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Legal Services Programs—The Caseload Problem, or How to Avoid Becoming the New Welfare Department

LERoy D. Clark*

INTRODUCTION

A reactivated and expanded legal services program for the poor is now five years old, having been given its current conception by the seminal article of the Cahn's.\(^1\) A number of new neighborhood offices were opened and approximately 1600 attorneys are now employed.\(^2\) The current publicity about the "War on Poverty" and the fact that these offices were more visible than previous legal aid operations since they were located in the center of the communities to be served, soon meant that they were extremely overburdened with cases.

It had been predicted that the legal problems of the poor were extensive\(^3\) and the burgeoning case load in these offices attested to the extent of the long-ignored legal problems of the poor. A recent article by Carol Ruth Silver gives a broad estimate of the full range of the need of indigents for lawyers and finally comes to the gloomy conclusion that there are not enough lawyers to service all indigents and that some hard decisions must be made as to who will be serviced:

A few only can be helped. We must acknowledge that the many must be left with their legal wounds festering and raw, bleeding their rights and entitlements into the gutters of our society.\(^4\)

While the magnitude of the problem as outlined by Miss Silver is staggering, we need not completely acquiesce in her analysis or conclusions. To define the problem is the first step towards a solution. Without doubt, the legal services programs are in a state of crisis, although not a very visible one. Most legal service programs are rendering the same routine kind of service of which old line legal aid

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societies were accused. This is in most instances directly traceable to the large influx of clients. A more insidious and subtle development are the adverse impact on the morale and energy of the new legal service attorneys and the spreading reputation that is discouraging the more alert, socially conscious law graduates from entering these programs. It is clear that many of the problems which the offices are experiencing are simply symptoms of the irrationalities produced in a country which clings to its semi-capitalistic state, thus producing unplanned, disfunctional imbalances in the commitment of resources between the private and public sectors. The legal services lawyer may be able to do little about this situation (although much of his thinking ought to go in this direction) but it is time now to understand that the most serious national legal problem of the poor is the over-extended caseload in legal services programs.

Resolving these problems should be the highest priority of legal service programs. This effort should emanate from the federal office of the legal services division of O.E.O. and should be much more extensive than the single conference on the case load problem which was held at the Harvard Law School. This office could, for example, finance a systematic study of the case load by as many law schools as possible in the country to come up with creative and innovative alternative solutions. Law schools are beginning to move towards the establishment of an urban law curricula and there is a wealth of law student time which may be spent on the writing of papers on "interesting" questions of poverty law not yet directed towards the resulotion of the most pressing problems in the legal service programs. Much of these resources can be applied to a coordinated study of what new arrangements are necessary to achieve the speedy, and efficient resolution of legal problems, while preserving quality performance by legal service attorneys.

METHODS OF LIMITING CASELOAD

Hearings and Uncontested Divorces

Miss Silver’s article on how to limit caseload exposes some of the more arbitrary practices that legal service offices are using to decrease the number of clientele they serve (e.g. closing the office, setting up residential requirements, etc.). These practices may persist for a long time because legal services, as she points out, is a limited commodity for which the demand far exceeds the supply. There are no panaceas, but perhaps some thinking could delimit the nature of the caseload and point towards legitimate ways to reduce or use it to protect the poor.

For example, uncontested divorces may be anywhere from fifteen
to thirty per cent of the caseload in many legal service offices. Perhaps legal service programs should push for legislation obviating the necessity for a hearing in these cases. In most instances, the hearing is *pro forma* and simply a more detailed development of facts which could be set out in an affidavit and which accompanies the complaint and other papers filed with the court. (These could easily be prepared by law students and approved, as many papers are now, by clerks of the court). Indeed, in one New York court, the clerk of the court has available a standard set of questions which each attorney is expected to cover in his examination of the plaintiff. The upshot is that lawyers, judges, plaintiffs and witnesses are participating in a formal charade of little substance. In Washington, D.C., the court appoints legal counsel to represent absent defendants and on rare occasions these attorneys have raised matters which put the jurisdiction of the court in doubt. However, the uncontested hearing need not be the occasion for settling questions of notice or of jurisdiction since the absent defendant is the most interested party and the most likely to bring to the court's attention any information which the plaintiff has concealed. Such a defendant can always raise these issues in a later, collateral attack on the judgment. Judicial hearings could well be limited to contested divorce proceedings, thus obviating a hearing in most cases handled by legal aid either because the defendant usually does not put in an appearance or there are no property or custody matters to be settled.

To meet the claim that this proposal may encourage persons in a hasty moment to secure such office-mailing-to-the-court divorces, a statute could provide that the divorce does not become final for six months. The filing party could at any time during the six months withdraw the complaint (and stop the divorce) or the defendant could, during that period, file an appearance and demand a hearing.

