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## **Specially Tailored Legal Services for Low-Income Persons in the Age of Wealth Inequality: Pragmatism or Capitulation?**

### **Cover Page Footnote**

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# SPECIALLY TAILORED LEGAL SERVICES FOR LOW-INCOME PERSONS IN THE AGE OF WEALTH INEQUALITY: PRAGMATISM OR CAPITULATION?

*Lucie White\**

*The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.<sup>1</sup>*

## INTRODUCTION

ONE of the major themes of this conference is whether the legal services society provides for low-income people and groups should be the same or different than the legal services that are purchased by high-income clients. The conference directs this question to the statutes, ethical rules, and practice standards that regulate the kind of legal services that low-income clients are entitled to receive. It also directs this question to the institutions for funding, distributing, and monitoring those services. Should we seek more creative and flexible ways for tailoring legal services for low-income persons to the particular capacities and circumstances of low-income clients, in this climate of growing income and wealth inequality? Or, is this proposal itself a symptom, rather than a solution, to that widening inequality?

The debate over how to provide and fund legal services to indigent clients is as old as the legal profession itself. But the character and intensity of that debate has varied across time. In the United States, this debate has heated up during periods of crisis and transformation in the American welfare state, such as the Progressive Era, the New Deal, and the War on Poverty/Great Society era. In each of those periods, the debate over legal services has been embedded in a larger contest over the normative foundations and institutional practices that shape the welfare state.<sup>2</sup> The United States and the other highly developed industrial nations are currently in the midst of a fourth period of crisis and change in the norms and institutions of their welfare states. The suggestion that I want to pose in this short essay is that the current debate over legal services for low-income persons is best understood in the context of this wider contest. The broad question that this contest poses is about the state's proper role in the distribution of societal wealth and the provision of basic human needs.

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1. *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970).

2. See Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. Rev. 474, 607-15 (1985).

The current crisis in industrial welfare states has been studied widely.<sup>3</sup> Nonetheless, the sources of that crisis are highly contested and poorly understood. Many commentators agree that a cluster of emerging, interacting, and ideologically-contested historical forces—technology, legal and institutional arrangements, culture, macro-economies, and the like—have converged to pose a deep political and cultural challenge to the institutions and practices that have characterized advanced industrial welfare states. This cluster of forces has produced three broad trends.

The first of these trends is a widening gap in wealth and income between the highest and lowest income groups.<sup>4</sup> This gap has had the effect of driving a wedge between the interests of politically and economically powerful elites and the disfranchised groups at the bottom of the wealth/income scale.<sup>5</sup> The second trend is widespread rejection, among both elites and mass public opinion, of direct state redistribution and social spending as the best means of countering this wealth/income gap.<sup>6</sup> This trend reflects the broad societal acceptance of two related tenets of neo-liberal political and economic theory: (1) that a lean government, one that can overcome the liberal addiction to “taxing and spending,” is the best engine for the generation of societal wealth; and (2) that an unfettered “free market,” which protects individual property against government taxing or taking, is the best mechanism for its equitable distribution.<sup>7</sup> The third trend is a widespread disillusionment, among intellectual elites as well as wider publics, with bureaucratic institutional arrangements in any setting, and particularly with using state bureaucracies to deliver social services such as education, housing, health care, and legal assistance.<sup>8</sup>

These three trends—a growing wealth gap; an increasing reluctance to use the state’s taxing or regulatory power to shape the market or distribute wealth; and an increasing disillusionment with state social service bureaucracies—have set the scene for the current period of challenge and transformation of the United States welfare state. Indeed, over the last decade, we have been swept into that process. We

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3. See generally Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* 250-378 (1995) (acknowledging the overwhelming complexity of studying transnational legal fields and proposing a new research agenda); Saskia Sassen, *Globalization and Its Discontents* at xix-xxxvi (1998) (analyzing new politics within the global city and the voice marginalized people have within this system).

4. See Richard B. Freeman & Lawrence F. Katz, *Rising Wage Inequality: The United States vs. Other Advanced Countries*, in *Working Under Different Rules* 29-56 (Richard B. Freeman ed., 1994).

