

2009

Restoring Legal Aid to the Poor: A Call to End Draconian and Wasteful Restrictions

Rebekah Diller

Emily Savner

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Recommended Citation

Rebekah Diller and Emily Savner, *Restoring Legal Aid to the Poor: A Call to End Draconian and Wasteful Restrictions*, 36 Fordham Urb. L.J. 687 (2009).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol36/iss4/3>

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Restoring Legal Aid to the Poor: A Call to End Draconian and Wasteful Restrictions

Cover Page Footnote

The authors are, respectively, a Deputy Director and Research Associate within the Justice Program of the Brennan Center for Justice at NYU School of Law.

RESTORING LEGAL AID FOR THE POOR: A CALL TO END DRACONIAN AND WASTEFUL RESTRICTIONS

*Rebekah Diller & Emily Savner**

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INTRODUCTION

As the burgeoning economic crisis pushes growing numbers of Americans into poverty and homelessness, the need to revitalize the civil legal aid system is more urgent than ever. For low-income families, a civil legal aid lawyer can be a lifeline to preserve a home against foreclosure by a predatory lender, recover back wages from a cheating employer, or secure sufficient food for a sick child. Studies have shown that access to a lawyer can be the critical boost that families need to avoid homelessness and the key factor that domestic violence survivors need to achieve physical safety and financial security.¹

Notwithstanding the clear benefits, the overwhelming majority of low-income people who need legal aid cannot obtain it, in large part due to political attacks that have compromised the Legal Services Corporation (“LSC”), the cornerstone of the nation’s institutional commitment to equal justice.² Every year, one million cases are turned away by LSC-funded offices due to funding shortages.³ Study after study finds that 80% of the civil legal needs of low-income people go unmet.⁴ On average, every legal aid attorney funded by LSC and other sources serves 6861 people.⁵ In contrast, there is one private attorney for every 525 people in the general population.⁶ This “justice gap” keeps families in poverty and threatens the stability of our court system.

The justice gap is not solely a product of funding shortages; it is also the result of extreme and ill-conceived funding restrictions imposed on legal aid programs by Congress in 1996.⁷ In an effort to deprive the low-income

1. See Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL’Y 158, 169 (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 429 (2001); see also Rebecca L. Sandefur, *Elements of Expertise: Lawyers’ Impact on Civil Trial and Hearing Outcomes* 3 (Mar. 26, 2008) (unpublished manuscript, on file with the Brennan Center) (concluding that “lawyer-represented cases are more than 5-times more likely to prevail in adjudication than cases with self-represented litigants.”).

2. What is LSC, <http://www.lsc.gov/about/lsc.php> (last visited April 12, 2009) [hereinafter *What is LSC*] (noting that LSC is “the single largest provider of civil legal aid for the poor in the nation”).

3. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 5 (2005) [hereinafter *JUSTICE GAP*].

4. *Id.* at 14.

5. *Id.* at 17.

6. *Id.*

7. See DEBORAH L. RHODE, ACCESS TO JUSTICE 104 (2004) (noting that the “current legal aid structure denies assistance to the politically unpopular groups who are least able to

clients of LSC-funded programs of full legal representation, Congress restricted the advocacy tools available to LSC clients. Clients of programs that receive LSC funds are denied access to the full range of legal tools available to people who have private lawyers, such as participating in class actions, claiming court-ordered attorneys' fee awards, and pursuing legislative and administrative advocacy.⁸ Second, Congress made some categories of individuals ineligible for legal services representation; all undocumented immigrants, certain categories of documented immigrants, and people in prison simply cannot qualify.⁹ Finally, Congress imposed an extraordinarily harsh, "poison pill" restriction on LSC-funded programs that extends the federal funding restrictions to limit all the activities conducted on behalf of clients of LSC programs, even when funded by non-LSC funds.¹⁰

In the thirteen years that have passed since the restrictions were pushed through the Congress as part of the Gingrich-era "Contract with America," the restrictions have denied countless people equal access to justice. They have prevented victims of predatory lenders from obtaining their full measure of justice. They have contributed to the widespread abuse of immigrant laborers, including those legally in the United States, at their employers' invitation. Further, by shutting down legislative advocacy, they have prevented legislators from learning about the legitimate concerns of low-income communities.

The most draconian aspect of the restrictions—the poison pill restriction on non-LSC funds—has warped the civil legal aid delivery system and wasted precious public and private money that could go toward serving more clients. In many states, justice planners have had to set up two, duplicative legal aid systems in order to ensure that state and other funds are not constrained by the non-LSC funds restriction.¹¹ The result is that scarce funds must be spent on duplicate administrative costs—two rents, two copy machines, and two computer networks. In other locations with less state funding for legal aid, there are no non-LSC-funded organizations

do without it and blocks the strategies most likely to address the root causes of economic deprivation").

8. See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53 to 1321-56. Congress has carried forward these restrictions each year by incorporating them in the annual appropriations rider for LSC.

9. See *id.* at 1321-56.

10. See *id.* § 504(a) (prohibiting any "entity" that engages in enumerated restricted activities from receiving LSC funds).

11. See, e.g., *Legal Aid Servs. of Oregon v. Legal Servs. Corp.*, 561 F. Supp. 2d 1187 (D. Or. 2008); J.J. Sullivan et al., *An End to Redundancy? CLS and PLA Anxiously Await Federal Court Ruling on Working Together*, PHILA. LAW., Fall 2005, at 18, 18 (describing dual system set up in Philadelphia).

to perform the restricted work. As a result, whole communities are unserved. Parts I and II of this Article survey the impact that the LSC restrictions have had on the ability of low-income clients to obtain justice. Part III provides examples of the manifold harms that the Brennan Center has identified in its multi-year effort to educate the public and lawmakers about the damage caused by the restrictions. Finally, it argues that now is the time for Congress to ease the restrictions to eliminate their worst effects.

I. LSC: COMMITTED TO THE AMERICAN PROMISE OF EQUAL JUSTICE

LSC embodies the federal government's most sustained effort to deliver on the oft-touted American promise of equal justice for all.¹² Congress created LSC in 1974 to provide high-quality civil legal assistance to those unable to afford attorneys.¹³ By providing legal assistance, Congress aimed to promote equal access to the justice system, improve economic opportunities for low-income people, and reaffirm faith in the legal system.¹⁴ LSC built on the federal government's initial foray into funding civil legal services under the auspices of the Office of Equal Opportunity ("OEO"), which administered the Johnson Administration's War on Poverty programs in the late-1960s.

LSC was structured not as a federal agency, but rather as a quasi-private, non-profit corporation to insulate it from the political battles that periodically enveloped the OEO legal services program. It is governed by an eleven-person, bipartisan board of directors appointed by the President and confirmed by the Senate.¹⁵ LSC operates by providing grants to independent, local non-profit organizations, incorporated under local state law, that in turn provide direct legal services within their communities.¹⁶ LSC-funded programs help nearly one million people a year.¹⁷ Those local non-profit organizations determine their own priorities for service provision, taking into account the particular needs of the client communities they serve.¹⁸ Legal services offices handle cases concerning basic needs: family

12. As Deborah L. Rhode has succinctly phrased it, "[e]qual justice under law is one of America's most proudly proclaimed and widely violated legal principles." RHODE, *supra* note 7, at 3.

