical advice and as instigators of social reform. Many poverty lawyers liken restricted programs to the old legal aid societies and regard unrestricted programs as the main hope for rights-based litigation and systemic reform work.

### NEW STRATEGIES

As the judiciary and the legislature responded to litigation successes, facilitated, in part, by the establishment of a nationwide network of community-based poverty law offices, poverty lawyers themselves revised their strategies. They questioned whether litigation was the best mechanism to achieve their goal of permanently restructuring social institutions and processes to benefit the poor.

During the 1980s, legal services lawyers began to consider openly whether the way in which they practiced their craft and worked with clients was truly bringing about the social reform they desired. In the late 1980s, two poverty lawyers, Lucie White and Gerald Lopez, challenged the predominant thinking in a series of law review articles.<sup>152</sup> Lucie White had been a poverty lawyer in rural North Carolina when, in 1985, she visited the community of Driefontein in South Africa.<sup>153</sup> Driefontein was a black farming community in a “white-designated” area, and the South African government sought to relocate community members into black homelands.<sup>154</sup> The community successfully combated the government’s efforts with the help of a white organizer and a white lawyer, both of whom became welcomed members of the community.<sup>155</sup> Lucie White gathered stories from community members, the organizer, and the lawyer about their experiences and drew some lessons about effective lawyering from those

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152. See Lucie White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WISC. L. REV. 699 (1988); Gerald Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984), *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 73 GEO. L. J. 1603 (1989) and *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989).

153. White, *supra* note 152, at 702.

154. *Id.* at 719-20.

155. *Id.* at 719-45.

stories.<sup>156</sup>

White identified a three-tiered model of lawyering. She described first-tier lawyering as pursuing an issue “through established channels of political disputing” where the focus is “on the official, public political contests that groups enter, how those contests are conducted, and, most importantly, who wins.”<sup>157</sup> In second-tier lawyering, “the lawyer acknowledges that litigation can sometimes work directly to change the allocation of social power. However, she [the lawyer] sees these effects as secondary to law’s deeper function in stimulating progressive change.”<sup>158</sup> Finally, third-tier lawyering involves helping a group learn how to interpret moments of domination as opportunities for resistance. The lawyer cannot simply dictate to the group what actions they must take . . . . The role of the lawyer is to help the group learn a *method* of deliberation that will lead to effective and responsible strategic action.<sup>159</sup>

White perceived that the Driefontein community used both second and third-tier lawyering to avoid relocation. As White viewed it: “[T]he tasks of the lawyer and organizer complemented each other in a single advocacy strategy . . . . Thus, the two efforts – of negotiation and community work – built upon one another. These were two aspects of a ‘lawyering effort’, in which no single actor occupied the ‘lawyer’ role.”<sup>160</sup> White ultimately concluded that third-tier lawyering was most effective in helping a subordinated group understand the means and methods of its domination.<sup>161</sup> Her vision of third-tier lawyering stood in strong contrast to the predominant lawyering method of poverty lawyers of the time, that of first-tier lawyering.

Gerald Lopez posited a vision of lawyering similar to White’s which he called rebellious lawyering.<sup>162</sup> Like White, Lopez was a poverty lawyer. In his book, *Rebellious Lawyering*, Lopez used vignettes of various poverty lawyers in practice to illustrate his charge that well-intentioned poverty lawyers generally did not actually listen to their clients’ stories, understand their clients’ backgrounds, or consider the skills and power that their clients’ possessed.<sup>163</sup> “Regnant” lawyers, using Lopez’ label, were so

156. White, *supra* note 152, at 719-45.

157. *Id.* at 748.

158. *Id.* at 758.

159. *Id.* at 763-64 (emphasis in original).

160. *Id.* at 766-67.

161. *Id.*

162. Gerald Lopez, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

163. *Id.*

focused on how a problem could be cast as a legal argument to establish or enforce legal rights that they failed to see or understand the larger social environment in which their clients lived. Thus, the legal solution crafted by a regnant lawyer distanced the client and cast the client always as a victim. As another rebellious lawyer has described it: “[Regnant] [l]awyers see clients as persons to be helped, as powerless persons who need to have problems solved through the intervention of the lawyer and her skills.”<sup>164</sup>

In contrast, according to Lopez’ vision, rebellious lawyers seek to become a part of the community in which they practice, to help the community organize and develop its members’ own voices of protest and advocacy.<sup>165</sup> Rebellious lawyers move from an elitist position, where the attorney determines the appropriate legal strategy even before the client has told the specifics of her story, to a background position, where the lawyer acts as facilitator and lets community members determine the scope of the problem and design the appropriate solution. The rebellious lawyer steps in to give technical help and advice, but does not assert control over the process.

Third-tier lawyering and rebellious lawyering sounded new to most legal services attorneys in the 1990s, but in many ways they portrayed the very message that Jean and Edgar Cahn had put forward in 1964 as the “civilian perspective” and had lobbied Sargent Shriver to include in his development of legal services under OEO.<sup>166</sup> What good did a lawyer do if she won a case creating the right for a tenant to withhold rent because the tenant’s apartment was rat-infested, if, as a result, the landlord closed the entire building and all the tenants lost their housing? In contrast, if the lawyer had helped the tenants organize before bringing the lawsuit, the tenants would be in a better position to protest the landlord’s actions and bring political pressure to bear on the local housing authority to intercede and force the landlord to make the required improvements. The power of a lawsuit becomes only one of many tools available for the community to use, and not necessarily the primary tool.