**Administrative Agencies**

Indeed, one could extend the suggestions and further reduce the need for lawyers and judges. One such device for dealing with cases which are simple, largely factual, and too numerous to be efficiently resolved by the lengthy litigation is an administrative agency which would process all non-contested divorce matters, particularly since these are not adversary proceedings but simply requests for a change of status. A party who was refused a divorce would have a right to appeal to the court for review. It could be made clear to the poverty public that, absent the situation where they knew their spouses would contest the divorce or where there were disputes about custody of children or property, that they should go initially to the new administrative agency. That agency would be staffed primarily by non-
lawyers for the bulk of the processing and by a few lawyers as “general counsel” who would resolve any legal questions which the lay-staff could not handle. Most of the data elicited is simple and could be secured by laymen (as it is now done by second and third-year law students and even legal secretaries of private practitioners). Such an arrangement would free the legal service offices from the paper work they now have for non-contested divorces.

The claim that the state is theoretically a “party” to the dissolution of the marriage is simply one of those “handed down” statements which appears in opinions and has little operational content, especially if it speaks to the state’s interest in preserving the marriage at the point where one or both parties have decided on divorce. Few, if any, states make available sufficient resources for the reconciliation of persons having marital problems, especially during the early stages of the difficulties when the best opportunity for salvaging a marriage is present. Attempts to reconcile persons where the marriage is in extremis are not likely to be successful in the overwhelming majority of cases. The parties have already achieved an “emotional” divorce by this time. This is particularly so in the case of indigents separated for long periods of time and who indeed may have a new de facto family. In any event, the pro forma hearing in a non-contested divorce proceeding is never used for reconciliation (and indeed cannot be used where the defendant does not appear or cannot be found); therefore, its abolition is unrelated to the state’s interest in preserving marriages.

Support Obligations

A reduction in caseload would result if legal service offices secured legislation exempting all spouses earning less than $2,000 per year from the support obligation. At present, there is in most support legislation a provision which exempts from support the obligated spouse unable to provide it. However, judges who feel that they must extract some form of payment from the defendant to make him discharge his “moral”, (if not his financial) obligation are free to extract minimal payments of $5.00 and $7.00 per week from defendants too poor to contribute anything. Indeed, a legal service office might try to achieve this by litigating the issue of whether these statutes must be read so as to exempt all defendants earning below $2,000, because the best

5. In only 4.08% of 31,000 suits for divorce was reconciliation effected in Los Angeles County in 1966. In approximately 27,000 of the cases (87%) neither the parties nor the judge thought there was any basis upon which to initiate a conciliation effort. Spellman, A Comparison of Conciliation Procedures, 1 N.Y.L.J. 160 (Oct. 24, 1968).  
6. The President’s Council of Economic Advisers in its 1964 report considered an individual poor who fell below $1,500. Assuming modest support order of $50 per month, the spouse earning $2,000 would be driven below the poverty line.
estimates would indicate that to extract money from such an individual would leave him with insufficient income to meet his own minimal needs. This cannot be the legitimate goal of support statutes. A cost-benefit study of the amount of money collected from poor defendants in relationship to the cost of prosecuting and administering support orders would probably show that the exemption figure could be set higher than $2,000. We may indeed be spending more on enforcement of support orders than is collected, or the "net profit" may not be large enough to warrant the collateral problems generated, e.g., the legal aid caseload. Where the woman is receiving welfare and is not the beneficiary of these collection efforts, we may be deepening the poverty problem unnecessarily for the poor male and creating financial pressures which could cause another broken relationship if he has a second family.

**NECESSITY FOR ADMINISTRATIVE REGULATIONS**

The size of the caseload which most legal services offices experience is generated, in part, by welfare maladministration, typically at the intake or case worker level and less frequently at supervisory levels. Such maladministration reflects a "war on the poor" that feeds on notions of "individual effort" more appropriate to an agrarian, frontier-like, non-technological society. Most case workers, like most Americans, have been subjected to the slogans surviving an earlier period. The welfare recipient is viewed not as having a "right" to welfare but rather as receiving a "handout", along with these attitudes, he receives calloused and indifferent administration. Legal service lawyers, therefore, must find ways to keep the workers from generating unnecessary numbers of cases through their misreading of (or not reading) regulations. Since it is unlikely that one can reverse the attitudes of case workers who are hostile to their clients, one should push for administrative regulations which control and set up penalties for malfunctioning on the job. If there can be criminal penalties for a case worker who gives too large a grant to a welfare recipient, it should not be too much to ask for some non-criminal penalties for giving a grant which is too small. Regulations should indicate that any case workers who are found to have improperly administered their cases in a given number of instances, without adequate explanation, should be subjected to fines, or where the record shows this to be a continuing pattern, discharged. The fine should be given the complaining welfare recipient as "damages" and the case worker should be removed from servicing that client any further. Records

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could be kept of all fair hearings and those in which the recipient prevailed when the denial of the grant or aid was a clear violation of written regulations, will count as a demerit on the case worker’s employment record. A sufficient number of demerits should trigger a hearing to inquire as to whether the case worker should be fined or discharged. Indeed, this simple notion that poor performance should carry with it some penalties could be carried over to every public agency which has a high degree of contact with the poor, (housing authorities, public schools) and which may engage in negligent, high-handed administration. Private professionals can be rejected by the paying public if it becomes known that they perform inefficiently. Public professionals (or workers) have a “captured” clientele and with the poor a particularly vulnerable clientele and there should be some way for that clientele to rate them to keep them responsive. Most persons who deal with governmental agencies probably have experienced aggravating bureaucratic delay and bungling, but special mechanisms to prevent this are more necessary for the poor, because what most of us experience as an inconvenience may be a disaster to them.