5. See Sassen, *supra* note 3, at xxv-xxvii.

6. See, e.g., de Sousa Santos, *supra* note 3, at 82-90 (discussing how the “promise of a fairer distribution of social benefits . . . has not been sustained and is being eroded”).

7. See *id.*

8. See *id.*

have watched this challenge focus upon the most vulnerable welfare state program: Aid to Families with Dependent Children ("AFDC"), which was put in place in the Progressive and New Deal eras, and expanded into an equal access entitlement program during the 1960s.<sup>9</sup> This challenge culminated in August 1996, with the repeal of the sixty-year-old AFDC entitlement, through the enactment of the Personal Responsibility and Work Opportunity Act ("PRWORA"), a new federal welfare reform law.<sup>10</sup>

As we all know, this law disestablished the federal AFDC program and devolved much of the legal authority for the block grants that replaced the AFDC entitlement to the discretion of state and local officials.<sup>11</sup> Further, it authorized private sector for-profit, charitable, and religious institutions to replace state bureaucracies in the delivery of welfare services to the poor.<sup>12</sup> The likely effect of these changes will be to exacerbate the gap of income and resources between well-to-do elites and the extremely disfranchised groups that AFDC serves.

Can the wider context that the enactment of PRWORA signals—of crisis and transformation in the foundational premises of the American welfare state itself—give us any new purchase on the perennial questions about the delivery of legal services that are the subject of this conference?

## I. EQUAL LEGAL SERVICES FOR EVERY AMERICAN: THE VISION FOR A GREAT SOCIETY

The language of this conference is a useful starting point for examining how debates over legal services reflect wider contests over the welfare state itself. The conference materials speak of legal counsel for low-income persons as a "service" that is to be "delivered."<sup>13</sup> The questions posed by conference organizers suggest that the default position in conference deliberations, against which we are considering proposals for change, is that this service is, or should be, the same for all persons in society, regardless of their economic wealth or social status. That language reflects assumptions about the welfare state that were contested, briefly accepted, and then eroded during the 1960s and 1970s. In that era of welfare state expansion, legal aid gained at

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9. See Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, at 8-9 (1993) (discussing the growth of AFDC in the 1960s).

10. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 101-913, 110 Stat. 2105, 2105-2355 (codified in scattered sections of U.S.C.); see also Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 Va. J. Soc. Pol'y & L. 3, 72-114 (1996) (criticizing 1990s welfare reform and arguing that "anti-welfarism has gone much further than before").

11. See Personal Responsibility and Work Opportunity Reconciliation Act § 103.

12. See *id.* § 104.

13. Indeed, the name of this conference is "The Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues."

least partial acceptance as a welfare state entitlement.<sup>14</sup> As such, it was defined as a commodity, like education, housing, health care, child care, and the like, that was to be “delivered” to low-income persons through a quasi-public state bureaucracy that was funded through tax transfers.

Thus, the entire system, like the welfare states of those eras, was set up to further the societal goals of equality and anti-subordination. In theory, the delivery of legal services to the poor through a government bureaucracy would further these two goals in the following ways. First, to combat wealth inequality, the same minimum quality of services would be made available to all citizens, across the income spectrum, regardless of ability to pay. Legal services offices would deliver the same minimum level of legal services as high-end law firms. Second, to combat status-based subordination, the legal services delivery system, unlike traditional law offices, would incorporate the features of modern bureaucracy that would ensure uniform treatment of persons in spite of their different positions in historical or societal status hierarchies. Thus, legal services offices incorporated organizational and consumer-protection features that were more characteristic of service bureaucracies than traditional law offices.

From its origins, the federally funded Legal Services system that was put in place during the Great Society era has grappled with two persistent questions. The bibliography for this conference demonstrates the centrality of those questions in the debates over legal services delivery over the last thirty years.<sup>15</sup> The vocabulary and agenda of this conference reflects their continuing influence, even as societal conditions have changed. The first of these questions is how the goal of providing a high *level* or quality of services in the interest of cross-class equality can be reconciled with the dual reality of an overwhelming need for such services and limited budgets to provide them. The second of these questions relates to the reliance of the legal services system on bureaucratic delivery mechanisms, in part as a guard against invidious, albeit largely unconscious, status-based discrimination toward socially subordinated clients from the traditional, and elite, modes of legal practice. How can such bureaucracies guard against the well-documented organizational dysfunctions that have plagued such systems, particularly, some will argue, when they are under the state’s command?

