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Marshall J. Breger

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MARSHALL J. BREGER

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LEGAL AID FOR THE POOR: A CONCEPTUAL ANALYSIS

MARSHALL J. BREGER[†]

In this Article Professor Breger examines the competing justifications that have been advanced for the provision of free legal aid to those who cannot afford to engage a private attorney. Professor Breger argues that every citizen has the right to effective access to the courts to resolve disputes in that they are the only state-sanctioned dispute resolution mechanism. Because of the complexity of our legal system, effective access to the courts often requires the services of an attorney. Under this theory of "access rights" a person is entitled to free legal aid when necessary for the enforcement of a legal claim, regardless of the moral or social utility of vindicating that particular claim. This approach constitutes a radical departure from the more commonly accepted utilitarian framework. Under utilitarian analysis legal aid is provided to a particular poor person solely because of the benefit that will accrue to the poverty community from the enforcement of that particular claim. Professor Breger observes that the adoption of the theory of access rights will entail a shift in the involvement of the client, the poverty community, and the attorney in the determination of how resources are to be distributed. The theory of access rights also will set different limits on the nature and extent of the government obligation to subsidize legal aid activity. In the conclusion of the Article Professor Breger explores the inescapable fact that the demand for free legal aid far outweighs the supply and suggests several methods of distribution that do not violate the principle of access rights.

I. INTRODUCTION: THE ALLOCATION OF WELFARE GOODS

Legal Services in America is presently undergoing a considerable reevaluation both as to its organization and purpose. Reagan administration proposals for the restructuring of federal subsidies¹ for legal aid have occasioned

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1. The Reagan administration has proposed the elimination of direct federal funding for legal services. Instead, funds for legal services will be available to the states, at their discretion, from the human services block grants. See Office of Management & Budget, Fiscal Year 1982 Budget Revisions 84-85, 156 (March 1981). While states would have the power to allocate their block grants for legal services purposes they would be under no compulsion to do so, nor would conditions be placed on any state allocation procedures. See generally, America's New Beginning: A Program for Economic Recovery, in Message from the President of the United States Transmitting a Plan to Achieve Recovery for the Nation's Economy, H. Doc. No. 21, 97th Cong., 1st Sess. (1981).

Legislation to reauthorize the Legal Services Corporation was introduced in the House by

extensive debate on the program's structure and organization. The debate has reflected political attitudes towards the fruits of legal services lawyering and has failed to provide a conceptual analysis of the program as an object for government subsidy or to develop criteria for analyzing the proper limits for government subsidy. This Article will attempt such an analysis by viewing the distribution of lawyers' services in civil cases through government-funded legal aid programs as a problem in the allocation of welfare goods.

Historically, private practitioners provided legal assistance as a charity, and its provision was considered the responsibility of the profession, not the government. Not until 1945 in England² and 1964 in this country,³ did government recognize a responsibility to provide civil legal assistance to those in need. Providing legal aid in the context of mounting fiscal limitations requires complex trade-offs. Scarce resources and rising costs have compounded the already difficult choices inherent in distributing welfare goods among members of society.⁴ While some economists would withdraw government from many of these allocation determinations, few would allow the market to re-

Representative Kastenmeier—H.R. 3480, 97th Cong., 1st Sess (1981). An amended version passed the House on June 18, 1981. See 127 Cong. Rec. H. 3127-28 (daily ed. June 18, 1981). A Senate reauthorization bill, S. 1533, 97th Cong., 1st Sess. (1981), was reported out of the Labor and Human Resources Committee on July 29, 1981. S. Rep. No. 171, 97th Cong., 1st Sess. (1981). There is no indication when the Senate will act on these bills.

In addition, H.R. 4169, 97th Cong., 1st Sess. (1981), the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1982, H.R. 4169, 97th Cong., 1st Sess. 26 (1981), incorporates the restrictions of H.R. 3480. The House appropriations bill is presently before the Senate. See discussion of legal services at Cong. Rec. S. 13,345-68 (daily ed. Nov. 13, 1981).

Recent criticisms of the Legal Services Corporation are reviewed in Cramton, *Crisis in Legal Services for the Poor*, 26 Vill. L. Rev. 521, 531-43 (1981).

2. Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6. The Act has been revised numerous times, most recently in 1974. See Legal Aid Act, 1974, ch. 4. The historical developments leading up to the introduction of the British scheme are sketched in S. Pollock, *Legal Aid—The First 25 Years* 9-25 (1975).

3. The Economic Opportunity Act of 1964, 42 U.S.C. § 2701-995 (1970) (repealed in part, Act of Dec. 28, 1973, Pub. L. No. 93-203, 87 Stat. 839, and Act of Aug. 23, 1974, Pub. L. No. 93-386, 88 Stat. 742) authorized federal grants to community action programs. This warrant was taken to encompass legal aid. Statutory approval of legal aid funding came in the Economic Opportunity Act of 1965, Pub. L. No. 89-253, § 12, 79 Stat. 973 (amending 42 U.S.C. § 2785(a) (1920)).

An early exercise in public funding for legal aid occurred under the aegis of the Freedman's Bureau during Reconstruction. See Westwood, *Getting Justice for the Freedman*, 16 How. L. J. 492 (1971). The development of the Office of Economic Opportunity (OEO) program is chronicled in E. Johnson, *Justice and Reform* 37-70 (1974).

4. The problem of distribution is, of course, the central theoretical issue for welfare economics. See I. Little, *A Critique of Welfare Economics* 86-120 (1950); Hicks, *The Foundations of Welfare Economics*, 49 Econ. J. 696-712 (1939); Kaldor, *Welfare Propositions of Economics and Inter-personal Comparisons of Utility*, 49 Econ. J. 549-52 (1939). The search for "Pareto optimality" and allocative efficiency has been a major quest for those wishing to apply welfare economics in legal analysis. Rather than engage in the "loose talk of efficiency, cost-minimization, and the liability rule/property rule distinction . . . that . . . punctuates faculty lounge discussions," Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 Cal. L. Rev. 221 (1980), this Article, while informed by the implications of the economic approach to law, will not address those concerns. Some useful discussions of allocative efficiency, however, may be found in id. at 223-31; Baker, *The Ideology of the Economic Analysis of Law*, 5 *Philosophy & Pub. Aff.* 3, 4-7 (1975); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451, 462-69 (1974). Richard Posner, a respected practitioner of the genre, now distinguishes his quest for allocative efficiency from utilitarian methodologies. Com-

solve them all.⁵ Even the Reagan administration's proposed restructuring does not suggest a total abandonment of the legal aid principle.⁶ Whether legal aid is controlled and financed through the federal government or through the individual states⁷ similar problems of justification and orientation emerge. Whatever the future direction of legal services, important lessons remain to be learned from the experience of the Legal Services Corporation.⁸

The Legal Services Corporation is the autonomous⁹ federally-funded public corporation charged by Congress with providing legal assistance to those persons whose income is below prescribed limits. The Corporation makes grants to local legal aid programs that employ attorneys for this purpose. While not a public agency,¹⁰ the Corporation's budget is largely drawn

pare R. Posner, *Economic Analysis of Law* 12, 20 (2d ed. 1973) with Posner, *Utilitarianism, Economics and Legal Theory*, 8 *J. Legal Stud.* 103, 111-35 (1979).

5. Opposition to use of the market mechanism for social welfare allocations is forcefully argued in R. Titmuss, *Commitment to Welfare* 138-52 (1968). The normative role of markets in the distribution of goods and services is discussed in *Markets and Morals* 5-9 (G. Dworkin, G. Bermant & P. Brown eds. 1977). Kenneth Arrow has pointed up the inapplicability, from the perspective of efficiency, of the market model to one social service, health care. See Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 *Am. Econ. Rev.* 941-73 (1963). Many of his insights may be applied fruitfully to the legal profession.

6. Some conservative critics have urged that those legal services needed by the poor be funded by providing a charitable tax deduction to attorneys who render legal services. E.g., *Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee*, 97th Cong., 1st Sess. (1981) (statement of Howard Phillips). See H.R. 3929, 97th Cong., 1st Sess. (1981) (bill to provide a tax credit for certain types of voluntarily contributed legal services to the poor).

Another conservative critic has argued that the "Corporation is so basically flawed that it is beyond reform sufficient to justify its continuation" without offering alternative structures for legal assistance to the poor. Regnery, Action, Legal Services Corporation and Community Services Administration, in *Mandate For Leadership: Policy Management In a Conservative Administration*, 1057, 1061 (C. Heatherly ed. 1981) (Heritage Foundation).

7. A similar controversy over federal or state control of legal services occurred in Australia. After much debate the federal option was severely limited and legal aid is essentially controlled by the various Australian states. The early position is developed in R. Sackville, *Legal Aid in Australia* (1975). Recent developments are sketched in Jones, *New Era in the Organization and Delivery of Legal Aid in Australia*, 54 *Aus. L. J.* 502 (1980).

8. A useful review of the activities of the Legal Services Corporation (LSC) to date may be found in Hollingsworth, *Ten Years of Legal Services For the Poor*, in *A Decade of Federal Anti-poverty Programs: Achievements, Failures and Lessons* 285-314 (R. Haveman ed. 1977).

9. 42 U.S.C. § 2996d(e)(1) (1976). See S. Rep. No. 495, 93d Cong., 1st Sess. 12, 24 (1973); Conf. Rep. No. 845, 93d Cong., 2d Sess. 19 (1974). The Corporation's position is laid out in an LSC Gen. Counsel opinion dated July 30, 1980, arguing that funds of LSC grantees may properly be used to satisfy the "non-Federal share" requirement of grants under the Older American Act, 42 U.S.C. § 3024(d)(1)(B). Letter from Mario Lewis to Joseph Dailing (July 30, 1980). See also *Spokane Legal Servs. v. Legal Servs. Corp.*, 614 F.2d 662 (9th Cir. 1980); *Legal Servs. Corp. v. Ehrlich*, 457 F. Supp. 1058, 1151 (D. Md. 1978) (decisions not reviewable under APA); Comptroller of the Currency Opinion Letter from John Shockey to Samuel Foggie (date unavailable) (bank deposits of LSC do not constitute "public money" under 12 U.S.C. § 90 (1970)).

10. *White v. North La. Legal Assistance Corp.*, 468 F. Supp. 1347, 1350-51 (W.D. La. 1979) (local legal services organizations autonomous and not agents of Corporation as regards employment decisions). But see *Dixon v. Georgia Indigent Legal Servs., Inc.*, 388 F. Supp. 1156 (S.D. Ga. 1974); *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841 (S.D.N.Y. 1973) (attorneys in program founded by OEO deemed to be "persons arising under" a federal office within the meaning of 28 U.S.C. § 1442(a)(1) (1976) (removal statute) due to pervasive OEO control of local program through evaluation process). See also *Lefcourt v. Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971) (criminal defense).

from federal sources.¹¹ In fiscal 1982 its congressional authorization was over 240 million dollars.¹² This figure, while substantial, is insufficient to provide comprehensive service to the poor.¹³ Whether funded by the states or by the federal government, legal assistance, for the foreseeable future, is and will continue to be a scarce resource.¹⁴

The distribution of limited resources includes issues of both macro- and micro-allocation. Macro-allocation issues of legal aid funding settle the portion of the federal budget devoted to legal aid.¹⁵ The micro-allocation issues concern how legal aid is to be distributed and to whom.¹⁶ While the debate over macro-allocation depends primarily on political factors,¹⁷ micro-allocation

11. In 1981 over 48 million dollars in non-Corporation funds were available for use by LSC programs. Thirty-two million of this amount was non-Corporation federal money while 16 million came from private or state and local sources. Legal Services Corporation, *Characteristics of Field Programs Supported by the Legal Services Corporation Staff of 1981—A Fact Book* 18-19 (Feb. 1981). In 1977 the GAO estimated that 33 million dollars of non-federal funding was available. GAO, *Free Legal Services for the Poor—Increased Coordination, Community Legal Education and Outreach Needed*, H.R. Doc. No. 164, App. I, at 24 (1978).

12. This fiscal 1982 figure is based on a continuing resolution providing interim funding through November 20, 1981. H.J. Res. 325, 97th Cong., 1st Sess. (1981). The fiscal 1982 funding for LSC will be included in H.R. 4169, which is still under consideration by the House-Senate Conference Committee. The fiscal 1981 figure was \$321.3 million. See Pub. L. No. 95-536, 94 Stat. 3166 (1980). The fiscal 1980 allocation was \$300 million. Budget of the U.S. Govt.—F.Y. 1981, H. Doc. No. 246, 96th Cong., 2d Sess. 593 (1980).

13. See Legal Services Corporation Annual Rep. 1977, at 15 (1978). Inflation has made these figures unrealistic.

14. Like medical care, legal care contains the interesting feature that the more you look for a problem the more likely you are to find one. Legal care and medical care are "moral hazards" in the insurance sense of the term. See Havighurst & Blumstein, *Coping with Quality/Cost Trade-offs in Medical Care: The Role of PSROs*, 70 Nw. U.L. Rev. 6 (1975).

15. This macro-allocation problem is resolved chiefly through political compromise not principled choice. See M. Gordon, *The Economics of Welfare Policies* (1963); Gorham, *Allocating Federal Resources Among Competing Social Needs*, in H.E.W. Indicators 1, 6 (Aug. 1966). To succeed in the budgeting process one needs to cultivate a clientele and "to develop fairly wide interest in the program." A. Wildavsky, *The Politics of the Budgetary Process* 66 (1964). But see generally A. Wildavsky, *Budgeting: A Comparative Theory of Budgeting Processes* (1975); J. Havemann, *Congress and the Budget* 136-38, 196-208 (1978). At least one commentator has suggested that "increased competition between age groups [for public benefits] will generate an increase in the total resources expended in federally assisted social programs." Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 Yale L.J. 27, 90 n.290 (1979). It is unclear why this should be the case.

16. The macro-political battle reaches congressional ears and is not merely a problem in the Administration, as recent events have suggested. The Corporation has had the freedom to make its budget request directly through Congress. While the Office of Management and Budget (OMB) has authority "to review and submit comments" on the Corporation's budget request, 42 U.S.C. § 2996d(e)(2) (1976), it may not control the amount of the request. This provision was reaffirmed as underscoring "the critical importance of the Corporation's independence from control by OMB." H. Rep. No. 310, 95th Cong., 1st Sess. 6, reprinted in 1977 U.S. Code Cong. & Ad. News 4503, 4508. This independence was provided due to perceived politicization of OMB since the Nixon presidency. See Berman, *OMB and the Hazards of Presidential Staff Work*, 38 Pub. Ad. Rev. 520 (No. 6, 1978); Heclio, *OMB and the Presidency: The Problem of "Neutral Competence"*, 38 Pub. Interest 80 (1975).

17. This is only partially correct. If there were no constraints on the amount of money available for legal aid, at some point one would have to ask whether the ethical limits of legal aid funding had been reached. In answering that question one would have to consider (1) whether the structure for providing legal assistance encouraged overuse and; (2) what sorts of legal jobs and work done by lawyers it is appropriate for government to fund. It should be obvious that the point of overuse of legal aid has not been reached and conceivably will not be reached in the foreseeable future.

tion concerns choices between competing ethical and social principles. It requires concrete decisions about the eligibility of recipients, the kind of cases that should be handled and the location of offices. This Article will provide a methodological framework for answering questions of this type.

There are two conflicting approaches to the allocation of legal assistance. The first, a social utility model, uses the principles developed in welfare economics to maximize total benefits to the poor. The other may be called a theory of access rights. It focuses on an individual's right to a lawyer, as a citizen of a country in which there is a state-sanctioned dispute-resolution system. It is an attempt to allocate legal assistance on a formula of distributive justice. Through an exploration of the conflict between these approaches, this Article analyzes the selection process for clients and cases in legal aid. It reviews how resource allocation decisions were made before the establishment of the Legal Services Corporation, and how they are now made.¹⁸

This analysis of the principles of legal aid distribution is focused on the problem of ensuring formal justice within the existing legal system of the United States. As such, it deals with questions of procedural fairness in the application of available legal resources and not with general questions of social justice. It is concerned that "the distribution of lawyers should not create advantages or disadvantages in those social interactions where law is involved."¹⁹ This Article starts from the proposition that some approximation of the ideals of procedural justice is possible in our existing legal system²⁰ and that the benchmark of procedural justice is an important criterion for judging any proposal for providing lawyers for the poor.

II. JUSTIFICATION FOR GOVERNMENT SUBSIDY OF LEGAL AID

The conventional justification for the federal government's provision of legal aid is the utilitarian proposition that the state's duty to provide legal

18. This Article was substantially completed before I read B. Garth, *Neighborhood Law Firms For the Poor: A Comparative Study of Recent Developments in Legal Aid and in the Legal Profession* (1980). While this comparative study of staff attorney legal services programs in North America and Western Europe reaches radically different conclusions about the role of law and legal services lawyers than I do, it is perhaps the most comprehensive study of legal services to date and will be an invaluable guide to future analysis.

While Garth traces "the development and institutionalization of new [activist] roles for legal aid lawyers," *id.* at 228, his is a normative as well as a descriptive analysis. He argues that neighborhood law firms (his term for salaried legal aid attorneys) should "evolve toward the kind of legal aid agency that will maximize 'social change.'" *Id.* at 231. In so doing he recognizes and approves the inextricable relationship between that goal and "a focus away from individual casework." *Id.* at 233. In part, this Article can be taken as a contribution to the continuing colloquy over the role and function of legal services in which Garth is among the most articulate participants.

19. See Abel, *Socializing the Legal Profession*, 1 *Law & Policy Q.* 5, 6 (1979). As such it is not concerned with efficiency considerations except insofar as they have an impact on the quest for procedural justice.

20. In contrast, Abel believes that "the legal system in a capitalist society *cannot* attain the ideal of formal justice." *Id.* at 7. This view reflects the deep-set belief of many critics of legal aid and proponents of an activist perspective for legal aid lawyers. The distinction between formal and procedural justice in analyzing legal systems is drawn in M. Weber, *Law in Economy and Society* 61-64 (M. Rheinstein ed. 1954).

assistance exists to the extent that legal aid maximizes the general welfare. Considerations of social utility govern the amount and kind of services provided and the choice of persons to receive it.²¹ Under this theory, the provision of legal assistance is an instrumental good, and its significance stems from the results achieved through the service provided. Access to legal aid in and of itself is seen as an empty shell, important only because law is viewed as a method of promoting social change. Thus justification of legal aid lies, for example, in its capacity to change substantive rules of law in favor of the poor and to shift wealth and power relationships in society.

In contrast, this Article argues for an alternate justification of legal aid based on a non-utilitarian approach. This justification derives from a theory of access rights, which requires the state to provide legal assistance to individuals wishing to make effective use of society's dispute resolution processes. As members of society, individuals are entitled to effective access to the law.²² Legal aid is a means of providing such access to those who cannot otherwise afford it.²³

The justification for access rights derives from an analysis of the role of courts and the legal system in society. In the modern state, the legal system provides a "general normative code" performing integrative functions in the social system²⁴ by use of formal dispute resolution mechanisms. By its control over the enforcement of judgments, the state maintains a monopoly over formal dispute resolution processes. In theory, at least, "[b]ehind every final judgment procured in any court . . . stands, ultimately, the United States Army."²⁵ This monopoly limits the extent to which individuals can engage in

21. "Choosing among clients and cases requires a relatively sophisticated political view about what legal assistance can or should be attempting." Bellow, *Legal Aid In the United States*, 14 *Clearinghouse Rev.* 337, 343 (1980).

22. One caveat: "There is, of course, no 'true' definition of law. Definitions flow from the aim or function of the definer." L. Friedman, *The Legal System: A Social Science Perspective* 10 (1975). See generally *id.* at 1-25; L. Friedman, *Law and Society: An Introduction* 3-5 (1977); Bohannon, *The Differing Realms of the Law*, in 67 *Am. Anthropologist* 3, 35 (1965). See also Gibbs, *Definitions of Law and Empirical Questions*, 2 *Law & Soc'y Rev.* 429 (1968); Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 460-61 (1897). This point is central to our enterprise. Only if we can define what we mean by law can we begin to stake out the areas where we arguably wish to ensure people access to a lawyer. Not all social problems are legal problems. Nor should they be treated as such.

23. It could be argued that the access right to legal assistance need not be triggered by a poverty standard but should be available to all citizens rich or poor. See M. Frankel, *Partisan Justice* 122-29 (1980); P. Stern, *Lawyers on Trial* 197 (1980) (arguing that we should "place legal help on a par with all the other parts of the justice system [the judges, the courts, the prosecutors, the police] and make it equally available, free of charge to all citizens regardless of wealth or station.").

While a public good analysis of legal services may well lead to a proposal for a statutory entitlement regardless of wealth, the issue is not likely to arise as a practical matter. Those who can afford their own attorneys are likely to opt for the private sector. Those who are legally needy (however that right is defined) will seek government subsidy. The micro-allocation problem remains.

24. T. Parsons, *The System of Modern Societies* 8 (1971).

25. Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 *Yale L.J.* 1, 8 (1970). As a description of the real world the statement is surely overdrawn. As Professor Leff points out "[E]ven the intermediate merceneries one buys—sheriffs, marshalls, judges—are usually sufficient unto the day." *Id.*

self help. In our pluralist society private forms of dispute resolution do exist, such as religious courts,²⁶ but they depend on voluntary submission to authority. Informal modes of adjudicating disputes also exist, such as commercial arbitration and labor mediation, but these techniques are backed by recourse to legal authority through arbitration statutes and labor contracts. Only through recourse to state-approved adjudication can citizens ensure themselves of the full protection of the law. Because individuals living in our society must exchange recourse to self help for police and judicial protection, they should be provided the opportunity to use the courts effectively to resolve disputes.

Access to the courts requires that the state waive or subsidize filing, appearance and other court fees where necessary.²⁷ But *in forma pauperis*²⁸ statutes alone only ensure formal access to the legal system. The rules of law governing the modern state are so complex that lawyers are required to interpret legal rules for indigents to determine if a valid claim exists and to aid them in navigating the shoals of the legal system. Indeed, effective access may also require claims for assistance in securing the "equipment of litigation,"²⁹ those experts and investigators necessary to prevent the right to counsel from remaining an empty vessel.

Recent decisions of the European Court of Human Rights support the view that the state does not provide citizens effective access to the legal system unless it proffers the opportunity of counsel.³⁰ The European Convention "does not guarantee any right to free legal aid as such."³¹ Nevertheless, in *Airey v. Republic of Ireland*³² the Court found that article 6 section 1 of the

26. See L. Landman, *Jewish Law in the Diaspora: Confrontation and Accommodation*, 86-103 (1968); I. Singer, *In My Father's Court* (1962); J. Yaffe, *So Sue Me!* (1972); Note, *Rabbinical Courts, Modern Day Solomons*, 6 Colum. J.L. & Soc. Prob. 49 (1970); Note, *Conflict Resolution and the Legal Culture: A Study of the Rabbinical Court*, 9 Osgoode Hall L.J. 335 (1971). Before emancipation exclusive authority was delegated to Jewish courts in a number of areas. See Lindo v. Bellario, 1 Hag. Con. 216 (1795); D. Shohet, *The Jewish Court in the Middle Ages* (1939).

27. H.R. Rep. 1097, 52d Cong., 1st Sess. 1 (1892). See 28 U.S.C. § 1915 (1976). See generally Note, *Petitions to Sue in Forma Pauperis in Federal Courts: Standards and Procedures for the Exercise of Judicial Discretion*, 56 B.U.L. Rev. 745 (1976). See also *Boddie v. Connecticut*, 401 U.S. 371 (1971).

28. See notes 397-403 and accompanying text *infra*.

29. Frank Michelman terms "important impediments to effective litigation" as "equipment" in *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 Duke L.J. 1153, 1164.

"The extent to which litigants pay to use the courts varies widely between jurisdictions." Spector, *Financing the Courts Through Fees: Incentives and Equity in Civil Litigation*, 58 Judicature 330, 333 (1975). The general problem of financing court costs is reviewed in American Bar Foundation, *Public Provision for Costs and Expenses of Litigation* (1966); Saari, *An Overview of Financing Justice in America*, 50 Judicature 296 (1967).

30. Note that by "citizen," I include all persons fully participating in a society and who have accepted the obligations of membership and concomitant benefits from that society. While this definition would include resident aliens, it is unclear whether it would include nonresident or illegal aliens.

31. *Airey Case*, Judgment of Oct. 9, 1979, Eur. Ct. Human Rights, Series A No. 32, at 14. See also Z. Nedjati, *Human Rights Under the European Convention*, in 8 *European Studies in Law* 105 (1978).

32. Judgment of Oct. 9, 1979, Eur. Ct. Human Rights, Series A No. 32.

European Convention³³ "may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court either because legal representation is rendered compulsory . . . or by reason of the complexity of the procedure or of the case."³⁴ At least in matters of legal complexity, effective access requires the assistance of counsel.³⁵

Modern discussions of citizenship reinforce the centrality of legal assistance to full membership in society.³⁶ While the contemporary rendering of the term "furnishes . . . a rather sketchy specification of rights and duties,"³⁷ the right to legal assistance has been declared an "inherent right of a citizen" in that "individuals can hardly be expected to live under and respect the law unless they have an opportunity to use it."³⁸ Thus the right to counsel may be defined as a civil or juridical right³⁹ rather than as a welfare right.⁴⁰

33. Article 6 § 1 of the European Convention of Human Rights reads in relevant part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." In *Golder v. United Kingdom*, Judgment of Feb. 21, 1975, Eur. Ct. Human Rights, Series A, No. 18, the European Court found that Article 6 § 1 secures the right to have claims relating to one's civil rights decided by a court or tribunal.

34. *Airey Case*, Judgment of Oct. 9, 1979, Eur. Ct. Human Rights, Series A No. 32, at 15-16.

35. *Airey* concerned a woman who applied for a legal separation in Ireland, which decree can be obtained only in the high court. The procedure was admittedly complex and no separation proceeding initiated from 1972-78 was handled pro se. There was no legal aid in Ireland at the time of the case. The case is analyzed in Thornberry, *Poverty, Litigation and Fundamental Rights*, 29 *Int'l & Comp. L.Q.* 250 (1980).

