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LAWYERING FOR POOR COMMUNITIES IN THE TWENTY-FIRST CENTURY

Matthew Diller*

On a number of levels, it may appear that this is a bleak moment at which to ponder the future of poverty law. Certainly, challenges abound. The leadership in Congress has targeted the Legal Services Corporation ("LSC"), seeking to defund it completely. Although the prospect of complete defunding appears unlikely at this point, LSC's budget has been cut by thirty percent since 1995. To make matters worse, LSC funded programs have been barred from engaging in a wide variety of activities on behalf of indigent clients. Among the prohibited activities are some of the most potent tools available to poverty lawyers, such as class action litigation, and legislative and administrative advocacy.

At the same time that budget cuts have decreased the number of lawyers serving poor communities and restrictions have limited the activities of those that remain, Congress has enacted sweeping changes in many of the laws that affect poor communities most directly. Thus, changes in federal welfare, immigration, Medicaid*

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2. See LOUISE TRUBEK & JULIE NICE, CASES AND MATERIALS ON POVERTY LAW THEORY AND PRACTICE 213 (1997).


4. For fuller discussion of the issues raised by Congress' imposition of restrictions on lawyers who work in programs that receive LSC funding, see Symposium, The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions, 25 FORDHAM URB. L.J. 279 (1998).

5. Since LSC's funding was cut by 30% nationally from $415 million to $283 million, 12.9% of program staff has left and 12.7% of local legal services have closed. See Alan W. Houseman, Can Legal Services Achieve Equal Justice, (visited Apr. 8, 1998) <http://www.clasp.org/pubs/legalservices/dialogue.htm#2>.


and housing\(^9\) law heighten the demand for lawyers in poor communities. Lawyers are critically needed to provide information about the changes that are underway, to represent individuals affected by these new laws, and to influence the ways in which these laws are implemented.

The situation is particularly dramatic with respect to welfare reform. Congress has required all fifty states to develop new programs of cash assistance for families, leading to a series of critically important policy debates at the state level.\(^10\) Yet, it has prohibited poverty lawyers who work in programs that receive LSC funding from presenting the perspective of public assistance recipients in these debates and barred lawyers from challenging unlawful state laws and regulations that come out of the process.

For these reasons, any consideration of poverty lawyering in the twenty-first century cannot take for granted the assumption that there will be poverty lawyers in the future. Working to save LSC, to restore its funding, and to remove the recent congressional restrictions is essential. Indeed, the fight to save LSC is clearly the single most important item on any agenda to provide legal services to poor communities.\(^11\)

At the same time, in organizing this Symposium, we viewed the current upheaval as an opportunity to consider new possibilities and directions for lawyers who work with poor communities. Our goal is to spur the task of building a new affirmative agenda for poverty law. The cuts in LSC funding, the imposition of congressional restrictions, and the restructuring of government programs that address the needs of the poor all suggest that poverty lawyers should ask basic questions about their goals and methods.

These questions also take on renewed importance because the imposition of restrictions on LSC funded organizations has led to the creation of many "spin off" programs, and the establishment of dual delivery systems in many areas.\(^12\) Under this dual approach,

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12. See Houseman, supra note 5 (noting that a new delivery system is emerging in many states that includes both programs funded with LSC funds but restricted in its activities, as well as programs funded with substantial non-LSC funds).
one program in an area receives LSC funding and operates subject to restrictions, while another group receives private or unrestricted government funding and remains free of the LSC restrictions. Many organizations are seeking to define their roles in this new environment. Because these "spin off" programs are not subject to any LSC requirements, they have more latitude than poverty law offices have had since the creation of LSC in 1974.\textsuperscript{13}

In rethinking the function and role of poverty law offices, it is important not to ignore past discussions of these issues. These questions have commanded the attention of poverty lawyers and academics since the inception of the OEO legal services program during the War on Poverty.\textsuperscript{14} In particular, efforts to restructure the delivery of legal services to the poor should be informed by the fundamental insight of the founders of the Legal Services program: lawyers can assist poor individuals and communities in altering the social conditions that create and sustain poverty. Poverty lawyers can play a larger role than simply facilitating the resolution of particular problems that poor people encounter on an individual basis. Indeed, the ideal of equal access to justice encompasses not only individual dispute resolution, but full participation in the processes of the legal system that shape public policies and direction.\textsuperscript{15}

Because of the recent congressional restrictions, many poverty lawyers of necessity must seek means other than class action litigation and legislative advocacy to influence the social conditions that create and sustain poverty. But, even apart from the restrictions, there are strong reasons why poverty lawyers should seek a broad range of strategies.\textsuperscript{16} The hostility of the courts to ambitious claims

\textsuperscript{13} See Houseman, \textit{supra} note 5. Similarly, in 1996 Congress defunded approximately twenty LSC funded support programs. \textit{See id.} These offices have been forced to redefine their functions and methods of operation in order to obtain alternative funding sources. Like the "spin off" programs, these offices are now free of constraints that LSC had imposed since 1974. Loss of federal funding has also sparked creative thinking about alternative means of supporting poverty law programs.


\textsuperscript{15} \textit{See generally} Marie Failinger & Larry May, \textit{Litigating Against Poverty: Legal Services and Group Representation}, 45 Ohio St. L.J. 1 (1984).

brought on behalf of poor clients\(^{17}\) and the revision of many laws to remove possible "hooks" on which to hang legal claims limit the potential of litigation.\(^{18}\) In addition, there is a growing skepticism about the efficacy of litigation as an agent for fundamental social change.\(^ {19}\) On the legislative front, the general public disdain for broad social programs limits the effectiveness of traditional legislative advocacy in support of government benefit programs.

This Symposium focuses on what we believe to be one piece of the answer to these questions: a renewed focus on community lawyering. Finding new ways to work with and engage poor communities is among the most important pieces of any new agenda for poverty law. By focusing on the goal of building community institutions and organizations, poverty lawyers can help poor communities in a number of vital ways.\(^ {20}\) First, they can help communities create structures for the provision of services that government has failed to provide. Thus, poverty lawyers can provide much needed legal representation in the establishment of community-based housing, health care, day care and other programs that meet vital needs. Second, lawyers can assist in community economic development projects that help to bring jobs and resources into impoverished areas.\(^ {21}\)

Third, poverty lawyers can help nascent and established grassroots organizations to achieve specific goals of community members, such as the prevention of environmental degradation, the preservation of neighborhood character through resistance to gentrification, the improvement of local schools, and a host of other goals that are frequently shared by residents of poor neighborhoods. This work contains the potential not only to achieve the identified specific goal, but also to strengthen and build community

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\(^{18}\) For example, the federal welfare reform legislation eliminates individual entitlements to receipt of benefits. 42 U.S.C. § 601(b).


\(^{20}\) This role for poverty lawyers was recognized at inception of the OEO Legal Services Program. See Edgar S. Cahn & Jean Camper Cahn, *The War on Poverty: A Civilian Perspective*, 73 Yale L.J. 1317, 1334-52 (1964).

organizations so that they can move on to the next goal more easily.  

A focus on community lawyering calls upon poverty lawyers to deploy the traditional skills of transactional lawyers in new ways.  

It therefore provides new opportunities for collaborations between poverty lawyers and the private bar. Community lawyering holds the potential to expand pro bono work beyond the litigation departments of law firms by tapping into the skills and expertise of corporate lawyers. Community-based poverty lawyers can work with client organizations or groups over the long term, drawing on pro bono support from the private bar for particular projects or transactions.

Community lawyering is based on the recognition that social and cultural institutions, such as churches, schools, service providers, and local businesses are critical to the quality of life in poor neighborhoods. When these institutions founder, the social structure of the neighborhood deteriorates, leading to an exodus of working class residents that further isolates the remaining residents from the economic and social mainstream. This isolation separates residents of poor neighborhoods from the network of information and contacts that can be critical to obtaining jobs.

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24. Sociologist William Julius Wilson has described the downward spiral that sets in when nonpoor residents leave poor neighborhoods: As the population drops and the proportion of nonworking adults rises, basic neighborhood institutions are more difficult to maintain: stores, banks, credit institutions, restaurants, dry cleaners, gas stations, medical doctors, and so on lose regular and potential patrons. Churches experience dwindling numbers of parishioners and shrinking resources; recreational facilities, block clubs, community groups and other informal organizations suffer. As these organizations decline, the means of formal and informal social control in the neighborhood becomes weaker. Levels of crime and street violence increase as a result, leading to further deterioration of the neighborhood ...

As the neighborhood disintegrates, those who are able to leave depart in increasing numbers; among these are many working and middle class families ...


25. Wilson, The Truly Disadvantaged, supra note 24, at 57.
By supporting and nurturing the growth of social, cultural, and economic institutions, community lawyering seeks to reverse this trend. Improving the quality of life in poor communities therefore provides both immediate benefits to residents and can also have an impact on the incidence and severity of poverty.

The essence of community lawyering is localism. It focuses on the goal of strengthening and building communities one by one. It requires identifying and using the assets and resources in a community, rather than searching principally for external solutions to problems. This local focus appears particularly appropriate at a point when the potential for social change on a larger scale appears slim.

Community lawyering, however, raises several issues that merit serious thought and attention. First, a focus on local problems and solutions should not be permitted to slip into a kind of isolationism. For ultimately, poor communities cannot afford to sit out the policy battles at the state and federal levels of government. In the end, poor communities must tap into the collective resources of society in order to fully address the range of problems that they face. Thus, the creation of a community health center can play a vital role in promoting the well-being of community residents, but we must not lose sight of the fact that such health centers operate in the context of a national health care system that is grossly inadequate for poor individuals and families. Accordingly, an overarching goal of community lawyering should be to help poor communities attain a measure of power and thereby establish a voice in the larger debate over the direction of our society. Absent such a goal, community lawyering may appear as a means of adapting to the political status quo, rather than a way of challenging it.

Second, community lawyering begs the question: how does one define community? The poverty law office that fosters close ties with its community sheds some of its detachment. There is a danger that the office may appear as simply another player in the internecine politics and battles that occur in any community. The


principle of "client-centered representation" only goes so far in helping lawyers deal with the conflicts and disagreements that inevitably arise. If the community is seen as the "client" in some broader sense, the question becomes: what is the community? Indeed, amid the cacophony of voices, the very notion of community may appear elusive.

Accordingly, a focus on community lawyering does not avoid difficult issues concerning the role of the poverty lawyer. Lawyers who seek to ground their work in the life of a community must still make difficult decisions and choices that could be construed as exercises of power. There is no monolithic community from which lawyers can take direction. Effective lawyering, therefore, requires putting aside romanticized notions of community and recognizing the sober reality that conflict and hard choices are inevitable. Utopian notions of community will lead only to disillusionment. Instead, attention must be devoted to the question of how poverty law organizations can deal with conflict and make the necessary choices in ways that are responsible and principled.

Finally, a focus on community lawyering need not suggest a lack of appreciation for other kinds of poverty lawyering. Despite the limits of litigation as a vehicle for achieving social change, the class action lawsuit remains the most effective means of combatting many illegal policies and practices of government agencies.

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30. See generally Paul Tremblay, Toward a Community Based Ethic for Legal Services Practice, 37 UCLA L. Rev. 1101 (1990).


32. See Ellmann, supra note 29, at 720 (describing ways in which lawyers exercise power over and manipulate their clients).


Economy lawyers can also continue to play a vital role in ways that are not local at all, such as developing an expertise in welfare, health, housing, or immigration policy and ensuring that the perspective of their clients is represented in the policy debates over these issues. Additionally, individual representation also plays an important role in the enforcement of laws that benefit poor individuals and provides an essential service to poor communities.

Despite LSC’s tribulations in Congress, the rise of community lawyering provides a source of hope and optimism about the future of poverty lawyering. Poverty lawyers are responding to the crisis by developing new strategies, forging new alliances, and exploring new methods of advocacy. For example, Professor Ann Southworth has documented the extent to which legal services lawyers in Chicago are already devoting significant attention to the representation of community organizations in planning and transactions. Programs elsewhere in the country are also utilizing this approach, and law school clinics are beginning to devote increased attention to problems such as community economic development. The rise of the environmental justice movement has created many opportunities for poverty lawyers to work with grass roots organizations on issues that are critically important to poor communities.

This Symposium issue grows out of a two-day conference held at Fordham Law School on November 6 and 7, 1997, that was jointly sponsored by the Fordham Urban Law Journal, the Stein Center for Ethics and Public Interest Law at Fordham Law School, and New York Lawyers for the Public Interest (“NYLPI”). Both the Urban Law Journal and the Stein Center were established through the generosity of Louis Stein, Fordham class of 1926. Despite his death in 1996, the vision of Mr. Stein continues to animate Fordham Law School’s deep commitment to the use of law in the service of the public. Moreover, his generosity and that of his family makes possible much of the school’s work in the area of public interest law.


37. See, e.g., Southworth, supra note 23.

38. See, e.g., Glick & Rossman, supra note 21.

39. See Jones, supra note 21, at 205 (estimating that eighteen law clinics engage in community economic development work).

The Symposium marks the twentieth anniversary of the founding of NYLPI, a group that has already made major contributions toward the cause of equal access to justice. The focus on community lawyering is particularly appropriate given NYLPI’s outstanding work with poor communities in New York City.

The content of the Symposium grew out the Advanced Seminar in Ethics and Public Interest Law that Professor Russell Pearce and I taught during the Spring of 1997. Five students worked with Joan Vermeulen, Executive Director of NYLPI, to develop the theme and substance of the program. The students, H. Vern Clemmons, Cristina Park, Maria Scheuring, Susan Welber, and Jennifer White, studied innovative poverty law programs in the New York City area to determine how they established their goals, whether they meet these goals, and the methodologies that they utilize. The students presented their work in class through a slide show that profiled a number of programs.

The students’ work led to the creation of a video for the conference exploring the work of three poverty law programs that focus on community lawyering in very different ways. This thirty minute video, So Goes A Nation: Lawyers and Communities, profiles the Community Economic Development Unit of Brooklyn Legal Services Corporation A, the Environmental Justice Project of NYLPI, and the Workplace Project’s efforts in organizing immigrant landscape workers in New York City’s suburbs. It was shown at the conference and is now included in CD-Rom format at the back of this Symposium Issue. We believe that the visual impact of the video provides a sense of these programs and of community lawyering that could not possibly be conveyed through the written word.

We are grateful to the financial support of the Open Society Institute for enabling us to make this video, and to Jacob Bender and Jim Simmons, the director and producer of So Goes a Nation. We are also grateful to the lawyers, clients, and organizers who appear in the video and to the actors, Jimmy Smits and Sam Waterston, who introduce and conclude the presentation. Finally, we appreciate the support of Dean John Feerick, whose initial vote of confidence made the project possible.

42. For a perceptive discussion of the video by a student in the Advanced Seminar, see Sisak, supra note 26.
A special thanks is due to the Symposium editors of the Urban Law Journal, Sean Hayes and Cristina Park, who devoted countless hours both to this publication and to every aspect of the conference. Both did a remarkable job. Other members of the staff and editorial board of the Urban Law Journal, including John Galluccio, Jim McCann, and Jack Pace also contributed in important ways. Lastly, much of the focus of the conference reflects the vision and hard work of my colleague Russell Pearce and Joan Vermeulen of NYLPI, who worked for almost a year to put the conference and the video together.

In most other respects, this Symposium Issue is largely self-explanatory. However, a note on the roundtable discussion is necessary. We envisioned the roundtable as a means of bringing community leaders, activists, academics, and practicing lawyers together to consider what neighborhood-based legal services should look like. Our goal was to foster discussion of this basic question free from the constraints imposed by the institutional interests of existing service providers and the dictates of funding sources. As the resulting discussion reveals, the panel came up with a number of alternatives that differ radically from the model currently relied on by most legal services offices.

The community leaders pointed to the lack of access to legal representation in many of the basic transactions that make a community function, such as estate planning, sales or purchases of homes, and advice for owners of small businesses. These comments drove home the point that poor communities, like all communities, include individuals with a range of economic and other interests. The goal of providing legal services to a poor community can be seen as encompassing the provision of counsel in a way that reflects this full range of interests. Indeed, as noted above, the working class residents and small business owners of a poor neighborhood are critically important to building institutions in the community.

At the same time, poverty lawyers have long sought to represent “the poorest of the poor,” those who may lack power even within their own communities. Community leaders, after all, respond to constituencies within their own communities that can make themselves heard. Groups that are stigmatized in society may also suf-

43. See supra note 28.
44. We are grateful to our moderator, Danny Greenberg, for his expert job in channeling the discussion without imposing undue constraints.
45. See supra note 28.
46. See supra note 24.
fer stigma in their own communities. The interests of welfare recipients, for example, may not command much attention, even in poor communities. The roundtable discussion therefore brought to light some potential tensions raised by community lawyering. The representation of poor communities can be broader than and somewhat different from the representation of poor people. To the extent that the two goals diverge, disagreement will inevitably arise.

I hope that this Symposium Issue and the accompanying video stimulate discussion and thought about the role of poverty lawyers in the future. Beyond that, I hope that they convey a flavor of the conference. For the energy and insights of the conference participants made clear that whatever course lies ahead, the enterprise of poverty law continues to inspire the passion and commitment that is essential to its future.
Thank you so much, Michael Cardozo. I am deeply honored that you, Matt Diller, and everybody else who was involved in putting together this really important conference asked me to come and offer these remarks.

There are so many people sitting here on this platform and sitting out there in the audience who could be standing up here saying what I have to say; indeed, Michael Cardozo just said a whole lot of what I have to say. Some of what we need to do, in fact, we know, and it's just that it is hard to get it done. But for me to stand up here when there are people here from all over the country, from all over the city, who have given so much, done so much, know so much about these issues that we are here to talk about, it just makes me doubly and triply honored to be standing up here.

So I will at least try to get us started. I wish I could stay; I have to teach at nine o'clock tomorrow morning, and so I will have to run back. But, it is just so important that this meeting is going on, and we need of course not only to figure out strategy, but also to carry it out and be effective.

We do meet at a challenging time for lawyering to the poor. We all know budgets have been cut, and that there is an unrelenting attack on the poor and on lawyering for the poor. We had a brief flicker of idealism — at least I thought I saw it after the 1992 national elections. That's gone.

Statutory frameworks governing the poor are less and less friendly; the Constitution of the United States is read more and more as a kind of replay or reinvention of *Lochner*,\(^1\) with the Supreme Court's role being to protect the private market order that we are told in many ways, over and over again, is the natural state of things.

But I did use the word “challenge” advisedly, because in crisis there is always opportunity, there is always a time to reassess. This

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\* Peter Edelman is a Professor of Law at Georgetown University Law Center. He served from 1993 until 1996 in the U.S. Department of Health and Human Services, first as Counselor to the Secretary, and then as Assistant Secretary for Planning and Education. This article was originally delivered as the Keynote Address at the Symposium at Fordham Law School on November 6, 1997. These remarks have undergone minor editing to remove the cadences that appear awkward in writing.

is the time to chart the future, to figure out new approaches, to seek new allies and new commitments.

I suggest we start the conversation with a governing principle: that our resource to do lawyering for poor communities is and has to be the entire Bar, including the law schools, the corollary being that a narrow definition of who does lawyering for poor communities was never right and is particularly inappropriate now. Maybe there was a view once upon a time that we could get federal funding to increase to the point where it reached the general realm of adequacy. I think we know now that that’s not going to take place in the near future. Indeed we do have to keep up the fight for federal funding. It is absolutely essential. It is at the top of the list, along with the relaxation of the restrictions on legal services.²

We also have to add state funding to that list. There is pending in New York State right now, as I think most people in this room know, with very strong support from the Bar and already endorsed by the Democratic Majority in the State Assembly, a proposal to make $40 million annually available from civil filing fees for legal services to the poor. If you permit me to say, as someone who does not live in this state, it should be enacted. At least a dozen other states have drawn on filing fees as a financial source for legal services, and it would strike me that New York should do the same. The proposal doesn’t involve an increase in fees; it’s a question of allocating a portion of the funds that go into the general fund right now.

Of course there are other possible sources of money from within the State — punitive damage awards, unclaimed class action damages, lawyer registration fees, and other interest-bearing accounts — besides those that are already tapped for legal services. And yet, while all of this — federal and state funding of legal services, and the legal services model — are an absolutely essential part of the answer, they are not the whole answer. We need to broaden our sights.

The challenges for lawyers to work on reducing poverty are broad. They include lawyering for fundamental, structural societal change, for basic and serious policy change, for achieving consistent policy application, creating and strengthening community in-

stitutions that help the poor, and case-by-case representation. This is a long list, but I think it is very important that we commit ourselves to all of it.

To even begin to meet these challenges, I would suggest that the private Bar has to take on a greatly increased responsibility. This is not the answer, but it is an essential part of the answer. Law schools, both faculty and students, can do more too, and while I'll say less about it with Alan Houseman and others here to discuss the details, legal services offices, even with budget cuts and statutory prohibitions, need to reexamine the way they spend their time to make sure that they are being as productive as they possibly can be with those precious limited resources that they have.

Let me begin with something that precedes policy formation: passion. Passion. Especially a passion about the fundamentally unjust social and economic arrangements that permit persistent, ever-deepening, and inexcusable poverty in this fabulously wealthy nation.

Something has gone out of our politics. Despite increasing wealth in this country, the income of the poor not only constitutes an ever-decreasing share in the pie, but it actually keeps going down in absolute terms as well. Well over half the population continues to lose ground in its share of the pie.

More than two decades ago, the late economist Arthur Okun lamented the fact that the income of the top one percent of earners in our country equaled the income of the bottom fifth.3 Now the income of the top one percent equals the income of the bottom thirty-five percent.4 We have had a huge negative change in a twenty year period.

And poverty is deeply concatenated with issues of race and gender. We all know African-Americans and Latinos are poor at three times the rate of Whites, and yet the President of the United States can convene a blue ribbon review of race relations in the United States and the racial connection to poverty is yet to be mentioned. We will not seriously affect poverty or be effective as lawyers for poor communities if we do not strongly assert and reassert a view and take an advocacy role on the structural framework that creates and perpetuates so much poverty in this country, and do so with passion.

Lawyers are the preeminent political actors in our society. Maybe that should be otherwise, but it is a fact. They constitute a plurality, if not a majority, in most legislative bodies, at least at the state and national level. Lawyers have close connections to the most powerful people and institutions in our country. Yet, if you look at bar associations across the country, with notable exceptions here in New York State and here in New York City, very few take an interest in issues of poverty and, in particular, the structural questions. Very few lawyers, organized or unorganized, speak to the structural issues that form the map of poverty in America. We need to change that.

Second, we need lawyer involvement in policy adoption and implementation. That is a different category from structure. Even in the absence of challenges to the fundamental structure, policies are constantly being adopted that affect the poor. This, in particular, is an important time. We are in the process of implementing the most important national policy change affecting poor people since the enactment of the Social Security Act of 1935, and this policy change has the greatest negative potential of any in our history.

Devolution means that there are fifty-one theaters of action. Simple arithmetic suggests the need for more players if there is to be any chance of effective advocacy on behalf of the poor in this decentralized world.

The first round of new framework creation has now occurred in legislatures across the country. New York's outcome, while it is not exactly thrilling, is certainly far better than what Governor Pataki proposed. And that is due to the hard work and advocacy of a lot of people who are in this room, as well as others across the state. That did not happen by accident.

So you've already been busy, you've already been doing what I'm talking about. A major challenge now is to monitor the process of implementation on the ground. It is proliferating down to thousands of counties around the country. Paying careful attention to implementation is absolutely vital. What happens when the law is applied to real people can be either better or worse than it looks on paper. Indeed, decisions at the line level, at the street level, at the bureaucrat level about people's lives, are at the heart of what this welfare law is about.

On one side, the issue is better training: better oversight within agencies of workers as they undertake this job. On the other side, however, is the knowledge that there are advocates, lawyers, and others watching, watching to make sure that where the rubber hits the road, people are treated positively and with dignity.

The legal services community in Ohio is getting involved in the county-by-county implementation of the new welfare law there. They are taking a leadership role in bringing people together from a variety of organizations from different professional bases that do not necessarily talk to each other every day otherwise. That is really important, and it is going to make a major difference, I think, in whether people are going to be helped or not to move from welfare to work, and for those who should not be working, to be able to stay home with their children and not be pushed around.

I for one do not believe that enough jobs are going to appear for all of those on public assistance who are supposed to find work, even in the absence of a recession. We are talking about relevant geographically accessible jobs. Not just any job, but a job that is relevant to a person who is on welfare who’s supposed to find one, and — I don’t have to say it to the people in this room — we must not believe the hype.

The President is out there, people are out there, politicians are out there all over this country saying, “It’s working, it’s wonderful.” The fact is that the welfare rolls, with all of the hype, have only gone down to the level they were at in 1989 before a bubble started with the recession of the early 1990s. The further fact is we are talking about an additional three million people: adults with children whose families are on cash public assistance who are expected to be off the welfare rolls by the time the time limits hit. That is a major project.

The people who have gotten jobs so far are those who tend to go off the welfare rolls when times get better; the people who have not been reached yet are those who have less education, less skills, and more personal problems. The heavy lifting hasn’t started. And in our largest cities, with New York City at the top of the list, and in isolated rural areas as well, the jobs are not there in sufficient numbers even now.

There was a terrific piece of journalism — and we need more journalism like this — on the front page of The New York Times on August 31 that documented in human terms the difficulties that

7. See Eleanor Mallett, Going to Bat for Welfare, The Plain Dealer, Nov. 25, 1997, at 1E.
women are having right now finding jobs in New York City at the top of the business cycle, let alone when a recession hits.\textsuperscript{8} In New York City this has meant resorting to a workfare approach that is of dubious utility at best, and those of you who have been working on this know that is an understatement, to call it even of any utility.

The damage that workfare is doing in New York City should be documented and publicized. The litigation\textsuperscript{9} that is ongoing about workfare in New York City is useful, but it should be accompanied by a political strategy and by more attention to preventing individual people from being pushed around. All of this is a role for lawyers, now and in the future.

Even more fundamentally, we should be talking about a real job strategy instead of workfare, and right now we need to be pursuing strategies to obtain a living wage for the large number of people who have found work but are not able to escape poverty. You shouldn't have to go to work, do everything that society asks, be out there working full time, and not be able to get out of poverty. That should not be the outcome.

A long list of things is needed to help people keep jobs once they obtain them: child care, health coverage, transportation, literacy and other education and training, substance abuse treatment and mental health services, and coaching to assist people in making it on the job.

We need to keep pointing out that there are people who are not in a position to work, either because they have responsibilities to care for a family member at home or because of personal problems or limitations. Also, it is vitally important that we make the case for restoration of a safety net for children, for those families for whom work is not available or is not appropriate. The worst single thing that this law did was to blast away the safety net, as limited as it was, that we did have.

There are roles for lawyers in all of this: helping to build the staff coalitions to work the Legislature and engage in administrative advocacy; litigating about policy wherever useful; and representing individuals who are pushed around by the bureaucratic regimen that now governs their lives.


The number of families and single people put in jeopardy by the recent statutory changes is massive. It encompasses not only welfare, but also disabled children, mentally impaired adults with drug or alcohol problems, immigrants, and general assistance recipients affected by state law changes. There have also been deep cuts in low-income housing programs.

Strategies to create individual representation, and not necessarily by lawyers, by the way, are essential. New strategic partners to create client flows instead of waiting for what comes in the door are essential. Client sources can include non-profit community organizations, government agencies, schools, health providers, and so on — a long list.

Third, there are new roles for lawyers in helping to build and strengthen community institutions. This is not a new idea, to be sure. But it cannot be said too often that any lingering romanticism about exclusive reliance on big case litigation as the avenue to social change needs to be laid aside. Litigation has its place (in sympathetic state courts and sometimes in federal courts) for the occasional winning constitutional issue, or when a state is systematically misinterpreting or violating a federal statute.

But, especially with the pressures created by the new welfare law, it is all the more important that a variety of new community institutions be created. Jobs that are created as a result of community economic development do double duty: they help to renew neighborhoods, and they provide employment in accessible, and one hopes stable, enterprises that are close to home. Community building needs to become a major focus of lawyering for the poor.

Indeed, if there was one thought that I could leave tonight, and that I hope will be a major focus of this conference, it is that.

The transactional and real estate development and venture capital skills of lawyers in private practice should be harnessed to the tasks of economic development and community development in low income neighborhoods. These are skills that many legal services lawyers do not have, or don’t really have the time to exercise, although the economic development work of Brooklyn Legal Services Corporation A with community-based non-profits, which you’re going to hear about at this conference, is a tremendous example to the contrary.

Private practitioners add other dimensions as well. They come with contacts in the banking, business, and political arenas that legal services lawyers do not have. Just the task of helping to create the best possible supply of affordable child care of acceptable
quality is something that lawyers can assist with in very significant ways.

Indeed, one purpose of this conference is to showcase a number of exemplary projects where lawyers and community organizations and organizers are working together in new ways. The work of Brooklyn Legal Services Corporation A, the Workplace Project and Jennifer Gordon on Long Island, and the Environmental Justice Project of New York Lawyers for the Public Interest, are models which really do show the way, I think, for the future.

Returning to the discussion of possibilities for the private Bar, I was particularly struck in reading the report of the Law Firm Pro Bono Project, which I know many of you know about, about the work of and the story of Leonard, Street & Deinard, a firm in Minneapolis. It is important to me personally because my father practiced with that firm for nineteen years before establishing his own firm after World War II. What this 120 lawyer firm has done is to adopt an entire neighborhood. They opened a legal services clinic in the neighborhood and they put it in an existing community health clinic. And the nice part of that story is that the community health clinic happens to be run by a physician who is the son of one of the founders of the law firm.

The law clinic handles the typical case load of a legal services office, but the firm also serves as counsel to a number of neighborhood non-profit organizations. It worked on affordable housing; it helped bring a grocery store to the neighborhood by doing the legal work on that deal; and it was involved in the building of a community center and the structuring of a revolving loan fund for home repairs. It also worked on a lead paint abatement project and wrote a number of community brochures on legal issues. And it currently writes a monthly legal information column in the community newsletter.

This example communicates the possibilities, much more than any hypothetical description that any of us might offer. It is concrete, it is real, and it says this is what can actually be done. The idea of a neighborhood law clinic run by a downtown law firm is not a new idea, but this model is completely up to date. The firm is fully involved in the task of community building, as well as in representing individuals. I think that is really important.

And as far as I have been able to ascertain — if I'm incorrect, I'd be very happy to be proven wrong — I don't think that there is a law firm in New York City that operates a neighborhood law office. Not that we have a lot, I might say, in Washington, but Covington & Burling in Washington has run one for many years.

There are other things law firms can do, of course. A law firm can adopt a school, offering legal representation to all families in the school on the myriad of problems that poor families have. Law firms can offer their lawyers rotations through legal services offices, public defenders offices, as a number of New York firms do and more should, and, of course, law firms can finance fellowships for young lawyers to do public interest work, the Skadden, Arps program\textsuperscript{11} being the spectacular prime example of this.

Lawyers who take early retirement can attach themselves to community-building efforts on a full-time basis. Lawyers experiencing a midlife crisis can do something useful instead of buying a red sports car. And we should not be shy in asking law firms to do more, because, you know, when we ask them, we are giving a gift, you see, an opportunity to work on the most important issue that we face as a nation. The list of relevant issues that lawyers can help on is just endless: not only the multiple problems of individual families, but zoning, toxic waste disposal, brown fields cleanup, reducing gun violence, and on and on.

There are 700 firms in the country that have over fifty lawyers.\textsuperscript{12} The ABA Pro Bono Project has signed up 160 of them to donate either three percent or five percent (there are two levels offered by the Project) of their billable hours to pro bono work.\textsuperscript{13} There is tremendous potential in this. And we can do so much more.

I think it is time to revive the discussion of mandatory pro bono work within the Bar, certainly on a state-by-state basis, and nationally as well. At the very least, mandatory reporting of pro bono activity would be a good step.

Fourth, I would suggest — and I know this has been a matter of some discussion here in New York City — that there should be organized in every city large enough to support it a non-profit pro bono intake center, clearinghouse, and strategy coordination

\textsuperscript{11} The Skadden Fellowship Program, sponsored by the law firm of Skadden, Arps, Slate, Meagher & Flom LLP, was founded in 1988 and currently offers twenty-five fellowships per year for public interest legal work.

\textsuperscript{12} Telephone Interview with the American Bar Association Law Firm Pro Bono Project (Apr. 24, 1998).

\textsuperscript{13} See id.
center on poverty law issues. The model for this, of course, is the Lawyers' Committee for Civil Rights Under Law. Especially with the restrictions on legal services offices, class action litigation that challenges large-scale failures and misinterpretations of policy needs a strategy central. So do legislative and administrative advocacy efforts. In other words, if you take the broader view that I was talking about that starts from structural advocacy and goes through larger policy advocacy, I think it makes the case even stronger for this sort of a center. Community building agendas and the multiple neighborhoods of a large city will be served more efficiently and more fully if there is a central pro bono clearinghouse. And, of course, the substantive issues constitute a long, long list. Financing should be relatively easy if there is a commitment to do it in terms of local foundations and law firms supporting it. I think it makes sense.

Now, I recognize that the Bar Association and New York Lawyers for the Public Interest are already doing a lot of the things that would be involved in what I'm talking about, but I do think that there is room for an over-arching entity to create a strategic focus. I think that could be a useful addition and all of that could fit together.

I want to suggest for discussion here, in the next day, and elsewhere if it's worthwhile, that it is also useful for the legal services community to do some rethinking of its role. I know that it is hard under these circumstances with all the cuts to even get through the day worrying about who's going to be turned away and who's going to be served, without being told you've got to change the way you do business. So I say that with trepidation. But nonetheless, it seems to me that the legal services office in a community might begin thinking of itself partly in a more catalytic role. The question in each case — in some cases anyway — might not be, "Do I sue?" or, "How do I personally handle this matter?" It might be, "How do I maximize the limited resources of this office? How do we maximize the participation of the rest of the Bar? How do we make alliances with community development corporations, health providers, public health advocates, human services people, the business community, trade unions, the faith community, to change policy, to build community institutions, to get maximum involvement in helping people? How do we contribute to educating people in the community to be able to help themselves whenever possible without need for a lawyer? How do we insert alternative
dispute resolution perspectives into our work?” All of this, it seems to me, is a challenge that is worth considering.

A fifth point in a strategic approach is taking another look at how we more systematically make use of what we might call extenders. Whether catalyzed by the legal services community or by others, there are so many areas — and I think everyone knows this — where representational help can be done by people who are not lawyers. This is not a simple proposition, particularly if we’re talking about volunteers, because people, especially in the neighborhood, are often not in a position to volunteer. They are just trying to survive and they need to get paid.

There are so many areas of possible application of this idea, in the child welfare system, in individualized education plans for special needs children, in SSI\textsuperscript{14} determinations and redeterminations, especially for children and substance abusers, and in welfare fair hearings. So, this is a subject that is not new, but one where there may be some possibilities that have not been exhausted.

Sixth, I also think it is time for some renewed thinking on how we get legal services to people whose income is not below the poverty line, but who nonetheless cannot afford to go to a lawyer. We know that this is a very, very large group of people. One reason — if I could just take a step back on this to give you some perspective — one reason for the paucity of our politics concerning the poor is that we do so little to acknowledge and respond to the problems of people who are just above the poverty line. They struggle daily to make ends meet and what they see are welfare recipients threatening their jobs now. What they see are welfare recipients being offered child care subsidies that in many states they are not going to receive, even though they are equally in need of help, although I am happy to say that there are a few states like Illinois\textsuperscript{15} and Minnesota\textsuperscript{16} that have committed themselves to end the waiting lists for child care for everybody who needs help. More states should do that.

What those people who are on that next rung of the ladder see is lower-income people who have health coverage through Medicaid when they have nothing. And of course they hear politicians whose strategy is to divide and conquer, who exploit their anger

\textsuperscript{14} “SSI” is an acronym for Supplemental Security Income.
\textsuperscript{15} See Linda Edelman, States Stave Off a “Battle at the Bottom;” Illinois is Giving Day Care to All 30,000 Families that Need It, CHRISTIAN SCI. MONITOR, July 29, 1997, at 1.
\textsuperscript{16} See id.
and encourage their bitterness. We need a politics of fairness; we need policies of fairness. One place to re-invigorate our efforts is in the area of legal representation.

So, are there ways that we can encourage practitioners to create small firms that serve “regular people?” Can we do more with prepaid models, what we have called “Judicare”\(^\text{17}\) — that, like HMOs, provide legal assistance without a specific fee for service when the need arises? What barriers of law prevent businesses or trade unions or churches from organizing or arranging for such coverage for their employees or members? I think this needs to be on our agenda for the twenty-first century.

I haven’t talked much about what law faculties and law students can do, and some of this is, of course, both obvious and complicated. Clinics are not cheap to operate. I know this as both a former Associate Dean and former, and hopefully again, future, clinician. Yet I think we could do more. Just as classroom professors should not teach from dog-eared notes, clinicians should be ready to adjust their focus to the cutting edge.

Equal justice foundations where law students raise money so fellow students can do public interest work in the summer are growing at almost every law school. Pro bono activities by students during the school year are increasing. Every one of the activities that I’ve discussed can be a place where students can get involved, whether as part of a class or on an extracurricular basis.

Faculty should at least be teaching the facts and the policy issues in a current way, because the map of poverty policy is changing, as we know, in major ways. So at the very least curriculum content should keep up.

Fordham University School of Law has a grant from the IOLA\(^\text{18}\) Fund in New York for its students to do clinical work and externships on welfare issues at a neighborhood legal services office of the Northern Manhattan Improvement Corporation in Washington Heights. The City University of New York Law School recently got a grant from the Open Society Institute for clinical students to help asylum seekers who are detained at Kennedy Airport and to expand community education efforts on naturalization and public benefits issues. Of course, the list of good things that are happening in law schools to help low income people, including at my own law school at Georgetown, of which I am very proud, is a long one.


\(^{18}\) “IOLA” is an acronym for Interest on Lawyers Accounts.
But we need to see more such efforts and we need to see more efforts that connect students to the world of policy formation and advocacy. As vital as case-by-case efforts to help individual people are — and we need to increase those — we sometimes miss the rest of the boat by not raising our sights to look at the legislature and the commissioner’s office and any other place, including the street, that might be relevant to policy change and even structural change.

I need to say I found this a difficult talk to write. Lawyers were in the forefront of the struggle against poverty when it started its contemporary phase in the 1960s. The steam has gone out of that commitment as a country. Not in this room, but as a country. I think that happened partly because the commitment of lawyers has been the target — indeed, the country’s commitment — has been the target of such a sustained, unremitting attack, and maybe also because litigation has become tarnished as a tool of change and we haven’t found a replacement for it that has household acceptance in the legal culture.

I am heartened by the commitment I see in many of today’s students and by the increasing interest in the private Bar, but it has no reflection in our larger politics as yet. So what we ultimately need is not just representation, not just help in building new institutions in particular communities, as critical as that is, but a movement: a revitalized, broad-based movement for economic, social, and racial justice in America. As lawyers and as citizens that’s the ultimate challenge I would lay before us tonight.

Thank you so much for the chance to be with you.
MR. CARDOZO: Peter, thank you so much. I feel, and I suspect that those on the stage with me, feel that we have a pretty hard act to follow. The good news is, though, that we are going to, after hearing from each of our panelists, which I think will add still greater insight into these issues, we’re going to have a dialogue and will be encouraging everyone to join us in asking both the panelists, and particularly Professor Edelman, whatever questions this stimulating talk may have generated.

Let me just take a moment to introduce our panelists, and I thought I would do it all at once so then I would encourage everyone to remain in their seats, and then we will have each panelist give his or her remarks. And I will introduce them from my right to my left, and then they will speak from my left to my right.

Yolanda Garcia is a community activist. She has organized most recently her Bronx neighborhood to challenge an urban renewal plan that would have razed homes and stores. I find particularly intriguing the fact that she was able in one year to organize 168 community meetings that ultimately led to persuading the government to approve the plan that had been proposed by the residents. And we look forward to hearing about these issues from her perspective.

Sam Sue is presently the senior staff attorney for New York Lawyers for the Public Interest, and he has in that capacity represented community groups and individuals in a variety of
different areas, as well as giving advice to various groups, such as tenant groups. Sam also brings us the perspective of a practicing lawyer, which he has been for many years, and before that was a director of a project for the Asian-American Legal Defense and Education Fund.

Lynn Kelly, who I suspect is known to many of you in this room, is a Professor here at Fordham. She has, before being a Professor here, used her lawyering skills in some of the areas that Peter was talking about — litigation, administrative and legislative areas. Working for The Legal Aid Society, she represented individuals as well as working on class actions, as well as being the Director of Litigation of The Legal Aid Society in Harlem.¹

I think by the time our three speakers have finished their remarks we will have had a very useful perspective.

And, as I say, our panelists have been asked to stay at their seats to speak so we can then move on to a fairly informal dialogue.

MR. CARDOZO: Our next speaker will be Sam Sue.

MR. SUE: Thank you very much, Michael. I'd like to preface my comments with the fact that my comments are pretty much affected by the fact that I was a community organizer before I became an attorney.

What I'd like to talk about is a new or non-traditional approach to providing legal services to the poor. In this approach, a law office provides both legal and organizing assistance to a community to empower a community.

Why is this approach important at all? Community empowerment is an important process that plants the seeds that build the abilities of communities to lead their own movements to create change. And, unfortunately, the traditional lawyer-client paradigm doesn't necessarily promote empowerment. In fact, sometimes the traditional paradigm disempowers neighborhood residents.

Sometimes lawyers come into a community to provide assistance to a community group, take over the community's struggle, win the struggle on behalf of the community and then go away, thus leaving the community no more empowered than they were when the attorney first came into the picture.

But as we know, a law office's involvement in the community doesn't have to be that way. A law office can help to foster, not deter, empowerment by offering a package of both legal and

organizing assistance to a community that is oriented towards building the capacity of community residents to lead and carry on their struggle for change.

In this empowerment paradigm, the lawyer does what a lawyer is trained to do. He or she assesses the facts, applies the law to the facts, gives legal advice, and also brings litigation when necessary. But the difference in this paradigm is that the lawyer doesn’t dominate the community’s struggle; he doesn’t take over the community’s struggle. He gives the community residents space — space so that the community residents can make their own decisions on their own.

And the community organizer in this paradigm serves as a coach. He pumps up the self-confidence of community residents; he builds the abilities of residents to set their agendas, to run their meetings, to formulate their strategies and to make their own decisions.

In this empowerment paradigm, both the lawyer and the organizer plant the seeds of empowerment and then step back and let the community grow.

To give you a better idea of what I mean by this empowerment paradigm, I would like to talk about the work of my office (NYLPI) in a Brooklyn community called “Red Hook.” In this poor community, several years ago, the City was proposing to build a sludge processing plant, and this plant would have endangered the health and safety of many residents of this very poor community.

So a civic association in the neighborhood called NYLPI for assistance and I, as the attorney, came in, provided the community with a sense of what kinds of procedures the City had to go through to approve the siting of the sludge plant. I laid out the legal grounds that could be argued to stop or slow down the siting of the sludge plant, and also talked about what kinds of grounds or what kinds of lawsuits we could bring and when such a lawsuit could be brought.

And Eddie Bautista, the NYLPI organizer, worked with the residents to put together a multi-prong strategy to stop the siting. And an important part of the strategy was the inclusion of public housing tenants in the campaign against the sludge plant.

Eventually, due to the community’s pressure on the City, the City withdrew the proposal.

But that’s only the beginning of the story here. Because after the sludge plant victory the community undertook various other community initiatives, grew and thrived with the support of
NYLPI's community organizer. For instance, the community went through a planning process for new growth and development to create more jobs, housing and social services. The community pressed for public access on a waterfront site that had been taken over by the Police Department. The community started a banking committee to press for a bank branch — this is a neighborhood where banks ran away instead of setting up shop — and the community continued to fight against the facility handling asbestos-laden waste.

The residents were in control of each of these initiatives, which received support from the community organizer and various other law offices, including ours. For instance, Eddie Bautista, the organizer, worked with a South Bronx Legal Services attorney and worked together to provide support to the community banking committee. And Eddie, the organizer, helped to connect private law firms through our Clearinghouse willing to provide pro bono service to many of these community initiatives.

And the Red Hook community wasn't the only party that was affected by this experience. Our office was affected by this experience as well. As a result of our experiences in Red Hook, NYLPI realized that there were environmental injustices not only in Red Hook, but also throughout the City. This realization led to the formation of the Environmental Justice Project a few years ago.

So what can we conclude from this example of empowerment? The first is that community residents can wage their own struggle for change when they're given the opportunity and when they're given the access to legal, organizing and technical resources.

The second point here is that providing the kind of support to communities you increase the ability of communities to come up with procreative ways and strategies of dealing with problems. They're not just being reactive to problems.

And the third point here is that the empowerment paradigm involves a very intense relationship between the lawyer and the client. It means a lot of meetings and it means a lot of intense interaction with community folks.

And the fourth point here is that community law offices and public interest law offices are very well positioned to providing this empowerment assistance to communities. After all, they know who's who in the neighborhood and they understand or know — many of these offices know the internal political dynamics in these various neighborhoods.
And for that very same reason private law firms can best foster empowerment when they work through or with community law offices or a public interest law firm. It's far too difficult and treacherous for a private law firm on its own to wade through a neighborhood's political culture.

The sixth point is less a conclusion but more of a recommendation for any of those fledgling public interest lawyers out there: perhaps law students should have a course, or part of a course, that's entitled “Community Organizing for Lawyers.” The purpose of this course isn't to turn lawyers into organizers. It's to turn lawyers-to-be into lawyers who can in the future work better with organizers. This is not so out of place given the fact that there is an “Accounting for Lawyers” course as a staple course at any of the law schools.

In closing, I'd like to make it clear that NYLPI isn't claiming to have all the answers to how a law office can foster community empowerment. The approach I described here is one among many, and I'm sure that there are other approaches that can be devised. And I'm also not ignoring the fact that many other community law offices have had a long and glorious history of working with community organizers. But what I am saying is that community empowerment needs to be higher up on our agendas and that law offices have to be much more creative in thinking about integrating their legal work with organizing work so that community empowerment is fostered.

Thanks very much for giving me this opportunity to speak.

MR. CARDOZO: Our final panelist now will be Yolanda Garcia.

MS. GARCIA: Thank you for inviting me here. I come from a different perspective because a community knows the need; they know where they need to go, what needs to be done for it, and they're the last to be asked at all to be included into any fashion of planning, political movement, or even having attorneys at one's side.

When we started this, it was a unique reason for it because we were threatened. Our homes, and a person's home, once taken away, there's very little left for that family to do anything. So we had a real basis for coming together.

When we put together the 168 meetings, that was only generated by Nos Quedamos. We had to attend the meetings of the Mayor's office, State Assembly's office, State Senator's office, Congressman's office, Borough President's office, Councilman's
office, Community Board 1 and Community Board 3. They all generated as many meetings as us. So sometimes we had three or four meetings a day.

However, when they came and told us, “Well, you’ve organized yourself,” and our name was extremely important because our name became our mission statement. *Nos Quedamos* means “We Stay” in Spanish. Grammatically wrong, but emphatic and to the point. Nobody was going to understand what we were talking about unless we translated our name into Spanish — *Nos Quedamos* — so that most of the community would understand that we were all talking the same language.

When the original meeting came by at Lincoln Hospital, when we found out the threat over our head that was pending, that the City of New York had spent the last fifteen years working on an urban renewal and not contacted one single person in all that time. It was amazing. We brought the meeting down by shutting it down. There was no violence, but definitely it couldn’t continue. So that’s why our name was so important.

Then they said, “You want active participation?” Literally they said, “Here, take it.” Of course, we weren’t planners, we didn’t know the regs, we had no lawyers, and we said, “Okay,” and ran with it.

We started inviting people in, the professionals like our architects were extremely good, and we were very fortunate to have them. We had political support because it was an election year. So our parameters were six months, just before the elections. And not even that. To give over our finalized plans in six months in order for City Planning to convert this document that we were doing into a real planning document, something that would go through the process.

So we had to do quick studies because professionals have their own language; it’s not a lay person’s language, especially architecture. And why does the housing in the United States find its basis on parking? We need houses, we don’t need parking.

So one of the approaches that we took was that we brought down the ratio of parking, which is .5 to every unit that’s done, to .4. And everybody says, “But you can’t do that.” We also told the City of New York that part of our mission statement is that we intended to become equal partners with the City of New York. Then we were trying to struggle to find out how real could this community, and how effective could this community become into making such an obscene proposal to the City of New York.
We started to look for lawyers, but of course Melrose Commons, New York, is the poorest district in the whole United States. So where were we going to come up with the money? There was no funding, there was nothing. So we took a bunch of legal size paper, plenty of Scotch tape, anything that looked black and anything that looked yellow, and we did our own mapping. And we started — we even had to go to Brooklyn to make copies.

We started canvassing the community. We started telling them, and, at the same time, we started learning the language that was now new to us.

In those 168 meetings, and all the other meetings that we went to that year, at the end of every single meeting, every single agency, every single politician would have their side. Except the affected community. We had to guess our way through.

So then as we were told, “You have to apply and become a 501-C(3) not-for-profit,” but then you had to wait about a few months. Well, those few months went to six months. We had given ourselves six months to do this planning action and they were telling us you had to wait six months to get any kind of pro bono work to make sure that you are a real organization. Now we have affected policy in New York City because we challenged the land use review policy, which is extraordinary.

As we caught our window of opportunity and went through it, it was great. Many other community boards wanted to do the same thing. Unfortunately, that window of opportunity was closed because many of the laws were changed. So many other communities will never repeat this. And whatever comes through will not be a community’s true vision of how they empower themselves.

Our system works on disenfranchisement. It works on totally taking a community who’s working for free, because as we attended these meetings no one was paid. While all the respective City agencies and everyone there was paid, the community was doing this on their own.

Many of the people who didn’t go to work didn’t get compensated at their jobs. At the end of the month, there was not enough money to pay for the milk for the children or to make sure there was enough food on the table. But the people were willing to make the sacrifices to insure that this community would come back.
Understanding the rationale of our community, it is very old or very young. Everybody remembers the good times. And as you keep doing research you find out that things are done by design. They are implemented by design and planning, and our community was implemented to self-devastate itself by design. Every time someone tells me, “Well, you shouldn’t have set the fires,” the answer is very simple. Would you set your house on fire? The answer is obviously no. So that means that by design when they took out two teeth — and I use the term “teeth” — of our borders about forty blocks away, everything in between was to die. But they caught a bunch of people who were not willing to move.

We wanted to improve our area; we wanted to leave a legacy to our children that’s no different from anybody else wanting to leave a legacy, wanting to make sure that this great country of ours is above politics, and we have to insure that our greatest natural resource is our people. They must continue to become a part of a normal standard.

No one should be set aside; no one should be denied planning. Right now in our area — I call it a triangle. A dead zone is developing because the left hand of government doesn’t know what the right hand of government is doing. And, unfortunately, we have no one — now we do because there’s been some interesting things that we’ve done. But the great resources to fight what’s coming down our pike are not there.

You have the Federal government trying to double the truck traffic in our area; you have the garbage transfer stations more than doubling; you have human waste more than doubling. The asthma is eight times the national average. No one has talked about liver damage or total kidney failure. This is a dead zone. And if we don’t stop it, there’s going to be 200,000 people in the area that within a very few years are going to die. And they’re going to die miserable deaths because it’s not managed care, it’s managed cost. And we’re denied so many things.

So we have to get together. We need lawyers by our side, because if we were able to do so much at the beginning, imagine what we could have really done. And as we did it, leave the door open for other communities to come in.

One of the most important things that we did was that as we went through and got our urban renewal certified, before the final certification, when it went back to City Planning, the elections had taken place. A new head of — the Mayor was there. And they
decided that this was not going to work because again we were challenging the land use review process.

We paired up with New York Lawyers for the Public Interest and when the language came in that would have devastated our area, who had rendered our map useless. They wanted to take away all public review except at the local community board, and that public review will have thirty days. If they say, yes, you want it or no, you don't want it, they still were going to do whatever they wanted.

Thanks to the organizing effect, the way Sam Sue just said, and the legal help, we were able to contact Brooklyn, Manhattan and made such a great big consortium that we were able to defeat them.

This is the way, or part of the way, to go into the future. But we do need a lot of help.

And I can give you one last comment. I can tell you that by not having lawyers it has cost our community in projects that we brought in well over $20 million. Now you're talking to the poorest community in the whole United States. Losing that kind of money, it is insane. Because there is not enough help out there.

Thank you.

MR. CARDOZO: Thank you. What we are now going to do is encourage questions among the panelists and Professor Edelman.

And then after some of that we will open this up to the audience. As the moderator, I will get the ball rolling.

Peter, you were very eloquent on the need for the private bar to step up to the plate and help out in this area, but you didn't quite say how we're going to persuade the private bar to see that it in fact is their obligation to do this. And I wonder if you have any thoughts that you could share with us.

PROFESSOR EDELMAN: Of course I don't have a blueprint. I wish I did. I wish I knew. But it is essentially the additive effect of the kind of people who are here tonight with the leaders in the Bar here locally and around the country who are beginning to have more enthusiasm about doing this or speaking out more. Allies need to be enlisted who, within the Bar and outside, will speak to the question. That is basically it; it's the additive effect. And there's no magic.

MR. CARDOZO: I would just throw in that your reference to mandatory pro bono, at least mandatory pro bono reporting, reflects that simply appealing to the better interests of the Bar is not enough, and thus far in New York there is unfortunately only one Bar Association, and I happen to be privileged at the moment
to be the President of it — that is, giving its voice to the need for mandatory pro bono, or at least mandatory pro bono reporting. And I do think that we have to focus on appealing to the firms' better interests as well as their self-interest to see that we can't do more.

PROFESSOR EDELMAN: Well, I'm glad that we have the ABA Pro Bono Project. I hope that that as a matter of networking around the country will smoke out more Bar leaders who have an effect in some sense across state lines. I certainly didn't know about some of the things that are going on; I only gave you the example of Lenin, Street & Diner (phonetic). There are a number of other firms in other states that are doing things that would be ammunition for you and others in New York City to point out to some of your colleagues within the City. So that it would be reverberative and additive.

It's an uphill battle, you know. There is an enormous gulf — I don't have to tell you — between the top and the bottom in this society. Right now the big law firms are rolling in dough. I mean, they are making so much money it is absolutely unbelievable. Coincidentally, however, because the economy is very, very hot, it would be a problem to make young lawyers available on a pro bono basis because everybody is working 160 hours a week. So when would they have time for the poor people?

But the fact is that the resources are there, and people ought to be embarrassed about the obscene amounts of money that are being made. You know, we ought to be publishing the amounts of money that the major partners are making in every one of these law firms, and just right there we might get a little embarrassment to do something.

MR. CARDOZO: I'll just make one more comment on this point. I would appeal to the students in this audience who are at the moment probably thinking about their futures. I would encourage the students to ask the law firms, "What about my pro bono opportunities?" And if I go to the law firm I will earn a lot of money, but will I have the opportunity to do pro bono work at the same time? Because when you are in a booming economy and the law firms do need you, because they need young, bright lawyers, the pressure on them to hire is great. And right now I think if you ask the questions, and a lot of people ask those questions, it's going to encourage the law firms to move in the more correct direction.

PROFESSOR EDELMAN: That's a very important — I would underscore that point.
MR. CARDOZO: Comments for or questions from our panel.

PROFESSOR KELLY: I have a question for either Ms. Garcia or Mr. Sue, which is, are there any lessons that you could share with us about improvements we could make in helping neighborhood groups find free lawyers? Based on your struggle to find people do you have any suggestions on how we could do a better job of matching community groups up with pro bono lawyers?

MS. GARCIA: Basically, early on, a lot of the community groups that start — and they have to wait for a period to see if they are going to be established or if they aren't going to be established, and I know the resources are very scarce out there; I understand that part of it. However, the first few months are either to make the group possible or to break the group.

As I say, we struggled and we went from knocking from door to door to door to door, and finally we came upon New York Lawyers for the Public Interest, and we even incorporated ourselves incorrectly at first, and we had to pay for it, but it still was done incorrectly, and we finally got the help that we needed. But it was — the help came in at a point where many of the doors were closing already, and we were going to be left out after so much struggle and so much going through it. And that's why this one big challenge was so great, because it meant public review in the City of New York, and possibly the State of New York, would have ceased to exist, though they came in with, as a right anyway. But at least it took longer to get there, and public review under the process is still in place. We can be very proud of that.

MR. SUE: I'd like to add something too, which is that many of the community organizations like Yolanda's aren't necessarily in the loop. They don't know necessarily what resources are available out there in the world.

And the only way that law offices are going to get these kind of cases is to have people to do outreach, and go out to the communities and pull those clients in. For example, many private law firms who want to take pro bono cases would never have heard of community cases such as the ones Yolanda speaks of, but not for two things: (1) a community organizer, and (2) some sort of component in a public interest office that can draw upon the resources of the private bar.

But what's really critical is that you've got to have this organizer going out to the community to pull in the community's need so that we can hear what's going on out there.
MR. CARDOZO: Other questions from the panelists?
Then I'd like to throw out one more. Perhaps, Lynn, you could answer this. How do you maximize the efficiency of the private bar? What is it that the private bar, at least in the litigation front, should be asked to do as distinct from what you should be asking Legal Services to do? Is there any hint of who should do what?

PROFESSOR EDELMAN: Well, in the kinds of law suits that the Legal Services people are not allowed to bring right now.

PROFESSOR KELLY: Yes. There's a whole area of law suits that the Legal Services Corporation has been barred from doing, including class action work. There is the point of donating money to neighborhood offices that are doing this, and I think there's also some imaginative work that needs to be done in terms of partnering on these law suits.

I mean, we've done some of it. I know some of you in the audience worked on a series of efforts that we did around right to counsel in Housing Court. And we divided the work up between the people that do poverty law area as their profession and pro bono law firms and tenant groups, and it was a coordinated effort and it worked quite well, although we sort of missed the wave on that.

But there are ways to leverage and there's work that other people are expert in that poverty lawyers are not expert in. And one of them is transactional work, which Peter Edelman touches on repeatedly in his remarks.

It is not something that poverty lawyers spend a lot of time doing. Putting together a deal to build the building is not sort of core stuff that Legal Aid or Legal Services have traditionally done, although I know that Brooklyn Legal Services has done some of it.

So I think we can build in pro bono efforts on some of those things where people who've worked on deals and worked on transactional stuff can really leverage the work that poverty lawyers are doing.

But it is difficult. It is sort of a puzzle that we all struggle with to try and figure out which pieces of an effort can be given to which parties, and where can we draw off expertise from other people. And what poverty lawyers have is a great deal of depth and expertise in the core issues in which they practice all the time and in state and federal practice.

And I think it's something that we need to keep working on.

MS. GARCIA: I have a question. If you were to publish, as you have suggested, these mega amounts of money that the lawyers are
making, what percentage would be equitable to return to the communities in order to provide the lawyers that these communities need? Ten percent, fifteen percent?

MR. CARDOZO: Without wanting to defend the fact that I do think lawyers should do a great deal more, I think Peter is right that some lawyers are earning a huge amount of money.

The fact, of course, remains, that most lawyers in the State of New York and throughout the country are not earning anywhere close to the kinds of things Peter has indicated, and many are struggling to eke out a living. And the question I think in part is, how do you draw that line. Because the individual practitioner in your community or a comparable community, to tell him or her that “X” percent, whatever “X” is, should be contributed, I’m not sure that that works, and it gets into a very complicated question, which is why I think we have to look at other potential solutions.

And one of the things that Lynn and Peter have referred to is the transactional area enables lawyers who are not litigators, not the people who go to Court all the time, to do pro bono work. And while I don’t think lawyers are doing enough pro bono work, I think most people would agree that the pro bono work that is being done is being done primarily by the litigators. And if we could find meaningful work — meaningful to non-litigators — not only will they be performing a service, but they will be becoming better lawyers. And so it follows that it is in their self-interest.

And I think we have to constantly ask ourselves, it’s why I asked the question before, how can we appeal to the lawyer’s self-interest. And if you say to the young associate in a large law firm that he or she will never be negotiating a major transaction where you’re representing a major client for the next five or six years, because of the way law firms are organized, but if they go out and they represent a community organization they are going to be doing significant corporate work right away, then that is going to appeal to that lawyer, and that’s why I think we have to focus on that a lot more.

MS. GARCIA: Well, necessarily I didn’t mean money. It’s like the banks. They have to give back, re-invest in the communities, basically along those lines. And what percentage of that would it take? How many new lawyers coming in can be lent to communities, exactly what you’re saying, that it would have to be like on the bigger law firms, a burden placed upon them.

MR. CARDOZO: There have been various proposals, as I say, that the City Bar Association had recommended that every lawyer
be required to donate a certain number of hours each year. The numbers were very modest that were suggested, and it has been hooted down throughout the legal profession. So we have a long way to go.

Any other comment?

MR. SUE: I actually have a question, and it's directed to many of those here who are partners in many of the large firms. Is there any way to create incentives within the career structure of law firms to encourage pro bono work? Shouldn't partners encourage their associates take pro bono work by making such work a plus within the firm? Is that realistic, or is that pie in the sky?

MR. CARDOZO: Personally, I think that's got to be focused on a lot more, because I think if the leaders of the law firms — and there are some. I think we should be very careful to not sweep a wide swath of damnation to the law firms. There are some law firms — the Minneapolis firm that Peter alluded to, and there are others — which do hold out those signals to their people, and that I think is one of the great ways to get people more involved.

Peter, you want to comment?

PROFESSOR EDELMAN: Just that I would underscore what you said. I mean, I know it registered with everybody about students interviewing, but it reminded me that in the late 1960s and early 1970s that students who were going out being recruited did exactly that, inspired by Ralph Nader and others at the time, and maybe by the civil rights lawyers.

And it worked for a while, and then the steam went out of it. The next generation comes along very quickly in terms of, you know, the next generation of law students may be next year. And so by the mid-70s I don't think they were asking that question any more. But when they did, the law firms were quite responsive in the early 70s. They would fall all over themselves saying, "Oh, come here, we'll give you the best opportunity to do pro bono."

So it really can work. And of course we have, with the National Association for Public Interest Law and the organizations of public interest-oriented students on each, almost every law school around the country now, the capacity to get some organization among law students to go out, to get the message out that they ought to ask that question when they are being recruited.

MR. CARDOZO: I think it is time to open this up to the audience.

AUDIENCE: Vincent McGee. I am not a lawyer. We are talking about a lot of work of remediation that lawyers can be
helpful in, but we're also watching the safety net and so forth in legislation in the nation being taken apart by other lawyers in the Congress and around the Congress and in the corporations and so forth. And I haven't heard anything about using lawyers to encourage people in terms of the political process and "Civics 101."

The numbers speak loudly in terms of the poor and their potential votes if they're used. And every couple of years there is a big push on voter registration and so forth, but I don't think there is enough participation and encouragement and basic education, which lawyers can do and law students can do, to build into all of these experiences, encouragement for people and forcing them to realize that if they don't vote the legislation isn't going to happen, and continually there's going to be a need for remediation and the tide is going to — the undertow is going to take all of this stuff away.

PROFESSOR EDELMAN: Well, of course you would imagine that I would agree with you, and it was certainly imbedded in my first point about tackling the structural problems and policy problems and the question of lawyers sort of getting outside of the box of whether it is litigation or anything that is the specifics of building communities, all the things that are somewhat more limited activity.

What Sam said about the sort of lawyer-organizer combination rings very strongly in relation to what you are suggesting, because if we really are going to back up — and this is very subject to the same question, the same type of question that Michael asked me earlier. You know, "Specifically how are you going to make that happen?" I have no recipe.

But if you're talking about building a new movement, which is really what you're talking about, then what's at the bottom of that is organizing. And the lawyers would be there to do the sort of — the technical part of it when it comes to the lobbying part.

Now, you know, there is some tax law problems about which lawyers can do that, there is some Legal Services restrictions about which lawyers can do that and so on. But fundamentally at a level of generalization we need that partnership, and it underscores something else that Sam was talking about.

When we're asking for the involvement of the private bar, the downtown private Bar in relation to poor communities, it's very important — I want to underscore what was said — that the client is out there in the community, the people who know the community are the people in that community, and the people who
are there, the public interest lawyers who are there on a full-time basis; basically there has to be something that’s the intermediary.

There’s no way the downtown lawyer’s going to come in there, drop in, go on out. Equally true with the political organizing question, so that there have to be some mechanisms that bring people together to make that happen, or it can’t be successful.

MR. CARDOZO: Yes?

AUDIENCE: My name is Joy Schwartzman. I don’t think I will be out of law school until early in the millennium, but I wanted to address your idea for a movement being needed, and I’m very glad that the policy structural issue has been brought up because I think we need to have legal education be given as some kind of an inoculation to young people. You have that in the health area in school; I’m sure children know what an HMO is. They may not know everything, but do they know what the Bar Association does? They know very, very little. I think there is a big inadequacy.

Part of the political preparation is that there is virtually no legal education for children in school. So you have to start very young.

And then I have a request, that we all — or Professor Edelman — think of a new rubric for the area of poverty law, because that’s a stigmatizing word, because the area of communities that need service, legal services, is much greater than the poor. There are a lot of working middle class people who are very, very underserved by their needs for lawyers.

So I’d like to see — empowerment is a good word — let’s find a word for this intent and this movement that is not as stigmatizing.

MR. CARDOZO: I’ll take the first part of your comment, because I think it is very well taken. It cuts across a lot of other areas.

I think there is definitely a significant need for increased — whether you want to call it legal education or civics. Actually Chief Judge Kaye in New York has been trying to advocate that. There is still a long way to go. The New York City bureaucracy is sometimes difficult to penetrate.

But I think you’re 100% right, that more attention needs to be paid to that.

On the other issue I don’t know if any of our panelists want to comment on that?

PROFESSOR EDELMAN: I agree. I think that we need to find, for purposes of respecting poor communities, as well as for
political effectiveness, rhetoric words that accurately describe what we're doing and are not stigmatizing. That's absolutely right.

MS. GARCIA: I can give an example from my community. When the people were afraid to speak and some of them started speaking out, the rumor was circulated that if they were receiving any kind of assistance from the government, it would be taken away. Talking about totally disenfranchising people. That is the core of it.

And secondly, many of the lawyers that would help from the area, since it has such a bad name they didn't want to become associated because they would be stigmatized also.

MR. SUE: I wanted to add that there's not only the need to come up with new paradigms of methodologies for delivering legal services, but a need to re-define existing legal problems. For instance, the Environmental Justice movement in general redefined environmentalism, shifted the definition away from conservationism and actually incorporated many of the existing "poverty law" issues like lead paint issues, housing issues, etc.

So I think there is a need to come up with new paradigms to look at at old problems differently.

AUDIENCE: I am Arlene Halpern. I am with Legal Services in New York City. I have been a Legal Service lawyer for more than twenty years, and more recently I have had the pleasure of also being employed by the Children's Defense Fund, so I've done a little bit of both.

I think the challenge, especially Legal Services in these days, if we are really going to represent our community, is to get out of our lawyering role, our traditional lawyering role. We do it very well and we litigate wonderfully. I think it's a very important part.

But I think the most successful way, as dynamics change, is to understand that our clients are multi-faceted and have multi-faceted issues.

I know for me the most rewarding and best representation I've done has been when I've worked with other disciplines in the community. The lawyers really have to become part of the social services, health, child-care, day care parts of that community if we're truly going to be able to represent people in these changing times, when a lot of the forces to be are going the other way.

And I think organizing is part of it. I think it's broader than that, also, and I'd like to see us sort of rethink more, how do we do this, and for Legal Services attorneys especially I think it offers an
opportunity for them to grow and develop and work within the restrictions also.

I don't know anyone else had comments about that or reaction to that.

PROFESSOR EDELMAN: Well, you're talking to the choir when you're talking to me. I mean, it's a put-up deal, right? She works for the Children's Defense Fund.

MR. CARDOZO: Dean Feerick has a question, I think.

DEAN FEERICK: I grew up across the street from where [Yolanda Garcia] doing her organizing, and I wasn't aware that there was the problem that you so eloquently described.

I'd like to propose to you, Michael, as president of the oldest Bar Association in New York State, that in the remaining months of your presidency, which has been a glorious one through the present time, you consider creating a center on lawyering in and for our poor communities that would have a number of components to it — a component dealing with the policy issues, strategy sharing, volunteers that would like to get more involved in assistance, a clearing house of information.

I would be very disappointed if, at the end of this program, an action program was not put together to move the ball as best we can with some of these subjects, and with respect to the Center, it might be a Center that would have an advisory board that would have on it citizens from the different parts of the City to share information about what's going on so that the legal profession could get more educated about this. And even those of us who care and are knowledgeable — I spent twenty-six years at 161st Street and Melrose Park, and I didn't know. Shame on me.

I think there's a wonderful opportunity for the Bar under your leadership to start moving the ball.

MR. CARDOZO: I think what I can say, John, is we will take it, as everything you have suggested, under careful consideration, and I think it's a very provocative suggestion.

And, I should note, in that regard that one of the suggestions that's been made one or two of the speakers is harnessing the energy of retired lawyers. And, in that connection, John had suggested a couple of years ago that we create a program at the City Bar Association to harness the energy of retired lawyers which we are now, with his encouragement, doing, so that when a lawyer reaches either the mandatory retirement age or has decided

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2. John D. Feerick, Dean, Fordham University School of Law.
he’s just tired of practicing law on a day-to-day basis, we have a
program now to capture that person’s energy send him out to the
community.

But this suggestion, John, we will carefully consider. Thank you.

AUDIENCE: My name is Meg Barnett. I am a staff attorney at
the Lawyer’s Alliance for New York, and I am also a Skadden
Fellow.

And I’m a firm believer that the pro bono efforts of private law
firms should be applauded and explored, for additional the
resources are there to be leveraged and used in sort of innovative
ways.

But at the same time, I think that we have to really face the facts
about the real limitations of pro bono and that it is in fact
presumptuous to assume that the private bar could sort of step in
for the deep kinds of expertise that Lynn Kelly has discussed, and
just the realities of associates at these firms and their hours and
whatever. And no matter how dedicated they are, the unfortunate
reality is that this term in this culture, pro bono comes at the end of
the day, which is often at 1:00 or 2:00 in the morning.

So one of the things I think is that in addition to encouraging to
give more hours, but to just give more dollars. I’m sure that there’s
a lot of graduates or soon to be graduates here who can’t find jobs,
despite the fact that the public interest organizations desperately
need to hire them, because there aren’t the funds to do so.

So I, as a Skadden Fellow, applaud the efforts of Skadden. It’s a
shame to me, I think, that more law firms don’t emulate that
program, and I think that in addition to sort of asking for more
hours, ask for more dollars to fund the people who want to do it
full time and dedicate their expertise to do it.

MR. CARDOZO: I think that’s eloquently said. I do think in
fairness to the firms that we’ve been talking about, I don’t think it
is as well recognized as it should be that New York law firms are
probably the most generous in the country with respect to
contributing money in the pro bono area.

But your point remains well taken.

AUDIENCE: My name’s Alexander Hilary. I work with the
Harlem Legal Aid office. Professor Kelly used to be my
supervisor.

PROFESSOR KELLY: Hi, Alex.

MR. HILARY: Professor Edelman taught me my first law
school class, so I feel empowered to ask a broad, philosophical
question.
PROFESSOR KELLY: I'm sure we can't answer it. Go ahead.

MR. HILARY: Now, when we talk about poverty law — with my apologies to the young lady who did not like the term, I mean, that's what it is at this point — what is the goal? I mean, are we saying the goal of poverty law is to make the poor no longer poor? Is the goal of poverty law to ameliorate the status of the poor?