13. *See* 42 U.S.C. § 2996 (1977).

14. *Id.*

15. *See id.* § 2996c.

16. *See id.* § 2996e.

17. What is LSC, *supra* note 2.

18. *See* 42 U.S.C. § 2996f(a)(2)(C) (2006).

matters (38%), housing (23%), income maintenance (13%) and consumer issues (12%).¹⁹

LSC is the single greatest source of funding for legal aid in the United States, but it is just one part of a three-pronged partnership that also includes state and local governmental institutions, and private donors.²⁰ In 2007, LSC provided more than \$330 million in grants to 138 programs with more than 900 offices.²¹ In the same year, more than \$490 million was received by LSC programs from non-LSC sources: state and local governments, Interest on Lawyers' Trust Accounts ("IOLTA") programs, foundations and other private donors.²² The proportion of non-LSC funds possessed by LSC-recipient organizations has risen substantially since the restrictions were put in place, from 40.33% in 1996 to 58.1% in 2007;²³ however, recent declines in IOLTA funding and state budget shortfalls due to the national economic crisis may start to reverse that trend.

II. THE LSC RESTRICTION REGIME

At the inception of LSC, Congress placed some restrictions on the activities of LSC-funded lawyers, but struck a balance that enabled individuals to perform essential legal work.²⁴ For example, while some limits were imposed on tools of advocacy—class actions, for example, could only be undertaken with the approval of a program director—they were not completely barred.²⁵ Congress also banned certain participation in certain types of cases that reflected particular controversies of the time, including litigation related to military registration, desegregation, and attempts to procure a "non-therapeutic abortion."²⁶ However, LSC-recipient programs could

19. What is LSC, *supra* note 2.

20. LEGAL SERVS. CORP., LEGAL SERVICES CORPORATION FACT BOOK 2007, at 8 (2008) [hereinafter FACT BOOK 2007], available at <http://www.lsc.gov/pdfs/factbook2007.pdf>.

21. What is LSC, *supra* note 2.

22. FACT BOOK 2007, *supra* note 20, at 7.

23. Compare *id.* at 6, with LEGAL SERVS. CORP., 1996 LSC AND NON-LSC FUNDING [hereinafter 1996 LSC] (on file with the Brennan Center).

24. See ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW AND SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 21 (2007), available at http://www.clasp.org/publications/legal_aid_history_2007.pdf.

25. 42 U.S.C. § 2996e(d)(5) (1977). Congress also prohibited recipients from using LSC and private funds to engage in administrative and legislative lobbying, unless such representation was "necessary to the provision of legal advice and representation with respect to such client's legal rights." Recipients were free to engage in lobbying with other non-LSC government funds, such as funds from local and state governments, if the sources of those funds permitted such activities. See *id.* § 2996h.

26. *Id.* § 2996f(b)

still represent clients in such cases if a state or local government funder wished to finance the effort.²⁷ For the most part, Congress held true to its declaration set forth in the LSC Act that “attorneys providing legal assistance must have full freedom to protect the best interests of their clients.”²⁸

A. 1996 Restrictions Sharply Curtail Advocacy Available to Poor Clients.

The restrictions imposed in 1996 marked a clear departure from this balance by sharply curtailing advocacy on behalf of legal services clients. The 1996 restrictions were the culmination of attacks on indigent legal services that began soon after LSC’s formation. Hostility came in large part from agribusiness interests in farm states, which were angered by the representation of farmworkers conducted by legal services offices.²⁹ Ronald Reagan’s 1980 election provided an eager ally in the White House. The Heritage Foundation’s conservative agenda, *Mandate for Leadership*, published on the eve of President Reagan’s first term, detailed steps to take to eliminate LSC or, at least, to reduce its effectiveness.³⁰ Declaring LSC “so basically flawed that it is beyond reform sufficient to justify its continuation,” the plan called for the wholesale destruction of LSC.³¹ If complete elimination proved infeasible, the Heritage Foundation urged, steep budget cuts and broad restrictions (to be imposed through LSC appropriations riders) would be the second-best alternative.³²

LSC survived the attempts to eliminate it under the Reagan Administration, though with less funding.³³ However, the blueprint for hobbling LSC was ultimately put in place during the 104th Congress, when Republicans took control of both houses for the first time in decades and, through the “Contract with America,” renewed the call for elimination of LSC.³⁴ The House of Representatives, led by Newt Gingrich, adopted an initial budget that would have cut LSC funding by one-third for FY 1996, a second third

27. *Id.* § 2996h.

28. *Id.* § 2996(6).

29. See, e.g., Robert Hornstein et al., *The Politics of Equal Justice*, 11 AM. U. J. GENDER SOC. POL’Y & L. 1089, 1096 (2003); Editorial, *A Brazen Assault on Legal Services*, N.Y. TIMES, June 23, 1990, at 22, available at <http://www.nytimes.com/1990/06/23/opinion/a-brazen-assault-on-legal-services.html>.

30. Alfred S. Regnery, *Action, Legal Services Corporation and Community Services Administration*, in MANDATE FOR LEADERSHIP, POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 1057, 1061-62, 1068 (Charles L. Heatherly ed., 1981).

31. *Id.* at 1061.

32. *Id.*

33. FACT BOOK 2007, *supra* note 20, at 7.

34. See HOUSEMAN, *supra* note 24, at 36.

for FY 1997, and then, eliminated all federal funding in the subsequent year.³⁵ Through a compromise brokered by then-Senator Pete Domenici (R-NM) and others, the plan to entirely de-fund LSC was averted.³⁶ Instead, Congress cut LSC's appropriation by almost one-third and imposed a set of funding restrictions that severely limit the work that LSC-funded programs could do, including with the money they received from non-LSC sources.³⁷

Under the 1996 appropriations rider, which has been carried forward in subsequent years with only slight modification, non-profit organizations receiving LSC funds are barred from using the following tools of advocacy for their clients, even though such tools are available to individuals who are represented by privately funded attorneys:

- class action litigation;
- claims for attorneys' fee awards;
- most legislative and administrative advocacy; and
- educating potential clients about their rights and then offering to represent them.

The restrictions also prohibit LSC-funded organization from representing categories of clients, including:

- incarcerated people;
- undocumented immigrants, and certain documented immigrants; and
- individuals facing eviction from public housing projects who are charged with a drug offense.

Other restrictions include a ban on all abortion-related litigation and on redistricting cases.³⁸

B. Extraordinary, Poison Pill Restriction Is out of Step with Private-Public Partnership Model.

In a somewhat unprecedented power grab, Congress prohibited recipients from engaging in these restricted activities not just with LSC funds, but with any funds, no matter the source.³⁹ Once an organization receives its first dollar of LSC funding, all of its funds from state and local governments, other federal programs, and private foundations and donors are re-

35. *See id.*

36. *See id.*

37. *See id.* at 36-37.

38. *See* Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53-1321-56.

39. *See id.*

stricted.⁴⁰ Not only did this extension of federal power shift policy dramatically away from the balance struck in the LSC Act—which permitted recipients to use funds from other government sources for the purposes for which they were intended⁴¹—but the 1996 law also marked a stark departure from the usual model for federal grant-making. It is fairly common for the federal government to restrict the activities it funds; however, it is extremely rare and raises grave constitutional concerns when Congress restricts the activities that grantees choose to finance with their own, non-federal funds.