36. The concept of citizenship has been explored in T. Marshall, *Citizenship and Social Class in Class Citizenship and Social Development* (1964) where "the right to justice" is deemed one of the central elements of citizenship. *Id.* at 71. See G. Almond & S. Verba, *The Civic Culture* (1963); R. Bendix, *Nation Building and Citizenship* (1964). A useful linguistic analysis of the concept of citizenship may be found in Kelly, *Who Needs A Theory of Citizenship?*, *Daedalus*, Fall 1979, at 21, 27-28.

37. R. Pranger, *Action, Symbolism and Order* 199 (1968).

38. Ehrlich, *A Year in the Life . . . the Legal Services Corporation*, 34 *NLADA Briefcase* 63, 65 (Dec. 1976). See Cramton, *Promise and Reality in Legal Services*, 61 *Cornell L. Rev.* 670 (1976). "In a free society, the system of justice rests on a fundamental notion of social contract: we give up our right to resolve disputes by force because a substitute arena—the courts—exists to decide such disputes. But if this arena is to be a meaningful substitute, all must have an equal opportunity to enter and to prevail there." *Id.* at 677.

39. This term is drawn from James Gordley, who distinguishes that justification from the welfare right justification for government subsidy. Gordley, *Variations on a Modern Theme, in Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* 77-132 (M. Capelletti, J. Gordley & E. Johnson eds. 1975). The former is a right granted to citizens to protect their interests, while the latter links legal aid to "the modern struggle against poverty and hence to such modern 'social rights' as the rights to an adequate diet, to decent housing, and to medical care." *Id.* at 109. As Gordley would trade off welfare rights to maximize social utility, his use of the term "right" in this context may be confusing.

40. The essence of the welfare state justification for government subsidy for legal assistance is the view that "[a]mong the normal welfare services that a modern state provides for the needy is legal aid." Israel Legal Aid Law, H.H. no. 907, at 21 (1910), cited in Lieberman, 9 *Isr. L. Rev.* 413, 417 (1973). This argument is based on the general claim that governments in a complex industrial society have a responsibility to provide for the basic welfare needs of citizens. In some versions of this argument the right to counsel is included among such basic needs as food, housing and health care that the citizen may claim from the state. The basic needs argument is developed from an American constitutional perspective in Michelman, *In Pursuit of Constitutional Welfare Rights*, 121 *U. Pa. L. Rev.* 962 (1973). See also the earlier version of the Michelman thesis in Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *Harv. L. Rev.* 7 (1969). But see Winter, *Poverty, Economic Equality, and the Equal Protection Clause*,

Legal doctrine concerning the right to counsel is ambiguous. The Constitution requires that defendants in criminal contexts receive the assistance of counsel. Although legal aid supporters have long asserted that an individual has a parallel constitutional right to legal services in civil cases,⁴¹ the courts have consistently rejected that right except under special circumstances.⁴² However, the counsel claim does not turn on constitutional argument alone. Justification of government subsidy can be based on an access right claim, which flows from variants of social contract theory. As this right to counsel is

1972 Sup. Ct. Rev. 41. A weaker formulation may be found in Grey, who suggests the basic needs justification "does not necessarily suggest that the right to have basic material needs met is, or soon will be or even should be, a judicially-enforceable constitutional right" but rather that the principle—"that basic material needs be guaranteed by government to those who cannot meet them through their own efforts" is like a constitutional principle in that it "has come to have an entrenched status as one of the fixed moral imperatives governing our political life." Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 Stan. L. Rev. 877, 900-01 (1976).

This position conflicts with the view articulated by David Stockman, Director of the Office of Management and Budget, that: "I don't believe that there is any entitlement, any basic right to legal services or any other kind of services and the idea that's been established over the last ten years that almost every service that someone might need in life ought to be provided, financed by the government as a matter of basic right, is wrong. We challenge that. We reject that notion." Cited in R. Evans & R. Novak, *The Reagan Revolution* 134-35 (1981). Stockman's inclusion of legal services with other welfare programs is only one approach to the problem of access right claims and the derivative claim for legal assistance. See note 39 *supra*.

41. E.g., *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *In re Gault*, 387 U.S. 1, 34-42 (1967) (juvenile delinquency proceeding); *In re Barnard*, 455 F.2d 1370 (D.C. Cir. 1971); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Davis v. Page*, 442 F. Supp. 258 (S.D. Fla. 1977); *Vail v. Quinlan*, 406 F. Supp. 951 (S.D.N.Y. 1976); *Danforth v. State Dep't of Health and Welfare*, 303 A.2d 794 (Me. 1973); *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976); *In re Ella R.B.*, 30 N.Y.2d 852, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972); *People ex rel. Menechio v. Warden*, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971); *Rudd v. Rudd*, 45 A.D.2d 22, 356 N.Y.S.2d 136 (1974) (civil proceedings that may involve possible incarceration); *In re Fisher*, 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974) (various parole and probation proceedings and revocation contexts); *State v. Jamison*, 251 Or. 144, 444 P.2d 15 (1968); *State ex rel. Hawks v. Lasaro*, 157 W. Va. 417, 202 S.E.2d 109 (1974).

42. The claim that counsel is a constitutional right in a divorce proceeding was rejected by a state court of appeals, *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975), although the United States Supreme Court required Connecticut to waive filing fees for divorce proceedings for parties unable to pay such costs. *Boddie v. Connecticut*, 401 U.S. 371 (1971); accord, *Kiddie v. Kiddie*, 563 P.2d 139 (Okla. 1977). The *Boddie* precedent however, has been construed narrowly even as regards filing fees and other court costs. See *United States v. Kras*, 409 U.S. 434 (1973) (filing fees in bankruptcy discharge); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (requirement of \$25 appellate court filing fee for judicial review of adverse state administrative decisions upheld even as applied to welfare claimants). No constitutional right to counsel was found in a variety of welfare hearing contexts. See, e.g., *In re Brown v. Lavine*, 37 N.Y.2d 317, 333 N.E.2d 374, 312 N.Y.S.2d 75 (1975); *Aiello v. Commissioner of Pub. Welfare*, 358 Mass. 91, 260 N.E.2d 662 (1970); in prison disciplinary proceedings, see *Baxter v. Palmigiano*, 425 U.S. 308 (1976); in deportation proceedings, see *Burquez v. United States Immigration and Naturalization Serv.*, 513 F.2d 751 (10th Cir. 1975); *Murgia-Melendrez v. United States Immigration and Naturalization Serv.*, 407 F.2d 207 (9th Cir. 1969). But see *Aguilera-Enriquez v. United States Immigration and Naturalization Serv.*, 516 F.2d 565, 569 (6th Cir. 1975). See also *La France*, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 Duke L.J. 487; *McCanich*, *A Constitutional Right to Counsel for Divorce Litigants*, 14 J. Fam. L. 509 (1976); *McKay & Kirklin*, *Legal Aid To the Poor in Civil Cases—Why Not?* N.Y.L.J., July 23, 1976, at 1, 4; Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 Fordham L. Rev. 989 (1975); Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 Mich. J. L. Ref. 554 (1976); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L.J. 545 (1967). See generally *Lassiter v. Department of Social Servs.*, 101 S. Ct. 2153 (1981) (no constitutional right to counsel in parental rights termination case); *Besharov*, *Terminating Parental Rights: The Indigent Parent's Right to Counsel after Lassiter v. North Carolina*, 15 Fam. L.Q. 205 (1981).

necessitated by the complexity of the legal system, it is neither a universal⁴³ nor a natural right.⁴⁴ It will expand or contract in different cultures depending upon the roles attorneys play in them. The American adversary system, dominated by lawyers,⁴⁵ puts those without adequate counsel at a distinct disadvantage. In a European "inquisitorial" system, the need for lawyers might be less.⁴⁶ Similarly, in primitive societies less wedded to notions of a "formal rationality," the lawyer's role may be even less important.

The notion of an individual right of access to the legal system can best be understood against the background of a general theory of rights. According to Dworkin a right is an individual entitlement or claim independent of considerations about collective goals such as utility.⁴⁷ Thus, "a right is a kind of independent guarantee of a benefit."⁴⁸ A person's rights are what belongs to him as his due, what he is entitled to, hence what he can rightly demand of others.⁴⁹

The tension inherent in the conceptual distinction between utilitarian the-

43. More attention has been paid to the claim of universal "right" to medical services than to that of a "right" to legal care. For an analysis of the extent to which a right to health care is culture-specific and a discussion of the implication of "health rights" to resource allocation, see A. Campbell, *Medicine, Health & Justice: The Problem of Priorities* 27 (1978); Beauchamp & Faden, *The Right To Health and the Right to Health Care*, 4 J. Med. & Philosophy 118 (1979); Bell, *The Scarcity of Medical Resources: Are There Rights to Health Care?* 4 J. Med. & Philosophy 158 (1979); Daniels, *Right To Health Care and Distributive Justice: Programmatic Worries*, 4 J. Med. & Philosophy 174 (1979); Outka, *Social Justice and Equal Access To Health Care*, 2 J. Religious Ethics 11 (1974).

44. Thus, the claim that individuals have a right to legal assistance and that society has a correlative duty to provide such a service cannot be understood as a "natural" right. The claim is based on a notion of fairness in a culture-specific context—a society of complex laws and formal dispute resolution processes.

At the same time it cannot be argued that any duty society may have to furnish legal assistance to the poor is a duty to provide lawyers "on the traditional model to all who desire it. . . ." C. Fried, *Right and Wrong* 182 (1978). Government may choose to provide legal aid on a staff attorney model (Fried calls this the "bureaucratic model," *id.* at 182), or through private attorneys reimbursed by the state (the *judicare* model). Centralized or federalist operating structures can be used. Indeed, the state may even use such experimental techniques as paralegals or lay advocates to meet its duty to provide access (if such modes prove to be generally effective). Considerable effort is presently being expended to develop alternative modes of dispute resolution designed to reduce or eliminate the need for lawyers in "minor" disputes. See E. Johnson, V. Kantor & E. Schwartz, *Outside The Courts: A Study of Diversion in Civil Cases* (1977); D. McGillis & J. Mullen, *Neighborhood Justice Centers: An Analysis of Potential Models* (1977). See also text accompanying notes 416-17 *infra*.

45. Fuller, *The Adversary System*, in *Talks on American Law* 34 (H. Berman ed. 1971). See generally J. Thibaut & L. Walker, *Procedural Justice: A Psychological Analysis* 22-28, 67-81 (1975); Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506 (1973); Skolnick, *Social Control in the Adversary System*, 11 J. Conflict Resolution 52 (1967).

46. See Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure I*, 71 Harv. L. Rev. 1193 (1958); Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure II*, 71 Harv. L. Rev. 1443 (1958). But see Wyzanski, *An Activist Judge: Mea Maxima Culpa. Apologia Pro Vita Mea*, 7 Ga. L. Rev. 202 (1973); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281 (1952).

47. R. Dworkin, *Taking Rights Seriously* 94-96 (1977); see also Nickel, *Dworkin on the Nature and Consequence of Rights*, 11 Ga. L. Rev. 1115 (1977).

48. Nickel, *supra* note 47, at 1117.

49. *Id.* at 1116-19.

ory and the principle of rights is a classic tension in ethical theory.⁵⁰ For if "rights-talk" serves any purpose, it places a brake on the use of social utility criteria. It sets the outer limits beyond which that calculus may not stray. To say that X has a right to Y is to give X a claim to Y regardless of the social utility of doing so. This is not to suggest that rights are inviolate. Most rights theorists would argue that rights are defeasible⁵¹ and can be overridden by other competing rights. Dworkin concedes that rights may sometimes be infringed on policy grounds, but he insists that a right must have "a certain threshold weight against collective goals in general."⁵² The balance is not easily tipped.

John Rawls, perhaps the most influential modern social contract theorist, has proposed a theory of justice that attempts to develop principles for the just distribution of goods and liberties in society. Rawls' version of social contract theory implicitly supports the view that the state has a responsibility to subsidize legal aid for individuals in need.⁵³

50. Robert Keeton considers that the two contrasting modes of thought find expression in different areas, one based on individual entitlement and the other on social calculus. As examples of this dichotomy he cites Fried's distinction between asserting an interest and asserting a right or entitlement, Rawls' distinction between "the liberties of equal citizenship" and the welfare of society as a whole, and Okun's distinction between giving priority to equality among individuals and giving priority to economic efficiency. Keeton, *Entitlement and Obligation*, 46 U. Cin. L. Rev. 1, 10-12 (1977). Albert Weale applies the distinction to political theories. "It is indisputable that there is a substantive difference between political theories which are rights-based, and therefore have a principle of respect for individuality underlying them and political theories which use a criterion of collective welfare as the basis for making choices." A. Weale, *Rational Choice and Political Principles*, in *Rational Action* 105 (R. Harrison ed. 1979).

51. On the concept of defeasibility generally as developed from the notion of contract, see G. Baker, *Defeasibility and Meaning in Law, Morality and Society* 26-57 (P. Hacker & J. Raz eds. 1977); Feinberg, *Action and Responsibility*, in *Philosophy in America* 134-43 (M. Black ed. 1964); Hart, *The Ascription of Responsibility and Rights*, in 49 *Proc. Aristotelian Soc'y* 175 (1948-49). Grey applies the concept of defeasibility to rights.

To say the right created by a promise can be overridden by sufficiently compelling competing considerations does not imply that the right means nothing at all, or that we have retreated to utilitarianism In general, reference to the supposed balance of pains and pleasures involved or to the intensity of competing preferences, is not a sufficient ground for violation of a right.

Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 *Stan. L. Rev.* 885 (1976). See also R. Dworkin, *supra* note 47, at 92.

52. R. Dworkin, *supra* note 47, at 92.

53. J. Rawls, *A Theory of Justice* 239 (1971). While Rawls' conception of the "well-ordered" state focuses on substantive principles of justice, e.g., the just distribution of goods in a society, his conception of natural justice as a mechanism that preserves "the integrity of the judicial process" requires the availability of counsel in a well-ordered modern legal system. In Rawls' words:

[A] legal system must make provisions for conducting orderly trials and hearings; it must contain rules of evidence that guarantee rational procedures of inquiry. While there are variations in these procedures, the rule of law requires some form of due process: that is, a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances. For example, judges must be independent and impartial, and no man may judge his own case. Trials must be fair and open, but not prejudiced by public clamor. The precepts of natural justice are to insure that the legal order will be impartially and regularly maintained.

Id. Impartially and regularly maintained legal order requires the assistance of counsel in an adversary system.

It should be noted that Robert Nozick, in developing his theory of a "minimalist" state suggests that

While Rawls refers only infrequently to legal aid in specific terms, three aspects of his theory may justify claiming legal assistance from the state.⁵⁴ First, access to legal institutions could be deemed a "primary social good"⁵⁵ parallel to those basic liberties Rawls regards as primary.⁵⁶ Like those enumerated basic liberties, the legal system is an aspect "of the social system that define[s] and secure[s] the equal liberties of citizenship."⁵⁷ Under Rawls' scheme all basic liberties are required to be equally protected,⁵⁸ and the state is charged with insuring the "fair value" of such liberties.⁵⁹ To the extent that access to the legal system is a primary social good it follows that there will be a right to legal assistance.

Second, access to the court system, like public education, is clearly a prerequisite of the realization of other rights and interests. Thus, such access may be justified as stemming from Rawls' Second Principle giving a priority to goods that ensure fair equality of opportunity.⁶⁰ Since the right of effective access to legal institutions is a precondition for the vindication of all legal rights, individuals may claim this service from the state.

Third, Rawlsian analysis calls for individuals to determine principles of

Every individual does have the right that information sufficient to show that a procedure of justice about to be applied to him is reliable and fair (nor no less so than other procedures in use) be made publicly available or made available to him. He has the right to be shown that he is being handled by some reliable and fair system.

R. Nozick, *Anarchy, State and Utopia* 102 (1974).

54. For an application of Rawls' theory of justice as fairness to health care see Green, *Health Care and Justice in Contract Theory Perspective*, in *Ethics and Health Policy* 111-25 (R. Veatch & R. Branson eds. 1976). For difficulties inherent in this application see Daniels, *supra* note 43, at 174.

55. Primary social good is defined in J. Rawls, *supra* note 53. "[P]rimary goods . . . [are] things that every rational man is presumed to want. These goods normally have a use whatever a person's rational plan of life. For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth . . . These are the social primary goods." *Id.* at 62.

56. See Rawls' discussion of what are basic liberties, *id.* at 201-05. As Professor Hart points out, to understand Rawls' theory of liberty, you must consider his views on such issues as the principle of fairness, the common good among others. Hart, *Rawls on Liberty and its Priority*, in *Reading Rawls* 230, 234 (N. Daniels ed. 1975). Also, Hart acutely notes that "there are important forms of liberty—sexual freedom and the liberty to use alcohol or drugs among them—which apparently do not fall within any of the roughly described basic liberties." *Id.* at 237.

57. J. Rawls, *supra* note 53, at 51.

The basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.

Id. Rawls notes that "[a]t this stage it would serve no purpose to classify systematically the various liberties." *Id.* at 205.

58. *Id.* at 61. They are not however strictly equal in value or worth. *Id.* at 204, 224-26, 277-78. As Scanlon notes, "[S]ignificant inequality in wealth, income or authority . . . will represent an inequality in the ability of citizens to make use of their liberty in order to advance their ends. . . ." Scanlon, *Rawls' Theory of Justice*, in *Reading Rawls* 181 (N. Daniels ed. 1975).

59. J. Rawls, *supra* note 53, at 225. See the criticism of constitutional government for its failure to ensure popular participation in government. *Id.* at 226.

60. "The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle." *Id.* at 302-03.

justice for the basic structure of their society through an original agreement defining the basic terms of their association.⁶¹ This basic agreement is made through a thought experiment in which individuals imagine themselves behind a veil of ignorance, ignorant of their actual social and economic positions. The principles they choose, Rawls asserts, will be fair in that they will be chosen without self-interest after general principles of justice are chosen. In Rawls' "original position" persons meet again to adopt specific political forms and to choose a constitution. "Since the appropriate conception of justice has been agreed upon, the veil of ignorance is partially lifted."⁶² Thus, they know "general facts about their society"⁶³ and will take those facts into account in choosing constitutional rules. Given the vital importance of attorneys in resolving disputes in our society and the general uncertainty about when, if ever, one's rights or interests might require vindication in the courts, it is likely persons in the constitutional stage would ensure the general availability of counsel by recognizing a right against the state for access to legal counsel.

The quantitative implications of the contractarian and the utilitarian justifications sketched above differ in terms of the amount of legal services that the state has a responsibility to provide its citizens. Under the utilitarian approach the state's responsibility is limited to that amount of legal services that will maximize the welfare of the poor. Under access rights principles the state has an affirmative duty to provide enough legal services to meet the just demands of citizens. If not enough resources are made available to satisfy claims to legal aid, it is incumbent on the legislature to make more funds available, even at the cost of monies for social welfare purposes. The institutional framework under which those services are provided is irrelevant. Rights theory can demand that the state provide legal service adequate to satisfy the needs of all citizens; utilitarian theory cannot.⁶⁴

The practical reality is that the modern state has failed to provide sufficient legal services to satisfy either the utilitarian or the rights theory.⁶⁵ This legislative failure, however, does not vitiate the power of access rights theory in developing distributional principles for allocating the available funds for legal services. This Article suggests that the theoretical justification for government subsidy of legal aid will control the method by which legal aid should be distributed. The view that government subsidy is justified by a theory of

61. J. Rawls, *supra* note 53, at 118-30.

62. Even if a person wishes to avoid litigation, he may not be able to avoid being named a defendant in a lawsuit. Thus on traditional Rawls' maxi-min principles a right to counsel would be claimed even if one were unaware of one's wealth-position in the real world. *Id.* at 197.

63. *Id.* Like the right to vote, claims regarding access to the legal system relate to fundamental ways of ordering a liberal society. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

64. R. Dworkin, *supra* note 47, at 90-91.

65. Under both theories, resource allocation must take place under conditions of scarcity. This scarcity is of two kinds, natural scarcity in which insufficient funds are available for legal aid and artificial scarcity, when the legislature chooses to provide insufficient funds for this purpose. The fact of scarcity is a problem for both theories. Natural scarcity affects both rights and utilitarian theory. Artificial scarcity presents a special difficulty for rights theory. It suggests that the legislature has failed in its duty to provide for just claims by the population for legal assistance.

access rights results in a different service distribution than would occur under a social utility justification. As Dworkin says, rights theories encompass distributional implications that social utility theories lack. Because utilitarian distribution principles subordinate individual to collective needs, any policy based on collective goods "will suggest a particular distribution, given particular facts"⁶⁶ but does not call for the provision of specific opportunities for any given individual.

The rejection of the use of social utility criterion in determining distribution of legal services is based on the principle that every person has a right to equal concern and respect. According to Dworkin,

government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, . . . and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect but with equal concern and respect.⁶⁷

If the right of access to the legal system is one held by citizens, then each citizen should have an equal claim to legal assistance when such assistance is necessary to vindicate significant interests.⁶⁸ If we are to treat the wants and desires of each individual as equally worthy of respect, then we cannot select the recipients of legal aid by making distinctions among persons based on their moral worth or the social worth of the claims they wish vindicated.

Therefore, a person cannot be rejected as a client because of the comparative social utility of his case.⁶⁹ Admittedly, the claim that more people can be served and more legal assistance dispensed if aid is allocated according to social utility criteria should not be lightly denied. Such distributions, however, violate the access rights upon which supporters have based their claim to government subsidy. In circumstances in which all requests for legal aid cannot

66. Dworkin, *supra* note 47, at 91. Dworkin underscores the notion that the distribution principles of social utility theories are "subordinate to some conception of aggregate collective good, so that offering less of some benefit to one man can be justified simply by showing that this will lead to a greater benefit overall." *Id.*

67. *Id.* at 272-73.

68. This theme pervades constitutional literature. For a probing analysis of the values inherent in one variant of a claim of right to access, see Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28 (1976).

69. The classic articulation of this view has been put forward by Jonathan Weiss, a practicing legal services attorney who proposed the following neighborhood lawyer's credo:

Cases cannot be selected according to a scheme established by a poverty program or by any other group . . . To reject clients whose cases do not seem to make the legal points sought to win some social revolution, that they lack the social impact desired by a theoretician, however well intentioned, who holds a position on an advisory board, is to play a very immoral type of god. . . . Once the lawyer-client relationship has been established, how can any lawyer, especially a neighborhood lawyer dealing with a person whose total past experience has been one of rejection from the officials of the court and the rest of the establishment, say to this client across his desk: "Your cause is just, but it lacks the social utility without which we cannot represent you?"

Matthews & Weiss, *What Can Be Done: A Neighborhood Lawyer's Credo*, 47 B.U.L. Rev. 231, 241-42 (1967).

be granted, an individual's right is not respected when his request is denied on grounds of social utility. Of course, an individual may decide to sacrifice his own claim for the common good of his "class" or community.⁷⁰ That superogatory decision, however, is the individual's prerogative and not a decision for his neighbor or community.⁷¹

Respect for persons need not be vitiated by the fact that scarce resources require some form of rationing. The inability to provide service to all who need it does not necessarily violate a right to treatment as an equal. Thus, respect for persons means that "interests should not be disregarded and arbitrarily violated" and that there should be "certain procedural guarantees that

70. What is important is that he not be under any obligation to make such a sacrifice to the general welfare. Indeed it is that very lack of obligation that makes such conduct praiseworthy. See Urmson, *Saints and Heroes*, in *Essays in Moral Philosophy* 198 (A. Melden ed. 1958). But see Daube, *Limitations on Self-Sacrifice in Jewish Law and Tradition*, 72 *Theology* 291 (July 1969). This point is a key to this Article's analysis. For as Charles Fried suggests, "A claim of right . . . is peremptory. It says that because I have this right you must do (or forbear doing) this thing irrespective of whether recognizing my right would maximize the sum of advantages." C. Fried, *supra* note 44, at 85.

71. One variant of utilitarianism—act-utilitarianism—can be used to justify individual claims of access to the legal system. Under this view, the right to the assistance of counsel is based on the extent to which access to justice is at least partly a public good providing external benefits to society. Thus, it is the public benefit derived from legitimatizing individual claims of access to the legal system which justifies the protection of individual access claims. The public good aspects of legal services are sketched out in Bush, *The Economic Significance of Access to Justice: An Analysis of Resource Allocation to Dispute Resolution Services in Relation to Public-Policy Making and the Public Interest*, in 3 *Access To Justice* 191, 201-20 (M. Cappelletti & B. Garth eds. 1979).

Legal services can also be considered a "merit good," which means a good that is meritorious for persons to possess even when its provision does not meet individual preferences. Examples include government provision of free school lunches and housing subsidies. While the concept requires an imposition of preferences it has been justified as a correction for deficiencies in the exercise of consumer choice due to lack of information. By analogy, legal services are provided free to people who otherwise would not choose to spend their own money on them, because for example, they do not realize that their problems can be solved through the legal process. But it may be inaccurate to describe legal services as "merit goods," which go against the poor person's natural preferences, since many people do want legal services and would choose to spend a portion of their income on them if they were not priced so high. Similarly, it is hard to see the example of low cost housing as something that goes against preferences. R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 80-81 (1973). See also Musgrave, *Provision for Social Goods*, in *Public Economics: An Analysis of Public Production and Consumption and Their Relations to the Private Sectors* 124, 143-44 (J. Margolis & H. Guitton eds. 1969), where the concept is discussed in terms of "merit wants." For an argument that there is no fundamental difference between social and merit wants and that the concept of merit goods should be abandoned, see I. Garfinkel, *Merit Goods, Consumer Sovereignty and Efficiency: A Suggested Application of Occam's Razor* (1970). Some commentators have suggested that legal aid should be viewed as a modified "merit good" in that an equal distribution of the merit good is not intended but rather that an assurance of a universal minimum is contemplated. Tobin, *On Limiting the Domain of Inequality*, 13 *J.L. & Econ.* 263, 275-6 (1970).