When we speak, for example, of Ms. Garcia's community and we talk about poverty law in that community, is the purpose, is it our goal to make it no longer what she called the poorest community in the country, but something else?

I mean, when I'm working in Harlem, okay, and I have like fifty or sixty clients and I'm trying to keep them in their individual apartments, am I fulfilling the goal of poverty law, or is the goal of poverty law something broader than that, which would be, say, making Harlem no longer a poor community?

I think we need to, since we've been asking questions that deal with paradigms, ask ourselves what is our ultimate purpose. And if we ask ourselves what our ultimate purpose is, maybe we would know if it's doable or not. Peter?

PROFESSOR EDELMAN: You're still at it. He did that in Civil Procedure, too. I remember. It's great to see you.

Well, that's of course a deep, deep, big question. Because everything — I think everything that you're doing that you just described is extremely important, but of course it's not enough.

And, you know, it comes down to, I suppose, an underlying issue about poverty policy. That is to say, it would be wonderful if we could make everybody who is poor, not poor. That would be wonderful. But that's really only one goal.

You're also talking about people living in neighborhoods and communities that really have strength about them and where they can live safely and bring up their children, and that have about them a quality of life. The opposite, negative quality of life is often connected with being in poverty, but people simply having money isn't necessarily going to build communities and build a sense of neighborhood.

We have challenges about building community among people who are not poor, obviously, too. These are things that cut across lines.

The question of work, is whether you get out of poverty because you have more money, or do you get out of poverty because you have a job? What kind of a job is it? Is it satisfying?
You know, it ramifies on out into a whole series of issues that go well beyond the issue of poverty, if poverty simply is a question of having less than a certain income, and therefore being nominated poor in the society.

It has to do with being part of a political process, which was Vinnie McGee's question earlier.

So if I take all of those things in terms of the goal of poverty lawyers, and indeed it's been said in the course of the evening all of the different issues that confront somebody who is poor and lives particularly in a neighborhood of concentrated poverty. We talked about Environmental Justice, but we haven't talked as much about violence as we should and the right that people should have to live in non-violent circumstances in their home and on the street, and how are we going to accomplish that.

Every one of these things is something where, as you know as well as anybody, there is a potential role for a lawyer, right? It takes us into another long discussion about what do — lawyers have clients, they serve clients. How do you make sure you're serving the client as opposed to out there on some agenda or some care of your own?

So all of those issues impinge on it, and I guess I would say that we ought to take before we decide, you know, what our limitations are and what we're doing with very limited resources. We should start with the broadest possible view of what we're up to and then try to figure out how we can pursue that. And, certainly one of the things that many of us are suggesting here is that short of the kind of structural change that we really should be talking about, short of the kind of political organizing that we should be talking about, at the very least within neighborhoods that are largely poor, there's a lot more that lawyers could be doing to help community-based organizations and community-based lawyers.

Outside lawyers can help through those mechanisms to help build a sense of neighborhood and community, which also includes economic development and jobs and leads to less poverty. And it's not a question, Lynn, of not saying — it's not a question of saying I don't believe in litigation; it's a question of saying — there's some "both-and's" here — and of course what happens when I come out and I say we have got to stop reliance on litigation as the only thing, I have to then go on and say, "Well, of course there are times when we want to litigate, of course litigation is useful."

Florence Royceman, some of you know, gets so mad at me because she thinks I don't emphasize litigation enough. But if we
don’t turn that coin over and talk about the community-building side, we tend to fall back into doing litigation disproportionately too much because it’s what we’re most used to doing on the poverty side. Even though in the downtown law firm, transactional work is equally as valuable.

Thank you so very, very much.

MR. CARDOZO: I want to thank our panelists very much. I think this is a great start to a great program.

Thank you very much.
LAWYERING FOR POOR COMMUNITIES ON THE CUSP OF THE NEXT CENTURY

Lynn M. Kelly*

Peter Edelman has addressed the challenges of lawyering for poor communities on the cusp of the next century. He has called, correctly, for reassessment and new approaches. He has focused lawyers on the need for involvement by the entire legal profession in providing assistance to poor and moderate income communities and he has underscored the implementation of welfare reform at the state level as a key issue for lawyer involvement. But I believe that Professor Edelman's broad vision has given less weight to the role of law reform litigation and to poverty lawyers in the coming years than is warranted.

I would like to focus on three critical objectives for the next generation of poverty lawyers: identifying strategies that work, increasing legal representation for poor communities, and keeping a vibrant legal community engaged in poverty law. First and foremost, we need to identify strategies that work. Peter Edelman is right: litigation has become tarnished as a tool of change. Most of us who became poverty lawyers in the 1980s-1990s did not expect to eradicate poverty through litigation. But don't sell litigation short. During the last two decades, law reform litigation has worked. Poverty litigators have been successful in impact cases particularly where we have caught waves of public sympathy for subclasses of the poor: the elderly, the disabled, families with children facing homelessness, battered women, and foster children. We have expanded the choice far beyond the federal courts and file cases in the state courts and with agencies. Litigators have also focused explicitly on developing full records of the facts about the effects of challenged policies on the lives of poor people.

Professor Edelman correctly notes that lawyers seeking to reduce poverty must engage in legislative and administrative advocacy as well as individual representation, group representation and

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* Clinical Assistant Professor of Law, Fordham University School of Law. From 1982-1985, and 1986-1996, the author was an attorney with Civil Division of The Legal Aid Society in New York City in the Park Place Office, the Civil Appeals and Law Reform Unit and the Harlem Neighborhood Office. This article has developed from the author's remarks during the Roundtable Discussion at the Symposium at Fordham University School of Law on November 6-7, 1997.
class action and law reform cases. That is what poverty law offices unconstrained by the Legal Services Corporation's guidelines, are doing today.

The second strategy that works is building coalitions that increase the political clout of poor people. Partners for coalition building can be found in unlikely places and in unlikely ways. The challenge is to find shared interests between what appear to be different communities. For example, in the past lawyers have brought together leading doctors and poor undocumented immigrant women in need of prenatal care. Similarly, lawyers have aligned the interests of gay life partners residing in a rent stabilized apartment in Greenwich Village, and transplanted Southerners residing for twenty years in a rent stabilized apartment in Harlem who share finances and holidays and care for one another like a family. I would like to briefly illustrate what I mean with two cases in which attorneys successfully built these bridges.¹

In Lewis v. Grinker, the goal was to obtain Medicaid coverage of prenatal care for undocumented immigrant women in New York.² Our work, as poverty lawyers, was supported by two law school clinics and by New York Lawyers for the Public Interest which submitted a brief on behalf of the American College of Obstetricians and Gynecologists, the American Medical Association, the American Public Health Association, the Greater New York March of Dimes Birth Defects Foundation, and other medical groups which supported the medical and cost savings arguments that poverty law advocates were making about prenatal care. The backing of the

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1. I was the lead attorney for the plaintiff class in the Lewis v. Grinker litigation from 1986-1995 and amicus curiae for The Legal Aid Society on the Braschi v. Stahl Associates appeal to the New York State Court of Appeals, 74 N.Y. 2d 201, 544 N.Y.S. 2d 784 (1989). I was also one of the attorneys for the intervenors on the RSA v. Higgins litigation at the Supreme Court and the Appellate Division, 164 A.D.2d 283, 562 N.Y.S.2d 962 (1990).

2. 965 F.2d 1206 (2d Cir. 1992). This was not the original goal of the case as filed in 1979 which set out to obtain Medicaid on behalf of all undocumented immigrants by successfully arguing that there was no statutory basis for the regulation barring undocumented immigrants from Medicaid. Lewis v. Gross, 663 F.Supp. 1164 (E.D. N.Y. 1986) ("Lewis I"). In recognition of the political reality that Congress amended the Medicaid statute to include an alienage restriction following the success of Lewis I, plaintiffs refocused their efforts on the statutory and constitutional claims available to the more sympathetic subclasses of undocumented pregnant women and children. Plaintiffs obtained a preliminary injunction against the denial of Medicaid coverage for prenatal care to undocumented women residing in New York State. Memorandum and Order dated March 5, 1987. In November 1989, Plaintiffs obtained a permanent injunction on behalf of pregnant undocumented women, 794 F.Supp. 1193 (E.D. N.Y. 1991), which was upheld by the Second Circuit, 965 F. 2d 1206 (2d Cir. 1992).
medical establishment, acting as experts and amici curiae, was critical to the Second Circuit's decision that poor undocumented immigrant women residing in New York should have access to federally reimbursed Medicaid. As a result of this landmark case, for more than a decade, thousands of mothers in New York State have received prenatal care without regard to their alien status. Their children, born in New York as U.S. citizens, are off to a healthier start and the public has saved the expense of costly neonatal intervention and the lifetime costs of disability.

*Braschi v. Stahl Associates Company* expanded tenants' rights through a successful coalition formed between gay rights, poverty law, civil rights and other groups which shared the common goal of preventing the eviction of persons threatened with losing an apartment when a loved one dies or moves out. The American Civil Liberties Union ("ACLU") represented Miguel Braschi, the surviving gay life partner of the prime tenant on his appeal to the New York State Court of Appeals. Mr. Braschi faced eviction from a rent controlled apartment after the death of the prime tenant. The amici curiae emphasized the civil rights' aspect of the case and broadened the claim beyond the gay community. For example, The Legal Aid Society argued that its poor clients lived together as families without legal sanction because in many cases they could not afford lawyers to get divorces or adoptions. The City of New York, the Association of the Bar of the City of New York, Community Action for Legal Services, Gay Men's Health Crisis, Lambda Legal Defense and Education Fund and others pointed out to the state's highest court how the court's ruling would widely impact the

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3. Research conducted by the New York State Department of Health estimated that there were approximately 13,472 births to undocumented mothers receiving Medicaid for prenatal care in New York annually. The researchers concluded that it is less costly to provide prenatal care than to bear even the initial costs of hospitalization for the increased number of babies born with low birth weight and other poor outcomes in the absence of prenatal care. *See* Brian Gallagher, *The Effect of Health Care Reform on Undocumented Women's Access to Prenatal Care in New York State* (unpublished paper on file with the Fordham Urban Law Journal). Assuming that 13,472 undocumented women sought prenatal care annually over the decade from 1987-1996, some 130,400 citizen children were born healthier with Medicaid funded prenatal care for their undocumented immigrant mothers. In New York City, the Health Department reported that infant mortality fell below 1,000 a year for the first time for a rate of 7.8 deaths per thousand live births, the lowest rate ever while still higher than the national average of 7.3 deaths per thousand. *See* Infant Mortality Drops Below 1,000 a Year, N.Y. Times, May 20, 1997, at B2. The Lewis case has thus been part of a successful strategy to reduce infant mortality and the short and long term costs to the public of low birth weight infants.

4. 74 N.Y.2d. 201, 544 N.Y.S.2d 784(1989)
community and demonstrated the breadth of the political support for the position. In a landmark decision, the New York Court of Appeals in Braschi, held that family included non-legally recognized relationships for purposes of succession rights to rent controlled apartments.

Following Braschi, the coalition further expanded to include groups such as the Eastern Paralyzed Veteran’s Association ("EPVA") which argued that their disabled veteran clients lived in family arrangements with other veterans with whom they bonded emotionally and shared services and expenses. The Legal Aid Society’s lawyers possessed technical expertise in housing law and state appellate practice and the ACLU and Lambda brought civil rights expertise on issues affecting gay men and lesbians. Four months after the Braschi decision, the coalition successfully advocated with the New York State Division of Housing and Community Renewal ("DHCR") to publish emergency regulations expanding the definition of family for rent stabilized and rent controlled tenancies in conformance with the Braschi decision.5

Legal Aid lawyers helped draft the technical language for the state rent stabilization regulations which were then challenged by apartment owners. The coalition members and several dozen new groups intervened on the side of DHCR or served as amici curiae on appeal. By December 1990, after pitched procedural battles, the Appellate Division in RSA v. Higgins,6 upheld DHCR’s regulations expanding the definition of family to rent stabilized apartments.

In a mere year and a half, advocates had completely reformulated the rules for succession in rental housing in New York.7 Building on its success, The Legal Aid Society then used administrative advocacy and the civil rights arguments to obtain broader succession rules for other forms of rental housing including New York City-owned in rem apartments.8 Some coalition members

7. The owners appealed the Appellate Division’s decision but the Court of Appeals transferred the appeal back to the Appellate Division, 79 N.Y.2d 849, 580 N.Y.S. 2d 196 (1992). The Appellate Division then affirmed, 189 A.D.2d 594, 592 N.Y.S.2d 255 (1st Dept. 1993), aff’d 83 N.Y.2d 156, 608 N.Y.S.2d 930 (1993). Since the regulations were in effect pending the Rent Stabilization Association’s appeals, tenants had expanded protection from December 1990 forward.
8. 28 R.C.N.Y. Ch. 24 (Eff. Date Jan. 31, 1992). The regulations governing New York City’s in rem housing stock include the Braschi definition of family however the
wrote letters in support of The Legal Aid Society’s clients’ position that the in rem housing program should have Braschi-style succession regulations. While there remains no substitute for political organization and power, bridge building and coalition work can yield significant and far-reaching victories that help poor communities.

It is also important to broaden the areas of law viewed as relevant to the poor. Poverty law programs must build practices in areas beyond housing and welfare. For example, environmental justice, including siting of facilities such as sewage treatment plants and trash incinerators, must be part of the future for poverty lawyers. Inner city neighborhood based lawyers have known for a long time that poor clients suffer disproportionately from health problems.9 In addressing this issue, it is not enough to get clients disability benefits, lawyers must try to improve the health status of the communities. As a result, abatement of lead paint and asthma triggers such as rodent and roach infestation have become part of the focus of housing lawyers in New York.

Poverty lawyers must also assist low income communities in obtaining legal assistance to meet the needs and aspirations of community residents seeking to move up the economic ladder. We need community based lawyers who can resolve legal snafus for students who need a student loan in order to return to school or who have attended a fraudulent trade school. Community law offices should do some anti-discrimination work because there is almost no representation of low wage workers with discrimination claims.

Consumer law is another important area, particularly for senior citizens who are preyed upon by fraudulent sales scams. While in

regulations give the City more discretion than a private landlord in denying successor tenancy to those who exceed income limitations or engage in “unacceptable activities.” New York City’s in rem housing stock is one of the largest publicly run housing programs in the country and includes some of the City’s most neglected and dilapidated housing.

9. When I was the Director of Litigation in the Harlem Neighborhood Office of The Legal Aid Society from 1991-1996, I participated in weekly client intake and heard many clients describe their own and loved one’s health problems. The Harlem Neighborhood Office of The Legal Aid Society’s annual Legal Services’ Corporation Surveys of Client Needs between 1991-1997, have shown health concerns ranking second only to housing in terms of client defined areas of legal need. Personal communication with Collin D. Bull, Attorney-in-Charge, Harlem Neighborhood Office. Medical researchers have documented the strikingly poor health status of some inner city residents. See, e.g., Colin McCord & Harold P. Freeman, Excess Mortality in Harlem, 322 N.E.W. ENG. J. MED. 173 (1990); Kleigman, Perpetual Poverty: Child Health and the Underclass, 89 PEDIATRICS 710 (Apr. 1992).
the Harlem Neighborhood Office of The Legal Aid Society, I represented a grieving mother who sued a funeral home and a cemetery after she purchased a private grave for her adult son and then discovered she could not erect a headstone because her son was buried under six other bodies in a common grave. A few strategic cases such as this can have a serious deterrent effect on consumer fraud and on discrimination. New York-based offices need to rebuild practices in broader areas like consumer law that have fallen by the wayside with the shift of resources into homeless prevention in the last decade.

In Professor Edelman's argument for a broader definition of who does lawyering for poor communities, I think we must remember to give credit to the dedicated community-based lawyers providing daily legal services to the poor. Moreover, legal aid and legal services' lawyers remain the most efficient providers of legal services to the poor. Increased resources must be provided to legal services' offices so that they can provide increased representation. Even if the outlook for federal funding is grim; state, local and private funding must be pursued. Those of us who have coordinated pro bono representation by the private bar have seen real


11. The President of the State Bar of Michigan noting the Legal Services Corporation's mere 3% overhead, has concluded that "[t]he federal Legal Services Corporation (LSC) since 1974 has quietly and efficiently provided access to our system of justice for those of insufficient means." See Thomas G. Kienbaum, President's Page: The Legal Services Crisis Grows, 74 MICH. B.J. 1248 (Dec. 1995). The President of the New York State Bar Association stated:

[w]e have worked hard to preserve funding for legal services in this state for, although we calculate that our members volunteer over 2 million hours of pro bono work per year, the provision of legal assistance to the disadvantaged cannot be sustained via volunteer efforts alone. There is a desperate need for professional legal service providers to meet the needs of the poor, the battered and the elderly.


12. The Legal Services Corporation Proposed Strategic Plan FY 1998-FY 2003 states "Congress substantially reduced funding for legal services, from a pre-rescission level of $415 million for FY 1995 to $278 million for FY 1996. As a result of the reductions, grantees were forced to close offices and lay off staff . . . . The Corporation considers that the level of funding for FY 1996 and FY 1997 represents the bare minimum necessary to hold the legal services delivery system together . . . . LSC is unlikely to receive large increases in its appropriation." The February 25, 1998 testimony of the Chairman of the Legal Services Corporation, Douglas Eakeley before the Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies of the House Appropriations Committee requested only a 5.5 percent increase for FY 1999 above the FY 1997 Program Services to Clients' portion of the budget which is merely "a cost of living adjustment reflecting the rise in the Consumer Price Index 1997-98." 1998 WL 91158, at *3 (F.D.C.H. Feb. 25, 1998).
limits to pro bono commitment particularly in the absence of active support from partners who are prepared to reward associates for their pro bono work. To combat this, poverty lawyers and clearinghouses such as New York Lawyers for the Public Interest who build bridges for pro bono lawyers working in poor neighborhoods, need continued support from the leadership of the private bar. The private bar must also renew its efforts as an effective lobbyist for increased funding for legal services to the poor.

To further the efforts of lawyers assisting the poor in the twenty-first century, increased resources could be used by community based law offices to develop enhanced technology to increase services. Programs should use poverty law websites to distribute crucial information to large numbers of advocates including pro bono attorneys as well as clients. Interactive programs (expert trees) can be developed which will reduce the amount of time lawyers have to spend on repetitive sorting and matching tasks such as determining benefit levels and eligibility which can be done by a computer. Offices must accelerate efforts to have standard forms and pleadings on the computer. Furthermore, access to a decent law library or to online research has been too slow in coming to poverty lawyers.

Community law programs need to continue to experiment with workshop settings to address demand for lawyering services and what Peter Edelman has called extenders which could include paralegals and law students. The Harlem Neighborhood Office of The Legal Aid Society obtained New York Interest on Lawyer Trust Fund Accounts ("IOLTA") funding for a law graduate to work on consumer law issues in 1995-97. With this boost in resources, the Harlem Office developed a monthly student loan workshop and informational handbooks. In each workshop the


14. Bar associations have actively supported funding for the Legal Services Corporation but these efforts need to continue if the program is to survive. See supra note 12.

15. The fiscal 1999 budget request for the Legal Services Corporation includes $17 million to expand and develop Client Self-Help/Information Technology Initiatives. See supra note 12.


17. For an example of the use of an expert tree, see <http://www.dol.gov/> and click on the Veteran's Preference Expert System which permits a person to determine their own eligibility for a veteran's preference.
students had a variety of problems underlying a defaulted loan varying from attendance at a fraudulent trade school to a permanent disability which should excuse the loan. While the diversity of issues required some individualized counseling, the students seemed to become empowered by helping each other while the attorney was helping another person. The hope was for each student assistant to bring her knowledge back to her school and pass it on to her fellow students.

Finally, I am concerned that we make every effort to keep a vibrant community of lawyers engaged in poverty law. By this I mean that we bring in law students, new attorneys, and pro bono volunteers and retain poverty law experts to mentor them on creative problem solving for poor clients. Legal services attorneys have been doing a lot with a little for a very long time and they should be applauded for it. We need to keep them engaged in the work because it is the combination of expertise and new energy that will drive the best coalition and lawyering work on behalf of the poor in the decade to come.

Conferences such as this one are important because they bring diverse parts of the lawyering community together to reflect on where we are headed. Because I believe that poverty lawyers have inadequate opportunity for reflection, I would like to suggest that New York based legal aid and legal services programs give their attorneys the opportunity to spend one week a year in residence at a law school reading on current issues in poverty law, reflective lawyering, and improving service delivery. I think there is good reason to start this program with housing attorneys who have a high volume defense practice where eviction and consequent homelessness is a daily threat. The law school would provide a quiet corner and a computer with access to research tools. In return the attorneys might participate in a lunchtime roundtable for students interested in poverty law. My hope is that the programs would self-consciously build a base of reflective attorneys who would then participate more actively and creatively in formulating legal strategies. I hope that an opportunity to reflect on their important work - free of the din of Housing Court and the immediacy of the needs of the client - would provide renewal and rejuvenation to these lawyers so that they will keep doing good work for a very long time.

While the challenges will continue to be great, the rewards for those who will practice community based lawyering for the poor into the next century are enormous.
MR. GREENBERG: I could not pass up the opportunity to moderate this panel. There are four professors on this panel. The opportunity to call upon a professor when they are not prepared — and see what’ll happen — is one that I couldn’t say no to.

This is an unusual panel, and it’s an unusual panel in a sense because this is an unusual conference. For many in this room who have participated in conferences before, it seems to be that as we approach the year 2000, there are numbers of places asking in different ways, what’s the future of the profession, what’s the future of poverty law, what do we do in this era as we go forward? The Second Circuit itself had a panel on this at its summer
conference, and there are numerous other schools that have done it.

This is different. It's different because of who the panelists are. We hope that this part will be different because of the format that we've chosen to try to do, to surface what some of the issues are. But the people that you see before you are people who bring really varied and different perspectives to the work that lawyers might do with communities.

And this is a very community-based, community-oriented session that we're trying to do. We're trying to filter some of the issues that can be done abstractly, and put them into a realm and put them into a context that we hope will take some of the abstractions and make them more real.

So look up here and see who is here. I'm not even going to introduce them, even as individuals. I'm just going to say that two of the folks are really community activists and are not lawyers. Four are professors, three at a law school, one at a business school. Two work as lawyers with community-based organizations. And then there's Alan Houseman, who runs the Center for Law and Social Policy ("CLASP"). And Alan, for all who have been fortunate enough to know him through the years, sort of has perspectives on all of those and is one of the leading people in thinking about those issues. So that's the panel that we have.

Here's the context; here's the hypothetical. Fordham Law School, through a generous benefactor, is going to give between one and two million dollars to a community in New York to set up some kind of legal services for its community. No restrictions. No LSC regulations. No rules about how it's going to be spent. Not even a requirement that it be an office, as such. Simply that between one and two million dollars is coming into a community.

And the other part is the community doesn't have legal services now. We're at blank slate. There is the ACLU, and a lot of other organizations that are citywide, countrywide, but there is no community-based law office around. And the question for these nine distinguished panelists to think about, and they have been thinking about, is: What are we going to do with that money?

Now, in the audience today there are an extraordinary number of people who might as easily be standing up here or sitting down on the panel. That's not meant to be simply a compliment; it's meant to say that I intend, as the moderator, to involve you in this. This is not passive; we will not talk for an hour and a half, and then we will say at the end, "Anybody have a question?," and four
people will stand up and either make a small speech or ask a question. That is a traditional model. We’re not going to do that.

I am going to try to involve you, and I want you to be involved as it is going on. There may be moments that I will actually turn and ask someone in particular in the audience, or more likely anyone in the audience, whether they have a different perspective or anything else to add to it. We want this to try to be interactive. We want no speeches up here; we want this to be a discussion, with a lot of experts struggling with the hard issues. Not at the abstract level that is mere theory, nor at the very concrete level. A million to two million, and Errol, what would you do with it?

MR. LOUIS: Okay. I would take it and create a project in a limited community, a relatively small community, similar to the one that I work in, Bedford-Stuyvesant. I would limit it to what I call non-heroic lawyering in other words, providing legal services to support the ordinary flow of commerce and transactions in that community.

Because one of the most overlooked aspects of poverty, when looked at from a community basis, is that funds are constantly siphoned out — in part because there has been insufficient development of a commercial culture, and in part because people are winging it on transactions. People are going into real estate closings, the biggest deal in their life, the essence of the wealth that they hold, and signing their name to $80,000 documents without ever having talked to a lawyer.

Not surprisingly, people are being fleeced; transactions are falling apart; employers, small business and so forth are unable to really complete the kind of work that they need done. One small example is somebody I had to make a loan to because nobody else in the world would make a loan to him. He ran a business for nineteen years in an inner city community and he never had a lease. And that was because he was relying on the information networks and arrangements and traditions that you’ll see cropping up in what is by definition a subsistence economy in a low-income community.

To move folk beyond that, to something that approximates the kind of structure that you need to interface with the rest of the economy requires lawyers.

MR. GREENBERG: Okay, Luis, you’re shaking your head a little bit up and down.
MR. ACOSTA: Well, first of all, as it would be a miracle I would communicate immediately to the Vatican, so as to support any Jesuit up for sainthood.

Second, I would begin to look at my community and see what is the issue, the most pressing issue on the tip of everyone’s tongue, and organize a development team of people throughout the community focused on that issue. I would not even mention legal services.

MR. GREENBERG: Esmeralda, as a community-based lawyer, Center for Justice, what would you say to what has been said?

MS. SIMMONS: Well, the first thing I would look at is: Why this community? And more important than that, the fact that there needs to be a consensus of the community itself, of the civil society of the community. So I am not exactly agreeing with Errol that it is only the business community that needs to be consulted.

So the first question would be putting together, with some lawyers, yes, but more importantly, with researchers and community residents, a composite team that is going to decide how we are going to move our community out of poverty.

MR. GREENBERG: Okay. Jennifer, you started The Workplace Project in Long Island around immigrant issues. How does that fit in?

MS. GORDON: Well, I think if the money was coming to me, I would take one $1,925,000 and find a very good mutual fund and put it in and let it sit there for a while, and use $75,000 to hire an organizer — maybe a lawyer — and figure out a couple of things.

One is process. What is going to be the process to set this up, so the community knows. The second is strategy, and the strategy varies, depending on the problem. You may have a very different strategy if you are dealing with workers’ rights and the underground economy, and the needs of people with AIDS to have access to public benefits and wills, etcetera.

And once you have process and strategy, it is a community question. I would see my responsibility, as a person who was bringing the money in, as getting people what they need in the community, what they need to know, in order to make the decisions about process and strategy, and get them started.

MR. GREENBERG: So let me keep directing this. So, Alan and Edgar, you were both around, literally, at the beginning of legal services movements, where the question about if you have yourself a couple of million dollars, what would you do, was not a theory. And it was supposed to be community-based.
You have heard four visions of using the money today. How does that comport, how is that different, are we going to make the same mistakes that we made thirty years ago if we go ahead and do this? Edgar?

PROFESSOR CAHN: I view law as an extractive industry that creates dependencies and takes resources and salaries out of community. I would fundamentally restructure, first of all, the legal system within the community, dealing with neighborhood courts, dealing with youth courts. I would invest in the use of technology to expand radical use of pro se work. I would create a barter economy that generates flowing currency, flowing within the community. And I would work to shift from entitlements to something I would call earned entitlements, where the work done to earn entitlements is community development work by the residents.

MR. GREENBERG: All right. And Alan?

MR. HOUSEMAN: Actually I agree with much of what Edgar just said. But I probably would focus on the sort of approach to ending poverty in the community that Esmeralda laid out, and Jennifer amplified. I would probably start by asking: what are the active groups in this community, both low income and non-low income. And what kind of issues are they working on. And out of that, try to figure out the best ways of using lawyers as well as a variety of other folks to address those issues.

At the same time, because we are talking about a legal services program here, I would do much of what Edgar did, my focusing on court and technology.

PROFESSOR ADAMS: I actually just want to go back to something that Jennifer said, that sort of first little piece you said about doing something with a mutual fund.

One of the main concerns I would have, and I think it is a little bit different from the sort of approaches people have talked about in terms of community, which I think are really important, is how do we ensure the longevity of this project.

So $1 to $2 million sounds like a lot of money to begin with, but it is not. It is gone. It is gone in six months, it is gone in a year, it is gone in eighteen months. And one of the things that legal services has been poor at doing has been thinking about programmatically, how do we ensure our funding sources, and how can we ween ourselves off of federal funding. Because I think we have a huge problem with that right now.
The other thing I would suggest is just to think about how, in terms of building up a structure to do that — it does not have to be a lawyer who runs the organization, runs the financial aspect of the organization. We need to professionalize what we are doing in terms of thinking about money and going out and marketing our ability to continue to be able to maintain these services to the people who have money. And those are corporations and donors.

PROFESSOR THOMAS: Yes, I want to jump in there. I want to come back to the way that Errol started this off. Because one thing that struck me when he started was that his definition of the community in need seemed much broader than just thinking about poor in terms of the bottom ten percent of the society. He talked about things that I think relate to how you sustain a community that has a range of poor people in it.

What that makes me think about is if I had the million dollars, I would think to myself that for the first year we might not be able to impact the actual amount of legal services. But in terms of thinking about the long term, I would want to move away from programs that have a tendency to go toward more bureaucracy, or professionalism. I think legal services suffers from some of what education suffers from in terms of people becoming unionized, and professionals becoming invested in professional interests.

I would support trying to find ways to bring law firms into the community-private law firms that have a social justice focus. For example, finding ways to figure out what the kinds of problems. And basically trying to support ways to bring storefront lawyers back to the community, as well as helping them to think about economically advantageous ways to deliver services within that model, like using non-lawyers to provide some services.

The other thing is then to connect with organizations like Jennifer's, that might speak to particular needs that are broad in our community and fund legal services from those organizations that focus on a particular sort of high impact kinds of things. But the idea would be somehow to feed entrepreneurism, move away from bureaucracy, and create for people the sense that they have lawyers, not just legal services.

MR. GREENBERG: So if Jennifer was only going to spend $75,000 on new lawyers, you might not spend any; you might have other people try to bring the existing legal world into the community.

PROFESSOR THOMAS: I might give Jennifer $75,000 for the services she wants to provide, and then do things like set up a fund
that would provide grants to people who want to put law services in our community, like they have done with doctors in some poor communities.

Provide bridge money when a community lawyer is taking on a project that might pay out in the end in terms of being able to collect fees, but would require a major investment from them to represent some set of community interest.

MR. LOUIS: What I like about what David is saying is that, to an extent that most people do not realize, there are not people just hanging out their shingle along a struggling commercial strip in a low income community. And what that means, among other things, is that you might be able to get legal services if you are about to get evicted, or if you have sort of a familiar pattern for which legal services are set up.

On the other hand, if you are a struggling business person, or you have some ideas, and by definition you are carrying a lot of the weight for the development of that community — maybe you are employing five or six people — the stakes go up for that community if you go out of business because you did not have any legal help.

We have a whole wave of just wills and estates; it's just incredible. I mean, we spend all this time trying to develop the communities, people acquire a little bit of something — a house they inherit or something like that — and then it is gone in half a generation, because nobody made up a will.

MR. GREENBERG: All right, so it is a half hour into a panel, and not one person has used the words “law reform.” So what does that mean? That is what legal services has been doing largely for thirty years. Is it irrelevant as we go to the twenty-first century? Should we not even be thinking about that?

MS. SIMMONS: I think the reason why no one is talking about law reform is because our communities are basically interested in the community economy, and are not interested in things that are going to affect the broad brush, because they found out from their own experience that broad brushes, in fact, basically tend to lose their bristles.

And the only thing that affects them in the long run is someone else’s determination about how they should be treated. So the only way out of this is, in fact, to build the economy of the local community, something that is almost unheard of. We do not even have regional economies in this area.
So that is why we are not talking about law reform, because people have lost faith in the fact that law can do much to change them in the long run.

PROFESSOR ADAMS: But I am not sure that that is legal services’ fault.

MS. SIMMONS: I did not say it was. It is the society as a whole.

MR. ACOSTA: My community is not poor because it does not have lawyers. And I understand the need to have all kinds of professional expertise in every community, to make it whole. But I do not believe in the social service model.

And I would form a development team that would focus on one concept that could organize most people in that community to create a membership-based focus movement for peace and justice. One that could clearly articulate the needs of our community for development, for democracy, for healing, and for human rights. And one that had as its principal objective the creation, the inspiring, the nurturing of indigenous leadership.

And to the extent that lawyers or any profession can support that, it is a good. To the extent that they can come in and become a barrier to that, no matter how well meaning, it is evil.

MS. GORDON: And I think that just because we are lawyers, we see problems and assume that the direction to go in addressing them is law. I think that is the approach that has gotten broad based-legal service in trouble. I think as a matter of strategy, you have to look at the problems you are facing. There may be a role for legal services in them, and there may be a big role depending upon the problem. But I think that with local leadership and strategies that take into account economic development, organizing, maybe law reform, maybe legal services, maybe things that have nothing to do with a service model, that is how you get at the roots of those problems.

PROFESSOR ALFIERI: Danny, as a starting point, let me challenge the premise of this panel: there is no community. In Miami, for example, our communities of color struggle in conflict over race, class, and ethnicity. These conflicts encompass Cuban, Salvadoran, Nicaraguan, Colombian, African-American, Haitian and Caribbean communities.

At the University of Miami Law School’s Center for Ethics and Public Service, the issue of community arises in developing and implementing our community service initiatives. Evidence of fragmentation, coupled with funding scarcity, compels us to pursue community projects based on limited public-private partnerships.
To the extent that these projects rely on underwriting from the private sector (banks or insurance companies), we risk compromising our community-based advocacy objectives.

MS. SIMMONS: But that is the whole point, you see. Community is not a racial group; community is a cultural group that self-defines itself in terms of what they have in common. What society basically builds itself on is those fragments. This whole concept of anything, of the neighborhood, or a community that is composed of a racial group or people with economic interests alone, has never existed.

So what we need to find is exactly what Luis has talked about. What drives that community, and how can their needs as they have defined them, how they want them to be addressed.

MR. GREENBERG: I take it that you are saying that there are multiple voices. So let us stay with it a second. What voices do you listen to, how do you get to hear the voices in a community that even defines what a community is.

MR. LOUIS: In other words, it is an art and not a science. And if you are operating within the community, who it is is whoever you happen to be talking to. You know? I mean, people self-organize along religion, race, class, the block that they live on and so forth. And the notion that it does not exist is, you know, I mean, in New York City if you cross a certain street, people will come out and beat you to death, you know. They will get into it based on something.

So it is real, and it is live. Police protection, political services, I mean, all kinds of things change radically from group to group. And it is very complicated. And it is fun. Actually, it is interesting; you have a lot of stuff going on.

So I would say that what you want to find is some kind of, a much more entrepreneurial model. And that is what I would be pushing for as well, to say, you know, you want to set some people down in the community who have to sort of make a living at getting good at this stuff. Because you can sit back and plan and look at this community, that community; you can start a process and wait for that to spin out while your money is eroding; or you can sort of go in and look at the way the people have organized themselves along institutional lines and within a local economy, and try and become a full player within that economy. And that is what is lacking right now, as far as I can tell.

MR. GREENBERG: So some people in the audience have worked in communities, maybe been around a long time; I see
faces of people who have been involved in legal services in communities a long time. So how do you understand the community? How do you know to whom to speak?

If it is whoever you are speaking to at that moment, what happens when the person next to that person disagrees? What happens when one group wants to put in a homeless shelter in the community, and another group says, “Not in my backyard,” and they are both in your community and they are both poor.

How do we think about those questions, even if we are committed to community models? Voices out here, or there, whoever wants to take it.

AUDIENCE: I am Lee Banker from Brooklyn Legal Services Corporation “A.” I am not intending to fudge the question, but people keep — the theme from the panel is economic development. And it seems as if they are saying economic development instead of legal services. Part of being a litigator is, the first thing you learn is to talk loud.

What Brooklyn’s experience has been — Paul Acinapura and Marty Needleman from Brooklyn “A” quite a long time ago, recognized that community economic development should be an essential part of what legal services lawyers do. Which is to say, not just the defense of individuals, not just affirmative law reform cases, but learning the nuts and bolts of corporate law, tax law, contract law and government regulatory agency law.

And we have done that, and have established a large number of businesses, of self-owned housing projects, of health centers, none of which, not one of which could have been established without those nuts-and-bolts commercial legal skills being given to them, and which, I might add, the private bar are so time consuming that I don’t think any pro bono system could volunteer sufficient services.

MR. GREENBERG: So what about that? Is there a role for lawyers in the visions that the panel is articulating? Or are they basically irrelevant?

MR. HOUSEMAN: Well, when you focus on the role lawyers, most lawyers do transactional work. And we have been talking about transactional work, so there is clearly a role for lawyers. It may not be the role of litigating major cases, or doing hands-on helping service work. Although I think both of those have roles which we need to talk about.
But most work is transactional that lawyers do, and that is in many respects what we have been talking about in part here. Not completely. So there's a clear role for lawyers.

MR. LOUIS: There absolutely is. We started what is now an over $5 billion banking institution, federally regulated; we did it without ever talking to a lawyer. You know, we have gone to court multiple times over bankruptcy cases; people come to me with $10,000 checks saying, “My uncle died and I just got this check; what should I do,” and I do not even have any place to send them. That is a real problem. And institutions that have been formed painstakingly will crash and burn without assistance of a type that only lawyers can provide.

MR. ACOSTA: I think there is a role for lawyers if they are culturally syntonic and if they understand their class biases, and if they can be part of a team that is about indigenous leadership and they can be about a collective that is rooted in community. Definitely there is a place for lawyers. There is a place for doctors; there is a place for everybody with expertise.

But if we are talking about community development, if we are talking about the effort of my community and communities across America toward self-determination, then we are talking about a collective effort, rooted in community, led by indigenous leadership.

PROFESSOR CAHN: When you are talking about community economic development, you are talking about normally money-defined activity. The market economy does not want human labor, extracts human labor; it is the one cost you can squeeze because you cannot squeeze other costs. If we are going really to talk about economic development, we are going to have to talk about community ownership of assets.

But we are also going to have to talk about redefining as work the work that was done in the home and in the neighborhood, the raising of kids, the building of community, a whole social infrastructure that was not money. A monetary system defines growth by how many prisons you build, how many people you put in jail; it is not growth to keep a kid out of trouble or growth to keep a senior out of a nursing home. So we have got actually to redefine what we mean by economic activity if we are going to talk economic development.

PROFESSOR ADAMS: I think there is a role for lawyers. I mean I am very pro-economic development and I am very pro-community economic development. I think that is incredibly
important and I think it’s something that we have paid enough attention to and there is no question about it.

But I still believe there is a role for legal services. I still believe in legal services. I think we need really to undertake and look hard at how legal services functions, how it has been funded, how we need to continue looking at our funding.

But we still are in a situation where — and not to talk about people with $10,000 checks — there are people who have nothing. People who have nothing. People who — and particularly now after the most recent welfare situation, how to deal with these sorts of large numbers of people — who really are on the edge, who are homeless, who are in the process of dying.

And I understand what you are saying. But I feel that there is a cultural role and a very useful role for legal services, and we need to reform that.

PROFESSOR CAHN: But it is that very deficit perspective that I think is going to get us in more trouble. I view the communities I work with as rich, as rich in human talent and knowledge. I dealt with a kid who was up for marijuana before a youth court, and I asked him did he know the alphabet, could he at least teach a first or second grader how to read, could he go hug a senior in a nursing home. When you start asking people not what skills they have, but what have they done for family, neighborhood or community, you find that they can do everything that is going on in the so-called mainstream economy. We have to build on that wealth.

So I say legal services has to charge clients in community service. I say to a person, “I can keep you from being evicted. I cannot make where you live a place where I would want to raise my kids and live. So if I do not want my life to be a life lived in futility, I need you as badly as you need me.” We need to restructure reciprocity into the whole relationship.

MR. ACOSTA: I agree with that. And I think that if we went one step further and got away from client, the concept of client, and really build membership-based organizations where legal services was an integral part, as well as other kinds of services, but were based on a membership’s rights and responsibilities, to develop one’s community, that we could really get to some of the issues that are really underlying this whole discussion.

PROFESSOR CAHN: And there are complex legal questions. For instance, you have heard of business improvement districts. We could have neighborhood improvement districts where a neighborhood could levy on itself a time tax, because that was what
built all the roads in the Northwest and that is how, in effect, even the Appian Way was built if we are going to go back into history. So what I am saying is that our ability to levy on ourselves taxes. Hope Six project in Baltimore is about to say, “Part of your rent can be paid in community service,” to the community, and the community can decide how to use that flow of hours monthly. That is a kind of valuing of human time that we need to do that the market economy does not do.

MS. SIMMONS: And one of the reasons legal services is at a juncture, in my opinion, is because the whole idea of a larger society or a public role in assisting people and in giving people benefits, and anything that is considered to be an entitlement has been completely abandoned by a large number of people in our society; I am talking about the American society.

So if there are no entitlements, if there are no programs, if there are no benefits, then what in fact are legal services lawyers going to work for in terms of the poor? It will have to be a redefinition of how the poor want to live in society and how they feel they should be contributing.

MR. GREENBERG: What about that? Anybody disagree with that notion of the role of what legal services lawyers should be doing? I mean, I absolutely know that there are people out there who disagree — with the role that legal services — let me rephrase it. Anybody want to raise their hand and say why they disagree with what was just said?

AUDIENCE: My name is Erica and I work for the Children’s Aid Society. I am an Assistant Director at an extended day program in a school. And I think there are a couple of issues at hand.

One is this money. I am from Washington Heights, and there are a lot of issues in Washington Heights. And I think one of the things that I want to say is that, when you go into a community, do not waste money reinventing the wheel. Utilize the resources in the community, because it is not that we do not have any resources; it is just that people have not looked for the resources.

And when you go into this community, you have to understand that you need to provide an explanation, a reasoning, behind why you are going into this community. You cannot go in with a savior mentality — “I’m going to save your community.” It is not going to work. It has to be a “we” effort, a collective effort, for us to be able to help the people that have needs.
There are a lot of safety nets that are being taken away from our children, and there is nothing to replace them. And that is something that needs to be taken into account.

MR. GREENBERG: Okay, but I want to ask the question again. The statement was made and Esmeralda said it as directly as anybody can, and there must be somebody who does not agree with that statement. So what is the role, or is there a role? Wayne?

AUDIENCE: I am Wayne Hawley from MFY Legal Services. I am not sure I disagree with the conclusion that traditional defensive individual services for low income people are not the way to go. But there is that short run problem. There is that short run problem that we all see, any of us who are in the serving professions. We see that person who is about to be evicted, who has no food on the table, and all these solutions - and I think we are all increasingly becoming aware that the solutions the panel are suggesting are the right ones in the long run, but as the philosophers recognize, in the long run, we are all dead. And it is that client, he or she, client, community member, however the person in need is defined, who is there, who is going to be homeless, evicted, lose their kids, get deported, whatever it may be, in the next week or month. And how do we respond to that short-term problem and at the same time deal with the questions the group is addressing? I do not have an answer, but I think these are things that have to be attended to.

MS. GORDON: I would like to give a shot at an answer, which is that there are situations where nothing but legal services is going to solve the immediate problem. And the question is, can you set up mechanisms, so if you are running a community organization and legal services is part of that, so that people who come in get funneled through a process where they become part of figuring out a larger solution.

For example, at The Workplace Project, you come in, if you have not been paid your wages, we will help you if you take a nine-week class in labor law, immigration history, organizing techniques, labor history; become a member of the organization, go out on picket lines, start fighting for legislative change to deal with the problem, and become a part of a larger solution.

So there is a concrete mechanism set up to feed people from the sense of short-term victim to long-term actor in a solution.

MR. ACOSTA: I want to say that I am not against emergency services. But I think that in many of our discussions we pose this
question: Are we about treatment, or are we about development, or prevention, if you will? And I think we have to be about both, obviously.

But who is driving the engine? It is a membership based, indigenously-led, focused organization of community that has to drive that engine. Because without that, if we allow lawyers to lead an effort, if we allow doctors to lead an effort, in and of themselves — obviously there are lawyers from my community who are Latino, who live there, you know — I am not saying that lawyers cannot be indigenous to the community; I am not saying any of that.

I'm simply saying that in and of itself, the profession does not embody, necessarily, leadership skills or necessarily the ability to facilitate a community process for development. And that, therefore, what has to drive the engine has to be a community organizing effort, a membership-based, focused effort on broader issues. And rooted in collective self-help, even as we deal with the immediate.

PROFESSOR CAHN: I do not want to be difficult, but why do you have to join something to get your legal rights? Can you just be a citizen?

MR. ACOSTA: No, you do not have to, but I am saying, look, you can go for service anywhere. And you can continue to go to service. I do not think we are going to get out of the root causes or the problems that we face in our communities just by service alone; I think that is why the social service model is bankrupt. Definitely you can go to a service. But if we are focused on change, on transformation, it is not going to be by the client service-based approach.

PROFESSOR ALFIERI: Can I respond to Wayne?

MR. HAWLEY: Yes, Tony.

PROFESSOR ALFIERI: Let us revisit the “short run problem” Wayne Hawley mentioned regarding the provision of direct services to low-income clients and communities, especially in emergency circumstances. Although half of Miami’s children under age six live in poverty, our primary indigent legal services provider (Legal Services of Greater Miami) lacks the institutional and staff resources to represent such a large, impoverished population. The history of local, state, and federal legal services programs illustrates this insufficiency and the ongoing burden of underrepresentation. Given this unfortunate history, Wayne, can
you explain how we should go forward in supplying direct legal services to meet emergency needs?

MR. GREENBERG: Let us not make it back and forth, but if anybody else wants to do it, let us get other voices.

AUDIENCE: Thanks. My name is Ray Brescia. I am an attorney at New Haven Legal Assistance, and was an attorney at Legal Aid Society here in New York for five years.

To speak to the service model of legal services, it is simply a fallacy to say that we handle every eviction that comes in the door. And I think that we have to realize that there are, you know, in Housing Court alone in New York City, 30,000 evictions that go through every year. And we turn down clients every day. So to say that we have to have this emergency services model is — we are not even doing that. So I think that we do have to take a step back and say, how can we do the preventative work, and how can we do the institution building work.

MR. HOUSEMAN: Well let me just add one thing to that. That is, that we have often thought that the only way we can do this is to, ourselves, try to meet all those emergencies. And I think we are beginning to see, this is not a panacea, but we have to think of ourselves as leveraging resources from others — private bar, non-lawyers — others to try to meet some of it now. Non-lawyers can not practice in the courts, obviously; but there are roles for law students, there are roles for non-lawyers, there are roles for the private bar here, and we have not utilized and leveraged those resources as effectively as we should. Even if that is done, we are never going to meet all of those emergency needs. But there is a way to do it better and reach more than we are doing it now.

AUDIENCE: My name is Sylvia Duringue. I am a senior post-doc at NDRI. I am intrigued that with the problem having been framed with none of the restrictions that apply to legal services, and with the dichotomy between immediate, emergency services and community building, nobody is mentioning the possibility of challenging some of the more recent legislation, including welfare reform. Because I would have to disagree that the social service model is bankrupt; I think it has been bankrupted. And I would suggest that is a different argument.

MR. GREENBERG: So let me phrase it back to the panel and say, Congress passes the law, it talks about welfare reform, it talks about immigration; clearly, clearly, clearly some gross unconstitutional parts of those things. Who in your model takes
that on? Should it be taken on? How does the money come to do it?

MR. HOUSEMAN: First of all, there are a lot of organizations that are taking the issues that are there to litigate on. There is the ACLU, there is a whole host of organizations that are taking them on, including some legal services programs. So you can not just say it is the legal services role to take on that set of issues.

Secondly, there is much less legal leverage that exists around those set of issues today, and one has to face up to that. Most of the legal services welfare law is premised on federal law; most of that federal law is gone. There are very few constitutional issues there; most of them are being litigated and will be litigated. So the notion that we, legal services, have to be in the forefront of that litigation is not necessarily a correct use of our resources it is not thinking about how to leverage resources, it is not looking at our role, in my view.

PROFESSOR ADAMS: I guess the question that I have is, why should the ACLU be the appropriate organization to do that? I mean, why are they more appropriate to litigate around the rights of low-income people than legal services is? Why are they in a better position to know what to do? Is it because they have better legal expertise than we could hope to have?

MR. HOUSEMAN: No. What I was trying to say is there is a set of issues that have to be litigated, given the hypothetical that was set. But there is a discrete set of issues that is different from daily representation of people who are adversely affected by the system.

PROFESSOR ADAMS: I guess we are back to the sort of class action versus direct client services issue.

MR. HOUSEMAN: Yes, but what I am trying to make is a different point. The point is there are very few legal issues like that can be effectively litigated. That is the point I am trying to make. So that it is easy to leverage resources from the ACLU or from the private bar, working in collaboration with legal services programs who may have some expertise, to challenge those issues.

The harder problem, the more difficult problem, is how do you relate to and react to and assist and work with the people who are going to be adversely affected on a basic level by the changes that are going on. What do you do about them? And that is not going to be class action litigation.

MR. GREENBERG: Let us hear from some other people and we will come back to you.
AUDIENCE: My name is Bruce Rosen. I am a city planner. Yesterday Peter Edelman raised the issue very briefly of "regular" people, those people who have some income above poverty level but the inability to access for any needs, legal services, and who would be impacted by deteriorating conditions of their community.

I am wondering, where does the law community fit in before you get into a situation of constant stress and crisis? And I will give some examples that I think fall into the economic realm. Within the City of New York we have had a continual outflow of savings institutions based in the Bronx, Brooklyn and Queens, the most recent being Greenpoint Bank, which up to now has had the majority of its mortgage portfolio in the City. Their charters say that they are based in Brooklyn, the Bronx or Queens; nobody goes and makes an attempt to stop them from crossing over the City's boundary.

Or some other examples in terms of manufacturing firms. The case of Farberware, where the workers were not allowed to acquire, with assistance, control of the corporation, and the product line has been moved overseas. Or Tastee Bakeries in Flushing, where the City held because of industrial revenue bond, the real property, and allowed the corporate owner to reacquire that.

And there are similar things like that. And I never see anybody saying, "Let us stop this before you create the situation where we are going to have the deterioration where it is a more expensive and a more arduous process of reconstructing."

MR. GREENBERG: So let me take that and the previous two or three statements and let us get back to the hypothetical. Which is that there is some finite amount of resources to go in; the panel has acknowledged that there is some role for what would be called traditional lawyering, using some of those resources. But like the question, we are talking also about economic development, and I guess that we are still in the middle of what role, if any, for the traditional concept of lawyering that Michelle and Alan and others were talking about. Anybody want to talk back to those points?

PROFESSOR CAHN: Back to clients, though. If you have an organization and that organization is making the shots as to what are the priorities, it is one thing. If you can engage in the kind of leadership development sources, a civic or municipal or neighborhood corporation says, "I want to attack the movement, you know, they came here with a promise and they have taken the money and now they are splitting," that is a fight they get onto.
There are other kinds of fights that we know legal service lawyers or others have to get into. I have yet to meet a grassroots leader who was not either sooner or later under investigation or indictment.

MR. GREENBERG: That is the criminal defense part of the legal services.

PROFESSOR CAHN: And so the question of how you protect the process, because on the one hand you have got to go at war with forces that want to invade and want to extract money; on the other hand, you have got a whole structural building process. I think Jennifer’s statement gives you an exact example of one thing we need to do, everything that we give out, that we have given out in the past, could become a catalyst to generate and build organizations, to generate membership, to generate a giving back. Not necessarily to the person who gave, but to a community group so that we need to use what we have as an asset to leverage and to get a multiplier effect and to imbed people in the self-help matrix.

MS. GORDON: I think, if I can just quickly build on what Edgar said. It is not just that you want people in the community to get services and then be drawn into the fight. They have to be the leadership of the organization. And that is not ever going to happen unless there is a mechanism for it to happen, like, for example, an all-member board. You can not have a couple of “client representatives” on a board and hope that it is really going to be a community organization.

PROFESSOR THOMAS: One thing that strikes me is, in this conversation there is a lot of debate about whether or not lawyers should lead. And I guess the issue for me is, what kind of relationship should lawyers be in to their communities and to their clients.

One thing about Jennifer’s model is there is a notion of how they are in relationship to their clients, the people they serve. If we come back to a kind of broader view of meeting other kinds of needs, you know, how should lawyers exist in relationship to the community.

My view is that you have to find ways to bring lawyers to communities in ways that they feel invested in that community. Then I think you can create a relationship where if there is an organization like Luis’s, there are also lawyers in that community who are invested in the community, therefore have a right just like everybody else, to be a part of that movement.
But on the other side, to come back to the kinds of issues that Errol raised is, if there are people who do not belong to the organization, but who have needs that in lots of ways are going to influence the health welfare of the community, how do we make sure that they are in relationship to the services that they need?

And the issue is, how do we put together the relationship, not who leads or who does not or whether there is a role for litigation. We know you need lawyers; we live in a litigious society. But how should they be in relationship?

AUDIENCE: My name is Allison Farina. I am a second year law student here at Fordham. And I worked for a short time at a business improvement district local development corporation in New York City. And a lot of what I guess I have been hearing is maybe that the purpose of legal services somehow is to take a greater part in these organizations that are already set up throughout the City. They provide forums, they hook into all the people and the institutions already in the neighborhood, and they would be a great solution possibly to pulling your lawyers in.

I know that down at 14th Street, Cleary Gottlieb has adopted Washington Irving High School and has made tremendous strides. And I was just wondering what your thoughts were on that issue.

PROFESSOR THOMAS: Well, let me just say, I would not say that what you want to advocate for is legal services taking a greater role. That expanding their role is not the way to go. The way to go is, how do you create other kinds of relationships with lawyers in the community, and bring people with lawyering skills and knowledge and expand people's understanding of the law. Which means finding ways to educate a broader base of people about how to use the law and what the law is, not expanding the role of an organization that has done a lot of good, but I think also has a central tendency toward bureaucracy and being over-professionalized.

MS. SIMMONS: In response to your point, I will use the example of my center, the Center for Law and Social Justice. The lawyer is first of all the minority; but in order to qualify for lawyering these are the criteria I establish as the founder of this organization, you have to live in the community or in a community that we are serving. Live there. I walk to work; I live in Bedford-Stuyvesant.

And other staff members who are researchers have to have a history of working with community-based organizations. You just can not walk in out of law school or with an MBA or an MPA and
say, “Here I am; I am going to help you.” We do not want anyone to help us; we want to work with our community. And it is community organizations that we represent and work with in partnership.

That is the only way we found to make sure that there is not this elitism established, and this “hypothetical leadership” that has never in fact worked for our community. And that is why we are trusted in our community.

PROFESSOR CAHN: Last year I structured a relationship between a community development corporation, MANA in Washington, D.C., and Holland & Knight. Holland & Knight agreed that for every hour of legal services they put in, the community would pay with one hour of community service. The community wanted crack houses closed, an investigation of police corruption, their neighborhood school kept off the closing list, and the money released for Kennedy Playground.

Last year Holland & Knight compiled bills of $230,000, all paid for in community service by people campaigning for street lights, by doing landscaping, by escorting seniors at night to safe places, by tutoring in the schools, by painting the schools. That kind of reciprocity can in fact generate major support. I am not saying it is a substitute for the kind of creation, but you need all the resources in there you can get.

MR. GREENBERG: We have too much consensus.

So let me instead of trying to generate lack of consensus from the audience, which has not worked, let me try to throw back to the panel in your consensus, let me see if I could break you apart.

Tony Alfieri started by saying that he did not know what community was, and actually gave ten examples, five examples from Miami, which are very Miami-based. Esmeralda, I assume that you have to deal with, in your community where Medgar Evers is, an African-American community and a Hasidic community very close to each other. Edgar, you talk about the community said they want the playground closed or open, but I assume there are other parts of the community that may have a different view of whether the priority was to close the playground and put the private law firm time-dollar hours into the keeping of the school playground open or closed. And on and on and on and on.

How do you do it? How do you find out, how do you make the decision, did you make the decision about where people had to live, did you make the decision or was that a
community decision that the best people would be living in the community and that value should trump other values.

Let us stay with your vision of it, and we can come back to other visions. But let us stay with yours. But let us get hard and let us get concrete about how you know what community means, and where there are divisions in the community. So take it away.

MS. SIMMONS: Yes, in regard to my center, I did not make the decision solo. I put together the same group that I mentioned at the first question and said okay — and this is the truth — I have half a million dollars. Everyone said they want a legal center to fight police brutality, etcetera. We are not going to try to trump legal services in Bedford-Stuyvesant. So what is it that you want to do?

And who were those people? Some folks that I do not work with regularly. Yes, ministers; yes, elected officials; yes, the head of this youth organization, Sub-Grown; some homeless folks that had organized themselves; and block associations in the community. And they all said, “Well, why do you not get some lawyers, but we need people that are going to tell us what the real facts are.” And that is how the research component came about; that is how it was done.

And thereafter, those are the same people that have come to us and said, we want to do, not in my backyard in regard to this homeless shelter, because we have sixteen within two blocks. Exaggeration. But not great exaggeration. Or we want to have the school closed or school open, etcetera. And it has only been on the basis of how many cases we can handle that we have taken it; when we have no more room in our docket, we close our docket until we have room. And that is how it has worked.

PROFESSOR ALFIERI: Recognize, however, that part of the challenge here stems from the unitary notion of community pervading the civil rights movement, the welfare rights movement, and even the interpretive construction of class actions under Rule 23 of the Federal Rules of Civil Procedure. The inherent fallacy in this notion, indeed the common fallacy of group cohesion and expression, accounts for the widespread and growing decertification of class actions in federal and state courts. Exposing this fallacy renders our decisions concerning group and community representation incoherent and therefore, unprincipled. Yet, circumstances compel us to make these decisions on a daily basis. And we make them!
MR. ACOSTA: Well, I do not know about that. In 1981, in a community outside of Williamsburg, Brooklyn not large enough to fill Yankee Stadium—less than 50,000 people—we lost one young person every single week. The community had a greater homicide rate than any country in the world at peace, and any country at war in terms of young people in that time.

Now, that is an emergency. You know the social service model in terms of providing a service meant that we would perhaps have to have better suturing if they fell down from their gang wars in the street, and try to save a few. But we looked at that emergency, took it as a way of creating community.

For example, when I, as the Associate Executive Director of the Municipal Hospital, went to the City Councilman and said, “Our young people are dying,” he said to me, “What young people? They are not ours. They are gang kids. They are not part of our community.” Now that City Councilman went to jail. There are a lot of people within our community who would extricate themselves at any given moment, based on their politics or worldview.

So our effort is to create community. Because we created El Puente, focused on development, not client-based services, but focused on development, six years later when a crazy school district put a wall to segregate children at Public School 16, guess what? We were able to reach out to Brooklyn Legal Services and Puerto Rican Legal Defense and Education Fund, put together a team of lawyers, and we led the effort of the largest boycott in Brooklyn school history, and brought that wall down.

Last year, the Republican governor of this state signed a law prohibiting the building of a fifty-five-story incinerator in my community. Now this was an incinerator that was already legislated, already passed by the City Council. Everybody told us, legally we did not have a chance. Yet because we had an indigenous-led community development organization that could reach out to Brooklyn Legal Services and to other lawyers, and come up with an organizing effort that, yes, involved litigation and the practice of law in the courts, but more importantly, involved creating a political base between people that, Tony, you would think would never understand themselves as a community, the Latino majority and the very volatile Hasidic minority, coming together to build a bridge, and finding common ground in the ground itself, and thereby beginning to create the structures of a community.
PROFESSOR CAHN: You can get different voices together around several things, around a shared grievance; you can get them together around enlarging the pie. If they are fighting over a fixed pie, they will scratch each others' eyes out over nickels and dimes; however, if they are around enlarging a pie, the focus will shift to building a dream, and making a future for their kids.

And the other thing is, if today's decision is not the last time, but if they know there is a commitment to, you go first, but I go second, and there is a relationship of trust, it has been my experience that they will let somebody go first and go second. But if you set it up so it is all or nothing, one time only, you are in trouble.

MR. ACOSTA: And I should say that I was indicted, by the way, by Attorney General Mitchell, who also went to jail.

MR. GREENBERG: That is the beauty of the American legal system.

AUDIENCE: Hi, I am Daniel Asano and this will merely be a question from a first year law student who does not have too much experience being a lawyer. But from talking to other lawyers and upper class law students, there seems to be a tension between traditional thinking and thinking outside the box.

And my basic question is, are lawyers trained, do lawyers have the capability, do lawyers have the skills to do community organizing, economic development? Are these things that we really should be asking lawyers to do, because lawyers are just smart people and the degree has flexibility, as we all say?

Or, is it that we should maybe insist on lawyers sticking to their levels of expertise, because lawyers do not know how to organize people because they deal essentially with very narrow sort of types of issues. And that is something I struggle with: have I made the right decision in coming to law school, if I want to work on these other issues?

MS. GORDON: See, I think that nobody would argue with the premise that in the business context, lawyers make mergers, lawyers do business, lawyers organize things, bring different corporations together; that lawyers have a broad range of things to offer to their clients in business.

And I think that in poor communities, you can make similar analogies. I think the danger is, lawyers are used for what they are in the business community — they are a tool. And in poor communities, lawyers have the chance to have too much power and use the community for what they want. And I think that is the
distinction as opposed to the skills distinction. I think all the skills are important.

MR. LOUIS: The skills are important. I should say, though, that there is a problem when it does come to thinking outside the box. I mean, some of the stuff that Edgar is talking about, you could not find one lawyer in a hundred who could walk you through some of that stuff. And that is a problem all by itself.

We started a cooperative financial institution, and I am a big believer in producer and consumer cooperatives. I find very few people, students or otherwise, who know anything about coop law, you know, outside of the narrow housing field, and could really sit down side by side with people and do some interesting stuff.

And these different formats, worker-owned companies, producer and consumer cooperatives, credit unions and so forth, this is how you can leverage what resources there are within low income communities. So I would say that there is a real need to sort of look at a lot of this stuff. And it does not necessarily involve litigation at any point. It does not necessarily involve, you know, sort of conditional corporate law, although obviously that has to be sort of a background against which you start to look at some of the other stuff.

MR. LOUIS: Absolutely. I wanted to start something called the Central Brooklyn Partnership for Cooperative Economic Development; found out it is against the law in New York State to put cooperative into your title unless you are structured in a particular way.

I started asking around: well, who can help us structure ourselves in a particular way? Nobody knew how to do it. It happens all the time.

PROFESSOR CAHN: There is homework to be done. You are always walking out there on space. Even in a field you know, every case feels like it is almost a case of first impression, no matter how long you have practiced, if you take things seriously.

The problem is we are talking about structuring. But lawyers have always structured. The frame is the Constitution, mainly the lawyers; and I will bet they had never written a constitution before, most of them.

Lawyers are restructuring all of Eastern Europe. They are privatizing, you know, all over the damn places that they know what they are doing. We are in a mess because of the experts we have. Okay?
MR. GREENBERG: All right, without being Thomas Jefferson up here, let us get another opinion.

AUDIENCE: Hi, I am Karen Weber from the Public Justice Center. We are Maryland-based. We have a very different community than exists here in New York City. I am originally from New York City, so I know that for a fact. I have been in Baltimore now for two years.

And I think that the trap we may be falling into is our own parochialism as New Yorkers. Every community is not the same; every community does not have the same level of sophistication or even tension. Because sometimes it is tension that drives communities into action and into empowerment.

The community that I am now used to dealing with in Baltimore has the same group of five or ten leaders, who come to the same meetings, and articulate the same positions. Is this community empowerment? I think that we have a tendency to over-romanticize the notion of community and community leadership. And I think that is the trap that this panel is falling into.

So I am the voice of dissension at this particular point, and I look forward to your feedback on that.

MR. ACOSTA: But your dissent is not about community. Your dissent, I think, if I heard it correctly, it is about that there are various kinds of communities. And that we ought to keep a notion that what you heard was examples of New York City, and that necessarily New York City is not America.

It is the whole that we are talking about. Maybe that is a semantic thing, but we are talking about the whole. And about creating infrastructure for the whole. We call it community; you might call it something else.

But bringing different networks together to work together so that a common space, a common place where people live and thrive can be bettered, is what we are about.

PROFESSOR CAHN: I was not talking about the whole when we started. I mean, we have a hypothetical that assumes scarcity and assumes making some hard choices strategically, which is sort of where I think we are kind of missing the point. I mean, we need to define what we want to do and we need to define just as clearly what we do not want to do.

MR. GREENBERG: Let us hear from someone up here.

AUDIENCE: Hi, my name is Eddie Bautista. I am a community organizer with New York Lawyers for the Public Interest. Just two comments. First, I heard someone mention
before about lawyers being trained to organize. God help us from that model; it is not something I would ever encourage.

Secondly, I think people are oversimplifying this concept of community. I just want to take a page from our experience in Red Hook, Brooklyn. Community is, in our concept, a bunch of stakeholders who, for a given issue in a given moment, find unity in something. And God knows how long that unity will last, probably just beyond that one issue.

One of the things that happened in Red Hook, for example, is that we in fact use El Puente as a model. Red Hook is a community that is predominantly African American and Latino; eighty percent of that community lives in public housing; there are about 12,000 people in that community. And there was a sludge treatment plant that was planned for that community. The people who took the leadership was a small civic group of White homeowners in Red Hook; and when they approached our office, we encouraged them, and it took about six months before they even were willing to step into public housing to meet with the people in the tenants' association. And we built a really unlikely alliance between White homeowners and people in public housing. We fought back, the community beat back the sludge treatment plant.

A year later, an AIDS facility was proposed for Red Hook. And the White homeowners went bananas, and started organizing against it. The tenants' association approached us and we had to represent the tenants' association and help negotiate economic development opportunities, housing opportunities, health care opportunities, that were arising from this AIDS facility.

So within three or four years, we had this coalition that came together, fell apart, and came back together again last year. Why? Because now they are threatened by the closure of Fresh Kills landfill and an exponential increase in waste transfer stations.

These people have been at each others' throats, and we expect them to be at each others' throats again. But they have identified as stakeholders things that they can struggle together on.

MS. SIMMONS: I differ with your initial definition of community. Community is not geographic. You later changed your definition of community to alliance, stakeholders, and coalition. That is exactly what that was. That is not a community in my definition.

"Community" is people who have a cultural affiliation with one another, that share common values and mores, and have a world
view that is together. It is not merely the fact that they are homeowners sitting next to public housing folks. That — and Crown Heights shows that — does not comprise community.

MR. GREENBERG: Okay, again, from the audience?

AUDIENCE: I am Alan Rothstein from the New York City Bar Association. I had two thoughts, one of which I think is a thought for another conference that is coming up here, which is, when you start looking at the issue of delivering services to clients in an individual model, and you want to get away from, that has all sorts of ethical implications which have to be looked at. Is the code of ethics that lawyers operate under appropriate for what you are talking about? And that is really fundamental. But my sense is that it is not.

The second thought is, there is a lot of conversation essentially about clients — if you use that term in this context — buying into the use of lawyers or developing community structures. Which leads to the notion that, we have always assumed legal services are free; and I know Professor Cahn is making the point that they should not be. What is the general sense that you have as to whether people should buy in one way or another, sweat equity or money, for the kinds of services that are provided in the community as a better way of legal services provided in the community, to leverage that money better?

PROFESSOR CAHN: I would use my $2 million to help a lawyer or lawyers get established, and then rely on them to make their own living. Because there are — I say this to law students all the time — there are millions and millions and millions of dollars washing around, even in what looks like the most disastrous low income local economy. It takes time and it takes patience to figure out how to operate with in, in such a way that you can make some money. And you can make a decent living there.

I mean, all the work that I have done is sort of based on that assumption. And the raw numbers, I think, bear out. So I think that you lose an essential component of what the market can do well, which is to provide some accountability and some immediate feedback on whether or not you are doing a good job.

For instance, in the case of the “NIMBY-type” stuff, if you are a lawyer and your bread and butter is working within, say, a geographic area, you cannot end up too often on the unpopular side of issues, or you will not make a living. So I would look to something like that and to not let folks off the hook, because providing free services as the only model starts to open up a lot of
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the questions we talked about before, about who defines community, who says a good job was done or not and how do we know, and how were sides chosen.

MS. GORDON: I also think money has a tremendous — and this is no news to anybody — amount to do with power and control. And unless you pay for the legal services you receive — and I believe at least partly in money. In our organization, you pay for them, you have a twenty dollar retainer, a seven percent contingency; but then we ask you to put in time because you have to ration services somehow. It is not unlimited resources. You have to figure out a way to build the organization, and part of that comes through money. But part of that comes through deciding who you are going to help, based on who is going to help build the organization.

PROFESSOR ALFIERI: Precisely in order to reach out to communities in a state of disorganization or preorganization, we at the Law School’s Center for Ethics and Public Service are contemplating various interdisciplinary forms of collaboration involving partnerships with other divisions of the University of Miami, particularly the Schools of Medicine and Nursing. Emphasizing entitlement education, such partnerships would enable us to gain access to individuals and groups at the local, grass-roots level.

MR. GREENBERG: I see some hands in the audience. Robin and Mike, hold it for a second, because I, as we are sort of moving toward what is the last half hour of this panel, there have been a couple of comments out there that always evoke in law schools the great laughter which is, you know, sort of, God forbid lawyers be organizers, what is this place teaching me anyway, what am I supposed to do when I get out of here, and other such things that we can all identify with.

So let me throw it to the panel and to others out here, and try to move the conversation, again from the consensus of the community controlling what happens, arguments and nuances about what the community is, and how we build coalitions to leveraging roles of other institutions within the community —

PROFESSOR ADAMS: Just before that, just to break the consensus on clients who pay.

MR. GREENBERG: I will always allow that, Michelle. We will always allow that.

PROFESSOR ADAMS: Just because I feel so strongly about this I think that we have to set sort of very intelligent income
requirements if we are going to still have that. But if we are talking about people who are the poorest of the poor, I do not believe they should have to pay for legal services.

MR. ACOSTA: But you will accept the idea that, let us say, my mom, who is a beneficiary in my family of this great welfare system, can contribute something to someone else’s support and health, and that there could be some kind of informal bartering, as is always the case in our communities as we build relationships.

PROFESSOR ADAMS: I do not know whether I will accept that notion or not.

MR. GREENBERG: Okay. We will leave it —

MR. ACOSTA: That is how we have survived.

MR. GREENBERG: We will leave it for the moment and we will say that it is certainly, if part of the role of this panel is to raise issues, it is raised, and there are clearly different viewpoints. But let us get to law schools. This is a law school. Many people in the audience are people who have moved from being legal aid, legal services lawyers into the academy where they are training next generations; still see themselves as involved in the struggles, in the movements that they first started out with, albeit now doing it from a different place.

Panel, what role do law schools, what role do law students, what role, if we want to then move it to the private bar, what role do the external institutions that are now in place — but let us stay with law schools for at least a couple of minutes — what role do law schools, clinical program students, what roles do they play in your vision of using the million and a half dollars in ways that are useful to your community?

MS. GORDON: I think clinical programs, especially some of the largest ones, right now are focusing on individual cases. And what that leaves out is what it really feels like to work as a lawyer in part of a community. People are not, by and large — although there are some very good exceptions — getting the experience of how you work with organizers, how you work with an organized community, how you work with a disorganized community, and what skills as a lawyer you are going to need to play all these complex roles that communities require of lawyers. And I think that is something that clinical programs and the courses that back them up really need to begin to address.