Clearly, some of the innovative grievance resolution mechanisms which have been suggested should be set up, such as landlord-tenant arbitration panels, for much of the negotiations which legal service lawyers now engage in could just as well be conducted by bright, trained non-lawyers. The lawyer should have the first look at the case to make sure that no serious rights of the indigent have been invaded and should have the option of referring those matters that are truly subject to compromise to such an agency. The legal service office naturally should keep an eye on the administration of such arrangements (and the administrative agency I suggested above for divorce), as the experience is that quite often they too begin to compromise the indigent’s position.

In addition to reducing or redistributing the caseload, we should also increase the number of lawyers and law students servicing indigents. More states should permit student practice and law schools could profitably incorporate the clinical work into their curricula. A number of graduates of accredited law schools are lost to the profession because they fail to pass the Bar Examination, which is a highly questionable process for screening out incompetents anyway. Schware v. Board of Bar Examiners, 353 U.S. 232 (1956), holds that the criteria for excluding a person from law practice must not be arbitrary and “must have a rational connection with the applicant’s fitness or capacity to practice law,” at 239. Against this standard the Bar Examination may be an arbitrary and unconstitutional restriction on the right to practice since they have never been validated as an appropriate measure of the capacity to be a lawyer.
Service Offices could seek legislation allowing recent law graduates to work on a supervised basis for six months in a legal service program in lieu of taking the Bar Examination. To deal with the problem of determining competency, the head of the program or the lawyer’s immediate supervisor could give a thorough evaluation of the candidate.

**IMPEDEMENTS TO JUDICIAL RELIEF FOR THE POOR**

This writer has previously stated that the resistance to judicare programs should abate, for there are many single practitioners in low-income areas with marginal incomes who would welcome the opportunity to be paid for cases which in some instances they now handle without compensation. Further, it has been humorously conjectured that poverty could be done away with if a number of persons could get rich completing the task. The poor have no difficulty finding lawyers to handle negligence cases where decent contingent fees are likely. Likewise, new legislation could authorize counsel to recover a reasonable attorney’s fee from the other side in any case where the indigent prevailed. Persons who litigate against the poor are armed by the inability of the poor and their legal service offices to sustain the full expense of litigation when it entails investigators, expert witnesses, transcripts, briefs and time for research. These built-in impediments to judicial relief for the poor are hardly removed by *in forma pauperis* statutes or the budget for legal services.

By overextending or exhausting the opposition these impediments give those who are economically stronger an unfair leverage to win cases, irrespective of the merits. A poor litigant expends proportionately more of his resources, (e.g. time away from work) than his well-to-do adversary. What legal services ought to aim for is a correction of this imbalance so that the economically strong will be required to absorb some of the costs of litigation against the poor. This may have the salutary effect not only of making the economically strong more cautious about instituting litigation against the poor, but of also putting them in a position of supporting mechanisms for the resolution of conflict which are cheaper, fairer and more efficient.

It is reasonable that private counsel for the poor be paid a fee by

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11. See the nightmarish account of one attorney for indigents who spent an entire year handling only six cases involving consumer fraud. Schrag, *Bleak House 1968: A Report on Consumer Text Litigation*, 44 N.Y.U.L. Rev. 115 (1969). Mr. Schrag was supported by the resources of the best endowed civil rights organization concerned only with litigation (NAACP Legal Defense & Educational Fund, Inc.). Few, if any, legal service offices could deploy their manpower in this manner despite the importance of the litigation.
the opposing side when the indigent prevails. The losing party has caused the winning party to be in court and should pay the bulk of the costs of the action. While this recommendation is counter to the "American" rule of disallowing counsel fees as a part of the costs awarded the prevailing party, it may fall within those exceptions which permit the court to award fees where necessary to assure that a litigant will not be unduly deterred from asserting his rights against a powerful adversary because of lack of funds, or where the losing party has engaged in a gross and intentional violation of the clear rights of the prevailing party. The latter standard would surely include some major slumlords and those businessmen engaging in grossly fraudulent and deceptive sales. The objection will probably be made that the well-off litigant cannot recover counsel fees from his poor adversary when he prevails. The reply is simply that if a balance must be struck between the well-off and the poor, in the interest of preserving the indigent's access to court, the equitites favor shifting the economic burden to those most able to pay. Newman v. Piggie Park Enterprises may be pertinent to this problem. There the court ruled that plaintiffs who prevailed in civil rights cases should ordinarily recover counsel fees, unless special circumstances existed which made such an award unfair. The case is not completely analogous to the usual poverty law case in that the court was interpreting a statutory authorization for counsel fees. In two particulars, it does provide some justification for allowing only indigents to recover counsel fees. The court noted first that the passage of the civil rights statutes evinced a strong national policy to eradicate racial discrimination and second, that counsel fees should be regularly awarded to private attorneys acting as "private attorney general" for plaintiffs to assure the effective implementation of an important public policy. The court noted that although the action