The 1996 restrictions faced almost immediate challenges in court on First Amendment grounds. A federal district court in Hawaii ruled that the restriction on non-LSC funds violated the First Amendment because it did not afford a recipient non-profit any avenue through which to use non-LSC funds to engage in constitutionally protected speech and advocacy.⁴² In the wake of this ruling, LSC attempted to salvage the constitutionality of Congress's law by issuing a so-called "program integrity regulation."⁴³ Acknowledging that the non-LSC funds restriction had overreached, LSC claimed that its regulation was intended to provide recipients with the opportunity to use their own non-LSC resources to finance the restricted activities.⁴⁴

Yet, it is clear from the operation of the regulation that its real intent is to make it as difficult as possible for a recipient to use private funds to engage in restricted representation. To spend non-LSC funds on restricted work, grantees must operate a new organization out of a physically separate office, with separate staff and equipment.⁴⁵ In practice, LSC's program integrity regulation imposes conditions so onerous that almost no program in the country has been able to successfully rely on it to create a separate affiliate through which to conduct privately financed, restricted activities.⁴⁶

40. *See id.*

41. 42 U.S.C. § 2996i(c) (1977).

42. *Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997).

43. *See* 62 Fed. Reg. 27,695 (May 21, 1997) (to be codified at 45 C.F.R. § 1610) (describing history of the program integrity rule).

44. *See id.*

45. *See* 45 C.F.R. § 1610.8 (1997).

46. *Closing the Justice Gap: Providing Civil Legal Assistance to Low-Income Americans: Hearing Before the S. Judiciary Comm.*, 110th Cong. (2008) (statement of Rebekah Diller), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3370&wit_id=7200.

The regulation continues to be the subject of ongoing litigation that challenges its impact on protected First Amendment activity.⁴⁷

III. THE LSC RESTRICTIONS OBSTRUCT JUSTICE FOR LOW-INCOME INDIVIDUALS AND WASTE SCARCE FUNDS

Over a decade of experience with the legal services restrictions has shown that they prevent people with pressing needs from obtaining full access to the justice system. They deny low-income people the legal tools available to those who can afford to pay for a lawyer. They also exclude the politically disfavored—prisoners and certain immigrants—from access to representation and thereby access to the courts. The restrictions constrict the choices available to state and local governments, as well as private foundations and individual donors, who wish to be partners in innovative efforts to expand access to justice. Finally, they squander precious funds that could go toward representing more underserved clients.

A. Limits on Advocacy Tools Available to Low-Income Clients Obstruct Equal Justice.

Notwithstanding the restrictions, legal services offices continue to provide high-quality representation and assist client communities in addressing widespread legal problems.⁴⁸ However, clients face many types of legal problems that could be addressed more effectively and efficiently were they to have access to the legal tools available to all other litigants. This section describes the impact of particular advocacy restrictions—those prohibiting attorneys' fee awards, class actions, and legislative and administrative advocacy—and includes specific case examples that the Brennan Center has gathered from legal services offices around the country.

47. *Velazquez v. Legal Servs. Corp.*, 97 CV 00182, and *Dobbins v. Legal Servs. Corp.*, 01 CV 8371 are two combined cases currently pending in the U.S. District Court for the Eastern District of New York. The author is one of the attorneys representing the plaintiffs in these challenges. The current proceedings follow the issuance of a preliminary injunction on First Amendment grounds against the application of the physical separation requirement to three New York-based plaintiff legal aid organizations in 2004. *Velazquez v. Legal Services Corp.*, 349 F. Supp. 2d 566 (E.D.N.Y. 2004). The U.S. Court of Appeals for the Second Circuit subsequently lifted the preliminary injunction and remanded the case to the district court. The Second Circuit ordered the district court to apply a different legal standard to determine whether the burdens imposed on the plaintiff legal services programs by the physical separation requirement effectively deny them adequate alternative channels through which to spend their non-LSC funds on the activities prohibited by the funding restrictions. *See Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2005).

48. *See, e.g.*, Raun J. Rassmussen, *Affirmative Litigation Under the Legal Services Corporation Restrictions*, 34 CLEARINGHOUSE REV. 428 (2000).

Many of the examples involve efforts to combat predatory lending and other consumer scams that are tied to the mortgage meltdown and foreclosure crisis. Legal aid providers have been inundated with requests for help by people about to lose their homes.⁴⁹ The need is tremendous and the resources available are limited. When legal aid offices are able to take cases in which consumer fraud was involved,⁵⁰ the restrictions—particularly the class action and attorneys’ fee restrictions—limit the ability of LSC recipients to perform their private attorney general role in the consumer protection enforcement scheme and enable wrongdoers to write off individual cases as a mere cost of doing business.⁵¹ Moreover, the restrictions on legislative advocacy have gagged legal aid attorneys in their critical role in alerting legislatures to the problems of low-income communities, including those that led to the subprime lending crisis.⁵²

1. Attorneys’ Fee Award Restriction

Much has been written about the role of attorneys’ fee award mechanisms in encouraging private attorneys to take cases that vindicate important social goals such as the elimination of discrimination.⁵³ For cases in which legal services organizations represent clients, attorneys’ fees serve three related, and equally important, functions. First, fees provide leverage within a litigation and encourage settlement. Second, they act as a deterrent against the violation of laws that are designed to protect the public. Third, they enable legal aid programs to marshal additional revenue from non-LSC sources.⁵⁴

49. See BRENNAN CTR. FOR JUSTICE, *THE ECONOMY AND CIVIL LEGAL SERVICES* (2009), http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services.

50. It is increasingly acknowledged that the subprime mortgage meltdown was not just the result of objective economic forces but also the product of fraud in the mortgage business. As Sen. Patrick Leahy recently stated when introducing a bill to help federal agencies crack down on mortgage and other financial fraud, law enforcement cannot keep pace with the number of complaints: “suspicious activity reports alleging mortgage fraud that have been filed with the Treasury Department have increased more than tenfold, from about 5,400 in 2002 to more than 60,000 in 2008.” 155 CONG. REC. S1679, S1682 (2009) (statement of Sen. Leahy).

51. See Laura K. Abel, *Lawyers for the Poor Muzzled in Subprime Mess*, NATION, Jan. 16, 2008, <http://www.thenation.com/doc/20080128/abel> [hereinafter Abel, *Lawyers*].

52. See *id.*

53. See, e.g., Pamela S. Karlan, *David C. Baum Memorial Lecture: Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003).

54. See, e.g., *Duell v. Condon*, 84 N.Y.2d 773, 780 (1995); *Maplewood Mgmt. v. Best*, 533 N.Y.S.2d 612, 613-14 (N.Y. App. Div. 1988); CAL. LEGAL SERVS. COORDINATING COMM., CALIFORNIA STATE JUSTICE PLAN 2001: RESPONSE TO LSC PROGRAM LETTER 2000-1, at 32 (2001) [hereinafter CAL. LEGAL SERVS.].