PROFESSOR ADAMS: One thing that I have noticed at my school that I think is something that would not have occurred to me without teaching there, is that my view is that law students can
play an enormous role in terms of providing legal services under appropriate supervision. The problem is whether law schools will let them. Okay?

And what I mean by that is to suggest that often there are internal struggles in the law school about the role of the clinical program, whether we ought to let outside practitioners supervise our students, and things of this nature. And I think one of the things that we have to do, speaking now to stand-up professors in law schools, is to make sure that the clinical professors, number one, are treated well; and number two, understand that the law students can perform a service role, maybe as a primary function, and secondarily, that they learn from preferring that service role as opposed to the other way around.

MR. GREENBERG: So Tony's view that Miami as a community is somewhat fragmented pales as a concern to most law schools.

PROFESSOR ADAMS: I would not speak about most law schools; I just talk about mine. But keep going.

PROFESSOR THOMAS: Can I jump in? Let me just say what I saw as the role for law schools in my vision of trying to get lawyers to establish firms in communities, private lawyers. And that was to link with lawyers who work in communities and provide law students as interns who work with community lawyers who are in private practice.

The other role, I think, is in acting as educators. Working with programs that, say, have a focus around housing, and being involved in efforts that educate tenants about their legal rights, those kinds of efforts.

PROFESSOR CAHN: I think part of the problem with getting law schools to make the contribution they can, is if you only have one semester of clinic, you are going to be dealing with that level of cases that people can handle just in case management and in basically right/duty relationships.

I think we are talking about shifting from rights and duties to the question of powers-how people can create new contractual, new organizational structures. And for that you would need to have relationships, I think the law school should have relationships with, and sponsor relationships with advanced public interest groups that are doing the kind of community lawyering we are talking about. And I think that needs to be an advanced clinic.

Beyond that, I really think that we have got to look at the practice of law and the impact of technology because of its
dramatic impact. If we are preparing people for a mode of practice that we already know is obsolete, then we are not preparing the law students of today for the future, and we are not.

MR. GREENBERG: Tony, you look like you are saying something.

PROFESSOR ALFIERI: Edgar rightly points out the importance of both technological and training innovation in legal education, especially in the arena of clinical legal education. Yet, until recently, law schools and clinical educators have appeared surprisingly resistant to the integration of community-based methods of advocacy instruction. That long-standing resistance may be attributable to inexperience as well as ideology. Put differently, the politics of community law practice may be incompatible with the politics of legal education.

PROFESSOR ADAMS: Well, the liberal right is not trying to kill our clinics. I mean, we pride ourselves on our clinical programs to a certain extent. But for instance, one of the ideas that was proffered this year on the clinical committee is, let us let as many students as possible take advantage of the clinics, and let us not be able to let the individuals who run the clinics actually select students. And that would mean making sure that most of the students’ clinical experiences would last only one semester.

Well, my view is that students should be in a clinic for a year. In part, for the reasons that were just mentioned here. But that was something that I had to fight for as a member of that committee, so it was important for me to get on that committee and make my views known because there was a distinction between the administration and the clinic on that.

PROFESSOR ALFIERI: Plainly, to combat the traditional politics of legal education exhibited in ongoing battles over clinical instruction, students need to mobilize institutional support. It is folly to expect such support from law school faculties, even progressive faculties.

MR. GREENBERG: Let us go to the audience.

AUDIENCE: My name is Joe Tomlin. I am at the University of the District of Columbia School of Law. I run a clinic and I have been in clinical education since 1984. We are a progressive law school, you know, we are there to create clinics. Every student is mandated to take a clinic at least twice, with community service in the first year.

The problem with clinics, it seems to me, fundamentally, is that we are subsidizing the apprenticeship program into the
marketplace of lawyering, because we do not bridge people into public interest positions because they are all still market-based.

So I guess one of the ideas I want to posit for folks, and it goes back to the very first comment, is, if we are going to get this million or two million dollars, maybe as we are all struggling to create community and do community-based organizing that uses lawyers, not to extract resources but to put them back in, and so the community controls the lawyers. Right? While we are on our way to that, why do we not teach students, and ourselves find ways to use the techniques that rich lawyers, lawyers for rich people, have used to transfer wealth. So why do we not find fee shifting, I mean there are fewer and fewer of these that work for poor people, but let us train our students to find, if we are talking about splitting up a limited pie, ways to enrich poor people and ways to get themselves into public interest poverty law jobs.

One proposal, Tony, which goes back to your point earlier, how do we represent the poor kids. You know, special education still has market rate attorneys' fees if you prevail. Every poor kid I have ever met is getting screwed over by the school system; most of them have some special education disability. We should train our students — that is what we are trying to do — to represent those kids and extract that money back into the poor community and use it for organizing.

MR. GREENBERG: Okay, let me just say that in the audience we have representatives of Soros and NAPIL Fellowships that are designed to actually create more jobs, more roles for lawyers, rather than simply shift the number of people who want those jobs. And throw back into the mix for you to talk about not only clinics, but roles of foundations, roles of the private bar, as we move toward thinking about how to implement your visions of it. So whoever wants to start it, take it.

MR. HOUSEMAN: Well, I am not sure I want to start there. On the clinical point, I think there are a couple of models that we need to recreate a few more of. One of them is Gary Bellows' model in Boston, where students actually spend a semester or a year at a legal services office full time, and they are not somewhere else. They are not in and out, they are not doing class work, they are actually working at that office full time.

There were some earlier attempts at this approach; it has not been replicated very much. But it seems to me that if we are thinking in the clinical education field, we ought to think about
ways to replicate that model, see what works and does not work about that model, and see how it is useful.

Secondly, when we are talking about the community lawyering, at least four different models were proposed. And law students can play a role in each of these models. One was — the New York Public Interest Law model. You have a central office, you have organizers that work out of that office and work with community groups, and then the law firm, if you wish, comes in itself and mobilizes and leverages other resources to help that community group. I think that is that model.

A second model was to put lawyers in the community, use the Fordham money for that, cut them loose, and hope they survive.

A third model was to create a community-based institution along the lines of Esmeralda's institution, where there will be some lawyers and some non-lawyers.

And a fourth model was to create legal units of community-based organizations.

Now law students can play a role in each of those; clinical programs can attach themselves to each of those. So there is a wide variety of opportunities that are presented for law students to be used effectively and for them to grow, whichever one of those models you adopt.

So it seems to me that when we are thinking about this issue, we need to look at some things like what we have got in place that may not have been replicated very much and see how they can be used, and if we are moving to a different sort of paradigm around community-based lawyering, as one fundamental direction that we are going, then there is at least four different models have been discussed, and law students can fit into any of these.

MS. SIMMONS: I believe there is also a need for "Ph.D.-type" graduate students outside of law school-type fellowships to be created. So that people that are in fact studying law, that have an interest in stepping outside the box and getting a larger picture of what community needs are, will have an opportunity to do that, not only in practice, through a clinical experience, but a clinical experience in conjunction with an abstract thinking experience, either on the ground or in university, or a combination of both.

That sort of fellowship, I have not seen exist. Though there are some very, very good clinical experiences that attempt to match that by giving students a larger picture.

And I also think there could be a very creative use of clinical experiences, depending upon the demands of the students. I had a
rather unique clinical experiences ages ago, out of Brooklyn Law School, where I spent two years, twenty hours a week, working as an intern clerk to a Federal District Court Judge. And the reason I spent all that time in that clinic was because I wanted to learn the U.S. legal system as it operates in terms of power. And it truly, truly taught me that, in terms of what actually works, how the rules really get effected, and how a group or groups or poor people in general would suffice and basically come out in terms of the American justice system.

That could be duplicated on community level at any of these models that Alan has so nicely put forth, if the student comes with the ideas of how he or she wants to package the experience, and does not simply say, "Give me what you have, tell me what to do and I will do that."

PROFESSOR CAHN: I think the past definition of poverty law has really focused on, how do you assert rights, how do you protect rights. And rights are essentially claims that already exist in law and expectations already protected by law.

I think the poverty law of the twenty-first century is about, how do we empower people to define themselves as contributors to expand the pie, and how we make sure that we do not define the pie purely by reference to dollars. If you talk about environmental degradation, if you talk about quality of life, if you talk about civic engagement, if you talk about social capital, you are not talking about things measured by dollars.

MR. GREENBERG: All right, so raise your hand in the audience or on the panel if you are currently involved in a clinical program, either as a teacher or a student. Raise your hand. Just keep your hands high. All right? [A majority raise their hands.]

Now, keep your hand up if you are currently involved, either as a teacher or a student, in a clinical program that approximates the models that they are talking about. Put your hand down if you are not involved in that. [About half lower their hands.]

MS. SIMMONS: I am not clear.

MR. GREENBERG: Well, good. A confusing question. And you actually answered it. I heard the panelists saying that one of the problems is that traditional clinical models — I will translate it — teach basic lawyering skills for the most part, do not teach community skills in the way that for an hour and a half we have talked about it. All of which leads to the logical question that was asked up there, which is, what does my legal education have to do
with anything that is being talked about? That is what my question is.

If you are involved in a clinical program that is beyond the skills in the individual cases, and have programs that more approximate the values in the ways people here are talking about it, raise your hand and let us hear a little bit about that. Louise?

AUDIENCE: Louise Trubek, University of Wisconsin Law School. All of my students work on non-client-based projects. And we work on legislative and administrative advocacy work, as well as coalition building. We do not use any one neighborhood base.

One of the areas that I am involved in that I think is interesting is in health care, where we have organized a group in the community, which is Madison, of people who are basically field level people — nurses, community health, public health people — and we get together on a monthly, no, every-other-week basis to monitor and act on issues involving health care. What is interesting is that I facilitate and my students work along with me on this. And the reason we are successful is all of these other people cannot speak out; they cannot publicly speak because of their positions. So they tell me what the issues are and I speak out.

And we are increasingly now developing out-stationing in Medicaid in the community, and we are taking the lead on it. So I think this is kind of a mixed example, because it is both coalition and community, if you agree with the community being the small city, and we use people from within the existing bureaucratic institutions who want a space. And they also influence their own institutions because they then speak out privately to the people on top of them. And I am increasingly thinking that health care is a very interesting model; as we move into managed care, there are a lot of opportunities there.

MR. GREENBERG: Okay.

AUDIENCE: I am Steve Wizner, and have been a clinical teacher for twenty-eight years at the Yale Law School. And I have been hesitant to speak this morning because in the thirty years plus that I have been a legal services lawyer, things have gotten worse and not better. So I kind of thought I had nothing to offer.

But we do have a clinic. The majority of our clinics follow the classical individual client representation service or law reform model. We have one clinic called Housing and Community Development. And in that clinic, we only work with groups. For instance, we work with public housing tenants' organizations, or we
work with community-based groups. In starting up small businesses, we helped start up a laundromat that is owned by a non-profit tenant organization in a public housing project. We work with community organizations, we work with developers of affordable housing, and in that clinic students learn how to work with groups, how to serve as counsel to community organizations.

And I have to say that teaching in that clinic is the most challenging teaching that we do, because we are not used to doing it. Even the idea of doing deals, of transactional work, is not something traditionally that legal services lawyers do. But it is important, I think, that law students today learn those skills.

MR. GREENBERG: I am going to go over to the other end of the room and ask Alan Grauper, Bill Dean and some people who are involved in trying to leverage the private bar for some thoughts about that. But if the panel wants to respond to some of the clinical points, why don’t you do that as I am walking around. Great blank looks, right? Great blank looks.

I am a former criminal defense lawyer. Alan, the private bar, the role, if we hear the things that are being said about non-traditional uses of lawyers in communities, and listening to communities, how do you see the private bar’s role in that?

AUDIENCE: Danny, I see a law school auditorium, and I sit in the back seat for a particular reason that I remember, even thirty years ago. But it never worked thirty years ago, and it doesn’t work today.

MR. GREENBERG: Let me just say there are rare moments where somebody gets to put a member of his Board of Directors on the spot.

AUDIENCE: No, I don’t feel on the spot, but I feel that I should listen for a change. I think we may be in a certain respect complicating things here today. We are not complicating it in terms of what I am hearing, which is a need for lawyers to be a part of the community-based, project-oriented movement, if I can use that word.

But I think if we look at what lawyers do and what we are trained to do and what I think we do best, if we restrict ourselves to what lawyers do, things could become a little simpler. I hear some of the community-based people today saying, well, when lawyers step out of the lawyer’s role, they are a hindrance rather than a help.

A lawyer without a client, I have always felt, is a very dangerous thing. The lawyer takes his or her instructions from the client and
represents the community organization in what the community organization wants to do. Lawyers are sometimes smart people who can help and can be organizers as well. But if we are talking about legal services, I think that lawyers as lawyers have a role to play in finding out how to create a cooperative and doing it.

And in terms of the role of the private bar, one thing I am very impressed by today is the need that I am hearing for business lawyers. And one of the big problems in terms of pro bono is, you know, Danny, over the years, is that we are talking about eviction cases, which private lawyers do very badly. And we keep coming back to that group; we come back to a minority of the legal profession in New York who are litigators to put more business lawyers into the job of doing what they do best. I think we can do more.

I heard the lawyer from Brooklyn “A” say that pro bono lawyers are hard to train and may not be able to function that well. But I do think that if we keep in mind the need for training, and we keep in mind obviously that pro bono lawyers have disappointed the professionals over the years, I think that they can do a great deal more.

But I think we are talking about the traditional role of the lawyer. The lawyer does not make the merger; the lawyer is called in to effect it when somebody else decides what to do. And I think a lawyer can be perfectly comfortable representing a community-based organization, if the lawyer remembers what the lawyer does and what he or she does best.

MR. GREENBERG: All right. So let us get some reactions from the panel, or anybody else, to the role of either law schools or the private bar, as we try to think of lawyering roles in these things.

MR. ACOSTA: I think it would be, to support what Esmeralda’s been saying and others have been saying here, I think it would be disingenuous of us to think that what we are talking about, at least what I am talking about, is the kind of perspective or approach to the work that basically says, you know, these are poor people, and whatever I can do, I can do. You know. And I will commit myself to that.

Yes, we need commitment; and we need a sense of passion for that. But what we need are skills. I mean, I think he was right. You know? I think our young people who have set up the rap groups and are making CDs, want to make sure that they have the kind of understanding about the law that does not allow them to get ripped off by labels.
El Puente is launching a new paradigm in public education where we are the first community organization to own our own public school. Well, guess what? We needed lawyers to help us navigate all of that.

So what we are saying is simply that all of us bring our skills to serve a particular effort, world view, goal; and we ought to know what that goal is, and make sure that we are supportive of it and don’t get in the way of it.

MR. GREENBERG: Okay.

AUDIENCE: My name is Peggy Healy and I am working right now at a battered women’s shelter in White Plains, called My Sister’s Place. And I am a recent graduate of law school and I went to law school after much experience in community organization.

But I just want to reflect again, that you do not need one or two million dollars to do several things that are possible to do without money in the law schools. Certainly, you need money for clinics, but you also need the Public Interest Resource Center that we have at Fordham and other places; you need places where students can get out into the community. If they are exposed, I think hearts and spirits will be engaged. And that is what you need; you need people’s passion, you need people’s concern.

But also if you are going to bring your skills, which are very specific, I think that we need to de-mystify the law in many ways. We need to make it accessible to regular people. We need to do that in very simple ways; there are simple ways to do that. And everyone here, if they did it, it would make an enormous impact.

And finally, there are no communities out there that have nothing. There are none. There is not a community in this world that does not have anything. All of them have something. And amazing resources. And if we can see more and more clearly — that is really a mind change for all of us — to see what the resources are, I think there would be enormous possibilities for us changing in an enormous way.

MR. GREENBERG: To those of you on the panel who are in New York and are doing the work that you are doing, and there are at least four or five if you. Could you use law students? Could they get in touch with you directly and be put to use in learning how to do the lawyering you are talking about? Jennifer?

MS. GORDON: We can, we do. I think the truth is, though, that sometimes working in communities requires a special kind of law student. For example, we do not take law students who do not speak Spanish. But it is also necessary for a law student to want to
work as part of a community. And I think that because it is not emphasized in classes and clinics, people do not understand yet what those skills are.

And so when law students come to us and find out that the expectation is that they will support organizing efforts, that they will support the development of our business cooperative and other efforts that are not direct services, we have a lot of attrition. So we would love more than we get, and we can certainly use them.

MR. ACOSTA: Yes, ditto to everything that Jennifer said. But principally and bottom line, are you willing to grow, in body, mind, spirit and community? And are you willing to understand that this is an opportunity for your growth, and to respect the process as such?

MS. SIMMONS: Yes, we do, and the students basically get to choose the type of project that they want to work on from that which has been brought to us by community groups. And/or they can create their own with a community organization. So we obviously do use them and we work with established clinical programs. Or a student can come on their own and we will negotiate credit with their law school.

MR. LOUIS: Yes, we have used law students a number of times. The most interesting use of them is interns. What we have tended to do, actually, is show them all the legal background, the Federal Credit Union Act of 1934 and some of the other relevant legislation, and then just have them do straight research.

But what was most interesting recently was just sort of toss some of them into a business development project, and help them just apply their skills, just as bright people who can think through a problem if they have the information. And it was to expose them to the kind of business transactions that take place even in a low income community.

MR. GREENBERG: Okay, one more from the audience. Bill?

AUDIENCE: Bill Dean of Volunteers of Legal Service. In Peter Edelman’s presentation,¹ I was especially drawn to his sentence that resources for serving the poor must come from the entire bar. And I do think that the private bar, on selective projects, can make an enormous contribution in terms of transactional work and developing projects in terms of community development; in terms, obvious, of the lawyer’s grist for a lawyer’s mill, which is impact litigation and class action work, especially

important now that legal service offices, many of them cannot do those actions; even in emergency cases. While housing is a disaster for the private bar in terms of Housing Court, there are many areas — benefit issues, issues of school suspension, issues of special education.

But let me just turn it around and say that from the private bar's perspective, I think that it is extremely important; not only do I think that lawyers can give and provide useful services and advice, but I think that the experience that they get and what they learn from this experience is very, very important for the private bar.

One of the things that I think has to distress anyone living in this city or in this country is that we have too many golden ghettos, too many lawyers in the profession who have absolutely no sense whatsoever of the social problems and economic problems that people face in our society. And I think that lawyers who work on these types of projects, they come away with a tremendous sense of human problems, of the city that they live in; and they can indeed become advocates for these issues in legislative hallways. So it is a very useful exchange.

MR. GREENBERG: So we are getting to the end. So this has gone on, and let me thank the panel for really highlighting for us exactly what at least the mission of the session was, which was to get us to focus about what lawyering might look like from community-based, and now you can all give them really a well deserved round of applause.

Let me thank the audience for doing exactly what I hoped the audience would do, which was to stay engaged and talk.

I am not going to try to sum up everything that the panel said. I do, however, want myself to make one comment as we are breaking for lunch, which is to say this:

I think this was an extraordinarily successful panel for what it was asked to do, which was to help us think about lawyering in ways that do not usually get done. I do want to take the last minute or so to talk to the students, and particularly students who asked what they could do.

Some of the words that are never used in law school are words like fun, words like enjoyment, words like, what do you love to do. I think that at the end when I asked, can students volunteer or through clinical programs go there, the four people in community-based organizations gave exactly what I would say was the right answer, which was, “You could come to work for us, but it depends
upon whether or not you are going to love being with us and can do what we do, because only then can you do it well.”

This was an extraordinary discussion, and almost a unique discussion, of an aspect of lawyering that is rarely talked about. It is an aspect of lawyering. If you do not want to be, if you do not love to be, if you cannot relate to being in the community with the people that are being talked about, do not go there out of guilt. Do not go there out of guilt because you will be miserable and you will make your clients miserable.

If what you love to do is to be in a library and understand knotty issues, and deal with them and think about them, there is a role, as everybody said, still, for the going ahead and challenging that lawsuit. If you love to be on your feet and help people solve problems in the individual way that Wayne says they need it, there is still a role despite all the regulations of Legal Services Corporation for people to be in court day after day after day, doing the exciting, important and wonderful work.

If you are great with talking with people, think about lobbying. If you want to deal with communities, go here. There is a myriad of ways. If none of those appeal to you, think about teaching kindergarten.

There are thousands and dozens, and lawyers, as you have heard, have no monopoly on it. So I think we would do you a disservice at the end, if this gets raised to a level of prescription for you rather than an important model of how we think about lawyering.

There are so many wonderful, wonderful, wonderful ways of living a really wonderful life, where the contradiction between being a human being and being a professional is brought to a minimum. And look around at the people in this room and you will see the wonderful examples of people who would never use the word sacrifice for the fact that they have devoted their lives to doing the things that are important.

I thank you again.
ON LONG-HAUL LAWYERING

Susan D. Bennett*

Introduction

I came to the practice of community development law from three perspectives: as a former general practice legal services lawyer (trained by some of the people present at this conference); as a law school professor; and, for the last fourteen years, as a clinical teacher of second and third year law students, primarily in the representation of indigent clients seeking to secure or maintain public benefits. With the help of these students, over the course of the past two years, I changed the focus of that clinical practice. We now represent fledgling nonprofits, small businesses, tenant co-ops in private housing, and tenants’ associations in public and subsidized housing. When we are called upon to describe our practice, for brevity’s sake, we label it as “transactional,” in “community and economic development law.”

My choice of a path that diverged so far from my training and from the substance and ethos of my practice experience, reflected a first grudging and then enthused adaptation to a different world: one in which no causes of action to secure economic rights remain.1

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* Professor of Law and Director of the Community and Economic Development Law Clinic, Washington College of Law of the American University. My thanks to Danny Greenberg, for showing me early that the practice of poverty law is the most honorable in the world; to John Eidleman, for sharing both his Legal Services statistics and the model of a Legal Services life; to the Washington College of Law, and Ann Shalleck, who, as Director of the Office of Clinical Programs, unquestioningly cleared the way for a new clinical project; to our clients, for being brave beyond belief; to Nancy Cook, for her principled thinking; to Pat Roth, for being present at the beginning; to Louise Howells, for modeling the best in thoughtfulness and collaborativeness; to Perry Wallace, Ken Anderson, and Nancy Abramowitz for their unflagging encouragement and assistance; and to Michael Diamond, for writing manuscripts that make me think long and hard about community, and who pushed me over the edge.

1. See Alan Houseman, A Short Review of Past Poverty Law Advocacy, 23 Clearinghouse Rev. 1514, 1517-20 (Apr. 1990) (noting an accumulation of developments which have undercut the efficacy of litigation for economic rights, beginning with the Supreme Court’s refusal in the 1970s to recognize constitutional protection for rights to subsistence, and continuing into the 1980s with Congress’s narrowing of statutory eligibility for welfare and shifting discretion for welfare administration to the states). Some twenty years ago, long before the de-federalization of both the welfare and housing systems a current colleague of mine predicted that litigation strategies to coerce improvement in housing conditions would implode, succeeding in

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I felt that I owed it to my students who are dedicated to legal services or public interest careers, to teach them about what business lawyers and community organizers do. What this has meant is that the clients, (new nonprofits that I will describe below), the students and I, all share similar learning curves and maturation processes. It is from the perspective of this very different background, and even from a very different present, that I can hold up Brooklyn Legal Services Corporation A (“Corporation A”) and the Workplace Project and the New York Lawyers’ for the Public Interest (“NYLPI”) as models (albeit distant) for a very unique construct of lawyering.

How distant can be gauged from even the briefest description of the disparities in situation between their practices and my own. For instance, our clinic continues to be measured in “cases,” and not in community projects - certainly not in neighborhood-based projects. The reason for this is simple. Like most law school clinics, we do not live in a neighborhood. We meet our clients in the basement laundry rooms of their apartment buildings or in community centers, because our offices are too far away. New clients come to us through word of mouth and through contacts made by attending our community meetings. These meetings, and these clients, occur in and come from every ward in the city except the one in which our law school is located: the richest, whitest, most exclusionary quadrant of the District of Columbia. This alone contrasts us with the community-based practice described in Corporation A.

The placement of an office is only one of many statements of philosophy of what is important in teaching and practicing law. My comments on the video come from this and other elements that seemed to embody philosophies that contrast with my past experience, but which make tremendous sense to me now. I would like to discuss these elements, first, as a fledgling lawyer myself for fledgling non-profits (call me an “FLFNP”); and second, as a teacher for what I hope will be the FLFNPs of the future.

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the short term, but failing in the long term to increase the stock of affordable, decent housing. See Michael Diamond, Rehabilitation of Low-Income Housing through Cooperative Conversion by Tenants, 25 AM. U. L. REV. 285, 289-93 (1976) (describing limited efficacy of civil enforcement of habitability codes and of rent strikes as tools to increase the supply of affordable housing).

2. An exception to this pattern - and there may be others - is the Community Economic Development Clinic of the University of Michigan Law School, which, as a result of conscious choice by its founders, is located in Detroit, about sixty miles away from the main campus of the law school in Ann Arbor. For further discussion of the uneasy fit between law school priorities and community development practice, see discussion infra Part I.B.
Three major points stand out for this FLFNP. First, the skill and art of the community development practitioner is that of “long-haul lawyering.” Long-haul lawyering derives from many elements, but two are critical. One is presence in the community. As one of the community organizers in the segment about the Workplace Project said, earning trust means “going there earlier than everyone else; and being there in the morning.” The legal services provider must be community-based and collaborative (or needs to be community-based in order to be collaborative). Presence, a moral and geographical presence, is an imperative.

Second, legal services representation in the community is unbounded, in both nature and duration. The “unboundedness” of the exercise is the second critical element of long-haul lawyering. The groups whom the community lawyer represents may well be “clients for life,” and the lawyer is rarely able to predict which skills her clients’ situations may call upon her to use, or to refrain from using. The “collaboration” that I just mentioned may require a fluid sharing of tasks, in ways that blur demarcations between what the lawyer thinks of as her and her client’s expertise. In addition, the video reminds us that there will always be the necessity to resort to other, non-transactional legal services. Litigation - or the threat of it - is still a powerful tool. There must be legal “hooks.”

Third, teaching the practice of community development law in a law school clinic is like nailing jello to a wall.

I. The Unsettling Prospect of Long Haul Lawyering

A. A pleasant surprise, a source of unease: the entrance of the “Client for Life.”

As Sam Sue, one of the critical actors in NYPLI’s environmental advocacy in Red Hook, said during the conference discussion that relationships in an on-going community practice are intense. This comes as no surprise. Initially, it would never have occurred to me that representation of an association or non-profit corporation could approach the drama, immediacy or anxiety involved in the representation of a mother whose child has been snatched, or of a family on the verge of eviction. The purchase of an apartment building, or the development of a health center, can drag out forever, without the galvanizing ups and downs that may bond the lawyer and her individual client together through what may be an equally protracted representation. But there is no denying Sam’s point. Client-lawyer relationships in a community development
practice are intense because they are born of no one single moment. They are the product of a mutual evolution over time: of the long-haul lawyer and the client for life.

The notion of "clients for life" is sobering. Actually, it is frightening. There was always that nice, satisfying snap to "closing a case." Now, as when I served as a Legal Services lawyer, the short-term case, not the long-term relationship, is the rule. Most cases completed by LSC grantee organizations consist of quick advice and referral. This is nothing new. Focus on brief services has been a feature of legal services practice for the past few years.

Relationships in traditional legal services individual representation are more often defined by "the case" rather than by "the project vision." In legal services practice, as in the judicial arena, pressures to produce numbers and to make room for ever more cases have turned "closing the case" into the lawyer's unit of accomplishment.

There are undeniable externals that pressure poor people's law offices into practicing law "by the case." Two years ago Congress withdrew from Legal Services grantees the funding, the stability.

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3. The Legal Services Corporation retrieves data for casework performed in field programs at the time of case closure, so any analysis of the composition of casework is always retrospective. Still, for calendar 1996, 38.5% of all cases closed were concluded after "Advice and Counsel," and an additional 20.8% were closed after "Brief Service." Of cases in which staff rendered more substantial services, 2.2% were closed based on settlements with litigation; 2.7% with settlements without litigation; 3.8% were closed as a result of decision by an agency; and 7.2% were closed after a decision by a court. LEGAL SERVICES CORPORATION, LEGAL SERVICES FACTS 1996, at 13 (1997) [hereinafter 1996 FACT BOOK].


5. Tellingly, the Legal Services Corporation's codes for types of work do not capture group work or transactional projects. 1996 FACT BOOK, at 14-15 (1997) (listing from the 1996 Grant Activity Reports the types of closed cases. Categories consist of Consumer, Education, Employment, Family, Juvenile Health, Housing, Income Maintenance, Individual Rights, and Miscellaneous, with sub-categories, and with the reasons for case closing noted next to each sub-category).

6. See, e.g., Alan Houseman, Community Group Action: Legal Services, Poor People and Community Groups, 19 CLEARINGHOUSE REV. 392, 399 (Summer 1985) (predicting pressures on legal services offices to provide "limited services to large numbers of clients," and the institution of case-reporting requirements that would "encourage high case counts").

7. Appropriations for the Legal Services Corporation decreased 30.5% from fiscal year 1995 to FY 1996, from $400,000,000 to $278,000,000. This represented the most significant withdrawal of support since 1982, when Congress cut appropriations for the Corporation by 25%. See 1996 FACT BOOK, at 1. Field offices lost 12.9% of their full-time office staff. See id. at 9. Field offices closed 14% fewer cases in 1996 than in 1995, and 21.2% fewer cases requiring extended service. See id. at 16.
and the professional discretion to elect forms of delivery of legal services—class actions, community organizing, legislative lobbying—that might support more expansive or systemic representation. This action merely continued a process of curtailment of capacity for broad-based lawyering that began the minute that Legal Services offices received their first federal funding, and demonstrated a recognition that systemic representation is political and threatening. Even without these incursions, field offices have faced pressures, as have other social services providers, to choose between meeting the emergency need and building for the long term.


11. Current prohibitions restrict recipients from using federal funds in any activity to influence the promulgation, passage or amendment of any regulation or statute at any level of government. See Pub. L. 104-34, § 504(a)(2-4), 110 Stat. 1321, 1353 (1996). Recipients may not engage in legislative or regulatory advocacy, or in casework, to raise any systemic challenge to welfare law. See id. at § 504(a)(16), 110 Stat. 1355. Recipients may use outside funds to comment in public rulemaking, or to respond to specific inquiries from legislative bodies or committees. See id. at § 504(e), 110 Stat. 1357.

12. When Congress also prohibited field offices from requesting attorneys' fees in civil rights and other cases arising under fee-shifting statutes, it eliminated an indirect but significant source of support for such labor-intensive projects. See Pub. L. 104-34, § 504(a)(13), 110 Stat. 1321, 1355 (1996) (prohibiting distribution of funds to any recipient that "claims . . ., or collects and retains, attorneys' fees pursuant to any Federal or State law . . . ."). Legal Services attorneys brought $10,912,330 in attorneys' fees to their programs in 1995; in 1996, (presumably in cases begun before the effective date of the 1996 legislation) they won $5,277,270 in fees, a decrease of 51.6%. 1996 Fact Book at 5.

13. For a description of the almost instantaneous intervention of the state bar association to force restrictions upon the activities of the nascent California Rural Legal Assistance in the 1960s, see Philip B. Heymann and Lance Liebman, The Social Responsibilities of Lawyers: Case Studies 30-31 (1988). For a contemporaneous discussion of congressional restrictions imposed in the mid-1980s on community-based legal services activities, see Houseman, supra note 6, at 398-99.

14. Many commentators, over many years, have prescribed ways of addressing the intractable problem of the availability of too few poor people's lawyers to take too
Collectively, these externalities limit the energy and the vision necessary for entering into the relationship with the “client for life.” But there is nothing particularly intensity-enhancing about the lost litigation tools: the protracted contact implied in systemic or class action litigation does not translate necessarily into such a relationship. Nor is there anything magical about group or transactional representation. A lawyer-client relationship that begins with a transactional task may carry intrinsically no greater degree of intensity than if the retainer called for assistance with an SSI claim. Something induces the practice based on “clients for life” that is more intangible than whether the focus is on the individual client or the group, or on environmental impact litigation or education in workplace rights. Something more than external pressure impels “Corporation A,” or the Workplace Project, or the NYLPI, or some other poverty community development practitioners, to envision their representation in terms of “projects” rather than “cases.”

That “something” may explain why Corporation A is almost unique among models of legal services poverty law practice. The pressure to produce closed case numbers, the unfamiliarity with and distrust of these areas of law as appropriate tools for representing poor people, and fear that community development will be

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15. See, e.g., Martha Matthews, Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children’s Class-Action Cases, 64 FORDHAM L. REV. 1435, 1435 (1996) (in which the author describes her experience as an attorney for the plaintiff classes of children in or at risk of being placed in foster care in Arkansas: before she heard a child in foster care speak of the anguish of being kept ignorant of the location of her siblings, she had been prepared to treat the issue of sibling visitation in foster care as a “give-away” issue in negotiation of a settlement).


17. Some twenty percent of some three hundred Legal Services Corporation field programs have devoted resources to community economic development representation, with at least four programs practicing exclusively in that field. See Mario Salgado, Building a Community Economic Development Unit, 28 CLEARINGHOUSE REV. 981, 982 (Jan. 1995).
perceived as community organizing may deter programs from assuming the risk of long-term transactional projects. But what really deters is Corporation A's approach to representation. It acts as "house counsel" to its clients. This designation implies a relationship that evolves as the organisms do, with the lawyers' activities conditioned on the clients' own capacities and perceptions of the long-term needs of the neighborhood, as much as on the exigencies of the moment.\(^\text{18}\)

For the law office to commit itself to a practice based on a client's growth demands a flexibility and a willingness to dig deep. It is rare that one cataclysmic event will trigger the representation of a community organization. It will probably take the tenth, not the first, shut-off of the heat and hot water for the tenants to call the lawyer; or the tenth, not the first time that someone is turned away from the closest emergency room for the neighbors to demand a community health center. As a corollary, it may take the tenth, not the first or the third, client-lawyer meeting for the client group, with its own group identity formed over months of internal bickering and external buffeting, to feel comfortable enough to use the lawyer as lawyers are accustomed to be used: to call her before, not after meeting with the housing authority about the grant; to show her the contract with the laundromat rental company before, not after it is signed.

We come back to presence. Being able to stay put and to dedicate resources over time, is the greatest contribution that a program can make to the practice of long-haul lawyering. Long before Congress stripped Legal Services offices of most of the weapons in their arsenals for systemic strategies, consultants reminded them that their greatest strength lay in "being there": on the "collective institutional memory" of the neighborhood law office, a repository of impressions filtered through individual cases that build insight about neighborhood problems. It is these organic impressions that no one client, no one lawyer, and no one intake system can or does identify, and that offices should endeavor somehow to capture.\(^\text{19}\)

The mechanisms of class action, and especially of legislative advocacy, have undeniable power to address the structural injustices


that repeated single inequities expose over time. But none of the initiatives in Brooklyn or Long Island which the video depicts depended on any of the confiscated tools for their success. The recent blatant removal of the capacity for structural advocacy may in the long run do no greater harm than the removal of the neighborhood-based law office - whether that removal occurred through "friendly" diversion of focus into elite, one-issue specialty offices in the 1960s and 1970s, or through hostile elimination of staff in the 1980s and 1990s.20

It is of course perseverance in the dedication of mental resources that makes the most difference. After a few short years of community development law practice, the FLFNP marvels as much at what the video does not, as at what it does, show. The Corporation A - Brownsville CDC collaboration works because so many people spent so much unseen time laying groundwork. There are the years of "going there earlier than everyone else." There are the years of staying with the client group that starts with little more than a vision; that keeps its receipts in paper bags and throws away the stupid little forms it gets in the mail from the Internal Revenue Service because, hey, it makes no money so it doesn’t have to pay any taxes, right? These are the groups whose officers work three jobs; or spend whole days on line at the Department of Human Services so they don’t miss their workfare appointment, and so have no energy to send out notices of membership meetings, let alone hold them. And on and on. Yolanda Garcia’s 168 meetings seem little short of miraculous based on what I have learned over the past two years.

While we must ask, what sustains the long-haul lawyer?—we should wonder as well: what sustains the long-haul client? For anyone with survival as a day job, doing the night meetings and the weekend work of "civil society" is asking more than most of us

20. Alan Houseman has clarified the historical roots of what often has been oversimplified as an impact-service, specialty office-neighborhood office dichotomy in Legal Services. As he explains, early differences in approach arose more from whether the core of the representation was situated in the neighborhood office, or in community-based lay advocacy groups, no matter what their location; each mode employed a full range of strategies. See Houseman, supra note 6, at 395. From its inception in the 1970s, the Legal Services Corporation emphasized development of specialty units, with a focus on "professionalism" in traditional lawyering tasks, and de-emphasized organizing and other skills not directly tied to litigation. See id. at 397. For further description of early disagreements over approaches to effective poor people's representation, see MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973, 22-39 (1993).
usually ask of ourselves.\textsuperscript{21} When my students and I get petulant because our clients don’t take minutes and don’t keep books, we have to stop and reflect on what effort not only of will, but of faith, it takes to assume responsibility for the well being of your community.

I have discussed with colleagues troubling issues of whether lawyers should only represent community group clients who are “lawyer-ready” - that is, who have moved from paper bags to third-hand filing cabinets. While we continually worry about lawyer competence, is it appropriate to set standards for client competence? “Capacity-building” is a buzz-word in the new world of abdication (also known as devolution), in which non-profits struggle to fill the gaps left by government in the provision of housing and social services. For community groups to take on the complicated and expensive job of building, financing and managing housing requires significant external supports and strong internal organization.\textsuperscript{22} Similarly, groups may need training in how to construct themselves as a group in order to articulate unified, representative positions to a lawyer. But the question of whether that training should be a predicate to representation, or should be the task of the newly retained community development attorney, can be answered only by the answer to another question: how deep is the lawyer willing to dig? How much a witness to, and participant in, the struggles of the group to constitute itself out of the welter of individual hardships and competing demands can the lawyer be?\textsuperscript{23}

One must add to the difficulty of the indeterminacy of long-haul lawyering one paradox: that being “present” requires the commu-

\textsuperscript{21} See Robert Halpern, Rebuilding the Inner City: A History of Neighborhood Initiatives to Address Poverty in the United States 12 (1995) (describing the history of community-based but top-down dictated urban improvement projects as expecting unreasonable sacrifices from “... those with the fewest capital, institutional, and human resources to draw on those resources to better their lives; ...”).

\textsuperscript{22} See, e.g., Alex Schwartz, et al., Nonprofit Housing Organizations and Institutional Support: The Management Challenge, 18 J. Urb. Affairs 389, 393 (1996) (describing financial and organizational resources that nonprofits draw on to enable them to engage in housing development).

\textsuperscript{23} In a classic Clearinghouse piece - and one of few in this Legal Services periodical that directly addresses group representation - Michael J. Fox set forth as his sixth of fifteen “rules” for community lawyers that the lawyer should insist on unified direction from the group, communicated through a formal process. He suggested this not as a way of screening out less well organized clients, but as a way of assisting the client group in developing structures that it will need if it is to succeed in its projects. See Michael J. Fox, Some Rules for Community Lawyers, 14 Clearinghouse Rev. 1, 3 (May 1980).
nity lawyer to figure out when not to be. While the community lawyer may need to be prepared to hand out fliers, drive children to baby-sitters so the officers can attend a meeting, or produce several dozen deviled eggs on a few hours notice (the best guarantee of attendance at a meeting is food), she also needs to know when to hang back. Some of the most consistent advice given to community lawyers consists of warning them not to use their professionalism to dominate the group process.\(^{24}\) But the issue becomes more complicated when the group implicitly or overtly requests assistance that may not look like domination, but may amount to subversion of the group’s purpose. Richard Marsico has described how, with all good intentions and with the client’s apparent approval, his clinic’s focus on legal strategies for challenges under the Community Reinvestment Act may have diverted the client’s energies from the community organizing necessary to address the political roots of disinvestment.\(^{25}\) He also notes that the clinic’s goal of making itself available for “non-lawyer” tasks may have had the unintended consequence of undermining the client’s internal administrative organization.\(^{26}\) Richard’s brave (and perhaps unduly self-castigating) exposure of the difficulties that even the most sensitive community lawyer can face in deciding when and how to represent suggests that knowing when to act and when not to be seen, may be the most useful skill of the long-haul lawyer.

As I noted, the video does not show us the early stages of Corporation A’s relationships with its community clients. We do not know the genesis of many of these relationships - or what the basis was of any choices that had to be made at intake.\(^{27}\) But I am confident that it is through “presence” throughout the stages of the

\(^{24}\) See id. at 5. “Rule 10: [a]void dominance of the group at all costs.” See also Steve Bachmann, Lawyers, Law and Social Change, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 6-7 (1985) (noting the limited uses to which the Association of Community Organizations for Reform Now - ACORN - puts its attorneys, in order to avoid the risk of attorney domination of the group).


\(^{26}\) See id. at 652-54 (describing how the clinic’s philosophy of cross-disciplinary collaboration with the client in legal and non-legal work culminated in the author’s filling in for secretarial staff when the client organization lost funding).

\(^{27}\) See generally, Tremblay, supra note 14 (discussing triage issues in legal services intake). The question of the community development analogy to legal services “triage” demands a whole separate article. In setting criteria for taking new cases, should community lawyers take into account whether the representation will further any kind of coherent community vision? Can or should the articulation or furtherance of a coherent community vision be the lawyer’s business, or - much as with the
journey that the community lawyer finds what Sam Sue spoke of as intensity. Choosing to be present at the creation of a neighborhood group can be as much an act of faith and commitment to uncertainty as taking on the most ferocious custody litigation. You know some of what it will entail. You can hope - but you really have no idea of exactly when or how or whether it will end.  

B. Teaching the skills of “long-haul lawyering?” Standard issue: one shovel. Next week on the syllabus: Who Calls the Fire Inspector?

Last summer the New York Times Sunday Magazine ran an article on John Rosenberg, director of a legal services office in eastern Kentucky. He started his practice twenty-five years ago by helping the thirty families of David, Kentucky buy their town - not their apartment building, their town - from its absentee owner. Later, he assigned a new lawyer to assist full time with the legal work for the town. The redevelopment project which the residents initiated involved the installation of new water and sewer systems. The clients suspected that the contractor had not laid the water main deep enough. The lawyer’s first task as the lawyer for David was his first task as a lawyer, period. He took a shovel, and a tape measure, and dug a hole.

You will look far, and in vain, for better teaching aids in this business than a shovel and a tape measure. I know now that teaching and modeling community representation, as it is practiced in the Workplace Project or by Corporation A or by the NYLPI, is a daunting task, whether one has a laughable one or a more forgiving two semesters within which to do it. As our colleague Peter Pitegoff has noted, the brevity of the law school clinical experience is at odds with all the longevities required for community practice: longevity of technical experience, longevity of judgment, longevity of each project, longevity of the vision of which each endless pro-


30. See id.
ject is just one part. Add boundedness to brevity, and you begin to appreciate the challenge of teaching community lawyering in law school. Duncan Kennedy alerted us years ago to noticing how law school recapitulates and reinforces professional hierarchy. Similarly, law school curricula—the focus on discrete doctrine organized into two to four credit packets—encourage the compartmentalization that makes adapting to the view of lawyering-by-the-case easy. Whether law schools create this time sense, and this need for definition and finality, or simply respond to the constructs of the profession, makes no difference—the result is the same.

In a reference that may have no meaning beyond my generation or geography, doing community lawyering after going to law school is a lot like parallel skiing after being taught how to snow-plow: you have to unlearn most of what used to get you downhill. Curricula and materials further the mind-set that make teaching this concept of law practice so difficult. Litigation itself is peculiarly linear, as are case theories defined by “causes of action”—and I never fully appreciated how welded law schools are to linear models, until I tried to teach something about non-linear lawyering. The standard track of clinical legal education moves students from client interviewing through formulation of a cause of action, through ensuing fact investigation and legal research, and through


33. To elaborate: where and when I grew up, on the ice fields of New England, my generation learned how to ski via the maneuver known as the snowplow. Snowplowing was premised upon one view of how to approach a hill: traversing sideways, always going against the grain. Once you, the beginner, had trained your muscles into a frozen posture of bent knees and legs splayed into a “V”, and your reflexes into guiding you away from the bottom of the hill, you were ready to graduate into real skiing. You were supposed to modify your weighting and edging, to slide both skis into parallel motion, and to attack the fall line head on. It was a world view conditioned by equipment (heavy wooden skies; lace-up leather boots with too much give in the ankles to promote confidence that skis would inevitably follow feet) and geography (northeastern skiing, with narrow runs and sudden patches of glare ice), that encouraged a cautious but ultimately maladaptive style.

34. For a re-conceptualization of traditional case theory analysis to ground it more thoroughly in client narrative, see Binny Miller, Give Them Back Their Lives: Recognizing Client Narrative in Case Theory, 93 Mich. L. Rev. 485 (1994). The author’s criticism of the “traditional model”—that it reduces the complexity of clients’ experiences to mere supports for the winning doctrinal legal theory—arises implicitly from that model’s embeddedness in the context of preparation for trial. See id. at 492-502 (describing approaches to case theory taken by leading casebooks and texts, all premised on stages of trial preparation).
the performance events of opening statement, witness examination, and closing argument. The model draws its linearity not so much even from the framework imposed by litigation, but from assumptions that all representation starts with a pre-formed event, such as the decision to write a lease or to open a particular business. This model does not work - either in its linearity or in the narrowness with which it defines “skills.”

That the lawyer might serve a useful purpose in assisting the client in reaching that decision, and might need a different perspective on counseling or fact-gathering skills in order to do so, is not considered. The widely-used teaching materials that I know which illustrate the skills critical to any kind of lawyering use this model - even when they purport to draw their examples from transactional practice, and even when they

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35. See Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: the Structure of Problem Solving, 31 UCLA L. REV. 754, 762 (1984) (commenting on the overwhelming linearity and litigation focus of the literature dealing with negotiation); see also id. at 758 n.6 (that negotiations occurring in transactional contexts may differ so greatly from the interactions depicted in the standard literature that any attempt to apply principles from the adversarial model may be “dysfunctional”).

36. See infra note 37; see also David Binder, Paul Bergman, and Susan Price’s Lawyers as Counselors: A Client-Centered Approach (1991). Most of the text addresses client interviewing and counseling, and the processes of fact gathering and theory generation, in the context of problems conceptualized as litigation events. See id. See also Robert Bastress & Joseph Harbaugh, Interviewing, Counseling and Negotiating (1990) (which illustrates its discussion on these skills with a few transactional examples). But Bastress and Harbaugh pose very specific problems derived from and constrained by facts already in evidence: a reconfiguration of a former business; the setting up of a joint venture with one particular potential partner; and the exploration of problems with an investment. See id. at 62, 92-93, & 184-86.

37. Binder, Bergman, and Price explicitly recognize the litigation slant of most writing on legal problem-solving, and therefore apply the first example of lawyer-client interaction in their book to an individual client’s non-litigation, transactional needs. Binder, supra note 36, at 5-6. However, inclusion of this as the first of three examples of “nonlegal concerns” implies strongly that the lawyer should evaluate such factors as a predicate to the consideration of whether to embark upon litigation. The sections of the book specifically devoted to interviewing in transactional work - on “Gathering Information for Proposed Deals,” and the ensuing technical advice on “Techniques for Gathering Information About Proposed Deals,” - are helpful in that they conclude with a caveat about the inherent differences between fact-gathering in litigation and in transactional situations, with the investigation about the “deal” requiring a more “wide-ranging” inquiry. See id. at 197-223. A subsequent section of the text, “The Counseling Model and Proposed Deals,” follows up with suggestions on how to approach drafts of documents which sum up the agreements reached in the “deals.” See id. at 376-406. However, the approach throughout does focus on the event of the “deal,” as the culmination of a linear sequence. While the process of “deal-making” will certainly figure among the activities of community lawyering, it will arise as the result of other, less linear or predictable processes that produce the circumstances that generate the deal.
address the development of skills as fundamental as problem-solving to the teaching of broadly conceived transactional law.\textsuperscript{38} One must search back twenty years to find a text and materials - out of print - which focus on planning as a lawyer's skill in transactional law.\textsuperscript{39}

In community development practice, students gain no comfort from the neat case theory model. But as community lawyering practiced as "business law in the public interest"\textsuperscript{40} challenges static conceptions of lawyers' roles, it demands reconsideration of lawyers' skills; and there is no dearth of reflection about the skills we need to inculcate in the fledgling transactional community lawyer. Several of the few clinical law school faculty who teach in transactional, housing or economic development clinics, have articulated their view of what these clinics can or should teach. Although they want students to gain proficiency in the substantive matter of the work - the tax, corporations, housing, and finance law - they give the highest value to the approaches and to the political lessons which immersion in community-based issues teach. Primary among these approaches is that of collaboration: with community groups, with non-lawyers in interdisciplinary partnerships, and,  

\textsuperscript{38} See Gary Bellow & Bea Moulton, The Lawyer Process: Materials for Clinical Instruction in Advocacy (1978). In their introduction to their magisterial text, Gary Bellow and Bea Moulton acknowledge that the book gives "only scanty treatment" to what they label as "non-litigation planning and collaborative bargaining." Id. at xxv. Indeed, their commentary in the chapter on case planning immediately adopts the frame of reference of trial literature, with their section on developing theory of the case advocating consideration of broader context, but premised on "parties to a particular dispute . . . ." Id. at 317 & 324. See also The ABA Report: Legal Education and Professional Development - An Educational Continuum, of the Task Force on Law Schools and the Profession: Narrowing the Gap (the "MacCrater Report") (1992). While The MacCrater Report is not a law school text, it does set out "Problem-Solving" as one of the critical lawyering skills, but has been criticized as failing to prescribe the consideration in problem-solving of perspectives broader than those which serve the client's immediate interests in litigation. See id. at 141-148; see also Kimberly E. O'Leary, Using "Difference Analysis" to Teach Problem-Solving, 4 CLINICAL L. REV. 65, 74 (1997).

\textsuperscript{39} See Louis M. Brown & Edward A. Dauer, Planning by Lawyers: Materials on a Nonadversarial Legal Process (1978). This is the only book I have found that deals with transactional lawyering as an approach, rather than as a collection of discrete skills such as contract drafting. The only example I know of a community development textbook is Charles E. Daye et al., Housing and Community Development: Cases and Materials (2d ed. 1989). As a comprehensive overview of policy, and litigative and transactional strategies, for preserving affordable housing, the casebook would work admirably even now as a classroom text. It does not address in any detail, and does not purport to, the skills which will enable the lawyer to approach her relationships with community-based group clients.

\textsuperscript{40} The phrase is Peter Pitegoff's. See Pitegoff, supra note 31, at 283.
most important, with the client groups themselves. As Susan Jones has emphasized, representation of clients in development issues exposes students to poor people as affirmative actors, with influence in the community and expertises that must be consulted.

There is no owner's manual for this kind of law practice - (perhaps because) there is no owner. We must then ask what course materials do we use, and how do we plan a year's worth of classes? We assign the linear texts, and glean from them what we can concerning techniques in interviewing and fact-gathering that we can extrapolate to the situation of groups who begin with no agenda save an idea. We draw from social work and sociology texts on group dynamics. We may not have a class on cross-examination, but may split an instructional "hour" between necessary explanations of the impact of unrelated business income on a 501(c)(3) corporation, and discussion of the question, raised by one student's experience, of who calls the fire inspector: the lawyer (read, law student clinic intern) or the tenants' council. If the student calls the fire inspector, (especially in D.C.), gets someone to come out, and issue a violation for the illegally padlocked basement exit door, then the student has gained some mastery over bureaucracy, and feels pretty good. The student has also unnecessarily lawyerized an organizing moment, and stolen an opportunity for the tenant's group to enhance its credibility with management and its own membership. At the end of the day, we can say that we have explored two critical elements of community lawyering: how to keep your client solvent, productive, and still tax-free, and how to reflect on the desirability of keeping your nose out of your client's domain - an example of the cardinal principle I mentioned earlier of "don't butt in."

"Who calls the fire inspector" is a critical part of any curriculum on community lawyering, one of the many not addressed by the books. Another major part, also uncovered, consists of how to educate the client for self-help. The example of the Workplace Pro-

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ject illustrates the critical role of client education as a key lawyering goal: that organizing, and the use of client education as an organizing tool, is part of the lawyer's toolbox. Thus it must be part of the law teacher's toolbox too: we need to borrow a page from the teacher training programs in which we certainly never took part, and instruct our students in how to design and present workshops for clients. While this skill resembles the oral advocacy skills we teach in clinics, particularly when we emphasize the importance of heeding the interests and capabilities of the audience, the goals differ. Oral advocacy seeks to persuade; client education seeks to empower.

If the quintessential community lawyering skills are endurance, presence, and the discretion to know when not to butt in, the question remains: how do we teach "presence?" Even more to the point, how do we teach "presence with persistence?" Perhaps the most important aspect is orientation. The "how to" tracts, however "client-centered" they in good conscience may be, depend on a structure in which forces external to the client control the rhythms of representation. Not that externals assume lesser power to constrict in the transactional world, where the calendars of developers, grantors, and lenders substitute for those of courts, agencies and the other side. But changing the usual lawyer's orientation from one that prompts reaction to problems, to one that induces action in furtherance of a community's assessment of its strengths, may be an important mission of the community lawyering curriculum. Working with our clients from a pro-active "asset-based," rather than a reactive "deficiency-based" stance to attack problems is one way to show why long haul lawyers need mental, physical and political stamina.

II. At the End of the Day - the Remaining Necessity of Legal "Muscle"

As Paul Acinapura described in the video, Brownsville Community Development Corporation achieved its dream of building a

44. Jennifer Gordon had the opportunity to describe more fully the role of client education as a mode of legal services delivery in her article on the Workplace Project. See Jennifer Gordon, We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change, 30 Harv. C.R.-C.L. L. Rev. 407, 433-37 (1995).

full-service community health center because of one lawyer's close and creative reading of one word: "hospital." Paul's interpretation of that key term in the context of New York State's Public Health Law - plus countless rounds of negotiation, meetings, and studies - triggered the bond issue that made the project possible. Yet sometimes the close reading and the meetings and the submissions are not enough: sometimes you need muscle (or what all of us, lawyers or not, conventionally think of as muscle). Corporation A plays with back-up: the presence of a second legal services organization ready to take on the protracted litigation that may be necessary when the tools of negotiation and the strategies of moral and political persuasion fail. Most of the examples we have seen work because there are legal hooks. Things are not so different from conventional practice in that respect. Even the Legal Services lawyers who do advocate community development solutions to problems of poverty have linked those solutions to opportunities extracted through litigation.

Professor Southworth has written about the practice of transactional law as "building and maintaining relationships." Yet, our clients historically live in a world in which they are shut out of relationships. They and their Legal Services lawyers have struggled to develop norms of due process to guarantee access to impartial arbiters, all as a way of compensating for our clients' exclusion from

46. See Glick & Rossman, supra note 18, at 128-30 (describing the long process of persuading New York State's Department of Health to authorize the state Medical Care Facilities Finance Agency to issue bonds to finance the renovation of a facility). 47. See id. at 149-51 (describing how the litigation director and housing units of Corporation A represented tenants in a rent strike and state court suit against the Department of Housing and Urban Development and the building's owner for appointment of a receiver and other relief. After the appointment of a receiver resulted in some immediate improvement in the condition of the building, Corporation A's Community Development Unit then assisted the tenants in negotiating purchase of the building). See id. at 151-55. 48. See John Little & The Staff of the National Economic Development and Law Center, Practicing Community Corporate Law, 23 CLEARINGHOUSE REV. 889, 889 (Nov. 1989); Debbie Chang & Brad Caftel, Creating Opportunities through Litigation: Community Economic Development Remedies, 26 CLEARINGHOUSE REV. 1057, 1058, 1058 n.1 (Jan. 1993) (both emphasizing that community economic development and litigation strategies are not mutually exclusive, but, rather, that litigation compels the dedication of resources that community development expertise can help direct into lasting improvements). 49. Ann Southworth, Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice, 1996 WIS. L. REV. 1121, 1126 (concluding that transactional counseling focuses on preventive measures, which include the nurturing of relationships, and that such a practice might produce more collaborative relationships with clients than might litigation-based practices).
the kind of marketplace based, old boy, old girl networks that grease the wheels for everyone else. It doesn't get any better just because you call yourself a "CDC."\footnote{50}

I am constantly sobered by the realization that my clients have no legal hooks. Two weeks ago, the president of one of our client groups - a public housing tenants' association - called. She was deeply afraid. The head of the District of Columbia Housing Authority, a court-appointed receiver accountable to virtually no one, had shoved an agreement into her face and demanded that she sign it in a week. The agreement called for the tenant's association to join with the heads of one major corporation, one foundation and unnamed "community representatives" (none of whom would be from her community and none of whom her group would get to pick) in order to form a community development corporation, to which the Housing Authority would transmit the power to dispose of her public housing property. The expressed goal for the project seemed to be for "reduced density" mixed income home ownership - all for a complex with 97% occupancy and income at 15% of median. We know that Congress repealed the "one for one replacement" rule, which had required public housing authorities to provide alternative housing space for any unit they sought to demolish,\footnote{51} and that our clients' right to be relocated and dispersed does not include the right to return.\footnote{52} There is no hook.

What there is, is the kind of organization that workers in the Workplace Project used. They stood firm together, to insist that no one would work for less than their autonomously set going rate.

\footnote{50. Nor might clients necessarily perceive it as any better. In their critique of alternate dispute resolution, Delgado, et al. noted that, for some claimants, the formality of adversarial adjudication increases their sense of systemic fairness, and decreases the danger that a more intimate, unstructured setting might allow extraneous prejudices to control. \textit{See} Richard Delgado, et al., \textit{Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution}, 1985 Wis. L. Rev. 1359, 1388 (1985). Many have cautioned against the suitability of non-adversarial means of structuring relationships between parties of unequal power. \textit{See}, e.g., Trina Grillo, \textit{The Mediation Alternative: Process Dangers for Women}, 100 \textit{Yale L.J.} 1545, 1592 (1991) (noting possible inability of mediator to judge power disparities between parties); Judith Resnik, \textit{Failing Faith: Adjudicatory Procedure in Decline}, 53 U. Chi. L. Rev. 494, 544-45 (1986) (questioning whether informal, non-adjudicatory mechanisms for resolving disputes will guarantee greater fairness).

\footnote{51. \textit{See} Pub. L. No. 102-550, § 1002(a), 109 Stat. 235 (1995) (deleting 42 U.S.C. § 1437p(a)(3), which had required public housing authorities seeking permission to demolish units to show "provision of an additional decent, safe, sanitary and affordable dwelling unit for each public housing dwelling unit to be demolished or disposed").

\footnote{52. \textit{See} 42 U.S.C. § 1437p(b)(2) (1997) (requiring public housing authorities to assist all tenants displaced by demolition or disposition projects in being relocated).}
Our clients have less bargaining power than that. They do have the ability to withhold their willingness to be displayed as a community partner, a relationship that HUD has required applicants for particular grants to demonstrate. To do this - to take the risk of not being a team player - will take tremendous courage. No lawyer can provide that. But then, given what our clients show us every day, no lawyer needs to.

Some of the rewards of this practice have been predictable: the joy of watching students relate to poor clients who are resourceful and knowledgeable leaders; the exposure to new substantive areas of law, scorned in law school and now painfully, obviously essential; the immersion in cutting-edge issues of public policy in neighborhood development, welfare, housing and job creation. It has been perhaps the degree of the intensity of the interchanges, and of the urgency of the need to re-examine daily every given of how I counsel and teach, that has amazed me. For a FLFNP, this is a scary practice of law. It is also completely exhilarating.

53. See 42 U.S.C. § 1437f(q) (1996). The “HOPE VI Revitalization Program” is the federal program through which the District’s Housing Authority has funded and hopes to fund major renovations to its public housing stock. See Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriation Act of 1998, Pub. L. No. 105-65. In its Super Notice of Funding Availability (SuperNOFA) for Housing and Community Development Programs, the guideline that governed the competition for the most recent round of funding, the Department of Housing and Urban Development awards 10 out of 100 points to the public housing authority for demonstrating “full and meaningful involvement in the planning and implementation of the revitalization effort.” 61 Fed. Reg. 15,489, 15,582 (1998). While the NOFA sets a minimal baseline for participation as the scheduling of one public hearing, the NOFA also requires demonstrating that the residents and community members “[s]upport the activities proposed in the submitted application.” Id.
A RESPONSE TO THE VIDEO

Charles Sabel*

Let me preface my remarks by informing you that I am not a lawyer. That means that there are things I don’t get and things that I’ll say that you may not grasp immediately, because there are certain assumptions we don’t share. To illustrate that, let me just tell you, I don’t even get lawyer jokes.

For example, when I saw the movie So Goes A Nation¹, and Sam Sue says, “Law schools teach basic skills,” I didn’t realize that was a joke until you all laughed at it. So there are many subtleties of this sort that escape me. And absent experience and some deeper form of spontaneous communion, and in blatant disregard for the most elementary lessons of community organizing, instead of connecting my own non-existent experience to the film, I’m just going to modestly propose a strategy for the reform of legal services — in connection with these community-based initiatives. What else could I do in total ignorance?

Now, what I’d like to do is focus on the connection between the local and the national — local change and national change — as it emerges in the film. And in particular, I’d like to give you three successive interpretations of the film from this point of view.

The first is meant to void a misunderstanding. It is an unfair interpretation, and I offer it because I want to rule something out if it really can be ruled out explicitly.

The second interpretation is to indicate a possibility with a limit — a possibility for linking the local with the national, but I think a limited possibility.

And the third interpretation is to sketch a supplemental perspective compatible with what’s in the film, but not indicated explicitly in it; but compatible with other things that have been said in the room, which together with things that are said in the film, begin to address this larger problem of establishing a connection.

Now you may think it peculiar to even pretend to offer one, let alone three interpretations of the connection between the local and

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* Professor, Columbia University School of Law. These remarks were originally delivered as part of the Symposium at Fordham University School of Law on November 7, 1997. They have undergone minimal editing to remove the cadences that are awkward in writing.

national in that particular film, which is concerned with community-based projects. Yet the national is clearly present. The name of the film, "So Goes the Nation," comes from something that Yolanda [Garcia] says: "a block, a community, a city, so goes the nation." And Jimmy Smits gives a national political account of communities under attack.

People get into this, I'm assuming, because they are concerned with things which were simultaneously local and national. They wanted to do good things in particular settings that had large ramifications.

There is a connection, and yet the connection — for reasons that you'll see in a second — is hard to grasp in the progression of the film. So first, the unfair misinterpretation in order to exclude it from further discussion.

The unfair interpretation is: we know that the right strategy — going to the national level of extending and amplifying citizens' access to rights — is largely ineffective at the current moment, and is probably disempowering as well. Therefore the clear alternative is to go back to a familiar thing — building community autonomy. And there's a lot in the film that suggests that.

An absolute retreat from any dependence on the state and on the law, or minimal dependence. So Brooklyn Corporation "A" goes and helps build a hospital. Red Hook fights a battle to exclude certain kinds of facilities from siting in its neighborhood. The Workplace Project does the most elemental forms of organizing: it goes to immigrant workers, as people have been doing for decades, and tells them that it is in their own immediate interest if they will agree not to work below the minimum wage on this corner.

And we can impose that ourselves. What you saw in the movie was case after case of communities solving problems through their concerted action with a minimal amount of interference by the state. Or in one case, the state being co-opted in the form of the police officer who actually is not enforcing any law, but is the witness.

But plainly that is not what is intended. That is, it would be a great injustice to the creativity of these things to think that they are just a return to this kind of community organization. Because for one thing, the old kind of community organization was aimed at building up community power to get something directly from the state, not to solve the problems directly. So that's already a difference.
But apart from that, there is a second and more fundamental difference. And it goes to the beginnings of a link to broader, but more comprehensive levels, which is that in all of these activities, coalitions were being built. And there was the beginning of a spontaneous linking wherever opportune, to whatever entities of the state whatever entities of public administration were available, propitious, and well-situated for achieving local ends.

So in Brooklyn, New York, the people access the tax revenues to write revenue-free bonds. It's the City Charter which provides the Fair Share exemption. And The Workplace Project culminates in the passage of a law signed by Governor Pataki. Direct analogy.

But there is a dispassionate view. There is a dispassionate view that local activities can ramify and where that ramification is useful, no one thinks twice about pursuing it. This is not a localism in the sense of a deliberate effort to create local communities in opposition to the broader whole; it's one where, insofar as those connections are seen as opportune people, people begin to pursue them. But there are obvious limits. And you can see the beginnings of the limits in the film and in part of the discussion.

One is the question of "community." That is, the more you organize as a community, the more you are faced with the question, "Is this a homogenous group with a culture of its own, or is it a tumultuous assembly coalition of different groups and different interests?" I think the implicit view in much of the film we saw was the second, especially in Red Hook, for example. But it is not clear and it will become an issue.

The second thing is, there is a deeper problem of how these community-based organizations grow. The choice they face is, should they continue their narrow focus on the particular issue that was at their origin; or should they begin following the manifold interests of their members, and to take on new activities, and if so, how should they link into the broad community?

So we saw an example of that. Red Hook is obviously in large measure, branching out into environmental coalitions, with other adjacent communities in New York. And presumably getting into other activities as well, but the focus clearly is on the environmental aspect.

The Workplace Project faces a choice. Should it continue to focus on labor issues for the immigrant community? Or should it focus on the issues — the many other kinds of issues, health, schooling issues — that the members of that same community have outside the workplace?
It becomes a very different organization, and there is no discussion of these things in the current setting for the simple reason that the organizations were born in response to concrete problems and the correct belief that you could do something effective at the community level, once you understood that you were not in complete dependence on any outside authority. That assumption makes it hard to broach the question of how to link up.

Let me come to a third interpretation, one not contained in the film because of this very focus on the community as the starting point, but rather one that was introduced earlier on, by Louise Trubek in the discussion that I heard in the morning before lunch. She mentioned a case from Madison. She mentioned something that is absent from the discussion, which is the reform of all the bureaucracies, and the service agencies that are in the background of this film. That is, the film is in effect, a film about a response to a world where those agencies are no longer accessible and can no longer be put in the service of vulnerable people. And then you see communities responding.

The question is whether that is the whole truth. Because the fact is that they are no longer the right place to begin does not mean that it is wise, or even in the end, possible to ignore them completely.

Louise’s story was a story about bunches of health care professionals in Madison, Wisconsin, who were coming together to discuss reform problems in settings that I am presuming here opened out to clients and users and citizens more generally. And the obvious point here is that a new form of public is being created. You have a setting where, outside the legislative process and outside any interest groups, you have the beginning of a new kind of discussion about how to reform these agencies.

Now, it is very obvious that at some point, assuming that these community-based initiatives go forward, they will either link up with emergent discussions of that sort, that grow out of the reform of these services, or they will have no interlocutors at the national level and they will fall back on one of the first two limiting strategies that I discussed, either interpreting themselves as just providing for the survival of small groups, or just cobbling together whatever sorts of coalitions they can in order to maintain the sensation of momentum when in their heart of hearts they know that they are just maintaining a kind of a better version of the status quo.
So I think there is an enormous potential revealed in this film. Its incompleteness is not a sign of a fundamental flaw, but of a need to extend the discussion to parts of the world which have been brutally disappointing, but which are not, for that reason, forgettable. Thank you.
I come to you with very skimpy experience as a civil rights lawyer, but with a keen interest in studying lawyers who focus on civil rights and poverty issues. Several years ago I interviewed about seventy lawyers in Chicago who work on these matters. Since then, I have been writing articles about what I learned from those interviews.¹ It is from that perspective—as one who tries to understand and describe the work and aspirations of dedicated lawyers in another large metropolitan area—that I approach today’s film.²

I will comment primarily on the first part of the film, focusing on the work of Brooklyn Legal Services Corporation A in establishing the community health center. That segment highlights what I think is an important and perhaps insufficiently well-recognized role of lawyers in helping poor communities address urban poverty—what might be called business planning for the poor. Peter Edelman and all of the other panelists have given such a prominent place to business planning in this conference that my premise, that this work goes largely unnoticed, may soon be proven wrong. But I think that the claim remains true today.

Let’s step back for a moment to define what we’re talking about in theoretical terms. We are used to talking about various advocacy roles for lawyers—different ways of establishing and enforcing rights through litigation and administrative advocacy. But we have paid much less attention to this very different role for lawyers—a role that involves advising, negotiating, and structuring arrangements unrelated to any existing claim or dispute. I am not suggesting that this type of work is new; lawyers have played such roles at least since the 1960s. But most of us have not regarded it as one of civil rights and poverty lawyers’ core functions. Nor am I


² These remarks draw heavily on conclusions presented in Southworth, Business Planning for the Destitute?, supra note 1.
suggesting that planning work is a substitute for activist advocacy. In fact, it often depends heavily on related advocacy projects. But it is different in kind from adversarial advocacy, and, for certain purposes, it is important that we recognize those differences.

In my study of civil rights and poverty lawyers in Chicago, about twenty percent of the matters described by lawyers were primarily planning projects rather than litigation or administrative advocacy or legislative work. Almost all of the clients for this work were community organizations and minority entrepreneurs. The lawyers in my study who performed planning services helped their clients come into compliance with applicable regulatory regimes and enabled them to take advantage of legal protections and opportunities. They negotiated deals and drafted agreements. They helped their clients secure resources from government and private sources, often showing terrific creativity in devising funding schemes. Like the Brooklyn Legal Services lawyers highlighted in the film, the lawyers in my study who performed planning services prided themselves on having facilitated the success of their clients’ own projects.

Why is this work important? This planning work bears a close connection to the efforts of community organizations to deal with urban problems and of small businesses to provide jobs and services in struggling neighborhoods. Self-help organizations have taken a variety of forms in poor communities, including single-issue neighborhood groups, economic development corporations, and community service organizations. They often emphasize building consensus, gathering resources, and doing deals. They and their small business counterparts need lawyers to play roles that are classic ones for lawyers who serve paying clients but quite unconventional for civil rights and poverty lawyers. Just as corporations and wealthy clients need lawyers to help them mobilize resources, broker arrangements, clarify risks, and document transactions, community organizations and minority entrepreneurs need lawyers to help them in these ways as well.

What are the practice sites for these planning services? In my study, the vast majority of the lawyers who provided planning services worked in private firms. I am not certain why that is so in Chicago or whether it’s true in other cities. With important exceptions, lawyers in most other work settings—most law school clinics, legal service programs, advocacy organizations, and grass-roots clinics—generally do not have the experience with transactional work that their counterparts in private practice have.
One of the questions I would like to put to the group is whether we can do more to develop planning skills in lawyers who are committed to serving poor communities. No doubt transactional lawyers in private firms constitute a significant untapped resource. But these lawyers generally are not socially connected to the poor communities that need transactional and planning skills. This is a point made by David Thomas and Errol Louis, and I hope that some of you also will address this issue.

I suggest that we also consider a related question: Are we doing enough in our law schools to help students understand the connection between planning skills and poor people’s needs? We need to do so to ensure that students who are interested in serving poor communities begin looking for ways to develop the skills they need.

How does planning work relate to concerns about lawyer domination in civil rights and poverty practice? Perhaps there is something about the nature of planning work and the clients who consume those services that allows for, perhaps even facilitates, more collaborative relationships than advocacy work typically does. When Paul Achnapura says that he and the other lawyers involved in that project saw themselves as participants rather than as leaders, they may have intended to express their views about how they should serve their clients with respect to this project. But this comment may also reflect certain structural factors that almost inevitably influence the distribution of power in attorney-client relationships. I will not take time to develop this point, except to note that the client here was a sophisticated organization—not a poor individual or a member of a plaintiff class or an ill-defined constituency—but rather a client that could, and perhaps did, hold its lawyers accountable. Moreover, the lawyer’s work here, almost by definition, required reference to the client’s objectives. The project was to build the community health facility. Some of the legal issues undoubtedly were complex and arcane, but the underlying task, the underlying issues, were matters about which the lawyers had no particular expertise and about which the client cared deeply. In other words, there may be something about the nature of this work and the clients who use such services that allows for client control more readily than adversarial advocacy ordinarily does.