13. Rolax v. Atlantic Coast Line R.R. Co., 186 F.2d 473 (4th Cir. 1950) where black plaintiffs sued a union for discriminatorily excluding them from seniority, the court said:

... in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situation, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. . . . at 481.
was private, it extended the rights of many others similarly situated. The court did not specifically rule on whether a defendant who prevailed in any civil rights case had a parallel right to recover counsel fees, but it did limit its statements of regular recovery to the prevailing party who succeeds in obtaining an injunction. Attorneys for the plaintiffs argued that defendants had no similar right to recover counsel fees because their resistance to integration had less priority than plaintiff's litigation seeking integration.

The eradication of poverty is certainly as much a part of the current statutory policy of the federal government as its anti-discrimination policy. Indeed, some of the most deleterious social conditions in the country flow more from poverty than from racial discrimination since we know that millions of white persons also suffer its ravages. Further, with respect to the non-white population, it is hard to conceive of how the national policy favoring the eradication of racial or ethnic discrimination can be achieved without a concomitant reduction in the massive poverty they experience. It can be easily demonstrated that illegal practices committed against the poor often deepen and accentuate their poverty. Private attorneys are needed to perform the "attorney general's" function, defending the poor against actions which complicate and impede the national policy to end poverty. Another national policy that is important and that emanates from recent constitutional decisions is that persons are entitled to counsel and, moreover, effective counsel. Private attorneys may give the indigent the very legal assistance which is now jeopardized by overburdened legal service offices. These offices might increase their broader and more affirmative attacks on poverty if they were freed from some of the stop-gap defensive caseload.

Giving a corresponding right to the non-indigent litigant who prevails to recover counsel fees is not necessary since it would not further the national policy to end poverty. This naturally could raise a question of denial of equal protection, but the answer is that we can treat persons dissimilarly who are in different positions. Further, to

16. *Id.*
17. 42 U.S.C.A. § 2701:
The United States can achieve its full economic and social potential as a nation only if every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society. It is, therefore, the policy of the United States to eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity.

See T. KAHN, THE ECONOMICS OF EQUALITY (1964), in which the author predicts that overt racial discrimination will be replaced by overt and covert anti-lower class discrimination.

19. The difference in treatment should be softened by the fact that the payment of counsel
meet this constitutional claim, the rule could be qualified to permit the non-indigent to recover counsel fees where the indigent’s case was extremely frivolous, or where unduly dilatory and time-consuming tactics were adopted. Such fees should be recoverable from the government when legal service offices engaged in the practice and from the private attorney where he was the malefactor. The latter suggestion may seem unusual, since attorneys are supposed to be responsive to their clients’ wishes. However, as a matter of fact, clients, especially indigents, are not qualified to manage the details of litigation and abusive practices really emanate from the attorney. No attorney is bound to engage in such practices even if his client is well-versed enough to urge them. Under such a proposal one might enlist some powerful allies for rules requiring that the courts absorb all incidental costs and fees in non-frivolous litigation since they are really a regressive tax on the right to seek judicial remedies.20

There will be limits on the indigent resorting to litigation under this proposal. Private attorneys will be motivated to take only cases with merit since their fee will depend on having a winning case. The requirement that the recovery of fees for the private attorney could result only from a referral by the legal services program would curtail “ambulance chasing”. No damper on novel affirmative actions on behalf of the poor which were not “sure-winners” would occur because the legal service offices could undertake these. Their salaried attorneys would risk no loss in income in not prevailing; and these offices might also best institute law reform because they see the indigent’s problems more regularly. Further, the caseload that probably will remain in some degree will deter legal service offices from pushing substanceless, harassing litigation. The indigent under such an arrangement would directly be put on a more equal footing.

**RIGHT TO COUNSEL IN CIVIL SUITS**

The legal service caseload can be used to force other institutions to seek solutions to the problems presented by masses of cases. Rather than arbitrarily relegating some indigents to the injuries that will of necessity ensue without counsel, legal service programs should push

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ahead to urge that there is a constitutional right of indigents to counsel in civil cases.\textsuperscript{21} The courts are not apt to be congenial to this notion since they are aware now of the stresses of supply and demand. The courts, however, are required to rationalize their decisions and could not say that a right to counsel exists, but that it cannot be enjoyed because there are too few attorneys. One could choose civil cases which possess the same elements as a serious criminal case, of a complexity which a layman cannot be presumed to handle and involving some imminent loss of liberty or other important rights. Therefore, cases most ripe for raising this issue are civil contempt proceedings against husbands defaulting in their support obligations or proceedings in which a mother is threatened with the loss of custody of her children.\textsuperscript{22}

If the constitutional right to counsel were established in these cases, O.E.O. could then promulgate a rule, as they have pursuant to legislation effecting representation in criminal cases, that legal services programs are prohibited from handling those cases in which it was established that the state had the obligation to supply counsel. Perhaps, confronted with the pressure of having to supply counsel in support enforcement proceedings and faced with a limited number of attorneys, the suggestion above that there be a flat exemption of husbands earning below $2,000 per year would be adopted by each state. It might also impede hasty or ill-founded attempts to deprive parents of custody of their children.