It should be stressed that adjudication clearly encompasses significant private good aspects. See Landes & Posner, *Adjudication as a Private Good*, 8 *J. Legal Stud.* 235 (1979), drawing useful analogies from the early English practice of financing lighthouses out of user fees paid by the shipping industry. Coase, *The Lighthouse in Economics*, 17 *J. L. & Econ.* 357 (1974). The problem bears further investigation as the responses and comments to the Landes & Posner article suggest. See generally 8 *J. Legal Stud.*, No. 2 (1979) (entire issue); R. Posner, *A Theory of Primitive Society, with Special Reference to Law* 41-42 (Working Paper No. 007, Center for the Study of the Economy and the State, Univ. of Chicago 1979); Landes & Posner, *The Private Enforcement of Law*, 4 *J. Legal Stud.* 1 (1975). The justification of personal contributions to legal aid as in England depends in part on the claim that the service is, to some degree, a private good.

express fairness"⁷² by the state in the distribution of goods and services. As has been suggested, "the requirements of fairness and due process flow from the right to treatment as an equal even when equal treatment is not possible."⁷³

The access right approach outlined in this Article accepts that certain emergency considerations override any one individual's claim to equal treatment in the distribution of legal aid. This is in keeping with the view that a right can sometimes be infringed on compelling policy grounds, but "cannot be defeated by appeal to any of the ordinary routine goals of political administration."⁷⁴

In locating the conceptual justification of legal aid in a right of access, this Article advocates the adoption of a client-oriented perspective toward legal aid in which the interests of the individual clients determine the substance and scope of legal services offered. This client orientation is a direct consequence of the theory of access rights. Such a perspective expresses "respect for the capacity of persons, as such, for rational autonomy—to be, in Kant's memorable phrase, free and rational sovereigns in the kingdom of ends, . . . viz. . . . to take ultimate, self critical responsibility for one's ends and the way they cohere in a life."⁷⁵

III. THE STRUCTURE OF RESOURCE ALLOCATION IN LEGAL ASSISTANCE

Many decisions at different levels affect who receives legal assistance, which services will be made available, the types of clients represented, and the substance of cases handled. This section will describe the parts played by Congress, by the Corporation, by program attorneys and by the client community in the allocation process and will assess how far the decisions of each fulfill the client-oriented perspective outlined above.

Any discussion of resource allocation in the legal assistance context must recognize that much of the debate has been principally rhetorical. Whatever allocation of responsibility is made for the setting of priorities, significant implementation problems persist.⁷⁶ As with all bureaucracies, local programs often resist directives from central authorities and field workers may adapt programmatic rules. In discussing each level of resource allocation, this section will both analyze its conceptual justification and describe how resources are, in fact, allocated.

72. Childress, *A Right to Health Care*, 4 J. Med. & Philosophy 132, 138 (1979). Various solutions to the problem of limited resources are discussed later in this Article. See section V *infra*.

73. *Id.* The distinction is drawn from R. Dworkin, *supra* note 47.

74. R. Dworkin, *supra* note 47, at 92.

75. Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 Ga. L. Rev. 1395, 1407 (1979). See generally I. Kant, *Foundations of the Metaphysics of Morals* (L. Beck trans. 1959).

76. See J. Pressman & A. Wildavsky, *Implementation* (2d ed. 1973).

A. *A Historical Perspective: Allocation Prior to the Legal Services Corporation*

In order to understand current attitudes about the structure and allocation of legal assistance for the poor it is necessary to review the history of allocation criteria used until the creation of the Legal Services Corporation in 1974. The legal aid movement began in the United States in 1876. Until 1964 it was funded mainly by private philanthropy or the volunteer assistance of private counsel.⁷⁷ When the right to counsel in criminal cases assumed constitutional status, criminal legal aid became the responsibility of the prosecuting jurisdiction.⁷⁸ Civil programs, however, were funded by the federal government as part of the War on Poverty. Thus the Legal Services Corporation has two forebears: the voluntary legal aid movement and the federally-funded Office of Economic Opportunity (OEO) Legal Services program. Both reflected institutional and ideological concerns that militated against the notion that legal assistance should be distributed according to principles of access rights.⁷⁹

The problem of scarce resources has always plagued the legal aid movement. When the obligation to provide legal aid was seen as a responsibility of private charity and the profession, the sums provided were never equal to the task. Throughout the early history of the legal aid movement local programs restricted service to certain functions, subject matter categories and population groups. For the most part, however, the criterion for service was neither the most efficient use of available resources nor a recognition of a right of access to the legal system for all poor persons, but rather a concern that funds not be used to support clients or causes that were in some sense unworthy. This concern reflected a general attitude toward philanthropy that pervaded American social welfare until the War on Poverty.⁸⁰ Allocation decisions usually were

77. E. Brownell, *Legal Aid in the United States* ch. 7 (1st ed. 1951). See generally J. Maguire, *The Lance of Justice* (1928).

78. *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

79. Smurl, *Eligibility for Legal Aid: Whom to Help When Unable to Help All*, 12 *Ind. L. Rev.* 519 (1979), reviews the secondary literature on the development of legal aid and argues that "of the several alternative [eligibility] standards, those which are egalitarian are more relevant and morally justifiable in the determination of eligibility for free legal service—than, standards of merit or desert and of social contribution." *Id.* at 538. Smurl focuses on subject matter and eligibility restrictions under the traditional legal aid scheme. He fails to extend his analysis to (and indeed studiously ignores) the contemporary allocation issues raised by the use of social utility criteria discussed in this Article.

80. See W. Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America* 67-69 (2d ed. 1979). American social welfare in the latter half of the nineteenth century was strongly influenced by Social Darwinism and Herbert Spencer. Social theorists "feared that social welfare methods that supported dependency and misfits would end in the weakening of mankind." J. Axinn & H. Levin, *Social Welfare: A History of the American Response to Need* 89 (1975). Symptomatic of the self-reliance philosophy equating poverty and personal inadequacy, relief was restricted to the aged, injured, sick or substandard unemployed, not to vagrants. *Id.* at 89-90. H. Wilensky & C. Lebeaux, *Industrial Society and Social Welfare* 41-42 (1965). "[Only in a post-Freudian age could one] understand, accept and forgive the frailties of the client, for they were, except in detail or severity, the same as those of the [social] worker." P. Klein, *From Philanthropy to Social Welfare* 259 (1968).

made by a program's board of directors consisting almost exclusively of prominent local attorneys. Program staff, however, had considerable discretion in allocating program resources; little review or appeal existed as a check against their intake and service determinations. These local legal aid societies often shrank from controversial litigation, fearing adverse public reaction. Indeed, the philanthropic legal aid groups often sought first to resolve disputes by non-adversary proceedings. Only after negotiation failed would court proceedings ensue.⁸¹

One area of controversy arose in response to the question whether the legal aid lawyer should be "satisfied that the position of [the] client is correct in fact and in law"⁸² before agreeing to represent him in court. For some, "[l]egal [a]id representative should only present a case that was so absolutely sure and so overwhelmingly in favor of the [l]egal [a]id client, that to find against him would be the clearest violation of justice."⁸³ Thus the legal aid lawyer would take only technically meritorious cases.⁸⁴ Some legal aid lawyers went even further and required that a client have substantial equity on his side as well as a strong legal position. One director pointed out:

In this office, we have steadfastly required that a person have a good claim, both morally and legally. In fact, we have more readily accepted a case weak legally and strong morally than one strong legally and quite weak morally. We have been accustomed to follow the maxim in the court of equity that all who seek equity must come with 'clean hands.'⁸⁵

The attitude of legal aid agencies toward divorce cases reflects a tension between the principle of universal eligibility and case selection on the basis of moral propriety. This tension was well articulated by an early proponent of legal aid:

In theory, a Legal Aid Organization is a poor man's law office. If the law entitled a man to a divorce, it would seem improper to deny him the divorce merely because he is poor, when a wealthy man, upon the same set of facts, might obtain it. If, therefore, the Legal Aid Organization is to be the poor man's law office, it must take divorce cases.

In opposition to this line of reasoning we have certain cogent arguments. We are told that divorces should not be encouraged, and that to open the way to a flood of divorces among the poor would go

81. Statement of Policy in Representing Poor Persons in Court Actions and in Referring Cases to Members of the Bar, *Legal Aid Rev.*, Jan. 1944, at 1.

82. *Id.*

83. Fabricant, Should Representation in Court by a Legal Aid Office Imply Anything More Than a Justiciable Issue?, *National Association of Legal Aid Organizations [hereinafter NALAO] Comm. Rep. & Proceedings A-79* (1946).

84. Carlin & Howard, *Legal Representation and Class Justice*, 12 *U.C.L.A. L. Rev.* 381, 413-415 (1965); Silverstein, *Eligibility for Free Legal Services in Civil Cases*, 44 *J. Urb. L.* 549, 574 (1967).

85. NALAO, *Rep. of Comm. 5* (1934-35) (remarks of Mr. Theophilus). See also Report of Committee on Relations with the Bar of the National Association of Legal Aid Organizations, NALAO, *Rep. of Comm. 77* (1924).

far to disrupt the family as the basis of society. We are also told that a divorce is so expensive in many jurisdictions that any one who can afford it can also afford to pay the attendant lawyer's fee.⁸⁶

The uncertainty over how to approach divorce carries through the entire pre-Corporation period. In some areas it was argued, "[T]he bar looks upon divorce as a luxury,"⁸⁷ and it was felt "that two adults, without children, ought to be able to find some way out of their dilemma without the help of legal aid."⁸⁸ The prevailing view was "that it is against public policy to make divorce too easy by making it too cheap."⁸⁹

Client service was limited by other subject matter restrictions. Service was prohibited in paternity cases because the state theoretically brought such support proceedings.⁹⁰ Representation of bankrupts was problematic.⁹¹ Libel

86. NALAO, Rep. of Comm. 82 (1924). The NLADA and its predecessors took a variety of views regarding divorce. An early version of the organization's statement of ideals required that

[e]very Legal Aid Organization should, as far as local conditions permit, endeavor to: Accept divorce cases on behalf of indigent persons, whether plaintiffs or defendants in those instances in which there are social reasons which appear to make such an action both necessary and desirable from the standpoint of the client as well as of the family.

Id. at 70 (1934).

In 1947 a substantially similar idea was adopted. NALAO, Comm. Rep. & Proceedings B-4 (1947). The Committee on Policies, Standards and Statistics approved a request proposing that legal aid organizations "should accept a divorce case first, where social need exists; secondly, where there is a good *prima facie* case; and, third, where the client cannot afford to employ counsel." Id. at B-3. See also E. Brownell, *Legal Aid in the United States*, 72 (1951). In 1957 the standard was relaxed further:

Every legal aid organization should . . . undertake the defense of all divorce cases, provided the client cannot afford to employ counsel, and appears to have a meritorious defense. It is the obligation of every member organization to defend these cases.

Every legal aid organization should . . . accept a divorce case for a plaintiff first, where the client cannot afford to employ counsel; second, where there is a good *prima facie* case; and third, where social need exists.

NLAA, Summary of Conf. Proceedings 29 (1957). The restrictions on divorce representation as well as other subject matter restrictions, were eliminated from NLADA standards in 1965. See 24 Legal Aid Briefcase, Dec. 1965, at 61, 62.

A perceptive critique of the 1947 standard, which provides a general critique of the "social need" argument, can be found in the correspondence between Alan Wardwell and Emory Brownell reprinted in 6 NALAO Briefcase, Apr. 1948, at 31-35.

87. NLAA, Proceedings of the 34th Annual Conference 118 (1956). See also 5 NALAO Briefcase, June 1947, at 57, 62 (comments of Judge Hackney); Theophilus, *Determining Social Need*, 22 Legal Aid Briefcase, Apr. 1964, at 211, 213 ("Obtaining a divorce is not a right but a privilege. For most Legal Aid clients, a separation is just as useful and practical as a divorce").

88. 44 Legal Aid Rev., Jan. 1947, at 3, 11 (remarks of R. Gardiner).

89. Five Questions to the American Bar Association, 21 Legal Aid Rev., Oct. 1923, at 4, 5. Some took this view for pragmatic reasons so as not to offend funding sources. See 5 NALAO Briefcase, June 1947, at 62-63 (comments of Judge Goodrich). For others the requirement that a client secure "a recommendation from the welfare agency . . . or . . . a minister" derived from the need to allocate scarce resources properly. See address by Ronald Gevurtz in NLADA, 40th Annual Conference, reprinted in NLAA Proceedings 5 (1962). See also Advisory Committee, NALAO Activity as to the Moral and Social Factors of Legal Aid Associations, 5 NALAO Briefcase, June 1947, at 60 (comments of Judge Charles Wysanski).

90. Letter to the Editor from Arthur K. Young, 20 Legal Aid Briefcase, June 1947, at 200.

91. In the early twentieth century many people looked "upon the bankruptcy law as a disreputable business." Mariano, *Discharge in Bankruptcy Through Legal Aid Societies*, 33 Legal Aid

and slander cases were rejected,⁹² as were wage claims unless it was considered that the employer had treated the employee unfairly.⁹³ Other restrictions set by local legal aid offices included adoption, change of name cases, workmen's compensation cases,⁹⁴ and personal injury or tort cases, "which will attract competent attorneys on a contingent fee basis."⁹⁵

The early history of legal aid reflects a tension between access principles and a principle of moral desert that limits service eligibility to persons deemed worthy in some moral sense. Access principles were never accepted widely; instead allocation focused on the character of the client as well as the character of his legal problem.

The federally-funded Legal Services program defined itself against the structure and experience of the traditional legal aid programs, and at its inception resisted imposing a selective grid on a program's caseload.⁹⁶ The new

Rev., Apr. 1935, at 1, 4, largely because of the notion that it fosters imprudence among reckless debtors. Most legal aid societies restricted their representation of bankrupts in some manner.

The National Association of Legal Aid Organizations proposed a criterion that limited bankruptcy representation to

those instances in which the client has a reputation for honesty and has made every reasonable effort to pay his just debts but in which creditors have refused to cooperate in any reasonable plan of payment and have persisted in harassing the client by attachment of his wages or by other proceedings to such an extent that he is in danger of losing his employment; to undertake bankruptcy proceedings, however, only as a last resort, and after all other attempts in the way of conciliation or otherwise have failed to protect the client from the unreasonable collection practices of his creditors.

NALAO, Conf. Proceedings 50 (1936). That was the NALAO Bankruptcy Ideal before 1947. In 1947 it was recommended that the Ideals be restated as "Recommended Practices" and the Bankruptcy rule liberalized as follows:

Every legal aid organization should, as far as local conditions permit, endeavor to: . . .

11. Accept bankruptcy cases only in instances where everything possible has been done to make an adjustment with a creditor and where it is obvious that a client will never be able to pay his debts and will be harassed by creditors for a long period.

Committee on Policies, Standards, and Statistics, Report, reprinted in NLAA Proceedings A-20 (1947).

92. Cobb, Legal Aid Practice, 35 Legal Aid Rev., Apr. 1937, at 3. See also Silverstein, Eligibility for Free Legal Services in Civil Cases, 44 J. Urb. L. 549, 582 (1967).

93. Rule 4 of the Rules of the Legal Aid Society of New York provided:

in a case of a claim for wages due for domestic employment, if it appears that the applicant abandoned the employment without reasonable notice to the employer, such fact will be considered misconduct which, if not satisfactorily explained, shall cause the case to be rejected by the Society's attorneys.

Cited in NALAO, Conf. Proceedings 141, 142 (1926). See also Scope of Work by "Poor Man's Lawyers" Great Throughout New York City, 26 Legal Aid Rev., July 1928, at 1, 4 ("The only cases not tolerated are those of employees who quit without notice."). Thus one early legal aid leader, Arthur von Briesen, stated: "Whoever receives our attention must show that he *has* rendered some service, that he has done some work, and that he is entitled to a corresponding consideration, which, being denied, we enforce on his behalf." Quoted in J. Auerbach, Unequal Justice 56 (1976) (emphasis in original).

94. For a full listing of the various restrictions programs had laid down, see E. Brownell, Legal Aid in the United States 74-76 (1951); Silverstein, Eligibility for Free Legal Services in Civil Cases, 44 J. Urb. L. 549, 582-83 (1967).

95. E. Brownell, *supra* note 94, at 75.

96. Thus John Robb responded to congressional inquiry about the circumstances under which legal services accepts a divorce case by arguing that

[t]he only rules that we have in most of the programs are that the person have a complaint for which there is a legal remedy. We don't try to impose a social sanction and try

guidelines for legal services programs made clear that programs which received federal funds must accept all categories of civil cases from eligible clients.⁹⁷ Acknowledging their broader function, legal services attorneys rejected the notion that they had any personal or professional responsibility for the views of their clients. As two progenitors of legal services, Edmund and Jean Cahn, noted:

Other professionals such as social workers and educators are institutionally given the role of mediating between their employers and their clients. A lawyer need not be apologetic for being partisan, for identifying. That is his function. The "identifying" attorney is one who will not judge his client or his motive.⁹⁸

Thus Legal Services lawyers saw their role as advocates in the traditional sense, in zealous pursuit of their clients' interests. Unlike their predecessors, they rarely focused on a client's deserts or the character of his problem.

This laissez-faire approach to client selection soon resulted in waiting rooms filled to overflowing. This demand, when combined with the small number of available attorneys, forced attorneys to deal with the constraints of scarcity. A debate soon ensued between those who argued for the need to limit eligibility in order to maintain high quality service and those who argued that Learned Hand's maxim, "thou shalt not ration justice,"⁹⁹ forbade formal service restrictions. Moreover, many Legal Services lawyers perceived themselves as strategists in the War on Poverty and argued for caseload limitations¹⁰⁰ as a method of allowing attorneys to focus their energies on cases of social significance. This concept of impact litigation, then called law reform, soon became a stated public goal for the legal aid lawyer.¹⁰¹ Programs were

to determine the social desirability of whether or not a person should or should not have a divorce

Hearings on H.R. 8311 Before the House Comm. on Educ. and Labor, 90th Cong., 1st Sess. 2116 (1967) [hereinafter cited as Hearings on H.R. 8311]. Robb suggests that "[o]ne of the basic purposes of the Legal Services program of the OEO was to sweep away arbitrary limitations on service." *Id.* at 2117.

97. OEO, Guidelines for Legal Services Programs 22-24 (1967); E. Johnson, Justice and Reform 107 (1974). Thus Robb, in support of the program, suggested in 1967 that

there are certain areas . . . where some limitations of service have already been imposed but frankly we resist them because we continue to go back to the fundamental principle that equal representation before the law for all people ought to be available whether you can afford it or not. [It] may be [that] ultimately the legal services program is going to be driven to making priority allocations. We have resisted up to now.

Hearings on H.R. 8311, *supra* note 96, at 2135.

98. Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 *Yale L.J.* 1317, 1335 (1964).

99. Address by Judge Learned Hand, Legal Aid Society of New York, 75th Anniversary Dinner (Feb. 16, 1951), reprinted in E. Brownell, *Legal Aid in the United States* xviii (1951).

100. See Silver, *Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 *J. Urb. L.* 217 (1969); see also Clark, *Legal Services Programs—The Caseload Problem, or How to Avoid Becoming the New Welfare Department*, 47 *J. Urb. L.* 797 (1970). Similar problems are discussed in the context of public defender caseloads in Note, *Caseload Ceilings on Indigent Defense Systems To Ensure Effective Assistance of Counsel*, 43 *U. Cin. L. Rev.* 185 (1974).

101. "By March 1967 we had already developed a fairly precise management goal for the Legal Services Program—to focus substantial program resources on law reform." E. Johnson, *Justice and Reform* 170 (1974).

rated according to the size of their law reform docket.¹⁰² As burgeoning case loads forced programs to consider allocation mechanisms, law reform activity, at least rhetorically, eclipsed the individual service function of legal aid.¹⁰³

Even when no systematic allocation techniques were used, programs often set priorities by rationing devices. Many programs set a limit on the acceptance of divorce cases to avoid becoming "divorce mills."¹⁰⁴ In some, only the first one hundred divorce clients per month could be accepted. Other offices used more subtle rationing techniques. For example, by informing clients of a six month waiting period for a divorce case, offices limited services to the most intense or hardy.¹⁰⁵ Another technique was to move offices from a storefront to an upstairs office building, thus discouraging casual queries or crank repeaters.¹⁰⁶

While law reform may have been the ideological lodestar of the OEO Washington staff, many local programs failed to implement directives either because of philosophical objections or due to local political considerations.¹⁰⁷ Indeed, OEO program evaluations are replete with criticisms of programs for failing to meet law reform standards.¹⁰⁸ Nonetheless, law reform remained the ideological focal point of legal services for many of its most committed and articulate staff.

B. The Role of Congress in Resource Allocation

Congress' substantive goals for government-subsidized legal services were

102. Program evaluations were used to "engineer" changes in program priorities and to "negotiate" the firing of directors who were less enthusiastic about law reform. *Id.* at 175. See generally *id.* at 173-76. See also *Monmouth Legal Servs. Org. v. Carlucci*, 330 F. Supp. 985, 987-88, 990 (D.N.J. 1971).

103. The use of law reform terminology is fraught with symbolic connotations for both radical and conservative critics of legal aid. The term is a condensation symbol in Edelman's terminology, one which evokes emotions associated with situations rather than referential or economical ways of referring to situations or concepts. M. Edelman, *The Symbolic Uses of Politics* (1970).

104. Thus, Earl Johnson decried the "millions in legal aid funds . . . being spent on divorces." Johnson, *Further Variations and the Prospect of Some Future Themes*, in *Toward Equal Justice* 133, 219 (M. Cappelletti, J. Gordley & E. Johnson eds. 1975), suggesting that such expenditures fail a minimum cost effectiveness test. See also E. Johnson, *supra* note 101, at 230-33. The cost-budget approach is urged in a different context by James Lorenz, Jr. Lorenz, *The Application of Cost-Utility Analysis to the Practice of Law: A Special Case Study of the California Farmworkers*, 15 U. Kan. L. Rev. 409 (1967).

105. The Buffalo Neighborhood Legal Services currently requires a six-month waiting period for appointments for matrimonials absent special circumstances. The waiting period for clients who seek legal assistance in other subject-matter categories is far shorter. Letter from George L. Cownie, Director, Neighborhood Legal Services, Inc., Buffalo, N.Y. to author (Feb. 3, 1981).

106. See the description of the Philadelphia Office for Juveniles' shift from a neighborhood to a central office of Community Legal Services in L. Forer, *No One Will Listen* 299-300 (1970).

107. See Finman, *OEO Legal Service Programs and the Pursuit of Social Change: The Relationship Between Program Ideology and Program Performance*, 1917 Wis. L. Rev. 1001. The best analysis of law reform as an ideology can be found in C. McCarthy, *The Consequences of Legal Advocacy: OEO's Lawyers and the Poor* (Ph.D. dissertation, Univ. of Cal. at Berkeley 1974).

108. See, e.g., GAO Rep. No. B-130515, *The Legal Services Program—Accomplishments of and Problems Faced by Its Grantees* 25 (Mar. 21, 1973); GAO Rep. No. B-130515, *Effectiveness and Administration of the Legal Services Program Under Title II of the Economic Opportunity Act of 1964* (Aug. 7, 1969). See also 1 John D. Kettelle Corporation, *Final Report: Evaluation of Office of Economic Opportunity Legal Services Program* (1971).

not clearly articulated in the legislative history of the enabling statutes for the various programs. The stated purpose of the 1964 Economic Opportunity Act was "to strengthen, supplement and coordinate efforts in the furtherance" of the policy to "eliminate the paradox of poverty in the midst of plenty."¹⁰⁹ The statutory purpose of the Community Action Programs, under whose rubric Legal Services was initiated, was that of "enabling low-income families and low-income individuals of all ages . . . to attain the skills, knowledge and motivations and secure the opportunities needed for them to become fully self-sufficient."¹¹⁰ The 1974 Act includes as a goal "a need to provide equal access to the system of justice . . . for individuals who seek redress of grievances."¹¹¹ The 1977 amendments carried forward this access language and added that the provision of legal assistance to those too poor to secure counsel will "assist in improving opportunities for low-income persons."¹¹²

Numerous attempts were made during OEO's administration of legal services to restrict the subjects for which service could be provided¹¹³ and the population groups who could receive legal assistance. For example, efforts were made to amend the Economic Opportunity Act to prohibit legal representation in divorce actions¹¹⁴ and in actions "against any public agency of the United States, any State, or any public agency thereof."¹¹⁵ One Senate committee recommended prohibiting the use of federal funds for litigation challenging federal welfare regulations.¹¹⁶ Funds were in fact prohibited for most

109. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 2, 78 Stat. 508 (1964) (codified at 42 U.S.C. § 2701 (1976)).

110. 42 U.S.C. § 2781(a) (1977).

111. Legal Services Corporation Act of 1974, § 1001, 42 U.S.C. § 2996 (1976).

112. Legal Services Corporation Amendments of 1977, Pub. L. No. 95-222, § 2, 91 Stat. 1619 (1977) (codified at 42 U.S.C. § 2996 (Supp. III 1979)). H.R. 3480, 97th Cong., 1st Sess. (1981) and S. 1533, 97th Cong., 1st Sess. (1981), the Legal Services Corporation reauthorization measures presently before Congress, would add further restrictions to legal service activities. See notes 126-27 *infra*.

113. The English scheme also contains subject matter limitations. The legal aid scheme as a whole does not apply to certain types of actions such as defamation, contested election petitions, and various civil proceedings in magistrates' courts. Although the Legal Aid Act of 1974 allows access to administrative tribunals, regulations have not as yet implemented such access. Legal Aid Act, 1974, ch. 4. In 1977 the Lord Chancellor withdrew the use of legal aid from uncontested divorces arguing that attorneys were not necessary for such work, except in special cases. Legal Aid (Matrimonial Proceedings) Regulations 1977 (S.I. 1977, No. 447). This subject matter restriction was based on financial considerations flowing from the increasing proportion of legal aid expenditures expended for uncontested divorce. Gibson, *Divorce and Recourse to Legal Aid*, 43 Mod. L. Rev. 609, 610, 616 (1980). Of course the divorce limitation depended on the view that in most cases an attorney was not necessary in an undefended divorce proceeding.

114. Economic Opportunity Act Amendments of 1966, H.R. 15111, 89th Cong., 2d Sess., 112 Cong. Rec. 24,409, 24,429-30 (1966). An amendment offered by Rep. Dole provided that "federal funds shall not be used, directly or indirectly, to prosecute or defend divorce, separate maintenance or annulment actions." It was rejected 38-23. *Id.* at 24,430.

115. This was the famous Murphy Amendment. See Economic Opportunity Amendment of 1967, S. 2388, 90th Cong., 1st Sess., 113 Cong. Rec. 27,871-73 (1967) (defeated 52-36, *id.* at 27,873).