Of course, none of this planning work goes anywhere without strong, healthy organizations and without access to capital. But
lawyers can play some role in helping community organizations and entrepreneurs emerge, grow, and accomplish their objectives.

Finally, a word about Jennifer Gordon’s vision of how various political strategies fit together. Critics often charge that civil rights and poverty lawyers lack political sophistication. In particular, critics often say that civil rights and poverty lawyers do not understand how litigation relates to other available strategies and fail to appreciate, or refuse to acknowledge, the limitations of their methods. But I have been struck with how many of the lawyers in my study emphasized, as Gordon did in the film, the wisdom of using a variety of strategies simultaneously and always considering first and foremost, “What will work here?” Or, in Gordon’s words, “What will fix it?” The most effective lawyers are politically savvy, at least in that sense; they focus more on beneficial results than on favorable judicial rulings.
REINVIGORATING POVERTY LAW PRACTICE: SITES, SKILLS AND COLLABORATIONS

Louise G. Trubek*

I. Introduction

The perspective of contemporary law students on lawyering for the poor is highlighted in an inspirational video written and produced by staff and students at the Fordham Law School.¹ The narrator, Sam Waterston, describes the initial integration of lawyers into the “War on Poverty” in the 1960s and the ensuing two decades of attack on the right of poor people to legal counsel.² The narrator then indicates that, despite setbacks to the 1960s model, innovative practices are developing and expanding in the practice of lawyering for the poor. Waterston states that “[t]he provision of legal services to the poor is a field that is still in its infancy. Only in the last thirty years has sustained thought been devoted to the issue. As with all frontiers, the room for experimentation and creativity is enormous.”³

Using words and pictures to describe three legal practices in the New York area, the video creates a vision of one approach to reinventing poverty lawyering. This vision is labeled “community lawyering” and is defined as lawyers, together with colleagues from different professions, who work with community groups and indi-

* Clinical Professor, University of Wisconsin Law School. I would like to thank Cristine Nardi for her usual excellent editorial assistance, as well as the students and faculty of the Fordham University School of Law responsible for the outstanding video and symposium.


2. This statement is not quite accurate since most observers consider the beginning of lawyering for poor people to be the legal aid movement which was initiated in the early 1900s. See Michael Grossberg, The Politics of Professionalism: The Creation of Legal Aid and the Strains of Political Liberalism in America 1900-1930, in LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE 18TH TO THE 20TH CENTURY 305 (Terrence C. Halliday & Lucien Karpik eds., 1997).

vidual clients to achieve social change. The three practices described are: a Legal Services practice working with a community health center to expand health care access in a Brooklyn neighborhood (the Brooklyn story); a public interest law firm organizing resistance to environmental degradation (the Environmental story); and a new practice that organizes and represents low-wage workers in a suburban community (the Workplace story). The video concludes with an affirmative plea to law students to continue lawyering for poor people by following the path highlighted by these exemplary practices.

The Brooklyn, Environmental, and Workplace stories demonstrate innovations essential to meaningful contemporary lawyering for the poor. The narrative clearly presents these exemplary practices as alternative routes to traditional poverty law practice, stating “[t]he three projects featured in this film show how creative lawyers can develop new ways of working with poor communities.” The video highlights three essential elements in these alternative legal practices: multiple organizational structures, expanded lawyering skills, and intensive collaborative relationships. It is these elements that the video has identified as innovative and distinctive from the earlier poverty law model. The video however, in its desire to inspire law students, presents only a narrow range of innovative practices containing these elements. In addition, because the video fails to portray the very real challenges that all of these practices must face to achieve sustained viability, there is a risk that the transformative potential of the practices will not be understood or realized. Unless the progressive legal community has a full understanding of both transformative potential and tangible challenges, alternative practices may fail to provide useful services and, ultimately, to survive.

This Comment describes why the three elements—multiple organizational structures, expanded lawyering skills, and intensive collaborative relationships—are essential to innovative practices. It also explores the different ways contemporary lawyering incorporates these elements and examines the challenges faced by such practices. The Comment concludes with strategies for supporting innovative poverty law practices.

4. See id. at 3.
5. Id. at 49.
II. Elements of the Practices

A. Multiple Organizational Structures

The persistence of the Brooklyn lawyer, the energy of the young Workplace Project lawyer, and the imagination of the Environmental lawyer reveal a continuing thread of dedicated lawyers over a thirty year period. The lawyers' innovative practices are similar in their organizational status; all three are nonprofit, tax exempt entities formed to provide legal services to poor people. These programs represent versions of the canonical model for social change lawyering: a specialized law office devoted exclusively to lawyering for the disadvantaged funded by government or charitable contributions.6 While the passionate dedication of the lawyers and the organizational structures of these practices are similar, their funding sources and origins are diverse.

The Brooklyn program, founded in 1968, is an office of the national Legal Services Corporation ("LSC"). It has a budget of $4 million which includes state and city contracts, private contributions, and $1.2 million in LSC funding. Its mission is to assist poor people, and, per LSC regulations, a majority of the board of directors are attorneys. The remaining directors are client-eligible individuals.7 The program's lawyer is a veteran attorney with many years of experience working with its client, the Brownsville Family Healthcare Center. The Environmental program, founded in 1976, is part of New York Lawyers in the Public Interest ("NYLPI"). NYLPI's budget is $1 million and is made up of donations from lawyers and law firms, grants from foundations and government organizations, and court-awarded attorneys fees. Its mission is to provide representation for unorganized groups, and it is governed by a board of directors consisting mainly of partners from law firms.8 The Workplace Project was founded in 1992 by a recent graduate of Harvard Law School who obtained a fellowship to develop a legal project to assist immigrants.9 The mission of the group is to use "any technique we can find or think of to assist

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7. Telephone Interview with Paul Acinapura, Associate Director, Brooklyn Legal Services Corporation A (Jan. 14, 1998).
immigrants." Their budget is $375,000 and consists of 90% foundation contributions, 1% membership dues, 1% attorney fees, and 1% interest income. The board is elected entirely from the members who are all immigrant workers.

Despite the similar thread of commitment and nonprofit status, the origins of the three practices are significantly different. The Brooklyn practice is an LSC program. The inclusion of an LSC program is an important statement as it indicates that these offices can provide group advocacy even within the LSC restrictions. Another practice, the Environmental program is sponsored by NYLPI, an organization started as part of the wave of public interest law firms founded in the 1960s and 1970s. It aims to ensure lawyer participation in important social issues. The third practice, the Workplace Project, began with a grant from the Echoing Green Foundation which funds graduating law students interested in practicing poverty law.

The varied origins of the practices explain the significant difference in funding sources. Funding for the Brooklyn and the Environmental programs, veteran groups founded in the 1960s and 1970s, is based on sources built over years of political and professional effort. The governing structures of these veteran practices reflect an understanding of the dynamics of fundraising. Their boards of directors are primarily contributors or representatives mandated by funders. In contrast, the six year-old Workplace Project relies on short-term funding, and its board consists totally of client members. This may reflect an optimistic view that financial viability can be sustained without including funders in the nonprofit governing structure.

The varied opportunities for alternative practices are demonstrated by the community work of a traditional law office such as Brooklyn Legal Services and by the ability of a new law school

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10. Video Script, supra note 3, at 34.
15. The LSC regulations require client representatives on the board of directors. See supra note 7.
graduate to provide needed services to an underrepresented group. These community practices can be described as part of a new wave of community lawyering. However, the three practices outlined in the video do not reflect the entire range of possible organizational structures and funding sources for community advocacy. In fact, a much wider range of alternative practices and funding sources is available. For example, private law firms can provide community lawyering through carefully designed practices that include reduced fee arrangements and rely on fee-shifting statutes.16 Pro-bono programs that serve communities may be organized in bar associations, and some large law firms have set up their own community-based law offices to provide pro-bono services.17 Moreover, social service agencies and schools use lawyers either on staff or through pro-bono arrangements to provide community lawyering.18

Paradoxically, the variety of community lawyering practices creates challenges to their viability. The lack of a singular funding source and the plethora of lawyering sites can minimize the significance of the alternative lawyering movement. In addition, community legal practices have been marginalized in the recent history of poverty lawyering.19 The current wave of community legal practices are likely to confront the same obstacles of fragmentation and marginalization.

B. Expanded Lawyering Skills

The stories told in these three projects demonstrate a range of lawyering skills. First, there are the conventional skills: analyzing statutes, understanding legal procedures, legislative lobbying, and representing individual clients in hearings. The Brooklyn story describes one lawyer's statutory analysis which enabled the Brownsville Family Healthcare Center to obtain bonds to build a marvelous medical facility in the community. The Environmental

16. See Trubek, supra note 6, at 428-433.
19. See Buchanan, supra note 12; see also Feldman, supra note 12.
story discusses a lawyer's knowledge of administrative procedures which allowed the Redhook United Coalition Against Sludge to block the building of a sludge plant in their neighborhood. The Workplace story explains the project's successful lobbying effort that resulted in the passage of state legislation penalizing employers for non-payment of wages. This project's representation of individual clients in fair labor standards procedures is also noted.

These stories also demonstrate skills that are unconventional: educating communities and clients about laws and legal institutions, researching community institutions and the local economy, and facilitating coalitions and group action. For example, the Workplace Project has the most developed community education program. Project staff conduct a mini-school where classes on labor laws are taught to community members. These classes are an essential element in their organizing and representation model. The Environmental story tells how one lawyer researched the impact that a high number of environmentally degrading facilities would have on the viability of the community economy and day-to-day living conditions. This story also stresses the unique skills required to bring together diverse groups in the community to create unified opposition to the siting of harmful facilities. Brooklyn Legal Services worked with health care leaders to access government financing to upgrade a local health care facility. The growth of this facility both enabled community economic development and improved health care delivery.

The struggle to broaden and legitimate skills that poverty lawyers can use to effectively assist poor people is long-standing. Organizing clients and educating people on rights has been advocated since the 1960s. A recent volume on social values and legal education worldwide suggests that community legal education and research on community issues should be an integral part of social change lawyering in all societies. However, the pull of traditional lawyering methods such as individual case representation and impact litigation is enormous. Jennifer Gordon, the founder of the Workplace Project, notes the difficulty of integrating case representation into a community organizing strategy. She asserts that clients are often more comfortable with individual case representation offering only short-term success rather than the long run strug-

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gle to educate and organize the community. In addition, law school training emphasizes traditional legal skills, reinforcing the legal profession’s hierarchy of values.

C. Intensive Collaborative Relationships

The emphasis on collaborative relationships across professions and between client groups and lawyers is the third notable element. The Brooklyn story discusses the strong alliance between the physician-director of the Brownsville Family Healthcare Center and the legal services lawyer. The shared vision and expert knowledge of these two professionals allowed the expansion of a health care facility which now provides accessible care in a low-income community. The Workplace and Environmental stories both dramatize the role of community organizers who work with lawyers to create community alliances. These organizers possess both a knowledge of community resources and constraints and the skills and experience of bringing people and groups together.

One advantage of these collaborative relationships is the exchange of skills and strategies. No one profession has the perfect strategy for social change, but each offers important skills and talents towards this goal. Social change lawyers should expand their practices through this type of multi-professional collaboration. For example, social workers are essential in child welfare advocacy projects. Similarly, collaboration with scientists in environmental cases is crucial. In addition, housing policy advisors often work with lawyers to develop strategies and programs to house the homeless. Multi-professional collaboration allows clients to obtain holistic services. It also creates opportunities to access additional sources of funding; multi-professional projects are better able to compete for grants and contracts so they may provide a more diverse package of services.

22. See Gordon, supra note 9, at 437-443.
24. Fordham University School of Law Center for Family and Child Advocacy, an inter-disciplinary undertaking run jointly with Fordham’s Graduate School of Social Service, links governmental and community-based agencies to develop more effective approaches to the problem of dealing with at-risk children and their families. The Family and Child Advocacy Clinic provides internships for law and social work students on the rights of parents to reunification services after foster care placements. Letter from Ann Moynihan, Clinical Professor, Fordham University School of Law, to Louise Trubek, Clinical Professor, University of Wisconsin Law School (Dec. 11, 1997) (on file with the author).
However, professional conduct codes can restrict the ability of lawyers to develop these collaborative practices. Existing codes restrict the unauthorized practice of law and prohibit multi-professional practices and the solicitation of business. A variety of constitutional and political initiatives against such restrictions, including freedom of speech and association challenges, anti-trust sanctions, and legislative protections, could be launched. But, a combination of resistance to change within the organized bar and the diversity of groups interested in challenging such restrictions has prevented the development of an effective strategy.

A more collaborative relationship between lawyers and clients in a community-oriented practice is also highlighted in the video. The Workplace and Environmental stories describe a lawyer-client relationship that stresses involvement and participation. To gain individual representation, the Workplace Project requires client participation in community organizing. Similarly, the Environmental story suggests that the role of neighborhood group leaders is crucial in the success of the project. In the Brooklyn story, the long-standing collaboration between Legal Services and the Brownsville Family Healthcare Center provides continuing satisfaction to both parties. Lawyer-client collaboration is also emphasized in recent scholarship on poverty lawyering. This emphasis is especially noticeable in the extensive writing on domestic violence advocacy. As expected, however, the Model Rules of Professional Conduct restrictions on the unauthorized practice of law and unprofessional conduct by lawyers challenge collaborative lawyer-client relations. The continued resistance of the bar to revise these restrictive provisions has rendered some forms of collab-

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26. The interest in multi-professional and multi-disciplinary practices has increased. This trend is apparent throughout the legal profession, not only within the field of social change lawyering. See Gary A. Munneke, Dances With Nonlawyers: A New Perspective on Law Firm Diversification, 61 FORDHAM L. REV. 559 (1992); see also Deborah L. Rhode, Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996).

27. See Gordon, supra note 9, at 443.


30. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(b) (1997).

31. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a) (1997).
orative practice problematic due to fear of sanctions against both lawyers and clients.\footnote{32}{See Rhode, supra note 26.}

Additionally, it is important to note that there can be a tension between professional collaboration and community empowerment. The argument is that professionals, such as organizers and social workers, will become as certain of their expertise as lawyers, which will result in a battle of experts rather than a genuine sharing of community commitment. As a result, these collaborative practices can fail to challenge the conventional hierarchy between the lawyer, the client, and the community.\footnote{33}{See Gerald P. Lopez, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice 331 (1992).}

III. Strategies for Change

The students and staff of the Fordham Law School displayed great imagination and tenacity in envisioning new poverty law practices. By locating the practices, producing the video, and hosting the symposium, they demonstrated dedication to the tradition of lawyering for the disadvantaged while proposing an alternative vision. However, the question remains whether this vision will, in fact, result in a radical departure from conventional poverty law practice that is capable of improving the status of poor people. Such exemplary practices may not present a challenge to existing social structures. The community lawyering model is sometimes described as doing for poor people and communities what corporate transactional lawyers provide for their business clients.\footnote{34}{See Brian Glick, Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience, 23 N.Y.U. Rev. L. & Soc. Change 1 (1997).}

The critique is that change cannot occur merely by doing for poor communities what corporate lawyers do for the wealthy. To invoke social change, there must be both empowerment and a challenge to the status quo.\footnote{35}{See Lopez, supra note 33, at 331; see also Lucie White, "Democracy" In Development Practice: Essays on a Fugitive Theme, 64 Tenn. L. Rev. 1073 (1997).}

This critique is well-founded. There are real difficulties in reinvigorating poverty lawyering today. The funding is difficult to locate, the canonical model is disintegrating, and the organized bar often appears disinterested or antagonistic. However, the strength of community lawyering is in the details of the practices themselves. The combination of non-traditional organizational structures, expanded lawyering skills, and intensive collaboration...
creates practices that encourage client empowerment and promote social transformation. The community lawyering practices highlighted in the Fordham video depict these transformative elements. Although these elements have long been advocated and sporadically practiced, they have often been marginalized. Bringing these elements to the forefront and insisting on facing the challenges they raise is the only route to reinvigorating poverty lawyering. Therefore, identifying strategies to confront these challenges is the next agenda.

Suggested strategies include challenging restrictive code provisions, linking alternative practices, forming funding alliances, and educating professionals. There is increasing interest in confronting ethical restrictions and professionalism rhetoric, found in the professional responsibility codes, that threaten the viability of community practices. The Fordham University School of Law is hosting a conference on this topic. The organizers plan to examine alternative approaches to bringing ethical and professionalism requirements in line with legal practices that exist today. The coherence of the community lawyering vision is weakened by the varied origins, locations, and funding sources of alternative practices. Linking disparate alternative practices can create a coherent social change movement that offers supportive networks and strategic alliances. The Alliance for Justice, an association of public interest law firms, was founded in the 1970s to publicize the role of the public interest lawyer. It has continued to provide both information to law students interested in public interest careers and support to individual public interest law firms throughout the United States. Linking alternative practices can also promote fundraising. Faced with a coherent image of community lawyering, funding sources are more likely to view individual practices as part of a larger, more relevant picture. Moreover, umbrella organizations like the Alliance for Justice can themselves assist in fundraising for their members. Finally, educating lawyers, social workers, organizers, and other professionals in the skills required for community development is essential. This training can take place within the academy or in ad hoc continuing education programs. Forums dedicated to the exchange of knowledge across disciplines can also be provided by law schools and professional associations.

36. For further information on this conference, entitled Conference on The Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues, contact Professor Bruce A. Green, Fordham University School of Law.
Conclusion

Emboldening law students to believe that law can assist poor people is exactly what is needed today. The Fordham video displays a knowledge of the history of poverty lawyering and an appreciation for the veteran lawyers and organizations who have worked for social change for so many years. The students’ vision must be accompanied by an understanding of the barriers to creating viable transformative practices. The synergy of an idealistic vision and realistic strategies will enable lawyers to meet the challenges of the legal services frontier.
FACING SOUTH: 
LAWYERING FOR POOR COMMUNITIES IN 
THE TWENTY-FIRST CENTURY*

Lucie E. White**

Introduction

We live in baffling times. On the one hand, many people are doing remarkable work to sustain and improve embattled communities. A new generation of activist lawyers are undertaking too many projects for any one person to keep track of, even with the most sophisticated web-browsing software. And groups that had staked out their identities on the basis of fixed categories are entering into new social movements that blur their own boundaries and open up the field of progressive politics. This work is giving many people new allies, new energies, and a new sense of power. At the same time, however, bad things are happening to good people, here in the United States and all over the world. Susan Bennett could have spoken for all of us when, in her remarks on the previous panel, she described the increasing destitution of her clients, and her own increasing frustration. Thus, although we have good cause to feel hopeful about lawyering for poor communities in the twenty-first century, we also have good reason to despair.

My daughter Anna is studying the history and economies of developing countries in her sixth grade geography class. Last night, over dinner, when I told her I would be going to New York the next morning for this conference, she said, "Mom, do you realize that I had just a one in twenty chance of being born in the Economic North." And then she said, "And, you know, the Economic North is not a place; it is a situation."

My daughter's comment caused me to think about how my own work with poor people has changed over the last two decades. All of my work is with clients who live inside of this country. But increasingly, since the mid-1980s, I have sensed that the lives of low-income native-born people in this country, not to mention low-income first-generation immigrants, are moving farther and farther inside of the Economic South, even though they reside in the very

* This article has been edited from the Closing Remarks originally delivered as part of the Symposium at Fordham University School of Law on November 7, 1997.
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epicenter of the Economic North. If the current trend toward a growing division of wealth and income in this country continues into the twenty-first century, the Economic South will become the homeland of more and more people inside of the territorial boundaries of rich countries like the United States, at the same time that it continues to signify an exotic place, one that we can easily erase from our field of vision as we go about our lives.

Thus, to talk realistically about “Lawyering for Poor Communities in the Twenty-first Century,” we must expand our frame of reference beyond the world of service-eligible client groups that we have traditionally represented in poverty law practices. We must expand our frame of reference to include all of the people who are being rendered destitute by current policies of global economic integration, regardless of which side of the territorial borders of the United States and other rich countries their bodies happen to fall on at any particular moment of time. At the same time that we open up our frame of reference, we must add the idea of global equity to the core normative commitments that motivate our work. When we begin to open up our frame of reference in this way, the issues that we must open our eyes to can seem almost blinding in their scope and complexity. We must open our eyes to a world in which rebellious clients - and their lawyers - are getting detained and disappeared, rather than evicted from their Section 8 apartments and defeated in court. Yet as much as we might like to believe that the global thing is just a distraction, if we are serious about lawyering for poor communities in the twenty-first century, we have no choice but to expand our field of vision to include those places where disenfranchised populations are increasingly making their homes.

I. Consider A Low-Income Mom in New England . . .

A. Getting the Picture

Now I want to turn back from such global reflections, and describe something much closer to home. For the last several years I have done an exercise in my social welfare class that I adapted from materials that Professor Martha Mahoney developed for her students at the University of Miami Law School. I begin the semester by presenting a hypothetical woman, whom I call Diane Donovan, to my students. Ms. Donovan has a high school education and some experience in clerical jobs. After high school, she got married, had two children, and stopped working at her hus-
band's suggestion. Gradually, he began to abuse her. Eventually she moved out with the children, and he left for parts unknown. She is afraid to track him down to collect child support, so she goes on welfare briefly, and then goes out and finds a full-time, but short-term job, doing clerical work for Manpower, Inc. The job does not pay any benefits, but it does pay the prevailing federal minimum wage.

After introducing Ms. Donovan to the students, I assign them to small groups, which go out into the Boston area and work up a realistic budget for Ms. Donovan's basic needs. They are instructed to find the best possible deal on each of Ms. Donovan's basic necessities, such as food, housing, health care, child care, transportation, clothing, and the like. I ask them to keep track of the resources and strategies that they use as they do the exercise, and to think about how readily a woman in Ms. Donovan's position could conduct the same kind of search on her own. After creating a budget of Ms. Donovan's expenses, they are asked to compare this figure with her total take-home income, including wages, governmental benefits which she is entitled to receive, and the federal and state Earned Income Tax Credits for which her household is eligible. Based on these calculations, I ask the students to consider whether Ms. Donovan can indeed overcome economic "dependency," and become "self-sufficient," even if she succeeds in both finding and keeping a relatively stable, formal sector full-time job?

When the students do this exercise, every group comes up with a gap between Ms. Donovan's total income and her basic expenses. The short-fall ranges from about $5,000 to about $20,000 a year, depending on the size and location of the apartment that they locate for her, and the level of state regulation - well as safety and quality - in the child care arrangement that they expect her to use. The bottom line to the exercise is that no matter how frugal or clever the students imagine Ms. Donovan to be, she does not earn enough income to pay for her family's basic costs of living and to pay someone else to care for her children, even with a full-time job.

Diane Donovan is extremely lucky, as low-income single mothers go. She has a high school diploma and solid work experience. She is healthy. And, most importantly, she has managed to find a more-or-less steady, full-time, though temporary job. Many low income single mothers are less fortunate than Ms. Donovan: they face obstacles like isolation, intimate violence, limited resource networks, lousy educational backgrounds, significant health risks, memories of bad job experiences, unremedied racial or sex-
ual trauma, and sick children. Many of these women feel too bur-
dened by exhaustion and despair to keep going, day after day, even
if they have a job.

When such women regularly face a regular monthly gap between
their income and expenses, even when they are working to their
maximum capacity, their lives run a big risk of cycling into a down-
ward spiral. For a while they can borrow money and resources
from their informal networks of family and friends, who are likely
to be of low-income backgrounds themselves. But when they fi-
nally exhaust these networks, and the rent does not get paid, wo-
men in Ms. Donovan’s position will face eviction. When that
happens, they are likely to move into a car or a shelter, or to camp
out in a welfare waiting room until they are given a voucher for
emergency housing. Eventually, if these moves do not work to link
their families to a new source of stable income, like disability bene-
dits, they risk resorting to even more “informal” forms of shelter,
like cardboard arranged on a sidewalk like a deck of cards.

All of us at this conference who have done street-level advocacy
with homeless families - as Susan Bennett has in the nation’s capi-
tal, and I have on the beaches and sidewalks of Los Angeles - all of
us who have done direct advocacy with homeless families un-
derstand that this scenario is not some horror story that has been con-
cocted by partisan advocates to thwart the bold experiment of
welfare reform. Those of us who have done direct advocacy with
homeless families know that this scenario describes one of the
common paths that low income families with children, especially
single parent families with few sources of social support, really take
when the outer limits of their capacity to secure income fails, on a
consistent basis, to meet their needs.

The image of a fully-employed woman with young children
sleeping on the sidewalk is not something that we like to have on
our minds in this country. The Donovan family camped out on an
urban sidewalk is hardly the poster-image that we want to associate
with the “independence” and “self-sufficiency” that welfare re-
form, when successful, might foster. Yet because of the inadequacy
of a full-time minimum wage income to cover a single-parent fam-
ily’s basic monthly expenses, every single parent with young chil-
dren - even the most fortunate and resilient among them - is at risk
of finding herself in the center of this picture over the next five
years, as the federally-mandated welfare time-limits finally begin to
kick in.
B. Resisting the Lure of Denial

The Donovan exercise arouses high levels of anxiety among students. Few students find it easy to report the budget gap that their research has found. Few find it easy to acknowledge that the simple story of the goal of welfare reform—to enable low-income women with children to become independent of government handouts by getting a job—seems to lack coherence, if it is tested against the constraints of the real world.

Their typical first response to this discomfort is to doubt the accuracy of their own numbers or the cleverness of their search strategies. Their typical first response to the assignment has been to insist that Ms. Donovan’s budget gap is a reflection of their own ineptness in doing the exercise, rather than a signal of deep tensions in our society for distributing social wealth in an equitable manner and for enabling and resourcing the invisible work of care. The typical first response of the students to the Donovan exercise is to think that they are the ones with the problem, and to blame themselves for getting the answer wrong.

After failing to uncover mistakes in their arithmetic or lapses in their ingenuity, a few will go back into the field, to search for new options for Ms. Donovan that will bring the numbers down. Last year, one group of particularly determined students worked for the entire semester with the Donovan problem, searching for bargain-basement deals on her basic needs. This group wrote a guidebook for Ms. Donovan that was modeled on the popular “Let’s Go” travel guidebook for undergraduate students. In the guide, the students came up with sophisticated search strategies for her to locate the cheapest housing, childcare, prescription medications, winter coats, and other necessities on the Boston market. They mapped all of her hidden assets. They identified obscure government benefits and charitable handouts for which she could apply. After a semester’s worth of intensive research on the Internet, in the Harvard Law Library, and on the streets, the “Let’s Go” group of students managed to close Ms. Donovan’s wage-gap by a few hundred dollars.

Many students, however, find an easier way to cope with the anxiety that Ms. Donovan’s dilemma seems to arouse. They distance themselves from Ms. Donovan’s problems, by finding subtle ways to blame her for them. “If Ms. Donovan won’t cooperate with us to produce a balanced budget, then she deserves to have to cope with her own problems.” Such denial works pretty well to salvage their own sense of basic financial and moral security, especially
when the Ms. Donovans of the world live far out of sight, across the freeway, in another town. With their heads in the sand with regard to Ms. Donovan's traumas, the students can continue to believe that they continue to live in a system in which the numbers will work in your favor, so long as you are willing to work hard.

Thus, the students' first response to Ms. Donovan's dilemma is usually denial. First they try to deny their own intelligence. Then they move on to deny the disturbing human meaning that those numbers both signal and obscure. A few students move beyond this phase of defiance or denial to grapple with the issues that the exercises raise in a more complex way. As they begin to face up to the challenge of Ms. Donovan's dilemma, they also begin to challenge their own assumptions about the practice of poverty law. They begin to question the idea that lawyers working with poor communities should limit themselves to clear legal claims that they know how to process. They begin to envision a role for themselves that is more risky, but also seems more sensible in response to the lived experience of families like the Donovans. They begin to envision their role as that of standing beside disenfranchised people, and communities, and seeking to be of use to them rather than delivering prepackaged services to them.

C. Searching for the Logic Behind Bad Laws

As students form this new idea of their role as poverty lawyers, they begin to ask hard questions about laws that they had once taken for granted. Consider the recent welfare reform law, for example, which mandates termination of federally-funded welfare benefits to most single mothers of young children, like Ms. Donovan, after a total of five years.1 The logic behind this law starts to seem like a mystery when the real harm this law is likely to cause to families like the Donovans is at the center of one's attention. Students who puzzle over this law's hidden logic generally come out with four different theories of what its drafters and boosters might have expected it to accomplish.

According to the first of these accounts, the reform was designed to force low-income single mothers to do their part to expand growth in the informal sector of our nation's economy. By compelling women like Ms. Donovan to increase their labor market involvement beyond that of taking a formal sector full-time job, the

law harnesses their deepest fears into a powerful engine of economic expansion. There will inevitably be some losers in so bold a strategy for opening up new fields of economic expansion. Some women will not prove to be tough enough, or lucky enough, or cynical enough to do the tricks and make the deals it will take for them to thrive. But no matter. Most families will find some way to earn extra income, or to cut down their consumption of luxuries like licensed childcare. And even the ones who lose out in the race to balance their budgets will finally be free.

A second account of the law's hidden logic is that it was designed to shore up the institution of nuclear marriage by compelling poor single mothers to form households with men. Demographic data about the dynamics of poverty show that one sure way for a female-headed household to exit from poverty is to merge itself with a household that includes a man with a job. Therefore, a law that ends income entitlements for poor single mothers might lure these wayward women into marriage with wage-earning men. That account of the law's logic fails to take account of the high incidence of domestic violence among all women, including low-income women on welfare. Nor does that account factor in the disproportionately high rate of unemployment among young men of color in racially segregated urban neighborhoods.

A third account of the law's hidden logic is that it was designed to back up the power of employers and investors to shape the terms and conditions of low wage labor in this country. Welfare gave low-income women some power to shape their own deal with the labor market. The reform that ended welfare has gutted that power. Without the safety net of welfare, low-income women will have no way to walk away from jobs that affront their basic dignity, destroy their health, or leave them too exhausted to care for their children. The hidden logic of the policy, in this view, is to boost the power of people who do not have to do low wage work to shape it in ways that reflect only their own priorities and desires.

A fourth account of the welfare reform law's hidden logic starts at the end of the story, with one of those everyday annoyances of urban life. An affluent professional woman, rushing from a park-

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ing garage to her office, barely avoids stepping on a homeless person on the street. "Why aren’t the police here to enforce the anti-begging ordinance?" she wonders to herself, as she seeks to regain her stride. She has long ago learned, through such sidewalk encounters, never to shift her eyes toward the nuisance. Therefore, she never sees that this one has a couple of kids at her side.

Such encounters are still unusual on our cities’ streets. We can hope that the grassroots efforts, all over the country, to prevent the worst-case outcomes of welfare reform will keep this scenario from playing out on a wide scale. Yet a fourth account of the hidden logic of welfare reform sees this law in the context of a world-wide retrenchment in economic and social citizenship rights. From this perspective, its most important effect is to numb the affluent to the visible suffering of the poor. Thus, it normalizes, even in this wealthy country, the idea that some level of complete destitution, even among women and children, is a necessary side-effect of the best policies for promoting global integration and sound economic growth.

In this account, the welfare reform law helps to promote the idea that some lives need not be afforded basic protection, so long as the latest trends in social policy calculation point toward higher priorities. In order to live in such a moral order, affluent people must learn how to distance themselves from the faces of the poor. They must learn to desensitize themselves from their own feelings of empathy for the suffering of those around them. Otherwise, those unruly human passions might distort their political judgment.

Advocates for the homeless in the 1980s and early 1990s saw legal and social policy in this area make a gradual but steady shift from charity to criminalization, as the the public became more and more familiar, and fatigued, by encountering homeless persons on the streets. In Los Angeles, for example, the prevailing local policy toward the homeless moved from street-level social services to their forced removal from high-income areas such as Santa Monica’s oceanside parks, to confined areas like Skid Row or the city’s eastern suburbs, where they would not drive down property values or pollute public space.5 According to this final take on the welfare reform law’s hidden logic, its deepest significance lies in its normalizing the destitution of women and children in order to

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smooth the way for the devolution and eventual disappearance of the industrial era welfare state.

Some students who go through this thought experiment retreat into cynicism. Why not throw in my lot with the rich, they wonder, when the poor are getting treated so badly? But other students seem to find hope in their own despair. They come out of this thought experiment prepared to embrace a gritty kind of never-say-die pragmatism. They emerge from their own analysis of this law even more determined to put everything that they know about lawyering at risk in order to work with low-income people and communities in morally and strategically promising ways.

D. Moving Beyond Despair

Once students free themselves from rigid notions of how to deliver legal services to the poor, they begin to seek out every trick in the books for enhancing their clients' political and human power. Sometimes federal law reform litigation is still the best option. More often, in the present political climate, state and local arenas offer better settings for working toward change. Such work can be done to challenge and channel new levels of federal funding to states in domains like childcare and job training. These new streams of funding present opportunities to create new enterprises partnerships, and institutions for adult education, job training, small business assistance, domestic violence prevention, and the like — on the local and state level.

In conjunction with such work, lawyers can engage in creative interpretation of statutory and regulatory language, thereby both expanding and enforcing the precatory entitlements that can still be read into state and federal welfare laws. State laws and regulations that govern welfare-to-work transition services such as childcare and transportation, for instance can become a focus of intense, indignant, and politically savvy advocacy strategies, in which welfare reliant women who are determined to move into work can readily take a leading role. The social agencies that deliver transition services can be monitored when they are giving bad service, and publicly recognized when their work is good. Cross class coalitions of women can form around specific issues, like flexible work schedules, family leave assistance, or child care, that matter to all parents with children, albeit in different ways.
II. Lawyering for Poor Community in a South-Facing World

As students and lawyers pursue such flexible and creative lawyering strategies, their own work will draw them toward the practices and know-how of the most experienced community-based social justice activists. Their own work will draw them to those grassroots leaders and groups that have learned how to create safe, nurturing, and justice-seeking spaces, relationships, and social-change practices in settings of great inequality, all over the world. For most of the new pragmatic approaches that determined lawyers are drawn to in the aftermath of welfare reform require the active, impassioned, and confident presence of low-income people and groups, as partners rather than clients, in order to get off the ground. All of these new approaches - of creatively interpreting and enforcing the subtle “entitlements” in welfare reform laws, or lobbying for the reworking of state and local laws and regulations, or monitoring and partnering with social agencies and programs, or establishing new street level enterprises and institutions - are premised on working with low-income people as allies and colleagues. All of these approaches are premised on engaging and enhancing the political and human capacities of low-income actors, in joint ventures toward change.

So the students who honestly grapple with the grim hidden logic of welfare reform tend to find their way to the most creative community-based social justice practices and activists as they search out good paths toward change. They find themselves drawn into practices that are grounded in alliance rather than service delivery, because that is the kind of work that is called for after entitlements have been repealed and services defunded. Allying with those who have been written off of the map of the state’s attention is the stance that is called for by the hidden logic of welfare retrenchment. A stance that faces South, toward the people who are expected to stay quiet in their destitution: this is the stance that is called for by the hidden logic of welfare retrenchment. Once poor people’s lawyers for the twenty-first century - our students - get to this realization, once they work through their own denial, confront the hidden logic of welfare reform, and find their way to experienced community-based social justice activists, then the hard work of devising good practices through which lawyers can help build the power of impoverished neighborhoods in our own urban centers - of “walking the talk” of community-based empowerment - can begin.
FACING SOUTH

A. Journeys

Following the lead of my most committed and experienced students, I have spent a good deal of time, over the last several years, seeking to educate myself about best practices for what I have called, for lack of a better word, "collaborative lawyering in the field." Those efforts have taken me in several directions. For instance, I have learned something about community-based lawyering practices that emerged from liberation theology and popular education in Latin America. I have also learned something of the history and practice of the Highlander Folk Center in Tennessee, a site that has helped to engender community-based social justice movements, both here in the United States and globally, since the Great Depression. After training labor and civil rights leaders and groups in the 1930s through 1960s, the Highlander Center has more recently focused on issues like environmental organizing in Appalachia, and organizing across-borders to challenge sweat-shop employment practices.

I have also learned from low-income women, in Boston and elsewhere, who are using women's support groups as a base for guiding the holistic development of themselves in community, so that their own emerging capacities are understood to enhance their communities' power. These groups are doing very innovative work around domestic and racial violence, economic literacy, and micro-enterprise development, for instance, work that is informed by the broad goal of building networks of community-based institutions that will enhance their own lives. Thus, over the last several years, with help from my students, I have gradually found my own way to several rich traditions of community based work. These traditional and embedded practices of community-building seem almost to converge with the pragmatic, dialogic, or collaborative approaches to lawyering that clinical poverty law teachers in the United States have sought to theorize, in their scholarship and practices, in this country, over the last decade.

I recently attended one of several recent international gatherings of people and groups who are engaged in grassroots community-building practices, from across the poor, underdeveloped, formerly colonized, or, some would say, economically "Southern" regions of the developed and developing world. Most of these people were from what are sometimes called the poor countries, but some were

based in what is called the developed world. Most were engaged in community-building projects like the ones that have been featured at this conference. Few of these practitioners were trained as lawyers, but pragmatic, collaborative lawyers could easily learn from, and join in, their practices. These practitioners came together to talk about their projects and practices, in the same way that we have come together today. They came together to explore how dialogue about their diverse practices could help them to connect, critique, and improve what they do.

B. Three Fields of Tension

If my learning has taught me anything about community-based lawyering practices, it has taught me that the work is not easy. The work is hard because it is about staying in there for the long haul, after the photo opportunities go away. The work is also hard because it demands a mix of hope, shrewdness, and patience, even from those among us who were not born with such an unlikely mix of traits. And finally, the work is hard because it keeps coming up against three core tensions, tensions that pose a huge threat to its claims to moral legitimacy and political consequence. I name these tensions with three key words that come up again and again in discussions of community-based lawyering work: the tension around the "teacher" - or organizer, leader, facilitator, lawyer - and what defines and limits her power; the tension around the "community" and what produces its cohesiveness and marks its boundaries; and the tension of "emancipation" or what grounds the work's theory of, and path toward, positive change.

I like to think of these tensions - around the teacher's power, the community's boundaries, and the project's theory of emancipation - as fields of trouble and promise that should be valued and respected, rather than denied or resisted. Indeed, we should teach ourselves to be on the lookout for each of these troubles, as if with a second eye, in every moment of the work, because close attention to their presence can help us keep the work on track. These three tensions begin to cause trouble precisely at those times when practitioners become complacent that they no longer pose any problem. If we can learn to accept and study these tensions as a routine part of community-based social justice practice, we can gain access to a great source of insight and energy. We can gain a critical edge in our practice, in the very best sense of that word. If we can learn to respect these tensions, they can become that elusive normative grounding that the work requires. In closing, I want to say a few
more words about each of these three fields of tension, as I currently understand them.

1. What Guides the Teacher?

First, the tension around the role of the teacher. There is always going to be tension, in community-based work that aspires to be both participatory and emancipatory, between the directive role that an organizer, lawyer, leader, or teacher, must play to get the work going and keep it on track, and the teacher’s aspiration to draw out, rather than dictate, the group’s own voices. William Simon has referred to this paradox as “the dark secret” of community-based poverty lawyering. You need powerful leadership to get a community-based group together and to help it undertake meaningful action. Yet with that leadership comes the obvious risks of domination and exploitation.

This field of paradox includes familiar questions about who should provide this necessary leadership or facilitation — the organizer, the lawyer, an indigenous community leader, a corporate body of community members, a wider array of stakeholders, or some coalition of the above. It also includes questions about where that leadership should in turn look for guidance. Should it see itself as the “hired gun” of a wider consensus of the community’s will? Should it see itself as informed by its own theories, intuitions, values, experience? Should it see itself as guided by a practice of dialogue between its own intuitions and values and those of wider community constituents? Finally, this field of paradox includes questions about the practices that the teacher or leader should use to enhance the voice of the wider community with and for whom it works.

2. What Binds the Community?

The second field of paradox is that of community itself. One set of questions involves the basis for the community’s coherence. In order to engage in action, a community must have enough commonality to work together. How can this sense of common ground be fostered among diverse individual actors? Practice in this area suggests that a sense of community among low-income actors can most readily be created by emphasizing common racial or ethnic identities, common life histories, or common language or cultural

practice among people who reside in the same geographically defined neighborhoods or who work for the same boss. Such strategies of building coherence within a community bind some people together by closing others out. Whether it is language, ethnic identity, religion, cultural commonality, or the accident of neighborhood residence alone, the practices that will most easily motivate people to work together have the unwanted side-effect of setting up boundaries between that group and wider realms of community.

We could have talked more in the earlier panel about why Jennifer Gordon’s work has centered among Central American immigrants. She surely has to start somewhere to build a community-based worker organization on Long Island. A common Central American origin is certainly a defensible place for her to begin. But having made that decision, how can she lead the group to challenge its own self-defined boundaries - its racial unity, for example - as the work proceeds. Suppose that Jennifer, as the project’s founder, seeks to guide the organization’s members toward less categorical understandings of their own race identities, over time. How can she play such a role in a way that does not manipulate their values to conform them to her own, but also does not endorse their racial prejudices? Such questions can be aimed at community-based projects from the outside, in ways that seek to undermine them. But such questions can also help guide the internal practices of community-based initiatives toward practices in ways that enhance social justice.

3. Which Way is Justice?

The third field of tension is that of emancipation. This tension is likely to cause problems precisely at the point when the project starts to work, and the individual participants feel a new sense of voice and power. The risk is that these emboldened individuals will begin to debate the taken-for-granted goals of the project itself. Do we really need to build a non-profit health center, or should we leverage a deal to bring in a for-profit shopping mall? Do I really want this organization to defend undocumented immigrants, or should we organize legal residents to get better jobs? When a project begins with the dual goal of community improvement and participant empowerment, internal conflict will inevitably erupt within the group as the empowerment agenda begins to

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succeed. People will begin to put forth multiple visions of what they want for their community, and for their own lives.

Of the three fields of tension, it is the final one, of emancipation, that is most actively debated among experienced practitioners of community-based work in developing countries. One of the reasons for their preoccupation with this issue is that much of the community-based work in developing countries over the last three decades has been premised on Marxist theories of the process and goal of progressive social change. After the demise of socialism as a plausible way to organize a complex society, ground level practitioners of community-based work have been compelled to reflect on the underlying empirical assumptions and normative values that guide their work.

At the international conference of community-based practitioners that I have described, for instance, the most recurring theme was that of “scaling up.” What connects community-based practices of empowerment, organizing, and institution-building to larger-scale processes of political, legal, social, cultural, and economic change? Practitioners of community-based work from all over the world came to the conference well aware that creating moments of empowered community at the local level does not necessarily have any impact on the wider societal trend toward increasing levels of social and economic inequality. Creating moments of community on the local level may not have any impact at all, in the long run, on the increasing levels of destitution, all over the planet, of the poor.

**Conclusion**

We may think that the link between grassroots empowerment and global justice is too hard for us to ponder, especially at the end of such a wonderful conference. But if we can find in each other the strength to reject the lure of denial, this is a basic question that we should not avoid. It is easy to undertake community-based work in an age when the President, the Governors, the Congress, and the courts have been both dishonest and mean-spirited about the needs of the poor. Yet if we move to this work without asking ourselves how it can help to combat the larger forces of inequality and injustice, in our society, then the work can fairly be dismissed as one more way to put our heads in the sand. In many developing countries, community-based workers have been able to avoid reckoning with the fact that their work disrupts wider systems of power. They have not been able to avoid that truth because the most suc-
cessful community-based activists have regularly become the targets of death squads. Thus, some elite social actors seem to understand quite clearly that this kind of work presents great danger, or potential, to further social justice, even if no one has spelled out an easy theory for how the links or ripples between community-based empowerment and wider spheres of social and political power get made.

One way that we can open up the question of those links is by close study of specific examples in which such links have been made. Jennifer Gordon's story of how her Workplace Project changed New York's fair labor standards statutes is one extraordinary case to study, and it happened right here in New York.9 The story of how local organizing among disabled immigrants was successfully coordinated with national and state level lobbying and litigation to reverse immigrant exclusions in the federal welfare reform law is another. Another example, is of the success of some South Asian micro-lending circles to make changes in the balance of power in regional electoral politics.

In the discussion of "scaling up" at the international conference that I have referred to, the participants identified several themes that suggest how linkages between community empowerment and wider emancipatory change can be fostered. One of the most important of these themes was that of horizontal networking. In many cases, changes in higher level distributions and practices of power seem to take place in the context of a good deal of conscious attention, among community-based activists, to creating close links of communication, mutual learning, and resource sharing horizontally, with "sister" projects that seek to address the same broad social justice issue.

A second theme that emerges from examples is that practices of mutual respect, inclusion, and democracy within community-based groups can sometimes influence the internal practices of the governmental agencies that interact with these groups.

The work of studying such examples in search of recurring questions and themes is a slow kind of inquiry. It is also tricky, because you are never sure whether what you think you are seeing is more wishful thinking than verifiable reality. But we must not let the very real challenges of theory building in the domain of "scaling up," or micro-macro linkage, turn us away from the work of com-

munity-building, or the work of understanding our own practices, so we can pursue them in more connected and more effective ways.

As we move toward the twenty-first century, the most promising opportunities for social justice lawyers are also sights that pose great risks. There is the risk that the work will turn us away from the real centers of power. There is also the opposite risk, of deluding ourselves about the work's value and power. Given these risks, it is especially important that we learn to help one another to keep our eyes open, toward our clients, each other, and our visions of social justice, as we work together.
WHO'S IN CHARGE, ANYWAY?
A PROPOSAL FOR COMMUNITY-BASED
LEGAL SERVICES*

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Introduction

For over one hundred years, some of our country’s most dedicated lawyers have struggled to provide legal services to poor people. The road has not been an easy one. Richard Nixon vetoed a legal services bill over the issue of presidential appointments, then signed the Legal Services Corporation Act just before resigning.1 Nixon’s Vice-President, Spiro Agnew, was a vocal opponent of federally-funded legal services.2 Ronald Reagan submitted eight consecutive budgets seeking to eliminate all federal funding for the Legal Services Corporation (“LSC”).3 Simultaneously, he appointed a hostile LSC board of directors. Bill Clinton’s election, however, brought new hope to advocates. Hillary Clinton is a former president of the LSC Board.4 The early Clinton budgets included an increase in LSC funding, but they were countered dramatically by the severe cuts and restrictions imposed by the 1994 Republican-controlled Congress.5

* This article was written in conjunction with the Symposium at Fordham Law School on November 5-6, 1997 on Lawyering for Poor Communities in the Twenty-First Century.
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2. See Fred Barbash, White House Wants to Cut Off Federal Legal Aid for the Poor, WASH. POST, Mar. 6, 1981, at 3; Abel, supra note 1, at 483.
3. See, e.g., Barbash, supra note 2.
5. See Steven Stycos, Revoking Legal Services: Republicans Want to Keep Lawyers from the Poor, THE PROGRESSIVE 1 (April 1996); Kenneth Jost, Legal Initiatives
While these "external" forces were determining the fate of LSC, "internal" forces were debating the means of providing services. Most historians consider the early 1960s the start of the modern era in providing legal services to the poor. At no time during the modern era has there been a consensus among legal services providers on a single delivery system. In practice, however, a system based on individualized services in discrete areas has dominated.

In this article, we reexamine this service mode, its benefits and deficiencies. We argue that the service model is not the best use of a limited legal resource. Legal services programs can improve the quality of their service by establishing community-based programs which emphasize closer links with community groups and community institutions. By moving in this direction, legal services programs will be better situated to mobilize community resources and reflect community priorities. A community-based program will avoid the top-down, lawyer-dominated priorities that we believe now exist.

I. The History of Legal Services to the Indigent

A. History Pre-Dating the Legal Services Corporation

The history of legal services to the indigent in the United States begins with the creation of the German Legal Aid Society in New York City in the 1880s, which rendered legal assistance to poor German immigrants. This organization ultimately became the Legal Aid Society of New York, which exists today. The Legal Aid Society broadened its clientele through a connection with the Settlement House movement in New York City's immigrant ghettos. Even though this link was formed, the leaders of the Settlement House Movement chose to work with the private bar on a volunteer basis to handle their larger, law reform matters. As the Settlement Houses became discredited as too political and progressive, Legal Aid distanced itself from these attacks and found support from private funders. Legal Aid attorneys focused solely on individual cases, often pressing their clients to settle their

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Stall: Shareholder Law Passes, but Tort and Crime Bills Fail, 82 A.B.A. J. 20. The LSC appropriation was reduced by one-third, to $278 million.


7. See id. at 22.

8. See id. at 14. According to Davis, Legal Aid attorneys were considered less skillful than members of the private bar. Id. at 15.

9. See id. at 15.
WHO’S IN CHARGE?

claims. Funders and the private bar preferred this individual service approach to a more political one.

As other legal aid programs developed throughout the first half of the twentieth century, the scope of services expanded. Limiting services to the “worthy poor,” however, remained the basic approach. Most services were provided by local volunteer lawyers on a case-by-case basis. The goal was to provide the poor with access to the legal system.

New Haven, Connecticut’s legal services programs provide a typical example of this approach. Before the Ford Foundation sponsored its highly-documented legal services model program in New Haven in 1963, the city had a Municipal Legal Aid Bureau dating back to 1927. Grace Bossie, who was not a lawyer, directed the Legal Aid Bureau (“LAB”) until 1963, after which she became the Executive Director of the New Haven County Bar Association. Throughout Grace Bossie’s tenure, she would identify worthy cases and seek local lawyers to handle the cases on a volunteer basis. Yale law students were integral to this process. Francis X. Dineen, one of the two attorneys funded through the 1963 Ford Foundation grant (the other was Jean Camper Cahn), was a student director of the Yale Law School Legal Services Program which worked with the LAB. Dineen reports that the cases involved primarily small claims matters handled by students being supervised by local attorneys or by Grace Bossie. There was no concept of community outreach, community control in prior setting, or law reform. This basic model of individualized casework for the worthy poor was

10. See id. at 13.
11. See id. at 15.
15. See Charter of the City of New Haven § 2-17 (establishing a municipal legal aid bureau from March 1, 1987 “to furnish legal aid and advice in proper civil cases to any person who is financially unable to employ counsel”).
16. Interviews with Grace Bossie and Francis X. Dineen (on file with the authors).
17. See id.
18. See id.
replicated many times across the country. It is generally referred to as "legal aid."  

B. The Creation of the Legal Services Corporation

Legal services was supposed to be a radical departure from a legal aid approach. As Matthew Diller notes, the idea that lawyers had a role in eliminating poverty was new in the early 1960s. The old legal aid model was criticized as a "band-aid approach to the poor's deep problems" as opposed to a more structural, reform-based approach. The Legal Services Corporation ("LSC") was constructed on this newfound anti-poverty foundation.

Alan Houseman, identifies five critical elements that differentiated legal services programs from "legal aid" programs:

First, legal services programs were responsible to all poor people as a client community. This was a dramatic departure from the prior model of serving only those clients who appeared at the lawyer's door with a defined problem. Moreover, responsibility for a community implied identifying and understanding that community.

Second, clients had the right to control decisions about the solutions to their problems and, by participating on a local legal services program's board of directors, to participate in identifying problems to address. In Houseman's words: "[L]egal services was an advocate whose use was to be determined by poor people rather than an agency established to give services to poor people."

Third, legal services was committed to "redress[ing] historic inadequacies in the enforcement of legal rights of poor people caused by lack of access to the institutions that created those rights." This was the now-classic law reform approach, with legal services programs as the "chief law enforcers for federal agencies" on behalf of poor people. In earlier days, opponents had vigorously objected to law reform efforts, likening them to social

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20. See Diller, supra note 13 at 1404.
21. Id. at 1405.
23. See Houseman, Political Lessons, supra note 19, at 1684
24. Id.
25. Id.
26. Id.
engineering\textsuperscript{27} and bad policy.\textsuperscript{28} More recently, legal services programs have been criticized for ignoring law reform responsibility.\textsuperscript{29}

Fourth, legal services, through "community education, outreach efforts and physical presence in the community"\textsuperscript{30} would assist clients in identifying legal needs. Legal services programs would respond to need rather than demand.\textsuperscript{31} Legal services would be proactive, empower clients and achieve community goals.\textsuperscript{32}

Finally, legal services would provide a "full range of service and advocacy tools,"\textsuperscript{33} including litigation, appeals, administrative representation, legislative advocacy, rule drafting and comprehensive strategies.\textsuperscript{34}

These five elements were goals set for legal services programs. Critics such as Marc Feldman,\textsuperscript{35} Gary Bellow and Jean Charn\textsuperscript{36} disagree with Houseman's view that these goals were accomplished.\textsuperscript{37} While Houseman supports his conclusions with empirical data, Bellow and Charn assert that no such data exists. They are all correct. Volumes of numbers exist, but such data is of minimal value.\textsuperscript{38}

Throughout the history of federal funding for legal services, local legal services lawyers have felt pressure to emphasize quantity above quality. As a legal services attorney in Pennsylvania and

\begin{thebibliography}{99}
\bibitem{28} See Geoffrey C. Hazard, Jr., \textit{Social Justice Through Civil Justice}, 36 U. Chi. L. Rev. 699 (1969). Hazard argues that legal services programs should focus on civil justice (enforcing property claims recognized by law) and not social justice (transfer of property interests by means of law operating posterior to the formation of property). See \textit{id.} at 711.
\bibitem{30} Houseman, \textit{Political Lessons, supra} note 19, at 1685.
\bibitem{31} \textit{Id.}
\bibitem{32} See Roger C. Cramton, \textit{Crisis in Legal Services for the Poor}, 26 Vill. L. Rev. 521, 524-25 (1981) (noting one of the original purposes of the early OEO legal services program was "to assist groups of poor people in organizing as groups.").
\bibitem{33} Houseman, \textit{Political Lessons, supra} note 19, at 1685.
\bibitem{34} \textit{See id.}
\bibitem{35} See generally Feldman, \textit{supra} note 19.
\bibitem{36} See Bellow & Charn, \textit{supra} note 29.
\bibitem{37} \textit{Id.}
\bibitem{38} We recognize that there is no such animal as "legal services programs" and no description can possibly apply to every program. As Alan Houseman points out, each local program was and remains unique, with localized skills, experience levels, resources and politics, strengths and weaknesses. Perhaps most important, the 326 legal services programs have 326 directors. Just as elementary schools tend to reflect their principals, so do many legal services programs reflect the abilities and inclinations of their directors. See Houseman, \textit{Political Lessons, supra} note 19, at 1686.
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Connecticut from 1972 through 1985, one of the authors remem-
bers meetings where the sole purpose was to learn how to report
and distinguish “information and referral,” “advice only,” and
“brief services.” These categories magnified productivity beyond
reason and “proved” that attorneys were not spending their time
on class actions and other forms of social engineering.

The “data” overstated client outcomes. For example, in the mid-
1970s, recipients of funds through Title XX of the Social Security
Act (the predecessor to Social Services Block Grant Funds) had to
complete a statistical reporting form for each service provided.
One category of service was “Information and Referral.” The form
included a box for “objective achieved” or “objective not
achieved.” One day, a client called, seeking housing. She said she
had gone to the welfare department, which referred her to a local
housing agency, which referred her to family services, which re-
ferred her to legal services. No one could help her. Nor could the
author. It did, however, occur to him that the federal government
would receive four forms, and identify four “cases.” In three of
those cases, the client’s objective was achieved through successful
information and referral. The client, however, still did not have a
place to live. Any legal services worker can tell similar stories
about LSC statistics. There was, of course, a political rubric for the
numbers game. Continued and increased funding depended on
service, not on impact: quantity, not quality.

Moreover, while the legal services community talked about law
reform, the cases trotted out for “show-and-tell” in newspapers
and in Congressional testimony were usually non-political service
cases. Legal services advocates showcased cases of the worthy
poor. They argued that these individuals would have suffered from
the unfair actions of government or landlords or unscrupulous
businesses if not for our intervention. This tendency has not
changed. In the December 29, 1997 Connecticut Law Tribune trib-
ute to legal services, local programs identified four “worthy poor”
cases to showcase: (i) a working mother, whose childcare benefits
from the state were delayed for several months (the client eventu-
ally paid her child care worker with her rent money, resulting in
the commencement of an eviction proceeding against her); (ii) a
quadriplegic “father of two” suffering from Lou Gehrig’s disease,
whose home care health services were terminated; (iii) a child with

39. Robert Solomon, who worked for Buck’s County Legal Aid Society in Doyle-
ston, Pa. and New Haven Legal Assistance in New Haven, Conn. is the oldest of the
authors.
"a debilitative condition," whose parents "endured for two years without help from supplemental security income ("SSI") disability benefits, which could have eased the suffering of the child;" and (iv) a mother and children facing domestic violence. (This last story included a "before and after" poem from one of the children). There was no mention of any of the following: client participation in decision making; that these cases reflected broader community needs; a description of the full-range of services offered by the programs.

Each of these clients presents a compelling case. Each should have legal representation. In fact, each would have been near the top of the list under the old, discredited "legal aid" system. It is instructive that the image legal services chooses to project in its most public opportunity is one that totally ignores Houseman's five elements differentiating legal services from "band-aid" representation.

C. Ronald Reagan and the Drive Toward Quantity

The pressures to report large numbers of cases increased dramatically in 1981, when Ronald Reagan appointed a hostile board of directors to the LSC. Former LSC insiders, once considered by attorneys in the field as "Washington" or "LSC bureaucrats," were now the heroes of a government in exile. The real enemies were now in power, routinely passing regulations limiting what they saw as the worst abuses of legal services (i.e., class actions, suing governments, representing illegal aliens or farm workers, organizing

41. See id.
42. What is equally troubling is the extent to which each of the individual clients outlined in these stories is described as helpless without legal assistance; indeed, the extent to which the individual clients were mythologized as helpless was most likely consistent with the legal strategies employed to assist them, thereby strengthening the isolation and dependence of the clients rather than using the legal advocacy as a means of empowering them. For an analysis of this tension between traditional advocacy and empowerment, see, e.g., Anthony Alfieri, The Antinomies of Poverty Law and a Theory of Dialogic Empowerment, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 673-674 (1987/88); Richard D. Marsico, Working for Social Change and Preserving Client Autonomy: Is There a Role for AFacilitative Lawyering?, 1 CLINICAL L. REV. 639, 646 (1995).
43. This decision to publicly sublimate an activist agenda in favor of a "service to the worthy poor" face has internal repercussions as well. So much effort goes into creating the public image that, over time, the imagery becomes reality both internally as well as externally.
and lobbying legal services programs).\footnote{See Legal Services Corporation Act, Pub. L. 93-355, 88 Stat. 378 (1974), (codified as amended 42 U.S.C. § 2996); Houseman, \textit{Political Lessons, supra} note 19, at 1680-91 (discussing consequences of legislative actions).} With a twenty-five percent reduction in federal funding (more in some cases, due to the impact of the cut in the Social Services Block Grant and other funds originating with the federal government), programs faced retrenchment. Staff size shrank. Neighborhood offices were closed.\footnote{Id.} In a move toward efficiency, programs turned to increased specialization, causing greater attorney isolation and separation from the client community.

In late 1981, the National Legal Aid and Defenders Association ("NLADA") sponsored a conference to deal with the Reagan assault on legal services and the resulting retrenchment issues. Legal services offices, which never had the luxury of meeting the legal needs of their communities, were forced to determine how to meet the same needs with fewer resources. And they had to do this with completely demoralized staff.

It is impossible to prove empirically what effect retrenchment had on Houseman's five elements. Anecdotally, however, a common theme at the 1981 NLADA conference was a restructuring of priorities, with emergencies placed first.\footnote{Robert A. Solomon, one of the authors of this article, attended this conference as the incoming Executive Director of New Haven Legal Assistance Association.} Many legal services workers would not accept serving fewer clients facing eviction, benefits termination or domestic violence. While some programs experimented with pro-se representation and community education, involvement in the client community declined and, in many instances, disappeared. "Emergencies," which had been the bulk of legal services representation, now occupied legal services offices full time. While priority lists looked impressive, many offices never moved beyond the top of the list. The great majority of clients went unrepresented.

Although LSC staff did not engage in law reform advocacy generally, with the future of LSC in doubt, clients were mobilized, often with great effect, to "Save Legal Services."\footnote{"Save Legal Services" was an organized effort and included support from local programs, NLADA, the ABA and unions.} This legislative advocacy was focused on securing more funds for the legal services programs at the expense of lobbying efforts on other issues directly affecting clients.
D. The 104th Congress's Assault on Legal Services

With the election of President Clinton came a brief glimmer of hope. While the first two Clinton budgets increased LSC funding, the Republican Congressional landslide of 1994 reversed this momentum and brought swift and massive changes to LSC.

Total funding to the Corporation was reduced by almost thirty-three percent to $278 million. The remaining funding was tied to new, wide-ranging and substantive restrictions on staff activity. The legislation poisoned the entire funding well of organizations receiving any LSC funds by imposing the restrictions on all work performed by such organizations, regardless of the funding source. Unlike in the past, LSC recipients could no longer raise non-LSC funds to perform otherwise restricted activities.

In the face of these changes, programs throughout the country formulated different responses. Some, like the Legal Aid Society of New York, the nation's largest public interest law firm, declined to accept any LSC funding, thereby relieving themselves of LSC restrictions. Others, like the legal services networks in Connecticut and Pennsylvania, devised new corporate structures to separate restricted from non-restricted activities. But a number of programs have adhered to the new restrictions. For many programs, the restrictions simply did not require much change in their services, which speaks volumes about the extent to which LSC-funded offices were engaged in "political" or "unpopular" work.

Funding cuts have resulted in further retrenchment during the past two years. Alan Houseman reports that LSC funding was cut by thirty percent. Staff size was reduced by 12.9% and 12.7% of local offices were closed. Thus, due to reductions in staff and the

48. See Jost, supra note 5, at 22.
49. See id.
50. See John A. Dooley & Alan Houseman, Legal Services History 25 (1984); see also Symposium, The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions, 25 Fordham Urb. L.J. 279, 287 (discussing reaction to the restrictions imposed by Congress by various legal services offices.).
51. These structures appear cumbersome at best, with increased administrative costs and an isolation of services and staff.
52. See Alan W. Houseman & Linda E. Perle, What Still Can Be Done: Representation of Clients by LSC Recipients, Report of the Center for Law and Social Policy (Dec. 2, 1997) (reporting that "[o]ver 95% of the work done in legal services in 1995 can continue in 1997 and over 98% of the cases brought to court in 1995 could be brought in 1997").
53. See Alan W. Houseman, Can Legal Services Achieve Equal Justice, Materials for the First Annual Arthur Lyman Colloquium, Yale Law School (Mar. 5-6, 1998) Yale L. & Pol'y Rev. (forthcoming). It is instructive that both New Haven Legal
new limits on the substantive work such staff can perform, programs are retreating from the community and moving more completely toward the individualized "legal aid" model of representation.

II. Critique of the Service Model of Representation

After the initial funding cuts in legal services programs in the early 1980s, many programs engaged in a conscious retrenchment. They withdrew from the community, both physically and politically. This withdrawal was marked by an explicit return to the service model of delivery; the same model which had been denigrated as a "band-aid" approach in the 1960s.  

Recent LSC funding cuts, substantive restrictions, and sweeping changes in the nation's welfare laws have contributed to a sense of crisis in legal services. We believe, however, that the emphasis on individualized services and the withdrawal from the community-based models present as great a challenge to legal service's programs continued vitality and relevance. In the face of this crisis, legal services programs should move toward a community-based delivery system. Because the traditional model has both practical and political shortcomings, we advocate a movement away from the service delivery model. This change will bring LSC back to its original goal of a community-oriented approach to the provision of legal services. Such programs will better serve their communities and become, once again, a positive force for structural change.

What follows is (1) an analysis of the service delivery model and (2) some of what we and others have seen are the practical and political shortcomings of such an approach.

A. The Service Model and the Assumptions That Justify It

Service model defenders presume that its implementation will result in high quality services in discrete areas (i.e., those individuals served will avoid significant harm through legal intervention). We believe this presumption is exaggerated. While legal services programs provide valuable services, benefits from a service model are less than generally reported. Other models could provide similar results, but with greater lasting value. Also, a different model

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Assistance and MFY in New York have closed all of their neighborhood offices, centralizing their respective programs in single, "downtown" offices.

54. See Diller, supra note 13.

55. See infra Part. IV.D.
The core assumption of the service model is that individual clients with discrete legal problems will receive formal representation by an attorney or paraprofessional. Over the course of the representation, the staff member meets with the client, identifies and assesses the problem, plots the strategy that will be employed, drafts documents and negotiates orally and in writing. If necessary, she appears in court or in an administrative proceeding on behalf of her client. Finally, the advocate prevails, either through formal or informal dispute resolution. The problem is resolved; disaster is averted. Resolution may include obtaining or maintaining welfare benefits, reinstating tenancy or obtaining child support. The client has been served and the staff member moves on to serve another client. The result is significant (in many cases, critical) for those clients who actually receive this idealized service.

Even accepting, as legal services advocates do, that serving a small minority of eligible clients justifies implementation of the service model, the defense of the model still hinges on several assumptions: (i) that clients face discrete legal issues which are subject to the type of individual client representation offered; (ii) that clients have the wherewithal to approach legal services offices with their problems at the right procedural moment in their case; (iii) that the legal services office has adequate staff to handle such problems; and (iv) that the problem is susceptible to resolution.

If any of these assumptions fail, the model fails, because the assumptions are mutually interdependent. If the breadth or quality of the legal problem does not lend itself to individual client representation, or clients fail to present their problems to legal services offices in a timely manner, or staff is unavailable or unwilling or incapable of addressing the problem, then the services actually available to clients lose their significance. The service model, therefore, provides little or nothing to the large majority of eligible clients.

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56. The dynamic can result in a particular client seeking assistance either too early or too late, depending on the type of legal problem the office identifies as being susceptible to representation. For example, in landlord-tenant litigation, an office may make a decision that (1) it will not screen cases for intake if a tenant has not received an eviction complaint from her landlord and (2) it will not accept a case if the tenant has already filed a pro se answer in the eviction proceeding, thus providing the potential client with a very narrow window in which her case may even be considered for representation.

clients in need of legal services. This fact is borne out by statistics showing that legal services offices fail to address a significant number of the legal issues poor people face.58

Legal services programs cannot serve the entire eligible client pool. The model assumes, however, that those cases that are accepted reflect the primary needs of low-income communities. We believe this assumption is incorrect. Members of poor communities face extreme adversity, including environmental degradation, joblessness, a lack of marketable skills, poor education, political alienation and pervasive discrimination.59 Many are unable to meet even their most basic needs without extensive governmental intervention. Despite these factors, legal services providers have chosen to address only those limited types of cases that fit the service model. The range of cases accepted is based on one or more of the following: staff skills, preferences and availability; funders' preferences; and whether the client is the first or the fifth case of that type that the office has been asked to handle that week. This model does not address the complex needs of the community. Rather, representation is limited to a narrow range of specialties, usually landlord-tenant disputes (offering exclusively tenant-side representation), denial of government benefits, child custody cases, and restraining orders in domestic violence cases. Even within these different areas of representation, the attorney's specialty drives the services provided. Lawyers decide which cases they believe fit the program's priorities. These decisions are made usually unilaterally with little or no community involvement. As a practical matter, "lawyer preference" and "high priority" become synonymous.60 As Gerald Lopez states, activist lawyers equate "what

58. See Dooley & Houseman, supra note 50, at 5.
60. Additionally, there is the pressure of accepting the hardship cases that may appear at the office door. Recognizing what is described as "the visceral urge to respond to present crises," one commentator suggests that two ways to improve the ability of legal services attorneys to engage in a more structural approach to a community's legal problems would be (1) to remove the decisions of what cases to accept or reject from "front-line attorneys," thereby minimizing the psychological strain of having to reject clients with pressing, immediate needs when a more efficient approach would require devotion of staff time to structural issues, and (2) to "explore the prospect of representing groups more often" because in such representation, "the rescue mission is at least diffused, and the [structural, long-term approach to client problems] may be more attainable." Paul R. Tremblay, Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy, 43 HASTINGS L.J. 947, 969-970 (1992).
they already [do] best (or most often) with what would most help
the community.\textsuperscript{61}

Even a client with a problem that fits this model may not receive
assistance. Legal services programs and the American Bar Associ-
ation report the chronic inability of programs to meet all the legal
needs of poor communities.\textsuperscript{62} In places like New York City,
roughly one in ten tenants in housing court has attorney represen-
tation, a figure that includes wealthy tenants as well as poor. It is
thus more likely than not that a potential client will go unrepres-
ented, even where her legal problem falls within the range of cases
the office handles.\textsuperscript{63}

In this sense, the service model operates like a lottery in which a
minority of eligible clients receive valuable service. The majority
of clients are forced to deal with eviction, loss of benefits, domestic
violence and custody disputes without the benefit of legal services,
not to mention the whole host of other needs that go ignored.

Proponents of the service model argue that the service model is
superior to others because too many emergency needs will go un-
met if other models are implemented. Yet, as we can clearly see,
far too many emergencies slip through the gaping holes in the de-
livery system and a whole range of issues go unaddressed, even
with implementation of the service model. The service model can-
not meet its own aspirations. Such aspirations, therefore, do not
justify employing this model over other approaches.

\textbf{B. The Practical and Political Effects of the Increased
Emphasis on A Service Delivery Model}

\textit{1. Practical Effects}

Faced with dwindling resources, many programs have increased
subject matter specialization in an effort to achieve more efficiency.
After years of implementing the service model, staff members have
become quite skilled in several substantive areas of law. Their
work has led to significant changes in the way that government and
private actors treat the poor in these areas. These skills, however,
have been acquired at the cost of developing others. Community
input concerning subject matter priorities is limited. If, as we be-
lieve, poor communities require a broader range of skills than
those offered, the value of these specialized attorneys diminishes.

\textsuperscript{61} See \textit{Gerald Lopez, Rebellious Lawyering: One Chicano's Experience}

\textsuperscript{62} See David Barringer, \textit{Downsized Justice}, 82 A.B.A. J. 60, 64.

\textsuperscript{63} Id.
Legal services programs perpetuate the problem. Staff members are trained within a set model of traditional and increasingly arcane practice areas and methods. Burdensome caseloads curtail the possibility of more broad-based work. Clients with multiple problems are unlikely to have all of their problems addressed by a single attorney. For example, consider a defense to an eviction proceeding. Many legal services' attorneys have developed a specialized knowledge of the substance and procedure of eviction defense and provide exceptional representation in such cases. At the same time, their knowledge in other areas is limited. If a lawyer becomes aware of benefits problems, another attorney with benefits expertise will handle such matters. If the apartment has lead paint, a third attorney might handle a special education problem for a lead-poisoned child, provided the legal services program provides assistance with special education issues. Any personal injury problem will be referred to the private bar. If a community's primary housing problem is a need for quality, low-income housing, the legal services office should seek out potential developers of such housing. Instead, legal services' offices will likely maintain its anti-eviction practice, because representing tenants in eviction cases is work it has always done. Moreover, the nature of these eviction defenses will not change with changing vacancy rates or changing neighborhoods.