Caseload could also be a weapon if legal service programs requested, in a single action, a two-year postponement of the processing of thirty to forty per cent of those cases where the indigent was the defendant. Naturally, the program would want to avoid this request

\textsuperscript{21} See The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967) and The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966).

\textsuperscript{22} In New York City, indigent respondents in neglect proceedings are typically unrepresented. See Representation in Child Neglect Cases: Are Parents Neglected?, 4 Colum. J. of Law & Social Prob. 230 (1968). A constitutional challenge was made to this practice in In re Cager, 251 Md. 473, 248 A.2d 384 (1968). The court ruled that a mother in a neglect proceeding had no independent right to state appointed counsel (or to be a party to the proceeding) where her children were provided counsel by the state. The court cited the Gault decision in support of its position, noting that a mother could be separated from her child by a delinquency proceeding and that the Supreme Court spoke only of the "child's right" to counsel. The Court ignored a crucial difference in that the delinquency proceeding focuses on the behavior of the minor, whereas in a neglect proceeding, it is primarily the parent's conduct which is being inquired into. (In Cager, it was solely the conduct of the mother's because they were being charged with having two or more children out of wedlock.) Indeed, in a neglect proceeding, the parent is more in need of counsel than the child because if the adult fails to successfully defend against the charges, not only could custody of the children be lost, but the finding of neglect in the civil proceeding could be the basis for a charge of criminal neglect. The Cager court did say that a mother had a right to become a party to the proceeding to prosecute an appeal should counsel for the children decide not to appeal.
where the indigent is the plaintiff or seeking affirmative relief, but this

type of action probably constitutes a small part of the total caseload in

any legal service office. The suit for this request of postponement

should be a class action asserting that the size of the caseload did not

allow adequate time within the next two years to prepare for

participation in the cases comprising thirty to forty percent of the total

load. The office could further argue that any diminution of the

lawyer-client relationship with the indigents that resulted from the rush

into proceedings would be such a denial of due process of law as to

deprive the court of jurisdiction to proceed. The office could cull its

caseload for those defensive matters in which delay would occasion

least injury to the plaintiff and in which his need for immediate

judgment was less crucial (e.g., collection of money owed to a major

finance company). Such disadvantage to plaintiffs might not be

completely avoided for in most states’ actions for money owed, the

interest runs only from the judgment and delay would detriment the

plaintiff. The court would simply have to find, however, that in

comparing the equities that plaintiff would be injured less than a

defendant forced to trial either without counsel or with inadequately

prepared counsel.

The two-year delay should be easier to justify in those cases where

a state agency sought some action against indigents. Even if the

government were required to lose money (e.g. by continuing welfare

payments or by permitting continued occupancy of public housing for

non-payment of rent) the expense is simply one that the government

would be required to absorb in order to permit the indigent a proper

defense in terms of due process. The refusal of the state to absorb the

costs of delay, coupled with a denial of an injunction for postponement

by the state court, would constitute “state action” denying not only

due process but also equal protection of the law.

Pressed to prove the claim that legal service offices need the two-

year postponement where private counsel appeared for plaintiff, staff

attorneys could in depositions or interrogatories question the opposing

counsel as to the number of cases he handles over a given year and the

average amount of time spent on them (the practice of billing for the

number of hours spent should aid this discovery). The legal service

office would then produce a similar statement, with particular detail

23. Most states have some form of the writ of mandamus or writ of prohibition in which

an appellate court may control the proceedings in lower courts to “compel the performance of

an act which the law specially enjoins, as a duty resulting from an office” CAL. CIV.

PROC. § 1865 (1954), or to arrest “the proceedings of any tribunal . . . exercising judicial

functions, when such proceedings are without or in excess of the jurisdiction of such tribunal . . .

CAL. CIV. PROC. § 1102 (1954).
about the cases for which it was requesting postponement. The attorneys could, as Miss Silver does in her article, present the complexity of a legal problem peculiar to serving indigent clients. Requests for such relief, although in precise terms, not inappropriate, will probably shock the courts.

Legal service programs should not passively absorb the crisis of the caseload. They should toss the problem where it belongs—into the courts, and thereby indirectly to the legislatures, whose responsibility it is to see that some semblance of justice prevails in the judicial system. At present it does not.