Fees play a critical role in consumer protection and mortgage fraud cases, in particular. In all but five states, consumer protection statutes that prohibit deceptive practices permit prevailing plaintiffs to recover attorneys' fees from defendants who have been found to have violated the law.⁵⁵ On the federal level, the Fair Housing Amendments Act ("FHAA"), a tool for combating the racially discriminatory bias in much subprime lending, also provides for attorneys' fee awards when a plaintiff has prevailed.⁵⁶ The Real Estate Settlement Procedures Act ("RESPA"), which prohibits kickbacks to mortgage brokers, authorizes prevailing parties to obtain attorneys' fees.⁵⁷ In addition, fees are authorized under the Truth in Lending Act ("TILA"),⁵⁸ which mandates certain disclosures in home equity lending, and the Home Ownership and Equity Protection Act,⁵⁹ an amendment to TILA that mandates additional disclosures for high-cost home loans and prohibits certain loan terms such as negative amortization and balloon payments.

The possibility of having to pay attorneys' fees provides critical leverage to ensure that a better funded legal adversary does not drag out proceedings in an attempt to exhaust the legal aid lawyer's resources. As the New York Court of Appeals has stated, the availability of attorneys' fees is "an incentive to resolve disputes quickly and without undue expense" on the part of the court and litigants.⁶⁰ Without the ability to level the litigation playing field, low-income litigants are placed at a disadvantage in the litigation and in settlement negotiations.

LSC-funded South Brooklyn Legal Services ("SBLs") has one of the nation's leading predatory lending practices. It reports that the inability to seek fee awards frequently results in predatory lenders dragging out cases that might otherwise settle if fees were available to serve as an incentive to resolve the case before the investment of substantial attorney time.⁶¹ In one case against Ameriquest Mortgage Co., one of the nation's largest

55. See CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 21 (2009), available at http://www.nclc.org/issues/udap/content/UDAP_Report_Feb09.pdf.

56. 42 U.S.C. § 3613(c)(2) (2006) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs.").

57. 24 C.F.R. § 3500.21(f)(1)(iii) (2009).

58. 15 U.S.C. §§ 1601 *et seq.* (2006).

59. 15 U.S.C. § 1639 (2006).

60. *Duell v. Condon*, 84 N.Y.2d 773, 780 (1995) (describing New York's Real Property Law § 234, which permits tenants to obtain attorneys' fees when a residential lease term permits landlords to collect fees).

61. Interview with Jessica Attie, Project Co-Dir., Foreclosure Prevention Project, S. Brooklyn Legal Servs. (Jan. 22, 2009).

predatory lenders, SBLs represented an elderly African-American widow who had been conned into an unaffordable mortgage when she needed to make repairs to her home of over twenty years.⁶² After meeting with Ameriquest representatives, this client received a 2/28 mortgage (a thirty-year mortgage with two years at a fixed rate and twenty-eight years at an adjustable rate) with initial monthly payments of \$2,300, nearly three times her monthly income.⁶³ To make it appear as if she could afford the loan, Ameriquest allegedly created a fake set of financial documents to include in her loan file, including a 401(k) document, employment statement, lease agreement, and tax returns.⁶⁴ With SBLs's assistance, she brought a case alleging Fair Housing Act, Truth in Lending Act, Real Estate Settlement Procedures Act, New York Deceptive Practices Act and other violations.⁶⁵

In an attempt to prove that the company engaged in a pattern of extending unaffordable loans to borrowers, SBLs sought the lender's loan files for other borrowers around New York.⁶⁶ Ameriquest initially refused to turn over the documents and the company was able to draw out a lengthy court battle due to the severe mismatch in negotiating stances.⁶⁷ Eventually, Ameriquest produced 50,000 pages of documents, which took two attorneys hundreds of hours to review and was an enormous drain on SBLs resources.⁶⁸ The case eventually settled.⁶⁹ Had SBLs been permitted to seek attorneys' fees, Ameriquest might have had an incentive to limit the amount of time the plaintiffs' attorneys had to spend on the case, thus, speeding up the litigation process. Fees would have also given the SBLs client more leverage in settlement negotiations.

The award of attorneys' fees also serves a deterrent purpose. For example, it ensures that wrongdoers suffer some additional financial penalty for violating a consumer protection or civil rights statute and cannot merely write off the costs incurred in the litigation as a cost of doing business. When low-income victims of such violations cannot seek fee awards, however, that purpose is frustrated. As new "foreclosure consultant" scams—in which unsavory "consultants" make money by falsely promising to help distressed homeowners refinance or otherwise reduce their mortgage

62. Complaint at 1, *Overton v. Ameriquest Mortgage Co. et al.*, No. 05-CV-4715 (E.D.N.Y. Oct. 6, 2005).

63. *Id.* at 7.

64. *Id.* at 9.

65. *Id.* at 2.

66. Interview with Jessica Attie, *supra* note 61.

67. *Id.*

68. *Id.*

69. *Id.*

debt—appear with alarming regularity, the fee restriction hampers efforts to shut them down.

LSC-funded Legal Aid Foundation of Los Angeles (“LAFLA”) estimates that as many as 30% to 40% of homeowners contacting its office last year for foreclosure-related assistance had either already paid a foreclosure consultant or had been contacted by one.⁷⁰ To protect homeowners and ensure that they are informed of their rights, California law regulates the practices of mortgage foreclosure consultants.⁷¹ Even with this law on the books, LAFLA reports that some consultants illegally provide little or no services and divert the homeowner from seeking legitimate assistance. In many cases against deceitful foreclosure consultants, actual damages would be in the range of \$1,500 to \$2,500, but this small amount limits the effectiveness and feasibility of litigation.⁷² Despite the statutory provision for attorneys’ fees in the California law, there are inadequate resources available among those entities that could pursue fees, including the private bar and criminal prosecutors, to fight these predatory consultants. If LAFLA could seek fees in these cases, they could raise the consultants’ costs of continuing these illegal practices, perhaps high enough to put them out of business.

Attorneys’ fees also deter wrongful conduct by individuals who flout court orders. In one aspect of LSC-funded Legal Aid of West Virginia’s practice, staff attorneys and volunteer private attorneys represent victims of domestic violence who seek protective orders.⁷³ However, when an abuser repeatedly flouts court orders, the victim cannot seek attorneys’ fees to deter such flagrant and dangerous violations of the law.

Finally, the attorneys’ fee restriction cuts off a key fundraising mechanism that would permit programs to bring in added funds to serve more clients. The California Legal Services Commission has observed that in addition to impeding successful case resolutions, the attorneys’ fee award restriction creates serious funding problems for LSC grantees.⁷⁴ Prior to the restriction’s enactment, LSC-funded organizations in California recovered approximately \$1.75 million annually in attorneys’ fees, a revenue source no longer available to them.⁷⁵

70. Memorandum from Dorothy Herrera Settlage, Legal Aid Found. of L.A., to Dennis Rockway, Legal Aid Found. of L.A. (Jan. 26, 2009) (on file with the Brennan Center).

71. CAL. CIV. CODE § 2945(c)(1) (West 1980).

72. Memorandum from Dorothy Herrera Settlage, *supra* note 70.

73. Interview with Adrienne Worthy, Executive Dir. of Legal Aid of W. Va. (April 15, 2009).

74. CAL. LEGAL SERVS. COORDINATING COMM., *supra* note 54, at 32.

75. *Id.*

2. *Class Action Restriction*

Class actions provide courts and litigants with an efficient mechanism for adjudicating the similar claims of a group and ensure that similarly situated persons obtain relief when a defendant violates the law. They also provide access to the courts for individuals who might not have the resources to bring an individual claim. In some cases, the availability of a class action ensures that broad discovery can take place as to a defendant's unlawful actions.