116. See Family Assistance Act of 1970: Hearings on H.R. 16311 Before the Senate Comm. on Finance, 91st Cong., 2nd Sess. 363-64 (1970) (attempted amendment to the Social Security Act forbidding use of federal funds to challenge welfare policies); S. Rep. No. 1431, 91st Cong., 2d Sess. 488-90 (1972). A 1974 amendment proposed by Sen. Russell Long to curb welfare litigation was also defeated. See 120 Cong. Rec. 1,685-89 (1974). Most of the antagonism to welfare litigation took other forms than a direct subject matter ban. See Bloch, *Cooperative Federalism and*

criminal defense,¹¹⁷ as well as for members of the armed services and their families.¹¹⁸ Unsuccessful attempts were made to insert similar restrictions in the Legal Services Corporation Act.¹¹⁹ Even so, the 1974 Act significantly limits the activities of legal services' attorneys. As the Corporation's mission is representation in civil matters, criminal representation was forbidden.¹²⁰ Representation of clients in school desegregation,¹²¹ selective service,¹²² and nontherapeutic abortion cases was disallowed,¹²³ as was representation of juveniles.¹²⁴ The ban on juvenile representation was dropped in the 1977 amendments¹²⁵ but the other restrictions were continued. In 1980, after ex-

the Role of Litigation in the Development of Federal AFDC Eligibility Policy, 1979 Wis. L. Rev. 1, 31-32.

117. See Pub. L. No. 90-222, § 222(a)(3), 81 Stat. 698 (1967) (repealed 1974). Criminal defense work was only allowed "in extraordinary circumstances where . . . the Director has determined that adequate legal assistance will not be available for an indigent defendant." *Id.*

118. Pub. L. No. 91-177, § 104(b), 83 Stat. 829 (1969) (repealed 1974). Members of the armed services could receive service only in cases of extreme hardship.

119. Indeed the House even banned representation of Watergate defendants. See 119 Cong. Rec. 20,754 (1973). This amendment may have been proposed in exasperation at the lengthy debate over the 1974 Act.

120. 42 U.S.C. § 2996f(b)(2) (Supp. I 1980) prohibits the provision of legal assistance in any criminal proceedings, except to individuals charged with a misdemeanor or lesser offense or its equivalent in an Indian Tribal Court. Exceptions to this restriction exist when the court appoints a legal services attorney to represent a defendant. *Id.* See also 42 U.S.C. § 2996f(b)(3) (Supp. I 1977) regarding prohibition of legal assistance for those civil actions arising out of malfeasance of officers or officials with regard to challenging the validity of the criminal conviction. See also 45 C.F.R. §§ 1613.1-4, 1615.2 (1979).

121. 42 U.S.C. § 2996f(b)(9) (Supp. III 1979). See also H.R. 3480, 97th Cong., 1st Sess., § 14(a)(3) (1981) (prohibiting litigation or legal advice relating to the desegregation of schools).

122. *Id.* § 2996f(b)(10) (Supp. III 1979). The 1977 Amendments modified the prohibition to allow legal assistance in those cases in which an eligible client alleges that he was improperly classified prior to July 1, 1973. See 123 Cong. Rec. at 19,690-91; H.R. Conf. Rep. No. 825, 95th Cong. 1st Sess. 16 (1977). See also 123 Cong. Rec. 17,025 (1977). Opponents of the current law point out that legal services offices still cannot challenge military discharge classifications, and hence the denial of job opportunities and veterans benefits to eligible clients. See Oversight of the Legal Services Corporation 1980: Hearing Before the Subcomm. on Employment, Poverty and Migratory Labor of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 139 (1980) (statement of N.O. Metzger).

123. 42 U.S.C. § 2996f(b)(8) (Supp. III 1979) forbids the Corporation from making funds available

to provide legal assistance with respect to any proceeding or litigation which seeks to procure a non-therapeutic abortion or to compel any individual or institution to perform an abortion, or to assist in the performance of an abortion, or to provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution. . . .

The Senate bill would have prohibited abortions except when "necessary to save the life of the mother." In conference, the Senate receded. S. Conf. Rep. No. 845, 93d Cong., 2d Sess. 27, reprinted in 1974 U.S. Code Cong. & Ad. News 3897, 3908. That Senate position was substantially reinstated in the 1981 House reauthorization bill. H.R. 3480, 97th Cong., 1st Sess., § 14(a)(2) (1981).

124. 42 U.S.C. § 2996f(b)(4) (1976). "Juvenile" referred to an unemancipated person less than eighteen. The prohibition against representation of juveniles was not total. Exceptions were made for those juveniles with parental or guardian consent, upon the request of a court, in child abuse and neglect cases, or "for the protection of such person(s) . . . [or] for purpose of securing . . . services under law in cases not involving the child's parent or guardian as a defendant or respondent." *Id.*

125. Pub. L. No. 95-222, § 10, 91 Stat. 1619 (1977). The restrictions had "been demonstrated to be inappropriate and because of their complexity [had] discouraged legal services attorneys from representing juveniles in certain cases." 123 Cong. Rec. 33,354 (1977) (remarks of Sen.

tended debate, a population exclusion restricting representation of illegal aliens was added.¹²⁶ The fiscal 1981 congressional appropriation was conditioned on the exclusion of cases involving homosexuality or gay rights.¹²⁷

Besides restricting service in specific areas, Congress has also tried to specify affirmative priorities for the use of Corporation funds. It attempted either to allocate specific amounts to serve specified populations¹²⁸ or to order the Corporation to develop programs that would serve discrete categories of the poor.¹²⁹ Congress believed that the failure to set national priorities resulted in de facto discrimination at the local level against systematically underserved groups, including the elderly, certain ethnic groups and native Americans.

The treatment of the elderly in legal services' programs highlights this problem. Although 16.2 percent of the poor are elderly, most programs do not serve a corresponding proportion of elderly clients.¹³⁰ It is unclear whether this reflects a lack of interest on the part of legal aid offices or a lack of mobility on the part of the elderly. Either way, the insufficient attention paid to the legal needs of the aged¹³¹ has spurred the development of federal and state legal aid schemes aimed at the elderly client. Similar concerns have led to

Cranston). The restrictions were dropped in conference. See H.R. Conf. Rep. No. 825, 95th Cong., 1st Sess. 14 (1977).

126. A rider appended to the Corporation's 1980 appropriation prohibits the use of Corporation funds "to carry out any activities for or on behalf of any individual who is known to be an alien in the United States in violation of the Immigration and Nationality Act." Departments of State, Justice and Commerce, the Judiciary and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-68, 93 Stat. 416, 433 (1979). The Corporation has interpreted the rider to apply only to cases where the alien has been adjudicated to be in illegal status, thus considerably narrowing the scope of the restriction. See LSC Gen. Counsel Op. (Dec. 5, 1979), reprinted in Departments of State, Justice, Commerce, the Judiciary and Related Agencies Appropriations for 1981, Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 96th Cong., 2d Sess., Part 2, 161 (1980). "We don't ask a client when they walk in the office, 'Are you an illegal alien?'" *Id.* at 159 (remarks of Dan Bradley, Corporation President). In contrast, Immigration and Naturalization Service regulations now require an indigent alien under exclusion or deportation procedures to be informed of the availability of free legal assistance if the local program has evinced a willingness to provide them. 8 C.F.R. §§ 236.2(a), 292.2, 292a (1980).

Many Congressmen were not satisfied with this exclusion, and H.R. 3480, 97th Cong., 1st Sess. § 14(a)(6) (1981) prohibits legal assistance to aliens with specified exceptions. See discussion of restrictions, *supra* note 1.

127. H.R. 3480, 97th Cong., 1st Sess. (1981) § 14(a)(6) prohibits the expenditure of funds on litigation that will "adjudicate the legalization of homosexuality." The meaning of this statutory language is unclear. See 127 Cong. Rec. H. 3,048 (daily ed. June 17, 1981); H. 3,074-86 (daily ed. June 18, 1981).

128. See H.R. 6666, 95th Cong., 1st Sess., 123 Cong. Rec. 20,899 (1977) (Rep. Biaggi's amendment to identify the elderly and handicapped and emphasize their need for accessibility in receiving legal services).

129. See Proposed Amendments to the Legal Services Corporation Act of 1974: Hearings on S. 1303 Before the Subcomm. on Employment, Poverty and Migratory Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 12-30 (1977) [hereinafter cited as Proposed Amendments] (statement of T. Ehrlich).

130. A Report to the United States Commission on Civil Rights, *The Age Discrimination Study* (Part II) 104 (Jan. 1979). According to an April 1976 report to Congress cited by this study, persons over 65 constitute 13.6% of the poverty population. *Id.*

131. See *id.* at 104-06. The elderly, it is argued, "must have someplace to turn for adequate and effective legal assistance in dealing with a vast complex of crucial legal issues if they are to take full advantage of the Governmental programs designed to benefit the elderly." S. Rep. No. 255, 94th Cong., 1st Sess. 25 (1975).

claims for special funding formulas for native American and rural populations.

The Corporation was able to escape any requirement that designated funds be set aside for specific poverty groups. But congressional concern about the special needs of certain disadvantaged groups led to compromise language that required the Corporation to adopt procedures that would weigh "the relative needs of eligible clients for . . . assistance . . . including particularly the needs for service on the part of significant segments of the population of eligible clients with special difficulties of access to legal services or special legal problems (including elderly and handicapped individuals)."¹³² This precatory language suggests congressional unhappiness with the Corporation's "generalist" approach.¹³³

Congressional restrictions on the representation of specified subject and population categories reflect apparent congressional rejection of the access-right justification for government subsidy. Congress may have justifiable political or moral rationales for such legislated restrictions.¹³⁴ They cannot, however, be justified by recourse to a theory of access rights. Under access

132. 42 U.S.C. § 2996f(a)(2)(C)(i) (Supp. III 1979). The listing of groups in the amendment was not intended to be exhaustive. See 123 Cong. Rec. 19,689 (daily ed. Dec. 15, 1977) (remarks of Sen. Nelson). While reinforcing the general, suggestive nature of the amendment, the House-Senate Conference agreed that elderly and handicapped persons have special difficulties of access to legal services or special legal problems which must be considered in the priority-setting process. H.R. Rep. No. 825, 95th Cong., 1st Sess. 12 (1977). Congress mandated a special needs assessment study concerning elderly persons, handicapped persons, veterans, Native Americans, migrants, and seasonal farmworkers, persons with limited English speaking abilities, those in sparsely populated areas with harsh climate and inadequate transportation. 42 U.S.C. 2996(f) (Supp. III 1977).

As Thomas Erlich pointed out, the Corporation sees its responsibility as "the client community," that is to say, the total "community of poor persons who are represented by the program." Legal Services Corporation Oversight—Hearing Before a Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 28 (1979). The Corporation opposed specifically earmarking funds for special groups, in that other discrete groups of poor persons might be disserved. See Proposed Amendments, *supra* note 129, at 16. Special funding would mean "special consideration" for some groups and would "seriously fractionate the client community." *Id.* at 16-17. Rather than fuel such intrapoverity conflicts the Corporation took a generalist approach, attempting to serve all persons eligible within a geographic area and not focusing on components or "subclasses" of the poor when implementing its mandate.

133. The Corporation takes the view that "choices about legal problems associated with specific groups of poor people are better drawn at the local, rather than the national level." Hearing, *supra* note 132, at 5-6.

134. Both subject matter and function restrictions have been condemned by liberals, and the controversy reflects the lack of political consensus over those legal services deemed marginal to the program's central mission. Senator Nelson, Chairman of the Subcommittee on Employment, Poverty, and Migratory Labor, noted in the 1977 hearings that "the limitations written into the statute were written in there for purposes of getting the bill passed." Legal Services Corporation Act Amendments: Hearings on S. 1303 Before Senate Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm. on Labor and Human Resources, 95th Cong., 1st Sess. 94 (1977). Later in the hearing Senator Nelson again stressed the political consideration that prompted the restrictions:

As a member of the committee from the time the Poverty Act was enacted and from the time the legal services program was created, I can tell you that the rationale for the prohibitions was that without them there would be no legal services for the poor . . . [t]he fact is that limitations were imposed because we could not get the votes without them. It is as simple as that.

Id. at 172.

right theory, the legitimacy of a citizen's claim to legal services does not depend upon the purpose to which he intends to use the courts. Rather, his claim to legal assistance is based on his right of access to the legal system. The substantive goals for which he claims recourse to law are irrelevant to the strength of his access claim.¹³⁵ In contrast, the congressional use of population and category restrictions bears analogy to social-utility-based allocation criteria. Both flow from strategic decisions, moral or political, about the most provident use of legal services funds. The former focuses on principles of desert, the latter on the most efficient distribution of legal resources.

Congress has also restricted the functions that federally-funded legal aid lawyers can perform by limiting the types of legal work that can be undertaken for a client. The restrictions on lobbying have been among the most controversial. The 1974 Legal Services Corporation Act forbids Corporation-funded attorneys from influencing "the passage or defeat" of any federal, state or local legislation.¹³⁶ Attorneys may not "influence the passage, amendment

135. The only subject-matter restriction that does not offend a client-oriented perspective is the congressional ban on criminal representation. This ban may be seen as a decision to separate defense functions in civil cases from state and local constitutional responsibilities for criminal defense, thus continuing an historical trend to separate functions due to funding contingencies. R. Smith, Justice and the Poor 103, 105-07 (3d ed. 1924).

In truth, the skills required for a criminal lawyer often differ from skills necessary for civil work. Further, the constitutional mandate that state and local governments fund criminal legal aid results in an independent funding source for public defender and assigned counsel programs. The decision to create a federal presence in this overlapping area might result in a substitution of federal for local funds in the criminal area. The total amount of monies available for legal aid then would not increase.

Nonetheless, legal services and public defender programs have "shared concerns" that "can serve as a basis for creative and efficient cooperation," Geier & Ginsberg, Cooperation between Legal Services and Public Defender Programs, 32 NLADA Briefcase, Jan. 1975, at 125. This is true even if one rejects the ideological underpinning of their position concerning "the inescapable relation of poverty to crime." *Id.* at 126. However the funding responsibilities are allocated, the separation of service at the delivery point is anachronistic and artificial. It is inefficient to tell a client, "[W]e'll handle your false pretences [*sic*] charge but you'll have to go across town to find a lawyer to handle the collection case involving the same facts." Brooks, President's Page, 33 NLADA Briefcase, May 1976, at 67.

136. 42 U.S.C. § 299e(c)(2) (1976). The congressional attitude towards lobbying by legal services attorneys has tacked and veered and is suggestive of the lack of congressional consensus over the program's purpose. In 1977 legislation was introduced to allow legislative representation without a specific client, when "a government agency, legislative body, a committee or member thereof . . . permits the general public to participate (by comment or otherwise) in the consideration of a measure." H.R. 5528, 95th Cong., 1st Sess., 123 Cong. Rec. 2546 (1977). This language was deleted in the House Judiciary Committee; the bill was reintroduced as H.R. 6666. 123 Cong. Rec. 3,707 (1977).

The House later passed legislation to permit a legal services program to engage in legislative or administrative representation on an issue directly affecting eligible clients if the board of the local program had determined, in consultation with the client community, that the issue was a priority for the program. *Id.* at 6,533 (voice vote). Several tacks were taken in attacking the Corporation's lobbying activities. Congresswoman Holt argued that "the taxpayers' money should not be used to fund special interest lobbies whose purpose is to change national policy." *Id.* at 5,672. Rep. McClory feared that an all purpose client would be developed by legal service offices to fulfill the requirement of a specific eligible client, and that agencies would "spend more time in legislation than in helping some more pressing or more immediate problem of the person." *Id.* at 6,532. The House language was rejected in conference and the 1977 amendments substantially retained the lobbying restriction albeit in slightly relaxed form. See H.R. Conf. Rep. No. 825, 95th Cong., 1st Sess. 13 (1977) (Senate demanded that lobbying be limited to "measures directly affecting the activities under [the Act] of the recipient or the Legal Services Corporation");

or revocation" of any federal, state or local executive or administrative agency.¹³⁷ Further, Corporation funds may not be used "to support or conduct training programs for the purpose of advocating particular public policies or encouraging political activities, labor or antilabor activities, boycotts, picketing, strikes and demonstrations, as distinguished from the dissemination of information about such policies or activities."¹³⁸ Congressional concern about the open textured character of these restrictions led to the passage of a rider in the 1979 appropriations statute prohibiting the use of Corporation funds for publicity or propaganda campaigns designed to influence federal or state legislation.¹³⁹

see also 123 Cong. Rec. 12,762 (remarks of Rep. Kastenmeier). The result of this controversy was the 1977 restriction, codified at 42 U.S.C. § 2996f(a)(5)(A)(B) (Supp. III 1979), which reads as follows:

[T]he Corporation shall—

- (5) insure that no funds made available to recipients by the Corporation shall be used at any time, directly or indirectly, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State or local agency, or by any State or local legislative bodies, or State proposals by initiative petition, except where—
 - (A) representation by an employee of a recipient of any eligible client is necessary to the provision of legal advice and representation with respect to such client's legal rights and responsibilities (which shall not be construed to permit an attorney or a recipient employee to solicit a client, in violation of professional responsibilities, for the purpose of making such representation possible); or
 - (B) a governmental agency, legislative body, a committee, or a member thereof
 - (i) requests personnel of the recipient to testify, draft, or review measures or to make representations to such agency, body, committee, or member, or
 - (ii) is considering a measure directly affecting the activities under this title of the recipient or the Corporation.

See also 45 C.F.R. § 1612.4 (1979).

137. 42 U.S.C. § 2996f(a)(5) (1976).

138. *Id.* § 2996f(b)(6). Attorneys were also forbidden to encourage any such demonstrations. *Id.* § 2996e(b)(5)(a).

139. Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act of 1980, Pub. L. No. 96-68, 93 Stat. 416 (1979), provides that "[n]o part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress." *Id.* at 435.

It is unclear whether this rider adds anything to existing statutory and regulatory restrictions. The amendment's language is "precisely the same as provisions added to the Treasury, Postal Service, and General Government Appropriation Acts, and it is not clear what, if any, further restriction it places on lobbying activities of LSC funded programs." Departments of State, Justice, Commerce, the Judiciary and Related Agencies, Appropriations for 1980: Hearings Before a Subcomm. of the House Comm. on Appropriations, 96th Cong., 1st Sess., Part 6, 477 (1979).

In the judgment of Dan Bradley, LSC president, the additional language is "unnecessary, given the much clearer limitations placed on lobbying activities by the Legal Services Corporation Act itself." Departments of State, Justice, Commerce, the Judiciary and Related Agencies, Appropriations for 1981: Hearings Before a Subcomm. of the House Comm. on Appropriations, 96th Cong., 2d Sess. 142 (1980) (testimony of Dan Bradley). However, he did not recommend deletion since "if it would raise [congressional] concerns that the Committee was somehow opening doors to activities that are otherwise impermissible." *Id.* Nevertheless, the Corporation promulgated in March 1981 further restrictions on legislative advocacy to "ensure . . . day-to-day observance" of the existing congressional restrictions. 46 Fed. Reg. 16,267 (Mar. 12, 1981).

The extent to which the Corporation and its grantees have obeyed these restrictions has been disputed. See Letter from Acting Comptroller General Milton J. Soclar to Representative F. James Sensenbrenner (May 1, 1981), reprinted in 127 Cong. Rec. H. 1,843 (daily ed. May 5, 1981) (charging LSC with violating relevant anti-lobbying statutes and appropriation restrictions). H.R. 3480, 97th Cong., 1st Sess. § 5(a) (1981) would tighten the lobbying restrictions on the Corporation, and § 5(b) would increase restrictions on grantees.

Legal services attorneys have also been prohibited from engaging in certain extralegal functions for their own purposes or on behalf of eligible clients.¹⁴⁰ The 1974 Act forbade legal services' programs from using funds to "organize, assist to organize, or to encourage to organize for the creation or formation of . . . any organization, association, coalition, alliance, or federation."¹⁴¹ The 1977 amendments relaxed these restrictions, apparently allowing assistance to such entities.¹⁴² Presently the statute does not prevent "the provision of legal assistance to eligible clients" for group organization or incorporation.¹⁴³

These restrictions have been attacked as unconstitutional¹⁴⁴ and unethical, but it is unlikely that they are either, although they may be debatable social policy.¹⁴⁵ The proposed subject-matter restrictions are well within governmental powers. Surely specific limited grants of service, such as legal aid to disaster victims¹⁴⁶ or legal assistance to taxpayers,¹⁴⁷ are proper government

140. Thus, legal services attorneys may not engage in voter registration activity or provide transportation for prospective voters to the polls. See 42 U.S.C. § 2996f(a)(6)(A)-(C) (1976).

In the 1974 Act employees were prohibited from partisan and nonpartisan political activities. Thus the restriction in the 1974 Act acted as a "super-Hatch Act" by forbidding Corporation employees from engaging in nonpartisan political activity. Legal Services Corporation Act Amendments: Hearings on S. 1303 Before the Subcomm. on Employment, Poverty and Migratory Labor of the Senate Comm. on Labor and Human Resources, 95th Cong., 1st Sess. 28 (1977). The Hatch Act, 5 U.S.C. § 1503 (1976), permits nonpartisan political candidacies by government employees.

The 1977 LSC Amendments Act did away with the ban on nonpartisan candidacies and made the Hatch Act limitations equally applicable to Corporation employees. See Pub. L. No. 95-222, § 7(a), 91 Stat. 1620 (1977) (codified at 42 U.S.C. § 2996e(e)(2) (Supp. III 1979)).

141. See 42 U.S.C. § 2996f(b)(6) (1974). Critics of this view have argued that organizing poor people using government funds is "a legitimate purpose just as organizing shareholders who might consult a private attorney about a stockholders dividend statement." Legal Services Hearings Before Subcomm. of House Judiciary Comm., 95th Cong., 1st Sess. 102 (1977) (statement of L. Pritchard).

142. 42 U.S.C. § 2996f(b)(7) (Supp. III 1979). In conference, the provision was clarified so as to prohibit the use of funds to initiate organizing activity "while making clear that a Legal Services program may provide legal assistance to an eligible client who intends to form or organize such an entity and seeks assistance from the recipient [of congressional funds]." 123 Cong. Rec. 19,690 (daily ed. Dec. 15, 1977) (remarks of Sen. Nelson); see also H.R. Conf. Rep. No. 825, 95th Cong., 1st Sess. 15 (1977).

143. The current statutory language, although it continues to discourage organizing, is a change from the original Legal Services Corporation Act of 1974. Gone is the prohibition against a program's ability to "assist," "encourage" or "plan for" an association. See 123 Cong. Rec. 33,340 (1977). The change marks a move from specific descriptions (assist, encourage, plan for) to more general words which have a different meaning.

H.R. 3480, 97th Cong., 1st Sess., § 14(a)(1) (1981) tightens these restrictions on the claimed basis that the law as presently stated has been continually violated. The House Bill prohibits the dissemination of information "advocating particular public policies or encouraging political activities, labor or antilabor activities, boycotts, picketing, strikes, and demonstrations" as part of a training program. *Id.*

144. The constitutionality of various restrictions on service is discussed in Note, Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act, 61 Cornell L. Rev. 734 (1976).

145. See *Chemung Welfare Rights Org. v. Cramton*, [1976-78 Transfer Binder] Pov. L. Rep. (CCH) ¶ 23,004 (restrictions on picketing and organizing). See 45 C.F.R. § 1612.2 (1980).

146. See Disaster Relief Act of 1974, Pub. L. No. 93-288, § 412, 88 Stat. 157 (codified at 42 U.S.C. § 5182 (1976)).

147. See Proposed Federal Taxpayers Relief Act of 1975, H.R. 9599, 94th Cong., 1st Sess., 121 Cong. Rec. 28,821-24 (1975) (Rep. Vanik), which urged that the Legal Services Corporation set up

determinations. Nor is such limited service unethical. Many attorneys limit their practice to particular areas. No group of attorneys is required to provide a full panoply of service—one's professional duty is to do competently whatever job one chooses to take on. An attorney who secures a divorce for a client is not obliged to handle his bankruptcy. Indeed, an attorney who takes on the trial of a matter is not required to undertake the appeal. Of course, when pursuing a discrete legal claim, restrictions on the manner or object of discovery proceedings or the nature of the remedy pursued would be improper.

Congress recognized the necessity for resource allocation mechanisms in the 1974 Act, which required the Corporation to "establish priorities to insure that persons least able to afford legal assistance are given preference in the furnishing of such assistance."¹⁴⁸ No definition of "least able" was provided. There is no evidence whether Congress was focusing on the problem of the "poorest of the poor," or merely referring to the need to set income eligibility guidelines that exclude the middle class.

In 1977 Congress delegated to local programs, through the Legal Services Corporation, the duty to make such allocation procedures. The Corporation's duty was to "insure that . . . recipients, consistent with goals established by the Corporation, adopt procedures for determining and implementing priorities for the provision of such assistance, taking into account the relative needs of eligible clients for such assistance."¹⁴⁹ The programs were further charged with accommodating the needs of those "significant segments of the population of eligible clients with special difficulties of access to legal services or special legal problems (including elderly and handicapped individuals)."¹⁵⁰ The legislative history gives little guidance on this priority-setting process. Substantively it suggests that programs take into account "relative needs" and special access problems. It in no way resolves the debate over who should allocate resources or what criteria they should use. In particular it neither requires nor prohibits the use of social utility or impact criteria. The allocative requirements made by the statute, however, suggest comparisons by individual needs rather than considerations of impact on the poor generally.

Restrictions on legal aid functions are not inconsistent with the theory of access rights. The congressional desire to limit the core meaning of the right to legal services to litigation functions reflects the view that the government's responsibility to provide legal expertise is limited to the single function of ensuring access to the legal system. According to this view, securing access to a dispute-resolution forum is separated from claims concerning access to the leg-

a three year pilot project to aid taxpayers on a sliding scale basis. H.R. 9599 § 5(c). The proposal was opposed by the IRS, see *Proposals for Administrative Changes in Internal Revenue Service Procedure: Hearings Before the Committee on Oversight of the House Ways and Means Committee, 94th Cong., 1st Sess. 433 (1975)* (statement of Comm'r Donald C. Alexander), and died in committee and was not included in the Tax Reform Act of 1976, Pub. L. No. 94-455; 90 Stat. 1520.

148. 42 U.S.C. § 2996f(a)(2)(C) (1976).

149. Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, § 9(b)(1), 91 Stat. 1619, 1621.