Another limitation of the service model can be seen in a legal services office's welfare practice. In many communities, with the advent of significant changes in the nation's welfare laws, large numbers of recipients will face termination of their benefits. With drastic reduction in staff size, legal services offices cannot possibly handle client demand. They must engage in extensive triage, either attempting to identify the worthiest cases, or worse, arbitrarily selecting a certain number of cases from the pool of individuals and families seeking assistance. Legal services programs instead could train lay advocates and law students to provide representation in benefits termination cases. Most offices, however, fail to train others to provide such representation. They opt instead in favor of providing staff representation for a few individuals, rather than some less perfect form of representation for many individuals.  

64. Non-legal services offices have successfully implemented high-volume models of representation using law students in administrative hearings, notably, the Unemployment Action Center (dealing with unemployment compensation hearings) and the Urban Justice Center (dealing with welfare fair hearings). See David Luban,
Physical and political withdrawal from the community creates a lawyer-driven system that often results in fewer clients served ultimately, both because of the narrowing of the subject matter of the representation and the breakdown of lines of communication between legal services programs and low-income communities. The commitment to the service delivery system and resulting retrenchment has other practical effects.

First, by closing community-based offices and consolidating staff into centralized space, program staffs become physically removed from the community. The effects of this consolidation can be minimized by community outreach. In practice, however, there are more than enough potential clients who come to the central offices. Unfortunately, only those clients who are aware of the program's existence and who survive the case selection and intake process will receive assistance. As a result, many needy families are forced to rely on word-of-mouth for information regarding the potential availability of representation and the scope of that representation.65

Second, programs misuse resources by allowing attorneys to represent clients at administrative hearings instead of assigning lower paid paralegals or volunteer students. This is a predictable result of over-specialization. Once an attorney's workload is limited to social security and welfare cases, the social security and welfare cases must fill that attorney's time. If the bulk of those cases require representation at administrative hearings, the attorney may need to attend those hearings to fill the workday, even though a paraprofessional or law student could serve in a meaningful capacity in this representation. Strict adherence to a lawyer-driven, service delivery model obligates that attorney to provide extensive, high quality legal services to a few, deserving clients, while many more equally deserving clients go completely unrepresented. Attorney time would be better spent training and supervising lay advocates.66

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65. Given subject matter specialization, staff within a single program may not even know the entire scope of representation provided by the office. It is thus highly likely that the word "on the street" concerning the availability of legal assistance will also be uninformed, thereby foreclosing the program's ability to meet the legal needs of those poor families that will never even seek assistance.

66. For a description of how an office can utilize staff to train lay advocates, see Jennifer Gordon, We Make The Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change 30 Harv. C.R.-C.L. L. Rev. 407 (1995).
Third, there is constant pressure to maintain quantity. Legal services lawyers face institutional pressure to accept cases which can be disposed of within manageable time limits. This emphasis mitigates against long-term community education or community development projects, the success of which cannot be easily quantified.67

Finally, even if programs perceive the need for new skills, they are slow to broaden services. Funding limitations impede staff development, sometimes overwhelming it completely. Priority setting tends to reflect funders' preferences, current staff skills, and staff willingness or unwillingness to learn new areas of law.

2. The Political Role of the Service Delivery Model

Emphasis on the service delivery model has significant political effects as well. The service model undermines the possibility of more broad-based and, at the same time, more efficient, collaboration between legal services programs and the communities they serve.68 Priorities are determined in a top-down, attorney-dominated process, instead of a bottom-up, community-oriented process. Retrenchment and withdrawal from the community increase the likelihood that staff will dictate the program priorities. Community needs are frequently disregarded or misinterpreted. The staff's ability to provide certain services becomes the driving reason for providing them, regardless of whether this approach is detrimental to the community-at-large.

Without significant community input into resource deployment and priorities, the services ultimately provided may actually result in some negative effects.

First, staff representation of certain individuals may perpetuate nuisances or otherwise impede the development of safer communities, e.g., the representation of drug dealing tenants, particularly in public housing.69

Second, focusing on representing discrete individuals may impede the development of coalitions to deal with common problems. Common problems remain undetected, in part, because legal services programs deal with individual manifestations of these problems separately. As Stephen Wexler pointed out almost thirty

67. See supra note 60 and accompanying text.
68. See, e.g., Lopez, supra note 61, at 10.
years ago, poor peoples' problems cannot be isolated from the rest of their lives.\footnote{See Wexler, supra note 57, at 1050.}

Third, legal services may impede the growth of community organizations by defining problems as deprivations of individual legal rights, as opposed to community problems susceptible to community solutions. This encourages people to turn to legal services offices for assistance instead of community-based groups, thereby foreclosing the possibility of truly community-based solutions.

The isolation of legal services offices raises another issue. People in poor communities have little, if any, positive interactions with the civil justice system. The State is a constant presence in peoples' lives. If that presence becomes overwhelming, an attorney might intervene. For instance, the court will appoint a lawyer if the state tries to remove children from the home. A lawyer might stop a welfare termination or delay an eviction. A lawyer might get a restraining order to prevent domestic abuse. As this demonstrates, under the service model, poor people only get lawyers to stop something bad from happening.

That is not true in the world of middle-class or wealthy people. Lawyers help clients buy houses, establish businesses, act proactively with government (zoning variances, SBA loans) and plan estates. Even litigation is different. Plaintiffs seeking to be made whole hope litigation will improve their current status. Poor people, at least under the service model, use litigation to maintain the status quo (e.g., to keep the benefits they already have).

Assume that the service model actually works. Assume that low-income individuals can appear at the door of the local legal services office, hand over their problem for a few months, and have it resolved. Even in this idealized scenario, what has the model accomplished? Proponents of the service delivery model see the service as an end in itself and ask: "What more could anyone ask of a legal services office?"

But what has the service model taught the client? Although some may argue that such an experience is empowering for the client, it is hard to see what power is acquired when a legal services office becomes just another in a long line of agencies that interact with low-income individuals. If one entity is incapable of fixing the problem, whether it is the local welfare office or public housing authority, low-income individuals move on to the next office until
the issue is resolved. 71 Under this model, legal services offices risk being perceived (or may already be perceived) as a social welfare agency, reminiscent in many ways of the old legal aid offices from which early legal services offices so carefully distanced themselves. Remember Houseman's five critical elements of legal services? What happened to representing the client community?

III. Towards a Model of Community-Based Legal Services

A. The Theory of Community

The origins of the word community come from the Latin communis or fellowship “implying the quality of a community of relations and feelings.” 72 This “sense of community” or “felt experience of belonging, connection, shared meanings or identity, of being in relation with fellow members” 73 is the “organizing concept for the psychological study of community.” 74 Before American society became as mobile as it is today, this sense of community was synonymous with a geographical location such as town or neighborhood. Much has been written about the delineation of community in these terms. 75 Today, we have other competing conceptions of community which include definition by work group, ethnic identity and sexual orientation. These competing conceptions of community do not diminish the importance of geographical definitions, particularly for poor urban neighborhoods. Since our focus is on a meaningful concept of community for the purpose of providing legal services, a geographical concept makes sense, recognizing that legal services programs generally define their client populations geographically.

71. Many legal services staff have had the unfortunate experience of being referred to as a “caseworker,” which shows the inability of at least some clients to differentiate between legal services programs and local welfare departments.
72. Godfrey T. Barrett-Lennard, Toward a Person-Centered Theory of Community, 32 J. of Humanistic Psychology 63 (Summer 1994).
73. Id. at 65.
75. See id.; see also Thomas M. Meenagan, Community Delineation: Alternative Methods and Problems, 56 Soc. & Soc. Res. 345 (Apr. 1972) (definition of community as geographical or not is essential to defining social research); Thomas J. Glynn, Neighborhood and Sense of Community, 14 J. of Community Psychol. 341 (Oct. 1986) (study looked at significance of neighborhood to community); Marc Fried, The Structure and Significance of Community Satisfaction, 7 Population and Env’t. 61 (Summer 1984) (study of relationship of residential community satisfaction to life satisfaction).
Research in the fields of psychology and sociology have linked this "sense of community" to positive characteristics for an individual. Thomas Glynn found a significant relationship between a sense of empowerment and community satisfaction.\(^76\) In a study of the relationship between numerous variables and life satisfaction, Marc Fried found that community satisfaction makes a significant contribution to life satisfaction, "even by comparison with such major variables as marital and work satisfaction" and that this finding is most striking at the lowest status level.\(^77\) David Chavis and J.R. Newbrough cite "fifty years of research in American social sciences" which shows a relationship between "the strength of a sense of community" and improved mental health, the quality of child rearing and parenting, neighborhood beautification, informal social control, crime prevention and even disease prevention.\(^78\)

The development of a sense of community within a neighborhood is arguably more important for groups of isolated, severely impoverished people. For example, welfare recipients living in public housing have limited access to alternative communities such as those available through the employment context. The current status of community in the public housing population is endangered by the high level of violence in the projects.\(^79\) The level of violence must be lowered to encourage community development. Tenants who feel safe are more likely to attend community meetings, visit friends, allow children to play outside with other children, and attend school functions. As Robert Bellah emphasizes: "Where social trust is limited and morale is blasted, one of the most urgent needs is a recovery of self-respect and a sense of agency that can come only from the participation that enables people to belong and contribute to the larger society."\(^80\)

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76. Glynn, supra note 75, at 350.
77. Fried, supra note 75, at 82.
78. Chavis & Newbrough, supra note 74, at 336.
79. See Stephen Schmitz, Three Strikes and You're Out: Academic Failure and the Children of Public Housing, 174 J. EDUC. 41, 42 (1992) (stating that "[a]t the family level, this same fear of violence and its manifested stress reactions foster the development of a stockaded mentality where families retreat from the outside environment to the safety of their own apartments").
In addition, institutions facilitate participation.\textsuperscript{81} Researchers Chavis and Newbrough emphasize the importance of institutions in the development of community:

Central to this process is the participation of community members in collective problem-solving. This often is accomplished through the strengthening of mediating structures such as the neighborhood, family, church, voluntary association, schools, and the workplace. The empowerment of people and groups through these structures leads to . . . the "competent community."\textsuperscript{82}

For example, an elected body of tenant leaders is a community-building institution for the public housing community. Outside groups, like legal services programs, can support the development of community by validating such institutions.

Thus, the development of a sense of community by public housing tenants can lead to other positive outcomes in the lives of the individual tenants. In fact, a sense of community may be a necessary first step to any meaningful amelioration of the problems facing this beleaguered population.

\textbf{B. Rights and Responsibilities: The Conflict between Communitarianism and Individual Rights}

If we accept the importance of community, we still must examine how to consider the needs of the community in relation to the rights of the individuals who comprise it. Most communitarian visions conflict with the liberal tradition in our country of emphasizing the rights of individuals.\textsuperscript{83} Communitarians believe that this tradition has led to an impoverishment of individuals as well as of society as a whole. Mary Ann Glendon notes that while there is little agreement about what deserves to be a right, many seem to feel that "if rights are good, more rights must be even better, and the more emphatically they are stated, the less likely it is that they will be watered down or taken away."\textsuperscript{84} Glendon argues that this

\textsuperscript{81} See, e.g., AMITAI ETZIONI, \textit{The Spirit of Community} 134-160 (1993) (finding that communities form around institutions such as schools, community policing stations, etc.).

\textsuperscript{82} See Chavis & Newbrough, \textit{supra} note 74, at 338.

\textsuperscript{83} There is also debate surrounding when and if community played a more important role in American life (e.g., several communitarian visions are nostalgic for a previous era). See ROBERT BOOTH FOWLER, \textit{The Dance with Community} 23-37 (1991); BELLAH ET. AL., \textit{supra} note 80, at 27-51. Exploration of this issue is outside the scope of this paper.

\textsuperscript{84} MARY ANN GLENDON, \textit{Rights Talk} 16 (1991).
“rights talk . . . promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.”

Critics of communitarianism, like the ACLU’s Ira Glasser, feel that “communitarianism really means majoritarianism. The tendency is to make constitutional rights responsible for the failure to solve social problems.”

One way to explore this issue is to examine the impact of individual rights strategies on the social and economic struggles of African-Americans. The civil rights movement emphasized individual rights. There is no question that those efforts resulted in important victories for African-Americans. Yet, as John Calmore points out, “[the civil rights movement] was essentially demand or protest focused, rather than program focused. While the reforms sought were radical in their call for inclusion of blacks in the American dream, the movement was not protesting much against the ‘system’ as against being ‘left out of it.’”

The movement’s emphasis on ending segregation made it difficult to simultaneously support the development of the black “community,” in a sense blurring “the distinction between a compulsory ghetto and a voluntary community.” To move beyond the limitations of the strategies used in the civil rights movement, Calmore argues, a focus on “rights” must be replaced by one which improves “group conditions.”

Other observers point to the questionable efficacy of the traditional (individual rights focused) strategies employed by legal services lawyers for meeting the needs of clients of color:

85. Id. at 14.
86. See ETZIONI, SPIRIT, supra note 81, at 49.
88. Id. at 223.
89. See id. at 236; see also Adeno Addis, Individualism, Communitarianism, and the Rights of Ethnic Minorities, 67 NOTRE DAME L. REV. 615, passim (suggesting that ethnic rights are only considered in individualistic terms, groups are seen as collections of individuals, which does not allow minorities to be seen as anything except “other” in the dominant majority society).
90. There are those who, in response to Critical Legal Studies’ call to discard rights, see the language of rights as critical to American blacks. Patricia J. Williams has written that, despite the fact that only some, and not most, blacks have benefited from what is promised by an emphasis on rights, and that “the constitutional foreground of rights was shaped by whites, parceled out to blacks in pieces, rights are empowering and, in some senses, defining for blacks,” PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 146-165 (1991). See also Richard Delgado, The Ethereal Scholar: Does Critical Legal Studies have what Minorities Want?, 22 HARV.
Despite hard work by legal services advocates, the plight of poor clients is as bad as or worse now than at any time during the twenty-five years that legal services programs have been in existence. Although few in legal services will acknowledge it there has long been suspicion among legal services clients and advocates of color that many non-minority members of the legal services community, especially those in legal services leadership, have gained self-esteem by looking down upon their poor clients of color. Other motivations may exist as well in the personal and professional biases of those who control legal services. Their biases are reflected in embedded advocacy strategies that fail to address emerging issues and clients' hunger for empowerment and self-determination.\textsuperscript{91}

The adversarial system itself encourages a focus on individual rights by requiring the zealous representation of particular clients. David Luban suggests that the system allows behavior which "excuses lawyers from common moral obligations to non-clients."\textsuperscript{92} In the process, lawyers focus their professional concern on their client's interests not the interests of justice.\textsuperscript{93} While Luban raises ethical issues, the basic premise is virtually identical to Houseman's goal of representing the client community.\textsuperscript{94} Luban advocates for "politically motivated" lawyers who responsibly "represent the political aims of [their] entire client constituency, even at the price of wronging individual clients."\textsuperscript{95}

Critics of communitarianism fear the oppression of individuals by the collective. There is no doubt that "'communitarianism' has a 'dark side.'"\textsuperscript{96} However, communitarians do not advocate a com-

\begin{itemize}
  \item \textsuperscript{91} See Paul E. Lee & Mary M. Lee, \textit{Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor}, 27 Clearinghouse Rev. 311, 312 (Special Issue 1993).
  \item \textsuperscript{92} Luban, supra note 64, at 20.
  \item \textsuperscript{93} See id.
  \item \textsuperscript{94} See Houseman, \textit{Political Lessons}, supra note 19, at 1669.
  \item \textsuperscript{95} Luban, supra note 64, at 25. This quote seems to violate rules of professional conduct. \textit{See} Model Rules of Professional Conduct Rule 1.2(a) ("a lawyer shall abide by a client's decisions concerning the objectives of representation."); Model Rules of Professional Conduct Rule 1.7(a) (stating that "a lawyer shall not represent a client if the representation of that client will be directly adverse to another client"). In his book, Luban suggests that the client-centered nature of the bar's ethical codes might be insufficiently "sensitive to the unique features of political law practice." Luban, supra note 64, at 321.
  \item \textsuperscript{96} See Kevin J. Worthen, \textit{The Role of Local Governments in Striking the Proper Balance Between Individualism and Communitarianism: Lessons for and from Americans}, 1993 BYU L. Rev. 475, 476 (1993).
\end{itemize}
plete abandonment of rights. They search for a balance between rights and responsibilities which, in today’s American society, requires a de-emphasis on rights. 97 What will keep the moral views of the community from isolating or victimizing a minority? Responsive Communitarians appeal to “higher-order values” that no community has a right to violate. 98 Together with the Bill of Rights, these over-arching guides will keep communities from making demands which are repugnant. 99 Michael Walzer provides a vision of community that rejects domination (or tyranny) by recognizing differences. 100 This regime of “complex equality” as he calls it “establishes a set of relationships such that no citizen’s standing in one sphere can be undercut by his standing in another.” This would seem to require a particular value system, one which recognizes that “the principles of justice are themselves pluralistic in form . . . ” 101 The question, finally, is an empirical one.

Can a tolerant community be maintained which encourages responsibility and moral behavior by emphasizing the collective without oppressing individuals? This question needs to be explored. But even in the short run, understanding that there are risks to validating community needs over absolute individual rights should not require a complete rejection of communitarianism. Amitai Etzioni suggests that “just as we do not avoid swimming because some people drown, we should not hesitate to raise our moral voice.” 102

Critics argue that traditional individual rights strategies have failed to meet the complex needs of legal services client populations. Gerald Lopez challenges the inherently conservative legal work performed on behalf of the poor that emphasizes asserting legal rights through litigation and minimizes the influence of the client. Lopez promotes a collaborative method of lawyering, which he calls “rebellious lawyering,” that minimizes the subordination of clients by lawyers and promotes client participation in the strategic, decision-making process. Lopez argues that lawyers and their clients and the client communities are partners. Some legal services providers have recognized the limitations of an exclusive focus on

98. Id. at 37.
99. Id. at 53.
101. Id. at 5-6.
102. See Etzioni, Rights and the Common Good, supra note 97, at 53.
individual representation and have branched out into community work.\textsuperscript{103}

In addition, Ann Southworth, in her review of Lopez' book suggests that his focus primarily on community organizing and public education ignores other ways that lawyers can use their skills to empower communities. "Lopez neglects the potential for lawyers to play other distinctive roles, particularly as general counsel and as providers of transactional services to community organizations and small businesses."\textsuperscript{104} She then describes the preliminary results of her interviews of seventy Chicago lawyers working on urban poverty issues which reveals that many are branching out beyond traditional individual rights, litigation strategies.\textsuperscript{105} Many legal services providers, however, resist the adoption of alternatives to individual rights strategies.\textsuperscript{106}

\textbf{C. Poverty and Communities}

The growing recognition of the need for community-based strategies could not come at a better time for poor communities. The changed welfare landscape places new stresses on poor communi-

\textsuperscript{103} See Lopez, supra note 61, at 231 (recognizing that attorneys for subordinated communities are regularly turning to more constructive, long-term development work as opposed to relying solely on litigation-based model of representation); see, e.g., Ann Southworth, Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice, 1996 Wis. L. Rev. 1121 (1996) (describing role of civil rights attorneys in planning work with community groups and individual entrepreneurs as possibly "reflect[ing] a shift in lawyers' roles in the civil rights movement away from rights creation and enforcement and toward counseling organizations and structuring arrangement for future projects"). Southworth also offers reasons why we might expect lawyers who perform planning work for community organizations and minority entrepreneurs generally to help in efforts to mobilize poor communities rather than inhibit such processes. See id. This trend is also marked by the creation of "Community Economic Development clinics" in several law schools, which are a product of both student interest and community need. See Peter Pitegoff, New Approaches to Poverty Law, Teaching and Practice: Law Schools in Housing and Community Development, 4 B.U. Pub. Int. L.J. 275 (1995) (describing the work of the SUNY-Buffalo, Seton Hall and Yale community and economic development clinics).


\textsuperscript{105} See id. at 231.

\textsuperscript{106} See Sol Stern, The Legal Aid Follies, City J., at 22 (Autumn 1995) (suggesting Legal Aid of New York reaffirmed a continuation of existing strategies when it hired a new Executive Director). "The ultimate goal of legal services for the poor ought to be to help poor people escape poverty." Id. Instead, Legal Aid has dedicated itself to maintaining a permanent victim class. In the process, it has undermined the very qualities that over the generations have helped poor people rise: the work ethic, social responsibility, and respect for law and order. See id.
ties with new restrictions on receiving welfare, new models for its delivery, and deep cuts in eligibility. At the same time, an incredibly robust economy has failed to diminish the growing inequality between the wealthiest and poorest members of society and failed to stem the decline of the inner city, where much of the nation's poverty is concentrated. These factors have increased stress on low-income communities and created a growing demand for legal services.

We are just beginning to appreciate the extent to which poverty is a community problem. The keys to fighting such poverty lie in community-based approaches. In his recent book, *When Work Disappears*, William Julius Wilson asserts that several factors have had a mutually reinforcing and destructive effect on individuals in poor communities. The loss of capital, well-paying jobs and the middle class, the erosion of social networks and the decline of housing markets, further isolate these communities in their poverty and make it more difficult for their members to become free of poverty's hold. Despite the growing hardships facing poor communities, through neighborhood-based efforts many communities have found innovative ways to keep capital within their communities and restore stability to them. Supporting these efforts should be a high priority for legal service programs.

D. Towards a Community-Based Model

While a service model is centered around the representation of distinct, individual clients in discrete legal disputes, the community-based model, as its name suggests, starts from the fictional presupposition that the community itself is the client. The lawyer must learn from "the client" its goals, legal needs and aspirations. The legal resources of the office can and must be marshaled to respond to these needs and priorities as the client, that is, the community, sees fit.


108. Some legal services programs have been supporting such efforts for years. See Brian Glick & Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 N.Y.U. REV. OF L. & SOC. CHANGE 105 (1997) (describing the work of the economic development unit of Brooklyn Legal Services Corporation A in assisting local community development corporations).

109. This model requires a degree of retooling, training in new substantive areas, community outreach and a commitment to client based services. It does not require a fundamental restructuring of legal services organizations. For such a model, see Golden, *supra* note 69, at 43-51.
A community-based model strives to bring coherence to the array of services offered by legal services offices by matching community needs with the services provided. Under this model, not only will services more accurately reflect the needs of the community, but this model will also insure that a significant number of individual clients with “emergency” cases, the main justification for a service model, will have their crises managed. It will provide the critical, “bread-and-butter” services, albeit in different ways.

1. Community Mobilization and Priority Setting

The first steps in any attorney-client relationship are determining the client’s needs and aspirations, gauging the strengths and vulnerabilities of her situation, and developing the best strategy to advocate effectively on behalf of the client’s interests. Proponents of the “client-centered” approach to lawyering emphasize the “client voice,” in order to avoid the attorney’s domination and control of the client. Under the client-centered approach, the attorney must not allow professional status and expertise to replace the client’s goals or judgments. A critical collaboration between lawyer and ‘pro se lay advocate’ is necessary to fully realize the opportunity for development of a relationship which is truly empowering and which does not dehumanize or decontextualize the experience of the client.\(^\text{110}\)

Legal services programs should apply a client-centered approach to their relationships with the communities they serve. This requires the provider to hear, and perhaps even aid the development of the “community voice.” The community reveals its legal needs through this voice. It is impossible to hear the community voice without listening. It is impossible to listen to a community without a community presence. Most legal services offices have failed to develop a constructive relationship with the communities they serve. Therefore, they have failed to construct a law practice around the needs of that community.\(^\text{111}\) As a result, the services


\(^{112}\) Peter Edelman has outlined a wide range of issues facing poor communities. Edelman recognizes the challenge that these issues pose to those engaged in the struggles of these communities. Indeed, Edelman describes a comprehensive anti-poverty program as including the following elements: (1) structural economic policy to create jobs; (2) job creation targeted to give work experience; (3) low-income housing devel-
rendered are rarely in response to community demand. Legal services must learn to value community insight into problems. Appreciation for this insight by legal services providers is critical to developing a truly collaborative relationship with the community. A collaborative relationship is central to the community model we espouse.

Accordingly, legal services offices must train themselves to hear the voices in the communities they serve. This goes beyond asking a few prominent members of the bar and a token representative of a local church to serve on the office's board of directors. Rather, this requires developing relationships with community leaders from all sectors of society, including: representatives of block associations, schools, community development corporations and local businesses; as well as local elected officials, sympathetic government workers, local business, homeowners and leaders of tenant groups. Every community is different and will organize itself according to different physical, political and geographic fault lines. Members of different sides of the same street might self-identify with different neighborhoods, fall in different census tracts, or find themselves in different political subdivisions. Office staff must reach out to and try to understand how community residents relate to each other and solve problems.113

Once legitimate neighborhood-based institutions are identified, legal services staff should work with the representatives of those institutions. Together they should identify the issues that concern the members of those institutions, both as individuals and as a group. They should collaborate on developing strategies for addressing those issues. Most importantly, community priorities as identified by the members of those institutions should trump priorities set by legal services offices. If there is little confluence between the priorities of the community and those of the legal services office or if these two sets of priorities are fundamentally

opment; (4) health coverage; (5) child care and Head Start; (6) improvements in public education; (7) enforcement of anti-discrimination laws; (8) family support services; (9) substance abuse treatment; (10) law enforcement; (11) child support enforcement; (12) income support for those who cannot find work. See Edelman, Comprehensive Antipoverty Strategy, supra note 59, at 1734-35.

113. The Department of Justice, Office of Justice Programs has recognized the importance of community based strategies for dealing with crime and for promoting community development. The "Weed & Seed" program works with sites in 170 neighborhoods across the country. At these sites, community residents are implementing local strategies. These efforts would provide excellent partners for legal services offices.
opposed, extensive reordering of the office's priorities will be necessary.

This process is more difficult than serving those clients who appear at the office. It requires a great deal of patience, time and hard work. The benefits of this process are not as readily apparent as when an individual client's benefits are restored or her tenancy reinstated. The benefits promise, however, to be more fundamental and long lasting.

2. The Role of Community Institutions

Community institutions assist legal services offices in understanding and hearing the community voice. Legal services programs collaborations with community-based institutions will insure that community representatives speak on behalf of and embody the communities' needs and aspirations. At the same time, community institutions serve other, no less critical functions.

Community-based institutions reflect the needs of individuals to align themselves with like-minded individuals.114 This is particularly true for low-income communities.115 From a political perspective, the grassroots efforts of community organizations encourage democratic participation in those communities. They provide essential protagonists for fundamental change on behalf of low-income communities. From a community development perspective, community groups serve as engines of community development and provide essential community services.116

Additionally, grassroots advocacy organizations often provide services similar to those provided by legal services offices. For example, these organizations assist individuals in negotiations with landlords and attend fair hearings on behalf of their constituents. They also contact local service providers (even legal services offices) to ensure that their constituents' needs are being met.

Most importantly, institutions that truly reflect their community's needs prove that subordinated communities can become ac-

116. See Glick & Rossman, supra note 108; So Goes a Nation: Lawyers and Communities (Sight Effects 1997) (on file with the Fordham Urban Law Journal and attached to 25 FORDHAM URB. L.J. (1998)).
tive agents in their own betterment. It is our belief that only through such institutions is fundamental change possible.

These institutions serve as a bulwark of the civic fabric. Their absence contributes to the rapid descent of low-income neighborhoods from stable, working communities into volatile, fragmented areas. Accordingly, the importance of working with community institutions cannot be exaggerated.

3. Collaborations between Community Institutions and Legal Services Offices

Legal services offices and community institutions can collaborate in carrying out their collective missions. First, legal services offices can serve as “corporate counsel” to community institutions. This role includes handling incorporation, assisting in regular corporate and tax filings, and advising on licensing, contracting and leasing issues. Second, legal services offices can provide critical “backup” for advocacy efforts. Legal services staff are justifiably proud of their ability to get results from a single phone call to an adversary. Community advocates also engage in this type of advocacy every day. The credentials of legal services staff members may give them an edge in negotiations with government officials and private landlords. However, it is more likely that the threat of a lawsuit brings results. In a collaborative relationship, there is no reason why advocates from community institutions cannot benefit from the threat of litigation when adversaries are aware of the presence of legal services support for such groups. Community groups should remain the first “line” of advocacy, with legal services staff serving as powerful backup when necessary. Adversaries will recognize that community institutions have legal representation and, therefore, have the ability to pursue legal remedies if negotiations fail. When this occurs, community institutions gain real power.

Several commentators have argued strenuously that it is more important for subordinated clients to develop their own problem-solving capacity than for attorneys to engage in a litigation- and lawyer-driven campaign to deal with the problem. Moreover, a

117. See, e.g., Wilson, supra note 107.
118. See, e.g., Southworth, supra note 104.
119. See Wexler, supra note 57; Anthony Alfieri, The Antinomies of Poverty Law and a Theory of Dialogic Empowerment, supra note 42 at 704-710. For a further description of the critical role group representation can play in furthering client empowerment, see Luke W. Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 Ecology L.Q. 619, 663-667 (1992). In or-
relationship between the community and a legal services office that is defined by the community will help to develop that office’s capacity as a force in the community. At the same time, this reputation will also help build relationships with individuals with discrete legal problems.

Third, a community organization can serve as a plaintiff on behalf of its members in litigation affecting the community, with the local legal services office as counsel. This dynamic may prove challenging for legal services offices. As they learn to be more responsive to community needs, they will be asked to develop litigation from a community perspective. No longer will they be crafting theoretical test-case models and then trying to find plaintiffs to fit the contours of their lawsuits. Litigation will be community-based, not lawyer-driven.

Finally, decisions about what kinds of services to provide, and to whom to provide them, must be thoroughly integrated with the work of community institutions. Legal services offices can take referrals from and refer individuals to these institutions. They can conduct intake at regular times in the community at the offices of these community institutions. Through these collaborative efforts, each group will develop a deeper understanding of how the other works. Together they can identify common issues facing the clients they jointly assist and determine what community efforts are necessary to address these problems. For example, if certain types of “boilerplate” administrative hearings appear frequently, lay advocates and law students can be trained to represent individuals in high volume. If political mobilization is necessary, legal staff can brief the community representatives on the potential legal issues that will arise and arm them with “talking points” to respond to their opponents.

4. Emergency Cases

Through a community model, emergency cases still can be handled when they arise, although they will be handled differently. Aggressive community education and institution building will help avert some emergency situations due to the greater knowledge held within the community of member rights and responsibilities. One example of aggressive community advocacy shows positive ev-

order to combat the range of issues impacting upon subordinated communities, a more comprehensive, community-driven approach must be implemented. A successful model must take into account the opportunities for legal services programs to assist in the development of the community’s problem-solving capacities. See id.
idence that even caseload size counts of the service model can be matched by the community model.

The Community Law Offices of The Legal Aid Society of New York ("CLO") is a community-based legal services office located in East Harlem. Of its fifty staff members, six attorneys, five paralegals and one supervising attorney make up the Housing Development Unit ("HDU"). HDU represents tenant associations throughout Northern Manhattan. Like most legal services offices in New York City, CLO handles eviction defense cases for households eligible for Emergency Assistance to Families (EAF). Through this program, legal services providers are paid on a per case basis by the City of New York for representing this client population. This population, though significantly large in New York City, is not the sole demographic group in the City needing eviction defense representation. Unfortunately, however, because of the funding potential, most New York legal services offices, CLO included, serve an increased number of EAF-eligible clients to the detriment of other needy, though less "lucky," client groups.  

Like most legal services offices in New York City, CLO management decided that each staff attorney and supervising attorney would be required to represent a certain number of EAF cases. Although members of the HDU would not be required to handle a full complement of these cases due to their building-wide representation, they were still required to meet a reduced quota with their time not dedicated to group representation because of commitments to funding sources. For several years, members of HDU met their "quota" through individual client representation. HDU's members, believing that such individual representation diminished their ability to represent group clients, decided, in conjunction with CLO management, to attempt to meet their quota through their standard group practice, including aggressive outreach to the membership to insure that staff was fully aware of all EAF-eligible clients. By conducting their normal group outreach and accepting referrals from those groups, HDU's staff members are now able to represent individual clients and such representation then serves the ends of their group clients, while still meeting their individual client quota.

A full year and a half into this approach, the HDU has been able to meet its pre-determined quota of cases with almost no individual

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120. CLO has experienced significant cutbacks in funding due to State budget cuts and Legal Services Corporation program changes (The Legal Aid Society of New York does not accept LSC funding).
outreach. At the same time, however, the community has benefited from the ongoing group representation. The HDU has been able to work with the community to develop and expand tenant associations, to institute affirmative litigation and aggressive advocacy strategies on behalf of these groups to remedy housing code violations and environmental problems, to assert rent overcharge claims, and to undertake community education efforts. CLO's experience shows that legal services offices need to take a lesson from community-based policing. It does make a difference to be on the beat, in the community, trying to do something positive.

CONCLUSION

Recent funding cuts and restrictions imposed on legal services programs have created a sense of profound crisis among legal services staff. Most advocates blame this perceived crisis on restrictions of the programs' work and forced cutbacks in staff.

We agree that legal services programs face a crisis that threatens to undermine their legitimacy and relevance. We do not believe, however, that this crisis is caused solely by funding cuts or restrictions. Such problems are overshadowed by the programs' failure both to comprehend the full scope of challenges facing their client communities and to adapt services to the needs of those communities. The historical commitment to individualized, service-oriented work leaves legal services programs in danger of becoming obsolete and irrelevant. Even worse, in some cases, the lack of a community focus will align programs against efforts to bring about progressive community development.

The traditional LSC service model is ill-equipped to combat the range of issues affecting subordinated communities. The service model has failed to address the root causes of poverty or to play a significant role in the political, community-based struggles of poor communities. Stephen Wexler addresses this issue simply and eloquently:

Poverty will not be stopped by people who are not poor. If Poverty is stopped, it will be by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves . . .

... Traditional [poverty law practice] hurts poor people by isolating them from each other, and fails to meet their need for a lawyer by completely misunderstanding that need. Poor people
have few individual legal problems in the traditional sense; their problems are the product of poverty, and are common to all poor people. The lawyer for poor individuals is likely, whether he wins cases or not, to leave his clients precisely where he found them, except that they will have developed a dependency on his skills to smooth out the roughest spots in their lives . . . . He can be another hook on which poor people depend, or he can help the poor build something which rests upon themselves — something which cannot be taken away and which will not leave until all of them can leave.\textsuperscript{121}

Given the range of issues that affect client communities, we believe that many offices would find that their priorities differ from those identified by the communities they serve. While we prefer on-going representation of institutions and their individual members over short-term, stop-gap representation, the ultimate decision should be in the hands of the client-community.

Legal services programs must develop a comprehensive and tactical understanding of the role of the law and legal advocates in the process of social change. Only then can we expect legal services programs to operate as a significant force for such change.

\textsuperscript{121} Wexler, \textit{Practicing Law}, supra note 57, at 1053.
The Role of the Private Bar

William J. Dean*

Lawyering for poor communities in the twenty-first century must include a greater involvement by the private bar than at present. The private bar now does a significant amount of pro bono work, but not nearly enough.

The Administrative Board of the Courts, comprising the Chief Judge of the Court of Appeals and the four Presiding Justices, recently adopted a resolution exhorting lawyers in New York State to provide at least twenty hours of pro bono legal services each year for poor persons.1 The Administrative Board faces a formidable challenge in making its exhortation a reality, for a surprisingly small percentage of lawyers provide more than twenty hours of pro bono legal services each year, even at many of the large New York City firms with strong pro bono programs. Indeed, out of twenty-nine New York City law firms reporting in the most recent Pro Bono Survey of The American Lawyer, fifteen firms reported that less than a third of their attorneys provided twenty hours or more of pro bono service.2

On the other hand, twenty-eight New York City law firms reported in the most recent Volunteers of Legal Service ("VOLS") survey that they had contributed a total of 395,681 qualifying pro bono hours during 1997.3 Law firms accepting the VOLS pledge undertake to provide annually at least an average of thirty hours of qualifying pro bono work per attorney. On a national level, in an effort to meet the aspirational pro bono standard of the American Bar Association's Law Firm Pro Bono Challenge,4 135 of the nation's largest law firms provided almost 1.6 million hours in donated legal services to poor people and charitable organizations in 1995, the first year of the Challenge.5 Twenty-three percent of

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1. See William J. Dean, Action by Administrative Board of the Courts, N.Y. L.J., Nov. 7, 1997, at 3 (noting that "the resolution will be incorporated into the biennial attorney registration statement in the form of a notice").
2. See The AM Law 100, AM. LAW., July/August 1998, at 5.
4. See id.
5. See Meeting the Challenge: The First Status Report on the Pro Bono Activities of America's Major Law Firms, a 1997 publication of the Law Firm Pro Bono Project, a Project of the Pro Bono Institute and the ABA's Fund for Justice and Education Standing Committee on Lawyers' Public Service Responsibility.
the firms exceeded their Challenge goal of three or five percent of annual billable hours.\textsuperscript{6} An additional twenty-two percent of these firms either met their goal or came within 0.5 percent of doing so.\textsuperscript{7} A majority of firms, however, failed to meet their goal.\textsuperscript{8}

The conclusion to be drawn from these reports is that some lawyers do an impressive amount of pro bono work and a great many do none, or very little.

In remarks delivered to the American Bar Association several years ago, Associate Justice Sandra Day O'Connor of the United States Supreme Court described both the pride and shame of the private bar:

While lawyers have much we can be proud of, we also have a great deal to be ashamed of in terms of how we are responding to the needs of people who can't afford to pay our services. On the one hand, there is probably more innovative pro bono work being done right now than at any time in our history; on the other hand, there has probably never been a wider gulf between the need for legal services and the availability of legal services.\textsuperscript{9}

Far more lawyers should do pro bono work. There are many reasons why every lawyer should perform such work, the strongest being, it is our professional responsibility to do so. Robert A. Katzmann, editor of \textit{The Law Firm and the Public Good},\textsuperscript{10} expresses the point cogently. After noting that the state grants lawyers a monopoly on legal services and that unauthorized practice is forbidden, he writes:

\begin{quote}
[The very reason the state conferred such a monopoly was so that justice could best be served - a notion that surely means that even those unable to pay . . . can expect legal representation. A lawyer's duty to serve those unable to pay is thus not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system.\textsuperscript{11}
\end{quote}

These are some of the arguments we use at VOLS to encourage lawyers and law firms to undertake pro bono work. First, since pro

\begin{itemize}
\item \textsuperscript{6} See id.
\item \textsuperscript{7} See id.
\item \textsuperscript{8} See id.
\item \textsuperscript{9} Justice Sandra Day O'Connor, Pro Bono Work - Good News and Bad News, Remarks at the Pro Bono Awards Assembly Luncheon of the American Bar Association, Atlanta, Georgia (Aug. 12, 1991).
\item \textsuperscript{11} See id. at 7.
\end{itemize}
bono work does not exist in a vacuum, we try to put a human face on the people who need help. They are not from another planet. They live in our city. They are very poor. They need assistance on the most basic civil legal matters, like having a roof over their heads, receiving benefits to which they are entitled by law, keeping their families together and not being cheated in consumer transactions.

Second, we talk about the desperate storage of legal assistance for poor people. Each poverty law office, staffed by a handful of dedicated lawyers, is expected to serve many thousands of the poor. This is an impossible task. "The single most awful thing we do here," a legal services lawyer has told me, "is to turn eligible clients away." Funding cuts have resulted in even more people being turned away. Volunteer lawyers can never fill the gap, but we can help many more people than are now being helped.

Third, we discuss specific opportunities for pro bono work that results both in effective service to the poor and excellent training for lawyers.

Fourth, we talk about the wide range of pro bono opportunities available for litigators and non-litigators in firms, as well as for lawyers in corporation law departments and individual practitioners.

Fifth, we describe how pro bono work enriches the lives of lawyers. Lawyers who have undertaken pro bono work learn firsthand about the very real problems experienced by poor people and, as a result of this work, became far more involved with their city. This is good for poor people, the profession, and New York; the city benefits from the active participation of lawyers in its civic life. Some lawyers have found their pro bono cases to be among the most rewarding of their careers. U.S. Court of Appeals Judge Frank M. Coffin highlights the benefits from performing such work:

> Pro bono service emerges as a beacon of opportunity: opportunity to work one-on-one with human clients, to gather new experiences of interest to others . . . to generate new pride in legal work . . . [and for younger lawyers] the early assumption of greater responsibilities, thus stimulating confidence, the ability to organize time, and maturity.12

A law firm's pro bono program, in my view, should have these basic components:

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12. Id. at 174-75.
(1) Participation by All Lawyers. Every lawyer should do pro bono work, and every lawyer should have on his or her docket, at all times, at least one pro bono case. This includes partners. It is no secret that most pro bono work is done by associates. But the Code of Professional Responsibility does not apply just to young lawyers. It specifically states, "A lawyer has an obligation to render public interest and pro bono legal service." The participation of partners in pro bono work can only serve to encourage other lawyers at a firm to become involved. Leadership and personal example are the prerequisites to success in this undertaking.

(2) Pro Bono Projects for Litigators and Corporate Lawyers. Litigators tend to be the work-horses of law firm pro bono programs. Opportunities for corporate lawyers are often overlooked. Non-profit organizations serving the poor, for example, do not just need litigators. Real estate lawyers can help such organizations on property transactions, corporate lawyers on governance and structural issues, employment and labor lawyers on personnel issues, transactional lawyers on financial planning matters, and insurance lawyers on liability matters.

Corporate lawyers can assist microentrepreneurs, a group of clients who are poor, but have an entrepreneurial spirit and are engaged in job creation, on business-related legal issues. Corporate lawyers can also help in the direct representation of poor people on some litigation-related matters. In pro bono work, compartmentalization of legal skills is less rigid than in private practice. Corporate lawyers bring a useful background to pro bono work, including valuable negotiating skills. When supplemented by training in the particular subject area, non-litigators are able to provide representation at administrative hearings where the formal rules of evidence do not apply.

Benefit hearings, political asylum hearings, and school suspension hearings are only a few of the areas where corporate lawyers can provide excellent representation of poor people. Corporate lawyers also can be effective in negotiating settlements in matrimonial matters.

(3) Firm-Sponsored Pro Bono Programs. Some lawyers will develop pro bono projects on their own. These initiatives should be encouraged. But there is also a need to organize programs sponsored by the firm. These can take the form of a matching program where a law firm agrees to accept pro bono cases on a continuing

basis from the entity with which it has been matched. The entity may be a legal service office, a hospital or other non-profit organization.

There are many advantages to a matching arrangement. Pre-screened pro bono cases come to the law firm on a regular, continuing basis; the law firm and entity with which it is matched develop close and productive working relations; the firm develops areas of pro bono expertise and so can handle a large number of cases expeditiously.

In addition, lawyers at the firm work as a team on the project, sharing experience and information. Participating lawyers feel part of a collegial undertaking instead of doing pro bono work in isolation. An *esprit de corps* develops among lawyers that generates more volunteers. A law firm sees tangible results from its pro bono program, instead of dispersing its energies and efforts in many directions at once. Finally, pro bono projects that are identified as law firm undertakings encourage lawyers, who might otherwise be reluctant to initiate a pro bono matter on their own, to participate on a project in which the firm has a proprietary interest.

(4) The Opportunity to Work on “Small Cases” and Large Matters. To encourage participation by lawyers at firms, a pro bono program should offer opportunities for one-on-one representation of poor people as well as work on impact and class action cases. Both have merit. Each may appeal to different people.

Some lawyers want to get away from document preparation and desire direct contact with clients, working as family counsellors by helping individuals and families on “small matters” — small perhaps in the total scheme of things, but of enormous importance to the poor person.

Other lawyers want to work on “big cases.” This is especially welcome given the prohibition on Legal Service Corporation-funded poverty law programs from bringing class actions. The private bar has an important role to play in this area. The American College of Trial Lawyers, a national association of 5,000 members constituting many of the leading trial lawyers in the country, is providing an example of what can be done. The College has a pilot project underway in New York City where Fellows undertake major impact and class action cases on a pro bono basis.14 Fellows in sixteen states have formed committees for the purpose of emulating the New York pro bono model. Fellows in six other states and the

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District of Columbia are considering implementing the model as well.

(5) Firm Sponsorship of a Rotation Program. As a part of an overall pro bono effort, a law firm should institute a program pursuant to which the firm releases associates to work full-time for a four- to six-month period at a poverty law office on housing or other matters.

Five law firms in New York City sponsor rotation programs: Cleary, Gottlieb, Steen & Hamilton and Willkie, Farr & Gallagher both have three lawyers from the firm working full-time for four-month periods each year with MFY Legal Services in Manhattan. LeBoeuf, Lamb, Greene & MacRae and Kramer, Levin, Naftalis & Frankel have the same program at South Brooklyn Legal Services in downtown Brooklyn. Skadden, Arps, Slate, Meagher & Flom loan associates to the Community Law Offices of the Legal Aid Society and to Lawyers Alliance for New York. Cleary, Gottlieb has a similar arrangement with Lawyer’s Alliance. In Washington, D.C., Covington & Burling sends two teams of lawyers, paralegals, and secretaries to the city’s legal services program for six-month periods.

The rotation program is efficient and effective. An associate working at a legal services office acquires the necessary expertise and then can apply it to a large number of legal matters. In addition to serving poor people on a matter of utmost urgency - keeping a roof over their head - lawyers working in the program speak glowingly about their participation.

Since much of the work is troubleshooting, problem-solving, and negotiating, it provides an excellent opportunity for lawyers to be creative and become good negotiators and decision-makers. The associate on loan has a chance to have primary responsibility on the firing line for a full docket of cases and to deal with clients, witnesses and opposing counsel. This can include significant courtroom time, but more basically involves the sort of direct client counseling and decision-making responsibility that can powerfully assist professional development. The associates returning to the firm also become in-house mentors to other lawyers at the firm working on pro bono matters.

Poverty law offices are on the front line in the delivery of legal services to poor people. The rotation program is a truly beneficial contribution by a firm in providing pro bono legal assistance.

(6) Firm Sponsorship of a Fellowship Program. A number of law firms fund fellowships to enable lawyers to work in legal services
programs. In a national competition, Skadden, Arps, Slate, Meagher & Flom selects twenty-five fellows each year. Covington & Burling funds four annual fellowships for graduates of Washington, D.C. law schools to work as staff attorneys in the Neighborhood Legal Services Program. Wachtell, Lipton, Rosen & Katz funds the salary of a lawyer at MFY Legal Services.

Kirkland & Ellis funds the New York City Public Service Fellowships at Columbia Law School and New York University School of Law. This fellowship enables a graduating law student from each institution to work for a public interest organization in the city for a year. Winthrop, Stimson, Putnam & Roberts and White & Case each offer an incoming associate the opportunity to work for a year at a public interest organization before joining the firm. At Milbank, Tweed, Hadley & McCloy, incoming first year associates may participate in a two- or three-month pro bono internship. At Fried, Frank, Harris, Shriver & Jacobson, associates can work for two years at the firm and then for two years with the NAACP Legal Defense and Educational Fund or the Mexican American Legal Defense and Educational Fund. At Sullivan & Cromwell, an incoming associate works for a year at the firm exclusively on prisoner civil rights cases before joining the firm’s Litigation Group.

Firms around the country participate in the National Association for Public Interest Law Partner Fellowships Program, funded by the Open Society Institute. Fellowship programs have the great merit of adding lawyers to the very small staffs of underfunded legal services offices and public interest organizations, enabling these offices to help many more poor people.

(7) Providing Training and Support Services to Poverty Law Offices. Other ways for law firms to assist poverty law offices include providing litigation skills training for legal services lawyers; training support staff at these offices; providing technical assistance in computerization and library development; and donating equipment and furniture.

A law firm with the full participation by its lawyers in pro bono work, which makes a special effort to assist poverty law offices through sponsoring a rotation program and fellowship program, and offers to provide training and support services to poverty law offices, would be making an outstanding contribution to the community. The firm, and each one of its lawyers, would be doing their part to fulfill the splendid aspiration inscribed on the facade of the United States Supreme Court: “Equal Justice Under Law.”
IF THE SHOE DOESN'T FIT . . .
REFORMULATING REBELLIOUS
LAWYERING TO ENCOMPASS
COMMUNITY GROUP REPRESENTATION

Janine Sisak*

"If the shoe doesn't fit, must we change the foot?" [This adage] is an illuminating comment about social practice and public institutions, and a good reminder that disempowered people may march with their feet and remake the legal and political order that way.¹

Introduction

From the perspective of a third-year law student, the Symposium, Lawyering for Poor Communities in the Twenty-First Century,² was an inspiring event. The participants—many of whom have written countless law journal articles on "poverty law in cri-

* The Stein Scholars Program for Ethics and Public Interest Law provided me with the incredible opportunity to participate in this conference and publish in the symposium issue of the Fordham Urban Law Journal. My work with Brooklyn Legal Services Corporation A ("Brooklyn A") began in the Advanced Seminar on Public Interest Law, a course founded and required by the Stein Scholars Program. There, my fellow classmates and I worked with different practitioners in the public interest sector in developing conferences, initiatives, and written works that were meant to inspire innovation in providing legal services to poor communities. While one group began the organization of this Symposium, Lawyering for Poor Communities in the Twenty-First Century, our group was commissioned to conduct case studies on the exciting work of Brooklyn A. These case studies, contained in an unpublished work cited below, formed the springboard for this Article. Thus, I would like to thank Minna Jung, Francis Matthews, and Toure Samuels for their initial contribution to this project. I would also like to thank Marty Needelman, Paul Acinapura, Hillary Exter, Wayne Saitta, and Denis Berger of Brooklyn A for providing the inspiring stories that provide the substance for this Note. I would like to thank Professors Bruce Green, Russell Pearce, and Matthew Diller for their unflinching support and guidance throughout my years of law school. Finally, above all, I thank the Stein family for founding the Stein Scholars Program for Ethics and Public Interest Law. The Program has encouraged me to contribute in a meaningful way to the public interest community both within Fordham Law School and beyond. It has truly been a transformative experience for which I will always be grateful.

sis"—were positive, hopeful, and content in their consensus that poverty lawyering must, and in fact already does, adopt a community-based approach. Their message was clear: Poverty law can be revitalized if lawyers complement traditional legal services with community-based methods in an effort to develop more holistic responses to the problems of economically disadvantaged groups.4


4. See Houseman, supra note 3, at 1707:
Solving problems of individual and group clients will involve more than lawyers, law students, and paralegals. It will require utilizing skills of people from a variety of different disciplines and developing interdisciplinary and
This notion of community lawyering was the central theme of the Symposium and, as such, was the focus of many of the panel discussions. Because the panels consisted of both academics and practitioners—both legal and non-legal—the discussions went beyond theoretical models and created a multi-faceted picture of community lawyering in practice. This practical perspective was completed by the video, *So Goes a Nation*, which featured three public interest organizations that represent community lawyering at its best. Sharing real examples of community lawyering is crucial to the development of this complementary form of poverty lawyering.

This Article focuses on the work of one of the organizations featured in the video and further examines its place within the model of community-based lawyering. Part I describes the community-based model—or "rebellious lawyering"—by explaining its main components in relation to those of traditional poverty lawyering—or "regnant lawyering." Part I also explores what rebellious lawyering might look like in practice. Part II introduces the work of Brooklyn Legal Services Corporation A ("Brooklyn A"), expands upon the case study featured in the video, and thus further explores the lawyering involved in expanding of a community-based health care center. Part III identifies both common themes and inconsistencies between Brooklyn A's practice and the rebellious lawyering theory. It then seeks to reconcile any inconsistencies to firmly ground Brooklyn A's practice within the theoretical concept. This Article concludes that such reformulations are necessary to truly maximize the impact of newly developed solutions.

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holistic approaches to advocacy. Thus, problem solving should focus on the client's problems as defined by the client and look beyond narrow legal conceptions and approaches.

*Id.*


6. Gerald Lopez coined this term as a label for his version of progressive lawyering that requires lawyer to collaborate with both professionals and non-professionals in their communities in continually evaluating both legal and non-legal approaches to problems. See generally Gerald Lopez, *Rebellious Lawyering: One Chicano's Experience* (1992).

7. *Id.* Lopez juxtaposes his notion of rebellious lawyering against, what he terms, "regnant lawyering," which is the traditional conception of poverty lawyering that primarily involves direct client representation and class action litigation. *Id.* at ch. 1; see also infra Part I.A.
I. Rebellious Lawyering: Theory and Practice

Academics have recently claimed that poverty law is in crisis.\(^8\) While most agree that poverty lawyers are burdened by scarce resources,\(^9\) certain critics have suggested that the attorney-client relationship is the root of the problem.\(^10\) They have posited that poverty lawyering merely offers band-aid relief rather than an effective solution to the fundamental problem of poverty itself.\(^11\) Gerald Lopez has labeled this faulty approach "regnant lawyering" and has offered "rebellious lawyering" as an alternative.\(^12\) This part explores both the critique of the traditional model and the crux of the alternative model.

A. Poverty Law in Theoretical Crisis

Regnant lawyering is simply the standard conception of poverty lawyering. Although it is a client-centered approach, regnant lawyering brings lawsuits designed to obtain rights and institutionally-defined remedies for poor clients.\(^13\) The regnant lawyer translates client grievances into legal claims and uses the court system as a forum for redistributing power to subordinated groups.\(^14\)

According to its critics, regnant lawyering has a myriad of flaws. First, lawyers, with their legal expertise, have a tendency to dominate the attorney-client relationship and further subordinate the al-

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\(^8\) See supra note 3.

\(^9\) See, e.g., David Luban, Lawyers and Justice: An Ethical Study 241-42 (1996) (reporting the 25% drop in law offices funded by Legal Services); Paul R. Tremblay, Toward a Community-Based Ethic for Legal Services Practice, 37 UCLA L. Rev. 1101, 1103 (1990) (noting that scarcity of time, resources, funding, and political capital make poverty lawyering unique); Trubek, Worst of Times, supra note 3, at 1123 (describing how the Legal Services Corporation is beleaguered by funding cuts and stringent restrictions).

\(^10\) But see Matthew Diller, Poverty Lawyering in the Golden Age, 93 Mich. L. Rev. 1401, 1429-30 (1995) (suggesting a refocus on more powerful institutional practices of subordination rather than the attorney-client relationship which, realistically, is a means of obtaining material goals rather than a source of empowerment).

\(^11\) See, e.g., Trubek, Embedded Practices, supra note 3, at 416 (suggesting that the Legal Services Corporation receives criticism because its traditional individual representation approach is ineffective in improving the overall situation of poor people).


\(^14\) See White, To Learn and Teach, supra note 3, at 755.
ready subordinated. Lawyers are socialized and trained to see clients as powerless people who need lawyers to intervene and solve their problems.

Second, regnant lawyers spend all of their time litigating, which sometimes leads to short-term victories but rarely challenges underlying obstacles to social justice. Thus, regnant lawyering tends "to favor the present and identifiable over the future and unnamed." Third, regnant lawyers themselves doubt their ability to effect meaningful institutional change, yet fail to try new approaches. Ironically, they inadvertently bolster what they want to deconstruct—the status quo.

Certain academics also identify institutional defects in regnant lawyering and doubt whether courts can provide meaningful remedies and effectively redistribute power. They criticize individual representation for its routine treatment that creates dependency, isolates poor clients, and prevents the shared experience necessary for class-consciousness. They also doubt the efficacy of law re-

15. See Lopez, supra note 6, at 52-53 (suggesting that privilege, power, and special knowledge of the legal culture encourages lawyers to easily monopolize the attorney-client dialogue); Alfieri, Antinomies of Poverty Law, supra note 3, at 665; Tremblay, supra note 13, at 951.

16. See Lopez, supra note 6, at 25, 49 (blaming formal legal training for lawyers' propensity to "trivialize the practices through which clients already work to control their lives"); see also Tremblay, supra note 13, at 952, 953 (noting that dependency is difficult to resist because the subordination occurs in a benign context).

17. See Lopez, supra note 6, at 24; Tremblay, supra note 13, at 952 ("Long-term rewards are not only ignored, they are sacrificed, as energies are applied elsewhere . . . ."); see also White, To Learn and Teach, supra note 3, at 757 (suggesting that relying on litigation may lead social groups to "plead[] for permission to conform to the status quo"). Professor Diller is a bit more forgiving. He explains the institutional pressures that encourage reliance on short-term administrative strategies that are more defensive in nature. See Diller, supra note 10, at 1419. He notes that because most recent Supreme Court cases have reversed lower court judgments in favor of poor people, poverty lawyers structure lawsuits to secure victories on factual grounds and avoid establishing helpful precedents that invite Supreme Court review. See id. at 1421 & n.96.

18. Tremblay, supra note 13, at 950.

19. See Lopez, supra note 6, at 26; Tremblay, supra note 13, at 952.

20. Lopez, supra note 6, at 29 ("[T]he regnant idea of the lawyer for the subordinated helps undermine the very possibility for re-imagined social arrangements that lies at the heart of any serious effort to take on the status quo.").

21. See White, To Learn and Teach, supra note 3, at 756-57. Professor White explains both the practical and theoretical shortcomings of litigation in the poverty law context. First, she notes that courts have difficulty formulating effective remedies, especially when inadequate public funding is at issue. Id. at 756. Second, she suggests that the process of translating grievances into legal claims may co-opt mobilization. Id. at 757.

22. See Gary Bellow, Turning Solutions into Problems: The Legal Aid Experience, 34 NLADA BRIEFCASE 109 (1977); Alfieri, Antinomies of Poverty Law, supra note 3, at 684 ("The failure to address legal disputes contextually as individual manifestations
form, test-case litigation because it gives lawyers decision-making power on issues about which they have second-hand knowledge. Thus, clients argue, strategic litigation may be “ill-suited to the poverty law context,” which inherently involves sensitive issues of power and subordination.

B. Rebellious Lawyering—The Theoretical Solution

Instead, these academics offer an alternative model, “rebellious lawyering,” in which lawyers “ground their work in the lives of the community of the subordinated themselves.” Rebellious lawyering mobilizes, organizes, and empowers clients to formulate a collective response to issues poor people face. It demands cooperation and collaboration between clients, lawyers, and other lay professionals in an effort to overcome the oppression inherent in the poverty law context.

Instead of being a linear professional service, rebellious lawyering is a “collaborative communicative practice” or “dialogic empowerment.” Through an open attorney-client dialogue, lawyers can defy myths of “ingrained indigent isolation and passivity” by treating clients as experienced self-advocates who are capable of resisting and reversing subordinated status. Rebellious lawyers also can help initiate a broader community dialogue that enables clients to share similar experiences with each other and serves as a

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of class antagonisms inhibit client politicization and class consciousness, thus reinforcing dependence, isolation, passivity, and fragmentation in poor communities.”

23. See Alfieri, Antinomies of Poverty Law, supra note 3, at 688; see also Martha F. Davis, Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973, at 145 (1993) (noting that the failure of the test-case litigation strategy “mitigates against reliance on litigation as the sole focus of a broad effort to promote change”).

24. See Davis, supra note 23, at 143.

25. Id. (suggesting that the Welfare Rights Movement failed because strategic litigation tends to undermine grass-roots organizing that is crucial in any social movement).


27. Id. at 38; see also Alfieri, Antinomies of Poverty Law, supra note 3, at 695 (encouraging lawyers to connect with and share in the “daily cultural experiences of the poor”).

28. See Tremblay, supra note 13, at 948, 953.

29. Id. at 952; see supra notes 15-16 and accompanying text.

30. White, Collaborative Lawyering, supra note 3, at 158.

31. Alfieri, Antinomies of Poverty Law, supra note 3, Part III.

32. Id. at 699.

33. See Lopez, supra note 6, at 49.
precursor to class consciousness. In the final stage, this dialogue forms a basis for effective coalition-building that encourages community-driven strategies with both legal and non-legal components.

Such coalition-building creates a delicate group dynamic. Ultimately, the lawyer does not assume a leadership position. Instead, as a team player, she offers a unique perspective, but limits her input to analyzing the legal ramifications of any proposed strategy. Nonetheless, the rebellious lawyer is often well-positioned to serve as a facilitator to the conversational process. While she does not claim to be more politically savvy, she is able to set the tone for collective learning and moderate the critique of the immediate situation. Maintaining a fluid dynamic is crucial because it allows each party to bring fragments of “community know-how” to the effort, thus “enriching and extending the range of possible strategies and outcomes they might cooperatively pursue.” The resulting collaboration reflects a mutuality whereby each party always teaches, always learns.

C. Rebellious Lawyering in Practice

What does this new vision of lawyering look like? Several academics have shared their fieldwork to offer examples of poverty lawyers “seeking to realize collaborative aspirations in everyday in-

34. See Alfieri, Antinomies of Poverty Law, supra note 3, at 702; see also White, To Learn and Teach, supra note 3, at 761 (crediting the emergence of critical consciousness to a reflective deliberative process in which oppressed groups identify concrete problems and act to challenge them).

35. See Lopez, supra note 6, at 37-38; Alfieri, Antinomies of Poverty Law, supra note 3, at 705; White, To Learn and Teach, supra note 3, at 758.

36. See Alfieri, Antinomies of Poverty Law, supra note 3, at 706.

37. See Lopez, supra note 6, at 50 (recognizing that while the client can better assess financial or emotional factors, the lawyer is better suited for legal analysis); Alfieri, Antinomies of Poverty Law, supra note 3, at 709; White, To Learn and Teach, supra note 3, at 763.

38. See White, To Learn and Teach, supra note 3, at 762.

39. See id. at 763 (“Rather than manipulating the group to preserve her as authority, she tries to engage the group to displace her as authority, and to relocate the very concept, transformed, in their own process of conversation.”).

40. Lopez, supra note 6, at 51.

41. See id. at 53 (“[T]hey desire to challenge what each knows—how each gained it, what each believes about it, and how each shares and uses it.”). Lopez also notes that one important lesson may be that the law is not necessarily the best response to any particular problem. See id. at 56.
These experiences tell us that rebellious lawyering can take many forms. Consider the three organizations featured in the movie, *So Goes a Nation*, that premiered at the Symposium. The Workplace Project is a non-profit membership center where over 200,000 Latino immigrants on Long Island collectively fight exploitation on the job. Their work entails grassroots organizing, in the form of work stoppages to secure higher wages and litigation to challenge the more persistent unlawful employment practices or conditions. New York Lawyers for the Public Interest has used similar organizing activities to fight environmental injustice in the Red Hook part of Brooklyn. These lawyers build consensus and coalitions among diverse community groups, the culmination of which is a large lawsuit aimed at blocking the location of additional waste stations in that community.

Both of these organizations seem to fit the vision of rebellious lawyering or collaborative practice. They formulate alternative strategies by combining litigation with community organizing. They involve lay advocates and community members in fueling their campaign. Their strength lies in activism, whether in the form of a rally to raise awareness or a strike to force a pay raise. Although litigation serves an important role, the litigation is focused on achieving community-determined, long-term goals rather than short-term victories for individuals. Thus, the impact litiga-

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42. White, *Collaborative Lawyering*, supra note 3, at 159.

43. This is consistent with the alternative model, which dictates that lawyers detach themselves from one particular favored strategy. For an example of these various forms, see generally Trubek, *Embedded Practices*, supra note 3 (describing two non-profit and two social justice law firms that rely on different combinations of individual and law reform litigation, legislative lobbying, grass-roots organizing, and client education); White, *Collaborative Lawyering*, supra note 3, (describing a clinical project where students identified organizations ready for a collaborative practice and concluded that different types of organizations demand different services from lawyers).

44. See *So Goes a Nation*, supra note 5.

45. See id.

46. See generally Tremblay, supra note 9. In his article, Tremblay discards his allegiance to the client-centered model of rendering legal services to poor clients and advocates for rationing based on community norms. He suggests that lawyers should choose to serve many, even at the expense of some individual claims. See id. at 1131. This theory is a variation of the rebellious lawyering model. It is an attempt to cure the tendency for regnant lawyers to treat client in isolation instead of viewing their problems within a community context. See id. at 1132. Tremblay thus offers a similar reformulation of the attorney-client relationship that results in empowerment, participation, and dialogue. See id.
tion is empowering because it naturally evolves from community-determined priorities.\textsuperscript{47}

*So Goes a Nation* also featured a third organization, Brooklyn Legal Services Corporation A, as an example of community-based work.\textsuperscript{48} Brooklyn A staff attorneys offer legal expertise to help local community groups implement community economic development projects. Acting as "in-house counsel" for these local groups, Brooklyn A lawyers provide both transactional and litigation legal services in the areas of corporate, real estate, tax, and regulatory law. Their joint effort with the community groups has created tenant-owned and community-owned housing opportunities, new community centers, nursing homes, and expanded community-owned and controlled health care and child care facilities.\textsuperscript{49}

At first blush, the work of Brooklyn A seems to be yet another version of "rebellious lawyering." Brooklyn A requires lawyers to work with lay people in projects intended to empower the community. Although Brooklyn A lawyers consider their work progressive because they are constantly challenging the existing infrastructure and the misallocation of wealth, they recognize that their work does not replicate the prototypical "rebellious lawyering" exemplified by the work of the other two featured groups. Instead, Brooklyn A lawyers consider their work as rather traditional because they render mostly transactional legal services like private law firms render to corporate clients. In this sense, the work of Brooklyn A seems to part ways from the work of the Workplace Project or New York Lawyers for the Public Interest.

The next Part examines more closely the work of Brooklyn A to create a basis for further analysis of its approach to lawyering for poor communities. It focuses on the Brownsville Multi-Service Family Health Center ("BMS Family Health Center") that, with the help of Brooklyn A, dramatically expanded its physical facility and its capacity to serve the community. It then seeks to identify themes that are both consistent and inconsistent with the concept of "rebellious lawyering."

\textsuperscript{47} See Alfieri, *Antinomies of Poverty Law*, supra note 3, at 689 (noting that law reform is not antithetical to empowerment because, if narrowly tailored, it can activate political consciousness and community activism).
\textsuperscript{48} See *So Goes a Nation*, supra note 5.
\textsuperscript{49} See id.
II. Brooklyn Legal Services Corporation A

A. Background

In 1967, Brooklyn A was established to provide individual civil legal representation to the low-income residents of North and East Brooklyn, including the neighborhoods of Williamsburg, Greenpoint, Bushwick, Bedford-Stuyvesant, Oceanhill-Brownsville, East New York, Cypress Hills, Starrett City, and Canarsie.\(^{50}\) In the early 1970s, Brooklyn A began working closely with local community organizations to foster local revitalization.\(^{51}\) Currently, six out of thirty staff attorneys are dedicated to this community economic development work.

The initial impetus behind community economic development work in Brooklyn was twofold. First, because the early legal services ideology was that of community empowerment, the early legal services offices, including Brooklyn A, were housed in storefront, neighborhood locations which made legal services physically accessible to the community.\(^{52}\) Second, community groups were emerging in the early 1970s, parallel to the evolution of Brooklyn A.\(^{53}\) Indeed, some of the founders of these community groups were Brooklyn A lawyers. This activism was typical of the 1970s, as one former Brooklyn A lawyer explained: "It was a different era... Williamsburg was crawling with young lawyers trying to save the world."\(^{54}\)

At the time, Paul Acinapura, the current Deputy Project Director of Brooklyn A, was one such young lawyer. He started working with community-based organizations in 1973 when he graduated from law school. Because his clients wanted to implement concrete projects like establishing health care facilities and tenant-owned housing, Paul developed legal expertise in real estate, corporate, tax, and administrative law. Although his work


51. See Brooklyn Legal Services Corporation A: Partnership for Community & Economic Development, Current Projects (1995) (pamphlet on file with the author); see also Glick & Rossman, supra note 50, at 117.

52. See Interview with Paul J. Acinapura, Deputy Project Director, Brooklyn A Community Economic Development ("CED") Unit, at Fordham University School of Law, New York, NY (Feb. 1997).

53. See id.; see also Glick & Rossman, supra note 50, at 114-18 (describing the evolution of community activism in East Brooklyn).

54. See Interview with Lawrence McGaughey, former Brooklyn A Staff Attorney, conducted by Francis Matthews, at Southside United HDFC ("Los Sures"), Brooklyn, NY (April 8, 1997).
sometimes involves litigation, it has developed into work that is primarily transactional in nature. This aspect is a direct response to the needs of the community.\textsuperscript{55}

For more than twenty-five years, Brooklyn A has been a model for progressive, neighborhood-based advocacy.\textsuperscript{56} Its core premise is that fostering local economic stability will alleviate poverty.\textsuperscript{57} This is a delicate process that has two important components. First, the community identifies its needs and initiates concrete projects such as health care facilities, low-income housing units, or recreational centers.\textsuperscript{58} Second, the community retains control and ownership of these projects. Control gives the community power to direct the allocation of funds and the rendering of services. Ownership allows the community to reinvest incoming funds back into the community.\textsuperscript{59} Thus, these projects not only provide services to address the community need, they also create equity for the community. Owning equity leads to independence.

Today, Brooklyn A represents over ninety community groups in such endeavors.\textsuperscript{60} By providing a wide range of legal and strategic planning and analysis services, Brooklyn A acts as in-house counsel to these groups and helps them to implement their community-based projects.\textsuperscript{61} The following section further explores the implementation of one such project: the expansion of the BMS Family Health Center.

\textbf{B. The BMS Family Health Center\textsuperscript{62}}

Brownsville is a poor, predominately black and Latino neighborhood in Brooklyn, New York. Like other such neighborhoods, health care is often in high demand and short supply. In the early 1980s, the Brownsville Community Development Corporation, with the help of Paul Acinapura of Brooklyn A, created the BMS Family Health Center ("Center") as a community-based solution to

\textsuperscript{55} See Interview with Paul Acinapura conducted by Minna Jung at Brooklyn A, East New York, NY (Mar. 25, 1997) [hereinafter Acinapura Interview].
\textsuperscript{57} See Glick & Rossman, \textit{supra} note 50, at 107-108.
\textsuperscript{58} See id.
\textsuperscript{59} See id. at 108.
\textsuperscript{60} See Brooklyn Legal Services Corporation A, \textit{Dedicated to Equal Justice for Brooklyn Neighborhoods for Over 28 Years} (pamphlet on file with author).
\textsuperscript{61} See id.
\textsuperscript{62} This part is based on a case study contained in Glick & Rossman, \textit{supra} note 50, Part II.A.
this community problem. The Center is a freestanding, not-for-profit health care center, which provides comprehensive primary care, diagnostic, and treatment services to the members of Brownsville and other central and east Brooklyn communities.

In 1989, the Center realized the need to expand to meet the increasing demand for its services. Despite this need, it doubted whether any expansion was financially feasible because it lacked capital, fundraising capacity, and even an operating profit. Anticipating serious obstacles, the Center again collaborated with Paul Acinapura to devise a strategy.

After helping the Center locate a new site to house its facility, Paul used his lawyering skills to research funding options. His knowledge of New York public health law led him to a statute that allowed hospitals to secure tax-exempt bond financing from the state. Although the language of the statute in no way precluded not-for-profit community health centers, like Brownsville’s, from applying for the bonds, the statute had never been used by such centers. Because of this limited practice, the decision-makers at the New York State Department of Health and the bonding agency were reluctant to let the Center benefit from this statute. In response, Paul initiated a dialogue with the agency officials to persuade them to accept a broader interpretation of the statute which would include—as the statutory language permitted—not-for-profit community health centers. Aggressive negotiations ensued, in which Paul relentlessly presented statistics on local demographics, the unmet health care need, and financial projections. After a full year and a half of intense review, the Center finally secured a significant victory—the Department of Health allowed the Center to apply for the bonds with a certificate of need application describing its expansion effort. The Center ultimately qualified for the program and became the first community-based health care provider to secure such funding.