For low-income people in particular, the availability of class actions is critical for obtaining relief from widespread, illegal practices.⁷⁶ Historically, class actions by legal services programs ensured that poor children obtained medical coverage,⁷⁷ forced the Social Security Administration to abide by court rulings,⁷⁸ and challenged consumer fraud.⁷⁹ Access to justice and legal services commissions in Georgia, Hawaii, Missouri, New Hampshire, and North Carolina have concluded that the inability to use the class action mechanism hinders legal services offices from providing the best possible services to their clients.⁸⁰ As the North Carolina Legal Services Planning Council has concluded, challenging some "illegal but widespread practices" without a class action lawsuit is "impossible."⁸¹

As with the attorneys' fee restriction, the class action limitation has a particularly harmful effect on efforts to combat consumer fraud that targets low-income communities. In predatory lending cases, for example, legal services programs must litigate against unscrupulous players piecemeal, helping one homeowner at a time instead of a broad class of victims. A recent suit by eight first-time homebuyers against United Homes, LLC, a self-titled "one-stop shop" of real estate companies, lenders, appraisers, and lawyers, illustrates the inability of the courts to fully enforce consumer pro-

76. See Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN ST. L. REV. 1, 10-14 (2005).

77. See *id.* at 11 (describing case brought by the Tennessee Justice Center).

78. See David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia and Oregon Describe the Costs*, 17 YALE L. & POL'Y REV. 337, 340-41 (1998).

79. See *id.* at 347.

80. See BRENNAN CTR. FOR JUSTICE, REPORTS FROM EIGHTEEN STATES HAVE IDENTIFIED FEDERAL RESTRICTIONS AS A BARRIER TO JUSTICE (2009), available at http://brennan.3cdn.net/f4c6618922cc8c403e_0hm6bns0j.pdf.

81. N.C. LEGAL SERVS. PLANNING COUNCIL, NORTH CAROLINA STATEWIDE LEGAL NEEDS ASSESSMENT 2003, at 49 (2003), available at https://www.legalaidnc.org/Public/Participate/Legal_Services_Community/Planning_Council/NC%20Statewide%20Needs%20Assessment%2003%2024%2003.pdf.

tection laws without the option of a class action.⁸² Represented by SBLs, the eight African-American homebuyers allege that United Homes conspired with appraisers, lenders, and attorneys to sell “over-valued, defective homes financed with predatory loans.”⁸³ They allege that United Homes failed to disclose their properties’ histories, inflated the homes’ values with inaccurate appraisals, overstated the buyers assets and incomes on loan applications, concealed information about loan terms, sold the homes in uninhabitable conditions, and refused to make agreed-upon repairs.⁸⁴ The homebuyers also allege that “United Homes exploited the racially segregated housing market to engage in ‘reverse redlining,’ the practice of intentionally extending credit to members of minority communities on unfair terms.”⁸⁵ The bulk of the plaintiffs’ claims have survived a motion to dismiss and the case continues.⁸⁶ Given the alleged nature of this “one-stop shop,” it is hard to imagine that these eight plaintiffs are the only low-income individuals in Brooklyn who have fallen victim. However, unable to file a class action against United Homes, SBLs cannot seek more widespread relief for other homebuyers potentially taken advantage of by United Homes.

3. *Legislative and Administrative Advocacy Restriction*

Low-income people are at a distinct disadvantage in raising their concerns before legislative and administrative bodies. They lack the lobbyists, trade associations, and monetary donations that provide corporate and other well-resourced interests access to the political process. At the same time, their daily lives are often inextricably linked with the operations of government and law.⁸⁷

Legal aid attorneys who see the legal problems faced by low-income communities on a daily basis can play a critical role in alerting legislatures and other government bodies to gaps in regulation and problems in the implementation of laws. The silencing of legal aid attorneys has had dire

82. *Barkley v. Olympia Mortgage Co.*, 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007).

83. *Id.* at *1.

84. *Id.*

85. *Id.* at *2.

86. *Id.* at *23.

87. See generally Barbara Gault et al., *Prospects for Low-Income Mothers’ Economic Survival Under Welfare Reform*, 28 *PUBLIUS* 175 (2008) (describing the effects of welfare reform laws and policies on low-income mothers); Christopher Mazzeo et al., *Work-First or Work-Only: Welfare Reform, State Policy, and Access to Postsecondary Education*, 586 *ANNALS AM. ACAD. POL. & SOC. SCI.* 144 (2003) (describing the effects of welfare reform and state implementation on educational attainment of low-income people).

consequences in the current mortgage crisis.⁸⁸ Attorneys at Maryland Legal Aid Bureau (“MDLAB”), for example, have witnessed many of the lending abuses that have occurred over the last ten years, but restrictions on legislative and administrative advocacy have prevented them from actively pursuing reforms.⁸⁹ Under the restrictions, the only way that a legal aid office can participate in lobbying is in response to a written request from a lawmaker.⁹⁰ Because few lawmakers are aware of this limitation and rarely invite the participation of legal services lawyers in legislative discussions, this highly unusual requirement most often shuts down communication entirely.⁹¹

In contrast, when MDLAB has been able to educate lawmakers about the problems faced by its clients—at a lawmaker’s invitation, as required by the restrictions—it has lent a critical, non-mortgage-industry voice to the process. In 2008, the Maryland Legislature dramatically overhauled state laws regarding credit and lending processes.⁹² Because of a lawmaker’s invitation, a MDLAB attorney was able to participate in a state Senate Finance Committee workgroup on revising consumer protection safeguards that was otherwise composed of representatives from the lending, mortgage, and banking industries.⁹³ The MDLAB attorney was the only person in the workgroup positioned to represent the interests of borrowers.⁹⁴ Input from this attorney ensured that the proposed consumer protections were not unduly limited to the most extreme types of loan products, as the industry representatives had proposed, and resulted in a more wide-ranging consumer protection bill being passed by the Legislature.

B. Restrictions on Unpopular Clients Render Courts Off-Limits for the Most Vulnerable.

Reflecting the political winds of the time, the 1996 restrictions prohibited legal services attorneys from representing many categories of immi-

88. Abel, *Lawyers*, *supra* note 51.

89. Interview with Kathleen Skullney, Project Att’y, Foreclosure Legal Assistance Project, Legal Aid Bureau (Feb. 23, 2009).

90. *See* 45 C.F.R. § 1612.6 (1997).

91. Abel, *Lawyers*, *supra* note 51.

92. *See, e.g.*, Andy Rosen, *Foreclosure Reform Bills Take Stage in Maryland Legislature*, DAILY REC., Feb. 6, 2008, http://findarticles.com/p/articles/mi_qn4183/is_20080206/ai_n21226608.