150. *Id.*

islative forum "for individuals who seek redress of grievances."¹⁵¹ While the importance of that latter function is not denigrated, it is not, under the theory presented here, an essential government responsibility.

While this claim has been hotly disputed, it is clear that the justification for legislative advocacy is based on different theoretical principles than the justification for litigative services developed in this Article. The justification of government subsidy for litigation flows from a citizen's claim of access to the legal system in the context of general principles of justice and theories of citizenship. In contrast, the justification for legislative advocacy flows either from a general equity argument—what the rich get the poor should have¹⁵²—or from an argument for government subsidy for interest group representation in the legislature based on a theory of "market failure,"¹⁵³ by which substantial groups in the population are unable to participate fully in legislative politics. Some interest groups may be too poor or demoralized to enter the political process. In some instances, the group interests represented, such as environmental or consumer concerns, may be too "diffuse"¹⁵⁴ to allow for the unaided development of political pressure groups. Technical access to the legislative process may not, in itself, be sufficient for robust representation in the political arena. This failure of the pluralist model, it is argued, can be remedied only by government creation or subsidy of "countervailing" interest groups¹⁵⁵ to correct this bias. This "market failure" argument has a far wider reach than lobbying by legal aid groups. It is the underlying justification for a host of government interventions in the legislative and administrative process including intervenor financing proposals¹⁵⁶ and statutory fee-shifting to encourage "private attorneys-general."¹⁵⁷ Indeed the "market-failure" concept

151. Proposed Amendments to the Legal Services Corporation Act: Hearings on H.R. 3719 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 57 (1977) (statement of Thomas Ehrlich) [hereinafter cited as Hearings on H.R. 3719].

152. "[N]o lawyer working in the legal services program should be restricted from doing anything that a lawyer for DuPont or General Motors would be permitted to do." *Id.* at 74 (statement of Representative Robert F. Drinan).

153. Trubek, *Public Advocacy: Administrative Government and the Representation of Diffuse Interests*, in 3 *Access to Justice* 445, 453 (M. Cappelletti & B. Garth eds. 1979). See also Trubek, Trubek & Becker, *Legal Services and the Administrative State: From Public Interest Law to Public Advocacy*, in *Innovations in the Legal Services* 131 (E. Blankenberg ed. 1980); Weisbrod, *Problems of Enhancing the Public Interest: Toward a Model of Government Failures*, in *Public Interest Law* 30 (B. Weisbrod, J. Handler & N. Komesar eds. 1978).

154. Trubek, Trubek, & Becker, *supra* note 153, at 142; Trubek, *supra* note 153, at 457-66. Trubek's analysis of "diffuse" groups, *id.* at 460, is directed at consumer and environmental groups rather than the poor. The comparisons between these underrepresented groups have been insufficiently explored.

155. This concept of countervailing power is drawn from John Kenneth Galbraith. See J. Galbraith, *American Capitalism: The Concept of Countervailing Power* 110-14 (1956). See also J. Galbraith, *The New Industrial State* (1967). It is applied to the context of access to justice by Mauro Cappelletti. Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 *Mich. L. Rev.* 793, 800, 848 (1975).

156. See, e.g., Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, section 202(a), 15 U.S.C. § 57a(h)(1) (1976); Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 *Geo. L.J.* 51 (1981).

157. See, e.g., Attorneys' Fee Civil Rights Award Act of 1976, 42 U.S.C. § 1988 (1976). For a listing of over 70 statutes allowing attorney's fee-shifting by prevailing parties in litigation, see

can be understood to justify the organization and sustenance of all kinds of pressure groups. While Congress undoubtedly has the power to create autonomous citizens' lobbying organizations, that enterprise falls outside the purview of legal aid and must be justified on different grounds.¹⁵⁸

The claim that legal assistance "must not be narrowly construed"¹⁵⁹ has been put forward as an ethical mandate for legal services attorneys on the view that full representation encompasses a wide variety of nonlitigation tasks including, when appropriate, legislative advocacy. This view is surely misconceived. While many attorneys, particularly in the Washington area, fulfill a variety of lawyering roles, legislative advocacy is not an inseparable part of a lawyer's workload. Whether or not congressional limitations on lobbying are wise or equitable they are unlikely to place the legal aid attorney in an ethical vise. Such service limitations, whether mandated by Congress or proposed by a local program's board of directors, do not raise questions of professional ethics.

C. The Role of the Legal Services Corporation in Resource Allocation

The congressional decision to create an independent nonprofit corporation to manage the federal subsidy for legal services was based on the view that an autonomous program would be free from political interference. This freedom, it was felt, would allow programs the latitude to focus on their mandate—the provision of legal services to the poor.

The Corporation, however, serves as more than the conduit for federal funds; it is the chief funding source for legal services. As such the Corporation has significant influence on the allocation of resources for and by legal services programs. Its guidelines and regulations provide "policy guidance . . . to insure that congressional intent is carried out,"¹⁶⁰ thus shaping implementation of the Act. Such management control has been exercised in at least three ways: (1) control over the geographical placement of programs and their funding levels; (2) control over the boundaries of client eligibility; (3) control over the priority-setting process.

During the Corporation's early years decisions regarding the geographical distribution of expansion funds were governed by two themes. First, a commitment to the minimum access plan¹⁶¹ which resulted in the placement of thinly funded programs throughout the country. Second, an attempt to cen-

Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 677, 707-19, 726-27 (1977).

158. Note, however, Cappelletti, *supra* note 155, who argues that the state can no longer fulfill its traditional role as protector of the public interest and that autonomous private public interest groups are necessary for that purpose.

159. Hearings on H.R. 3719, *supra* note 151, at 102 (statement of Llewelyn Pritchard).

160. R. Schmidt and J. Waller, Program Management and Evaluation, in *The Legal Services Corporation: A Recommended Approach 2* (Dec. 7, 1977, Urban Institute).

161. The minimum access plan would provide the equivalent of two attorneys per 10,000 people. It has been identified as the short-term goal of the Corporation. See, e.g., Legal Services Corporation, Annual Report 1977, at 10.

tralize existing programs for purposes of efficiency. Existing programs were enlarged, and contiguously located small programs amalgamated.¹⁶² By its control over "special needs" grants¹⁶³ and other discretionary nonformula funding the Corporation exercised further influence over the direction of program growth and development. This influence was limited, however, by Congress' grant-in-aid approach to federal subsidy that maximized program autonomy.¹⁶⁴ Further, the complex defunding procedures in the 1977 amendments created a presumption of funding continuity which inhibited effective control of local program activity.¹⁶⁵

Control over client eligibility was mandated originally by the 1974 Act, which required that the Corporation establish priorities that would give a service preference to "those who would be otherwise unable to afford adequate legal counsel."¹⁶⁶ The House Report for an early draft of this legislation makes clear: "Regulations promulgated by the corporation will assure that the poorest of the poor receive a priority in the provision of legal services. . . ."¹⁶⁷ This standard was omitted in the 1977 Amendments because preferences based on income might "upset priorities of the client community by requiring a less urgent legal problem to be given greater consideration, merely because the client had a lower income."¹⁶⁸ The present Act does not contain specific income eligibility criteria. Instead, the Corporation has delegated the choice of income limits to local programs which set their own standards for client eligibility within maximum income levels set by the Corporation.¹⁶⁹ These guidelines limit legal assistance to persons whose income does not exceed 125 percent of the Office of Management and Budget's

162. The Corporation made special efforts to order the amalgamation of small programs. See, e.g., *Spokane County Legal Servs. v. Legal Servs. Corp.*, 614 F.2d 662, (9th Cir. 1980); *Neighborhood Legal Servs. Inc. v. Legal Servs. Corp.*, 466 F. Supp. 1148 (D. Conn. 1979).

163. Legal Services Corporation, Annual Report 1978, at 9.

164. The problems in ensuring "local commitment to federal performance objectives" in grant-in-aid programs are reviewed in W. Williams, *Government by Agency: Lessons from the Social Program Grants-in-Aid Experience* xi passim (1980). The problem of ensuring grantee accountability is a generic one. See Hood, *Government by Other Means: The Grants Economy and the Contract State*, in W.J.M.M. *Political Questions* 146 (B. Chapman & A. Potter eds. 1974); Porter & Warner, *How Effective Are Grantor Controls? The Case of Federal Aid to Education, in Transfers in an Urbanized Economy* 276 (D. Boulding, M. Pfaff & A. Pfaff eds. 1973).

165. See Pub. L. No. 222, 95th Cong., 1st Sess. § 1, 91 Stat. 1619 (1977) (codified at 42 U.S.C. § 2996j (Supp. III 1979)). These provisions expanded the hearing procedures in the 1974 Act by requiring the appointment of an independent hearing examiner, when requested, before any final decision by the Corporation. See § 1011(2), as amended by § 10 of Pub. Law 95-222; Conference Report No. 825, 95th Cong., 1st Sess. (1977) (accompanying H.R. 6666). See 45 C.F.R. § 1623 (1978).

H.R. 3480, 97th Cong., 1st Sess., § 4(b) (1981), would repeal section 1011 of the Legal Services Corp. Act as amended and would no longer require that the Corporation hold a hearing prior to denying a refunding application. Notice and a hearing would still be required for suspensions and terminations of more than thirty days, however. See id. § 4(a). The propriety of such presumptive funding was discussed at 127 Cong. Rec. H. 2,990-93 (daily ed. June 16, 1981).

166. 42 U.S.C. § 2996(2) (1976) (amended 1977).

167. H.R. Rep. No. 247, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S. Code Cong. & Ad. News 3872, 3880.

168. H.R. Rep. No. 310, 95th Cong., 1st Sess. 10, reprinted in 1977 U.S. Code Cong. & Ad. News 4503, 4512.

169. 45 C.F.R. §§ 1611.3, .5 (1980).

(OMB) poverty threshold.¹⁷⁰ In most states, this is approximately \$5,388 for an individual and \$10,563 for a family of four.¹⁷¹ Otherwise ineligible persons may be eligible for legal services if a staff attorney takes into account "[t]he cost of obtaining private legal representation with respect to the particular matter in which assistance is sought."¹⁷² Attorneys may also consider "[t]he consequences for the individual if legal assistance is denied."¹⁷³

The Corporation also influences the priority setting decisions made by local programs. Under OEO, an overt effort was made to enforce law reform as a programmatic priority "irrespective of the attitudes held by board or staff leaders of grantees."¹⁷⁴ National goals and guidelines were laid down for programs to follow.¹⁷⁵ Evaluations were used to accomplish "major surgery on clearly deficient grantees."¹⁷⁶ This effort reflected a continuous tension between national policy and local control.¹⁷⁷ OEO, however, showed "its determination to enforce its demands by cutting back the funds of those offices which it [did] not regard as properly oriented."¹⁷⁸

The Legal Services Corporation took a different tack, delegating in large measure its responsibility to establish service priorities for resource allocation to local programs. The Corporation concluded that "[t]he specific mix of services and case types undertaken will be a matter for local judgment,"¹⁷⁹ not national policy. The abandonment of strong efforts to influence policy meant that legal services staffs became "increasingly autonomous . . . [and] free to set their own priorities."¹⁸⁰ Thus significant evaluation or monitoring of local program activity¹⁸¹ became difficult.

170. Id. § 1611.3(b).

171. 46 Fed. Reg. 19,936 (1981) (to be codified in 45 C.F.R. § 1611 app. A) (excepts Alaska and Hawaii). Authorized exceptions are found in 45 C.F.R. § 1611.4 (1980).

172. 45 C.F.R. § 1611.5(b)(6) (1980). This must be read in conjunction with 45 C.F.R. § 1611.4(a) (1980) if the individual's income exceeds the maximum level.

173. Id. § 1611.5(b)(7) (1980). This must be read in conjunction with 45 C.F.R. § 1611.4(a) (1980) if the individual's income exceeds the maximum level.

174. E. Johnson, *supra* note 101, at 176. In contrast, Gary Bellow suggests that "there was, particularly in the early years, relatively little federal control or regulation of individual programs." Bellow, *supra* note 21, at 338.

175. Office of Economic Opportunity, *Guidelines for Legal Services Programs* (1967). The development of the guidelines is traced in E. Johnson, *supra* note 101, at 106-16.

176. E. Johnson, *supra* note 101, at 173.

177. Hannon, *National Policy versus Local Control: The Legal Services Dilemma*, 5 Cal. W. L. Rev. 223 (1969). This is the core of the Reagan Administration's proposals to situate legal services in the states—although the administration has a different notion of who should exercise such local control.

178. Id. at 230. Katz concurs with this view of national OEO pressure on local programs in his study of the Chicago program. J. Katz, *Poor People's Lawyers in Transition* 252 (prepublication draft 1981). See generally E. Johnson, *supra* note 101, at 163-84.

179. Olmstead & O'Donnell, *Commentary on Singen, Management of Scarce Resources (or How to Be a Better Ant)*, 13 Clearinghouse Rev. 564 (1979). It is unclear why that should be the case. This view is posited on two assumptions: (1) that there are different local or regional needs in every part of the country and that centralized decisionmaking could best reflect these local idiosyncrasies; (2) that each local community should have the choice to decide how it wishes to set its own priorities consonant with its own ideological perspective.

180. J. Katz, *supra* note 178, at 254.

181. Bellow, *supra* note 21, at 343. The General Accounting Office concluded that it is essential that information about resource allocation be centrally collected and evaluated for local

The Corporation's requirement that local programs adopt procedures for establishing priorities in allocating its resources¹⁸² mandates that the procedures include "an appraisal of the needs of eligible clients . . . and their relative importance."¹⁸³ The priority setting procedure must ensure that "*all significant segments of the client community and the [program's] employees*" have an opportunity to participate.¹⁸⁴ This arrangement reflects the Corporation's view that varying local needs require differing program emphases.

Local programs, however, do not have complete autonomy in setting their litigation agenda. The Corporation monitors the actions of the local programs. Were a program to refuse all service work and limit its efforts to "impact litigation," the Corporation would probably step in.¹⁸⁵ By means of informal communication and monitoring by regional offices, the Corporation sensitizes local programs to the outer limits of their autonomy in the priority setting area.¹⁸⁶ While the Corporation has attempted to impose a variety of management controls over local programs, this has been met with tremendous field resistance and has been attacked by field attorneys as "bureaucratic" and stifling.¹⁸⁷ For the most part, however, the Corporation has failed to exercise

projects management and oversight. See GAO Rep. No. HRD-78-100, *Expanding Budget Requests for Civil Legal Needs of the Poor—Is More Control for Effective Services Required?* 17-19, 22 (Apr. 26, 1978).

The GAO accused the Corporation of operating too loose a bureaucratic rein on local grantees. The GAO commented unfavorably on the 1977 struggle between the Corporation and local operation and demonstration projects to obtain national data for a management study. Local offices refused to cooperate, expressing concern over confidentiality and fears that the information would be used to gauge attorney performance and quality of service.

182. 45 C.F.R. § 1620.2(a) (1980). As of January 1979, barely half of the programs surveyed by the Legal Services Corporation Office of Field Services even claimed to have established program priorities. Memorandum from W. Callahan, Draft of Proposed Content for Program Planning Primer (Jan. 12, 1979). Little evaluation has been done as to whether the compliance which has occurred has been meaningful or perfunctory.

183. 45 C.F.R. § 1620.2(a)(1) (1980).

184. *Id.* § 1620.2(a)(2) (1980) (emphasis in original). The original regulations published on November 23, 1976, required recipients to "insure participation by clients and employees of the recipient" whether or not they evinced a desire to participate. 41 Fed. Reg. 51,609 (1976) (codified at 45 C.F.R. § 1620.2(a) (1977)).

185. Thomas Ehrlich suggested that "if we found a program excluded a significant portion of the population in setting its priorities—in New York City, for example, if it excluded the elderly or excluded veterans, excluded Spanish speaking people—we would not allow that to continue without stopping it." Proposed Amendments, *supra* note 129, at 26 (statement of T. Ehrlich, President, LSC). Program staff apparently take a different position, however, suggesting that

Local priority determinations can, in theory, totally exclude an identified group within the eligible population unless some other violation of law is involved. For example, if a program will only see clients at one of its regular offices, all institutionalized persons are excluded from its services. A local judgement to that effect is presently permissible [*sic*].

LSC Research Institute, Section 1007(h) Issues Paper 13-14 (Sept. 13, 1978).

186. Lieberman, *Management Failures in Legal Services Programs: A Structural Dilemma*, 14 Clearinghouse Rev. 143 (1980).

187. Thus one legal services attorney has complained, "There is no longer a sense of community within legal services" blaming in part "a bureaucratic civil service mentality" presumably fostered by the Corporation. Rosenthal, *Legal Services . . . Revisited*, 35 NLADA Briefcase, Sept. 1978, at 128. This malaise in Corporation-staff attorney relations may be responsible, in part, for the growing trend towards unionization of legal services attorneys. Through December 1980, over 50 programs have been unionized. Schorr, *Unionization in Legal Services*, 14 Clearinghouse Rev. 836, 848 (1980). For a discussion of political issues involved in such unionization see *id.* at 844-50. See also Stavitsky, *Lawyer Unionization in Quasi-Governmental Public*

its regulatory powers.

The Corporation has used its abdication of central authority to develop a myth of local autonomy: the Corporation merely provides administrative controls and technical assistance to local programs, but does not control the ways in which local programs choose to spend their money and disclaims responsibility for the choices made.¹⁸⁸ This claim of neutrality depends on an implicit acceptance of the social utility justification for government subsidy and a concomitant rejection, rhetoric notwithstanding, of the theory of access rights.

Even so, the requirement of priority setting has been approved by both courts and ethics committees. The constitutionality of priority setting was upheld in a West Virginia case in which a local program limited its divorce caseload to situations "where the defendant could be personally served and where there were minor children of the marriage whose custody or support was in issue."¹⁸⁹ Further, the American Bar Association Committee on Professional Ethics has approved the use of such priority setting as a vehicle for caseload limitation, at least "to the extent necessary to allocate [resources] fairly and reasonably . . . to establish proper priorities in the interest of making maximum legal services available."¹⁹⁰ Another opinion has suggested that "the refusal of the directors of a legal services office to institute a system of priorities or waiting lists" causes staff attorneys to violate the canons of ethics when unmanageable caseloads cause "inadequate preparation by a staff lawyer or 'neglect' of cases already in hand."¹⁹¹ Thus, it is argued that Corporation-mandated priority setting possesses an ethical imprimatur as well as pragmatic popularity.

The Corporation's eligibility threshold of 125 percent of the OMB poverty line means that eligibility is largely restricted to welfare recipients.¹⁹²

and Private Sectors, 17 Cal. W.L. Rev. 55, 66-70 (1980), for a discussion of the collective bargaining issues.

188. Indeed, one corporation study document urged that the Legal Services Corporation "was not established to regulate the field but to serve the needs of the legal services field offices, staff and clients." Legal Services Corp., *Next Steps for the Legal Services Corporation* 148 (1978).

189. *Calvert v. West Virginia Legal Servs. Plan, Inc.*, 464 F. Supp. 789, 790 (S.D.W. Va., 1979). Barring the use of invidious criteria, it is likely that the adoption of efficiency of utility criteria for priority-setting is constitutionally valid.

190. ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 334, at 6 (1974).

It is possible that, in order to achieve the goal of maximizing legal services, services to individuals may be limited in order to use the program's resources to accomplish law reform in connection with particular legal subject matter. The subject matter priorities must be based on a consideration of the needs of the client community and the resources available to the program. They may not be based on considerations such as the identity of the prospective adverse parties or the nature of the remedy ("class action") to be employed.

Id.

191. ABA Comm. on Ethics and Professional Responsibility, Informal Op. No. 1359 (1976).

192. See 45 C.F.R. § 1611.3 (1979) (125% of official OMB poverty threshold); see also 42 U.S.C. § 2996f(a)(2)(A), (B) (Supp. I 1980).

The General Accounting Office has criticized Congress and the Corporation for permitting grantees to serve individuals above the OMB poverty level, especially in light of the Corporation's funding goal: to provide the poor with minimal, rather than adequate, access to services. The GAO believed that allowing such a threshold "could result in those least able to afford not receiving preference in obtaining free legal services." See Comptroller General of the United States,

This does not extend legal services to all people unable to afford lawyers for basic legal tasks.¹⁹³ Even the middle class may not be able to afford adequate counsel in complex litigation. The contingent fee system may mitigate this problem for personal injury cases and the growth of legal clinics and prepaid schemes may reduce fees in standard cases. Nonetheless, a legal aid scheme that attempted to serve all who could not afford legal assistance would expand its eligibility criteria substantially.¹⁹⁴

Eligibility criteria could be expanded in one of three ways. The first would be by abolishing the income requirement and making legal services available to all. This accepts the implicit logic of the theory of access rights. Indeed, the Older American Act takes this position in principle,¹⁹⁵ although the Act requires that "pending the availability of such programs for all older citizens, [programs] give priority to the elderly with the greatest economic and social need."¹⁹⁶ The second way would be by further developing the concept

Expanding Budget Requests for Civil Legal Needs of the Poor—Is More Control for Effective Services Required? 7 (1978).

193. It is clearly simplistic to imagine that the population divides up neatly into the "poor" who cannot afford legal services and the "nonpoor" who can.

194. The English rule on eligibility is more generous than the American limitations. In the mid-70s the scheme funded almost 40% of civil litigation. The Law Society & the Lord Chancellor's Advisory Committee, 27th Legal Aid Annual Reports 61 (1976-77). A recent revision of the eligibility requirements for part one of the scheme makes legal aid available to those with disposable incomes of not more than £ 4,075 and available without contribution to those with disposable incomes of not more than £ 1,700. However, the capital sum available to the applicant must not be in excess of £ 2,500. The applicant must make a contribution if his capital sum exceeds £ 1,200. Legal Aid (Financial Conditions) No. 2 Regulations 1979, S.I. 1979 No. 351; Legal Aid (Financial Conditions) Regulations 1979, S.I. 1979 No. 1394. See also Legal Advice and Assistance (Financial Conditions) (No. 2) Regulations 1979, S.I. 1979 No. 350; Legal Advice and Assistance (Financial Conditions) (No. 4) Regulations 1979, S.I. 1979 No. 1164. These schemes are well described (with somewhat dated figures) in 1 Royal Commission on Legal Services, Final Report, Cmnd. 7648, at ¶ 11.8-9, 12.1-13.72 (1979).

195. 42 U.S.C. § 3001 (1976 & Supp. III 1979). The regulations governing legal services provided under the Act contain the means-test prohibition, 45 Fed. Reg. 21,161 (1980), as do those concerning the general content of state and area plans. See *id.* at 21,150 (1980). In 1978, legal services became a required part of every aid package under the Act. The Department of Human Resource Development expressed concern that dispensing legal services to the elderly without a means-test (as opposed to other social services) "might be too restrictive for legal services. Legal representation can at times be very expensive, and a single client, who may well need extensive legal services may also be able to pay, at least in part, for those services." The agency invited comment on "whether it would be feasible or appropriate to allow legal service providers to consider an older person's income and resources in deciding the extent of legal representation to provide that person." 44 Fed. Reg. 45,040-41 (1979). After receiving many comments speaking to both sides of the issue, the agency decided to retain the means-test prohibition, but allowed area agencies to "set priorities for the categories of cases for which it will provide legal representation" and to "consider the availability of staff resources" so as to "concentrate on older persons with the greatest economic or social need." 45 Fed. Reg. 21,161 (1980); a legal service provider under the Act cannot require an older person to disclose financial information, except as part of the process of giving legal advice or while providing that person with additional resources and benefits under the Act. 45 Fed. Reg. 21,161 (1980).

196. See the congressional declaration of additional objectives, 42 U.S.C. § 3003(2) (1976). States are to take into account the particular needs of low income persons in choosing which services are to be funded and in locating service offices. See S. Rep. No. 255, 94th Cong., 1st Sess. 18, reprinted in 1975 U.S. Code Cong. & Ad. News 1252, 1259.

A 1976 study gives the impression that Title III area agencies funded by the Act should have been defining and screening for low income groups as part of the congressional mandate and were failing to do so. R. Steinberg, A Study of Funding Agreements and Program Agreements and Monitoring Procedures Affecting the Implementation of Title III of the Older Americans Act,

of "legally needy." Such a criterion of eligibility might be based on the number and intensity of a person's legal problems in relation to that person's income rather than using his income level alone. This criterion would consider: (1) total family needs in the particular case; (2) the seriousness and complexity of the problem; and (3) the private costs of required legal assistance. This concept of "legally needy" would cover individuals whose income and resources are insufficient to cover the cost of necessary services. This approach is already used in Criminal Justice Act determinations to provide government subsidy to criminal defendants. The third way would be for the Corporation to raise the income eligibility level above 125 percent of the OMB poverty line. However, without an increase in congressional funding, such an increase would only compound the existing resource allocation problem.¹⁹⁷

A central argument made by the legal services community against relaxing existing eligibility criteria is that enlarging the eligible group will dilute the purported homogeneity of the program's clientele and the uniformity of its

Rep. No. 3, A Longitudinal Analysis of 97 Area Agencies on Aging 65 (U.S. Cal. Andrus Gerontology Center 1976). Only 22% of the agencies surveyed used any income criteria for individual screening or group targeting and then as areas of emphasis only. *Id.*

The 1978 Conference report made it clear, however, that inclusion of a preference for those with the greatest economic need should not be interpreted as the first step towards institutionalizing a means-test for programs under the Act. See H.R. Rep. 1618, 95th Cong., 2d Sess. 69, reprinted in 1978 U.S. Code Cong. & Ad. News 3429, 3445.