These two dilemmas—how to deliver a rich people’s level of services to poor people without limiting the number of people that you can serve and how to deliver services flexibly and effectively to poor communities through the cumbersome apparatus of a welfare bureau-

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14. See Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 *Geo. L.J.* 1529, 1558-82 (1995).

15. See *Bibliography to the Conference on The Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 *Fordham L. Rev.* 2731 (1999).

cracy—produced a rich internal literature in the early period of the legal services movement.<sup>16</sup> There was extended discussion and debate within this literature about how to ensure that high (i.e., elite) standards of “quality” would be delivered to every single client who could get through a legal services program’s screening mechanisms.<sup>17</sup> There was equally extensive debate about the most rational or equitable screening systems.<sup>18</sup> Some focused on enhancing consumer voice within the bureaucracy, through “client advisory panels” that helped to formulate case-selection criteria.<sup>19</sup> Others focused on the criteria for identifying which cases could have the greatest “impact” on systemic issues that affected large groups of clients.<sup>20</sup> Others explored arbitrary rules for dividing the case-load among different policy areas.<sup>21</sup> There was also debate within the literature that critiqued the bureaucratic organizational structure of legal services programs. Some critics, such as Steve Wexler, admonished legal aid lawyers to leave these offices, and go out into the communities where their clients lived.<sup>22</sup> This theme in the early literature saw a resurgence in the late 1980s, in the spate of articles on the “theoretics of practice,”<sup>23</sup> or on “rebellious,”<sup>24</sup> “political,”<sup>25</sup> or “critical lawyering.”<sup>26</sup> Finally, there were proposals to expand the funding base for poor people’s legal services in various ways, such as through IOLTA-funding, private bar involvement, university/community partnerships, transactional lawyering clinics, and the like, so that the trade-off between maintaining an elite level of service in each individual case and serving a larger portion of the low-income population would not be so acute.<sup>27</sup>

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16. See *id.*

17. See Jeanne Kettleson & Gary Bellow, *The Politics of Scarcity in Legal Services Work*, 36 NLADA Briefcase 5, 6 (1979).

18. See generally Carrie Menkel-Meadow & Robert G. Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 Law & Pol. Q. 237, 237-54 (1983) (discussing issues of professional decision-making in legal resource allocation).

19. See Feldman, *supra* note 14, at 1628-29.

20. See Davis, *supra* note 9, at 58-59, 142.

21. See Menkel-Meadow & Meadow, *supra* note 18, at 241-42.

22. See Stephen Wexler, *Practicing Law for Poor People*, 79 Yale L.J. 1049, 1053-56 (1970).

23. See Symposium, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 Hastings L.J. 717 (1992).

24. See generally Gerald P. López, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* (1992) (discussing legal strategies to achieve social change).

25. See Symposium, *Political Lawyering Conversation on Progressive Social Change*, 31 Harv. C.R.-C.L. L. Rev. 285 (1996).

26. See Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. Pub. Int. L.J. 49, 49 (1991); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 Mich. L. Rev. 821, 873-95 (1997).

27. See, e.g., Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. Rev. 337, 379-90 (1978) (discussing the conflict lawyers face between the necessary increased subsi-

## II. THE PRESENT ERA

In the current climate, wealth inequalities are becoming more entrenched.<sup>28</sup> The political will for direct wealth redistribution and government service bureaucracies has eroded.<sup>29</sup> As a result, the questions that were posed to legal services in its early decades have become even more salient. Yet at the same time, these large trends have greatly undermined any hope of finding adequate resolutions to those dilemmas in ways that are consistent with the basic premises of the earlier system. Instead of continuing to take those premises for granted, we must recognize that the current trends require us to re-examine those premises themselves, and reconsider what a social welfare system can and should aspire to do in the emerging era.