93. Interview with Kathleen Skullney, *supra* note 89.

94. *Id.*

grants and all prisoners.⁹⁵ These exclusions have further marginalized those with the least access to the civil justice system.⁹⁶

1. *Immigrant Representation Restriction*

For certain categories of immigrants, including many who are lawfully in the United States, the restriction places legal representation out of reach even when the stakes are high. In many parts of the country, there are no non-LSC-funded legal aid offices that can serve undocumented and other excluded immigrants.⁹⁷ As a result, they have no place to turn when they face unlawful eviction, consumer fraud, or an employer who has cheated them out of wages.

One of the groups hardest hit by the immigrant restriction are those migrant workers here in the United States at their employer's invitation on H-2B visas, a visa category for unskilled, non-agricultural workers performing seasonal or temporary jobs. H-2B visa holders were excluded from legal aid eligibility in 1996.⁹⁸ Last year, Congress eased the restriction slightly and made H-2B visa holders working in the forestry industry eligible for legal aid.⁹⁹ However, H-2B workers employed in other industries, such as construction, canning and tourism, remain ineligible.¹⁰⁰

H-2B workers often perform tasks that risk physical harm and frequently are mistreated by employers.¹⁰¹ Many do not speak English and work in geographically isolated areas.¹⁰² Without access to legal services, they are virtually without recourse when their rights are violated. Employers often take advantage of this fact by misclassifying agricultural workers as H-2B

95. See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1321-53 to 1321-55.

96. See RHODE, *supra* note 7, at 115-16.

97. See, e.g., THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS 170, 181 (2005), available at <http://www.equaljusticeillinois.org/docs/LegalNeeds.pdf> (describing lack of non-LSC-funded legal aid organizations outside urban centers of the state).

98. See § 504(a)(11).

99. See Press Release, Legal Servs. Corp., Temporary Forestry Workers Now Eligible for LSC-Funded Services (Jan. 10, 2008), available at http://www.lsc.gov/press/updates_2008_detail_T220_R0.php.

100. See *id.*

101. See *Hearing Before the Subcomm. On Immigration, Citizenship, Refugees, Border, Security, and International Law Membership of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of George Miller, Chairman of the Education and Labor Comm.), available at <http://judiciary.house.gov/hearings/pdf/Miller080416.pdf>.

102. See MARY BAUER, S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 31 (2007), available at http://www.splcenter.org/pdf/static/Close_to_Slavery.pdf.

workers, when these workers should fall under the relatively more stringent protections of the H-2A visa program.¹⁰³

LSC-funded Texas RioGrande Legal Aid has described a number of cases in which it had to turn away exploited H-2B workers.¹⁰⁴ One case involved an “illegal guestworker importation scheme” in which a grower and two farm labor contractors used over 400 H-2B workers to harvest and pack onions and watermelons from 2001–2007 in south and west Texas to circumvent the protections and benefits of the H-2A program, including access to LSC-funded representation.¹⁰⁵ TRLA was unable to represent any of the H-2B visa holders, even though there was reason to believe that they had been abused at the hands of their employer.¹⁰⁶

2. Prisoner Representation Restriction

Legal services organizations are prohibited from representing anyone in prison.¹⁰⁷ This restriction has hampered efforts to resolve civil legal issues, such as those related to debt and child custody, that can help persons in prison prepare for reentry into their communities. In some parts of the country, the restriction has left those in prison with virtually no access to civil legal representation.¹⁰⁸

Michigan, for example, has a bold and innovative Prisoner Reentry Initiative that aims to help incarcerated people as they prepare to reenter society.¹⁰⁹ A team of community groups, faith-based organizations, and legal services providers stands ready to provide essential services.¹¹⁰ An important component of this project is “in-reach”; going into prisons and jails to address the problems confronting these men and women prior to release.¹¹¹

103. *See Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hired From Abroad?: Hearing Before the H. Comm. on Education and Labor*, 100th Cong. 90 (2008) (statement of Javier Riojas, Branch Manager, Tex. RioGrande Legal Aid), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:41982.wais.

104. *See id.*

105. *See id.*

106. *See id.*

107. *See Omnibus Consolidated Rescissions & Appropriations Act of 1996*, Pub. L. No. 104-134, § 504(a)(15).

108. *See, e.g.,* RHODE, *supra* note 7, at 116; THE 2007 ASSESSMENT OF CIVIL LEGAL NEEDS AND BARRIERS OF LOW- AND MODERATE-INCOME PEOPLE IN HAWAII II-24 (2007) [hereinafter THE 2007 ASSESSMENT], available at <http://www.hsba.org/resources/1/Documents/Access%20to%20Justice.pdf>.

109. Mich. Prison Reentry Initiative, The Three-Phase, Decision-Point MPRI Model, <http://www.michpri.com/index.php?page=how-it-works> (last visited Apr. 12, 2009).

110. *Id.*

111. *Id.*

But, even though this Michigan initiative is primarily funded with state and private money, legal services programs, such as the Reentry Law Project of LSC-funded Legal Aid of Western Michigan—a key legal player on the team—are barred from providing services to anyone in a prison.¹¹² The Reentry Law Project, for example, can only assist individuals once released, even though many of the problems facing prisoners would be better addressed during incarceration, so that citizens can move immediately into employment and housing upon release.¹¹³ For example, many prisoners face the loss of custody of their children while incarcerated and would benefit greatly from the help of an attorney as they struggle to maintain family relationships.¹¹⁴

In states that lack other funding or organizations designed to assist those in prison, the restriction has meant that legal representation is effectively out of reach. For example, in Hawaii, where the incarcerated population grew 138% from 1990–2006, the ACLU of Hawaii is the “only legal service agency with the potential to assist the inmate population; however, due to their limited resources they only accept cases which would result in a larger impact on the overall corrections system.”¹¹⁵

C. The Restriction on Non-LSC Funds Wastes Precious Funds and Unfairly Burdens State and Local Efforts to Expand Access to Justice.

The most draconian aspect of the LSC restrictions is the application of this entire set of limits to all of the state, local, private and other non-LSC funds possessed by LSC recipients. This punitive measure subjects legal services offices to a more stringent regime than almost any other federal grantee. It has interfered with efforts at the state level to leverage resources for the efficient and effective provision of legal aid. Finally, in a field notoriously under-resourced, the restriction on non-LSC funds has wasted precious dollars and driven away private funding opportunities.

1. Non-LSC Funds Restriction Is out of Step with the Government's Approach to Public-Private Partnerships.

The restriction on non-LSC funds, and program integrity regulation that implements the restriction, are out of step with the traditional model for public-private partnerships. Non-profit organizations that receive part of

112. See § 504(a)(15).

113. Interview with Miriam Aukerman, Reentry Law Project Dir., Legal Aid of W. Mich. (April 15, 2009).

114. *Id.*

115. THE 2007 ASSESSMENT, *supra* note 108, at II-24.

their funding from LSC are treated more stringently than almost all other government-funded non-profits, including faith-based organizations.¹¹⁶ Other non-profits must account strictly for their receipt of government funds, but are not forced to operate dual systems out of separate offices in order to use their private funds to engage in constitutionally protected activities.¹¹⁷

LSC has defended this “physical separation” model in court by claiming that such stringent separation is necessary to ensure that it does not indirectly subsidize or appear to endorse the disfavored, restricted activities, such as representation of undocumented immigrants or class actions.¹¹⁸ However, that claim is belied by the fact that faith-based organizations that receive government funds are subject to a much more relaxed separation regime.¹¹⁹ The First Amendment’s Establishment Clause bars the federal government from subsidizing or endorsing a religious grantee’s religious activities.¹²⁰ Yet, under the current federal Faith-Based Initiative, the government allows religious organizations to rely on a single staff to run federally funded, non-religious programs in a single physical space in which the organizations conduct privately financed religious activities such as worship and proselytization.¹²¹ The government has asserted that such a modest level of separation is good enough to avoid subsidization as well as the appearance of endorsing a privately funded religious message.¹²² The disparity in treatment with legal services programs is particularly striking since the Constitution’s Establishment Clause actually forbids governmental endorsement of a religious message, whereas the Constitution does not require the government to distance itself from the provision of legal repre-

116. See Office of Mgmt. & Budget, Circular No. A-122: Cost Principles for Non-Profit Organizations, available at <http://www.whitehouse.gov/omb/circulars/a122/a122.html> (setting forth accounting requirements for recipients of federal grants).