One might want to involve a prestigious legal institution, the American Bar Association, by asking that they conduct an investigation of whether the caseload was causing legal service attorneys to give less than complete attention to their client’s cases in violation of the canon of ethics. Obviously, this national organization dedicated to public and private interests would want to cope with the charge that the legal profession was failing in its responsibility to the poor.

POVERTY AS A POLITICAL PROBLEM

The major reason for the great difficulties of legal service programs is that the resolution of the poverty problem is not, in its broadest sense, a legal problem but a political one. In the early days of the establishment of legal service offices, many found it difficult to see what lawyers could do for the poor in any fundamental and substantial terms since the inadequate provision of resources by the public sector was the major problem the poor faced. Inevitably, one legal problem after another has spotlighted this fact. Meanwhile, lawyers have been hard-pressed for solutions because they knew that the judiciary, their prime arena, could not compel the legislature to

24. Only two per cent of private attorneys in a New York City study reported that they handled over 500 cases. One-half averaged thirty cases. J. Carlin, Ethics & The Legal Profession (1966). Carol Silver reports one office in which each attorney averaged 1800 clients each year. Silver, supra note 4, at 225, n.22.

25. Silver, supra note 4, at220-221.

26. Indeed, some legal service attorneys have informed the author that they are treated with hostility by judges and with disrespect by opposing counsel because their case burden causes them to miss hearings and because they appear in court in their beginning practice as fumbling neophytes. Limited supervision by over-worked senior staff attorneys contributes to this state of affairs.

27. Canon of Professional Ethics, No. 15, in part states: The lawyer owes “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.”

make affirmative moves towards economic solutions. Courts could protect a needy person from an arbitrary eviction from public housing, and it was certainly crucial to prevent the poor from being the butt of harsh, baseless rearrangements in their lives. But for every person the lawyer kept in public housing, there were thousands awaiting acceptance possibly in even more desperate need than the client facing eviction. Their failure to be admitted into public housing results from long waiting lists and the fact that low-rent public housing is not being built at a rate commensurate with the need. Slum housing, which also creates a major part of the legal service caseload headache is also a consequence of the poor lacking the alternative of public housing or public resources to make the rehabilitation which private landlords find uneconomical. The interminable warfare which goes on between the poor tenant and the slum landlord can never be substantially abated by piecemeal litigation and indeed even escapes resolution by whole city departments concerned with keeping housing up to code standards. Our economic structure makes our efforts in housing flow primarily in the direction of the most profit; therefore, in any major city you can see structurally sound office buildings torn down and replaced with new ones, while thousands of people (powerless people) live in substandard dwellings.

The welfare system also illustrates that the problem is mainly political and not legal. Some Legal Service Programs have done a magnificent job in getting arbitrary eligibility requirements struck down, such as the residence requirements or man-in-the-house rules which kept hundreds of thousands of persons from receiving the welfare grant to which they were entitled. Yet, the most basic problem is one of which practically every legal service office is aware, namely, that welfare is only a partial solution of the survival problem—namely, how do you get adequate food, clothing and shelter, not to mention luxuries.

30. BEYER, HOUSING AND SOCIETY 349 (1965).
32. See Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801, 859 (1965).
33. The President of a New York City Association of Real Estate Owners forecast an intensification of this process as landlords response to recent attempts by the City Council to roll back substantial increases in rents. The President said that most residential builders assumed that new buildings would be exempt from controls, and that they would turn to office buildings before being "entrapped" into further apartment buildings. N.Y. Times, July 15, 1969, at 41, col. 8.
such as medical care, which might add a few years to one's life. The welfare grant in all states is not adequate to accomplish that, and people on welfare must be engaged in highly creative corner-cutting and technical fraud in order to live. This subsistence produces serious social problems and necessarily complicates and proliferates legal problems for the legal aid programs. The early skirmishes around the "rights" of welfare recipients was correct and a necessary step. An important tool for any movement at the outset is a "moral" demand. The welfare rights movement, (potentially one of the most important in the country) has had its organizing facilitated by the lawyer's trying to replace charity and sufferance with the concept of "entitlement". In the future, however, such problems as a guaranteed annual income (and more important, an adequate guaranteed annual income) must be met and they are political in nature.  

The differences in the adequate and dignified administration of middle and upper class "subsidies" and lower-class welfare "hand-outs" is a difference between their political strengths.

Huge caseloads are simply the necessary fallout from an economic system which is undirected and uncontrolled. The problems which legal services attorneys must style as "legal" to provide a minimal protection to the indigent, are the product of a system which encourages hundreds and thousands of "private" decisions which, because they lack any scheme of rational planning, can generate intolerable conditions for a large segment of the population. Even public officials trying to achieve social change find it difficult to support matters such as adequately financed legal service programs because periodically they must face election before a general population in which our "private-decision" system has nurtured an every-man-for-himself-philosophy. Radical social protest, high prices, and "urban crisis", all products of a contradictory system, produce fear and anger in the general American public. The politician, functioning on what he terms "expediency" attempts to placate the uneasiness by telling the populace that their "security" can be achieved by a larger domestic and foreign police force. Thus resources are not committed to

36. The current proposals of the administration to create a grant level of $1,600 for a family of four (N.Y. Times, Aug., 1969, p. 1) may be an increase in the less industrialized states, but is still an outrageously low sum of money to meet a family's basic needs. Even such a low amount requires neutralizing resistance from the middle-income taxpayer, and the administration, either cleverly, or out of conviction, is emphasizing the "work-requirement" provisions of their proposals.

economic restructuring which is the only thing which can seriously diminish the caseload.