63. See id. at 124.
64. See id. at 125-26.
65. See id. at 128.
66. See Minna Jung et al., Brooklyn Legal Services Corporation A—Community Empowerment: Theory, Practice, and Results (unpublished manuscript on file with the author).
67. See Glick & Rossman, supra note 50, at 128-29.
68. See id. at 129. The State has since formed its own Primary Care Development Corporation to help community-based health care centers secure this tax-exempt bond financing.
After this funding was committed, Paul and the Center continued the expansion project. This was a lengthy process involving many highly technical legal matters. Over the next few years, Paul drafted and negotiated the architectural, construction, and various financing agreements, and, as house counsel, continued to represent the Center at the loan closing, the bond sale, and at meetings with state and local agencies and investment banks.69

In 1993, the BMS Family Health Center opened the doors to its new 28,000 square foot facility.70 The Center is now a full service community-controlled diagnostic and treatment center that provides comprehensive medical, dental, prenatal, AIDS, social work, and nutritional services to community residents.71 Its facility provides quality health care in more than 50,000 visits per year.72

C. Lawyering73

Paul considers his role as similar to that of a corporate lawyer. As with the traditional lawyer-client relationship, the goals of the client, here a group, drive the lawyering. For instance, when questioned about his negotiations with the Department of Health, Paul analogized his role to that of a corporate lawyer who would advocate on behalf of clients in front a state agency, which regulates private banking rather than public health.

On the other hand, Paul recognizes that representing community groups presents certain unique challenges. For example, he explains that negotiating with the State on behalf of low-income communities has political implications. Due to the demographics of this community, Brooklyn A often feel like their projects need to be better than everyone else's to gain the State's support. Racism may also play a part, as certain zip codes bring to mind communities of color.

Paul accepts such obstacles as part of his work. He truly immerses himself in the community and its agenda and advocates with community interests in mind. For this reason, his clients trust his sense of judgment and value his opinions. They appreciate his legal expertise—the skills to accomplish the legal tasks—and his

69. See id. at 129-30.
71. See id.
72. See id.
73. This section is based on Acinapura Interview, supra note 55, part of which is contained in Jung et al, supra note 66.
professional commitment—the promise to see a lengthy project to the end.

Equal participation and mutual learning characterize the relationship between Paul and his clients. Although the complex legal nature of community-based projects invites lawyer domination, each party tries to capitalize on the expertise of the other. While the client recognizes that Paul has the skills to navigate the legal terrain, Paul recognizes that the client is better situated to evaluate community goals. Despite this division of labor, the result is a collaborative effort. The community group defines the goals and identifies broad approaches, while Paul devises a legal strategy and then explains the entire transaction and its components in straightforward terms to allow for more community input. Thus, through this series of comprehensive planning, the end-product satisfies all parties.

According to Paul, this synergy demands a deep commitment from the lawyer to the goals and needs of local communities. In working with his clients, he often attends community board meetings and spends considerable time at the project site or his clients' offices. This outreach helps lawyers understand the operational reality of the project and develop a contextual understanding of the community's perspective. This groundwork is an essential part of an integrated, long-term planning process.

III. Is This Rebellious Lawyering?

On the surface, Brooklyn A lawyers seem to fit the broadest conception of the "rebellious lawyering" model. Through a collaboration with community leaders, they identify long-term goals and devise strategies to facilitate local ownership endeavors. Thus, they foster self-empowerment by grounding their work in the lives of their community.\(^74\)

Also in keeping with the model, Brooklyn A lawyers accept a supportive rather than domineering role.\(^75\) They follow the agenda set by the community groups and primarily serve to demystify legal technicalities.\(^76\) Also the attorney-client relationship is characterized by trust and mutual respect. Because Brooklyn A's lawyers are part of the community they serve, their goals rarely are differ-

\(^74\) See supra notes 26-29 and accompanying text.
\(^75\) See supra notes 36-41 and accompanying text.
\(^76\) See Lopez, supra note 6, at 57 (explaining that rebellious lawyers describe legal strategies in lay terms to make the information accessible to everyone).
ent from those of the community groups. This submergence in the community is an essential part of rebellious lawyering.\textsuperscript{77}

On the other hand, this form of community-based lawyering departs, albeit slightly, from the rebellious model. The differences do not seem to appear in the end result—which clearly is community empowerment—but in the nuances of the lawyering itself. For instance, the rebellious lawyering model envisions the empowerment originating in the attorney-client relationship or, more specifically, the attorney-client dialogue.\textsuperscript{78} While Brooklyn A lawyers do empower their clients by demystifying the law, they recognize that this client empowerment is only part of the whole process, a process that culminates in the project implementation, the true source of empowerment. Thus, the empowerment might not be as organic as the model presupposes. This notion of attorney-client dialogic empowerment assumes that all attorney-client relationships within the poverty law context present an opportunity for the lawyer to subordinate his client.\textsuperscript{79} Here, however, the client is not an individual; rather it is a community group, whose autonomy is less likely to be compromised by the will of the attorney.\textsuperscript{80} Furthermore, the leaders of these community groups are often sophisticated business people who frequently seek legal advice and are less likely to be overwhelmed by oftentimes intimidating legal expertise.\textsuperscript{81} Thus, because the relationship has less potential for attorney domination, it may fail to be the primary source of community empowerment.

\textsuperscript{77} See id. at 31 ("Professional lawyering fits within a larger image of social life, and ... rebellious [lawyering] takes its cue from what we all learn through our effort to get by and make things better.").

\textsuperscript{78} See Alfieri, Antinomies of Poverty Law, supra note 3, at 699 ("The reaching out of empowerment begins in the first moment of dialogue within the attorney-client relation."); see also supra notes 31-35 and accompanying text.

\textsuperscript{79} See Alfieri, Antinomies of Poverty Law, supra note 3, at 695 (contending that "[t]he attorney-client relation stands at the epicenter of th[e] marginalization [of the poor]"). \textit{But see} Diller, supra note 10, at 1429 (questioning the assumption that poverty law methodology is flawed).

\textsuperscript{80} For an excellent discussion of the ethical subtleties of representing groups in a public interest context, see Stephen Ellman, \textit{Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups}, 78 VA. L. REV 1103 (1992). Ellman posits that group representation protects individual autonomy because participation in a group is both an exercise of autonomy—the person chooses to be affiliated with a group—and a waiver of that autonomy—once in the group, the group makes collective decisions rather than individual ones. See id. at 1120.

\textsuperscript{81} See Southworth, supra note 3, at 1158 (contending that officers and directors of community groups are generally more sophisticated consumers of legal services than individual poor clients).
This, however, is not to say that the attorney-client relationship is not crucial in the process of empowerment. Rather, it only suggests that the actual empowerment may be grounded elsewhere, such as in the internal collective action of the community group. For example, while Paul is involved in the long-term strategizing of the project at hand, he admits that the group solely determines the goals of the project. As a lawyer, he is responsible for carrying out those goals in a client-centered way. Although he may participate in the empowerment process, he does so as an active member of that group, not in his capacity as a lawyer. 82

Second, Brooklyn A lawyers might de-emphasize that the attorney-client relationship fosters empowerment and instead credit the results of the attorney-client collaboration. 83 Here, the community empowerment assumes the form of institutional stability—health care facilities, recreational centers, tenant-owned housing. These projects represent ownership opportunities that create jobs and re-invest money into the community. Thus, this process of improving the community in a purely economic manner may be the true source of the empowerment.

Again, this is not to say that the lawyers are inconsequential to the empowerment process. 84 Indeed, “lawyers, legal institutions, and laws are significant factors in advancing the interests of [ ] clients and their institutional goals.” 85 The work of Brooklyn A shows just how significant lawyers can be in helping community groups navigate the legal landscape to realize their goals. It is important to note, however, that the rebellious lawyering model demands even more than accomplishing traditional tasks. Rebellious lawyers are expected to engage in non-traditional tasks—the most important of which is community organizing. 86 This represents yet another difference between Brooklyn A lawyering and rebellious

82. Paul notes, however, that it is often difficult, if not impossible, to distinguish between when he is acting as a member of the community or as a lawyer for the community. This point reinforces the notion that community-based lawyers are often submerged in the community to the extent that the interests of the community converge with the interests of the lawyers.

83. See Southworth, supra note 3, at 1152 (recognizing that community organizations are spearheading much needed “brick and mortar” projects that improve the quality of life for inner-city residents and inject a sense of hope).

84. See Southworth, supra note 12, at 220-22 (criticizing Lopez for failing to adequately explore ways in which lawyers can use traditional lawyering skills to help clients gain control).


86. See Lopez, supra note 6, at 73 (“[T] hose within the rebellious idea envision productive opportunities to investigate, plan . . . meetings, join together grievances, and practice story/argument strategies . . . .”).
lawyering. Although Brooklyn A lawyers often participate in community meetings and serve on community group boards, they do not directly initiate protests or demonstrations in the more traditional "activist" sense. Certainly, the community groups initiate such activities and Brooklyn A lawyers attend. Again, however, these lawyers may participate simply because they are community members, not because they are rebellious lawyers.

Furthermore, while Brooklyn A lawyers consider their work "rebellious" meaning "progressive," they also modestly describe their work as limited to traditional lawyering tasks: they advise, negotiate, and structure arrangements, just as a private attorney might do for a corporation. This transactional focus serves to satisfy as well as to fight the rebellious lawyering paradigm. On the one hand, rebellious lawyering rejects a litigation-centered focus and supports the use of alternative practices. On the other hand, rebellious lawyering fails to acknowledge transactional work as a possible alternative practice. Thus, because transactional work does not seem to fit in the rebellious model, some would contend that the work of Brooklyn A is not "rebellious" at all.

A. Making It Fit

In sum, although Brooklyn A lawyers participate in the community empowerment process, the source of the empowerment may not be grounded in any special attorney-client relationship. Because rebellious lawyering turns on a new vision of the attorney-client relationship, how can we reconcile the reality of Brooklyn A's work with the rebellious lawyering model? This section attempts to answer that question.

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87. Paul offers several explanations for why Brooklyn A lawyers do not directly initiate community activist projects. First, the lawyers recognize that doing so might create the impression of lawyer domination, even within community mobilization. Second, they realize that there are others in the community that might be better suited to represent the community, whether because of more political experience or closer affiliation with the constituency. Third, as a strategic matter, Brooklyn A lawyers sometimes want to avoid publicity often attached to community activism. Interview with Paul J. Acinapura, Deputy Project Director, Brooklyn A CED Unit, at Brooklyn A, East New York, NY (Mar. 13, 1998).

88. See generally Southworth, supra note 3, at 1154-55. For this article, Professor Southworth conducted a detailed study on lawyers who provide business-planning services for non-profit community groups. She concludes that these lawyers consider themselves facilitators rather than leaders or activists. See id. at 1147.

89. See supra note 35 and accompanying text.

90. See Southworth, supra note 3, at 1125.
Although some would argue that the rebellious model did not even conceive of such transactional work and thus could not encompass it, I contend that the work of Brooklyn A fits within the rebellious model. Finding this fit, however, requires redirecting the model’s theoretical focus away from the attorney-client relationship and toward some other source of empowerment. Although this shift seems drastic, it does not undermine the model if rebellious lawyering is considered an evolutionary process.

Consider the evolutionary aspect of rebellious lawyering: first, the lawyer and client engage in an open and mutually respectful dialogue which forms the first point of empowerment; second, clients share experiences with one another and realize similar challenges, thus forming the beginnings of class-consciousness; third, the attorney-client dialogue and the client-client dialogue converge to form a political discourse that results in full blown community empowerment.

Applying this formulation to the work of the three groups featured in *So Goes a Nation*, three visions of rebellious lawyering emerge. The founding lawyer at the Workplace Project seems to have mirrored the three-step progression. As a lawyer offering individual litigation, she entered into empowering lawyer-client dialogue, identified common labor-related problems among clients and encouraged the workers to assert their rights through both non-legal and legal approaches. In contrast, New York Lawyers for the Public Interest seemed to have entered the process at the second stage. When they joined the community, certain residents were already engaging in client-client dialogue by sharing a common concern about environmental injustice in their neighborhood. Because different sub-groups of residents were expressing the same concern, the lawyers focused on building coalitions to create strong support for a rather aggressive class action. Thus, these lawyers

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91. See, e.g., Southworth, supra note 12, at 215. Professor Southworth offers a fair critique of Lopez’s *Rebellious Lawyering*, supra note 6. She argues that Lopez offers a pessimistic vision of what lawyers can do by expecting them to downplay their expertise and involve clients. See id. at 215. She instead presents a vision where lawyers provide transactional, business planning services and clients prefer to defer to the legal expertise of the lawyer. See id. Professor Southworth points out that Lopez, by suggesting that lawyers have little distinctive to offer clients, fails to mention that lawyers are capable of performing other types of technical tasks. See id.

were instrumental in transforming the beginnings of community action into full-blown community activism.\textsuperscript{93}

Finally, Brooklyn A lawyers seem to be working from the third point of empowerment.\textsuperscript{94} Many of its clients are fully developed community organizations that, like Brooklyn A, have worked to initiate community development projects for over twenty-five years. This parallel evolution has precipitated a cleaner division of labor. For example, Brooklyn A lawyers do not initiate grass-roots organizing because the community groups are better equipped to organize and empower residents.\textsuperscript{95} Instead, the lawyers' activism is more closely tied to their role as legal advisors—that is, Brooklyn A lawyers attend community meetings and sometimes even serve on community boards to better represent their clients in their community efforts. Working within this community context, Brooklyn A lawyers focus on providing sound legal advice. In this sense, they are not directly responsible for the empowerment itself; rather, they facilitate the implementation of empowering projects.

This specialized community-based role demands that Brooklyn A lawyers primarily provide transactional legal services. Although the rebellious lawyering model does not mention transactional work, the model, if extended, would certainly cover such services.\textsuperscript{96} Indeed, rebellious lawyers refuse to disfavor any strategy because creativity and flexibility are necessary in helping economically disadvantaged communities.\textsuperscript{97} These lawyers instead focus on identifying a strategy best suited to address the particular problem.\textsuperscript{98}

\textsuperscript{93} See White, \textit{Collaborative Lawyering}, supra note 3, at 163. Professor White's clinic likewise focused on this second stage. She sent her students into the field to identify projects where collaborative lawyering is possible. \textit{See id.}

\textsuperscript{94} Because Brooklyn A lawyers have been involved in the community for over twenty years, it is arguable that they entered before the third level. Furthermore, because several Brooklyn A lawyers helped found the community groups, it is also arguable that they were more directly involved in creating the community agenda.

\textsuperscript{95} \textit{See supra} note 87.

\textsuperscript{96} \textit{See} Southworth, \textit{supra} note 12, at 226 (noting that Lopez could have easily included transactional work as an example of collaborative work outside of the litigation-centered construct).

\textsuperscript{97} \textit{See} Lopez, \textit{supra} note 6, at 68 ("Just as the future of social structures resists perfectly confident prediction, so too do the strategies deployed in the efforts to control these structures resist the complete command of problem-solvers.").

\textsuperscript{98} \textit{See} White, \textit{Collaborative Lawyering}, \textit{supra} note 3, at 166 ("While some of these tasks evoke familiar lawyer roles, others disrupt our preconceptions about what lawyers do.").
Rebellious lawyers also realize that certain periods favor certain strategies over others.\textsuperscript{99}

In this sense, Brooklyn A lawyers are rebellious lawyers. Through a collaborative effort, these lawyers and their community group clients have developed a strategy that is best suited to fighting poverty and its consequences, including inadequate housing, poor health, and drug abuse. Transactional legal work helps community groups implement concrete projects which provide services to the community and promote institutional and economic stability. In a time when welfare reform threatens the income of many local businesses, these attempts to bolster the economy are crucial to the survival of the communities that Brooklyn A serves.

Thus, Brooklyn A lawyers, like the Workplace Project and New York Lawyers for the Public Interest, fit the rebellious lawyering model, but the fit is unique. It is therefore important to recognize that rebellious lawyering is a somewhat amorphous concept whose elements change according to the structure of the community and its problems.\textsuperscript{100} For example, while the model conceives of empowerment as a direct result of the attorney-client relationship, the model also allows for empowerment coming from fully developed community groups.

By recognizing different sources of power, the model becomes more powerful because it encourages lawyers to tailor their services accordingly. Brooklyn A, for instance, tailors its services to meet the needs of a community that is, in a way, already empowered. As sophisticated non-profit corporations, these community groups need lawyers to handle traditional, yet complex legal matters because they are consumed with their own complicated management tasks.\textsuperscript{101} In contrast, other communities might lack

\textsuperscript{99} See id.; see also Southworth, \textit{supra} note 12, at 227-28 (explaining how changes in the legal and political landscape have demanded new strategies that address the structural aspects of urban poverty).

\textsuperscript{100} Although I contend that the model is amorphous, another reading suggests that the model is less comprehensive. One could argue that the rebellious lawyering model both overstates and understates the lawyers' role. On the one hand, the model overstates it with the belief that the attorney-client relationship can empower clients to begin community organizing. Although the Workplace Project seemed to accomplish this feat, most other conference participants agree that it is much easier to find a community who has already sowed the seeds of activism rather than to plant them oneself. On the other hand, the model understates the lawyer's role by ignoring other ways that lawyers can use their expertise to help clients obtain power and resources. See, e.g., Southworth, \textit{supra} note 12, at 222.

\textsuperscript{101} See Southworth, \textit{supra} note 12, at 224-25 (suggesting that lawyers should treat not-for-profit corporations like for-profit corporations and provide detailed technical legal services).
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established community groups and need lawyers to serve as catalysts for such grass-root projects.

Thus, rebellious lawyering encourages lawyers to adopt a variety of forms. This dynamic nature seems to be in keeping with the visionary goals of alternative practice. By denying the existing boundaries of the poverty law context, rebellious lawyering hopes to inspire innovation. Whether in the form of grass-roots mobilization, client education, or transactional legal services, this innovation promises to revitalize the practice of poverty law.

Conclusion

The foregoing discussion is meant to explore an alternative form of lawyering that can contribute to the much-needed revitalization of poverty law practice. The work of Brooklyn A is promising on two levels. First, on a practical level, it demonstrates its success by enabling communities to plan and build their future by identifying community needs and developing projects that not only address these needs but also alleviate poverty by community reinvestment. Second, on a purely academic level, it challenges the boundaries of the currently popular community-based, or rebellious lawyering model by fitting imperfectly within the construct. This mismatch encourages the field to "enlarge the discourses of law and legal institutions to fit, rather than to silence" these inspiring stories. Redefining and challenging roles and relationships, even within the critique of existing institutional roles and relationships, serves as an important reminder that there is not only one way to effectively serve poor communities.

102. See Trubek, Embedded Practices, supra note 3, at 433 ("There is no one 'silver bullet' that will satisfy all the visionary goals of critical lawyering.") (internal citation omitted).

103. Alfieri, Practicing Community, supra note 12, at 1764.
IMPLICATIONS OF THE LEGAL SERVICES STRUGGLE FOR OTHER GOVERNMENT GRANTS FOR LAWYERING FOR THE POOR

David S. Udell*

In the period since April 26, 1996, when President Clinton signed into law the comprehensive "Legal Services restrictions" that sharply limit the activities of Legal Services lawyers on behalf of their indigent clients, the programs traditionally funded by the Legal Services Corporation ("LSC") have responded in diverse ways. Some have declined LSC funds outright rather than operate under the restrictions. A few have challenged the restrictions by filing suit against LSC. Many have, at least for now, accepted life

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1. In some of the most significant restrictions, Congress prohibited Legal Services lawyers from engaging in legislative advocacy, participating in federal, state or local rulemaking, handling class action lawsuits, claiming attorneys' fees, representing incarcerated persons, representing certain aliens, and challenging welfare laws. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-53-57 (1996). See infra Part II (discussing restrictions in further detail).

2. Programs that have declined LSC funds include the following: Legal Aid Society of New York, Community Legal Services of Philadelphia, Greater Boston Legal Services, and others.

under the restrictions, and ceased participating in restricted activities for the foreseeable future.\(^4\) In some states, efforts have been made to coordinate the work of restricted LSC-funded programs with the work done by separate programs that have declined LSC funds and are thus able to operate free of the restrictions.\(^5\) Just one LSC program has accepted LSC's offer of the opportunity to affiliate formally with a separate, non-LSC program, for the purpose of spending non-LSC funds on activities subject to the restrictions.\(^6\)

While some within the Legal Services community have been reluctant to embrace the constitutional challenges to the restrictions,\(^7\) many have sought to identify new systems for ensuring that the poor will be able to obtain legal representation. Some propose that we find new sources of revenue to replace the general revenue funds that are no longer available to LSC.\(^8\) Others suggest that we

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4. The Legal Services for New York City, Inc. is an example.
6. LSC’s “program integrity regulation” offers LSC programs this opportunity if they satisfy certain criteria establishing “physical and financial separation.” See 45 C.F.R. §1610.8 (1997). To comply with these criteria, Charlottesville-Albemarle Legal Aid Society (“CALAS”), the long-time LSC provider in Charlottesville, Virginia, declined further receipt of LSC funds; a new provider, Piedmont Legal Services, then applied for and obtained the LSC funding and affiliated with CALAS pursuant to the regulation. Piedmont, as a recipient of LSC funds, is now subject to the restrictions; CALAS is unrestricted. The programs have the same board of directors. See also infra note 19 (discussing program integrity regulation).
7. See David Cole, A Shackling Compromise, How the Legal Services Corp. Sold Out the Poor, Legal Times, January 27, 1997, at 27 (criticizing restrictions as unconstitutional and criticizing LSC for opposing constitutional challenges to the restrictions); see also Recent Legislation, Congress Imposes New Restrictions on Use of Funds by the Legal Services Corporation, 110 Harv. L. Rev. 1346 (1997) (criticizing restrictions as unconstitutional, noting that “many in the legal services community have been reluctant to oppose [the restrictions], fearful that any challenge might incite congressional Republicans to actualize threats to eliminate LSC altogether”).
8. For example, programs have sought Interest on Lawyer Trust Account (“IOLTA”) funds, appropriations from state and local legislatures, grants from federal, state and local agencies, and private funds from diverse sources. Novel funding ideas have included supporting Legal Services with portions of “punitive damages” awards, unclaimed class action awards, and portions of court filing fees and attorney registration fees. See, e.g., The Steering Committee on Legal Assistance, Lawyers and the Poor in New York City – The Association of the Bar of the City of New York’s Civil Justice Crisis Plan, 51 The Record 708, 715 (1996) (listing potential sources of funding); see also A Chart of Significant Fundraising Activities for Legal Services, (Stand-
re-direct some of LSC’s funds to programs that develop new roles for the lawyer, such as programs that fight poverty more efficiently or more directly. Still others advise that we create new “public-private partnerships” also directed at alleviating poverty.

While these concepts for representing the poor may be justified on their own terms apart from the LSC restrictions, and may help LSC-funded programs to build new allies, the promise of these ideas should not eclipse the genuinely important work of LSC in providing legal representation based on a traditional model of lawyering. LSC, alone, was never expected to completely eradicate poverty, nor intended to solve all community problems. Rather, it was designed to provide lawyers — single-mindedly devoted advocates — to fight for clients in a world in which, so often, critically important rights, even lifelines, can be secured only through such advocacy.

So, before conceding the permanence of the restrictions or completely embracing a new agenda for providing legal representation to poor individuals or communities, it is important to assess carefully the strength of the legal and policy arguments for an unrestricted LSC. Although the doctrines that underlie the constitutional challenges to the restrictions are not always crystal clear, Legal Services lawyers and others should understand that the principles at stake are profoundly important and worth preserving. In providing funding for the poor to have lawyers, Congress should not be permitted to intercede in the relationship between lawyer and client by directing lawyers to refrain from making arguments and bringing claims on behalf of their clients. In addition, Congress should not be permitted to tell lawyers that

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11. See discussion infra Part III.
they may not even use their own non-LSC funds to make essential arguments and claims on behalf of their clients.

At a more pragmatic level, while efforts to identify alternatives to LSC funding and to provide the poor with alternative models of lawyering should be applauded, they likely will generate the same kinds of restrictions that now govern LSC. As long as government funds are used to fill the legal needs of the poor, government inevitably will be driven, at some point, to condition its giving on increasingly burdensome requirements. This threat of restrictions is present whether funding comes from licensing fees, lawyers' trust accounts, direct grants from government agencies, or other governmental sources; whether legal representation is delivered through new public-private partnerships or other models; and whether representation is provided to individuals, to groups, or to organizations. If the partner who pays the piper has the power to call the tune, it will — maybe not right away, but eventually. This pattern exists in almost every partnership that the government has entered into: the arts, family planning, military recruiting, university research, to name just a few.¹²

Thus, the success of new proposals for lawyering for poor individuals or communities necessarily turns on the larger question of whether the courts will appropriately preserve the principles that should prevent government from meddling when it funds the relationship between lawyer and client. Neither the restructuring of legal services, nor the quarantining of programs that receive LSC funds, will avoid the major problems that have brought us to this critical point. Unless we vigorously resist the LSC restrictions and defend the integrity of the lawyer-client relationship, the LSC program will face further restrictions, and new sources of funds for representing the poor will face similar threats.

This Article explores the constitutional limits on the conditions that government may impose on funding for the legal representation for the poor. In considering the Legal Services example, part I discusses the original statutory mission of LSC. Part II explains how the restrictions have interrupted that mission. Part III explains the "unconstitutional conditions" doctrine and the constitutional guidelines for determining how far government may go in attaching conditions to government funds. Part IV then describes more specifically the limits on governmental intrusion into the

work of Legal Services lawyers. Finally, part V discusses the implications of the LSC example with respect to other sources of government funding that may be used by LSC programs, or other programs, to provide legal representation to the poor.

I. The LSC Act

In all the debate about LSC's survival, and possible replacement, it is important to recall the original mission of LSC. The constitutional question of whether Congress has gone too far in tying the hands of Legal Services lawyers turns, at least in part, on the contours of the lawyering role as defined by Congress in the original Legal Services Act. The Legal Services Act ("LSC Act") of 1974's "Statement of Findings and Declaration of Purpose" sets forth the original purpose of LSC. Its goal was a grand one: to reaffirm the faith of the poor in the rule of law, and provide representation of "high quality" to "serve best the ends of justice." LSC's fundamental purpose is to provide "equal access to the system of justice in our Nation for individuals who seek redress of grievances." Congress mandated that LSC "be kept free from the influence of... political pressures," and declared that LSC's attorneys must receive "full freedom to protect the best interest of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics and the high standards of the legal profession." 13

13. For example, a plenary session at the Lawyering for Poor Communities conference was dedicated to open discussion of what features the audience would consider essential if a hypothetical "generous benefactor" were to donate two million dollars to a needy community in New York to set up "some kind of legal services." See Roundtable Discussion: Visions for the Future 25 FORDHAM URB. L.J. 729 (1998).

14. Many articles have described the formation of the Legal Services Corporation, including its extensive history leading up to enactment of the Legal Services Act. See, e.g., Alan W. Houseman, Political Lessons: Legal Services for the Poor—A Commentary, 83 GEO. L.J. 1669 (Apr. 1995); Warren E. George, Development of the Legal Services Corporation, 61 CORNELL L. REV. 681 (1976).


17. Id. at § 1001 (2)-(3) (1974) (codified as amended at 42 U.S.C. § 2996 (2)-(3)).

18. Id. at § 1001 (1) (1974) (codified as amended at 42 U.S.C. § 2996 (1)).

19. 42 U.S.C. §§ 2996 (5)-(6); see also id. at § 2996e(b)(3) (prohibiting LSC from "interfer[ing] with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and Code of Professional Responsibility of the American Bar Association"); id. at § 2996(f)(1) (stating that LSC must "insure the maintenance of the highest quality of service and professional standards, the pres...
The Congressional supporters of LSC endorsed these overarching goals in ringing terms. Legislators cautioned against burdening the new LSC with restrictions that would either prevent the poor from obtaining equal access to justice or provide only the mere appearance of justice. For example, in 1973, Representative Edward Biester of Pennsylvania cautioned against imposing restrictions which would lead to "a double standard within the legal profession." He stated:

By unfairly attempting to restrict the scope of [the lawyer's] activities, we would in effect be saying to the legal services attorney that his independence and responsiveness in representing an indigent client is not the same as that of a private lawyer receiving a fee. Can we make such a differentiation in the lawyer-client relationship? Can we legislate differences in the standards applicable in pursuing what should be the same rights under law?21

In words that were prescient, Representative Biester warned against any "attempt to discourage the lawyers from assuming controversial cases, the kinds of cases which may, for instance, question the actions of those who exert power or influence in the community." He explained:

Handling a client's every legal problem, controversial or not, is the duty of every attorney. An unreasonable weakening of the program as a whole will also have a deleterious effect on its ability to provide services in even the most routine of matters. Despite instances of overzealousness and excesses, Legal Services has been successful — it has been effective — because the attorneys have resisted attempts to compromise their commitment to protect the rights of the poor.23

21. Id. He also explained why he viewed such a double standard as intolerable: The purpose of Legal Services has been to give a voice, an assertion of legal rights to those who have traditionally been denied them. To restrict unnecessarily the legal services given the poor beyond those which are now performed by lawyers for the affluent and middle class undermines the social purpose of the Legal Services program. If we are to be true to our belief in equity under the law, the role of the poor client's lawyer must have the same flexibility exercised by other lawyers.

Id.

22. Id.
23. Id.
Similarly, Senator Edward Kennedy warned against imposing controls on the professional discretion exercised by lawyers in LSC programs:

I personally do not think that Washington should be deciding what legal issues local attorneys may raise on their client's behalf; I do not think Washington should be deciding what forums they can raise them in; and I most emphatically do not think we have any business telling a lawyer that the touchstone of whether or not to represent a client should be a measure of how controversial or how popular the issue.24

Senator James Pearson of Kansas likewise emphasized the importance of authorizing legal services lawyers to adhere to professional standards. He explained "the real issue is whether the poor have the right to the full range of legal protections capable of being offered by an attorney operating within the ethical boundaries of his profession."25 He added that "the time has come for the Federal government to make a commitment to the adequate provision of legal services for low-income individuals. In doing so we must not create a system which handicaps attorneys by restrictive rules and limitations on the range of tools which they can employ."26 Senator Pearson concluded by saying that "[s]uch action would provide second-class legal representation."27

The bar at large also understood how important it was not to restrict LSC. In commenting on the proposed legislation, several state bar associations conditioned their support for the LSC Act on the insistence that it preserve the professionalism and independence of the lawyers. The State Bar of California drove the point home: "This nation cannot tolerate one system of legal representation for the rich, and another inferior system for the poor."28 Opposing the various restrictions proposed for LSC's enabling legislation, the State Bar of California explained:

Independence and professionalism are not empty platitudes or concepts created for the benefit of lawyers. They are essential parts of our system of justice — a system premised on the lawyer's ability and obligation to represent his client's interests and to use the full scope of resources which are available to him as an advocate acting within our system of law.29

25. Id. at 1402.
26. Id. at 1403.
27. Id.
28. Id. at 1638.
29. Id.
Similarly, in a joint statement, the Bar Association of the State of New York, the Association of the Bar of the City of New York, the New York County Lawyers Association, and the lawyers' organizations then representing the poor in New York, advised Congress of the need for an LSC that, among other things, "permits legal services lawyers to provide the same representation to indigent clients that the private bar provides to its clients" and "is not restricted by statute in the kind of cases that it can take or the nature of the legal assistance it can provide to eligible clients."  

The Oklahoma County Bar Association similarly insisted that the LSC program should be enacted consistent with "the need to maintain full and adequate legal services for the poor."  

Twenty-four years after enactment of the Legal Services Act, these legislators' perspectives and bar association submissions are a reminder that the original purpose of the Legal Services Act, as made plain in the Act itself, was to ensure equal access to justice for the poor. Legal Services was not created to provide a restricted set of services, but rather to provide lawyers in poor communities who could do whatever lawyers need to do for their clients within their professional responsibility.

II. The Restrictions

A. How the Restrictions Interfere with the Lawyer-Client Relationship

In light of LSC's auspicious origins, the restrictions that Congress imposed on Legal Services lawyers in its 1996 appropriation are a flagrant betrayal of the ideal of equal justice under the law. Legal Services lawyers must operate under the following restrictions:

- They may not participate in class actions on behalf of their indigent clients, even to file an amicus brief. So, for example, a lawyer who saves one baby from lead paint cannot save several hundred more without filing numerous identical cases. Since Legal Services programs lack the resources with which to file repetitive identical individual cases, the prohibition on class actions imposes enormous constraints on the ability of program lawyers to tackle pervasive and systemic harms on behalf of their poor clients.

30. 120 CONG. REC. 19604 (June 18, 1974).
31. 120 CONG. REC. 2239 (February 5, 1974).
• Even in the context of a garden-variety benefits claim, they are
forbidden to challenge the constitutionality of a state or federal
welfare statute, or to argue that a state welfare regulation is un-
lawful, leaving the lawyer in the unenviable position of explain-
ing to an impoverished client, "If only you could afford a lawyer,
you would be able to make an argument that might win, but I
can't do it for you."

• Except for domestic violence cases, they may not provide legal
services of any sort to certain categories of legal immigrants.
Thus, a migrant farm worker can be subjected to the equivalent
of indentured servitude in a toxic outhouse but cannot even seek
advice from a Legal Services lawyer who is willing and able to
use non-LSC funds to represent him.

• They may not accept court-awarded attorneys' fees, even in
cases where their opponents may seek fees, even where the right
to claim fees would be the client’s best source of leverage, and
even though the availability of fees to other litigants reflects a
legislative judgment that the right at stake is sufficiently impor-
tant to justify a fee incentive as a means to attract quality repre-
sentation. In some contexts, such as in New York City's housing
courts, the restriction has tilted the playing field. Landlords may
freely claim statutory attorneys' fees if they prevail, while ten-
ants have no such right. Thus, landlords have no incentive to
settle, and instead have an incentive to escalate proceedings.
Similarly, as states hasten to cut welfare rolls, state welfare agen-
cies now routinely assign improper and dangerous workfare
tasks with complete impunity; states no longer face the threat of
liability for fees that previously discouraged such abuse.

• They may not participate in administrative rule-making proceed-
ings on behalf of indigent clients, and cannot appear at legisla-
tive hearings or initiate contact with legislators without first
receiving a direct invitation. Thus, legislators and policymakers
are free to fashion programs without hearing from the poor.
Ironically, this restriction was imposed by the same Congress
that brought us an end to "welfare as we know it," leaving fifty
states to fill the vacuum with fifty programs without the input of
the one group most knowledgeable about welfare and the needs
of the poor.

• They may not approach victims of constitutional or legal viola-
tions to offer to represent them. Thus, for example, a lawyer
who represents a client who has suffered from a pervasive injus-
practice cannot provide the same representation to others unless they miraculously materialize in the lawyer's office.

- Finally, they may not represent an incarcerated person, even in a suit unrelated to his incarceration, such as a child custody or support proceeding, even if the claim arose before incarceration, and even if the prisoner has not been convicted of any crime.³²

These restrictions tie up not just the federal funds provided by LSC to Legal Services programs but also the funds that Legal Services programs have traditionally gathered on their own from diverse other sources.³³ The receipt of just one dollar from LSC can prevent an LSC program from using its own funds to represent the poor in ways that the program deems most important. Thus, in enacting the restrictions and making them broadly applicable to LSC funds and non-LSC funds, Congress plainly sought to change the face of poverty law by exercising its fiscal clout.

The restrictions, which were renewed by Congress for fiscal years 1997 and 1998, wrought havoc for destitute individuals with dire legal needs. For example, in more than 600 cases, the restrictions forced Legal Services lawyers to resign as counsel. While there has been no way to assess the extent of damage caused by this mass abdication, in at least one conspicuous instance the withdrawal of counsel from a prohibited class action led to decertification of the plaintiff class and dismissal of the entire action when a regional and national search for substitute counsel proved fruitless.³⁴ Some of the 600 cases were reassigned to new well-meaning

³³. Pub. L. 104-134, § 504(d)(1), 110 Stat. at 1321-55. Under the Act, LSC distributes annual congressional appropriations to independent local LSC recipients throughout the United States in order to permit those programs to employ lawyers for the poor. 42 U.S.C. § 2996e(a), (c). Congress envisioned that LSC recipients would generate additional (non-LSC) financial support for activities conducted under the program’s auspices. See id.
lawyers, but without any assurance that the substitution would yield an equivalent level of representation. Many lawyers were forced to handle difficult cases in part-time or volunteer arrangements, while others had no alternative but to settle their cases on less than optimum terms.\textsuperscript{35}

The restrictions also intruded, and continue to intrude, on lawyer-client relationships in many class action cases which are in a post-judgment or post-settlement phase. Under LSC's regulations implementing the class action ban, LSC permits Legal Services lawyers to engage in "non-adversarial activities" in class actions.\textsuperscript{36}

But the moment the LSC lawyer catches and reports an opposing party's mis-step, LSC takes the position that the LSC lawyer has violated the prohibition on participating in class actions. In such circumstances, LSC may require lawyers to abandon either their clients or their jobs. Since it is particularly difficult to find substitute counsel willing to inherit the complex task of monitoring past suits that were brought to a successful conclusion by LSC offices, the chilling effect of the restrictions on such monitoring is an especially problematic intrusion on the lawyer-client relationship.\textsuperscript{37}


\textsuperscript{36} See Jan Hoffman, Counseling the Poor, but Now One by One, Legal Services Lawyers Cope with Ban, N.Y. TIMES, Sept. 15, 1996, at A47 (describing part-time arrangements, pro bono efforts, and concerns about whether new counsel could be found to handle cases subject to the restrictions); Eva M. Rodriguez, Legal Aid Forced to Drop Cases, LSC Lawyers, Clients Scramble to Comply with Class Action Ban, LEGAL TIMES, Aug. 12, 1996, at 1 (same); Nina Bernstein, 2,000 Inmates Near a Cutoff of Legal Aid, N.Y. TIMES, Nov. 25, 1995, at A8 (same).

\textsuperscript{37} 45 C.F.R. §1617.2(b)(2).

The following examples illustrate the chilling effect of the class action prohibition where an LSC lawyer is engaged in a monitoring role, or is sheparding a judicially approved settlement through to final judgment. When the restrictions were enacted, I was serving as class counsel in three class action suits that had been resolved on the merits years earlier, and in one class action scheduled for trial. I sought rulings from each court as to whether I should withdraw or continue as counsel. In the three resolved suits, LSC informed the courts that my continued "non-adversarial" role as a monitor of compliance would be permitted under the restriction that prohibits participation in class actions. However, in one of those cases, when I subsequently objected to the defendant's action in circulating internally a document that violated the settlement, the defendant's counsel (a government lawyer) reported my filing of the objection to LSC. LSC then ordered me off the case on pain of defunding all Legal Services programs in New York City, even though the merits of the underlying case had been resolved years earlier. Following a conference with the court, the particular objection concerning the government's non-compliance was resolved by stipulation, and LSC then allowed me to resume the monitoring role. In the fourth case, which was scheduled for trial, LSC demanded that I either abandon the case altogether or assume part-time status and handle the matter elsewhere without LSC resources. When the court ordered that I continue as counsel, I was forced to assume part-time
For every class action case that Legal Services programs abandoned, there are countless others that they will never take, depriving thousands of potential clients of the representation they otherwise could expect from Legal Services lawyers. Moreover, outside the class action context, the Legal Services restrictions have scuttled countless potential claims. At a time when all fifty states are implementing new welfare programs, hidden within almost any common benefits claim could be a challenge to the legality of some new law or regulation. While LSC’s statistics suggest that restricted Legal Services programs can still handle as many cases as before, these statistics mask the reality that under the old regime (when class actions, lobbying, and challenges to welfare laws were permitted) a single case could have benefited thousands.

Indeed, in handling cases under the restrictions, Legal Services lawyers must now be cautious when representing clients in welfare claims. It is very difficult, if not impossible, to anticipate whether particular claims will ultimately necessitate that a challenge to a welfare law, in violation of the restriction that essentially requires the lawyer to drop the case or admit inability to do what professional duty demands.38

Congress is still providing capable lawyers to the poor as promised in the 1974 Act, indeed, some of the best in the nation, but the restrictions deny these lawyers the weapons of advocacy they need status (operating at reduced salary and out of another office) to avoid LSC’s sanctions. Once the court preliminarily approved a settlement of the merits, I notified LSC and returned to full-time status with LSC’s approval. However, when I subsequently wrote the court to ask for help in resolving a very minor scheduling dispute, the government’s lawyer promptly sent my letter to LSC. LSC then cited the letter as evidence that I had violated the class action restriction and ordered me off the case, again on pain of defunding all Legal Services programs in New York City. LSC relented only after receiving a letter from the judge, and a letter from a supervisor in the U.S. Attorney’s office, both explaining that there was no adversarial dispute concerning the merits of the underlying case.

38. Under the restrictions, Legal Services lawyers must advise clients that the restrictions prohibit certain professionally appropriate actions, and may even require complete withdrawal from representation. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399 (1996) (“Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to Their Existing and Future Clients When Funding Is Reduced and When Remaining Funding Is Subject to Restrictive Conditions”). The ABA opinion does not address whether it is fundamentally unethical for government to require Legal Services lawyers to operate under one set of rules, while permitting all other lawyers to operate under other rules, or whether the restrictions violate the attorney’s duty to exercise independent judgment on behalf of the client. See also ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, A CALL FOR THE REPEAL OR INVALIDATION OF CONGRESSIONAL RESTRICTION ON LEGAL SERVICES LAWYERS 37-42 (Mar. 1998) (describing restrictions as “inconsistent with basic principles of professional responsibility”).
to be effective. Congress has replaced the dream of lawyers pos-
sessing "full freedom to protect the best interest of their clients,"
with lawyers possessing limited freedom to take only the limited
non-controversial steps that the government is inclined to endorse.

B. The Need to Secure Principled Constitutional Protection for
the Government-Funded Lawyer-Client Relationship

There is both an immediate need to solidify support for LSC and
a fundamental need to clarify principles sufficient to safeguard
other sources of funding for the legal representation of poor indi-
viduals and communities. Initially, it should be emphasized that
Legal Services continues to provide vital services despite the re-
strictions. The stabilizing effect of LSC's legal representation on
the lives of millions of individuals makes it irreplaceable,39 even as
it remains susceptible to criticism for diverse limitations.40 LSC
funds remain particularly important because of the difficulty of ob-
taining sufficient replacement funds in many parts of the country.
With LSC programs often functioning as the only source of repres-
sentation for the poor, we cannot lightly tolerate continued imposi-
tion of restrictions that subject LSC lawyers to a set of professional
standards that is inapplicable to all other lawyers. Such a state of

39. Accepting the fact that LSC's data count all cases as equivalent, regardless of
whether a particular case has broad or narrow impact, LSC funded programs continue
to provide legal assistance to many people. For example, in fiscal year 1995, LSC's
budget was $415 million and LSC programs handled 1.7 million cases with 1200 neigh-
borhood law offices and 4500 attorneys. In fiscal year 1996, LSC's budget was $278
million (a one-third cut from fiscal year 1995), and LSC programs still handled about
1.4 million cases with 900 neighborhood law offices and about 3,600 attorneys. In
fiscal year 1997, LSC's budget was $283 million. See Proposed Strategic Plan for FY
1995-1997) (on file with the author). The direct legal representation and advice pro-
vided by LSC has an additional positive benefit for many others who are without
counsel; LSC's presence in court and other settings promotes the rule of law and
influences evolution of the law.

40. See, e.g., Jennifer Gordon, We Make the Road by Walking: Immigrant Workers,
the Workplace Project, and the Struggle for Social Change, 30 HARV. C.R.-C.L. L.
REV. 407, 437-44 (1995) (describing "conflict between provision of legal services and
organizing"). At the Lawyering for Poor Communities Conference, commentators
observed that: client-service based models like Legal Services do not generate social
change (Acosta); the end of "entitlement" programs renders the role of the legal serv-
ices lawyer less vital (Simmons); the vast extent of poverty means that legal services
lawyers cannot represent all those with legal problems (Alfieri); representing the
"community" is inherently problematic given the conflicting interests of those who
are neighbors (Alfieri). See Roundtable Discussion: Visions for the Future, 25 FORD-
affairs evokes the two-tier standard of justice so deplored by legislators at the founding of LSC in 1974.  

More fundamentally, while conditions on LSC funds have prompted many organizations to decline LSC funding, and to seek new funds, this is no solution if the new funds also become encumbered by restrictive conditions. The strategy of avoiding political confrontation over the constitutionality of the restrictions, and operating under them, allows and arguably even invites further attack. Since successful representation of indigent clients will inevitably draw such attack, the failure to secure principled protection for such work exposes the programs, and clients, to tremendous ongoing risk.

III. The Constitutional Law

A. Constitutional Law Concerning Conditions Imposed on Funding

The restrictions on Legal Services lawyers are not the first example of governmental efforts to leverage funding as a means to impose intrusive controls on funding recipients. Thus, it is instructive, when seeking to protect the lawyer-client relationship from governmental intrusion, to examine the protection accorded by the Supreme Court to important relationships in analogous sectors of society. Although the Supreme Court’s analyses have at times been murky, a series of critical holdings, of which the most directly relevant are described below, apply the court’s “unconstitutional

41. See supra note 21 and accompanying text.

42. Restrictions analogous to the Legal Services restrictions have been imposed in some states on funds provided for the representation of the poor, including on Interest on Lawyers Trust Accounts funds. For example, Texas recently adopted an “Additional Filing Fee for Basic Civil Legal Services for Indigents,” but mandated that the funds not be used for class actions, lawsuits against government (apart from individual appeals from denials of government benefits), or lobbying. See Tex. Gov’t Code Ann. § 1, c. 51(J)(West 1997). In Maryland, the statute governing duties of IOLTA grant recipients has prohibited IOLTA grantees, since 1982, from using IOLTA funds for legislative advocacy, rulemaking or class actions. See The Maryland Legal Services Corporation Act, Art. 10 § 45J(b)(4, 6). In Washington, the state recognizes the principle that lawyers must be free “to represent clients without interference by third parties,” and provides for funding of a long list of specified forms of representation; nevertheless, the state prohibits the use of funds for forms of representation absent from the list (for example, employment discrimination), and for lobbying, rulemaking, class action litigation, and representation of “undocumented aliens.” See Wash. Rev. Code, § 260 (2)(5)(a)-(c), (g).

conditions” and “viewpoint discrimination” doctrines to define the limits of governmental control over recipients of government funding.

In Keyishian v. Board of Regents of the State Univ. of N.Y., the Supreme Court held that even though the government provides funds to universities, the government may not exercise control over the First Amendment activities of professors, and may not dictate the content of their courses.

In Regan v. Taxation with Representation in Washington, the Supreme Court held that Congress had acted within its constitutional authority when it conditioned special tax status under the Internal Revenue Code (status enabling donors to not-for-profit organizations to receive a tax deduction for their donations) on a promise by those organizations to refrain from lobbying. In holding that the “condition” of refraining from lobbying was not an “unconstitutional condition” on the federal subsidy embodied in the tax deduction, the Court made clear that Congress is free to determine which activities to pay for, and which not to pay for, regardless of whether a given activity (i.e., lobbying) is protected by the First Amendment. However, the Court cautioned that restrictions on speech, even in a federally-subsidized program, may be unconstitutionally burdensome. The Court explained that the Internal Revenue Code did not unduly burden the First Amendment right to lobby since a not-for-profit organization (like the plaintiff organization, Taxation with Representation) could easily establish a separately incorporated organization to engage in lobbying. Organizations merely needed to keep their records straight to show that no tax deductible contributions would be used by the corporation engaged in lobbying.

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45. 385 U.S. 589.
46. See id. at 603-605.
47. 461 U.S. 540.
48. See id. at 549-552.
49. Id. at 546.
50. See id. at 544 n.6
51. See id. at 544 n.6; see also id. at 553 (Blackmun, J., concurring) (noting that any significant additional burden on the relationship between the two organizations might be unconstitutional).
52. See id. at 544.
In *FCC v. League of Women Voters*, the Supreme Court held that Congress had exceeded its constitutional authority when it conditioned receipt of government funds by public television stations on a complete waiver of the First Amendment right to issue editorial opinions. The Court explained that, in *Regan*, Congress had allowed the not-for-profit organizations an adequate opportunity to engage in protected First Amendment activity, since they could incorporate as separate organizations for the purpose of lobbying. The Court observed that the restriction might have been upheld as constitutional if the stations had been afforded opportunity to use their own non-federal funds for editorializing.

In *Rust v. Sullivan*, the Supreme Court held that Congress acted within its constitutional authority when it conditioned receipt of government funds by family planning medical clinics on waiver of the First Amendment right to advise patients about abortion. The Court explained that the physicians and patients were not entitled to First Amendment protection since the physicians were not providing traditional medical care, but were instead funded only to provide patients with a limited governmental message endorsing prenatal care. Relying on the principles preserving academic freedom in *Keyishian*, the Court declared that an unconstitutional condition might be found in other contexts where Congress funds comprehensive professional relationships, and where expressive activity is expected or is considered essential to the functioning of society. The Court observed that, in such a case, legislation could be found unconstitutional regardless of whether the government took steps to preserve the freedom of the funding recipient to engage in protected activity outside of the funded program. The Court stated:

> [T]his court has recognized that the existence of a Government subsidy, in the form of Government-owned property, does not justify the restriction of speech in areas that have been traditionally open to the public for expressive activity or have been expressly dedicated to speech activity. Similarly, we have recognized that the university is a traditional sphere of free expres-

53. 468 U.S. 364.
54. See id. at 399-400.
55. See id.
56. See id.
57. 500 U.S. 173.
58. See id. at 203.
59. See id. at 193.
60. See id.
sion so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment. It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government.61

In eventually upholding the abortion gag rule, the Court relied in part on the fact that the government had provided an option to family planning programs to engage in abortion advocacy outside of the scope of the federally-funded family planning clinics.62 Under a government regulation that subsequently has served as a model for LSC's program integrity regulation, family planning clinics were permitted to use non-federal funds to provide advice about abortion through separate, affiliated programs.63 The Court distinguished League of Women Voters in which Congress afforded no opportunity to public television stations to issue editorial opinions using their own non-federal funds.64

In Rosenberger v. Rector and Visitors of the Univ. of Va.,65 the Supreme Court overturned the University of Virginia's refusal to authorize funds for a particular Christian student publication, where other publications had received similar funds, on the ground that the refusal constituted unconstitutional viewpoint discrimination.66 The Court distinguished Rust, in which restrictions on government funds had been upheld, by stating: "There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program."67 The Court further explained the unconstitutional conditions doctrine, stating that, in Rust:

We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may

61. Id. at 199-200 (internal quotations omitted).
62. See id. at 196-99.
63. See id.
64. See id. at 197.
65. 515 U.S. 819
66. See id. at 833-37.
67. Id. at 833.
take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.68

Thus, the Rosenberger Court made clear that, in Rust, the conditions on speech were permissible only because the government was the "speaker," and the role of the clinic physicians was merely to transmit the government's message. In Rosenberger, the conditions on speech were unconstitutional because a private speaker's rights were at stake.69

Finally, in Finley, the Supreme Court upheld a statute requiring the National Endowment for the Arts to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."70 The Court held that in light of the vagueness of the statute's exhortation to take particular values "into consideration," the risk of actual viewpoint discrimination was merely hypothetical.71 But the Court emphasized that any actual viewpoint discrimination would raise serious constitutional problems even if it occurs in the context of funding.72

These six Supreme Court decisions provide guidelines for assessing the degree to which the First Amendment73 should protect the lawyer-client relationship when the imposition of conditions on funding threaten it. Such protection is warranted where:

(a) the restrictions impinge on a lawyer-client relationship that is analogous to the professor-student relationship in Keyishian;

68. Id.
69. The Supreme Court has held that government may not retaliate against the exercise of speech by independent contractors. See Bd. of County Comm'rs, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996); O'Hare Truck Serv., Inc., v. City of Northlake, 518 U.S. 712 (1996). Two federal district courts have held that the First Amendment was violated where a county terminated Legal Services programs' grants in retaliation for litigation by the programs against the counties. See Westchester Legal Servs. v. County of Westchester, 607 F. Supp. 1379 (S.D.N.Y. 1985); Northern Penn. Legal Servs. v. County of Lackawanna, 513 F. Supp. 678 (M.D. Penn. 1981).
72. See id. at 2178-79.
73. The restrictions also deny equal protection in violation of the Fifth Amendment. See Roth, supra note 44, at 144-56. See also Romer v. Evans, 517 U.S. 620, 635 (1996) ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . .") (quoting Civil Rights Cases, 109 U.S. 3, 24 (1883)); cf. James v. Strange, 407 U.S. 128 (1972) (invalidating recoupment statute that treated indigent defendant more harshly than other civil judgment debtors); Tate v. Short, 401 U.S. 395 (1971) (invalidating statute that imposed prison term only on indigents who could not afford fines).
(b) the restrictions impose a greater burden on the speech of lawyers and clients than was imposed in Regan, by the Internal Revenue Code, on organizations required to establish separately incorporated organizations to conduct lobbying;

c) the restrictions impose at least as great a burden on the speech of lawyers and clients, as was imposed in League of Women Voters on public television stations that were afforded no opportunity to exercise First Amendment rights;

d) the restrictions intrude on a traditional professional relationship and on the speech of private individuals, rather than on an untraditional professional relationship, as in Rust, where the abortion gag rule affected government physicians who were merely transmitting a governmental message about family planning and not providing traditional medical care;

e) the restrictions discriminate against particular viewpoints of lawyers or clients, as in Rosenberger, where the funding of all student journals but one discriminated against the Christian journal that had been denied funding; and,

(f) the restrictions impose a greater burden on viewpoint than was imposed on the NEA, and on artists seeking NEA grants, by the ambiguous "decency and respect" requirement, in Finley.

B. Constitutional Law Concerning the Lawyer-Client Relationship

The application of the unconstitutional conditions doctrine in the Legal Services context necessarily also turns on whether the activities threatened by the Legal Services restrictions are worthy of constitutional protection in the first place. In a series of landmark cases, the Supreme Court has recognized that the bond between lawyer and client is the paradigm of the intimate relationship protected against government interference by the First Amendment rights of free speech and association.

Thus, in NAACP v. Button, where Virginia attempted to prevent the NAACP's lawyers from counseling prospective clients about the possibility of challenging segregated facilities, the Court declared that the lawyers could not be prosecuted for such counseling. The Court explained that the associational bond between a lawyer and prospective client was fully protected by the First Amendment.

75. See id. at 437.
In *In re Primus*, the Court refused to apply Ohio's ban on solicitation against a lawyer whose letter had advised women of the availability of free legal assistance if they were sterilized, or threatened with sterilization, as a condition of receiving welfare benefits. The Court held that the First Amendment protected this lawyer-client relationship.

In *Brotherhood of Railroad Trainmen v. Virginia*, the Court invalidated Virginia's effort to prevent a labor union from referring its members to selected lawyers. Here, too, the Court held that the First Amendment associational tie superseded the State's ethics rules.

In *United Transportation Union v. State Bar of Michigan*, the Court rebuffed Michigan's effort to prevent a union from referring its members to lawyers promising to charge a reduced fee. The Court explained that the First Amendment associational bond between lawyer and client precluded intrusive government regulation.

In *United Mine Workers v. Illinois State Bar Association*, the Court held that the First Amendment associational bond between lawyer and client precluded Illinois from applying its ethics rules against a lawyer employed by a labor union to handle its members' Workers' Compensation claims.

In sum, when government interferes with the relationship between the lawyer and client, it directly interferes with speech and associational rights protected under the First Amendment.

### IV. Why the Restrictions Are Unconstitutional

#### A. Why the Restrictions Are Unconstitutional, Regardless of Whether Funding for the Lawyer-Client Relationship Comes from the Government or from Other Sources

In light of the Supreme Court decisions, described above, which define limits on governmental efforts to impose conditions on funds, and specifically bar governmental intrusion into the attorney-client relationship, the restrictions on Legal Services programs should be considered unconstitutional.

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77. See id. at 431-32, 439.
78. 377 U.S. 1 (1964).
Insofar as the restrictions intrude on traditional professional relationships between lawyer and client, they are intolerable for the same reasons that conditions imposed on academic freedom were held intolerable in Keyishian. Indeed, in contrast to Rust, where the court held that no traditional physician-patient relationship was threatened by the "abortion gag rule," the restrictions on Legal Services lawyers do specific violence to the traditional professional relationship between lawyers and clients. As noted above, the Legal Services Act mandates that Legal Services lawyers adhere to the traditional standards of the legal profession. In contrast to the abortion gag rule, the restrictions on lawyering are not in any way dedicated to tailoring a government-funded program's particular governmental message, but rather interfere directly with the private speech initiated by thousands (or even hundreds of thousands) of individuals who seek, through representation by Legal Services, to have their own voices heard in the courts and in the legislatures.

Moreover, in Rust, the Court made clear that when government intrudes on traditional professional relationships and squelches private speech, restrictions on speech may be found unconstitutional regardless of whether the government also affords the funded recipients an opportunity to engage in the restricted speech, with their own funds, outside of the government-funded program. In Rust, the Court specifically observed that the "freedom of recipient programs to speak outside the scope of the Government-funded project" would not necessarily save restrictions that intrude into such a setting. The Court emphasized the specially protected nature of "speech in areas that have been traditionally open to the public for expressive activity or have been expressly dedicated to speech activity." Consistent with these principles, lawyering for poor clients in Legal Services programs is worthy of protection because it arises out of traditional, professional, lawyer-client relationships, because it advances the clients' and lawyers' viewpoints (as contrasted with the government's viewpoint) and because it takes place within institutions that are exquisitely sensitive to intru-

81. See Rust, 500 U.S. at 196-97 (abortion gag rule upheld, in part, because programs could still engage in abortion advocacy through separate programs); cf. Regan, 461 U.S. at 544 n.6 (restrictions upheld, in part, because programs could still engage in lobbying through distinct corporations); League of Women Voters, 468 U.S. at 399-400 (restriction on editorializing held unconstitutional, in part, because stations were afforded no alternative means through which to use their own funds to editorialize).
sions on speech (and just as sensitive as the University), notably, the courts and legislatures.\(^8\) Just as in *Rosenberger*, the restrictions on the activities of Legal Services lawyers must be found unconstitutional if targeted against particular viewpoints. Here, the restrictions are targeted against the particular viewpoints and positions of the poor and their advocates. The most vivid example is the restriction that prohibits challenges to welfare laws since, on its face, it affects only those espouse the view that welfare laws should be challenged (the restriction has no effect on those who propose to defend welfare laws). Other Legal Services restrictions have a disproportionate impact on the poor and their advocates even if they appear on their face to be more neutrally drawn (for example, the restrictions prohibit participation in class actions and prohibit representation of incarcerated persons). Moreover, in contrast to the statute in *Finley* which the Court upheld because it imposed no definite penalty on the expression of “indecent” viewpoints, the Legal Services statute penalizes the expression of disfavored viewpoints by providing for “debarment”\(^8\) of Legal Services programs that engage in the restricted activities.\(^8\)

**B. Why the Restrictions Are Unconstitutional with Respect to Funding for the Lawyer Client Relationship from Sources Other Than Government**

The foregoing principles render the restrictions unconstitutional regardless of whether the Legal Services lawyers are funded exclu-

\(^8\) The intrusion of the restrictions into the lawyer-client relationship, and therefore into the functioning of the courts, also suggests a violation of Separation of Powers.

\(^8\) Comprehensive constitutional challenges to the Legal Services restrictions are still pending. On May 18, 1998, in *LASH*, the Ninth Circuit upheld a district court order granting LSC's motion for summary judgment. See *LASH* 145 F.3d 1017, 1031. The Court specifically rejected the plaintiffs' claim that, as in *Rosenberger*, the Legal Services restrictions discriminated against expression of private viewpoints, concluding instead that in creating LSC the government sought “to promote a particular policy of its own.” 145 F.3d 1017, 1028 (quoting *Rosenberger*, 515 U.S. at 834). The Court ruled that “the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas.” 145 F.3d at 1028. The plaintiffs' petition for certiorari is pending. See 67 U.S.L.W. 3149 (Aug. 17, 1998) (No. 98-296). On March 20, 1998, in *Velazquez*, the Second Circuit heard oral argument on whether to uphold a district court order denying the plaintiffs' motion for a preliminary injunction against the restrictions. See *Velazquez*, 985 F. Supp. 323. The district court had held that “the restrictions pertaining to LSC recipients do not significantly impinge on the lawyer-client relationship.” *Id.* at 343.
sively with LSC funds, or instead with additional non-LSC funds. But even if Congress possessed authority to impose restrictions on lawyering activities paid for with LSC funds, additional constitutional principles limit the degree to which government may impose conditions on how recipients of government funds use their non-federal funds. As noted above, the Supreme Court made clear in *League of Women Voters* that when government imposes conditions on federal funds that threaten First Amendment rights, it must, at least, provide funding recipients with alternative channels through which to use their own funds to engage in protected activities. Thus, in *Rust*, the Court upheld the "abortion gag rule" not only because it involved a government "speaker" transmitting a narrow "government message," as discussed above, but also because the government, through a regulation, had authorized family planning clinics to spend their own, non-federal funds, on abortion advocacy through separate projects.

In seeking to defend the LSC restrictions from the constitutional challenge founded on the principle in *League of Women Voters*, LSC promulgated a "program integrity regulation" modeled on the regulation upheld in *Rust*. The LSC program integrity regulation is discussed here to illuminate the constitutional analysis that applies to recipients of LSC funds, and to recipients of analogous funds (subject to restrictions analogous to the LSC restrictions) when they seek to spend freely their own funds. While LSC's program integrity regulation does not permit LSC-funded organizations to freely spend their own non-LSC funds, it affords them a theoretical opportunity to spend non-LSC funds on restricted activities if they can satisfy the following criteria: (a) the non-LSC funds must be spent through a separately incorporated organization; and (b) the LSC must determine that the LSC recipi-

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85. See *supra* note 67 and accompanying text (quoting *Rust*).

86. See, e.g., Varshavsky v. Geller, No. 49767/91, slip op. at 14 (N.Y. Sup. Ct. Dec. 24, 1996) (holding unconstitutional the LSC restriction that prohibits "initiating or participating in class actions" noting that the government had, at that point, not afforded LSC recipients any opportunity to spend their own funds on such advocacy). In *Varshavsky*, the Brennan Center served as counsel to plaintiffs' Legal Services counsel. See also Daniel Wise, *Class Action Ban for Poor Struck; Legal Services Rule Held Unconstitutional*, N.Y. L.J., Dec. 27, 1996, at 1.


ent retains “objective integrity and independence” from the other organization based on “the totality of the facts” and consideration of whether the LSC recipient is “physically and financially separate” from the other organization. To determine whether programs are “separate,” the regulation explains that LSC will find that “mere bookkeeping separation” is not enough. LSC will consider the factors of “separate personnel;” “separate accounting and timekeeping records;” “degree of separation” from restricted activities and the extent of such activities; and the adequacy of signs distinguishing the two organizations.

These criteria impose a substantial burden on LSC programs that seek to use non-LSC funds to engage in restricted activities. While the regulation enables LSC and non-LSC programs to share overlapping boards of directors, and while it states that decisions about compliance will be based on all the evidence, the regulation still appears to require a high level of actual physical separation that is unnecessarily wasteful and therefore violates the First Amendment to the degree that it imposes unnecessary burdens on the lawyer-client relationship.

Most significantly, the provision that “mere bookkeeping is not enough” appears to require programs to invest in separate personnel, separate physical space, separate office equipment, and even separate computer networks.

Yet careful bookkeeping actually should be “enough” to safeguard the government’s interest in ensuring that only non-LSC funds will be used for restricted activities. While the government claims that further separation is justified to prevent the “appearance” that government endorses restricted activity, the concern about endorsement does not justify imposing onerous burdens on the lawyer-client relationship. Indeed, there is only minimal risk

89. Id.
90. Id.
91. Id.
92. In LASH, the Ninth Circuit accepted LSC’s assertion that in determining whether the program integrity regulation is satisfied no single factor is “determinative,” noting LSC’s assertion that a class action attorney had been allowed to continue serving as counsel “after modifying his schedule to work part-time for a LSC recipient.” LASH, 145 F.3d at 1027-8 (referring to Supplemental Excerpts of Record, at 34-35). The LASH court did not address the burden on First Amendment rights implicit in “allowing” an attorney to convert from full-time to part-time employment, to work for reduced salary, and to function out of two separate offices. Nor did the court appear to consider whether employment of part-time lawyers was a constitutionally adequate option for LSC programs interested in directing their non-federal funds toward the performance of restricted activities. For the record, I was the attorney who was the subject of LSC’s assertion. See also supra note 37.
that activities of Legal Services lawyers would be perceived as carrying the government's endorsement, and it is expected of lawyers that they will identify their affiliation accurately each time they make an appearance. Moreover, it is difficult for the government to identify a genuine harm even if the activities of Legal Services lawyers are seen as carrying the government's endorsement.\(^9\)

In sum, LSC's program integrity regulation improperly prevents LSC recipients from using their non-LSC funds to engage in restricted activities. Indeed, any doubt about the degree of burden in operating a legal program under LSC's program integrity regulation should be resolved in light of the fact that, in the entire nation, only a single, LSC-funded organization has, to date, established a separate affiliate entity under LSC's program integrity regulation.\(^9\)

**V. How Unrestricted Legal Representation Can Be Made Available to Poor Clients in the Twenty-First Century**

As LSC programs build walls around the federally-funded Legal Services programs, and try to raise new funds and create model programs to represent the poor, certain lessons resonate from the struggle against the restrictions.

Restrictions like those imposed by Congress on LSC funds are likely, eventually, to be imposed on new funds being sought by programs that provide legal representation to the poor. Regardless of where new funds are found, zealous lawyering on behalf of poor clients will always be perceived as provocative, and will always provoke political efforts to rein in lawyers who receive such funds.

The current threat to IOLA funds is typical of what may be expected.\(^9\)

New funds for the work of legal services programs that come from filing fees, registration fees, and other sources, are vulnerable to similar attack.\(^9\)

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\(^9\) See supra note 6.

\(^9\) See Phillips v. Washington Legal Foundation, --- U.S. ---, 118 S.Ct. 1925 (1998) (holding that the interest earned on client funds in "Interest on Lawyers Trust Accounts" is the property of the client, and remanding for a determination as to whether an unconstitutional "taking" occurs when Texas directs these funds to programs that provide civil legal services to the poor).

\(^9\) For example, the State Planning Assistance Network ("SPAN"), a joint project of the American Bar Association and the National Legal Aid & Defender Association, reports that nineteen states now have filing fee surcharges dedicated to civil legal services, and eighteen states have directly appropriated funds to legal services. See
While programs may attract private funds to use in representing indigent clients, obtaining private funds does not relieve programs of the need for government funds. Private funds will not match, in the foreseeable future, the approximately $300 million currently available in LSC funds, nor will private funds soon substitute for additional municipal, state, and federal funds available to represent the poor. Government funds also remain a crucial tool to leverage additional contributions of private funds.

The quarantining of LSC offices — segregating them from non-LSC offices — may seem like an attractive strategy for isolating the taint of the restrictions, but non-LSC offices must necessarily rely on grants from other components of government. Such offices, thus, remain vulnerable to the imposition of new restrictions like the LSC restrictions. Imposing a quarantine may ultimately do no more than delay the day of reckoning. Moreover, segregating personnel, leasing new physical space, and purchasing duplicative office equipment, are all expensive undertakings, particularly where in the end, they cannot guarantee security from restrictions that may follow such investments.

Segregating LSC offices from non-LSC offices is also a discouragingly inadequate solution in regions of the nation in which the non-LSC funds for unrestricted work are either unavailable, or too minimal to support a non-LSC office with sufficient capacity to serve the region. If the requirement of physical separation were rescinded, non-LSC money could be distributed among existing LSC offices across a state, thereby making unrestricted representation available throughout the state. Indeed, prior to passage of the restrictions, this was the general state of affairs. Now, under a regime that requires physical separation, the new non-LSC offices and the existing LSC funded offices, cannot share space and thus

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**The Span Update: A Guide to Legal Services Planning,** *supra* note 5 at 6-7 (citing 1997 findings of “Project to Expand Resources for Legal Services,” a division of the ABA standing committee on Legal Aid and Indigent Defendants).

97. Programs that accept some form of payment for legal services from indigent clients deserve further study to determine to what extent they can provide representation to the truly poor, be self sustaining, remain free from interference from government and other funders, and prove dynamic in diverse settings. See, e.g., Edgar Cahn, *Reinventing Poverty Law*, 103 *Yale L.J.* 2133 (1994).

98. Additionally, in contrast to LSC funds which historically have supported civil representation with only a few narrowly defined exceptions, the new grants from private sources and from certain state and local funds, are typically allocated for particular purposes that are narrowly defined. Nor are private funds immunized by the constitutional doctrines that set principled limits on the funder’s authority to determine what the recipient may do in representing clients. See discussion *infra* Part III.
must function in relative isolation from each other. In larger states, this requirement makes it prohibitively expensive for programs to maintain dual offices in sufficient number to ensure that unrestricted service will be available across an entire state or region.

Even in regions that are smaller, or that have sufficient funds to support parallel networks of restricted and unrestricted offices, the creation of organizations with similar and potentially duplicative missions will likely be problematic. Notwithstanding the good will of those involved, organizations may find themselves pushed into competition in fund-raising, hiring and in other areas, with the federally funded "restricted organizations" at a disadvantage. Nor is there refuge for Legal Services programs that use LSC funds to provide new forms of legal representation to the poor. Zealous advocacy, whether on behalf of poor individuals or not-for-profit community groups in poor neighborhoods, will inevitably provoke political reaction and efforts by government to impose conditions on such funds. Similarly, new models for representing the poor, such as those that would place lawyers within community organizations, or in schools or medical clinics, all will encounter the same risk of provoking any government funding source into imposing restrictions.

Because the restrictions are so pernicious, and their impact and ongoing effect so comprehensive, the reaction against the restrictions should be, conversely, intense and broad based. The strategies should include litigation, public education, and legislative advocacy. The struggle should be waged in the national arena, and at the state and grass roots levels to prevent new restrictions from being attached to new grants for legal services. The goals should include building a base of popular support for high quality, unrestricted Legal Services, removing the restrictions and eliminating the "physical separation requirement" that still prevents programs from using "other funds" to engage in restricted activities. Progress toward these goals is important not just for LSC, but also for the future of all civil legal services for the poor that is sponsored with government resources.

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Conclusion

In the end, a lot is riding on the effort to challenge the restrictions on constitutional or policy grounds. As long as the restrictions are in place, Legal Services programs and their non-LSC cousins will be squandering precious resources. Nor should we find much solace in devising alternative funding sources. Governmental funding will always be a necessary component of support for poverty lawyers; private sources could never carry the entire load. As long as that is true, the restrictions pose a threat to equal justice. There is nothing about LSC’s funding that makes it uniquely susceptible to governmental strings. If the restrictions are held constitutional, and viewed as legitimate, government will always have the incentive to attach them to any source of funding for lawyers. The challenge is either to convince the courts that the strings are unconstitutional or to convince lawmakers that they are unwise.
MERCOSUR: A TOOL TO FURTHER WOMEN'S RIGHTS IN THE MEMBER NATIONS

Erika Gottfried*

In Latin America we have advanced laws. It is the enforcement of these laws that often fails. A free trade pact would provide a written agreement which would act as an external anchor that can be used by low income groups and the disadvantaged who now lack political power to make sure these laws are enforced.¹

Introduction

Imagine you are a poor woman who grew up in a shantytown in the capital of your country. The last time you saw your husband was when the military announced over its loudspeakers that all men between the ages of eighteen and sixty had to go with them.² Since then, you have been doing odd jobs whenever possible so that you can feed your family. During the debt crisis of the 1980s, the government agreed to implement Structural Adjustment Programs³ which had the effect of raising the official unemployment rate to twenty-six percent.⁴ In fact, the unemployment rate in your shantytown reached eighty percent.⁵ Now, your country has joined a regional trade agreement and you fear the same thing will happen again.