117. See *id.*

118. See *Velazquez v. Legal Serv. Corp.*, 349 F. Supp. 2d 566, 607 (E.D.N.Y. 2004).

119. Exec. Order No. 13279, 67 Fed. Reg. 77,141 (Dec. 12, 2002); WHITE HOUSE OFFICE OF FAITH-BASED & CMY. INITIATIVES, GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS ON PARTNERING WITH THE FEDERAL GOVERNMENT (2002) [hereinafter FAITH-BASED], available at www.ethicsinstitute.com/pdf/Faith%20Based%20Federal%20Grants.pdf. This Article takes no position on whether the Faith-Based Initiative enables the government to fulfill its constitutional obligations.

120. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (“[O]ur cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.”).

121. Exec. Order No. 13,279, 67 Fed. Reg. 77141; FAITH-BASED, *supra* note 119.

122. Exec. Order No. 13,279, 67 Fed. Reg. 77141; FAITH-BASED, *supra* note 119.

sentation and, indeed, in some cases may even require government to provide representation.¹²³

The punitive nature of LSC's physical separation regime is further underscored by contrasting it with the more reasonable rules applied in 2002 to federally funded stem cell research. Scientists using private funds to conduct research on federally proscribed stem cell lines were required, for years, to operate two entirely separate labs, one for their privately funded research, another for their publicly funded research.¹²⁴ In 2002, the National Institutes of Health found this restriction so expensive, inefficient, and contrary to principles of scientific research that it removed the restriction.¹²⁵ The NIH permitted government-funded scientists to conduct privately funded stem cell research alongside federally funded research, in a single lab, so long as they use rigorous bookkeeping methods to ensure that any restricted stem cell experiments are financed exclusively with private dollars.¹²⁶ LSC-funded organizations should be placed on a level playing field with these and other federal grantees.

2. *Restriction on Non-LSC Funds Interferes with Growing State and Local Efforts to Expand Access to Justice.*

State and local governmental institutions and private charitable donors are essential partners in state justice systems designed to expand access to civil justice. For example, money for civil legal services is contributed by Interest on Lawyers' Trust Accounts ("IOLTA"),¹²⁷ state legislative appropriations, civil court filing fees, and a variety of other state and local contributions, all intended to enable low-income individuals, families, and

123. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

124. Laura K. Abel, *Drawing Lines for Dollar*, LEGAL TIMES, Sept. 30, 2002, at 62, available at <http://www.brennancenter.org/page/-/Justice/DrawingLinesforDollars.pdf>.

125. *Id.*

126. See Federal Policy, [Stem Cell Information], <http://stemcells.nih.gov/policy/defaultpage.asp> (last visited May 15, 2009) (on file with author). The restrictions on federally funded stem cell research have since been further eased by the Obama Administration. See Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 9, 2009), available at http://www.whitehouse.gov/the_press_office/Removing-Barriers-to-Responsible-Scientific-Research-Involving-Human-Stem-Cells/.

127. When lawyers hold clients' funds that are either nominal in amount, or expected to be held only for a short term, they must place the funds in an interest-bearing "IOLTA account." Pursuant to state law, the interest from these accounts are pooled (note: such interest would not exist but for such pooling) and used to fund civil legal aid for low-income people and to fund improvements to the justice system. More information available at IOLTA.org Leadership for Greater Justice, <http://www.iolta.org/> (last visited Apr. 12 2009).

communities to obtain civil legal assistance.¹²⁸ But, the federal government undercuts this important function, by effectively limiting how state and local contributions can be spent by local legal aid non-profits.

The restriction on state, local, and private money currently ties up approximately \$490 million in non-LSC funding annually, much of it from these state and local government sources.¹²⁹ Real federal funding levels have declined from the high-water mark achieved in FY 1981.¹³⁰ Since that year, annual federal underfunding of LSC has meant that LSC finances less and less of legal services organizations' work while the restriction continues to apply federal control over the entirety of those organizations' activities. Nationally, 58.1% of the funds that go to LSC grantees came from non-LSC sources in 2007, up from 40% the year the restriction was enacted.¹³¹

The proportion is much more skewed in some states. In New Jersey, for example, LSC funds amounted to only 13% of legal aid programs' total funding in 2007, yet the restriction encumbered the remaining 87%.¹³² Overall, LSC grantees in twenty-seven states received less than half of their funds from LSC sources in 2006,¹³³ yet the restriction limited what these programs could do with all of their funds. Thus the restriction, coupled with funding trends in recent years, has given the federal government increasingly disproportionate control over legal services organizations' activities and over the money of state, local, and private contributors.

3. *Restrictions Waste Precious Resources that Could Go Toward Serving More Clients.*

In some states with significant non-LSC funding, justice planners have established entirely separate organizations and law offices, funded by state and local public funders and by private charitable sources, to carry out the

128. See LEGAL SERVS. CORP., LEGAL SERVICES CORPORATION FACT BOOK 2006, at 14 (2007) [hereinafter FACT BOOK 2006], available at <http://www.rin.lsc.gov/Rinboard/2006FactBook.pdf>.

129. FACT BOOK 2007, *supra* note 20, at 6.

130. JUSTICE GAP, *supra* note 3, at 2.

131. In 2007 dollars, non-LSC funding increased from \$276 million in 1996 to \$490 million in 2007, while LSC funding decreased from \$408 million in 1996 to \$354 million in 2007 (dollar amounts adjusted for inflation using CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl>). See FACT BOOK 2007, *supra* note 20, at 6; 1996 LSC, *supra* note 23.

132. See FACT BOOK 2006, *supra* note 128, at 9. The "legal aid programs" discussed here include only those programs that received some LSC funding.

133. See *id.* at 13-14.

activities that LSC-funded programs are prohibited from conducting.¹³⁴ Because LSC's program integrity regulation requires physical separation between LSC-funded and non-LSC-funded organizations, the costs associated with overhead, personnel, and administrative expenditures are duplicated.¹³⁵ Twin systems inevitably cost more to run. Thus, the restriction creates dramatic inefficiencies in a system that is already underfunded. The money contributed by state and local governmental funders and by private charitable donors could be used to finance basic legal services for families, but instead has to be spent on duplicate offices, equipment, executive directors, and the time spent coordinating their efforts.