The caseload problem is thus ultimately a political problem, and thus political power in the broadest sense must be attained, and that usually proceeds from organizing at various levels. Most legal service attorneys understand that legal action in vacuo will never be effective in striking at the root causes of poverty. It will entail the full range of legal action, lobbying, capturing the media for free time through demonstrations and organizing, forming viable coalitions—all directed towards shaping a network of people making concerted demands. The attorney must see himself not solely as a passive professional rendering needed and specific services, but as an affirmative party of shaping, coordinating and reinforcing a movement. The legal service office must build itself a constituency—a host of groups of poor people, and of necessity, radicals, organized around specific issues who relate to the office as a focal point for articulating its demands. Many of the legal service offices are located in black ghetto communities, (probably an indicator of the extent to which these communities are beginning to mobilize themselves); however, the white poor are a slumbering giant. Legal service offices servicing white poor communities ought to take the lead in assisting the organization of welfare rights groups, tenant groups and the like. One piece of learning which emerged from the whole civil rights struggle in the south was that legal action, no matter how successful, was for naught unless there were large numbers of people in motion to make sure that decisions were implemented and to bring their own sense of creativity in focusing public attention. If the lawyers do not have time for the organizing effort, they ought to begin to draft proposals to secure foundation financing for it or try to integrate existing resources, such as VISTA Volunteers, into this effort.

The most important thing the lawyers can do, however, is to organize themselves. It is true that many of the legal service attorneys are members of formal legal organizations such as a local bar association, or the American Bar Association. These organizations, however, are organized to deal primarily with the lawyer as a technician or professional. They are not organized to become a part of an aggressive movement on behalf of the poor. To use a more crass

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38. The new organization, PLEA (Poverty Lawyers for Effective Advocacy), may be the beginning of such organization. In July, 1968, the group made some demands on the new director of the Legal Services Division of the Office of Economic Opportunity (O.E.O.) which concerned policy matters. N. Y. Times (Aug. 28, 1969). In the spring of 1969, a group of black lawyers from legal service programs conferenced in Chicago, Illinois to discuss the need for organizing themselves, and assuring O.E.O. of input from a black perspective. Their efforts should be intensified.
term, lawyers should unionize. The concerted force of some 1,600 odd attorneys would exercise some of the political leverage necessary to cope with the caseload problem. Indeed, the caseload is only one of the "working conditions" to which legal service attorneys should address themselves in order to improve the quality of the service they render. Low salaries create turnover, and a lack of up-to-date equipment, inadequate libraries, insufficient secretarial force all make coping with the caseload more difficult. They all stem from inadequate congressional financing—again a political problem. An organized, aggressive body of lawyers could bring the pressure on federal legislators to adequately finance the program and solve some of these problems, many of which are consuming the zeal and morale of recently recruited lawyers. A national union of attorneys should not, however, make the mistake that most unions make and concern themselves only with the limited issues of employee working conditions; rather, it should attempt to become a force in shaping the national policy on the reduction of poverty.

It may be possible to render the kind of service and to effect the kind of involvement suggested within the framework of the present program. However, legal service attorneys may have to seek a radical restructuring in the delivery of legal services to the poor because the early charge, made by the traditional bar, that lawyers servicing poverty clients privately would find their independence compromised if they were federal employees may be correct. Some legal service office might give one year's notice to O.E.O. that there will be mass resignations, but that the attorneys would undertake as independent contractors the rendering of legal services to the poor. The federal government, including O.E.O., now contracts out many services which they want performed. Medicare and the few judicare programs which exist constitute precedent for this demand. The attorneys then would contract for adequate monies to rent decent office space, buy necessary equipment and pay adequate salaries to all the partners, associates and supporting personnel of the new law firms. The prime purpose for this new status would be to permit the attorneys as full freedom and independence as those private attorneys have who represent adversaries of the poor. It might also provide the financial base to permit black single practitioners to combine into firms, a move which is sorely needed. Perhaps under this arrangement legal service attorneys would be much more aggressive in their lobbying efforts and indeed might not be bound by the restrictions on political activity in the Hatch Act.