Under the 1978 amendments, states and area agencies are required to "provide assurances that preference will be given to . . . older individuals with the greatest economic or social needs." 42 U.S.C. §§ 3025(a)(2)(E), 3026(a)(5)(A) (1980); see also 45 Fed. Reg. 21,157 (1980). Agencies administering the Act must focus their resources and personnel on needy older persons to satisfy the interstate funding formula, 45 Fed. Reg. 21,152 (1980), when designating service areas, 45 Fed. Reg. 21,153 (1980), when designating community focal points, 45 Fed. Reg. 21,156 (1980), in specific area plans, 45 Fed. Reg. 21,155, and in the delivery of services, 45 Fed. Reg. 21,156. See also H.R. Rep. No. 1150, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S. Code Cong. & Ad. News 3388, 3404. See W. Runciman, *Relative Deprivation and Social Justice* 222-26 (1966) for an analysis of the effect of means-tests on applicants and the reasons for the unpopularity of such tests. The universalist arguments against selectivism in the provision of social services are first, that they *stigmatize* the recipient; second, that the stigma and the lack of information of how to obtain a selective service will lead many in need not to request service; third, that systems of selective service isolate those in need from the rest of society and thus tend to result in service of inferior quality. See Redding, *Universalism and Selectivity*, 40 Pol. Q. 12-22 (Jan.-March 1969). But see R. Titmuss, *Commitment to Welfare* (1968), in which the author points out that "[t]here is . . . no escaping the conclusion that if we are effectively to reach the poor, we must differentiate and discriminate," *id.* at 159, and that "[t]he challenge that faces us is not the choice between universalist and selective social services. The real challenge resides in the question: what particular infrastructure of universalist services is needed in order to provide a framework of values and opportunity bases within and around which can be developed socially acceptable selective services aiming to discriminate positively, with the minimum risk of stigma in favour of those whose needs are greatest?" *Id.* at 135. In the last decade, there has been a movement away from universalism among social welfare theorists in Europe.

197. An increase in funding of legal services proportional to the increase in eligible clients would require a restructuring of the program, if not the profession. The requisite increase in funding would result in increased pressure for participation by the private bar in the available funding pool. Alternatively, the necessary increase in staff attorneys would result in the partial nationalization of the profession. See the scheme proposed by Marvin Frankel in *Justice: Commodity or Public Service* (1978); see generally Frankel, *An Immodest Proposal*, N.Y. Times, Dec. 4, 1977, § 6 (Magazine) at 93-104. See also M. Frankel, *Partisan Justice* 123-29 (1980). For a skeptical discussion of the effects of nationalization, see Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 Law & Pol'y Q. 5 (Jan. 1979); 1 Royal Commission on Legal Services, *Final Report*, Cmnd. 7648, at ¶ 5.7-.8 (1979).

purpose. If the purpose of legal services is to advance the position of the poverty community in society, enlarging the contours of the program to include the lower middle class would expand the variety of interests and concerns that the program must face.¹⁹⁸ For example, a program serving the "near poor" elderly might have to provide service in will drafting and simple real estate transactions. Such service, while important to the individuals involved, does not attack the roots of poverty or the structural concerns of the poor. With a larger eligible client pool, a program would have to set priorities that might ignore, or even conflict with, the needs of a significant portion of its constituency.¹⁹⁹

While suggestions that Legal Services use a concept of legal need tailored to individual circumstances may recognize considerations of fairness or equity, the approach is fraught with practical difficulties. An eligibility determination tied to legal need will vest the legal aid attorney with extraordinary discretion. Such discretion may defeat efforts to ensure client-oriented allocation of the use of legal aid.

D. The Role of the Attorney in Resource Allocation

Congressional, Corporation, and local board prohibitions and mandates are mediated through the managing attorney and his legal staff. Managing attorneys can influence a program's style and may well shape a program in their own image. While formally constrained by priority guidelines developed by the program's board of directors, managing attorneys and their staff have considerable discretion in the manner and intensity with which they approach the problems their clients present them. Similarly, they still control the decision whether or not to take on a client.²⁰⁰

Thus, within the parameters of decisions on resource allocation by Con-

198. See Fretz, *Decent Legal Care for Moderate Income Americans: Hope for the Eighties*, 36 NLADA Briefcase, Mar. 1979, at 2, 4, acknowledging the argument that "expanded eligibility would bring a greater variety of legal problems to an office. It could replace public assistance issues with unemployment compensation; it could eclipse Social Security advocacy with pension litigation."

199. Thus, one former legal services attorney has admitted that he formerly opposed expansion of eligibility limits because such an approach "would create conflicts for the poverty orientation of legal services, would cause class conflict to some extent among clients and between staff members and clients, and, most significantly, would create an irresistible temptation to expand services to middle income clients in pursuit of the money carrot." Letter of Paul J. Kelly, 36 NLADA Briefcase, Summer 1979, at 49. See also Fretz, *supra* note 198, at 3 ("Expansion could drain off to middle class whites those scarce funds intended to benefit poor blacks and other minorities."). Indeed, in a number of issues, such as welfare reform, the lower middle class may perceive its interests to be directly opposed to those of the hardcore poor. However, some commentators, including Fretz, have suggested that expansion "can help repair divisiveness between those who are legally served and those who remain unserved." *Id.* at 4. The importance of moderating such divisiveness, thus seeking out "links between the very poor and the others who are regularly put into conflict with each other by the kind of social legislation we have," has been urged by Edward Sparer. Sparer, *Legal Services and Social Change: The Uneasy Question and the Missing Perspective*, 34 NLADA Briefcase, Dec. 1976, at 58, 61. Sparer suggests that such linkage can be developed by legal aid lawyers looking "to new types of issues," other than expanding income eligibility. *Id.* at 62.

200. The tremendous influence of project directors was underscored as early as 1970 in two studies sponsored by OEO. Project directors in OEO Legal Services emerged as the "most impor-

gress, the Legal Services Corporation, and local boards, it is in large measure the staff in consultation and individual attorneys who set program priorities by the cases they choose to handle. In this respect the line attorney is the "gate-keeper" of the legal services system.²⁰¹ Either he, or a paralegal under his control, will make the initial decision whether a client is eligible for services²⁰² and whether the client will be served. Historically, the individual legal aid attorney had considerable discretion in deciding who should and who should not be served. In part, this was due to the open-textured character of the service regulations. In part it was a result of the lack of any effective review of attorney decisions.

The argument that the attorney should be given discretion to allocate program resources springs from a conviction that a professional should control and determine whom he will serve. The autonomous professional will resist the rules and regulations laid down by a regulatory authority like the Corporation. In the name of professional autonomy he will reject client control as bureaucratic interference with effective service for the poor.

Many commentators have stressed the importance of protecting attorney autonomy. Charles Fried, in an essay entitled "The Lawyer as Friend,"²⁰³ argues that just as we have the right in society to choose our friends, so should we have the right to choose attorneys and attorneys should have a similar right to select clients on the basis of either personal or moral considerations. Some writers have argued that unless attorneys choose their clients on the basis of such feelings, they will violate their duty of fidelity to self.²⁰⁴ Program directors have argued that no one, not even a program director, can set limits on an attorney's decision about whom he will serve. One program director has stated that whatever the program's priorities, if the "staff attorney whom you hired . . . makes the attorney decision 'this is my client, I will serve him,' . . . [I] cannot interfere with that decision."²⁰⁵ The view that "[b]oards can impose

tant individuals in establishing the policy orientation of the projects." Champagne, *The Internal Operation of OEO Legal Services Projects*, 51 J. Urb. L. 649, 651-52 (1974).

201. In fact, Champagne speculated that the "inadequate" emphasis on law reform in OEO Legal Services was directly due to the fact that "many attorneys are simply not interested in law reform." *Id.* at 653. Only 14% of the offices sampled in one study were involved in substantial law reform. He attributed this to "lack of both aggressiveness and interest in law reform." *Id.*

To Champagne, a supporter of a proactive posture by attorneys, the data suggested the OEO attorneys need to be motivated "to pursue goals other than individual case handling," *id.* at 654, even to the extent of "hiring and retaining only those [attorneys] supporting national program goals." *Id.* at 663.

202. There is controversy as to whether the screening process should be undertaken by an attorney or whether a paralegal should undertake intake interviews and make eligibility decisions. This is not a recent controversy. See NLAA, *Proceedings of the 31st Annual Conference* 86-88, 88-89 (1953), for conflicting views on whether "every client that came into an office had a right to see an attorney." *Id.* at 91.

203. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976). See also Dauer & Leff, *Correspondence: The Lawyer as Friend*, 86 Yale L.J. 573 (1977); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 30, 106-13.

204. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 Wash. U.L.Q. 429, 443.

205. ABA Standing Comm. on Ethics & Professional Responsibility, *Ethical Aspects of Restrictions on (Non-Profit) Legal Assistance Offices* 127-28 (1973).

upon the Legal Aid Director or his staff attorneys [orders about] which cases they can get into and which cases they cannot get into . . ."206 has been vigorously rejected.

Professional ethics do not require an attorney, public or private, to take all comers on a first-come, first-served basis. While the Code of Professional Responsibility suggests attorneys should not lightly decline employment, the Code specifically protects the autonomy of an attorney to choose his own clients. Lawyers who fail to derive personal satisfaction from representing a certain client may terminate the relationship. The attorney has no need to live with frustration.²⁰⁷ If a case or client offends his feelings, he may refuse.²⁰⁸ In this respect, the American position differs from the British taxi-rank rule, which requires a barrister to accept a client if his workload permits and the client can pay the fee.²⁰⁹

There are numerous problems with the American position in the legal aid context. It minimizes the role of the client as a participant in determining how program funds should be spent. We cannot assume that the program staff, even with good intentions, would in fact set priorities according to the community's best interest. There is, in fact, little reason to vest the legal aid lawyer with expert status in determining a community's legal agenda. The legal aid lawyer is not likely to be a resident of the community where he works. Often he comes from a different cultural milieu. Thus, even if we accept the lawyer's good faith, we may question his method for assessing community need and the accuracy of his perceptions.

As an example, the legal aid attorney's desire to pursue impact litigation may reflect the intellectual satisfaction and intrinsic legal interest of that

206. *Id.* at 183 (testimony of Mr. Benavides, Director of the Laredo, Texas Legal Aid Society).

207. Pincus, *The Clinical Component in University Professional Education*, 32 *Ohio St. L.J.* 283, 286 (1971).

208. ABA Code of Professional Responsibility EC 2-30 (1978). See also *id.* at EC 2-26. On the other hand, there is a duty to ensure that persons can get some legal representation. The Canons suggest that "a lawyer should not lightly decline proffered employment." They further note that a lawyer must accept "his share of tendered employment which may be unattractive both to him and to the bar generally." *Id.* Further, when requested by a bar association or appointed by a court, a lawyer "should not seek to be excused from undertaking the representation except for compelling reasons." *Id.* at EC 2-29. The old Canons were less specific. Regarding representation of indigent prisoners, they required that an attorney not "seek to be excused for any trivial reason." ABA Canons of Professional Ethics No. 4 (1967). There is a contradiction in the ethical literature on this point. On the one hand, the lawyer is free to accept employment from whomever he wishes. On the other hand, someone must agree to take on the indigent and controversial client. Often that attorney is viewed as a vaguely shady member of the profession. See G. Warvelle, *Essays in Legal Ethics* 132-33 (2d ed. 1920). Perhaps the rule should be reformulated as follows: A lawyer is free to decline employment for whatever reasons he chooses (although not for trivial reasons) unless there is no one available who will volunteer to take the case in which case he needs a compelling reason to decline to accept employment if asked.

209. "Counsel is bound to accept any brief in the Courts in which he professes to practice at a proper professional fee dependent on the length and difficulty of the case." W. Boulton, *A Guide to Conduct and Etiquette at the Bar of England and Wales* 48 (6th ed. 1975). Exceptions are made for conflict of interest cases. *Id.* at 32-41. The rule does not apply to solicitors, T. Lund, *A Guide to the Professional Conduct and Etiquette of Solicitors* 28 (1969), although some have suggested that it should. For a different view of solicitors' case-selection methods, see Can a Solicitor Pick and Choose, 34 *L. Guardian*, Feb. 1968, at 1.

work.²¹⁰ Some may view the repetition involved in general practice as boring,²¹¹ so it is not surprising that legal services attorneys shrink from routine domestic relations work. Attorneys may be affected by a variety of concerns in deciding whether to take on a case and how intensely to press it. Some of those factors are personal rather than professional.²¹² Thus, the attorney may consider a variety of extra-legal criteria in determining case selection, such as advancement within his administrative organization,²¹³ enhancement of professional reputation,²¹⁴ easing of workload,²¹⁵ emotional and intellectual needs,²¹⁶ and the desire for peer approval.

210. T. Parsons, *Essays in Sociological Theory, Pure and Applied* 185-99 (1949). See generally Ladinsky, *The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients*, 11 *Law & Soc'y Rev.* 207, 209-211 (1976).

It must be understood that there is no analytic reason why law-reform litigation must contain more "intrinsic" interest. Indeed, a small problem if attacked intelligently can require creative thinking and often result in important impact on the lives of the poor. I am indebted to Jonathan Weiss for underscoring this point.

211. However, "the discovery of a unique issue is likely to be a function of the amount of time that lawyers devote to a case, and thus of the amount of money that the client spends on lawyers. If the stakes are high, the problems can become very complex; if the client lacks money, his problems are likely to be routine." Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles and Social Hierarchies*, 76 *Mich. L. Rev.* 1111, 1117 (1978). A useful sketch of the implications to the legal profession of this "deep pocket" for legal research may be found in M. Galanter, *Larger than Life: Mega-Law and Mega-Lawyering in the Contemporary United States* (draft, Apr. 1980); see also G. Hazard, *Ethics in the Practice of Law* 152-53 (1978).

212. This phenomenon is not specific to attorneys. Research into the sociology of medicine suggests that doctors and medical researchers often make decisions for patients on grounds of self-interest rather than subject or patient interest. B. Gray, *Human Subjects in Medical Experimentation* 70-71 (1975). See also Blumgart, *The Medical Framework for Viewing the Problem of Human Experimentation, in Experimentation with Human Subjects* 39 (P. Freund ed. 1969).

213. "In the Los Angeles defender organization, the trial attorneys orient their behavior to suit the expectations of middle-level administrators. . . . Trial attorneys are generally rewarded for meeting their supervisors' expectations and penalized for rejecting them." Bohne, *The Public Defender as Advocate: A Study in Administration, Politics and Criminal Justice* 24, 25 (Institute for Research on Poverty, Discussion Paper No. 414-77, Apr. 1977).

214. The choice of cases might not be unlike that of a private, public interest law firm.

The development of the firm's program, the need to litigate and to obtain publicity and legitimization, cannot be left to walk-in trade. The firm has to select clients that will further these goals. The ideal client, from the point of view of a public interest law firm, is a group that is newsworthy and either a hierarchical or a paper organization, so that the lawyers only have to deal with the leadership rather than a restless membership.

J. Handler, E. Hollingsworth & H. Erlanger, *Lawyers and the Pursuit of Legal Rights*, 81-82 (1978).

215. Studies of prosecutorial priority-setting have suggested that prosecutors choose to go to trial against defendants when they believe the weight of the evidence is in their favor rather than when the defendants have prior arrest records and are labelled as "bad" men. This decision is motivated in part by work pressures. Forst & Brosi, *A Theoretical and Empirical Analysis of the Prosecutor*, 6 *J. Legal Stud.* 177 (1977). In discussing the decision of public defenders to stress a plea bargain, Jonathan Casper has pointed out: "He knows that his caseload is tremendous and that it is in the interest of the courts as a whole for most guilty men to plead guilty. He knows that he cannot spend as much time as he might like on any particular case." J. Casper, *American Criminal Justice: The Defendant's Perspective* 108 (1972); see also Church, *In Defense of "Bargain" Justice*, 13 *Law & Soc'y Rev.* 509, 522 (1979) ("Public defenders often labor under the same intense caseload pressures experienced by their counterparts in the prosecutor's office. . . . [T]hey may urge their clients to settle for a less advantageous bargain than the facts warrant."). The symbiotic relationship between defender and prosecutor is detailed in A. Blumberg, *Criminal Justice* (1967); Skolnick, *Social Control in the Adversary System*, 3 *J. Conflict Resolution* 52 (1967).

216. In the medical context one study of medical students found that the students would prefer to work on nonroutine cases than on routine ones. See H. Becker, B. Geer, E. Hughes & A.

Lawyers may also bring their personal political beliefs to bear on case selection and case handling criteria; those beliefs will often affect not only their approach to clients²¹⁷ but also the very clients they choose.²¹⁸ Legal services lawyers who believe their job is to serve the poverty community will allow their docket to be organized by the leaders of community groups with which they are working.²¹⁹ Attorneys who are committed to radical social change may try to work on cases that will help forward their political goals. Such lawyers will act as "moral and political 'entrepreneurs' who can take advantage of the pressures of ideals and the legitimation needs of the [political] system"²²⁰ to affect desired changes in the social order.

To the extent that the choice of clients depends on the political and social views of the legal aid lawyer, explicit review of a lawyer's political and social characteristics would suggest the nature of his bias in case selection. Efforts to compose a collective biography of legal aid lawyers have produced mixed results. Some suggest legal services attorneys possess many of the culture-spe-

Strauss, *Boys in White* (1961). While it is often suggested that attorneys prefer the interesting as opposed to the routinized case, there is evidence among public defenders that they choose to "type" clients for routinized processing. Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 Soc. Probs. 255 (1965).

217. Radical politics and a commitment to impact litigation do not necessarily result in a commitment to client control. Thus one commentator suggests that "[w]e have gotten idealistic young people to join us in the struggle by optimistically holding out the possibility that they could to some degree exercise their power for social justice, not merely act as servants of the poor." Kaimowitz, *Legal Services: Marching to a Different Drummer*, 35 NLADA Briefcase 66, 67 (June 1978). "This accountability to a mythical client populace can only be compared to trustees or capos in a prison system watching the actions not only of other inmates, but of their lawyers as well." *Id.* at 68. The ideal of the lawyer's role in guiding the supposedly powerless and helpless coexists with notions of professional autonomy. Thus one legal services attorney has recognized that "[i]t is often far too easy for well meaning legal services staff to take over from clients the power to make essential decisions on the course of legal representation." Dooley, *The ABA Model Rules—Why Legal Services Staff and Clients Should Become Involved*, 37 NLADA Briefcase, Sept. 1980, at 44, 45.

218. Thus in one student legal aid clinic, students debated at length over whether they should develop legal theories that would aid indigent landlords. *Lawyers, Clients and Ethics* 66-71 (M. Bloom ed. 1974). Further, the Parkdale Legal Clinic at York University, Toronto, refused representation of indigent landlords in eviction actions claiming that such representation is "destructive" of the effort of "establishing and maintaining an image of a place that represents the interests of low-income people." Representing landlords against tenants would "seriously diminish [the] clinic's potential for acceptability in the low income community." Letter from S. Ellis to Toronto City Executive Committee (Aug. 11, 1975). The Legal Aid Foundation of Chicago takes a similar position. J. Katz, *supra* note 178, at 258. The staff of the Toronto clinic later urged the proposition "that access to PCLS legal services be denied to clients seeking to oppose union organization" and that the board and staff "prepare a list of the people or causes for whom we will not act." S. Ellis, *Position Paper Number Two on the Subject of Access to Legal Services* (Apr. 12, 1977). By this view, the clinic would provide access to legal services only for those purposes approved by the staff.

While the impact of ideology on programmatic choice has been studied, see Finman, *OEO Legal Service Programs and the Pursuit of Social Change: The Relationship Between Program Ideology and Program Performance*, 1971 Wis. L. Rev. 1001, there has been no exact study of how ideology affects case selection in individual cases and how ideological views affect the extent to which clients, in fact, share in allocation decisions.

219. See generally Wexler, *Practicing Law for Poor People*, 79 Yale L.J. 1049 (1970). The correlative also occurs. The attorney may use his skills to help develop poor people's organizations.

220. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 Law & Soc'y Rev. 529, 561 (1977).

cific generational attitudes²²¹ of "new professionals"²²² engaged in social activism²²³ on behalf of the poor,²²⁴ which grew out of the student movement of the 1960s.²²⁵

One explanation for the uniform biases of these new professionals has been the view that their attitudes derive from an ideology encouraged by homogeneous social backgrounds. This view has been rejected in a recent study, which suggests "that both the Legal Services program as a whole and its more reformist components have been staffed by lawyers of heterogeneous backgrounds."²²⁶ That study found there was a "lack of prior political commitment among many Legal Services lawyers,"²²⁷ and that "Legal Services lawyers have idiosyncratic and divergent political motivations"²²⁸ for joining legal services. Legal services lawyers do hold different views from those championed by legal professionals generally. This is explained by the claim that "the program acts as a structural mechanism"²²⁹ that in part redirects "the careers of professionals who pass through them".²³⁰ Thus, experiences inherent in legal services, not political and social background, mold attitudes toward work.²³¹ Katz's socio-biography of legal aid attorneys suggests that the moral character of the legal aid enterprise requires attorneys to maintain a self-image as social activists²³² who take an expansive and aggressive notion of their clients' interests. Thus, legal aid attorneys are interested in aggregate problems of the poor rather than the "little disturbances of man."²³³ The former provide them the freedom for creative application of their legal skills and

221. See generally Mannheim, *The Problem of Generations*, in *Essays on the Sociology of Knowledge* 276 (P. Kecskemeti ed. 1952).

222. See R. Gross & P. Osterman, *The New Professionals* 117-31 (1972).

223. See R. Flacks, *Youth & Social Change* 104-39 (1971).

224. See N. Demerath, G. Marwell & M. Aiken, *Dynamics of Idealism* 186-211 (1971).

225. See, e.g., J. Skolnick, *The Politics of Protest*, 105-09 (1969); M. Teodori, *The New Left: A Documentary History* (1969); Flacks, *Social & Cultural Meanings of Student Revolt*, 17 *Soc. Probs.* 340 (1970).

226. Erlanger, *Lawyers and Neighborhood Legal Services: Social Background & The Impetus for Reform*, 12 *Law & Soc'y Rev.* 253, 271 (1978).

227. *Id.* at 269.

228. *Id.*

229. See Erlanger, *Social Reform Organization and Subsequent Careers of Participants: A Follow-up Study of Early Participants in the OEO Legal Services Program*, 42 *Am. Soc. Rev.* 233, 246 (1977).

230. See *id.* at 234.

231. Erlanger suggests that data supports "the conclusion that the 'radical' character of the program did not derive so much from the political predispositions of its lawyers as from the opportunity Legal Services offered lawyers to pursue client interests with the same vigor as they would in private practice." Erlanger, *supra* note 226, at 272. This statement is ambiguous in a number of respects. For one, it suffers from the defect of imputing homogeneity to the private sector. More important, it is unclear that opportunity or freedom has anything to do with ability or capacity. Most important, there is no evidence that legal services lawyers have such an opportunity. Erlanger relies on the rhetoric of legal services in developing his descriptive reality of the workings of a legal aid program.

232. J. Katz, *Routine and Reform: Personal and Collective Careers in Legal Aid* 11 (unpublished Ph.D. thesis, Northwestern Univ., July 1976). See also Bellow, *The Legal Aid Puzzle: Turning Solutions into Problems*, in 5 *Working Papers for a New Society* 52, 58 (1977).

233. The phrase is Grace Paley's. See G. Paley, *The Little Disturbances of Man* (1973). One sympathetic student of legal aid, however, has concluded that notwithstanding "the value of test-case litigation . . . I believe that more attention and effort should be made to secure individual

the opportunity for professional development.²³⁴ Further, "in order to maintain involvement, . . . [the legal services] lawyers must impose a sense of significance on their clients' problems."²³⁵ Both career concerns and personal self-esteem thus channel the legal aid lawyer into reform activity.

The concept of attorney autonomy does not justify client selection by the legal services lawyer. First, the government attorney is a salaried employee; he has agreed to work for a particular employer, thus relinquishing his freedom to select his own clients. Like corporate house counsel, he operates within a bureaucratic matrix that limits his professional autonomy. Congress has already limited the subject matter categories in which attorneys may practice. The Corporation itself argues that local programs can limit service according to community priority schedules, thus preventing attorneys from taking on cases or clients that they might, left to their own initiative, choose. Indeed, proponents of legal services have recognized the power of a Board of Directors to control a program's resource allocation by setting general service priorities.²³⁶

Although it is not unnatural for legal services attorneys to desire the same autonomy in case selection enjoyed by privately funded public interest attorneys, this is not possible. Legal services lawyers and public interest lawyers do not have equivalent roles. The public interest lawyer, whether he is a member of the Sierra Club or an attorney for a public interest law firm, has no constraints on his activity other than the Canons, his individual conscience, and his foundation grant.²³⁷ He may clearly make broad policy decisions that

justice in the day-to-day, low-visibility decisions that confront ordinary people." J. Handler, *Protecting the Social Services Client* 28 (1979).

234. See generally Katz, *Lawyers for the Poor in Transition: Involvement, Reform and the Turnover Problem in the Legal Services Program*, 12 *Law & Soc'y Rev.* 275, 284 (1978).

235. *Id.*

236. Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 *B.U.L. Rev.* 337, 347 (1978). See also ABA Comm. on Ethics and Professional Responsibility, *Formal Op. No. 334* (1974).

237. "Public interest lawyers can choose between many possible clients and causes" and thus face case selection problems as well. Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 *Geo. L.J.* 1095, 1108 (1971). For many public interest law firms specific case selection is made by a litigation committee that approves specific cases. The litigation committee of the Citizens Communications Center, as example, operates as follows:

The Litigation Committee is composed of at least five members, although the Board may elect to increase the number of the persons on the Committee. There are presently six members. Each member of the Litigation Committee is a Board member, an attorney, and possesses expertise in the competence relevant areas of law.

Once CITIZENS' attorneys have conducted a study of a particular problem presented to them and believe that it is an appropriate case for CITIZENS to represent a party, the Litigation Committee reviews their judgement to assure that the matter is within the scope of CITIZENS' purpose, ability and programs.

Prior to initiation of any proceedings, the matter under review is presented to a majority of the Litigation Committee. If the majority unanimously approves the litigation, the attorneys may then institute proceedings. But if any one of the members of the Committee to whom the materials are initially presented opposes the proceeding, the matter is then presented to the entire Committee for approval prior to initiation of the proceeding.

For Responsive Media: Citizens Communications Center, *The Ten Year Report of the Public*

"limit the kinds of litigation . . . [in] which he will assist."²³⁸ A privately funded public interest attorney need have no qualms about partiality. He may allocate his time and skills in whatever manner he chooses within the limits of his grant,²³⁹ and has no greater responsibility to adverse parties than any other

Interest Law Firm 100 (1979). See also Public Counsel, 1977-78 Annual Report of Public Counsel 7 (1978) ("No new litigation will be undertaken without thorough consideration by Public Counsel's Board of Directors and its litigation Committee."); Education Law Center, 1979 Annual Report 5 (1979) ("Overall program priorities are developed by the board of trustees on the recommendation of its program committee. Specific cases are chosen by the litigation review committee consisting of six lawyers appointed by the Chairman of the Board of Trustees on the advice of the staff."). The composition and procedures of the litigation committee are described in Memorandum from Marilyn J. Morheuser, Director, Educational Law Center to Friends of Public Interest Law 7-8 (July 18, 1980). In some instances public interest law firms may rely on their membership base to generate case selection criteria and provide some measure of accountability and discipline over intake. J. Fleischman, *The Criticisms of Public Interest Law: Some Rebuttals* 44-45 (unpublished manuscript, 1980).