Trade agreements have helped to foster the process of globalization of the world economies,⁶ and most countries in the world are

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3. See infra note 17.
5. See Fisher, supra note 2, at 27.
members of some type of trade agreement.⁷ Although trade agreements primarily are utilized to positively affect the economies of individual countries, they also affect the women who live in them.⁸ In South America, the Common Market of the Southern Cone ("Mercosur")⁹ is a trade agreement with great potential not only to help the economies of the member nations,¹⁰ but also to aid South American women in general.

South American women historically have been victims of discrimination and poverty,¹¹ and are affected by policies implemented by the individual governments and regional authorities.¹² Many assert that Mercosur and trade agreements in general should focus strictly on economic policies and trade, and thus should leave social issues regarding women to other means.¹³ This Note argues that Mercosur should be used as a tool to address issues that affect women. Part I presents a background of the position of women in Mercosur’s member states and how trade generally affects women. It also describes Mercosur and provides examples of regional agreements that address social issues. Part II juxtaposes the arguments for and against using trade agreements to deal with women’s social issues. Part III argues that Mercosur should be used to aid women in the member countries and to improve their societal positions within the region. This Note concludes by proposing that Mercosur prioritize women’s issues and makes structural changes to the agreement to reflect these changes.

¹⁰ See Interview of the President by Argentine Reporters, M2 Presswire Oct. 27, 1997.
¹² See Joekes, supra note 8, at vii.
I. Mercosur and Women

A. Women’s Social and Economic Position in the Member States.

Latin America’s recent past shows that any policy (economic, social, or political) impacts women differently than men.14 Women suffer specific forms of vulnerability that men do not experience.15 Also, economic recessions, repressive military regimes, and Structural Adjustment Programs (“SAPs”)16 imposed by the International Monetary Fund (“IMF”), all affected South American women, but did not address their specific needs.17 In fact, Mercosur is an extension of the liberalized economic policy begun with the SAPS.18 Nonetheless, the needs of women continue to be ignored in the member states.19 Therefore, Mercosur’s economic policy makers should explicitly consider women’s reality in the member nations and determine how a proposed policy will affect it.20

1. Socio-Economic Indicators

To determine Mercosur’s effect on the social and economic position of women in the member states, one must examine the factors that disproportionately affect women’s quality of life, such as the

14. See, e.g., Joekes & Weston, supra note 8, at 2-4. For example, trade may affect the distribution of jobs between “tradable” and non-tradable productive sectors, as well as shifting production relations between the formal and informal sectors. Id. at 33.
15. See, e.g., Nea Filgueiria, A Very Vulnerable “Development”, (visited Nov. 11, 1997) <http://www.chasque.apc.org/socwatch/uruguay.htm> (stating that “[t]he precariousness of their housing, the public insecurity and overcrowding, indicate risks, in particular for female children and adolescents, in everything related to sexual assault, abuse and exploitation.” Id.
17. See Kathleen Mahoney, Theoretical Perspectives on Women’s Human Rights and Strategies for their Implementation, 21 Brook. J. Int’l L. 799 (1996). “Structural adjustment programs imposed by the International Monetary Fund and the World Bank. [sic] They have caused disproportionate disadvantage to women because their theories, strategies, and solutions for development, growth, and underdevelopment tend to ignore women and the role they fulfill in their societies.” Id. at 852-53.
19. See, e.g., Paul Samuelson, Macroeconomics 386.
20. See Joekes & Weston, supra note 8, at viii.
rate of poverty, access to education, and political participation within the country.\textsuperscript{21} Poverty is a problem in Brazil, Uruguay, Paraguay, and Argentina,\textsuperscript{22} and it disproportionately affects women in these countries.\textsuperscript{23} Although the feminization of poverty is a worldwide phenomenon, compromising a great majority of the world's population living in poverty,\textsuperscript{24} the women of the Mercosur countries are particularly needy.\textsuperscript{25}

Women's educational and social experiences are unique at every stage of their lives.\textsuperscript{26} Studies of Paraguay have shown that parents reproduce the same sexist education that they received, and teachers reinforce it.\textsuperscript{27}


\textsuperscript{22} Half of Paraguayan households fall in the poor and very poor segments of the social economic status. \textit{See Paraguay, Uruguay Development Benefits from Mercosur Ties}, MARKET. LATIN AM., Aug. 1, 1997 [hereinafter Development Benefits]. The United Nations Report on Human Development stated that Brazil has the worst distribution of income and is recognized as a country having "inhuman growth." \textit{Uruguay: The Education System} (visited Nov. 11, 1997) <http://rs6.loc.gov/cgi-bin/D?cstdy:14:./temp/frd_q2XD>. Uruguay, on the other hand, has one of the most equitable distributions of income of the four countries. Twenty-eight percent of the population is in the upper and upper middle income segments, compared to thirty six percent that fall into the poor and very poor segments. \textit{See Development Benefits, supra} note 22.

\textsuperscript{23} \textit{See} Filgueiria, \textit{supra} note 15. Even though Uruguayan society is evenly split between the sexes, the indigent or poor households maintained by women are over represented — 3 times higher than the poor households headed by men. \textit{See id.} Brazilian women were much more likely to have no earnings or solely receive public benefits — 52.7\% of women compared with 27.8\% of men. \textit{See} Amelia Cohn, \textit{A Country of Injustice} (visited Nov. 11, 1997) <http://www.chasque.apc.org/socwatch/brazil.htm>. The poverty rate is improving, in Montevideo, Uruguay, for example, the percentage of poor households fell from 16.8\% to 9.9\% between 1989 and 1993. \textit{See Filgueiria, supra} note 15.

\textsuperscript{24} \textit{See} Gillian Moon, \textit{Trade and Women in Developing Countries} (visited Jan. 25, 1998) <http://www.caa.org.au/horizons/h13/trade.html> (stating that: the majority and the poorest of the poor [of the world's population] are women. Official figures reveal that women earn less than a tenth of the world's income and own less than one percent of the world's property. The proportion of women amongst the world's poor is growing rapidly — a process called the 'feminization of poverty.'

\textit{Id.}

\textsuperscript{25} \textit{See} Rivarola, \textit{supra} note 11, at 17 (stating that at least 60\% of the Paraguayan population lives under the poverty line).

\textsuperscript{26} \textit{See Latin American Women, Compared Figures} (1995) [hereinafter Compared Figures] (stating that even with the advances that women have achieved with respect to access to education, the school systems reinforce the traditional roles of men and women. This is expressed in a preference towards professional orientations in secondary and superior education). \textit{See id.}

\textsuperscript{27} \textit{See} Graziella Corvalan, Mujer y Mercosur: Paraguay 25 (unpublished manuscript, on file with the \textit{Fordham Urban Law Journal}).
Women are a small proportion of the membership in labor unions and have even less representation within the directorships in the member states. More broadly, women also are not represented adequately in the political sphere. For example, none of the member countries presently has a woman president or vice president, and the percentage of female cabinet members ranges from zero in Argentina to 9.1% in Paraguay (one of eleven ministers).

2. Women's Employment Situation

In each Mercosur country, women recently have entered the workplace in higher numbers. Women, however, often are pigeon-holed into traditionally feminine jobs which usually pay less in the labor market. Women also experience a higher rate of unem-

28. Out of Paraguay's 410 unions, seventy one percent are affiliated with the three central unions: the Central Unitaria de Trabajadores (CUT), the Confederación Paraguaya de Trabajadores (CPT), and the Central Nacional de Trabajadores (CNT). See COMPARED FIGURES, supra note 26. The CUT has 117 unions affiliated with 26,167 members, 24.4% of which are women. See id. Of the entire directorships, those with policy making authority, only 6% are women. See id.

29. Women represent between 4.2% (Argentina) and 11.1% (Paraguay) of the member states' Senates. See id. On the other hand, women represent between 5.6% (Paraguay) and 13.2% (Argentina) in the House of Representatives. See id.

30. See id.

31. See id. Paraguay has the highest percentage rate of women senators (11.1%) and the lowest percentage of women representatives (2.5%) of the five countries. See id.

32. See id. Over the last three decades women have entered the economically active population at a higher rate in every country. According to the "Platform for Women" of the Fourth World Conference on Women "due to . . . difficult economic situations and a lack of bargaining power resulting from gender inequality, many women have been forced to accept low and poor working conditions." FWCW, supra note 21. In the professional and technical spheres, women outnumber men in Brazil, Paraguay and Uruguay which is particularly notable because these occupations require a higher education degree. See COMPARED FIGURES, supra note 26. Women also outnumber men in all four countries in personal services. This is a rather amorphous category; it includes those jobs with the least level of productivity, such as work in the informal sector or domestic work and activities of superior productivity and wages, such as higher qualified work in the public sector in banking and financial services in general. See Teresa Valdes, Mujeres y el Mercado Común del Sur: Elementos Para Una Mirada Comparativa 3 (1995) (unpublished manuscript, on file with the Fordham Urban Law Journal). In all other positions (managers, farmers, and laborers) men outnumber women. See COMPARED FIGURES, supra note 26. In Uruguay's urban areas, men outnumber women as managers and laborers almost three to one and as farmers six to one. See id.

33. See Valdes, supra note 32, at 11-13. Women's average salaries are lower, across the board, than men's salaries for comparable work. In all five countries, women make between 63.9 - 75.1% of men's average salary. See COMPARED FIGURES, supra note 26. Although more women are studying in the universities and work in the
ployment than men. Additionally, women are victims of gender discrimination, insofar as they receive lower salaries than men for the same work and suffer sexual harassment in the work place.

Furthermore, the market deregulation imposed by the SAPs has reduced employment levels. When unemployment goes up, women are more likely to be pushed out of the formal, and into the informal sector. The informal sector is characterized by low skill levels, little pay, and precarious work conditions. Some women work informally as domestic help or small-scale entrepreneurs, earning only enough for short-term survival. Furthermore, "members of female headed households are generally restricted to low-productivity informal-sector employment . . . [and therefore] they are more likely to be poor and malnourished and less likely to obtain formal education, health care, or clean water and sanitation.

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34. See id. Urban Uruguayan women experienced an unemployment rate of 11.2%, compared to 7.5% of men in 1990. See id. This rate includes only those looking for a job for the first time. See id.

35. See id. In 1990, Paraguay's female population earned 63.9% of what their male counterparts made. See id. Argentina is the country with the lowest wage differential, where the women earn 75.1% of men's earnings. See id.

36. See Joekes & Weston, supra note 8, at 45.

37. From the late 1980s to present, women in urban sectors who have a middle school and high school educations have experienced the highest unemployment increase. See Valdes, supra note 32, at 15. In Paraguay, women represent over half of the informal workforce, and in Argentina and Brazil, the number is between 45% and 50%. See id. at 16. Some examples of work in the informal sector are "hawking, street vending, letter writing, knife sharpening, and junk collecting to selling fireworks, prostitution, drug peddling, and snake charming. Others found jobs as mechanics, carpenters, small artisans, barbers, and personal servants. Still others were highly successful small-scale entrepreneurs with several employees (mostly relatives) and high incomes." Michael Todaro, Economic Development 253 (5th ed. 1994).

38. See Valdes, supra note 32, at 16. Generally, those that are in the informal sector have little formal education, are unskilled and lack access to financial capital. For this reason, worker productivity and income are less than those in the formal sector. These informal sector workers do not enjoy worker protections, such as job security, decent working conditions, and old-age pensions. See Todaro, supra note 37, at 253.


40. Todaro, supra note 37, at 257.
The Mercosur states all have adopted a variety of social policies and programs to aid development, and many of these policies have acknowledged with particularity the importance of women’s issues. Brazil, for example, spent nearly fifteen percent of its Gross Domestic Product (“GDP”) on social programs during the first half of the 1990s. Paraguay’s president also is trying to reduce its informal economy, which is estimated to be about fifty percent of its GDP. Moreover, Paraguay promulgated a National Plan for the Prevention and Punishment of Violence against Women, with the general objective to “prevent and punish all kinds of violence against women, in order to eradicate it.”

Argentina has designed social programs specifically for women, such as a social security system used to protect both children and mothers during pregnancy and breast feeding periods. Argentina also prohibits women from working the forty-five days before and after they give birth. Moreover, Argentina instituted an affirmative action-type equal opportunity plan for women, which has led

41. See Cohn, supra note 23. Specifically, Brazil’s 1997 budget for social spending showed that food distribution rose 314% from the 1996 budget. Nevertheless, programs designed to expand and upgrade technical training and basic education lost 66% and 52% respectively. See id. Furthermore, the “social development strategy” has four subsets of actions:

a) maintaining the necessary and “not yet sufficient” conditions to promote improvement of the standard of living of Brazilians, i.e. ensuring macroeconomic stability, reforming government, and resuming economic growth; b) concentrating efforts on “universal” basic social services: education, health, social welfare, housing and basic sanitation, employment and social assistance (which account for over 90% of social spending); c) addressing bottlenecks (such as agrarian reform) with a view to accelerating the process of reform and restructuring of social services and proving attention to the socially most vulnerable groups (reduction of infant mortality, training of young people and minimum income for the aged); and d) articulating partnerships between government and civil society, as seen, according to the government, in the actions of the Solidarity Community Council.

Id. Nevertheless, this did not show any reduction in poverty or any improvement in social indicators. See id.

42. See Development Benefits, supra note 22.

43. SECRETARIA DE LA MUJER, NATIONAL PLAN FOR THE PREVENTION AND PUNISHMENT OF VIOLENCE AGAINST WOMEN 17 (1996). To complete this objective, the following actions were proposed: “care for victims, training of public sectors, education of society, legislation, research, records and educational public campaigns.” Id.

44. UN: Women’s Political Participation, Women in Informal Sector, M2 PRESSWIRE, July 23, 1997 [hereinafter PRESSWIRE].

45. See id.
to an increase in women's political participation from 5.8% to 28%.

Each member country has a secretariat on women's issues, whose responsibility is to represent women's concerns. Uruguay created a Special Commission on Women's Rights in the Culture Ministry, which is committed to revising and updating the general and particular laws regarding women. Argentina's National Council for Women also has introduced measures tailored to women's concerns. For example, the Council recently sent a bill to the Argentine Congress that would grant benefits to domestic servants, such as maternity leave, retirement, workers compensation, and social security. The Brazilian Women's Rights Council has implemented actions and initiatives concerning health, education, and labor. Finally, Paraguay created a Minister of Women to encourage the participation of women in the political, cultural, familial, labor and social realms.

**B. How Trade Affects Women Generally**

One positive effect of trade is that efficient export industries in a country become more productive and create more jobs in those sectors. Data shows that trade clearly has aided women's access

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46. See id. But what shows the government's priorities in this area is that this law was only implemented in 1995, even though it was approved in 1989. See Filgueiria, supra note 15.

47. See, e.g., IGUALDAD ANTE LA LEY: NUEVA LEGISLACION EN PARAGUAY 149 (Esther Prieto ed., 1996) [hereinafter IGUALDAD].

48. See Filgueiria, supra note 15.

49. See PRESSWIRE, supra note 44.

50. See id.

51. In the health area, the Council worked on family planning, and a national program for prevention and treatment of uterine and breast cancer. See Cohn, supra note 23.

52. The Ministry of Education committed itself to incorporate contents that are non-discriminatory with regards to women, as well as subjects promoting equality of men and women in its textbook selection. See id.

53. The Ministry of Labor, recognizing the process of feminization of poverty, is promoting training programs geared to adolescent victims of sexual exploitation and women heads of household. See id.

54. On September 18, 1992, The Republic of Paraguay created this position. See IGUALDAD, supra note 47.

55. See Sebastian Edwards, The Americas: Nafta Offers Latis Little They Can't Have Now, WALL ST. J., Apr. 18, 1997, at A19. During the beginning stages of a trade agreement, the market is adjusting to become more efficient. See Philip M. Nichols, Trade Without Values, 90 NW. U. L. REV. 658, 680 (Winter 1996). This means that some inefficient industries and even whole sectors will be forced to restructure or close which will result in laying off employees, while other industries will be strengthened and will be producing more to export to the larger market. See Labor Sector,
to paid employment, especially unskilled and manufacturing work.\textsuperscript{56} However, trade expansion hurts women in developed countries because it transfers jobs to women in less developed countries whose economies have become more efficient.\textsuperscript{57} Trade expansion also has many indirect, positive effects on women, such as improvements in self esteem, status, and treatment in the household.\textsuperscript{58}

Trade also has negative effects on women, however, which are exacerbated by the fact that economic restructuring affects them differently because of their gender-based roles.\textsuperscript{59} To gain fiscal bal-

\textsuperscript{56} See \textit{JOEKES \& WESTON}, \textit{supra} note 8, at 34-35 ("[J]obs created within an export-oriented development pattern have been disproportionately taken up by women. Exporting industries have a much higher proportion of women workers than other sectors.").

\textsuperscript{57} See \textit{id.} at 25. The theory is that women in developed countries tend to be employed disproportionately in unskilled positions, no less than those in the developing nations, so when the positions move to the developing nations, the women in the developed nations lose out. \textit{See id.} At the present time, this has not happened. "Trade expansion seems not to have been prejudicial to women's employment in developed countries, either in aggregate or in particular exporting industries. The level of total female employment has continued to rise steadily, irrespective of levels of import penetration in particular countries." \textit{Id.} at 35.

\textsuperscript{58} See \textit{id.} at 60. Tiano and Fiala state that in Mexico the attitudes and world view of the women who work in the export factories:

depart from an image of powerlessness and the ideology of the docile, undemanding women worker . . . . Most women appear to see themselves as adapting to the challenges of their changing roles in creative wages that benefit themselves and their families. [They] share a degree of empowerment and a conception of themselves as choice-making individuals with some control over their lives.


\textsuperscript{59} See \textit{JOEKES \& WESTON}, \textit{supra} note 8, at 2. For example, women's appeals to social change were only effective when it did not transcend their traditional roles as wife and mother. \textit{See} Catherine T. Barbieri, Note, \textit{Women Workers in Transition: The
ances, the member countries may need to reduce social spending on health care and education, which reduces employment opportunities. Men also tend to displace women’s jobs when they become unemployed, which often forces women into the informal sector. Unfortunately, the wages and income from informal work have gone down, and the reduction in social spending has resulted in additional burdens for women to fulfill the necessities of their families.

C. What is Mercosur?

South America has a rich history of regional and multilateral agreements, from the Latin American Free Trade Association (“LAFTA”) in the 1960s to the 1980 Treaty of Montevideo which created the Latin American Integration Association.


60. See Reich, supra note 13. Reducing state spending on social services affects women directly “by cutting their employment outside the home (fewer health care workers), for example, and indirectly by increasing pressures on women to provide these services themselves.” JOEKES & WESTON supra note 8, at 2.

61. See JOEKES & WESTON, supra note 8, at vii.

62. In 1993, the International Conference of Labour Statisticians defined the informal sector as:

informal own-account enterprises as enterprises in the household sector owned and operated by own-account workers, which may employ contributing family workers and employees on an occasional basis but do not employ employees on a continuous basis. Informal sector enterprises engage in the production of goods or services with the primary objective of generating employment and income to the persons concerned “and typically operate at a low level of organization with little division between labour and capital as factors of production and on a small scale.”\[...


63. See JOEKES & WESTON, supra note 8, at 47.

64. See id. at 2. For example, cuts in food subsidies lower the family’s nutritional intake if they do not invest in more time to find food outside their paid and household duties. See id. This especially affects women because “they are responsible for purchasing goods to meet family needs. Women are the primary providers of reproductive and social services — notably care of children and the elderly, health care, education and housing.” Id.

65. See Maria Haines-Ferrari, Mercosur: A New Model of Latin American Economic Integration?, 25 CASE W. RES. J. INT’L L. 413 (1993). The purpose behind LAFTA was in depth economic integration by establishing a common market, but its member states refused to surrender sovereignty for the necessary community institutions. See id.

66. See id. LAIA had the same purpose as LAFTA and was plagued with the same problems. See id.
The member states' protectionist refusal to surrender sovereignty for the regional good, however, led to the failure of both trade agreements.

Mercosur is a customs union in South America that was created when Argentina, Brazil, Paraguay, and Uruguay signed the Treaty of Asuncion ("Treaty") in 1992. It differs from earlier agreements because it came after years of SAPs implemented by the IMF during the debt crisis of the early 1980s. It also is an extension of the general policy shift in Latin America from protectionist import substitution to market driven export orienta-

67. See id. at 414.
68. See id. at 417.
69. See id.
71. See Treaty, supra note 70, at 1044.
72. See, e.g., WALDEN BELLO, DARK VICTORY: THE UNITED STATES, STRUCTURAL ADJUSTMENT, AND GLOBAL POVERTY (1994). The main elements of SAPs are: "exchange rate realignment" or devaluation . . . , removal of state subsidies on consumption and producer goods, reform or privatization of state enterprises, cutbacks in government expenditure program[s] to reduce the government deficit and liberalization of markets to improved production incentives and facilitate the allocation of resources into the most profitable activities." JOEKES & WESTON, supra note 8, at 44.
74. By the early 1990s most countries in the region had adopted neo-conservative economic policies to address the problems posed by large foreign debts, high inflation, and huge fiscal deficits. The ultimate goal of the neo-conservative economic prescription was to push through deregulation and trade liberalization so that the market, rather than the state, would be the ultimate referee on how resources would be allocated.
75. Import substitution is one strategy of economic development where a country attempts to be self-sufficient and lower the dependence on imports. See SAMUELSON, supra note 19, at 386. The countries implemented these policies to protect their "infant industries." Id. The policies may include high tariff and non tariff barriers. See id.
Mercosur is a result of this policy change and is intended to help insert the member states into the world economy.

1. Structure of Mercosur

Mercosur is based on three documents: the Treaty, the Protocol of Brasilia ("Brasilia"), and the Protocol of Ouro Preto ("Ouro Preto"). Its political structure was originally outlined in the

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76. Export orientation is another economic development policy where the country strives to export as many goods as possible by improving efficiency and competitiveness. See id. The country does this by removing controls and allowing the market to take its course. See id.

77. See Michael Reid, A Survey Of Mercosur: The End Of The Beginning - Mercosur Has Achieved Surprisingly Swift Success, THE ECONOMIST, Oct. 12, 1996 at 53. Since Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asuncion, many other countries investigated possible entry in Mercosur. See Debra Beachy, Free trade Spreads South / Mercosur Creates an Economic Power That Challenges The U.S.' Role in Latin America, HOUS. CHRON., Feb. 2, 1997, at 1. In June of 1996, Chile and Bolivia, on December 17, 1996, signed a Free Trade Agreement ("FTA") with Mercosur to become associate members and not full members. See Now They are Six / Mercosur Summit, THE ECONOMIST, Dec. 21, 1996 at 52. They decided to only become associate members because their external tariffs are lower than Mercosur's Common External Tariff ("CET") and did not wish to raise them. See Paula Green, Analysts: Exporters Should Shrug Off Mercosur Tariff Hike: But U.S. High-Tech Goods Face Lower Asian Prices, J. OF COM., Mar. 16, 1998, at 4A. Mexico, Canada and the members of the Andean Pact (Peru, Ecuador, Colombia and Venezuela) are all in the process of discussing some form of incorporation in Mercosur. See Thomas Andrew O'Keefe, An Analysis of the Mercosur Economic Integration Project from a Legal Perspective, 28 Int'l LAW 439, 446 (1994) [hereinafter Analysis]. Moreover, the European Union will be signing a FTA with Mercosur in 1999 which would be the first FTA between economic regional blocks. Free Trade Agreement with Europe in 1996, MERCOPRESS NEWS AGENCY, Oct. 2, 1997 <http://www.falkland-malvinas.com/archive/sni6021097.html>.

At the Summit for the Americas in Miami of 1994, President Clinton and all the hemisphere's leaders (except Fidel Castro of Cuba) agreed to organize a Free Trade Agreement of the Americas to cover both the North and South American continents. See Maybe, But How: Pan-American Free Trade (Free Trade Area of the Americas), THE ECONOMIST, Dec. 17, 1994, at 44. The easiest way to accomplish this is to build on existing trade agreements such as NAFTA and Mercosur. See The Americas Drift towards Free Trade (North and South America), ECONOMIST, July 8, 1995, 35.

78. On March 26, 1991, Argentina, Brazil, Paraguay and Uruguay collectively signed the Treaty which created Mercosur. See Emeric Lepoutre, Europe's Challenge to the US in South America's Biggest Market: The Economic Power of the Mercosur Common Market Is Indisputable, CHRISTIAN SCIENCE MONITOR, Apr. 8, 1997, at 19. The Treaty left the question of dispute resolution open, so the members met again on December 17, 1991 and created the Protocol of Brasilia for the Settlement of Disputes. Protocol of Brasilia, Dec. 17, 1991, 36 I.L.M. 691 [hereinafter Brasilia]. This outlines how a member nation can object to a policy that one of the other states has adopted. The parties who are in dispute must first negotiate. If this does not end in an agreement, the parties may submit the dispute to the Common Market Group and then to arbitration. Private parties who are detrimentally affected by a law adopted by a member state which violates a Mercosur obligation can file a claim with the Na-
Treaty and further detailed in the Protocol of Ouro Preto. Because the member states were willing to surrender only enough sovereignty to achieve their immediate goals, they decided not to adopt a supranational organization that would have authority to issue regulations with immediate binding effect, such as in the European Union. Instead, the Treaty loosely organized a governing scheme that allowed the member states to directly negotiate the progression of Mercosur.

The decision making organs of Mercosur are the Common Market Council ("CMC") and the Common Market Group ("CMG"). The CMC is the highest authority within the common market and is responsible "for the political leadership and for making the decisions necessary to ensure the achievement of the objectives defined by the Treaty of Asuncion." The CMG is the executive organ and is responsible for ensuring compliance and proposing measures to further Mercosur's goals. Most of the members of the CMC and the CMG are the same, and all of their decisions must be agreed upon unanimously and then ratified by the legislatures of each member state, resulting in a lengthy decision-making process.

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79. See Treaty, supra note 70, at 1044-45.
80. See Ouro Preto, supra note 78, at 1248-54.
81. See Assessment, supra note 70, at 14.
82. See Haines-Ferrari, supra note 65, at 432.
83. See Treaty, supra note 70, at 1047.
84. See id. at 1047-48.
85. Ouro Preto, supra note 78, at 1248. The Council consists of the Ministers for Foreign Affairs and the Ministers of the Economies of the member states and meets whenever appropriate and at least once a year with the participation of the Members' Presidents. See Treaty, supra note 70, at 1047.
86. The CMG consists of four members and four alternates from each country representing: the Ministry of Foreign Affairs, the Ministry of the Economy or its equivalent, and the Central Bank. See id. at 1048.
87. See id. at 1047-48.
88. See Analysis, supra note 77, at 444.
89. See id.
2. Economic Policy of Mercosur

The Treaty outlines the following final policies that govern Mercosur’s common market: (1) the free movement of goods, services and factors of production (including people and capital within the Mercosur region); (2) the establishment of a common external tariff (“CET”) and trade policy with respect to non-members; (3) the coordination of macro-economic and sectoral policies; and (4) the harmonization of the members’ legislation to further the integration process.

Originally, Mercosur addressed only the first goal: the free movement of goods. The second goal of a CET, which means imposing a tax on each good that enters the Mercosur region from non-members, was not adopted until the Protocol of Ouro Preto in 1994.

90. Treaty, supra note 71, at 1045. The reasons why the countries adopted Mercosur, as spelled out in the Treaty’s preamble, are: to expand their domestic markets as a “prerequisite for accelerating their processes of economic development with social justice,” secure the member states’ a “proper place in the international economy,” as a step to bring about “Latin American integration,” and to “promote the scientific and technological development of the States Parties and to modernize their economies . . . to expand the supply and improve the quality of available goods and services, with a view to enhancing the living conditions of their populations.” Id. at 1044.

91. See id. at 1045.
92. See id.
93. Id.
94. See id.

96. The member states agreed to progressively lower their tariff and non-tariff barriers to goods originating in one of the member states each year. Non-tariff barriers are defined by any measure, be it administrative, financial, or relative to currency exchange, which prevents or hinders reciprocal trade of a member state by a unilateral decision. See Trade Among Member Countries (visited Nov. 10, 1997) [hereinafter Trade Among Member Countries]. The rules of origin, outlined in the Treaty of Asuncion, state that goods need to be native or sufficiently transformed within the Mercosur region. See Analysis, supra note 77, at 442. Argentina and Brazil agreed to lower the tariffs to zero by 1994, while Paraguay and Uruguay were given another year to lower their tariffs to zero. See Haines-Ferrari, supra note 65, at 430.

97. See Trade with Third Party Countries (visited Nov. 10, 1997) [hereinafter Trade with Third Party Countries]. Many authors, before the Protocol of Ouro Preto, lamented that Mercosur countries would find it difficult to create a CET because “the countries would not be willing to consent to legal integration models operating without their full individual control.” Haines-Ferrari, supra note 65, at 420.

98. See Ouro Preto, supra note 78, at 1244. Brazil originally had a high tariff to protect its capital goods market, while the others wanted a low tariff. The agreed upon average trade weighted tariff was 14% which was lower than all the members’ tariffs,
To date, there is no agreement on how to implement the policies regarding the free movement of factors of production, the coordination of macroeconomic policies, and the harmonization of legislation. All of these goals, however, must be accomplished before Mercosur becomes a common market.

3. The Member States’ Economic Position

The member countries all have different economies based on different sectors. In the past five years, the member states’ economies all have improved. For example, their GNPs enjoy continued growth with few exceptions, and their 1996 inflation rates were lower than those in the previous four years.

While there is a great overlap of products that the countries produce, each country has a comparative advantage over the other except Paraguay’s. See Reich, supra note 13. Most of the tariffs are already in place with few exceptions. One exception is that each country has negotiated lists of products exempted from the CET. See Trade Among Member Countries, supra note 97. These will progressively lower to the common tariff. See Ouro Preto, supra note 79, at 1257. Introductory Note by Evelina Teubal Alhadeff. Argentina and Brazil were allowed a list of 300 products which will be protected until 2001 and Paraguay’s 399 products and Uruguay’s 300 will be protected until 2006. See Trade With Third Party Countries, supra note 97. Capital goods and computers and telecommunications is another exception to the CET. See id. On November 14, 1997 the economy ministers of the four countries banded together to raise the CET until December 31, 2000. See Economic News Briefs from Mercosur Countries, XINHUA ENG. NEWswire, Nov. 15, 1997. The maximum rate is now between twenty and twenty-three percent, while the maximum rate prior to this change was twenty percent. See Doreen Hemlock, As Fast-Track Stalls, Mercosur Rolls, SUN. SENTINEL, Nov. 24, 1997, at 6.

In November of 1997, Argentina’s Central Bank President proposed a single currency for the Mercosur region as the last stage to the integration process. See Argentina Proposes Single Currency for Mercosur, XINHUA ENG. NEWswire, Nov. 18, 1997.

See infra note 115 for the definition of a common market.


See AMERICA ECONOMIA (Edicion Anual 1996-97). From the years 1992 to 1996, all five countries experienced positive economic growth, except that in 1992, Brazil had a GNP rate of -0.9% and Argentina and Uruguay experienced negative growth in 1995. See id.

Brazil’s drop in inflation was the most dramatic: in 1993 it was 2,829.0% and fell to 15.0% in 1996. See id.

The five major export products of each country are the following: Argentina-oilcakes and oilseed, unmilled wheat and rye, oil byproducts, soybean (excluding flour), and sunflower oil; Brazil-iron and concentrate, oilcakes and oilseed, fruit and
members and is in a different stage of development. For small economies, like Paraguay, which are often characterized by a poorly developed infrastructure (an absence of a large body of skilled workers, a lack of capital, etc.), it is difficult to diversify and promote development through export orientation in the global economy. Consequently, these economies must rely on the imports of manufactured products, machinery, and consumer goods. Yet, Paraguay has a comparative advantage with agriculture. Brazil, on the other hand, already has diversified its exports to include industrial goods, such as automobiles and capital goods. Therefore, Mercosur must evolve in a way in which it does not detrimentally affect any individual country or population.

D. Other Regional Trade Agreements Have Social Policies

Most of the countries in the world are members of a regional trade agreement. Many types of agreements exist: free trade agreements, customs unions, common markets, economic integration, and full economic integration. The social policies most commonly included in trade agreements deal with labor is-

Vegetable Juice, Footwear, and Coffee and Coffee Substitutes; Paraguay-Raw Cotton, Soybeans (excluding flour), beef, roundlogs (sawable), and hides and fur; Uruguay-beef, wool hides, horsehides and furs, rice, and sheep or lamb wool. See COMPARED FIGURES, supra note 26.

106. The concept of comparative advantage states that each country produces some goods or services more efficiently than others and should therefore continue to produce those goods and services and stop producing other goods or services that are not efficient. See Nichols, supra note 55, at 662-63.

107. See Labor Sector, supra note 55.

108. See McCarthy, supra note 18, at 15.

109. See Development Benefits, supra note 22.


111. See, e.g., Peugeot Planning to Set Up Car Plant in Brazil, Import Parts from Argentina, BBC SUMMARY OF WORLD BROADCASTS, Jan. 6, 1998.

112. See Brand, supra note 7, at 170.

113. A free trade agreement includes the elimination of tariffs and quantitative restrictions on goods between member states. See Assessment, supra note 70, at 14.

114. A customs union is a free trade agreement with a Common External Tariff. See id.

115. A common market is a custom union that eliminates restrictions on the free movement of labor, services and capital (the so-called factors of production). See id.

116. An economic union is a common market that also harmonizes different macroeconomic policies. See id.

117. Total economic integration includes the unification of monetary, fiscal and social policies with the establishment of a supranational authority whose decisions are binding on all member states. See id.
sues.\textsuperscript{118} For example, the North American Free Trade Agreement's ("NAFTA") North American Agreement on Labor Coordination ("NAALC")\textsuperscript{119} and the European Social Charter\textsuperscript{120} both discuss labor issues within a larger trade agreement.

1. **North American Agreement on Labor Coordination**

Prior to NAFTA, the United States imposed unilateral trade sanctions to punish labor rights violators with loss of preferential tariff treatment.\textsuperscript{121} NAFTA's member states (Canada, Mexico, and the United States), however, negotiated NAALC, a separate agreement on labor to ensure that the member countries respected their own labor policies.\textsuperscript{122} The NAALC represented the beginning of a "substantive movement away from the unilateralism that has dominated US international labor rights policy."\textsuperscript{123} Nevertheless, it still retained strong unilateral features that stressed sovereignty in each country's internal labor affairs.\textsuperscript{124} For example, the members were obligated only to follow their own domestic labor standards,\textsuperscript{125} and the NAALC's guidelines on the fair treatment of workers are nonbinding.\textsuperscript{126}

The NAALC has been criticized because a country's minimum standards in wages or occupational safety cannot be modified under NAFTA, which relies on the domestic labor laws of each member state and does not adopt policies for the entire region.\textsuperscript{127} The NAALC also excludes women who work in the informal labor sectors, so these workers will not receive the benefits of increased anti-discrimination protection and union participation that the

\textsuperscript{118} See, e.g., North American Agreement on Labor Coordination, 32 I.L.M. 1499 (1993) [hereinafter NAALC].

\textsuperscript{119} Id.


\textsuperscript{122} See NAALC, supra note 118.

\textsuperscript{123} Compa, supra note 121, at 343.

\textsuperscript{124} See id. at 354.

\textsuperscript{125} See id.


\textsuperscript{127} See Compa, supra note 121, at 356.
agreement promises. Moreover, whether new members to NAFTA must accede to the NAALC is unclear, because it is a separate instrument from NAFTA.

2. European Social Charter

The European Economic Community's Treaty ("EEC Treaty"), which is the constitutional charter of the European Community ("EC"), grants authority to the European Council ("Council") to legislate matters. In the 1960s and 1970s, every decision by the Council had to be made unanimously, effectively giving each member state a veto. In 1985, the EC adopted amendments to the EEC Treaty. One such amendment permitted certain types of legislation to be adopted by a qualified majority vote of the Council.


128. See Barbieri, supra note 59, at 526.
129. See Compa, supra note 121, at 357. For example, if Mercosur adopts common basic labor norms more like the European model than the NAALC's "mix of multilateral forms and sovereignty-preserving substance" it is unclear how will the two agreements merge into the Free Trade Agreement of the Americas. Id. at 340-41.
130. See Goebel, supra note 120, at 4-5.
131. The European Council is the meeting of all the member states' heads of government and meets at least twice a year. See id. at 15.
132. See id.
133. See id. at 10.
134. See id.
135. See id. at 11.
136. See id. The following measures must still be adopted unanimously: "fiscal provisions, the free movement of persons, and 'those relating to the rights and interests of employed person.'" Id. at 12 (quoting the EEC Treaty Art. 100(a)(2)).
137. See id. at 8.
138. Id. This Article does not grant legislative authority to the Community. See id. at 9. Therefore, the Community uses Article 100, which grants this power, solely to harmonize laws to achieve the common market so that they can adopt legislation on this issue. See id. The Court of Justice has interpreted this Article broadly, but has limited this Article with reference to pay and not to equal treatment between the sexes. See id. at 30.
139. See id. at 30. "The directive requires member states to review their laws, regulations, and practices in order to eliminate any discriminatory provisions." Id. at 35.
140. See id. at 40.
Even after the 1985 amendments, most EC social policies still needed to be adopted by an unanimous consensus. Nevertheless, the United Kingdom, under Margaret Thatcher, opposed EC action in the social realm. Therefore, progress stalled in the social sphere during the 1980s.

In 1989, eleven of the twelve members of the EC adopted the Community Charter of the Fundamental Social Rights of Workers ("Social Charter"). Although the Social Charter does not have legally binding effect, it represents a political commitment of its members to move forward on social issues. The draft preamble declared that it was made to "offer improvements in the social field for citizens;" the final document, however, replaced the word, "citizen" for "workers." Accordingly, the Charter represents only workers and excludes anyone who has never been employed.

Title I of the Charter is divided into twelve sections that describe the substantive provisions. One of these sections discusses the equal treatment of men and women. In this section, the language is stated as an obligation and not just as a right of equal treatment. Therefore, the EC has made small steps to improve women's position in the region through the use of an agreement primarily based on trade.

II. Mercosur and Women: Competing Views

One of the primary goals of regional trade agreements is to help the economies of the member states. Under a protectionist view, the economy benefits because the trade agreement protects the do-

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141. See id. at 56.
142. See id. at 58.
143. See id. at 59-60. The United Kingdom originally opposed the Charter. See id. at 60. When Anthony Blair was elected Prime Minister of the UK, he acceded to the Charter. See Iain McMillan, Treaty Needs to Focus on Jobs, not Welfare, THE SCOTSMAN, May 8, 1997, at 29. Also, Austria, Finland and Sweden agreed to the Charter when they joined the European Community. See id.
144. See Goebel, supra note 120, at 61.
145. Id. at 63.
146. Examples of groups that are excluded from the Charter are: "students, wives who never sought employment outside the home, persons with adequate financial resources who never work, or persons with mental or physical handicaps who are incapable of being employed." Id. at 64.
147. See id. at 66-73.
148. See id. at 70.
149. See id. The text states, "[e]qual treatment for men and women must be assured." Id.
150. See Labor Sector, supra note 55.
mestic "infant industries"151 against third parties.152 Under an export orientation view,153 regional integration increases exports under favorable conditions.154

At the signing of the Treaty of Asuncion, Mercosur was viewed as initiating a “process of economic integration, rather than as a constitutional instrument for the common market.”155 For this reason, the member states agreed on only economic issues, and the instrument originally did not include social clauses or provisions for social integration.156

Since its founding, Mercosur has taken some steps to discuss social issues, specifically labor.157 In 1991, for example, the Ministers of Labour of Argentina, Brazil, Paraguay, and Uruguay met and signed a Declaration158 which emphasized "the need for the process of integration to be accompanied by a real improvement and greater equality in the conditions of work between the participating countries."159 In response to the Declaration, the CMG created

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151. An infant industry is “[a] newly established industry usually set up behind the protection of a tariff barrier as a part of a policy of import substitution. Once the industry is no longer an infant, the protective tariffs are supposed to disappear, but often they do not.” Todaro, supra note 37, at 682-83 (emphasis omitted).
152. See Samuelson, supra note 19, at 386.
153. See supra note 76 and accompanying text.
154. See McCarthy, supra note 18, at 13.
155. Castillo, supra note 95.
156. See id.
157. See id.; see also Ouro Preto, supra note 78, at 1253-54.
158. The Declaration was as follows:
   I. The Treaty of Asuncion opens the door to significant progress for their respective countries and a successful result should therefore be sought in the current negotiations.
   II. All social aspects of Mercosur need to be attended to and the various representatives should be helped in their tasks to ensure that the process of integration is accompanied by real improvement and relative equality in conditions of work in the countries signing the Treaty.
   III. The establishment of subgroups whose task will be to further the study of various relevant issues
   IV. Envisage agreement on an instrument within the framework of the Treaty of Asuncion to deal with the social questions which will inevitably arise from the implementation of the Common Market of the Southern Cone.
   V. The countries involved will provide all the necessary cooperation for mutual information of their respective schemes covering employment, social security, vocational training, industrial relations and individual work relations.
   VI. Follow-up to the agreements through other meetings similar to that held in this city of Montevideo on 8 and 9 May 1991 in which the authorities charged with social and labour matters participated.
Castillo, supra note 95 (original in Spanish).
159. Id. Moreover, the Ministers recognized the possibility of signing a social instrument within the framework of Mercosur. See id.
Subgroup 11 on Labour Relations, Employment and Social Security to discuss labor issues. With the goal of expanding Mercosur into a customs union, the Protocol of Ouro Preto created more administrative organizations, including the Social Economic Advisory Forum ("Forum") which is made up of representatives of business associations and trade unions. No Mercosur organ, however, has ever formally addressed women's issues.

A. Trade Agreements Should Not Discuss Social Issues

Many proponents of trade agreements believe that these agreements should focus solely on economic issues and leave social issues for other venues. These proponents base their arguments primarily on economics and international law.

1. Trade Agreements Focus Strictly on Economics

Mercosur's primary purposes are to boost trade in the region and to attract foreign investment to a wider market based on export orientation. Many opponents of harmonization of social issues argue that harmonization simply is another form of protectionism which these countries are trying to avoid. They contend that the only reasonable path to economic development is to take advantage of the country's cheap labor pool to attract foreign in-

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160. The Treaty gave the CMG authority to create subgroups to help perform its duties. The subgroups only have the authority to give recommendations to the CMG. See id. Subgroup 11 first met on March 27, 1992. See id. It further categorized their duties into 8 working groups as follows: (1) individual employment relations; (2) collective employment relations; (3) employment and migrant labor; (4) occupational training; (5) workplace health and safety; (6) social security; (7) labor costs in land and water transportation; and (8) ILO Conventions. See Compa, supra note 121, at 360.

161. See Labor Sector, supra note 55.


163. See supra Parts II.A.1, II.A.2.

164. See id.

165. See Mercosur: Now They are Six, THE ECONOMIST, Dec. 21, 1996 at 52.


167. See Reich, supra note 13. "Leaders in both Southeast Asia and Latin America argue that international minimum labor standards are simply a form of First World protectionism." Abbott, supra note 126, at 344.
vestment, and thereby increase their economic growth rate and general standards of living over time. They also argue that international minimum labor standards would deprive them of their comparative advantage. Moreover, to implement minimum labor standards for the whole region, companies in the more developed countries "simply wouldn't build factories" in the less developed countries because those countries would lose their cheap labor advantage.

Countries, such as Mercosur's member states, agree to join regional trade agreements because of the positive effects they have on the economies and societies. Trade allows a country to be more efficient which helps it accumulate savings to invest in development, acquire foreign exchange to purchase foreign technology, and increase labor and capital productivity thereby helping individuals indirectly over time.

Trade also aids individuals because it spurs production of a higher variety of goods, encourages investment in the infrastructure, and encourages political stability. When a nation's trade barriers are lowered, more goods are imported at a cheaper price, and thus even poor populations have access to goods that were previously available only to the wealthy.

Political stability is also a consequence of economic integration. That is, for a country to continue on this path of economic integration, it must cooperate peacefully with its neighbors. Furthermore, democracy is a prerequisite for membership in Mercosur

168. See id. at 344-45.
169. See id.
170. Reich, supra note 13.
171. Junichi Goto summarized some of these positive effects:
   1. greater consumer satisfaction due to an increase in the variety of goods; 2. a decrease in the monopolistic power of domestic firms; 3. increased technical efficiency due to a decrease in the average production costs; 4. a decrease in unemployment due to reduced imperfections in the labor market; 5. a contribution to economic growth through a release of capital resources from the distorted sector.
172. See Nichols, supra note 55, at 667.
173. Brazil is one example of this. The agricultural producers in the South have cut costs and invested in new technologies to keep up with the Argentine and Uruguayan imports. See Manzetti, supra note 74, at 113.
175. See id.
176. See Nichols, supra note 55, at 667.
because the members must work together for a common goal in order to continue in the agreement.  

2. **International Law Respects Member State Sovereignty, and Therefore the Member States Can Decide What Policies to Adopt**

A common international law argument is that each country in the world is a sovereign entity. Many commentators thought that it would be difficult for Mercosur to adopt the CET because it entails surrendering part of the member states’ sovereignty. They also argue that although the member countries finally did adopt the CET, social issues are too far within the domestic realm to achieve a consensus. Moreover, Mercosur does not have a supranational authority because the countries have been very careful not to give up any more sovereignty than they decide is necessary for their immediate goals.

Proponents of a narrow focus for Mercosur argue that the member states are in different levels of economic and social development and have historical and political differences. Furthermore, the less developed countries may not be able to afford the agreed

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177. See Michael Reid, *The End of the Beginning*, *The Economist*, Oct. 12, 1996 at 53. While all the members are now ruled by democratically elected presidents and legislatures, in the recent past they all were ruled by authoritarian dictators. Paraguay was ruled for thirty-five years (1954 to 1989) by General Alfredo Stroessner. See Jorge Pina, *Politics-Paraguay: Opposition Candidate Warns of Risk of Coup*, *Inter Press Service*, Feb. 26, 1998. Brazil was led by a succession of four-star military generals from April 1964 until March 1985. See Terence S. Coonan, *Rescuing history: Legal and Theological Reflections on the Task of Making Former Torturers Accountable*, 20 *Fordham Int’l L.J.* 512, 516 (1996). Argentina and Uruguay were both led by military juntas from 1976 to 1983 and 1973 to 1985 respectively. See id. at 516, 528-29. During these dictatorships, women often took a leading role to fight the dictatorships. See Barbieri, *supra* note 59, at 530 (discussing the Mothers of the Plaza de Mayo who protested the “disappearances” of their family members perpetrated by the Argentine military government).


182. See *Labor Sector, supra* note 55. See also *supra* Part I.C.3.
upon standards that exist in the more highly developed countries.  

**B. Mercosur Should Harmonize on Women’s Labor Issues**

The Preamble to the Treaty of Asuncion states that one of the goals of Mercosur is economic development with social justice. Although Mercosur has adopted two organs to address labor issues, they have limited effectiveness because they have the authority only to present recommendations. Moreover, women’s issues have never been addressed, because Mercosur has no juridical document requiring it. Mercosur’s members, however, have all signed on to many United Nations (“UN”) agreements regarding women’s issues, including the World Summit on Social Development in Copenhagen (“Summit”) and the Fourth World Conference on Women in Beijing (“FWCW”).

Although these agreements, in their present form, are not legally binding under international law because they are not treaties, they may be viewed as emerging customary law. Customary law, a source of binding international law, is a general recognition that a certain practice is obligatory in the international arena.

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183. See Reich, supra note 13. Reich wrote about developing countries, in general, with respect to US labor standards. But the analogy still holds to the topic of this Note.

184. See Treaty, supra note 70, at 1044.

185. See Ouro Preto, supra note 78, at 1254 (stating that the Forum “shall have a consultative function and shall express its views in the form of Recommendations to the Common Market Group”).

186. See id.; see also Brasilia, supra note 78; Treaty, supra note 70.


188. See FWCW, supra note 21.


191. See id. at 4. During the formation of a custom, a state can announce its dissent regarding a custom, and then the state would not be bound by that law even when the legally binding custom becomes fixed. See Francis Giba-Matthews, Note, Customary International Law Acts as Federal Common Law in U.S. Courts, 20 FORDHAM INT’L J. 1839, 1854 (1997).

192. See BROWNLIE, supra note 190, at 11-15. The elements of an obligatory custom are: duration; uniformity, consistency of practice; generality of practice; and opinio juris. See id. at 4-9. For the duration element, no specific duration is required, but the passage of time does help prove the generality and consistency. See id. While complete uniformity is not required, substantial uniformity is. See id. The generality requirement is similar to the consistency factor, but it makes it necessary to decide the
Therefore, the UN agreements "may constitute cogent evidence of the state of the customary law on the subject concerned." Once an international custom is found to exist, domestic courts have used international law within the domestic court system. Some countries have adopted specific international customs as legally binding under the jurisdiction of the national courts. Moreover, domestic courts may use nonbinding international law as an aid to interpreting domestic law.

1. The World Summit for Social Development

To remedy the debt crisis of the early 1980s, the IMF imposed SAPs on developing countries in exchange for credit. For example, developing countries adopted programs aimed at raising the unemployment rate and lowering social spending, as well as monetary and fiscal policies. However, while economic growth has continued, the gap between the rich and the poor widened. In Argentina, the IMF recently imposed a SAP that was conditioned on raising different social indicators, such as education and health care, and lowering poverty. Following this change in emphasis, the UN, including all of the Mercosur member states, met in Copenhagen in March 1995 to discuss and sign the Summit.

value of abstention: silence as tacit agreement or a simple lack of interest. See id. at 6. Finally, the states must be complying with the custom out of a sense of legal obligation, in other words, "opinio juris." Id. at 7.

193. Id. at 14.
194. See, e.g., Filartiga v. Pena, 630 F.2d 876 (2d Cir. 1980).
195. See id. (holding that international customary law can be the basis of a cause of action in United States courts). See Giba-Matthews, supra note 191, at 1854 for an interesting discussion of how the U.S. courts should adopt customary law as binding law.

197. See supra note 8, at 44.
198. See supra note 16-17 and accompanying text.
199. See supra note 8, at 44.
200. See Eugenio Carrasco, Critical Issues Facing the Bretton Woods System: Can the IMF, World Bank and the GATT/WTO Promote an Enabling Environment for Social Development, 6 TRANSNAT'L & CONTEMP PROBS. i, iii-iv (1996). In Chile, for example, the poorest ten percent of the population earned incomes equal to 1.5% of the total incomes received, while the richest ten percent earned 40.2% of the total. See Enrique R. Carrasco and M. Ayhan Kose, Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development, 6 TRANSNAT'L & CONTEMP PROBS. 1, 16 (1996) (quoting Sergio Bitar, CHILE: EXPERIMENT IN DEMOCRACY 5 (Sam Sherman trans., 1986)).
201. See supra note 13.
202. The principles and goals of the agreement it to have a:
At the Summit, the deliberations focused on: "(i) the alleviation and reduction of poverty; (ii) the expansion of productive employment; and (iii) the enhancement of social integration, particularly of the more disadvantaged and marginalized groups." The Summit was based on the view that development requires the full participation of the population in the formulation, implementation, and evaluation of decisions for the benefit of society.

To further these goals, the Summit declared ten basic commitments. Most importantly, the first commitment committed the signatories to "an economic, political, social, cultural and legal environment that will enable people to achieve social development." The fifth commitment was to promote "full respect for human dignity and to achieving equality and equity between women and men, and to recognizing and enhancing the participation and leadership roles of women in political, civil, economic, social and cultural life and in development." The final commitment encouraged the members to adopt "an improved and strengthened framework for international, regional and subregional cooperation for social development, in a spirit of partnership, through the United Nations and other multilateral institutions."

Along with the commitments, the Summit also adopted a Programme for Action ("Programme"). As part of the Programme, which was designed to provide concrete objectives, the UN, including Brazil, Paraguay, Uruguay and Argentina, agreed that regional agreements should ensure that humans are at the center of social development.

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political, economic, ethical and spiritual vision for social development that is based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and cooperation . . . . Accordingly, we will give the highest priority in national, regional and international policies and actions to the promotion of social progress, justice and the betterment of the human condition, based on full participation by all.

SUMMIT, supra note 187.

203. Carrasco, supra note 200, at iv.
204. See id.
205. This Note will only address three of the ten commitments pursuant to its scope.
206. SUMMIT, supra note 187.
207. Id.
208. Id.
209. Id.
210. These agreements should "promote the implementation of all human rights and fundamental freedoms and the elimination of all forms of discrimination." Id. Argentina is the only Mercosur member that presented reservations to the Summit. These reservations were regarding family planning and abortion. See id.
2. The Fourth World Conference on Women

In 1995, the United Nations Commission on the Status of Women ("CSW"), overseen by the United Nations Economic and Social Council ("ECOSOC") organized the FWCW because, despite the progress made after the first three World Conferences, much more remained to be done.\(^{211}\) The FWCW produced a completed document consisting of two parts: the Beijing Declaration and the Platform for Action ("Platform").\(^{212}\) At the conference, the participants agreed to adopt and implement the Platform.\(^{213}\) Although the agreement is not legally binding, the FWCW Platform could be used as a model for women’s international empowerment.\(^{214}\)

The Mission Statement of the FWCW Platform states that it aims “at removing all the obstacles to women’s active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making.”\(^{215}\) Furthermore, it states that “[t]he advancement of women and the achievement of equality between women and men are a matter of human rights and a condition for social justice and should not be seen in isolation as a women’s issue.”\(^{216}\)

The Platform lists Strategic Objectives and Actions.\(^{217}\) The “Women and Poverty” objective directs the governments to “[r]eview, adopt and maintain macroeconomic policies and development strategies that address the needs and efforts of women in poverty.”\(^{218}\) Another objective is to improve women's access to voca-
tional training, science and technology. One of the actions suggested to accomplish this objective is to develop and implement training policies that enable women to reenter the labor market with skills necessary “to meet the needs of a changing socio-economic context for improving their employment opportunities.”

III. Mercosur Should Address Women’s Issues

Although Mercosur started to address labor issues by creating the Subgroup 11 and the Forum, no part of Mercosur has addressed the problems women are facing in the member states. Mercosur should specifically work to advance women’s rights within the member states because, if it continues in the present manner, it will disproportionately affect women adversely.

A. Economics Is Not the Only Issue

Those that would restrict Mercosur to economic issues argue that everybody benefits in the long run when the economy grows. Unfortunately, policies necessary to achieve economic growth can be exceptionally harsh in the short to medium term on poor and vulnerable people who are living day to day. One of the conditions that the IMF imposed on developing countries in the SAPs

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219. See id.
220. Id. Beijing also directs the countries to eliminate all forms of employment discrimination. Two actions that are presented to the governments are to develop employment programs to women entering or reentering the labor market, especially those on the margin, as well as to eliminate discriminatory practices especially regarding women’s reproductive roles, such as refusal to hire or dismissal because of pregnancy or breast feeding. See id.
221. See supra notes 157-162 and accompanying text.
222. See supra note 162 and accompanying text.
223. See supra Part II.A.
224. See Barbieri, supra note 59, at 526 (stating that “unemployment is a recognized short-term effect of economic openness”). While opponents may argue that in the long term everybody benefits, the “long term” is not necessarily too welcoming either. McCarthy, supra note 18, at 11 (stating that: [t]he distribution of benefits is of such crucial importance for the establishment and the survival of an integration scheme that measures to procure an acceptable distribution should form part of all such scheme among countries at different levels of development; if matters are left to the forces of the unregulated market, an acceptable outcome will not materialize).

Growth rates may be rising, but so is the gap between rich and poor, while the middle classes have shrunk. See Reich, supra note 13. The gap may not be so detrimental, if real wages have gone up, but real wages have fallen. See The Backlash in Latin America: Gestures Against Reform, THE ECONOMIST, Nov. 30, 1996 at 53.
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was to raise unemployment.\(^{225}\) The unemployment rate, however, is not simply a number. It reflects the amount of individuals who are not working and thus cannot support their families.

Mercosur has not explicitly adopted the same policies as in the SAPs, but it does promote the same overall export orientation policy. Mercosur should make monetary and fiscal policies that ensure that unemployment stays within reasonable bounds, allowing people on the margins to survive. Unemployment disproportionately affects women in many ways, including pushing them out of the formal sector and into informal work situations.\(^{226}\)

Although the Brazilian government has recognized the need to address poverty in their domestic policies,\(^{227}\) Mercosur should try to achieve this goal as a regional group.\(^{228}\) Policy measures should include an investment in human capital, education, and training\(^{229}\) in order to restructure the economy from relying on primary resources to the competitive production of manufactured goods for export.\(^{230}\)

It may be true that political tensions have improved between the governments of the member states because of their membership in Mercosur, but the opposite effect may occur within its populations because Mercosur may polarize the economies within the region.\(^{231}\) Economic production also may polarize within the regions\(^{232}\) because industrial and technological growth tends to "gravitate towards the more developed countries and take hold,"\(^{233}\) while the

\(^{225}\) See Joekes & Weston, supra note 8, at 45.
\(^{226}\) See supra notes 36-40 and accompanying text.
\(^{227}\) One Brazilian authority stated that "Brazil is not a poor country, it is an unjust one." Cohn, supra note 23.
\(^{228}\) Giovanni Stumpo, a UN economist said, "There's a need for more active industrial policies and a greater co-ordination among country members." Industry Enthusiastic with Mercosur Reforms, Mercopress News Agency, Nov. 7, 1997 <http://www.falkland-malvinas.com/news/sni3.html>. Michael Reid wrote in The Economist that, "[i]f Mercosur's opportunities are really to be grasped it needs not just tariff cutting but harmonisation of rules on many things from intellectual property to antitrust and the environment." Michael Reid, A Survey of Mercosur: The Road to a Single Market, Economist, Oct. 12, 1996.
\(^{229}\) See McCarthy, supra note 18, at 16-17.
\(^{230}\) This is especially important because of the value added to primary products through each stage of production. When primary products are exported, the country that manufactures this product earns the most capital from the final product. On the other hand, the country that exports the primary good loses the opportunity to earn more from its goods. See Todaro, supra note 37, at 708.
\(^{231}\) See McCarthy, supra note 18, at 15.
\(^{232}\) "[M]arket forces tend to benefit the larger countries in a process of cumulative growth." Id.
\(^{233}\) Id. at 10.
less developed countries may be left to rely on their primary products and cheap labor source.

Polarization occurs because the larger economies function better in the regional/global economy and have a more skilled workforce, more opportunities, and specialized industrial services, while the smaller economies stagnate without aid from the other countries. If the market were allowed to take its course with little or no regulations, these initial disparities would be perpetuated and continually reinforced. Furthermore, multi-national corporations may tend to locate in the larger economies to hedge against the possibility that the regional agreement may disintegrate.

To stop this polarization, the member states must affirmatively adopt an “upward harmonization” of labor rights and standards because, the “race to the bottom” is a potential problem. At this point, all the Mercosur countries have their own individual standards regarding labor and women’s issues, such as anti-discrimination policies and maternity leave. Manufacturers thus seek to build factories in the countries with the lowest labor costs and weakest labor protections. As a result, the other countries adopt these lower standards to compete and thus create “downward harmonization.” Upward harmonization would require all the member states to end discriminatory practices and provide education and other benefits for women.

Sovereignty is an important issue, because adopting these policies would require the countries to surrender their historical control over an issue. Mercosur’s members, however, surrendered sovereignty when they joined the trade agreement and adopted the CET. Thus, they should be willing to do the same on women’s

234. See id. at 9.
235. See id.
236. See id. at 10.
237. The Treaty clearly states that, the member states are committed “to harmonize their legislation in the relevant areas in order to strengthen the integration process.” Treaty, supra note 70, at 1045. Race to the bottom refers to “both the pursuit of capital to areas with lower regulatory standards, as well as to the incentive for all countries to adjust their regulatory environment to a scale that is attractive to foreign companies.” Louise Williams, Trade, Labor, Law and Development: Opportunities and Challenges for Mexican Labor Arising from the North American Free Trade Agreement, 22 Brook. J. Int’l L. 361, 365 (1996).
238. See supra Part I.B.
239. See Compa, supra note 121, at 356.
240. See supra note 96-98 and accompanying text.
Moreover, with respect to the UN agreements, all the member countries independently have assumed legal obligations by signing them. Since their creation, Subgroup 11 and the Forum have not addressed women's issues. The Forum, for example, works with unions and management to decide on policies to recommend to the CMG and CMC. Nevertheless, women's participation in the unions is very low and their leadership roles are almost non-existent. Therefore, women need other guarantees within Mercosur's framework that will ensure that their issues are adequately addressed.

B. Models for Mercosur and Women

Mercosur has had many positive effects on the member states, such as giving Paraguay an incentive to industrialize more and lowering the inflation rate in all the member countries. Nevertheless, simply allowing the market to take its course also has many negative consequences. For example, jobs are lost when an industry closes because it cannot compete with the other countries' industries. Regionally, this is seen as efficiency because the country that does not have a comparative advantage in that industry must redirect its resources to an area in which the country does have a comparative advantage, and therefore employment in that area increases. Unfortunately, the individual who worked in the industry that was shut down does not view her new unemployed

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241. For an interesting argument on sovereignty, see Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (5th ed. 1973) (arguing that the concept of sovereignty cannot be divided).

242. Abdullahi Ahmed An-Na'im, State Responsibility Under International Human Rights Law to Change Religious and Customary Laws, Human Rights of Women: National and International Perspectives 167 (Rebecca Cook ed., 1994) ("This responsibility is fully consistent with the principle of state sovereignty in international law, since it does not purport to force any state to assume legal obligations against its will. It simply seeks to ensure that states effectively fulfill legal obligations they have already assumed under international law.")).

243. See supra note 162 and accompanying text.

244. See supra note 28 and accompanying text.

245. Even though cotton fields cover most of the country, for years Paraguay exported ninety-five percent of its unprocessed cotton. See Cottoning On: Mercosur Trade Pact Leads to Growth of Paraguay's Textile Industry, The Economist, Sept. 2, 1995 at 60. Recently, an Italian-Paraguayan group has opened a computer controlled spinning plant which adds 140% to the value of the raw cotton. See id.

246. See supra note 57 and accompanying text.

247. See supra note 106 and accompanying text.
status in the same way, especially when she has no other marketable skills.

The Preamble to the Treaty of Asuncion states that one of its goals is economic development with social justice. The policies, however, have not achieved this goal thus far. Mercosur should make women’s issues a higher priority, while continuing the positive consequences from the trade agreement, and complying with the UN conferences. Mercosur can do this now because it has a strong base and is expanding quickly.

1. Mercosur Should Add Administrative Organs to Address Women’s Issues

Two issues present themselves when discussing the addition of a new issue to a trade agreement: structure and substance. The structure can take many forms, some of which will have greater strength and authority than others. To give women’s issues a priority, Mercosur must adopt structural changes. At a minimum, the member states should adopt a subgroup, like the Subgroup 11, to address women’s issues. Unlike Subgroup 11, however, the women’s issues subgroup should have the authority actually to adopt policies, and its members should be representatives of the non-governmental organizations (“NGOs”) that represent the various sectors of all the member nations. By ensuring that the subgroup is represented by diverse sectors from all the member nations, policies can be promulgated that represent all groups, and do not operate to the detriment of any underrepresented sector.

More women should become part of the decision making authority of Mercosur. The two organs with any type of authority, the CMC and the CMG, are predominantly run by men. Mercosur should give a seat in these organs to a women’s representative from each country, so that women will have ultimate decision making power in policies that directly affect them. The member states’ secretariat of women would be in the best position to fulfill this role because she already has been appointed to represent and advocate for women in the respective country. Having a woman in this position would ensure that the recommendations by the subgroup on women will be adequately addressed.

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248. Treaty, supra note 70, at 1044.
249. See supra Part I.A.
250. See supra Part II.B.
251. See supra notes 83-89 and accompanying text.
252. See supra notes 47-54 and accompanying text.
The lack of a supranational authority presents a barrier, because Mercosur can only move slowly.\textsuperscript{253} Today, political actors must meet and decide the policies that Mercosur will adopt.\textsuperscript{254} Because they are political, they allow their decisions to be subjected to political expediency in an environment which is frequently dominated by domestic interest groups.\textsuperscript{255} Therefore, Mercosur should finally adopt the supranational authority which will effectively take the discourse out of the domestic political realm. This would take the pressure off of the politicians, who will then have more of an incentive to adopt policies that will help those that are on the margins of the economies. To do this, the member states must first agree upon and sign another agreement, like the Treaty of Asuncion, that will establish this authority and its limits.

Moreover, Mercosur should adopt a separate agreement that prioritizes women's issues. The North American Agreement on Labor Coordination and the European Social Charter are not completely satisfactory in the Mercosur context. The NAALC does not go far enough because the only obligations imposed on the member states is to comply with their own laws.\textsuperscript{256} Thus, an intra-regional hierarchy exists because a woman in one country may receive more benefits than one in another. Companies also may decide to move to the countries that have fewer regulations, resulting in a lose-lose situation because the women in one country are exploited, while the other country loses an industry.

A Social Charter-type agreement, on the other hand, also would be unrealistic because the EC members that signed on to this agreement surrendered an astonishing amount of sovereignty by allowing some policies to be enacted with a qualified voting majority.\textsuperscript{257} The history of Mercosur shows that the members have been unwilling to give up this much sovereignty.\textsuperscript{258} Moreover, the European Community's limited focus on only workers is unacceptable because Mercosur must address issues that affect all women, not just those who are employed.

\textsuperscript{253} See supra notes 81-89 and accompanying text.
\textsuperscript{254} See id.
\textsuperscript{255} See McCarthy, supra note 18, at 11.
\textsuperscript{256} See supra Part I.D.1.
\textsuperscript{257} See supra Part I.D.2.
\textsuperscript{258} See supra note 97 and accompanying text. While it may seem contradictory to propose a supranational authority but reject the concept of a qualified voting majority, it is a question of degree. A supranational authority would be representative of all countries and every policy would be adopted unanimously, which ensures that each country has the final say. In fact, they would effectively have a veto on any legislation.
Therefore, Mercosur should adopt a separate agreement that requires that all agreements among the member states be made unanimously, ensuring that each country has an equal vote on the final policy. Furthermore, the agreement should ensure that the countries harmonize social policies so that women throughout the region are on a level playing field.

2. The Substantive Provisions

The question of substance is much more difficult because sovereignty plays a particularly strong role with respect to social issues in the Mercosur countries. Nevertheless, external tariffs also were historically delegated to the domestic realm,259 and they have already been adopted.260 The member states should not hide behind sovereignty when women have unique problems that need to be addressed, such as discrimination, feminization of poverty, lower wages and less representation in power structures.261

Mercosur, for example, should give individuals standing to present disputes to Mercosur. At the present time, individuals cannot bring a claim to arbitration in a dispute over trade practices unless a member decides to represent the claim in the arbitration proceedings.262 This is an effective way to silence groups that have been excluded from Mercosur, including women. Therefore, individuals and non-governmental organizations should be able to present disputes in arbitration without the support of a member nation, especially where governmental or regional policies are at issue.

The nations have a moral obligation to comply with the platforms of action from both UN agreements.263 All of the nations were present at the Copenhagen and Beijing conferences and active in the negotiations of the final document,264 and thus all of the countries that signed on to these agreements implicitly consented to implement the recommendations set forth in the platforms. Although the countries had the option to file reservations,265 they implicitly stated that they would implement the platform in its entirety except for the specific provisions that were being reserved.266

259. See supra note 97 and accompanying text.
260. See supra notes 96-99 and accompanying text.
261. See supra Part I.A.
262. See supra note 78 and accompanying text.
263. See supra Part II.B.
264. See id.
265. See SUMMIT, supra note 187; see also FWCW, supra note 21.
266. See supra Part II.B.
Therefore, Mercosur must adopt the Platform's policies, namely, working to eradicate poverty and provide training so that women will be able to work within the globalized community.\textsuperscript{267}

Training is exceptionally important because of the inevitable closing of industries while the countries shift to their ultimate comparative advantage.\textsuperscript{268} Therefore, Mercosur must ensure that the newly unemployed have access to training and are able to fulfill their basic necessities until they can work in another industry. Mercosur can ensure this with subsidies and by designing training programs that will be available to all who need them.

Mercosur also should comply with the UN agreements by removing obstacles to women's participation and decision making in the public and private sphere. Argentina's Equal Opportunity Plan is one example that can be implemented on a regional level to aid women's access to the political realm.\textsuperscript{269}

In addition to complying with prior commitments, the member states should improve social services that support women's participation in paid work, such as childcare and healthcare, and adopt policies that aim to end gender discrimination, sexual harassment, and the feminization of poverty. Although the European Community has accomplished much in this area, it needs to go farther, and thus should be used only as a model to show how regional agreements can address women's issues.

The decision Mercosur makes in this area may become very important to the United States in the near future because of the Free Trade Agreement of the Americas ("FTAA").\textsuperscript{270} Mercosur is becoming increasingly important in the Americas since NAFTA has stalled with President Clinton's loss of Fast Track authority.\textsuperscript{271} The stronger Mercosur is, in comparison to NAFTA, the more bargaining power it will have in the negotiations for the FTAA. Therefore, whatever policy direction Mercosur takes, it will become the basis of discussion on the FTAA. The stronger the stance that Mercosur takes on women's issues, the more likely that women in the United States will benefit.

\begin{footnotes}
\item[267] See id.
\item[268] See supra note 106 and accompanying text.
\item[269] See supra note 46 and accompanying text.
\item[270] See supra note 77 and accompanying text.
\item[271] See id.
\end{footnotes}
Conclusion

Trade agreements, such as Mercosur, have helped foster the process of economic globalization. Even though they primarily are created to aid the member states’ economies, they also can be used to aid women who are on the margins of society and are victims of discrimination and the feminization of poverty.

Furthermore, the member states have agreed to various United Nations agreements that morally, if not legally, bind them to address women’s issues. If Mercosur addresses these issues, the member states will be able to counteract some of the negative effects of polarization, such as the “race to the bottom,” by aiming to end gender economic discrimination and poverty.
FAIR WORK, NOT "WORKFARE": EXAMINING
THE ROLE OF SUBSIDIZED JOBS IN
FULFILLING STATES' WORK
REQUIREMENTS UNDER THE
PERSONAL RESPONSIBILITY AND WORK
RECONCILIATION ACT OF 1996

Kathryn R. Lang*

Introduction

Margarita is a single mother living in the Bronx who began re-
ceiving a cash grant under Aid to Families with Dependent Chil-
dren when her son, Eduardo, was born four years ago. Recently, she was faced with a dilemma. She hired a neighbor to care for Eduardo and enrolled in a full-time training program to become a home health aide with a private company. She received a call from her welfare caseworker, however, informing her that to continue receiving full welfare benefits, she had to take a Work Experience Program ("WEP") assignment cleaning parks for twenty hours a week. Margarita knew that she could not take this workfare assignment, participate in a full-time job training program, and care for her son. Therefore, she had to decide whether to refuse her WEP placement and remain in the home health aide program, while losing half of her benefits, or drop out of the training program, perform her WEP assignment, and continue receiving public assistance.

Margarita knew that if she took the WEP assignment, she would continue to get full benefits for herself and her son, but feared that

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2. See Elizabeth Kolbert, Workfare Makes a Break Hard to Give, N.Y. TIMES, Oct. 6, 1997, at B1 for the report which provides the basis for this hypothetical.

3. See id. The Work Experience Program is New York City's workfare program which requires participants to perform work in exchange for their benefits. See infra Part II.A.