Thus, rather than continuing to debate the old questions—of how we can maintain elite levels of service for an exploding universe of need, or how state bureaucratic legal services delivery systems can be re-legitimized, expanded, and made more flexible in the current political climate—we should re-visit the foundational premises of the 1960s-era legal services movement. This conference is moving in that direction, albeit with some ambiguity. I think that move should be made more boldly. That is, we should debate head-on whether or not the foundational premises of the 1960s-era legal services movement are normatively and pragmatically optimal for the era into which we are moving. Is it wise and realistic for us to endorse a uniform level of legal services delivery (a level that has been elaborated in elite arenas of law practice), across the current wealth gap? Is endorsing the principle of *equal* (i.e., elite) legal services for all people the best means of promoting social equality across those divisions? Or rather, in the context of the present levels of wealth inequality, are we better off endorsing the idea that the social needs of disfranchised groups should be addressed *sui generis*, in ways that reflect *their own* experiences of need, their embedded historical and cultural realities, the societal power landscapes from their perspectives, their capacities, and their normative aspirations? Is such a normative foundation better than one which generalizes from elite institutions and practices in the interest of promoting an abstract idea of societal equality?

Some progressive scholars of health care delivery in the context of global wealth inequality have promoted such a departure.<sup>30</sup> They challenge the idea that a single normative vision of “equal health care” across the wealth spectrum is appropriate for current global

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dizing of public interest representation and the professional ethics they must work under).

28. See *supra* note 4 and accompanying text.

29. See *supra* text accompanying note 8.

30. See generally *Women, Poverty, and AIDS: Sex, Drugs and Structural Violence* (Paul Farmer et al. eds., 1996) (collecting essays by various health care experts attempting to reexamine the AIDS issue through the eyes of the poor).

conditions.<sup>31</sup> Rather, they argue that the nature of the health risks that threaten the survival of poor populations makes such universal rhetoric inadequate and, indeed, misleading.<sup>32</sup> According to these health care scholars, endorsing a uniform standard of service, even implicitly, is a bad idea, both as a short-term template for designing interventions, and as a longer-term normative goal.<sup>33</sup> They assert that such a notion will fail in the short run because it will not guide practice, research, and policy to address the urgent health needs of low income populations.<sup>34</sup> They also argue that such a notion will fail in the long term.<sup>35</sup> Rather than helping move society toward greater institutional equality, endorsing a norm of health care service that is implicitly based on elite practices and institutions will actually perpetuate the bifurcated institutional practices that construct and maintain societal stratification.

One can ask the same kinds of questions in the context of legal services delivery to low-income persons. One can seek to get below the questions that the Great Society era's legal services delivery system has obsessively generated—questions about the inability to deliver high quality legal services to all poor people, or the inadequacy of bureaucratic delivery systems to meet the needs of poor communities. One can seek to focus, instead, on the normative premises that generate those unanswerable questions. One can seek to question those premises directly. What do we think of a social welfare regime that promotes equality and anti-subordination by promising, but never delivering, an elite quality and level of social (and legal) service to poor people through state bureaucratic arrangements? Is such a vision optimal for the current age?

Opening up our foundational premises to scrutiny and debate will not lead us to easy answers. Letting go of the normative goal of a uniform level of service delivery for all persons will force us to acknowledge the depth of the current trend toward great wealth inequality. Letting go of that goal will force us to focus our practical know-how, research, and policy on the challenges to survival and well-being that are faced by those at the bottom. Letting go of that goal will force us to give up on the illusion that we further, rather than undermine, social equality by providing an elite level of services to a select few. At the same time, however, letting go of the goal of a uniform level of service for all persons carries the message that we have given up on the struggle for equality, and have resigned ourselves to living out our lives on an increasingly wealth-divided globe.

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31. *See id.* at xiii-xxi

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.*

My suggestion, then, is not that we should jettison the normative vision behind the New Deal/Great Society welfare state. Rather, I suggest that we surface the normative premises behind that vision and ask ourselves, as honestly and astutely as we can, whether those are the best premises on which to ground social welfare in the current age.