A useful analysis of decision-making and case selection processes in public interest organizations can be found in J. Berry, *Lobbying for the People* 199-211 (1977). Berry suggests the two main variables affecting issue selection are "the expertise and personal interest of the professional staff." *Id.* at 200. New Jersey's unauthorized practice committee criticized the Education Law Center, and by implication other public interest law firms, charging that "it is ELC's Board of Directors not its legal staff that decides whether to represent a particular client." New Jersey, *UPLC Opinion* 471-79 (1981). The New Jersey Supreme Court, in a unanimous decision, reversed the Committee, finding that "although ELC has a board of directors that includes non-lawyers as well as lawyers, the board is responsible only for policy-making. Decisions as to which cases to accept are made by a subcommittee of the board comprised solely of lawyers." *In re Educ. Law Center, Inc.*, 86 N.J. 124, 139, — A.2d —, — (1981).

238. *NAACP v. Button*, 371 U.S. 415, 420 (1963). For example, since 1950 the NAACP has undertaken only lawsuits that promoted school integration. Even prior to *Brown v. Board of Education* it would not accept cases that asserted a separate but equal position, even if such a suit might improve the position of blacks. Wilkerson, *The Negro School Movement in Virginia: From "Equalization" to "Integration,"* in 1 *The Making of Black America* 259, 269 (A. Meier & E. Rudneck eds. 1969). Examples of this policy abound. When Mrs. Sarah Bulah, a black housewife in rural Delaware, complained that "a bus passed right by her front door to take the white children . . . to their pretty little school up on the hill while she had to drive her daughter, Shirley, two miles to the old one-room schoolhouse for colored youngsters down in the village," civil rights lawyer Louis Redding told her that "he . . . wouldn't help me get a Jim Crow bus to take my girl to any Jim Crow school, . . . but if I was interested in sendin' her to an integrated school, why, then maybe he'd help." R. Kluger, *Simple Justice* 434-35 (1976). In 1951 a similar response was given to students in Prince Edward County, Virginia, who went on strike against the black high school because of its inadequacies and desired equalization. "The lawyer told the striking students that the only way the NAACP could get involved in their cause was to sue for the end of segregation itself—a giant step beyond the goal of the young strikers." One student noted, "It seemed like reaching for the moon." *Id.* at 476. The resulting lawsuit was the first attack on segregation per se in Virginia. *Davis v. County School Bd.*, 103 F. Supp. 337 (E.D. Va. 1952). A similar incident occurred after the landmark decision in *Brown v. Board of Educ.* 347 U.S. 483 (1954). Parents in Mississippi wanted their "separate but equal" elementary schools in their black neighborhood reopened but, after talking to Derrick Bell, agreed to sue for integration. Bell, *Serving Two Masters: Integration Ideals and Client Interests*, in *School Desegregation Litigation*, 85 *Yale L.J.* 470, 476-77 n.21 (1976).

The 1950 NAACP policy decision that segregation per se was unconstitutional is discussed in R. Kluger, *Simple Justice* 290-94 (1976). See Kelly, *The Desegregation Case*, in J. Garraty, *Quarrels That Have Shaped the Constitution* 242, 257 (1962); The Margold Report, in J. Greenberg, *Judicial Process and Social Change* 50-57 (1977).

239. Some foundations, however, perceive that their tax-exempt status makes them quasi-public organizations affected with a public interest who should therefore refrain from obviously partisan political activity. W. Nielsen, *The Big Foundations* 395-98 (1972). See also Hart, *Foundations and Social Activities: A Critical View*, in *The Future of Foundations* 43-57 (F. Heilmann ed. 1973). On this view foundations should be "even-handed in the political consequences of those activities, seeking neither to advance nor impede any cause save that of understanding

private attorney.²⁴⁰ The legal aid attorney, however, fulfills the state's responsibility to provide legal services in civil cases to those who cannot afford it.²⁴¹ In this respect he differs from the public interest lawyer, who can serve particular causes without regard to the need of the individuals involved.

E. The Role of the Community in Resource Allocation

The Corporation has recognized that resource allocation in the context of scarcity will result in decisions to prefer certain substantive areas and program functions over others. It is concerned that these decisions be made consciously rather than by default. As a result, it has developed the concept of formal priority setting by local programs as a mechanism for allocating local resources efficiently and in accordance with client needs. The 1974 Act required the Corporation to establish priorities which ensured that those least able to

and competence." Moynihan, *Social Welfare: Government v. Private Efforts*, 13 *Found. News* 5, 8 (No. 2, 1972).

In contrast, the Ford Foundation has advanced a far different conception of its role, showing "a willingness to enter zones of activity directly adjacent to politics and lobbying." W. Nielsen, *supra*, at 356. See Simon, *Foundations and Public Controversy: An Affirmative View*, in *The Future of Foundations* 58-100 (F. Heimann ed. 1973); Commission on Private Philanthropy and Public Needs, *Giving in America* 43-44 (1975). See also R. McKay, *Nine for Equality Under Law: Civil Rights Litigation* 21-22 (1977). The Ford Foundation has justified its grants to public interest law firms on process grounds of redressing imbalances within the adversary system, Ford Foundation, *The Public Interest Law Firm: New Voices for New Constituencies* 9, 31 (1973), rather than articulating a substantive bias for the litigation goals of its grantees. This focus on the creation of equity in adversary representation has not led the Foundation to recognize that "there may be several underrepresented interests" in a single litigation and that it might "be in the public interest to ensure equal *relative* representation." Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, in *Public Interest Law* 4, 22 (B. Weisbrod, J. Handler, & N. Komesar eds. 1978).

240. In one recent controversy, the Wampanoag Indian tribe, represented by the Native American Rights Fund, a public interest law firm supported in part by the Ford Foundation, see R. McKay, *Nine for Equality Under Law: Civil Rights Litigation* 21-22 (1977), sued the Town of Gay Head in Martha's Vineyard, Massachusetts, claiming that the town's common lands belonged to the tribe. *Wampanoag Tribal Council v. Town of Gay Head* (D. Mass., filed Nov. 1974) reported in 1978 *Native American Rights Fund*, 1978 *Annual Report* 63. Property owners in the Gay Head Taxpayers Association requested that Ford grant them \$15,000 to pay for their legal defense asserting that Ford had a responsibility to provide money for an adequate defense. In the opinion of the property owners, "[t]he problem was created by unlimited financing of the Indian cause and inadequate resources of the non-Indian members of our community to defend themselves against this litigative attack." Memorandum from Michael J. Sovern to National Affairs Division, Ford Foundation 6 (July 18, 1977) (quoting letter from Alvin Lane to Ford Foundation (Jan. 31, 1977)). See also *N.Y. Times*, July 8, 1977, at 21, col. 1; *N.Y. Times*, Sept. 20, 1977, at 40, col. 4.

Nonetheless, it is clear that Ford is not responsible for the property owners' predicament. In this respect its responsibilities as a private organization differ from those of a government funded legal aid organization. As a private organization, neither Ford nor any of its agents has a responsibility to persons injured by litigation. As the Foundation has suggested, "[a] claimant defending values the Foundation opposes is, of course, entitled to his day in court, but the Foundation is under no obligation to finance that day and should not do so." Memorandum from Michael J. Sovern to National Affairs Division, Ford Foundation, *supra*, at 8.

241. S. Jan Brakel has criticized the view that the publicly funded lawyer has the freedom to allocate resources as a private attorney might as "a paternalistic assessment of priorities made for, not by, the poor." S. Brakel, *Judicare* 126, 127 n.3 (1974). He argued that "[t]he fact that poor legal services clients are recipients of government largesse does not justify a unilateral dictation of service policy and priorities on the part of government officials or their hired consultants." Brakel, *Styles of Delivery of Legal Services to the Poor*, 1977 *Am. B. Found. Research J.* 219, 250.

afford legal assistance were given preference.²⁴² In 1977 the Act was amended to require that local recipients adopt procedures for determining and implementing priorities taking into account "the relative needs of eligible clients for such assistance," including the special needs of eligible clients "with special difficulties of access to legal services or special legal problems."²⁴³ In an effort to develop community participation in allocation decisions, the 1977 amendments also required that "eligible clients" be appointed to the Corporation board.²⁴⁴ While sixty percent of the directors of local programs must be attorneys,²⁴⁵ at least one-third of the directors must be eligible clients or representatives of associations or organizations of eligible clients.²⁴⁶ Indeed, Corporation regulations require that the Board be representative of the poverty community²⁴⁷ and state that it is essential to structure the governing body in such a way that ensures that legal services lawyers will be "accountable to the communities they serve."²⁴⁸

The requirement that clients be placed on boards of directors is not the only mechanism by which the Corporation attempts to ensure broad representation of client interests. The Corporation has encouraged the creation of a clients' lobby, the National Clients Council, as official representatives of the poverty community.²⁴⁹ The Council, a "trade association" of clients, is

242. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, § 2, 88 Stat. 383 (1974) (codified at 42 U.S.C. § 2996f(a)(2)(C) (1976) (amended 1977)).

243. Legal Services Corporation Amendments Act of 1977, Pub. L. No. 95-222, § 9(b)(1), 88 Stat. 383 (1974) (codified at 42 U.S.C. § 2996f(a)(2)(C) (Supp. III 1979)).

244. 42 U.S.C. § 2996c(a) (Supp. III 1979). The clients must be eligible when appointed. There is no requirement of continuing eligibility. LSC Opinion Letter (Feb. 8, 1979) [1978-1980 Transfer Binder] Pov. L. Rep. (CCH) ¶ 27,615.

245. 42 U.S.C. 2996f(c) (Supp. III 1979). See 45 C.F.R. § 1607.3(b) (1980). The attorneys "shall be selected from, or designated by, appropriate Bar Associations and other groups, including, but not limited to, law schools, civil rights or antipoverty organizations, and organizations of eligible clients." 45 C.F.R. § 1607.3(c) (1980).

246. 45 C.F.R. § 1607.3(d) (1980). Note that the group representative need not be himself an eligible client but, should that be the case, only eligible clients may participate in the selection process. LSC Opinion Letter (Aug. 14, 1978) [1978-1980 Transfer Binder] Pov. L. Rep. (CCH) ¶ 27,360.

247. Corporation regulations require that eligible client board members be selected from "a variety of appropriate groups" 45 C.F.R. § 1607.3(e) (1980). See also LSC Opinion Letter (June 8, 1979) [1978-1980 Transfer Binder] Pov. L. Rep. (CCH) ¶ 28496 recognized the representation problem by noting that "in certain circumstances, the limitation of groups receiving representation on a governing body to only a few similar organizations could violate this section." Such opinion letters represent Corporation policy until modified or withdrawn.

In fact, it is considered proper to select all eligible client board members and some attorney board members through a number of different local advisory committees that themselves represent different distinct segments of the community. LSC Opinion Letter (May 22, 1979) [1979-1980 Transfer Binder] Pov. L. Rep. (CCH) ¶ 28,500.

248. See 43 Fed. Reg. 32,772 (1978). For that reason staff members may not serve on local boards. LSC Opinion Letter (June 8, 1979) [1978-1980 Transfer Binder] Pov. L. Rep. (CCH) ¶ 28,496. The importance of accountability is also illustrated by the existence of the client grievance committee. See 45 C.F.R. § 1621 (1979).

249. The Council, "a nationwide organization of persons eligible for legal services," see LSC Annual Rep. 23 (1979), was set up during the OEO era. National Clients Council, Proceedings of 1979 Annual Meeting 32-35. Its goal is to foster ongoing accountability of the Corporation to the client community. Oversight of the Legal Services Corporation, 1980: Hearing Before the Subcomm. on Employment, Poverty and Migratory Labor of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 114 (1980) (statement of Kathy Cain).

funded by the Corporation to provide technical assistance to client board members. It serves as a pressure group for client interests before the Corporation and local programs. The Council's staff monitor Corporation activity and ensure a sensitivity to client concerns at both the local and the national level.

Consistent with the principle of local control, the original Legal Services regulations required the board of directors of each local program to set priorities, using suggestions from staff and the client community. Each program must make a focused inquiry into the community's legal needs.²⁵⁰ The revised regulations implement the amended Act's requirement that "the needs of all significant segments of the client community are considered in the priority-setting process" and that priority setting should be approached "in a systematic way."²⁵¹ While the 1974 Act requires that the Corporation ensure that programs have procedures for implementing priorities,²⁵² the regulations only require provision of a "brief written report" on the implications of their priorities for resource allocation.²⁵³ The priority setting process was seen as a vehicle for ensuring client involvement in the policy decisions of local programs. In structuring priority-setting the Corporation required that local programs "involve clients at every step of the process."²⁵⁴ Reliance on client input into the Board of Directors was apparently considered insufficient.

The Corporation does not, however, tell programs how their priority setting process must be structured. Some programs rely on client representatives on their board to sound out and articulate client sentiment.²⁵⁵ Other programs allow participation by formal poverty groups such as the National Clients Council or ad hoc groups of poor people.²⁵⁶ In some instances the legal staff determines what priorities should be, drawing on its understanding of community needs.²⁵⁷ A number of programs have developed community surveys and have mailed questionnaires or conducted door-to-door or telephone surveys to identify the legal problems of clients.²⁵⁸ More often, programs hold public meetings to ascertain client sentiment.²⁵⁹ At these

250. 45 C.F.R. § 1607.3 (1978) (prefatory material).

251. 45 Fed. Reg. 51,789 (1978).

252. Legal Services Corporation Act of 1974, Pub. L. No. 97-355, § 1007, 88 Stat. 378, 383 (codified at 42 U.S.C. 2996f(a)(2)(C) (1976) (amended 1977)).

253. 45 C.F.R. § 1620.2(c) (1980).

254. 43 Fed. Reg. 51,789 (1978).

255. Case Service Reports: Analysis of Narrative Submission, January 1-June 30, 1979, at 3-5 (March 25, 1980) (unpublished discussion draft prepared by Westat, Inc. for LSC) [hereinafter cited as Case Service Reports].

256. See *id.* at 3-3; C. Lyons & J. Epstein, *Priority Setting/Planning* 8 (Jan. 23, 1979) (unpublished memorandum to LSC).

257. Case Service Reports, *supra* note 255, at 3-2; see C. Lyons & J. Epstein, *supra* note 256, at 13.

258. Case Service Reports, *supra* note 255, at 3-2 & 3-3; C. Lyons & J. Epstein, *supra* note 256, at 10-11. See, for example, the Legal Services of North Carolina, Inc., Client Needs Survey (unpublished manuscript) (undated).

259. Indeed one statewide legal services program met its priority-setting duties by fostering an "Iowa Poor People's Platform Congress" based on the political party caucus system. See Barrett & Youells, *The Statewide Poor People's Platform Congress: Building Coalitions for Social Justice*, 14 Clearinghouse Rev. 1168 (1981). This statewide political convention allegedly provided "a

meetings, staff, board and clients discuss the legal problems faced by the community and vote a priority schedule for both substantive priorities and program functions. For example, the Contra Costa Legal Services program conducted a public conference to determine priorities, and agreed to follow its results.²⁶⁰ Four categories of participants were invited: staff, board members, clients and representatives of special interest groups within the poverty community. A random cross-section of clients and ex-clients was invited so that eligible clients "would constitute no less than half of all participants."²⁶¹ As another example, the National Legal Aid and Defender Association has developed a "model" priority setting process to assist programs in isolating needs and articulating ways to meet those needs.²⁶² A number of programs have set up weekend retreats to encourage a discussion of these problems.²⁶³ Programs have also used task forces to set priorities, assigning clients, staff and board members to a committee charged with developing a schedule for the board of directors.²⁶⁴ Over the last few years the number of programs that have allocated resources through some type of formal process has increased. Over seventy-four percent of programs presently engage in some form of priority setting.²⁶⁵ The larger the program, the more likely it is to set priorities.²⁶⁶

Programs have set priorities in a variety of substantive areas. Most identified seven or eight specific issues on which they wish to focus. Almost ninety percent of the programs identifying priorities focused on income maintenance, health and housing concerns.²⁶⁷ Almost two-thirds of programs established consumer and domestic relations problems as key goals.²⁶⁸ The actual ranking of the priorities is unclear. The emphasis in priority setting has been on ensuring that programs use some formal process to identify their goals; there has been less concern about the substantive priorities that programs choose. Corporation ideology suggests that local decision making regarding resource allocation is preferable. In the few cases in which the Corporation has taken exception to the results of local priority setting it has criticized the efficacy of the process rather than the actual results.

Resource allocation through priority setting is the Corporation's theoretical contribution to the problem of effective distribution of service. It reflects

truly informed and representative document describing the priorities of the state's poor people." Id. at 1173.

260. Report on the 1979 Priority Setting Conference of the Contra Costa Legal Services Foundation 2 (Mar. 8, 1979) [hereinafter cited as *Contra Costa Report*]. For another example, see Monroe County Legal Assistance Corp., Management Planning Conference (Oct. 22-23, 1976).

261. *Contra Costa Report*, supra note 260, at 1.

262. N. Metzner, *Too Many Clients, Too Little Time: A Guide to Management/Planning for Legal Services Programs*, NLADA 3-1 & 3-12 (Mar. 1974).

263. See Arango, *Planning for Legal Services Projects: Concepts, Experiences and Issues*, 12 *Clearinghouse Rev.* 163, 164 (1978). See generally N. Metzner, supra note 262, at 4-13 (Appendix).

264. See W. Callahan, *Priority Setting By Legal Services Programs* 9 (Apr. 1978) (study prepared for LSC Office of Program Support).

265. C. Lyons & J. Epstein, supra note 256, at 6.

266. *Case Service Reports*, supra note 255, at 3-6.

267. See id. at Table E-5 & Table 2-1.

268. See id.

an attempt by the Corporation to delegate responsibility while assuring a structured allocative process. Viewing priority setting as a neutral mode of allocation, the Corporation has ignored politics²⁶⁹ and has failed to take into account the extent to which priority setting has become a vehicle of competition between groups for service. Thus, the Corporation has focused on the integrity of the process without reference to its structural inadequacies. The entire effort has its own political dynamic that gives disproportionate significance to the views of the particular clients chosen to join the process and almost dispositive weight to the views of staff charged with translating that process into practice.

The statutory requirement of client representatives on a local board of directors reflects the ideological drive for community control intrinsic to federal poverty programs. The OEO War on Poverty nurtured the belief that participation by the poor in antipoverty decision making would reduce their alienation²⁷⁰ and strengthen indigenous community organizations.²⁷¹ The OEO Community Action Program guide urged the involvement of area residents and members of the groups to be served in planning, policy making and the operation of the poverty program.²⁷² While many social theorists hoped that community participation would help integrate a poverty community into the larger society, others believed that community participation would create institutions that would battle the establishment. The community action movement generated intense hostility from urban administrators.²⁷³ As interest in community control ebbed, Congress increasingly questioned the accomplishments of the Community Action Programs (CAP), which were the focal points for local participation.²⁷⁴

The principle of local control upon which priority setting rests flows from the view that the claim for legal assistance belongs to the client community

269. The term is borrowed from an essay by Stanley Herr. See S. Herr, *From Rights to Realities: Advocacy By and For Retarded People in the 1980s* 3 (DHEW Pub. No. [OHDS] 21026, 1979). See also J. Dooley, *My Perspective on Priorities From Elderly/Handicapped Visits This Summer* 13, 14 (Jan. 7, 1980) (unpublished memorandum to LSC).

270. This view is derived from the "opportunity theory" of juvenile delinquency developed in R. Cloward and L. Ohlin, *Delinquency and Opportunity* 175-78 (1960), which became the intellectual precursor for much of the antipoverty program. See B. Frieden & R. Morris, *Urban Planning and Social Policy* 178 (1968).

271. See Moynihan's comment that "The essential problem with community action was that the one term concealed at least four quite distinct meanings: organizing the power structure . . . expanding the power structure . . . confronting the power structure . . . and finally, assisting the power structure." D. Moynihan, *Maximum Feasible Misunderstanding: Community Action in the War on Poverty* 168 (1969).

272. See 42 U.S.C. § 2782 (1964). The general history of the maximum feasible participation concept of community participation is traced in Rubin, *Maximum Feasible Participation, The Origins, Implication, and Present Status*, 2 *Poverty & Hum. Resources Abstracts* 5-18 (No. 6 1967) and is critically reviewed in D. Moynihan, *supra* note 271, at 88-101. See also Kravitz & Kalodner, *Community Action: Where Has It Been? Where Will It Go?*, 385 *Annals* 31 (1969); Note, *Participation of the Poor: Section 202(a)(3) Organizations Under the Economic Opportunity Act of 1964*, 75 *Yale L.J.* 599, 608 (1966).

273. This hostility is described in R. Kramer, *Participation of the Poor* (1969).

274. D. Moynihan, *supra* note 271, at 138. See generally *id.* at 128-66. For a similar analysis from a more sympathetic perspective, see D. O'Brien, *Neighborhood Organization and Interest-Group Processes* 130-74 (1975).

rather than the individual. On this view, legal assistance should be distributed to community groups, which redistribute it according to their own criteria. Individual claims would be analyzed according to whether they advance community interests. This approach was used in the early years of OEO funding in the form of Community Action Program control of legal services funds.²⁷⁵ It was abandoned because of a concern over unbridled discretion and political determinations by community groups.

A number of theoretical problems are endemic to the concept of community participation. Most important is that of ascertaining the purpose of client representation or participation. Is it meant to suggest client control?²⁷⁶ Is it designed to foster attentiveness to client concerns? If the latter, what status should client concerns have vis-à-vis staff or Corporation concerns?²⁷⁷ A second problem is the representative status of the client board members.²⁷⁸ Few programs select their community representatives through client elections.²⁷⁹ In many instances, board members are "appointed by a community organization."²⁸⁰ In some cases, the local board members themselves elect eligible clients to be members of the board.²⁸¹ The client representative need not, in fact, be a poor person. In a case in which he is a representative of a poverty group, he need not be elected by the group, but may be selected by any method of appointment. Community representatives for the priority setting process are chosen in an even less systematic manner. In some instances any client who wishes to attend may do so and may vote. In others, groups are invited to send representatives, or board members may recommend clients whom they consider to represent community views.²⁸²

The requirement of client involvement without an adequate conception of

275. The battle over whether OEO Legal Services would be governed by the local lay CAP boards or by a lawyer-controlled board is documented in E. Johnson, *Justice and Reform* 64-66, 135-62 (1978). See also Economic Opportunity Act Amendments of 1967, Hearings Before the House Committee on Education and Labor on H.R. 8311, Part 3, 90th Cong., 1st Sess. 2124-28 (1967) (remarks of Rep. Goodell criticizing bar control of the program).

276. This might be difficult given the requirement of 60% attorney participation. See 42 U.S.C. § 2996f(c) (Supp. III 1979).

277. These issues in the political theory of representation cannot be resolved here. See H. Pitkin, *The Concept of Representation* (1967); see also C. Pateman, *Participation and Democratic Theory* (1970).

278. LSC Opinion Letter (Dec. 9, 1977) [1976-1978 Transfer Binder] Pov. L. Rep. (CCH) ¶ 25,404. The group representative must be appointed by the group, however. LSC Opinion Letter (Dec. 19, 1977) [1976-1978 Transfer Binder] Pov. L. Rep. (CCH) ¶ 25,406. The Board may not select the group representative, *id.*, nor may an independent screening committee. LSC Opinion Letter (Mar. 7, 1978) [1976-1978 Transfer binder] Pov. L. Rep. (CCH) ¶ 25,725.

279. A survey of client local board members conducted in 1978-79 found that "only one out of five respondents . . . were elected to board membership by clients." M. McCall, *Client Board Member Training Needs: A Report of Survey Results* 16 (1979) (unpublished memorandum to LSC).

280. *Id.* This was true for over one-third of respondents. In Buffalo all board members of the local Legal Services program are appointed by a variety of community groups including the SUNY Law School, the NAACP, and the Niagara Frontier Chapter of the New York Civil Liberties Union. Letter from George L. Cownie, *supra* note 105.

281. *Id.*

282. See C. Lyons & J. Epstein, *supra* note 256, at 8-12; Case Service Reports, *supra* note 255, at 3-2 through 3-4.

the nature and quality of that involvement leads to the disproportionate influence of participating clients. As a result, certain unrepresented minorities, such as the elderly or handicapped, with legal problems not endemic to the poor may be slighted.²⁸³ For example, on a local level, the severely handicapped have difficulty in speaking for themselves and often lack an organized constituency to press their claims. Without an interested person on staff or some outside pressure, the mentally disabled may be excluded from legal attention.²⁸⁴ Thus, such "discrete and insular minorities"²⁸⁵ of poor people will remain invisible. The Corporation has recognized this and is considering promulgating priority guidelines that will urge inclusion of groups with special needs.²⁸⁶ Its 1981 budget includes funds targeted for legal care for the institutionalized.²⁸⁷ This is a retreat from both the concept of local control and from the principle of the homogeneity of the poor.

The present process of priority setting generates skepticism that the results indicate the desires of the client community. Programs that use a community meeting to set priorities are vulnerable to the charge that the results may be dictated by the interests represented at the meeting.²⁸⁸ Programs with formal introspection processes that generate varieties of goals may find they are undergoing a "paper" process manipulated by the staff.²⁸⁹ Programs that engage in some form of consultation between the board and staff may be defining goals that reflect the subjective interests of staff members. Thus, the requirement of client representation on a local board of directors does not mean necessarily that the client community will effectively control the actions of a local program. Client representatives may reflect the interests of only one portion of a community's eligible poor. Such client participation also allows a social service staff to co-opt the poor by accepting the trappings of community con-

283. A. Houseman, *The Elderly and Handicapped Chapters of the 1007(h) Report* 19, 20 (Apr. 16, 1980) (unpublished memorandum to LSC); J. Dooley, *supra* note 269, at 13-14; A Report of the United States Commission on Civil Rights, *The Age Discrimination Study*, Part II 114 (Jan. 1979); see C. Lyons & J. Epstein, *supra* note 256, at 6-7. But see S. Herr, *supra* note 269, at 3 (arguing that the elderly are a vocal, well represented group but that the retarded are not). In his Memorandum, however, Houseman states:

For none of the programs observed did the presence of priorities and the process that created them mean that the elderly got either more or less service than they did prior to priorities. It is unlikely there is any program where priority setting has intentionally affected the relative quantity of work done for the elderly.