4. See id.

5. See infra note 121 and accompanying text.

6. See Kolbert, supra note 2.

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she might never get off welfare. “Picking up,” she said, “I do that in my house. I don’t call that experience.”

Instead, she considered her long-term employment prospects and decided to complete the training to be a home health aide, even though she lost half of her family’s benefits. Margarita reasoned that the job training would give her a permanent skill that would enable her to get off and stay off welfare, by keeping her employed full-time.

“Margarita’s dilemma” is one of the troubling results of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”). Congress passed PRWORA to move people from welfare to work.

PRWORA overhauled the welfare system by replacing Aid to Families with Dependent Children (“AFDC”), the oldest and most important part of the United States welfare system, with a program called Temporary Aid to Needy Families (“TANF”). This new program fundamentally changed the structure of welfare by eliminating guarantees of

7. Id.
8. See id.
11. See Social Security Act of 1935, ch. 531, §§ 401-406, 49 Stat. 620, 627-29 (1935). The Act instituted four different categorical public assistance programs to combat the effects of the Depression among vulnerable populations. See 49 Stat. at 620. Title IV of the Act was drafted originally to assist only needy children, as reflected in its name “Aid to Dependent Children.” See id. at 627. In 1950, its scope was broadened to provide financial assistance and services to the parents and relatives with whom the child was living. See Social Security Act Amendments of 1950, ch. 809, § 323(a), 64 Stat. 477, 551 (1950). In 1962, the name of the program was changed to “Aid and Services to Needy Families with Children,” and the assistance provided therein was retitled “Aid to Families with Dependent Children.” Pub. L. No. 87-543, § 104(a)(1), (3), 76 Stat. 185 (1962).

Although the term “welfare” is generally understood to refer to all types of public assistance programs for the poor, for the purposes of this note, “welfare” shall be used more narrowly to refer solely to AFDC and the program that has replaced it, TANF.
assistance,14 establishing a funding system of block grants to the states,15 and giving states broad power to design their own programs.16 Moreover, TANF instituted a system of mandatory work requirements17 and imposed a five-year lifetime limit on welfare assistance to needy families.18

PRWORA fundamentally changed the role of states in administering welfare programs. In the past, state resources primarily were used to make welfare benefit payments and support the bureaucracy that established the benefit levels.19 Under TANF, however, states are using their resources to support work by helping welfare recipients secure job leads, job training, adequate child care, and transportation.20 States must now determine the best way to provide work opportunities to parents on welfare without making their children worse off. Accordingly, states should now ensure that welfare recipients do not have to face “Margarita’s dilemma.”

This Note explores the implications of work requirements for welfare recipients. Part I provides the history and purposes of work requirements in welfare programs. Part II describes job creation options available to states under TANF, including work experience programs and subsidized private and public sector jobs. Part III analyzes subsidized employment, and argues that states should subsidize employment and training for the welfare recipients they must put to work. Subsidized positions are preferable to unpaid work experience programs because they bring participants within the traditional framework of employment and thus help to maintain this fundamental societal institution. Finally, this Note con-

15. See id. at § 603. Under PRWORA, the federal government no longer guarantees that it will match states’ spending on public assistance for families on an open-ended basis, but rather provides funding to states at a level fixed through fiscal year 2002. See infra notes 67-68 and accompanying text.
16. See id. at § 604.
17. See id. at § 607.
18. See id. at § 608(a)(7). A state may exempt up to twenty percent of its caseload from this time limit. See id. at § 608(a)(7)(C)(ii). The law gives states the discretion to set a shorter time limit than sixty months in their plans for administering TANF. The majority of states have included a sixty month limit; twenty states have reported time limits shorter than sixty months. See National Governors’ Association Center for Best Practices, Summary of Selected Elements of State Plans for Temporary Assistance for Needy Families (last modified Nov. 20, 1997) <http://www.nga.org/Welfare/TANF971120.pdf> [hereinafter NGA, Summary].
cludes that subsidized employment programs can function as a more “universal” alternative to welfare by providing assistance to all low-wage workers in a particular area.

I. History of Work Requirements

Congress created the AFDC program as part of the Social Security Act of 1935.21 AFDC provided cash benefits to families with low income, few assets, and children under eighteen in the household.22 The program was based on a system of “cooperative federalism,”23 which meant that the federal government matched funds spent by the states in administering their various programs.24

One of the most important characteristics of the AFDC program was that it provided assistance almost exclusively to poor households headed by women raising their children without a husband or father present as a breadwinner.25 The 1935 Social Security Act was designed to assist widows who were “deserving” of public support,26 so that they could stay at home to take care of their children.27 It is now expected, however, that women on welfare should work outside the home rather than be paid to take care of their children.28 Beginning in the 1960s,29 the AFDC caseload became more heavily composed of recipients for whom there was less pub-

23. King v. Smith, 392 U.S. 309, 316 (1968) (“The AFDC program is based on a scheme of cooperative federalism. It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States.” (citation omitted)).
24. See id.
25. See Moffitt, supra note 12, at 130.

By the dawn of the twentieth century, certain reformers began to argue that if the single mother was otherwise fit and proper, and the only problem was lack of income, then the family should be given relief so that the children could remain in the home. Single poor mothers would be the “deserving poor”—that is, excused from the paid labor force.

Id.
27. See id.
29. State rules that had barred certain women, mainly unwed and divorced mothers and women of color, from the welfare rolls were struck down by the Supreme Court in the late 1960s. See King v. Smith, 392 U.S. 309, 333 (1968) (invalidating Alabama's "substitute father" regulation); Shapiro v. Thompson 394 U.S. 618, 627 (1969) (holding unconstitutional states' regulations which required welfare recipients to reside within their jurisdictions for at least one year prior to applying for assistance). For a further discussion of these rules and their implementation prior to 1967,
lic sympathy: unwed and divorced mothers, and non-white families. Furthermore, labor force participation among women, and mothers in particular, has grown so enormously that the majority of mothers with children under age six have entered the labor force.

A. Statutory Development of Work Requirements

Over the past thirty years, congressional reforms to AFDC have shifted its emphasis from providing income support to the “deserving” to assisting recipients in preparing for and finding jobs, under the concept of reciprocal obligations.

1. The Work Incentive Program

The Work Incentive Program (“WIN”), created in 1967, provided an economic work incentive in response to the concern that the prior method of calculating benefits produced a strong disin-
centive for recipients to work.\textsuperscript{36} Instead of reducing a woman's benefits by one dollar for each dollar she earned at an unsubsidized job, this legislation permitted her to retain the first thirty dollars of her earnings each month as well as one-third of her remaining earnings before her family's AFDC benefits were reduced.\textsuperscript{37} Moreover, those whom the Department of Labor found "suitable" for employment were referred to jobs, on-the-job training, or work experience programs.\textsuperscript{38}

This system, however, was largely symbolic, since states enrolled only a small percentage of welfare recipients in work programs, and generally did not sanction those who refused to participate.\textsuperscript{39} The programs also created incentives for local welfare offices to "cream," or put their resources into those recipients most likely to find employment to begin with.\textsuperscript{40}

\textsuperscript{36} The Senate Report on the Social Security Amendments of 1967 stated: "For the purpose of providing greater incentives for appropriate members of families drawing aid to families with dependent children (AFDC) payments to obtain employment so that they need no longer be dependent on the welfare rolls the bill would — (a) exempt a portion of earned income for members of the family who can work; . . . ." 1967 U.S.C.C.A.N. (81 Stat. 821) 2837.

\textsuperscript{37} See 81 Stat. at 881. An earned income disregard allows a certain amount of income from work to be disregarded when calculating the amount of monthly aid a family receives. See 1996 Green Book, supra note 31, at 389-91. The WIN income disregard was known as the "thirty and a third" rule. See Edward M. Wayland, Welfare Reform in Virginia: A Work in Progress, 3 VA. J. Soc. Pol'y & L. 249, 268 (1996).

\textsuperscript{38} See. 81 Stat. at 885.


Although more than 2.7 million employment 'assessments' were made, just 24 percent were deemed 'appropriate for referral' to the employment service, and from this pool, only 118,000 were enrolled in programs. There was further attrition, and, in the end, only 2-3 percent of the eligible recipients obtained jobs through WIN. Moreover, only 20 percent of those who were employed held their jobs for at least three months. At the same time, few recipients were sanctioned. The vast majority of AFDC recipients were excused from participation by officials at the local level.

Id.; see also Rein, supra note 31, at 74-75.

\textsuperscript{40} Handler, supra note 39, at 60. Administrators of work programs would direct resources toward the most able and motivated participants and bypass the most vulnerable and unskilled in order to decrease costs and increase success rates. See Weinberg, supra note 30, at 429.
2. The Omnibus Budget Reconciliation Act

The Omnibus Budget Reconciliation Act ("OBRA") of 1981\(^\text{41}\) was an effort to reduce federal spending in almost every area.\(^\text{42}\) It made changes to AFDC's work provisions, including limiting welfare recipients' "thirty and a third" deduction\(^\text{43}\) to just four months.\(^\text{44}\) It also imposed a gross income cap on eligible families which equaled 150% of the standard of need determined by their state.\(^\text{45}\)

OBRA's changes were implemented with the expectation of saving the federal government up to $1 billion by ending eligibility or reducing benefits for families whose mothers reported their work income.\(^\text{46}\) This expectation, however, was not realized. During the 1980s, welfare rolls remained relatively steady,\(^\text{47}\) while the percentage of AFDC recipients reporting full-time employment dropped sharply and did not recover.\(^\text{48}\)


\(^{42}\) The report from the House of Representatives Committee on the Budget on the Omnibus Budget Reconciliation Act explained:

> Spending targets for the fiscal years 1981 through 1984 contained in the resolution will result in a cut of more than one-half in the average annual growth in Federal spending in the past 5 years, while allowing for real growth in spending for the national defense, thus reversing the decline in real defense dollars in the 1970s.


\(^{43}\) See supra note 37 and accompanying text.

\(^{44}\) See 95 Stat. at 843-44. 12.5% of AFDC families claimed the $30 and one-third earned income disregard in March 1979; in May 1982, only 2.5% of families claimed the disregard. See 1996 Green Book, supra note 31, at 478.

\(^{45}\) See 95 Stat. at 845. "Standard of need" is the total amount required by a family to pay for necessities as determined by each state. See Black's Law Dictionary 1405 (6th ed. 1990). For the amounts set by the states for the standard of need for a family of three over a twenty-six year period, see 1996 Green Book, supra note 31, at 443-45.

After setting its standard of need, each state then computes a schedule of benefits based on that standard. A state may set benefit levels below its standard of need by imposing a ceiling on benefit levels below the standard or by limiting payments to a fixed percentage of a recipient's determined need. See Rosado v. Wyman, 397 U.S. 397, 408-09 & nn.12-13 (1970).

\(^{46}\) See Rein, supra note 31, at 154.

\(^{47}\) See 1996 Green Book, supra note 31, at 467. The number of families receiving AFDC increased by nearly 50% during the 1970s, from 1,909,000 families in 1970 to 3,642,000 families in 1980. During the 1980s, however, the number of families held steady around 3,700,000. In the early 1990s, the numbers began to increase again, climbing to a peak of 5,046,000 in 1994 before starting to fall. See id.

\(^{48}\) See id. at 476. In March 1979, eight percent of mothers on AFDC reported that they were engaged in full-time employment. In May 1982, 1.3% of AFDC mothers reported full-time employment. This percentage remained around two per-
In addition, OBRA implemented three new work programs to supplement WIN. These voluntary work programs foreshadowed the mandatory work requirements that were introduced in the Family Support Act of 1988. State work programs varied according to differences in local labor market conditions. For example, states with strong economies tended to emphasize job search and placement, while states with weaker economic growth instituted community work experience programs.

3. The Family Support Act

The Family Support Act of 1988 ("FSA") extended work participation mandates to a larger share of the welfare caseload and, for the first time, required states to ensure that specific percentages of AFDC recipients were participating in a federal work program, percent through the 1980s and early 1990s, reaching 3.2% of AFDC mothers reporting full-time employment in 1994. See id.

49. See Sylvia A. Law, Women, Work, Welfare and the Preservation of Poverty, 131 U. PA. L. REV. 1249, 1274 n.101 (1983). The three programs were: (1) the Community Work Experience Program ("CWEP"), which assigned welfare recipients to jobs in public and nonprofit agencies in exchange for their benefits; (2) the Work Supplementation Program, which permitted states to transfer recipients' welfare grants to employers, and in turn require recipients to work for that employer; and (3) the Work Incentive Demonstration Program, which allowed states to design and run their own work programs. See 95 Stat. at 846-52.

50. See Handler, supra note 39, at 62 ("In the 1980s, WIN funding declined, state funding increased, and more than half of the states adopted work requirements — WIN Demonstration Projects. These state demonstration projects provided the background for the Family Support Act of 1988 as well as for Bill Clinton's proposed Work and Responsibility Act of 1994.").


[S]tates experiencing economic growth and low unemployment (mostly northeastern states) tended to develop more extensive programs emphasizing job placement, training, and supportive services while de-emphasizing work-for-relief. Several such state initiatives received national attention for their programmatic innovations, such as Employment and Training Choices (ET) in Massachusetts and Greater Avenues for Independence (GAIN) in California. In contrast, some economically depressed and rural states tended to emphasize the work-for-relief option. Id. For example, West Virginia, a state with a high unemployment rate and a depressed economy, instituted a mandatory community work experience program which required AFDC recipients to work in unpaid public service jobs as long as they were on the rolls. See id. at 179.


the Job Opportunity and Basic Skills Training ("JOBS") program. JOBS, however, also shifted the emphasis from community work experience programs to a range of education, training, and job-readiness programs for recipients. In an effort to combat "creaming," states were rewarded for targeting expenditures on the "hardest to reach": fifty-five percent of JOBS resources were to be spent on young mothers who had not completed high school or had no work experience, or on long-term welfare recipients who were about to become ineligible due to the age of their children.

JOBS programs were first implemented during the recession of the early 1990s, when most states were struggling with falling tax revenues and increasing welfare rolls. States sought the cheapest, easiest way to satisfy FSA requirements, and were reluctant to spend their money on JOBS programs. Over fifty-six percent of

54. See 102 Stat. at 2375.

55. See Handler, supra note 39, at 77; see also Lindsay Mara Schoen, Note, Working Welfare Recipients: A Comparison of the Family Support Act and the Personal Responsibility and Work Opportunity Reconciliation Act, 24 Fordham Urb. L.J. 635, 644 (1997). All states were required to provide basic education, job skills training, job readiness activities, and job development and placement. In addition, each state had to provide two of the following: job search, on-the-job training, work supplementation programs, or community work experience programs. See 102 Stat. at 2362-63.

56. See 102 Stat. at 2374.

57. See Moffitt, supra note 12, at 130.

58. See Mary Byrna Sanger, Welfare Reform Within a Changing Context: Redefining the Terms of the Debate, 23 Fordham Urb. L.J. 273, 283-84 (1996). The limited resources that were allocated to these programs served a relatively small number of welfare recipients and had very modest effects. See Joel F. Handler & Yeheskel Hasenfeld, We the Poor People 92 (1997) [hereinafter Handler & Hasenfeld, Poor People]. Research on JOBS programs shows that participants experienced a modest increase in earnings, rising levels of labor force participation, and slightly reduced welfare grants. However, there were no dramatic or lasting changes in recipients' overall income levels, the number of families on the welfare rolls, or welfare budgets. See Sanger, 23 Fordham Urb. L.J. at 284.
adult AFDC recipients\textsuperscript{59} were exempted from JOBS programs by the states because they were disabled, had a child under the age of three, or had no suitable child care for a child under six.\textsuperscript{60} Out of ease or necessity, states placed welfare participants primarily in pre-existing educational and training programs\textsuperscript{61} to satisfy their obligations under FSA.\textsuperscript{62} By 1995, there was a consensus that the JOBS program had failed, and AFDC had to be fundamentally reformed.\textsuperscript{63}

4. The Personal Responsibility and Work Opportunity Reconciliation Act

Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), AFDC and JOBS have been eliminated.\textsuperscript{64} The federal government may no longer closely regulate welfare programs,\textsuperscript{65} and financial assistance is no longer an entitlement for recipients.\textsuperscript{66} Instead of providing matching funds to states, the federal government now sends funding for cash assistance programs to the states in the form of lump-sum payments, known as block grants.\textsuperscript{67} Block grants give states greater discretion to design their own programs, but in exchange the states take greater responsibility for the financial risks of these programs.\textsuperscript{68}


\textsuperscript{61} See 1996 Green Book, supra note 31, at 420-21. Nationally, on average, 43% of the participants were enrolled in educational activities (high school, GED programs and remedial education), 16% in vocational training programs, 12% in assessment, 11% in job entry, 11% in job search or job readiness, and 4% in community work experience programs. See id.

\textsuperscript{62} See Handler, supra note 39, at 84.

\textsuperscript{63} See Douglas Muzzio & Richard Behn, Thinking About Welfare: The View from New York, Pub. Persp., Feb.-March 1995, at 35 ("There is a consensus in America that the current welfare system doesn't work and needs to be changed. Everybody wants to end welfare as they know it.")


\textsuperscript{65} See 42 U.S.C. § 617 (Supp. 1997) ("No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.").

\textsuperscript{66} See id. at § 601(b) ("This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.").

\textsuperscript{67} See id. at § 603. Part A of Title IV of the Social Security Act is now called "Block Grants to States for Temporary Assistance for Needy Families." Instead of providing open-ended federal matching funds, federal funding for states is frozen through fiscal year 2002 at amounts reflecting recent federal spending for AFDC. See id. at § 603(a)(1).

\textsuperscript{68} See id. at §602; see also Francis X. Clines, Clinton Signs Bill Cutting Welfare; States in New Role, N.Y. Times, Aug. 23, 1996, at A1.
Temporary Aid to Needy Families ("TANF"), the program PRWORA created to replace AFDC, ties the receipt of block grants by states to work participation rate requirements.\textsuperscript{69} TANF requires adult recipients to engage in work when "ready" or after receiving assistance for twenty-four months, whichever is earlier.\textsuperscript{70} Following the model of the FSA, PRWORA sets minimum rates of

\textsuperscript{69} See 42 U.S.C. § 607 (Supp. 1997). If a state fails to satisfy the work participation rate requirements specified in § 607, its federal TANF block grant may be reduced by an amount ranging from five to twenty-one percent, and the state must replace the reduced funds with state funds the next fiscal year. See id. at § 609(a)(1)(A).

\textsuperscript{70} See id. at § 602(a)(1)(A)(ii). Each state plan must outline how the state will "require a parent or caretaker receiving assistance under the program to engage in work (as defined by the State) once the State determines the parent or caretaker is ready to engage in work, or once the parent or caretaker has received assistance under the program for 24 months (whether or not consecutive), whichever is earlier." Id.

However, there is no explicit penalty for a state that violates this requirement. It is unclear whether providing assistance to an individual who had reached the two-year point and was not engaged in one of the work activities without an exemption would constitute an expenditure of funds in violation of TANF, which could lead to a reduction in the state's block grant. See id. at § 609(a)(1)(A).

As with the sixty month time limit, some states require recipients to engage in work before the maximum time limit specified in the federal law. Twenty-one states have indicated in their plans that they will require recipients to work before twenty-four months. See NGA, Summary, supra note 18. Many states have indicated they will follow the language in the federal statute by requiring recipients to engage in work activities as soon as possible. See id.
participation for those receiving assistance. These participation rates are calculated as a percentage of a state's entire caseload.

To be counted toward a state's participation rate, those who are required to work must participate in one or more of the activities listed in PRWORA. In contrast to JOBS, which emphasized ob-

### 71. The following are the participation rates required by PRWORA:

<table>
<thead>
<tr>
<th>Year</th>
<th>All Families Rate</th>
<th>Hrs. per Wk. Required for Participation (All Fam.)</th>
<th>2-Parent Fam. Participation Rate</th>
<th>Hrs. per Wk. Required for Participants (2-Parent Fam.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>25%</td>
<td>20</td>
<td>75%</td>
<td>35</td>
</tr>
<tr>
<td>1998</td>
<td>30%</td>
<td>20</td>
<td>75%</td>
<td>35</td>
</tr>
<tr>
<td>1999</td>
<td>35%</td>
<td>25</td>
<td>90%</td>
<td>35</td>
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<tr>
<td>2000</td>
<td>40%</td>
<td>30</td>
<td>90%</td>
<td>35</td>
</tr>
<tr>
<td>2001</td>
<td>45%</td>
<td>30</td>
<td>90%</td>
<td>35</td>
</tr>
<tr>
<td>2002</td>
<td>50%</td>
<td>30</td>
<td>90%</td>
<td>35</td>
</tr>
</tbody>
</table>

42 U.S.C. §§ 607(a) & (c) (Supp. 1997).

A single parent with a child under the age of six who works 20 hours per week will be deemed to be participating when calculating a state's participation rate, even after 1998. See id. at § 607(c)(2)(B). If a two parent family is receiving federally funded child care assistance, and one of the adults in the family is not disabled or caring for a disabled child, then to count toward the participation rates, the second parent must also participate in a work activity for at least 20 hours per week. See id. at § 607(c)(1)(B)(ii).

72. See id. at § 607(b)(1)(A). The required rates will be reduced by the number of percentage points by which the average monthly caseloads of the last fiscal year are below fiscal year 1995 caseloads. See id. at § 607(b)(3)(A)(ii). Caseload reductions due to changes in federal law or in eligibility criteria do not count toward reducing the participation requirement. See id. at § 607(b)(3)(B).

Many states will have lower "effective" required participation rates than the rates specified in the statute, shown in the table above, because they have experienced significant caseload declines since 1995. Every state except Hawaii experienced a decline in its welfare caseload between August 1996 and July 1997. See Administration for Children & Families, U.S. Dep't of Health & Human Services, Change in Welfare Caseloads Since Enactment of the New Welfare Law, (last modified Nov. 17, 1997) <http://www.acf.dhhs.gov/news/aug-jul.htm>. Twelve states reported reductions of 25% or more. See id. This will allow states to have effective participation rates for the fiscal years of 1997 and 1998 significantly below the 25% and 30% required by the statute. See id.

73. The activities listed are:

1. unsubsidized employment;
2. subsidized private sector employment;
3. subsidized public sector employment;
4. work experience programs, if sufficient private sector employment is not available;
5. on-the-job training;
6. community service programs;
7. job search and job readiness assistance;
8. vocational educational training;
9. job skills training directly related to employment;
10. education directly related to employment;
11. satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence; and
taining education and training, the types of activities that satisfy the TANF work requirement reflect a focus on actually securing employment. Moreover, to ensure participation, the state can reduce or terminate the family's assistance if a parent refuses to participate in a required work activity.

B. Purpose of Work Requirements

Although public support for welfare has diminished, polls show continuing approval for the original goal of AFDC: supporting poor children. Despite the goal of reducing the dependency of poor families on government programs, providing public support for children also means supporting their unemployed parents. Welfare reformers, attempting to balance these goals over the years, have ultimately focused on work.

(12) providing child care services to another who is participating in a community service program. 42 U.S.C. § 607(d) (Supp. 1997). None of these terms is defined in PRWORA, providing states with great flexibility in how they structure their work programs. However, college and other post-secondary education does not count as work activities under PRWORA, as they did in JOBS. See 102 Stat. at 2363.

Participants are limited to a total of 12 months in vocational training. See 42 U.S.C. § 607(d)(8) (Supp. 1997). Only those who do not have a high school diploma or equivalent may have their participation in secondary education and education directly related to employment meet their work requirements. See id. at §§ 607(d)(10) and (11).

No more than a total of twenty percent of individuals in all families may be counted as meeting the requirements by attending vocational educational training or high school. See id. at § 607(c)(2)(D). This limitation was increased to thirty percent by the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 5003.

74. See supra note 55 and accompanying text.


76. See 42 U.S.C. § 607(e)(1) (Supp. 1997). States cannot reduce or terminate assistance if a single parent with a child under age six refuses to work due to an inability to obtain needed child care. See id. at § 607(e)(2).

77. See Bloom, supra note 31, at 8 (citing Geoffrey Garin et al., Public Attitudes Toward Welfare Reform: A Summary of Key Research Findings 5 (1994)). "In one survey, 55 percent said the government spends too much on welfare, but 64 percent said the government spends too little on poor children." Id.

78. See id.

79. See id. at 10. The passage of the FSA and the expansion of work for welfare recipients revealed a general consensus among policy makers to condition the receipt of welfare on the performance of work. See Robert D. Reischauer, The Welfare Reform Legislation: Directions for the Future, in WELFARE POLICY FOR THE 1990s 10, 10-11 (Phoebe H. Cottingham & David T. Ellwood eds., 1989). This consensus, however, is not complete:

[O]ldly missing in the public debate is the more basic question — why should single mothers responsible for young children be expected to work
Although various reformers have offered a range of purposes for work requirements, the most important and enduring reason has always been to assist recipients in becoming self-sufficient members of the work force. Reformers, however, continue to disagree about the most desirable means for reaching this goal. The diversity of proposed methods shows the wide range of assumptions that exists regarding why people are on welfare.

1. "Work Ethic" Deficiency

One assumption is that poor families are on welfare because they have become dependent on public assistance, forget (or never learn) how to work for a salary, and lose (or do not develop) a sense of self-sufficiency. This school of reformers emphasizes work as a nearly universal value of American society and an essential feature of citizenship. Seizing upon this broad acceptance of the "work ethic," work-based reformers urge the government to require work assignments as a condition of receiving welfare benefits.

outside the home? While this question seems outside the bounds of contemporary debate, I wonder whether this reflects consensus or instead the failure of the debate-framer to hear diverging views. Martha Minow, Welfare of Single Mothers and Their Children, 26 Conn. L. Rev. 817, 822 (1994).

80. See Reischauer, supra note 79, at 26 ("All agreed that work has intrinsic value; that it can help welfare recipients develop a sense of self-respect, self-confidence, and identity in our work-oriented society. There was also a consensus that more should be done to try to make welfare recipients more self-sufficient.").

81. See Phoebe H. Cottingham, Introduction, in Welfare Policy for the 1990s, supra note 79, at 1 ("To be sure, everyone agrees on the fundamental objectives of welfare reform — to reduce poverty and dependence and to encourage economic self-sufficiency — but the consensus waivers on the concrete ways to bring them about.").

82. See Bloom, supra note 31, at 25.


84. See id. at 20 ("The United States has been known for a severe work ethic and, correspondingly, a suspicious attitude toward the poor.").

We're looking for a value, shared by rich and poor alike, on which to build an egalitarian life. It seems to me there is only one real candidate: work. And work, not coincidentally, is the value that is in danger of disappearing in the culture of the underclass. Bringing the isolated ghetto poor back into the mainstream society requires enforcing the work ethic — in the process, firmly establishing (or reestablishing) work as a unifying civic virtue.


85. See Mead, supra note 83, at 166 ("Increasingly, welfare recipients are not encouraged to work by special payoffs but required to work as a condition of eligibility. It is an effort to restore, through government, some of the social authority that used to enforce the work ethic."); see also Mickey Kaus, The Work Ethic State: The Only Way to Break the Culture of Poverty, New Republic, July 7, 1986, at 22.
This notion of reciprocal obligations requires recipients to participate in some kind of work activity in exchange for government-provided wages, services, and support to help them become self-sufficient and embrace the work ethic. According to these theorists, it is acceptable for the government to provide employment to "every American citizen over eighteen who wants it, in a useful public job," because it is important for the government to enforce societal expectations in the way it administers programs. Although such a program results in rising costs, these reformers argue that the expenditure is necessary to solve the persistent problems of the welfare system.

2. Cost-Benefit Analysis

A second assumption is based on the idea that welfare recipients enroll in public assistance programs because they rationally calculate the costs and benefits of their various options and recognize the incentives that welfare provides to rely on government assistance rather than on their own earnings to support their families. The reformers who accept this hypothesis advocate changing the incentives of the welfare system to make employment more financially attractive than receiving assistance.

Two themes can be identified in the work of these reformers: (1) making welfare a less attractive option by lowering benefit levels,

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86. See supra note 34 and accompanying text.
87. See MEAD, supra note 83, at 253.
88. KAUS, supra note 84, at 125.
89. See Reischauer, supra note 79, at 28. Even welfare recipients with young children "should be required to participate in some constructive activity, at least part-time . . . . both because it makes society's expectations clear and because it will reduce the possibility that those with young children will become entrapped by a dependent mindset during the period before they are required to participate." Id.
90. See KAUS, supra note 84, at 135 ("Still, it's expensive. So? This isn't a cost-cutting program. It's a solution to the underclass problem. In the long run, if the welfare culture is absorbed into the working, taxpaying culture, the budgetary payoff will be enormous — not to mention the payoff for social equality.").
91. See CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 154-166 (1984); MARY JO BANE & DAVID ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM 68-74 (1994). Laissez-faire conservatives, such as Murray, propose that the government dismantle the welfare system to end dependence on public assistance and force working-aged people to participate in the labor market, whereas liberals, such Ellwood, assert that the government should redirect funding to ensure that low-income families who work are raised out of poverty. See MURRAY at 227-28; BANE & ELLWOOD at 148.
92. See Sanger, supra note 58, at 292.
and (2) making employment more attractive by "making work pay." Employment is made more attractive by expanding the Earned Income Tax Credit ("EITC"), raising the minimum wage, and subsidizing child care.

3. Barriers

Another assumption is that people are on welfare because they face barriers to employment, such as lack of education, job skills, child care, access to transportation, and medical care. All people need various types of services to continue working, but people in middle- and upper-income brackets usually can either afford to purchase these services for themselves or work for employers who offer these services as fringe benefits. Welfare recipients assigned to work programs have reported to researchers that health care, child care, and transportation are the three most substantial barriers to their participation in these programs. Those who advocate providing support services as part of welfare programs assume that States effectively lowered benefit levels by default over the years by not increasing benefit levels to offset inflation. Average AFDC benefits eroded between 1970 and 1996 by fifty-one percent in real terms. See 1996 Green Book, supra note 31, at 446-448.


For a complete discussion of the Earned Income Tax Credit and suggestions for ways it should be reformed, see George K. Yin et al., Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program, 11 AM. J. TAX POL’Y 225 (1994).

96. See ELLWOOD, supra note 94, at 236.


98. See id. at 170.

99. See id. at 189. For example, of the women who dropped out of a job search program in the Louisville, Kentucky WIN program, 18% cited personal illness as the reason for dropping out, 16% cited family illness, 16% cited child care problems, and 7% cited transportation problems. See id. at 189-90.
people with limited resources cannot overcome the barriers to employment without assistance from the government.100

4. Culture of Poverty

The final assumption is based on the idea that many families in inner-city ghettos are trapped in an isolated "culture of poverty."101 These poor families become dependent on welfare for long periods of time in response to restricted opportunities and limited prospects for self-sufficiency.102 This "culture of poverty" produces lasting hopelessness, destroys motivation to work, and creates perverse adaptations to the realities of continued poverty.103 Combating these problems requires larger, structural changes, such as reducing segregation in schools and housing,104 and promoting widespread economic development.105 Fighting the "culture of

100. See id. at 170. Although these services generally have been regarded as secondary, they can present significant barriers to work. See id. at 165.

101. BANE & ELLWOOD, supra note 91, at 78.

According to culture of poverty characterizations, those trapped by such a culture are said to exhibit antisocial and counterproductive behavior. According to Ken Auletta, the underclass is a group that 'feels excluded from society, rejects commonly accepted values, suffers from behavioral as well as income deficiencies. They don't just tend to be poor; to most Americans their behavior seems aberrant' (Auletta 1982; p. xiii; emphasis in the original).


Some have grouped cultural theories together, categorizing the "culture of poverty" assumption as the liberal branch and the "work ethic" deficiency assumption as the conservative branch of the same model. BANE & ELLWOOD, supra note 91, at 79. However, I have chosen to treat them separately in this Note.

102. See ELLWOOD, supra note 94, at 205-6.

103. WILSON, supra note 101, at 158-59.

If ghetto underclass minorities have limited aspirations, a hedonistic orientation toward life, or lack of plans for the future, such outlooks ultimately are the result of restricted opportunities and feelings of resignation originating from bitter personal experiences and a bleak future. Thus the inner-city social dislocations emphasized in this study (joblessness, crime, teenage pregnancies, out-of-wedlock births, female-headed families, and welfare dependency) should be analyzed not as cultural aberrations but as symptoms of racial-class inequality.

Id.

104. See id. at 158.

105. See Wacquant & Wilson, supra note 101, at 100.
poverty" also requires programs targeted toward individuals, such as "job readiness" training, interview preparation, and job clubs.106

These four approaches are not mutually exclusive, and many state welfare plans have included more than one of them.107 For example, JOBS programs required participants to search for employment,108 as well as increase their employability through training, education, or work experience.109 Moreover, the JOBS program funded support services like Medicaid, child care and transportation assistance "to allow participation in employment, education or training."110

II. Job Creation Options Under TANF

The prevailing philosophy promoted by TANF's work requirements is "work first."111 The top priority is steering recipients directly into unsubsidized jobs, or into job search and job placement programs that will lead to unsubsidized jobs.112 Those who find such jobs — even low-wage jobs — likely will earn enough to lose their eligibility for supplemental cash grants, especially in states with low grant levels.113 Such people count toward a state's participation rate, in that they will leave the welfare rolls and contribute

106. "In addition, measures such as on-the-job training and apprenticeships to elevate the skill levels of the truly disadvantaged are needed." WILSON, supra note 101, at 151; see also ELLWOOD, supra note 94, at 217-30.
107. See BLOOM, supra note 31, at 25. For a description of the major program activities for nineteen welfare-to-work programs implemented under JOBS, see JUDITH GUERON & EDWARD PAULY, FROM WELFARE TO WORK 85-91 (1991).
109. See id. at § 681(a).
110. 45 C.F.R. § 255.0 (1997).
111. See AMY BROWN, WORK FIRST: HOW TO IMPLEMENT AN EMPLOYMENT-FOCUSED APPROACH TO WELFARE REFORM 2 (1997). States have espoused this philosophy in their work programs. For example, in describing its program under TANF, the Alaskan Department of Health and Social Services states: "ATAP [Alaska Temporary Assistance Program] uses the Work First approach to meet program goals of self-sufficiency . . . . The Work First philosophy holds that any job is a good job and the best way to succeed in the job market is to join it." State of Alaska Temporary Assistance for Needy Families State Plan, (visited Feb. 7, 1998) <http://hss.state.ak.us/htmlstu/pubassis/ATAPFN1.htm>.
112. See BROWN, supra note 111, at 2.
113. See KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET 102 (1997). The vast majority of states excluded even minimum-wage workers with average-size families if they worked full time (two thousand or more hours a year); in the South, virtually all minimum-wage part-time workers were excluded as well . . . . San Antonio mothers with average-size families were excluded from the welfare rolls if they grossed more than $264 a month, and in Charleston, the cutoff was $280.

Id.
to the state’s caseload reduction credit. Participants in job search and job readiness training also count toward fulfilling the state’s participation rate requirements, but individuals may take part in job search programs only for strictly limited periods of time.

Faced with the challenge of moving recipients into work, many states have shifted away from the JOBS strategy of education and training, and now are focusing on work activities, such as subsidized jobs and work experience programs, for those who are unable to find unsubsidized employment. In the coming years, as states must expand participation in work activities to meet the requirements, they may simply expand the ancillary programs that existed under prior law, i.e., work experience programs and wage subsidy programs. Work experience and subsidized employment are both productive activities for participants who lack a work history and may have trouble finding an unsubsidized job. Both approaches can teach participants basic work habits, give them skills and experience for their resumes and, ideally, help lead to permanent, unsubsidized jobs.

A. Work Experience Programs

In work experience programs (commonly referred to as “workfare”), participants generally work in unpaid jobs in the

114. See 42 U.S.C. at § 607(b)(3)(A)(ii) (Supp. 1997). A state’s work participation rate will be reduced by the number of percentage points by which the average monthly caseload of the last fiscal year is below its fiscal year 1995 caseload. See supra note 72.

115. See id. at § 607(d)(7). See supra note 73 and accompanying text.

116. See id. at § 607(c)(2)(A)(i). An individual will not count toward a state’s participation rate if she conducts a job search for more than six weeks total, or for more than four weeks consecutively. The total is increased to twelve weeks if the state’s unemployment rate is more than fifty percent greater than the unemployment rate of the United States. See id.

117. See BLOOM, supra note 31, at 62.


119. See BROWN, supra note 111, at 71.

120. See id.

121. See Gueron & Pauly, supra note 107, at 97.
public or non-profit sector in exchange for their welfare benefits.\(^\text{122}\) These programs usually are structured so that participants work for the number of hours equivalent to their families' welfare grant divided by the minimum wage.\(^\text{123}\) Under this approach, in a state with average benefit levels, a mother with two children would be required to work approximately twenty hours per week.\(^\text{124}\)

Work experience programs were little used under the JOBS program.\(^\text{125}\) Research on workfare programs reveals that, by themselves, they did not have a significant impact on either employment or earnings.\(^\text{126}\) Participants, however, generally performed work that had value to the community,\(^\text{127}\) and the programs introduced the idea of reciprocal obligations into AFDC.\(^\text{128}\)

Many states have adopted the politically popular workfare model instituted by Westchester County, New York, in 1989. This "Pride in Work" program has put more than 15,000 welfare recipients to work for Westchester County's municipal governments and non-profit organizations,\(^\text{129}\) and has dramatically trimmed the

\(^{122}\) See id. "Community work experience programs shall be limited to projects which serve a useful public purpose in fields such as health, social science, environmental protection, education, urban and rural development and redevelopment, welfare, recreation, public facilities, public safety and day care." 45 C.F.R. § 250.63(c) (1997).


\(^{124}\) See Bloom, supra note 31, at 63.

\(^{125}\) See 1996 Green Book, supra note 31, at 420-21. The national average in 1994 for JOBS participants in community work experience programs was 3.6%, with twenty-seven states reporting they had implemented such programs. Twelve states had significant programs, with more than 5% of their JOBS participants in CWEP. See id.

\(^{126}\) See Brown, supra note 111, at 77.

[H]arsh criticism has been leveled against workfare programs: These are make-work jobs requiring recipients to work off their grants. They rarely provide useful training . . . . They also pay no benefits. Workfare has been utilized primarily to sanction clients and the goal is not to develop a client's skills, which is often promoted as its reason, but really to reduce clients' payments or force them off the rolls.


\(^{127}\) For example, Westchester County's workfare program, Pride in Work, garnered $12.1 million in labor over seven years by requiring 15,725 welfare recipients to work. See Joseph Berger, Pitfalls in a Model for Workfare: Westchester's Politically Popular Project Leaves Questions Unresolved, N.Y. Times, Dec. 2, 1996, at B1.

\(^{128}\) See Brown, supra note 111, at 77. "Ms. Glass, the architect of the county's program [Pride in Work], feels that what is important is that anyone receiving a welfare check be made to work." Berger, supra note 127. See supra note 34 and accompanying text.

\(^{129}\) See Berger, supra note 127.
county's welfare rolls. The Pride in Work program, however, can only require workfare participants to do “nonessential” work because of efforts by public-sector unions to protect their members' jobs. Moreover, informal tracking shows that few leave the workfare program for steady employment.

B. Subsidized Private Sector Jobs

Under subsidized employment (also known as “work supplementation” or “grant diversion”), states use welfare grants as a source of wage subsidies for participants placed in private sector jobs. Related to subsidized employment is on-the-job training (“OJT”). In OJT, the state diverts a grant to a private employer who pays the welfare recipient while she receives job training. If the training is successful, the trainee can be kept on as a permanent, unsubsidized employee of the firm.

States provide subsidies to private employers who train or hire recipients by “cashing out” the recipients’ cash grants and/or food stamp assistance and providing these funds directly to the employers. The employer then gives the recipient a paycheck as a regular employee, and also pays some or all of the costs for unemployment insurance, worker’s compensation, and payroll taxes. Because they receive wages, participants in work supplementation programs are eligible for the Earned Income Tax Credit.

130. See id. (“20,658 cases of Home Relief — the welfare program for childless adults — have been closed, 60 percent of them permanently, because people refused workfare assignments or did not show up for work.”).
131. See id.
132. See id.
134. See Brown, supra note 111, at 78.
135. Id. (“On-the-job training (OJT) operates similarly to work supplementation, but OJT is available to individuals who do and who do not receive welfare and is funded through employment and training programs rather than diverted welfare grants.”).
136. See Gary Burtless, Employment, Earnings, and Income, in Welfare Policy for the 1990s, supra note 79, at 109. For example, two states, New Jersey and Maine, offered subsidized on-the-job training as part of their voluntary WIN demonstration projects. See Gueron & Pauly, supra note 107, at 199-203.
137. See Burtless, supra note 136, at 109.
138. See NGA, Summary, supra note 18.
139. See Brown, supra note 111, at 78.
140. See id. See supra note 95 and accompanying text.
Work supplementation programs for AFDC recipients were added by OBRA to supplement WIN.\(^\text{141}\) They were continued under the JOBS program of the FSA,\(^\text{142}\) but only thirteen states had work supplementation programs and only .2% of JOBS participants took part in such programs in 1994.\(^\text{143}\) Under TANF, a few states are opting to subsidize private employment for public assistance recipients by diverting money that would have been used for benefits.\(^\text{144}\)

Subsidies to employers may also take the form of federal tax credits. The Taxpayer Relief Act of 1997\(^\text{145}\) modified the Work Opportunity Tax Credit ("WOTC"),\(^\text{146}\) a federal income tax credit available to employers who hire welfare recipients.\(^\text{147}\) The Taxpayer Relief Act also created the Welfare-to-Work Tax Credit,\(^\text{148}\) a more generous credit for hiring long-term public assistance recipients.\(^\text{149}\) Although the substantive requirements are different, these two tax credits are coordinated and the certification process is the same so that an employer cannot claim both credits for the same individual.\(^\text{150}\)

\(^{141}\) See supra note 49 and accompanying text.

\(^{142}\) See 102 Stat. at 2363-65.

\(^{143}\) See 1996 Green Book, supra note 31, at 420-21. Although almost every state had on-the-job training as a component of its JOBS program, the average monthly participation rate in OJT was still only .5%. See id. "OJT, while apparently quite effective, is less common than classroom training or employment counseling because training slots are difficult to arrange among private employers." Burtless, supra note 136, at 109.

\(^{144}\) For example, Florida, Missouri and Oregon have included work supplementation programs in their TANF state plans. See Welfare Information Network, Subsidized Employment — Private, (visited Feb. 12, 1998) <http://www.welfareinfo.inter.net/subpriv.htm>. Wisconsin also expects that many of the participants in its W-2 program will be placed in subsidized private sector jobs. See Bloom, supra note 31, at 69.

\(^{145}\) Taxpayer Relief Act of 1997, Pub. L. No. 105-34.

\(^{146}\) See Pub. L. No. 105-34, § 603. The Taxpayer Relief Act of 1997 extended and amended WOTC under Section 51 of the Internal Revenue Code. Employers can claim a credit of forty percent of first-year wages up to $6,000, for a maximum credit of $2,400 for individuals who work at least 400 hours. Employers can also claim a credit of twenty-five percent for workers who work at least 120 hours but less than 400 hours. See I.R.S. Notice 97-54, Work Opportunity Tax Credit and Welfare-to-Work Credit, 1997-41 I.R.B. 7.

\(^{147}\) See I.R.C. § 51(d)(2) (1997). For purposes of the tax credit, an individual is not a member of a targeted group unless so certified by the state employment security agency (SESA). See id. at § 51(d)(11); see also I.R.S. Notice 96-52, Work Opportunity Tax Credit — Pre-Screening Notice, 1996-2 C.B. 218.


\(^{149}\) See I.R.S. Notice 97-54, supra note 146 (stating that employers may claim a tax credit of 35% of qualifying first-year wages and 50% of qualifying second-year wages, for up to $10,000 of wages each year).

\(^{150}\) See id.
In Oregon, a subsidized work program, called JOBS Plus, was created in 1994 for recipients of AFDC, food stamps, and unemployment insurance under a waiver granted by the United States Department of Health and Human Services. Although JOBS Plus was initially a small component of the overall Oregon JOBS Program, it has been expanded by Oregon under TANF. Employers issue subsidized workers a paycheck, and are reimbursed by the state for wages (paid at the minimum wage), payroll taxes, and workers’ compensation. Placements run for four months, with another two-month extension possible, during which the worker may take one day a week at regular pay to look for a permanent job. Employers are encouraged, but not required, to hire JOBS Plus workers into their permanent, unsubsidized work force.

C. Subsidized Public Sector Jobs

Subsidized employment in the public sector is quite similar to subsidized employment in the private sector, except that welfare recipients receive wages for work in community service jobs with public or non-profit agencies rather than private businesses. In the 1970s and 1980s, states used federal grants to locate wage-paying jobs in the non-profit and public sector for AFDC recipients in two multi-state demonstration programs, the National Supported Work Demonstration and the AFDC Homemaker-Home Health

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152. See id.
153. See id.
154. See id.
155. See id.
156. See CLASP, Glossary, supra note 133.

Supported Work enrolled a very disadvantaged group of AFDC recipients (averaging more than 8.5 years on welfare) in a 12- or 18-month program of carefully structured and closely supervised paid work experience with elements of on-the-job training. Gueron & Pauly, supra note 107, at 194.
Aide Demonstrations. These programs resulted in impressive increases in employment and earnings for participants. The public service employment program component of the Comprehensive Employment and Training Act of 1973 ("CETA") also provided paid work experience for AFDC recipients who volunteered to participate. This program provided continuing beneficial impacts on the earnings of adult women after they completed it.

Federal regulations in the JOBS program expressly prohibited states from using JOBS funds to create public sector jobs. TANF, however, has removed that bar, and states now may use federal TANF funds and state funds to subsidize public employment. Federal Welfare-to-Work grants from the Department of Labor, authorized in the Balanced Budget Act of 1997, also are available for a range of activities including work experience pro-

158. The AFDC Homemaker-Home Health Aide Demonstrations operated in 70 sites across seven states from January 1983 through June 1986. See Johnson & Lopez, supra note 157; Gueron & Pauly, supra note 107, at 196-99; Burtless, supra note 136, at 118-19.

The Homemaker-Home Health Aide Demonstrations targeted women who had been on AFDC for at least 90 days and reached a diverse group of welfare recipients, the majority of whom were WIN volunteers (i.e., had children under 6 years old). The program provided four to eight weeks of formal training, followed by up to a year of subsidized employment.

159. See Cottingham, supra note 81, at 4.

160. See Comprehensive Employment and Training Act of 1973 ("CETA") Pub. L. No. 93-302, 87 Stat. 839 (1973). CETA’s Public Service Employment ("PSE") program created publicly-funded jobs in public and non-profit agencies to assist those who were unemployed during periods of high unemployment. In 1977 and 1978, the Carter Administration expanded CETA dramatically in an effort to reduce joblessness and stimulate economic growth after the 1973-75 recession. At the height of the PSE program in 1978, more than 700,000 individuals were employed nationwide at an annual cost to the federal government of $4 billion.

PSE funding was eliminated in 1981, and when CETA was replaced by the Job Training Partnership Act in 1982, the authorization to create publicly-funded jobs was not included in the new law. See Johnson & Lopez, supra note 157.

161. See Burtless, supra note 136, at 114.

162. See id. at 115. Specifically, a series of evaluations estimated that the earnings gains among these women ranged from $650 to $1,200 per year (as measured in 1985 dollars). See id.

163. See 45 C.F.R. § 250.47(b) (1997) ("In no event will a State program of public service employment be approved under JOBS. Public service employment is fully-subsidized employment in a public agency."). In work supplementation programs under JOBS, states could place participants in private firms or nonprofit organizations. See 1996 Green Book, supra note 31, at 410.

164. See 42 U.S.C. § 607(d)(3) (Supp. 1997). See supra note 73. "Subsidized public sector jobs" is the third work activity on the list of activities that participants can take part in to be counted toward a state’s participation rate.

grams and "job creation through public and private sector wage subsidies."166

Vermont is the only state to implement such a program under TANF.167 In its Community Service Employment ("CSE") program,168 Vermont provides community service jobs in the public and non-profit sector for parents in families who have reached the state's time limit, but have been unable to find unsubsidized employment.169 Placements last for up to ten months, after which a two-month job search period is required.170 Subsequent placements following an unsuccessful job search also are available.171

CSE wages are calculated by multiplying the number of hours the participant works by the Vermont minimum wage.172 The state pays the full cost of wages, the employer's share of FICA taxes, workers' compensation, and liability insurance, and provides a monthly stipend of $90 to participants to cover the employee's share of FICA taxes deducted from their wages, as well as transportation costs.173 CSE participants, however, are not considered employees of the state of Vermont, or of the organizations where they are placed.174

III. Analysis of Subsidized Employment

Thus far, PRWORA has been a windfall for states, because federal funding has remained steady as welfare caseloads have de-

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167. See SAVNER & GREENBERG, supra note 118, at 5.


169. Vermont has established a 15 month time limit for two-parent families and a 30 month time limit for single-parent families. See id.


171. See id.


173. See SAVNER & GREENBERG, supra note 118, at 6.

174. Instead, "[t]hey are participants in a work activity for which they are paid wages that are subsidized by the ANFC benefit that they would otherwise receive in the form of an assistance payment if they were not subject to the Reach Up CSE work requirement." Community Service Employment, supra note 168.
clined.\textsuperscript{175} If the economy remains strong,\textsuperscript{176} welfare recipients will continue to leave the rolls,\textsuperscript{177} and states will be able to meet the federal requirements without having to administer large-scale work programs.\textsuperscript{178} This economic boom, however, has not benefited the poorest Americans.\textsuperscript{179} Those still remaining on the welfare rolls have little education, low skills, and limited work experience, and thus are harder to place in the labor force.\textsuperscript{180} TANF imposes steadily increasing work requirements, but does not provide the states with the increased funding they likely will need in the future to meet the requirements.\textsuperscript{181}

Furthermore, a recession eventually will occur, which likely will lead to increased caseloads.\textsuperscript{182} Employment-based welfare reforms work in tandem with economic conditions, and thus states must

\textsuperscript{175} See Miller, supra note 19, at 8A.


Researchers continue to debate how much of the falling caseload can be attributed to the strong economy and how much to the new, more stringent welfare policies. See Joel Dresang, \textit{Economy Credited for Welfare Case Drop}, MILWAUKEE J. SENTINEL, Nov. 20, 1997, at 5. A survey of people in New York City who left the welfare rolls between July 1996 and March 1997 found that only 29\% had jobs in the months after they were no longer on public assistance. See Raymond Hernandez, \textit{Most Dropped From Welfare Don't Get Jobs}, N.Y. TIMES, Mar. 23, 1998, at A1. Advocates for the poor claim that these numbers indicate that the stringent policies of the Pataki and Giuliani administrations are pushing former welfare recipients deeper into poverty, not helping them to reach self-sufficiency through employment. See id.


\textsuperscript{179} See Robert B. Reich, \textit{When Naptime is Over}, N.Y. TIMES, Jan. 25, 1998, \S6 (Magazine), at 32. “Despite the boom, inequality has widened. The nation's poverty rate is slightly higher than it was before the last recession. In 1989, 12.6 million, or 19.6 percent, of the nation's children lived in poverty; now it's 14.5 million, or 20.5 percent.” Id. at 33.


\textsuperscript{182} See Dresang, supra note 177.
plan for long-term economic trends. Previous experience shows that states are generous in their programs when the economy is strong and welfare rolls (and costs) are declining. In a recession, however, welfare rolls increase, funding drops, and political support for expensive programs disappears.

A. States Should Use Subsidized Employment to Meet TANF’s Work Requirements

States should build on past success and develop subsidized employment programs to fulfill their obligations under the TANF work requirements. The work programs that have led to the largest rise in earnings for participants are the AFDC Homemaker-Home Health Aide project, the National Supported Work program, CETA, and public service employment programs. Research on various work programs under WIN and OBRA reveals that for welfare recipients with no previous work experience, subsidized job programs have resulted in the greatest increase in earnings (ranging from $1201 to $2793, compared to $495 in job placement). Indeed, another study of WIN work programs shows that for all participants, the most effective component of the program was subsidized employment, either in private on-the-job training or public service work.

When designing their work programs under TANF, each state must decide whether to make wage-based positions one of a number of various possibilities for those currently receiving benefits, or an option for those who have reached the time limit, as in

183. See id.
184. See Handler & Hasenfeld, Poor People, supra note 58, at 63.
185. See id.
186. See supra notes 71-72 and accompanying text.
187. See supra note 158 and accompanying text.
188. See supra note 157 and accompanying text.
189. See supra note 160 and accompanying text.
190. See Burtless, supra note 136, at 137-38. The AFDC Homemaker-Home Health Aide Demonstrations’ combination of on-the-job training followed by subsidized employment resulted in particularly impressive gains, producing net social benefits in six of the seven states that ranged from $2,200 to $13,000 per participant. See Johnson & Lopez, supra note 157.
192. See id. at 156 (citing J.E. Gordon, WIN Research: A Review of the Findings, in The Work Incentive Experience 24-87 (C. Garvin, A. Smith & W. Reid eds., 1978)). For example, less than one percent of WIN participants were placed in on-the-job training, yet 6.3% of those who successfully obtained employment had participated in one of these training programs. See id.
Vermont’s CSE program.\textsuperscript{193} States should start their programs small and build them incrementally over time, later adding more positions. This will help maintain the quality of the program by addressing problems at an early stage before they can undermine the program, and ensuring that suitable slots with adequate supervision are developed for all participants.\textsuperscript{194}

Each state also must decide how to allocate wage-based positions among local or state government agencies, in non-profit and community-based organizations, and private firms.\textsuperscript{195} States may begin by looking to private employers and non-profits to create subsidized positions, but these may not be able to serve all the welfare recipients who will want to participate, or who will be required to enroll under the work participation rate requirements of TANF.\textsuperscript{196} In such instances, government agencies will need to create positions for many participants in a large-scale subsidized work program. For example, in the National Supported Work Demonstration during the 1970s,\textsuperscript{197} participants worked in diverse assignments, including building repair and maintenance, security, and child care.\textsuperscript{198}

Moreover, states should focus on moving participants into unsubsidized jobs as quickly as possible,\textsuperscript{199} because of TANF’s time limits.\textsuperscript{200} Thus, states should require those in subsidized jobs to conduct job searches every few months, take part in intensive job placement counseling, and join peer support groups to achieve this goal. States must strike a balance between allowing participants enough time in the program to benefit from the experience, and moving them into unsubsidized work before the time limits expire.\textsuperscript{201} This balance can be struck, as Vermont has done in its CSE

\textsuperscript{193} See SAVNER & GREENBERG, supra note 118, at 5. See supra note 169 and accompanying text.


\textsuperscript{195} See SAVNER & GREENBERG, supra note 118, at 5.

\textsuperscript{196} See supra notes 71-72 and accompanying text.

\textsuperscript{197} See supra note 157 and accompanying text.

\textsuperscript{198} See Pavetti et al., supra note 157.

\textsuperscript{199} See supra note 157 and accompanying text.


\textsuperscript{201} See id. at §§ 607(d) & 608(a)(7). The clock on time limits of § 608(a)(7) continues to run against welfare recipients while they take part in the work activities listed in § 607(d). “In at least one important, but little-noticed way, welfare policy is now at odds with itself. While time limits are in, so are state plans that let recipients keep benefits while they work — extending their stay on the rolls and further eating into the clock.” DeParle, supra note 180.
program, by placing a time limit of six to twelve months on subsidized placements, and then requiring participants to conduct a job search for four to eight weeks before beginning another subsidized placement.\textsuperscript{202} States also must decide how they will sanction those participants who perform unsatisfactorily in their work assignments or who refuse to perform work at all.\textsuperscript{203}

Most importantly, each state should seek to improve the skills of participants by including job training activities in the program that will improve their long-term employment prospects.\textsuperscript{204} For example, the AFDC Homemaker-Home Health Aide program was particularly successful because it combined on-the-job training with the guarantee of a publicly-funded job for a year in a manner that dramatically enhanced participants' employability.\textsuperscript{205}

1. The Advantages of Subsidized Employment

A subsidized work program offers distinct benefits over unpaid work experience programs because it falls within the traditional framework of employment (with all its benefits and protections)\textsuperscript{206} and is more likely to improve the future economic security of poor

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A study of the Pensacola, Florida welfare program with a two-year time limit on families receiving cash assistance found that:

caseworkers did not pressure recipients to leave welfare earlier, suggesting that they use their time to get education and training rather than bank it for the future. Time limits aside, the program also offered welfare recipients special services, such as more personal attention from caseworkers and enhanced child care, and it let them keep more of the money they earned while on welfare.


202. See supra notes 170-71 and accompanying text.


204. See Johnson, supra note 194.

205. See Johnson & Lopez, \textit{supra} note 157. See \textit{supra} note 158 and accompanying text.

206. As early as 1967, legislators debating work requirements for welfare recipients recognized the necessity of keeping these workers within the traditional employment framework:

An important facet of this suggested work program is that in most instances the recipient would no longer receive a check from the welfare agency. Instead, he would receive a payment from an employer for services performed. The entire check would be subject to income, social security, and unemployment compensation taxes, thus assuring that the individual would be accruing rights and responsibilities as he would in regular employment.


There is a danger in creating workfare positions for welfare recipients that are not considered "real" jobs. According to Professor Matthew Diller:
families. A job that pays wages, like the ones provided in the Vermont and Oregon programs, is more like "work" than a position in a workfare program like Westchester County's Pride in Work. Welfare recipients have demonstrated that they prefer the possibility of learning useful skills and the dignity of working for a wage in a "real job" over participating in workfare programs.

Participants who receive a wage also pay FICA taxes. Although this decreases the amount welfare recipients collect, and raises the costs to the state for the work slot as compared to a workfare position, these taxes serve the important purpose of bringing welfare workers within the traditional employment framework. In addition, paying these taxes offers significant advan-

[Work performed in exchange for welfare is not a job. Indeed, although the terms and conditions of such work may vary, [unpaid] work programs are deliberately structured so that they are virtually never comparable to holding an actual job. The PRWORA thus permits and promotes the creation of a social and legal status in which recipients work and provide valuable services, but receive none of the social benefits and potentially only a few of the legal protections of employment. Employment is a social institution that confers a series of social, economic and legal benefits on those who work. The potential for the creation of a large number of people who labor outside of this framework is a threat to the dominance of this institution.


207. A study of the new welfare policies adopted by the states under TANF found that Vermont's policies were more likely than all other states to improve poor families' economic security. See Are States Improving the Lives of Poor Families?, supra note 180, at 2.


209. See California Workfare (NPR radio broadcast, Feb. 14, 1998). As part of a campaign to demand jobs with a "living wage," participants in Los Angeles County's workfare program demonstrated against their assignments, displaying banners that said "Workfare is Unfair" and "Real Jobs Now," and explaining the "hazards, indignities and injustices" of workfare:

We do the work. We don't get the money, but they want us. They get two or three of us for one job. Now, we need the money like anybody else. We want to look like everybody else, and act [like everybody else], and pay our rent and utilities and live just like normal people. They won't let us. We need to.

Id.

210. See Savner & Greenberg, supra note 118, at 5. In a 1975 Revenue Ruling, the Internal Revenue Service found that payments received by CETA participants for services performed were to be treated as taxable income. See Rev. Rul. 75-246, Payments under Comprehensive Employment and Training Act, 1975-1 C.B. 24.

211. See Carol Marbin Miller, Labor Ruling Poses Tax Bind for "Workfare," St. Petersburg Times, July 24, 1997, at 5B.

212. See Savner & Greenberg, supra note 118, at 5.
tages to the family, in that it increases the possibility that these workers will be able to establish an employment record to qualify for universal social insurance programs in the future.\textsuperscript{213}

Additionally, these individuals will qualify for the Earned Income Tax Credit,\textsuperscript{214} which will offset the amount that payrolls taxes decreased their wages. In the Taxpayer Relief Act of 1997, for example, Congress specified that payments made to participants in work experience or community service programs under TANF\textsuperscript{215} should not be considered earned income for purposes of calculating an individual's eligibility for the EITC.\textsuperscript{216} Those in subsidized employment, however, are not barred from benefiting from the EITC.\textsuperscript{217} If work slots are structured as wage-earning positions rather than workfare positions, a parent with two children qualifies for a forty percent wage credit on the first $9140 of her earnings through the federal EITC in 1997.\textsuperscript{218} The EITC has remained politically popular because it encourages work while providing income to the poor, although it is not trouble-free.\textsuperscript{219}

\textsuperscript{213} The United States has a bifurcated social welfare system, with recipients placed in one of two categories depending on their history of employment. See Kathleen A. Kost & Frank W. Munger, \textit{Fooling All of the People Some of the Time: 1990s Welfare Reform and the Exploitation of American Values}, 4 VA. J. SOC. POL'Y & L. 3, 13 (1996).

The first category provides its recipients with long term benefits indexed to inflation with relatively few conditions, and includes programs for old age pensions and Medicare. It guarantees benefits to those who either have maintained an appropriate attachment to the labor force through work or a family relationship to a worker. The second type of federal program is welfare, including AFDC, the Food Stamp program, Medicaid, and a wide range of other programs that primarily fund services rather than provide direct financial support. The beneficiaries of the second track are largely underemployed and unemployed working age men and women and their dependents.

\textit{Id.} at 13-14. The benefits for those in the first category are much more favorable than the benefits for those in the second, because recipients with records of employment are considered morally "deserving" of assistance. See \textit{id.} at 14.

\textsuperscript{214} See SAVNER & GREENBERG, supra note 118, at 3; see also CSE Wage Payment Process, supra note 172. See supra note 95 and accompanying text.

\textsuperscript{215} See 42 U.S.C. §§ 607(d)(4) and (7) (Supp. 1997). See supra note 73 and accompanying text.

\textsuperscript{216} Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1085.

\textsuperscript{217} See SAVNER & GREENBERG, supra note 118, at 3.

\textsuperscript{218} See id.

\textsuperscript{219} See generally Alstott, supra note 95. Alstott finds that tax-based programs for income support such as the EITC have certain advantages, including wider accessibility, less expensive administration, and less stigma for recipients, but also identifies three inherent disadvantages in the EITC: "less accurate targeting, less responsiveness to changing needs, and vulnerability to noncompliance." \textit{Id.} at 589.
2. The Disadvantages of Subsidized Employment

States must address several disadvantages when including a large-scale program of subsidized employment with on-the-job training in their plans to meet the TANF work requirements. First, a danger exists that private employers simply will receive a windfall for hiring someone they would have hired anyway. In addition, there may be a stigma associated with subsidized employment, resulting in employer reluctance to hire welfare recipients, and participant unwillingness to work in temporary positions.

Second, in past programs, this stigma has resulted in trouble for administrators in finding and maintaining a large number of work slots in private firms that provide meaningful opportunities for productive employment. Administrators, therefore, have had to develop more work slots in public and non-profit agencies, which have been reluctant to accept costs for supervising workers whom they suspect are not productive or motivated. Moreover, as in Westchester's work experience program, unions that represent public employees may oppose efforts to develop work supplementation programs in the public sector because they threaten to displace their members.

Administering subsidized work programs also can entail substantial costs for social welfare departments because a great deal of staff time must be spent on identifying or creating work slots, culti-
vating contacts with supervisors, assessing participants' job skills, matching participants with jobs, securing reliable child care for participants' children, and dealing with absences, illnesses, and other attendance problems. However, management reluctance, union antagonism, and high administrative costs are problems that also are present in large-scale work experience programs.

Finally, although several studies show that the most common route out of welfare is through work, about forty percent of those who leave through earned income remain below the poverty line after they exit the welfare rolls. The Earned Income Tax Credit, together with the increased minimum wage, improves the ability of single mothers to engage successfully in the work force, but low-wage families still face significant difficulties. For example, one exhaustive study shows that despite higher monthly incomes, working single mothers are financially worse off than welfare-reliant mothers, because they have to spend more of their own money for housing, transportation, child care, medical care, work clothes or uniforms, and other miscellaneous expenses.

3. Elements of a Subsidized Work Program

States should create programs that provide subsidized employment opportunities for disadvantaged individuals who do not have the skills to function successfully in the regular job market. Subsi-

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227. See Bloom, supra note 31, at 65.
228. See id.
229. See Handler, supra note 39, at 50.
230. See id.; see also Joel Dresang, Work Often Not Enough for Welfare Recipients, MILWAUKEE J. SENTINEL, Apr. 12, 1996, at 2. Using more recent data, researchers tracking families receiving welfare in Milwaukee County, Wisconsin, found that 7,502 families, or nearly thirty percent of the caseload, left the welfare rolls in the first nine months of 1996. Yet only 16.2% of the departing families were earning more than the poverty level for a family of four in December 1996, and by March 1997 the proportion had fallen to eight percent. See Joel Dresang & Geeta Sharma-Jensen, Off Welfare, Few Escape Poverty, MILWAUKEE J. SENTINEL, Jan. 23, 1998, at 1.
232. See Ellwood, supra note 94, at 89-93. The problems confronted by the working poor, including the decline in real wages and the instability of low-wage jobs, are beyond the scope of this Note. For an extensive discussion of these and related issues, see generally Sara A. Levitan, Frank Gallo & Isaac Shapiro, Working but Poor: America's Contradiction (rev. ed. 1993).
234. See id. at 92-97.
dized employment and training can provide much-needed work experience and skills for those hard-to-employ individuals who have had difficulty leaving the welfare rolls. While no single model or approach can fit all labor market conditions or target populations, states should implement voluntary subsidized work-based training programs as an important part of their efforts to fulfill the TANF work requirements.

Work-based training programs provide short-term instruction on specific occupations that do not necessarily require an educational credential, such as a high school degree or a General Educational Development ("GED") certificate. Participants can enroll in a six-month program to train for a particular job, such as medical assistant or home health care worker, as in the AFDC Homemaker-Home Health Aide program. Other possible jobs are in construction, skilled manufacturing, data entry or bookkeeping, and commercial food service.

The training program must be closely linked to the local community to ensure that participants are learning marketable skills and can find jobs quickly after completing their courses. Local employers should find this program appealing because it can be specifically tailored to meet their needs for qualified, dependable workers. Some companies may even offer on-site training for participants. Local labor unions also should be involved in work-based training programs, by helping to design the training curricula, because they may know better than management what specific skills are required for a job, and can help new employees adjust to their new jobs by connecting them with more experienced workers.

Because of their close link with employers, participants who complete the training program can have a potential job waiting for

235. See Pavetti et al., supra note 157 ("The program is specifically targeted to welfare recipients for whom completion of a GED is not a realistic option, especially within a time-limited welfare system.").
236. See supra note 158 and accompanying text.
237. See Pavetti et al., supra note 157.
238. See id.
240. See id. at 32. The labor unions also benefit by participating in training programs because they will be able to expand membership and recruit new members. Furthermore, "if organized labor doesn't show that it can offset higher wages with higher productivity and quality, companies will move to where they can get cheaper employees." Id.
them. If necessary, states may need to include six to twelve months of subsidized wages to induce private and public sector employers to hire participants. If implemented carefully with adequate funding, however, such a program has the potential to significantly increase the long-term employment prospects for those welfare recipients who have not found jobs after participating in traditional workfare programs.

B. Satisfying the Purposes of Work Requirements

The wage-subsidization approach can satisfy each of the four assumptions behind the goal of moving welfare recipients into the labor force. Working for a wage reinforces the “work ethic” of participants by rewarding them for taking part in employment. In fact, proponents of the work ethic theory directly advocate government creation of jobs as a way of strengthening the work ethic of those who work in these jobs. Second, a program of income support makes subsidized employment more attractive than receiving welfare by “making work pay.”

Third, when states subsidize jobs, they can more easily provide the support services recipients may require to overcome the barriers they face to entering the work force. For example, states and counties can coordinate the child care and transportation support which families will need to take full advantage of these employment opportunities. States also are required to continue providing Medicaid to those participating in subsidized jobs. Finally, programs of subsidized employment can expand job opportunities for all low-skilled individuals in communities with high rates of poverty. Thus, such programs can be part of a comprehensive

241. See id.
243. See supra Part I.B.
244. See supra note 85 and accompanying text.
245. See supra notes 88-90 and accompanying text.
246. See supra note 94 and accompanying text. Even Charles Murray has expressed support for the idea of a subsidized job training program for the “hardcore unemployed.” MURRAY, supra note 91, at 214-15. His concern, however, is that employers will condone lower productivity and unreliable behavior from their trainees because they are receiving compensation from the state. See id. at 215.
247. See supra note 100 and accompanying text.
248. See Maryland Welfare Reform, supra note 20.
250. See Johnson, supra note 194. See supra note 101 and accompanying text.
economic policy that will greatly improve the employment opportunities of the "truly disadvantaged."\textsuperscript{251}

For example, the New Hope Project in Milwaukee, Wisconsin arranges full-time jobs (averaging thirty hours or more per week) with private businesses and non-profit agencies.\textsuperscript{252} It also provides income supplements to these low-wage workers to ensure that their earnings will exceed the poverty line, and facilitates access to subsidized child care and health care.\textsuperscript{253} New Hope requires a job search before making a placement, and limits participants to six months in a particular placement and twelve months over three years in the program, emphasizing that these are temporary jobs.\textsuperscript{254} Eligibility for this program is not limited to those on welfare, but instead is open to all low-income adults who are interested in gaining full-time work experience.\textsuperscript{255}

A subsidized employment program, like New Hope, can function as an alternative to welfare, rather than just a requirement for a family receiving welfare.\textsuperscript{256} Individuals working in these jobs are not seen as "receiving welfare;" instead they are considered to be low-wage workers who occasionally need to receive additional support in conjunction with earned income.\textsuperscript{257} By redefining the majority of welfare recipients,\textsuperscript{258} and including them in programs designed to help all of the low-wage workers in a particular neighborhood or city, recipients shed the stigma of dependency. Moreover, "universal" programs secure more political support\textsuperscript{259} because they are directed at a population of workers that is viewed

\textsuperscript{251} See Wilson, supra note 101, at 150.


\textsuperscript{253} See Johnson, supra note 194.

\textsuperscript{254} See CLASP, Welfare Reform, supra note 252.

\textsuperscript{255} See id.

\textsuperscript{256} See id.

\textsuperscript{257} See Handler & Hasenfeld, Poor People, supra note 58, at 144.

\textsuperscript{258} See Bloom, supra note 31, at 14.

\textsuperscript{259} Although this measure does target a particular, disadvantaged population, it qualifies as "targeting within universalism" because it arranges subsidies through the employment system in which all workers participate. See Theda Skocpol, Targeting within Universalism: Politically Viable Policies to Combat Poverty in the United States, in The Urban Underclass 411, 431 (Christopher Jencks & Paul E. Peterson eds., 1991) Three factors characterize the concept "targeting within universalism": first, when U.S. antipoverty efforts have featured policies targeted to the poor alone, they have not been politically sustainable, and they have stigmatized and demeaned the poor; second, some kinds of relatively universal social policies have been politically very successful; and third, room has been made within certain universal policy
as more "deserving" than the narrow welfare population. These programs also benefit a broader group, which can develop into a larger political constituency for the program.260

**Conclusion**

Under TANF, states facing increasing work participation requirements may be inclined to make greater use of pre-existing workfare programs. This option, however, has significant limitations, because it does not assist welfare recipients in acquiring job skills and becoming self-sufficient through employment. Instead, states should use TANF funds for subsidized employment programs, including work-based training, to satisfy the new participation requirements and to improve the financial security and employment prospects of poor families. Wage subsidy programs that provide employment assistance and incentives can help welfare recipients to secure all of the benefits which traditionally have been a part of employment.

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