In Oregon, for example, legal aid programs spend approximately \$300,000 each year on duplicate costs to maintain physically separate offices throughout the state.¹³⁶ If the restriction on state and local governmental funds and private money were lifted, the redundant costs could be eliminated. The significant savings from ending dual operating systems would enable legal services organizations to cover more conventional legal services cases—such as evictions, domestic violence cases, and predatory lending disputes—in underserved rural parts of the state with limited access to legal assistance.

The restrictions also make LSC-funded organizations ineligible for certain private funding. Legal Services NYC has been unable to obtain additional funds from a local foundation due to the restrictions on its representation of immigrants.¹³⁷ Legal Services NYC partners with fourteen community-based organizations in an innovative “Single Stop Program” that provides legal assistance and social services together at outreach sites in community-based organizations around New York City.¹³⁸ This effort, which helps families keep their homes, obtain essential medical care, qualify for emergency food benefits, and more, has been funded by a local anti-poverty foundation.¹³⁹ Concerned about the needs of New York's large immigrant population, the foundation added funding to ensure that legal assistance would be provided to immigrants regardless of immigration

134. See, e.g., *Legal Aid Servs. of Oregon v. Legal Servs. Corp.*, 561 F. Supp. 2d 1187 (D. Or. 2008); Sullivan, *supra* note 11, at 19 (describing a dual system set up in Philadelphia).

135. See 45 CFR §1610.5(a) (1997).

136. See *Legal Aide Servs. of Oregon*, 561 F. Supp. 2d at 1201.

137. E-mail from Andrew Scherer, Executive Dir., Legal Servs. N.Y.C., to Rebekah Diller (Feb. 14, 2007, 17:57 EST) (on file with author).

138. Legal Servs. NYC, Single Stop, http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=37&Itemid=66 (last visited Apr. 19, 2009).

139. *Id.*

status.¹⁴⁰ Because of the restriction on non-LSC money, however, Legal Services NYC could not seek this added funding from the foundation to expand this successful community-based outreach program.¹⁴¹

Finally, as is described *supra* in Part III.A.1., the restrictions prohibit legal aid organizations from bringing in additional revenue through court-ordered attorneys' fee awards when they have proven their case. All of these limits are unjustifiable in a system desperate for funds.

CONCLUSION

A growing number of national, state, and local voices have called for reform of the legal services restrictions. Reports by Access to Justice and legal services commissions in eighteen states have identified the restrictions as substantial barriers to justice.¹⁴² Others have spoken out about the harms of the restrictions, and particularly their application to non-LSC funds. Describing a lawsuit filed by Oregon against the "program integrity rule," Governor Ted Kulongoski said: "The important point is that for the first time a *state* is now party to a suit that attempts to free Legal Aid from restrictions that serve no purpose other than to close the courthouse door to plaintiffs who have no ability to hire private attorneys."¹⁴³

Calls for change have come from across the political spectrum. In 2005, the National Council of the Churches and thirty-one other faith groups wrote to House leaders requesting that the restriction on non-LSC funds be lifted.¹⁴⁴ The next year, the National Association of Evangelicals urged Congress to do the same.¹⁴⁵ The removal of restrictions has become a priority for the civil rights community as well.¹⁴⁶ The recently introduced

140. E-mail from Andrew Scherer, *supra* note 137.

141. *Id.*

142. See BRENNAN CTR. FOR JUSTICE, *supra* note 80.

143. Governor Ted Kulongoski, Guardians of Democracy: Public Service and the Rule of Law, Robert Abrams Public Service Lecture at NYU Law School (Jan. 23, 2006), available at http://www.oregon.gov/Gov/speech/speech_012306.shtml.

144. Letter from Nat'l Ass'n of Evangelicals, to Senators Richard C. Shelby and Barbara A. Mikulski (July 13, 2006), available at http://www.brennancenter.org/page/-/d/download_file_36360.pdf; Letter from Prison Fellowship, to Rep. Frank R. Wolf and José E. Serrano (June 7, 2004), available at <http://www.brennancenter.org/dynamic/subpages/letter%20to%20congress%20reentry%20legal%20aid.pdf>.

145. See Letter from Rev. Richard Cizik, Vice President for Governmental Affairs, Nat'l Ass'n of Evangelicals, to Rep. Frank R. Wolf and Rep. Alan B. Mollohan (July 13, 2006) (on file with the Brennan Center for Justice).

146. See REBEKAH DILLER, CTR. FOR AM. PROGRESS ACTION FUND, RESTORING LEGAL AID FOR THE POOR: OUR NATION NEEDS A ROBUST LEGAL SERVICES CORPORATION (2008), available at http://www.americanprogressaction.org/issues/2008/changeforamerica/pdf/legal_services.pdf.

Civil Access to Justice Act of 2009 would ease the most troubling restrictions put in place in 1996.¹⁴⁷ And the Obama Administration, in its fiscal year 2010 budget, recommended that Congress lift three of the major restrictions in the appropriations processes. Specifically, the President's budget seeks to remove the non-LSC funds restriction and the restrictions prohibiting programs from using their LSC funds to participate in class actions and receive court-awarded attorneys' fees.¹⁴⁸ National groups, alongside allies from the access to justice, faith, and civil rights communities, continue to urge Congress to heed the President's recommendations and remove the most onerous restrictions by fixing the rider language in the next LSC appropriation.¹⁴⁹

Finally, the national economic crisis makes correction of the LSC restrictions critically important. With homeowners facing foreclosure at alarming rates and thousands of people losing jobs each month, the need for legal services is more pressing than ever.¹⁵⁰ Correcting the LSC restrictions would bring in additional funds and ensure that cases could proceed as efficiently as possible. Revitalization of legal services advocacy would protect individuals, families and communities from ongoing harm, and would substantially improve the delivery of equal justice in American courts.

147. See S. 718, 111th Cong. (2009) (eliminating, *inter alia*, the restriction on non-LSC funds and attorneys' fees and easing limits on class actions, administrative and legislative advocacy, and representation of prisoners and documented immigrants.).

148. See Budget of the U.S. Government, Fiscal Year 2010 Appendix, at 1243 (May 8, 2009), available at <http://www.whitehouse.gov/omb/budget/fy2010/assets/appendix.pdf>

149. See, e.g., Joint letter to Senators Mikulski and Shelby and Representatives Mollohan and Wolf (May 4, 2009), available at <http://www.brennancenter.org/page/-/Justice/090508.LegalServicesSign-onLtr.pdf>.

150. See Press Release, RealtyTrac, Detroit, Stockton, Las Vegas Post Highest 2007 Metro Foreclosure Rates (Feb. 13, 2008), available at <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4119&acct=64847> (reporting a 79% increase in the percent of U.S. households filing for foreclosure between 2006 and 2007). The Bureau of Labor Statistics reports that, from March 2007 to March 2009, the unemployment rate has risen 4.1% to 8.5%. See Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000 (last visited May 15, 2009). The U.S. Census Bureau reports a 0.2% increase in the number of Americans living at or below 125% of the federal poverty line in 2007 as compared to 2006 (not statistically significant). See Bureau of Labor Statistics & U.S. Census Bureau, Annual Social and Economic (ASEC) Supplement, http://pubdb3.census.gov/macro/032007/pov/new01_125_01.htm and http://pubdb3.census.gov/macro/032006/pov/new01_125_01.htm (last visited May 15, 2009).