39. Prof. Gary Bellow of the University of Southern California would have legal service offices begin to take cases of persons who were just above the poverty line who could pay something less than a regular fee. This would be more possible under the arrangement suggested above.
Much of the danger in anti-poverty programs is precisely that they remove skilled, equipped persons from organizing and making the poor effective in electoral politics, for electoral politics are crucial to the resolution of many of the basic problems, including caseloads, which the poor face.40 Since the responsiveness of legislators is crucial to the capacity of the poor to secure remedies for their predicament, it is unfair to supply them only with lawyers who cannot render legal services which may be crucial in political campaigns or to defeat legislators who actively work against the interest of the poor. It is inequitable that only persons able to afford private counsel can have lawyers who can engage in political activity, while the poor are given access only to lawyers who cannot.

Indeed some program ought to test the proposition that application of the Hatch Act to legal service attorneys conflicts with the First Amendment right of indigent clients to associate for political purposes, and to have their counsel assist them. NAACP v. Button41 may provide support for this attack, since it held that state rules which prohibited an attorney from acting in conjunction with a group to attain their constitutional or political objectives were invalid.42

It may be appropriate to restrict the activity of general federal employees43 or even attorneys who are carrying out the internal business of a governmental agency. Legal service attorneys, however, are working solely for private persons as their counsel, and quite often against governmental agencies. Indigents should be able to expect that

40. An example is the "Murphy Amendment" to the Economic Opportunity Act which passed the Senate on October 14, 1969 (S. Rep. No. 3016, which would amend 42 U.S.C. 2834 (1964)). The amendment, however, was later defeated. A governor would have an irrevocable veto to end or curtail a legal services program, and other O.E.O. grantees would have continued to have a right of appeal to the Director of O.E.O. Naturally, programs which were too aggressive in defending the poor could be ended, potentially creating a greater caseload for programs located nearby.


42. The restrictions in the Economic Opportunity Act may be more vulnerable to attack because it, unlike the Hatch Act, prohibits involvement in non-partisan elections as well as partisan elections. See 42 U.S.C. § 2983 (1969). The VISTA office has interpreted the Act to apply to "CAP (Community Action Program) elections and local non-partisan contests such as school board . . . elections" O.E.O./VISTA Manual 4010-1, June 1968, at 22. Thus participation in matters such as the local school decentralization elections in New York City would appear to be a violation. A first attack could be that this is too restrictive an interpretation of the Act. Another O.E.O. memo interpreting the Act specifically permits participation in a non-partisan party. O.E.O. Instructions 6907-1, Sept. 6, 1968, Restrictions on Political Activities. The second attack should be that participation in non-partisan activity does not create even the alleged dangers of participation in partisan elections, and is therefore an unconstitutional incursion on political expression.

43. See Oscar Dingess v. John W. Macy, CA No. 2644-68 before the District Court in Washington, D.C. in which the Hatch Act's applicability to a non-lawyer O.E.O. employee is being tested.
their attorney can undertake *all* action on their behalf that is appropriate for lawyers and normally permitted privately retained attorneys.

It is inappropriate to deny them access to the skills which attorneys can provide in the political arena, solely because of their economic status and his employment base. To some extent this would constitute the testing of the Hatch Act from a different direction than is usually the case, for here the primary plaintiffs might be the indigent clients themselves demanding that the legal services counsel be made available to them for political activity cogently and clearly connected with the amelioration of poverty. In the usual Hatch Act case, the federal employee has asserted only that his right to political association was being denied.

There are problems with this proposal, to be sure: would the office have to service *every* indigent political group, even those with conflicting programs? The answer should be yes, since any other arrangement would permit the legal service staff to choose political goals as opposed to the client community. In cases where conflict between two groups was very clear, outside private counsel should be secured to serve at least one of them.

Since attorneys might be involved in the initial organizing phases of a political group there is, quite naturally, the problem that attorneys of one political persuasion or another, may be hired, with all the difficulties of a spoils system. This might make even more pertinent the notion that indigents ought to be serviced by independent law firms. Instead of a single program blanketing an entire city and the concomitant problem of all attorneys being hired through one or a few central offices one could create a number of independent local firms, which would effect their own hiring and thereby decrease the possibility of a central control establishing lawyers of only one political persuasion. None of these suggestions, however, fully responds to the difficulties that attorneys would have in servicing indigent groups for partisan politics. Awareness of the problems and the construction of as many safeguards as possible is the most that could be asked. In this connection, legal service offices should begin to raise questions about whether indigents in sore need of political organization will have an important ingredient—the lawyer—to assist them.

A national union of legal service attorneys could pressure O.E.O. to experiment with such independent law firms for the poor. O.E.O. could attempt to preserve the legitimate goals of the present legal services program by writing into the contract conditions such as community involvement in the direction of the offices and the like.
Those members of the Bar who were previously concerned about the “independence of lawyers” should applaud this proposal.

CONCLUSION

There are serious doubts as to whether legal service programs can move in any of the directions suggested. Many have become so habituated to the usual ways of approaching problems (negotiation, litigation, etc.) that they may not be able to take the more political steps necessary. They may, as one militant has said, be more a part of the problem than the solution. However, if they continue to function with their finger in the dike while the water rages over the top, they will shortly become the despised new welfare department, and will miss the opportunity to be creatively involved in the lawful resolution of the most serious social and economic problems facing this country.