Poverty lawyers also developed a related advocacy model called holistic lawyering.<sup>167</sup> Under holistic lawyering, the lawyer views herself as

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164. Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 951 (1992).

165. *Id.* at 952-53.

166. See Cahn, *supra* note 39. A community-centered model of lawyering was also suggested early on by Stephen Wexler in his article, *Practicing Law for Poor People*, 79 YALE L. J. 1049 (1970).

167. See Tanya Neiman, *Creating Community by Implementing Holistic Approaches to Solving Clients’ Problems*, Clearinghouse Review May-June 1999 at 19.

part of a larger service group, all of whom hold the common goal of understanding the true nature of the client's need and then crafting the best solution, whether or not that ultimately involves legal services. For example, a client comes to the lawyer and explains she is unable to pay a doctor for care the doctor provided to her child, and the doctor has sued. The holistic lawyer will look beyond the immediate legal problem of responding to the lawsuit to determine whether the client's child is eligible for free health care insurance under Medicaid, whether there are other social services available to the client that might help her improve her level of income, and whether the family might be eligible for other government benefits such as food stamps. The lawyer as a part of a larger advocacy network is able to help not only with the legal problem, but also with more basic problems that created the legal problem.<sup>168</sup> The lawyer does not necessarily see herself or legal action as having any more important place in the service network than any of the other providers or their activities.<sup>169</sup> Nor does she assume that the client's most pressing problem is a legal problem just because the client has come to her door before some other provider's.<sup>170</sup>

As with rebellious lawyering, holistic lawyering has its origins in the settlement houses and early multiservice programs like MFY. It shares in its philosophy with third-tier and rebellious lawyering the view that the client's full story is important, and the best response is not necessarily to consider the legal system as the first or only solution. Each of the models moves away from a rights-based strategy, although none reject the courts as an important way of achieving social redress.<sup>171</sup> Each emphasizes placing the lawyer within the client's community and developing the skills already held by clients.

Rebellious and holistic lawyers face the same situation as their legal aid society colleagues faced a century ago: the need for individualized services is enormous, and the daily pressure on a poverty lawyer to provide the most immediate emergency legal help is severe. Poverty lawyers in field offices have an unending stream of clients in the waiting room, many of whom could be sent away with a quick-fix legal solution. While not making any systemic change, this would at least provide some immediate

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168. Neiman, *supra* note 167, at 19.

169. *Id.*

170. *Id.*

171. The rights-based strategy has been critiqued on several fronts, most importantly by the Critical Legal Studies (CLS) movement. A central concern of CLS is whether it is viable to rely on rights-based advocacy. Edward Sparer has provided his view of CLS in *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984).

individual relief – “rescue lawyering”, as one commentator has labeled it.<sup>172</sup> Organizing and mobilizing a community and making an effort to learn fully about community problems takes time and requires lawyers to turn away individual client work; something difficult for well-meaning lawyers hoping to help everyone. It requires them to move out of the roles for which they were trained in law school.

## CONCLUSION

For over a century, lawyers in the United States working with the poor have struggled with how best to use law and legal process to attack poverty and assist the poor. Substantively, poverty lawyers have employed the federal constitution; statutes, such as those related to labor law; and regulations, such as those related to the Social Security Act. Methodologically, poverty lawyers have employed tools such as lawsuits, federal funding, and community organizing. They have learned that every substantive challenge and every methodology likely causes a series of reactions and responses. For example, poverty lawyers hoped that *Goldberg v. Kelly* would be the first step to establishing a constitutional right to live, but found the Supreme Court unwilling to go further. Poverty lawyers also learned through experience with the OEO and the LSC that the federal government’s interest in paying for poverty lawyers can wax and wane.

Despite poverty lawyers’ work, the number of poor people increases and the poor continue to have an ongoing need for legal assistance. Poverty lawyers remain dedicated to their work, although they continue to disagree about how best to practice. Some agree with Edward Sparer that a poverty lawyer must be a grand strategist, while others are convinced that it is more important to focus on an individual’s legal problem. As noted above, the debate is complicated by changes in the political climate and the judiciary. For example, in 1964 the federal government was generous with its funding for legal services and encouraged advocacy for systemic reform, but in 1995 it took the opposite approach and cut federal funds and encouraged individual representation. Poverty lawyers have learned they must adapt their advocacy to the political and judicial climate they find at the time.

In partial response to the need for adaptive strategies, poverty lawyers have also considered new ways of working with their clients. Lucie White and Gerald Lopez have argued that poverty lawyers should immerse

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172. Tremblay, *supra* note 164, at 963-64.

themselves in their clients' communities and not assume that lawyers are in the best position to determine effective advocacy strategies. By becoming a more integral part of the client community, lawyers will have more complete and rich information on which to formulate their advocacy strategies. This approach does not resolve the debate between systemic advocacy versus individual client advocacy, but it does allow a poverty lawyer to better assess how a client's or community's goals might best be achieved.