A. Houseman, *supra*, at 20. In other words even where "the elderly" are given high priority status as a separate group, actual implementation usually does not occur. *Id.*

284. See S. Herr, *supra* note 269, at 3.

285. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

286. See C. Lyons & J. Epstein, *supra* note 256, at 41. C. Lyons & J. Epstein, *Priority Setting* 4 (Mar. 15, 1979) (unpublished memorandum to LSC) [hereinafter cited as *Memorandum of March 15, 1979*].

287. Departments of State, Justice, Commerce, the Judiciary and Related Agencies Appropriations for Fiscal Year 1981: Hearings Before a Subcomm. of the Senate Comm. on Appropriations, Part 2, 96th Cong., 2d Sess. 110, 122-24 (1980) (statement of Dan J. Bradley) [hereinafter cited as *1980 Hearings*].

288. C. Lyons & J. Epstein, *supra* note 256, at 16; S. Herr, *The New Clients: Legal Services for Mentally Retarded Persons* 149-50 (1979).

289. C. Lyons & J. Epstein, *supra* note 256, at 15-16.

trol.²⁹⁰ Only programs that attempt to assess community needs empirically through survey techniques succeed substantially in creating a community profile that can serve as a basis for objective priority setting.²⁹¹ In the main, therefore, the priority setting process fails to fulfill the promise of the Corporation's goal of impartial resource allocation.

There is further conceptual inconsistency in the Corporation's ideal of community participation, which conflicts with the statutory insistence on attorney control of the program's board. Indeed, this tension between community and professional interests is a recurrent theme. During the OEO period legal services advocates vociferously opposed the introduction of lay control. They feared that placing programs under the control of the OEO Community Action Programs would result in lay interference with attorney autonomy, and with the aggressive impact advocacy that OEO Legal Services saw as its primary purpose. They demanded boards controlled by attorneys, although the CAP's could be said to represent, in theory, the very community that legal services was pledged to serve.

Staff control is highlighted by the lack of serious implementation requirements in the goal setting process.²⁹² The fact that a program chooses a half-dozen priorities says nothing about how the priorities themselves should be ranked or what specific program areas or functions should be ignored to satisfy that priority schedule. The fact is that if housing is a priority, welfare cases, for example, cannot be undertaken. As long as the priority setting process ignores the harsh reality of implementation the power to translate priorities into reality will remain with the program staff.

In fairness it must be recognized that the intent of the community participation ideal has been to make legal services more responsive to the needs of clients. The rationale is that the members of a local client community best understand the needs of individual clients within that community. Unfortunately, the process all too often legitimates the view that legal aid runs to the community and that it is the responsibility of community representatives (together with other board members) to decide the value that should be assigned to individual claims for service. The effort to ensure that legal services attorneys serve community needs is an approximation of the client oriented perspective. This effort recognizes, though not fully, the primacy of "client"

290. See instances cited in Rubin, *Maximum Feasible Participation: The Origin, Implications and Present Status*, in *Poverty & Hum. Resources Abstracts*, Nov.-Dec. 1967, at 5-18.

291. See discussion of survey methodology *infra* note 301. Nonetheless, the questionable methodological validity of some surveys lends credence to the argument that their underlying purpose is less to elicit community sentiment than to ratify staff views. See the description of the Food Research and Action Center priority setting process: "FRAC, an LSC-funded support center, for example, sent out a major questionnaire this summer to everyone on our mailing list. We have about 4500 people on our mailing list. And we ask people to rate the different activities that we work on. . . ." Statement of B. Schwartz, quoted in Plaintiff's Memorandum in Opposition to Defendants' Motions to Dismiss, at 16, *Grassley v. Legal Servs. Corp.*, No. 81-277-B (S.D. Iowa 1981). No effort was made to limit responses to eligible clients.

292. C. Lyons & J. Epstein, *supra* note 256, at 15. See Memorandum of April 16, 1980, *supra* note 283, at 20-21. Some excellent examples illustrating the interrelationship of staff control and serious implementation are presented in J. Dooley, *supra* note 269.

concerns. However, by ignoring the divergence between community priorities and individual needs, it misdefines "client."

IV. CLIENT KNOWLEDGE AND CAPACITY FOR RESOURCE ALLOCATION DECISIONS

One can only speculate how the priority schedule of individual clients would compare to those drawn up for them by attorneys or by community representatives.²⁹³ The existing studies on the legal problems of the poor have not adequately surveyed that question. Nonetheless, some evidence may be drawn from the corpus of literature on legal needs.²⁹⁴ The recent American Bar Foundation study on the legal needs of the public found that the most common problems for which citizens generally required attorneys were torts, real estate, consumer matters, estate planning, and governmental matters. The areas for which they actually went to lawyers for help were, in order of use, real property, estate planning, marital problems, torts, consumer matters, and governmental matters, broadly defined.²⁹⁵ Although attorneys in the private sector influence their clients' decision making, individual clients themselves determine how to allocate personal resources when securing legal assistance. They set their priorities and their attorneys serve them, or else the attorneys are released from employment. Indeed, the aggregation of individual client choices organizes the structure of the legal profession. This freedom of choice should be extended to the poor.

The argument against permitting client demand to shape the allocation of legal services assumes that client demand does not reflect client need. It goes as follows: It is misleading to rely on individual choice because poor people are ignorant of the numerous ways in which they can use an attorney. This ignorance prevents indigents from seeking aid in areas that would be of significant benefit for them. Further, the poor lack the confidence needed to take

293. Hannah Pitkin points to the paradox that to represent truly the constituency would require the presence of the represented at the decision-making stage. H. Pitkin, *The Concept of Representation* (1967). To do otherwise would result in the paternalistic model of representation envisaged by Edmund Burke who wrote that: "[t]he representative's duty toward his constituents is 'a devotion to their interests, rather than to their opinions.'" Id. at 176, quoting E. Burke, *Speech to the Electors*, in *Burke's Politics* 115 (1949).

294. "There exists no well-developed theory of lawyer use." Project, *An Assessment of Alternative Strategies For Increasing Access To Legal Services*, 90 *Yale L.J.* 122, 131 (1980). The problem of defining unmet legal needs is discussed id. at 123-28, 131-38. Bryant Garth reviews the existing studies in *Neighborhood Law Firms for the Poor* 3-13 (1980). This issue must be contrasted with descriptions by the demographers of lawyer use. Lawyer use is a function of client problem-solving behavior, problem incidence, and level of satisfaction with results obtained. B. Curran, *The Legal Needs of the Public: The Final Report of a National Survey* 261-63 (1977).

295. See B. Curran, *supra* note 294, at 99-159. The most recent survey of lawyer utilization in the general population, the Curran study was intended "to inform judgments about the nature and scope of the public's legal needs and to provide an empirical base for assessing the extent to which those needs are met within existing legal service delivery mechanisms." Id. at 9.

A limited but useful British survey of lawyer utilization among the London poor is B. Abel-Smith, M. Zander & R. Brooke, *Legal Problems and the Citizen* 80-82 (1973). The British survey considers the use of alternate advisory services as well. Id. at 67-80; see also id. at 39-63.

advantage of the legal system and manipulate it for their own benefit.²⁹⁶ They are commonly apprehensive about lawyers and the legal system and lack, in Carlin's phrase, "legal competence."²⁹⁷ Therefore, the legal services attorneys or community representatives must set priorities for a local office.

In considering this view it is necessary to analyze the concept of legal need. The proposition that we cannot rely on individual consumer demand to determine the legal needs of a community begins with the argument that the concept of legal need is a social construct and that the extent to which people go to attorneys will depend on cultural definitions of when and why one resorts to law.²⁹⁸ Such a "subjective" definition of legal need may be summarized by the notion that "[i]n the final analysis, an individual has a 'legal problem' only if, and when, he sees that he has one."²⁹⁹ This model suggests that need is a reflection of consciousness. The goal is to meet the individual's "set of felt needs."³⁰⁰ Research indicates that perceptions of legal need differ according to income level and exposure to the legal system,³⁰¹ and that poor people have a conventional, but limited, view of when a lawyer is needed. They recognize a need for attorneys in criminal, domestic relations, and real estate matters, but for little else. Their competence in directing attorneys also depends on their economic class.³⁰² Complementary studies further argue

296. Matthews & Weiss, *What Can Be Done: A Neighborhood Lawyer's Credo*, 47 B.U.L. Rev. 231, 233-235 (1967).

297. J. Carlin, J. Howard & S. Messinger, *Civil Justice and the Poor* 61-63 (1967).

298. Similarly in medicine, academic critics have suggested that "illness is a socially assigned category given meaning from society to society by social interpretation and evaluation of the biologically abnormal characteristics." Veatch, *The Medical Model: Its Nature and Problems*, 1 Hastings Center Stud. 59, 60 (No. 3, 1973). The patient is not vested with the "sick role" without a social judgment labelling him as such. T. Parsons, *The Social System* 428-79 (1951). Whether the social judgment is the physician's as Parsons suggests, or is part of an autonomous process of psychological organization by which individuals give meaning to their reality is unclear. See C. Herzlich, *Health and Illness: A Social Psychological Analysis* 28-40 (1973). See also S. Sontag, *Illness As Metaphor* 45-46 (1978).

299. F. Marks, *The Legal Needs of the Poor: A Critical Analysis* 4 (1971). Marks takes a somewhat different position in Marks, *A Lawyer's Duty To Take All Comers and Many Who Do Not Come*, 30 U. Miami L. Rev. 915 (1976).

300. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 Law & Soc'y Rev. 401, 405 (1975). The poor have always been viewed as "traditionalists" in their conception of the legal system. F. Marks, *supra* note 299, at 8.

301. See, e.g., Boston Bar Association, *Action Plan for Legal Services, Part I*, at 23-82 (1977); Sykes, *Legal Needs of the Poor in the City of Denver*, 4 Law & Soc'y Rev. 255 (1969); Levine & Preston, *Community Resource Orientation Among Low Income Groups*, 1970 Wis. L. Rev. 80.

A study of the accessibility of legal services to low income groups in London, Ontario, Canada, finds that the poor are not aware of the availability of lawyers' services and do not perceive lawyers as a source of help in resolving social problems. D. Cruikshank, *Legal Services in London: An Empirical Study* 18, 20, 22-26 (1971). On the relationship between client ignorance about or hostility toward lawyers and the delivery of legal services, see Phillips, *Social Work and Legal Services*, 42 Mod. L. Rev. 29-41 (1979).

The methodology of existing studies of legal needs has been questioned on the ground that "the incidence of legal problems may be in part a function of the number of questions addressed to the members of the sample." L. Goodman, *Memorandum on Legal Needs Assessment Methods* 5 (National Social Science and Law Project, Inc., Mar. 15, 1979). Surveys using more sophisticated techniques have been conducted by North Carolina Legal Services. See *Legal Servs. of North Carolina, Inc., Client Needs Survey* (unpublished manuscript) (undated).

302. J. Carlin, J. Howard & S. Messinger, *supra* note 297, at 61-76.

that knowledge about legal rights,³⁰³ as well as enforcement of these rights,³⁰⁴ bears a direct relation to income. Following this view, if a legal services program were to set priorities on a first-come, first-served basis, that program would necessarily be using a culture-specific and relative conception of need.³⁰⁵

Legal need is a variable that can also be manipulated by the attorney. Thus, the failure of the poor to use the legal system is not simply a result of their lack of "opportunity (principally price) and sophistication to use the legal system,"³⁰⁶ or their lack of legal competence. Instead, the attorney and his legal culture define certain problems as amenable to legal resolution.³⁰⁷ Lawyers that are "reactive,"³⁰⁸ waiting for clients to bring problems to them, will receive a docket different from that of attorneys who take an aggressive role and suggest possible ways in which clients can use the legal system, especially at its frontiers.³⁰⁹ This view suggests that client perception of a "felt need"

303. Leon Mayhew argues that if the poor do not have knowledge about certain legal rights, it is either because no social organization exists to provide routine and established support for that particular right, or because the rights involved are not perceived by the poor as relevant to their concerns. Often, such misperceptions exist because rights are not specified in such a way as to be palpable to those who possess them, experience their violation, and advocate or protect them. See generally Mayhew, *supra* note 300, at 409-10.

304. "It is not uncommon to find people who think that it is the well-to-do, especially the rich, who most have occasion to deal with law and lawyers." Cobb, *The Law and the Poor*, *Legal Aid Rev.*, July 1929, at 9. This view reflects the belief that legal problems are tied up with the ownership of property, traditionally conceived. Jonathan Weiss has convincingly discredited that view in *The Law and the Poor*, 26 *J. Soc. Issues* 59 (1970). See generally Ehrlich, *A Progress Report from the Legal Services Corporation*, A.B.A.J. 1139(1976) ("Inability to utilize the legal system can be and often is disastrous for the poor in ways that are inapplicable to others.").

On a macro-economic level, however, Pashigan contends that "[t]he most important determinant of the demand for legal services and for lawyers is real gross national product" and that "[s]hifts in the demand for lawyers are due for the most part to changes in real income." Pashigan, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 *J. L. & Econ.* 53, 72 (1977). This view stands on the premise that the number of transactions for which one needs an attorney is directly proportional to income. *Id.* Whichever view one takes about the poor's need for lawyers, however, the evidence is clear that lower economic and social groups use lawyers less than higher economic groups. See M. Cass & R. Sackville, *Legal Needs of the Poor* 77 (1975) (Australia); B. Curran, *supra* note 294, at 186-90 (a greater variable was level of education, however); Carlin & Howard, *Legal Representation and Class Justice*, 12 *U.C.L.A. L. Rev.* 381, 383 (1965).

305. See Marks, *A Lawyer's Duty to Take All Comers and Many Who Do Not Come*, 30 *U. Miami L. Rev.* 915, 916-18 (1976). In a similar vein, Michael Zander has urged that the legal competence theory is "unsatisfactory" as "an explanation of unmet need for legal services." He points out that "in some fields many poor persons do get the help of lawyers, whilst in others, many who are not poor lack such help." Further, the "use of lawyers varies enormously as between different kinds of problems. In other words, the kind of problem seems to cause much greater differences in lawyer use than the kind of potential client." M. Zander, *Legal Services for the Community* 289 (1978).

306. Marks, *supra* note 305, at 917.

307. Joel Handler, a poverty law theorist, has pointed out from a social work context that "as every practicing professional knows, when options are laid out for a client, he invariably asks what the professional thinks he ought to do." J. Handler, *Protecting The Social Service Client* 52 (1979). Handler concludes that the goal of client self-determination is rarely achieved. *Id.*

308. Black, *The Mobilization of Law*, 2 *J. Legal Stud.* 125, 128 (1973). One might also classify the process by which a legal system acquires its cases as passive or active. See P. Selznick, *Law, Society and Industrial Justice* 225-28 (1969).

309. Marks, *supra* note 305, at 922.

depends in large part on the attorney's "promotion of that need."³¹⁰

None of these theories justifies ignoring individual choice in legal services allocation.³¹¹ If it is feared that the indigent cannot make effective choices because of a lack of knowledge, the proper response is extensive client education.³¹² But even educated clients can be manipulated by their attorney's definitions of legal need. Therefore, any system must demand self-restraint by attorneys and develop a structure that will redefine the power relationships between professional and client. Recognition that the definition of a situation as a "legal" problem "is a consequence of the social organization of the legal system"³¹³ means that changes can be made to allow clients to decide whether certain problems, given the limited resources available, should be pursued through a legal strategy or through other forms of conflict resolution.³¹⁴

For these reasons, client education is the key to the development of client responsibility for resource allocation. Client education would inform poor people of their legal rights in a variety of contexts and would apprise them of the availability of legal services lawyers. Clients could then define the nature and character of the legal services they require.³¹⁵ The Corporation has long fostered such forms of community outreach,³¹⁶ but efforts toward client educa-

310. *Id.* at 919-20.

311. The problem inherent in the claim that clients have needs which they do not recognize is amenable to different solutions. One may dismiss the concept of needs as inescapably subjective and speak instead of rights. This conceptual shift would allow one to argue that individuals choose not to exercise their rights. Further, a focus on rights suggests that one ought "to reformulate the objectives of legal services research so as to include not only an analysis of the processes whereby existing rights are or are not enforced but also . . . attempt to identify those social problems and conditions in relation to which it might be thought desirable to create new structures of rights." These new legal rights could then be vindicated by legal services attorneys. L. Bridges, S. Sufrin, J. Whetton & R. White, *Legal Services in Birmingham* 3 (1975) [hereinafter cited as *Legal Services in Birmingham*]. See also White, *Lawyers and the Enforcement of Rights, in Social Needs and Legal Action* 37 (P. Morris, R. White, & P. Lewis eds. 1973).

312. F. Marks, *supra* note 299, at 13; Landinsky, *The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients*, 11 *Law & Soc'y Rev.* 207, 212-13 (1976).

313. Mayhew, *supra* note 300, at 408. See also *Legal Services in Birmingham*, *supra* note 311, at 2. One may resolve the apparent tension between Bridges and Mayhew by reading Mayhew as suggesting that social reality is malleable. It is unlikely, however, that as a sociologist Mayhew takes this view. For this important epistemological distinction see P. Berger & T. Luckmann, *The Social Construction of Reality* 1-18, 134-47 (1966).

314. One could argue that the way to build a poverty community's confidence in lawyers is to bring test cases which galvanize that community. Under this view a case might be worth bringing for its publicity value even if it is not considered technically meritorious. Whether this notion is encompassed in Marks' view of "legal competence" is unclear.

315. Whether or not a need is defined as a legal need may be a function of the character of the helping organization to which a poor person is referred initially. See White, *supra* note 311, at 51.

316. The need for community education is clear. Of 1,260 eligible poor persons interviewed in a 1978 GAO study about 60% were not aware that free legal services were available to them and only half of those who were aware knew the types of available services. See GAO Rep. No. HRD-78-164 *Free Legal Services for the Poor—Increased Coordination, Community Legal Education, and Outreach Needed* 19-23 (Nov. 6, 1978). That study showed that seven of the nine programs studied engaged in limited or no education programs. An LSC survey of its programs reached similar conclusions. Oversight of the Legal Services Corporation, 1980: Hearing Before the Subcomm. on Employment, Poverty and Migratory Labor of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 22 (1980).

Of course, to the extent to which resources are severely limited increased community education may prove frustrating if not self-defeating. As one legal services attorney noted, "[w]hen an office can take only 12% of the cases, there is no reason to publicize the services. Telling people to

tion must avoid duplicating the problem it hopes to solve, conceptualizing legal need through an attorney's point of view. Traditionally outreach programs have been an organizing tool with legal services lawyers directing programs, efforts, and resources to identify particular audiences and topics.³¹⁷ To the extent that the content of community education programs are tailored to promote particular service requests³¹⁸ community education serves to formulate a community's perception of legal need.

Such activity is improper for legal services attorneys for at least two reasons: their status as publicly-funded lawyers and their positions as lawyers of first and last resort for most poor people. First, because Legal Services is publicly funded, its institutional structure demands certain public accountability. Government funding carries with it responsibilities of fairness, if not neutrality. If the government attempts to develop "a system of awareness shaping, administered directly in response to a political determination of the proper awareness agenda,"³¹⁹ it should recognize its responsibility for "balanced communication,"³²⁰ thus ensuring that a variety of perspectives are addressed.³²¹ Of course, Congress could expressly authorize the use of federal funds to advocate particular uses for legal services. Lacking such authorization, legal services attorneys ought not to mold the poor's concept of legal need to meet their personal vision of the good society. Whatever criticisms one may make against the neutrality model of government intervention in the political process are not relevant to the case of government subsidy for legal services. Legal services is a claim that individuals may make on the community and as such, each person may make an equal claim. The state lacks the prerogative to use non-neutral criteria in resource allocation. Furthermore, the rationale of the legal aid principle is to ensure each citizen the legal rights he may possess under existing laws and not, in and of itself, to redistribute wealth and power by exercising legislative and political functions. As such, neutrality in allocation procedures assures that the program remains true to its articulated purpose: the vindication of rights embedded in law rather than the political mobilization of the poor. Any complaint that neutrality biases allocation to-

come in just to turn most of them away, seems to us a fraud on our client community." *Id.* at 261 (statement of Charles Dorsey).

317. Indeed, legal services partisans have approvingly pointed out that by strategic case selection one could "socialize" clients into having confidence in the use of lawyers and thus direct and stimulate client demand in selected areas of law. F. Marks, *supra* note 299, at 11.

318. *Id.* at 15. A fine line exists between "intervention" in a client's problems and "interference." "The principle of client self-determination can be easily perverted if the realities of personality dynamics are ignored." Cihlar, *Client Self-Determination: Intervention or Interference*, 14 *St. Louis L.J.* 604, 622 (1970). A lawyer's status, bearing and very presence can influence otherwise sincere attempts to let the client make an unfettered decision on a course of action. *Id.* at 616, 623.

319. J. Tussman, *Government and the Mind* 27 (1977).

320. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 *Tex. L. Rev.* 863, 908 (1979). See also Shiffrin, *Government Speech*, 27 *U.C.L.A. L. Rev.* 565 (1980), for a different analysis of the general problem of government intervention into the realm of ideas.

321. See *Bonner-Lyons v. School Comm.*, 480 F.2d 442 (1st Cir. 1973); *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951 (Alaska 1978); *Anderson v. City of Boston*, 376 Mass. 178, 200, 380 N.E.2d 628, 641 (1978), appeal dismissed, 439 U.S. 1060 (1979).

wards the status quo is relevant only insofar as the status quo fails to enable persons to seek legal redress of their grievances.³²²

A second, more important basis for self-restraint by legal services attorneys flows from our conception of the attorney as a professional. The agency aspect of the attorney-client relationship imposes special duties on the attorney different from those imposed on other professionals. The attorney's role as counsel is inconsistent with attempts to program a client's legal agenda. In spite of this, the lawyer-client relationship has historically been one of "professional dominance"³²³ in which the lawyer dominated and controlled the structure of the relationship.³²⁴ The client who seeks counsel from an attorney is predisposed to accept the attorney's definition of his problem. However, the fact that attorneys representing privately funded clients may aggressively define the legal agenda is no justification for allowing legal services lawyers to organize the client's schedule of legal needs. Corporate clients may be sophisticated enough in legal relations to counterbalance an attorney's influence. It is less clear that poor people have the same sophistication. If a private client is unhappy with his attorney he may discharge him and hire another. For the poor, the legal services attorney is likely to be the only lawyer available. The dangers of paternalism and professional dominance are thus much greater for the legal aid lawyer than for lawyers in the private sector.

The bureaucratic nature of the legal services program takes on many features of traditional street-level bureaucracy.³²⁵ In particular the interaction between poverty lawyer and poverty client reflects bureaucratic norms for the "routinized, mass processing of cases," reinforcing conceptions of professional dominance.³²⁶ Thus, one sympathetic observer concluded that legal services

322. Neutrality models are explored and criticized on a variety of grounds in Baker, *Neutrality Process and Rationality: Flawed Interpretations of Equal Protection*, 58 *Tex. L. Rev.* 1029, 1042-70 (1980).

323. See generally E. Freidson, *Professional Dominance* (1970); see also W. Moore, *The Professions: Roles and Rules* (1970).

324. The available studies of lawyer-client interaction generally support the claim of lawyer domination of clients. See D. Rosenthal, *Lawyer and Client: Who's in Charge* (1974). The closest analogue is the doctor-patient relationship in which the patient defers to the physician as an expert. He is a supplicant and not a consumer of medical services. See Bloom & Wilson, *Patient-Practitioner Relationships*, in H. Freeman, S. Levine & L. Reeder, *Handbook of Medical Sociology* 275 (3d ed. 1979). Five models of the doctor-patient relationship are described in Szasz & Hollander, *The Basic Models of The Doctor-Patient Relationship*, 97 *A.M.A. Archives of Internal Med.* 585 (1956). The literature on physician dominance is reviewed in Note, *Restructuring Informed Consent; Legal Therapy of the Doctor-Patient Relationship*, 79 *Yale L. J.* 1533, 1533-55 (1970). For the concept of patient as consumer, see Reeder, *The Patient Client As A Consumer: Some Observations on the Changing Professional-Client Relationship*, 13 *J. Health & Soc. Behavior* 406 (1972).

325. Such bureaucracies are defined as publicly funded organizations that deliver routine services to clients using low-level intermediaries. See Lipsky, *Toward a Theory of Street-Level Bureaucracy*, in *Theoretical Perspectives in Urban Politics* 196-213 (W. Hawley & M. Lipsky eds. 1976). For case studies analyzing the activities of public housing managers and Veterans Administration out-patient department and emergency room clerks according to this construct, see J. Purttas, *People-Processing: The Street Level Bureaucrat in Public Service Bureaucracies* (1979).

326. Hosticka, *We Don't Care About What Happened, We Only Care About What is Going To Happen: Lawyer-Client Negotiations of Reality*, 26 *Soc. Probs.* 599 (1979) (detailing lawyer domination of lawyer-client interview process in which lawyers confined "communication to prescribed subjects," *id.* at 610).

to the poor has "become shallow, cautious and incomplete."³²⁷

This problem is exacerbated by the differences in private and public attorney-client relationships. Research on the attorney-client relationship³²⁸ suggests that legal aid lawyers respond to a generalized view of clients and cases prior to encounters with specific clients thus ensuring "that what he expects will happen does indeed happen."³²⁹ Such lawyer-client interactions create a "closed environment"³³⁰ that denies autonomy to clients.³³¹ If the publicly funded client ought to have "control over the 'subject matter' of the action,"³³² at least "when client values or lawyer conflicts of interest are involved,"³³³ is the allocation of decision-making authority affected prior to the creation of a formal attorney-client relationship?³³⁴

In the private sector this question would raise few difficulties. An attor-

327. Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA Briefcase, Aug. 1977, at 110. It should be noted that these evaluations flow from a focus on the character of individual attorney-client interactions judged against the highest standards of attorney quality. Earlier evaluations of legal services performance focused on "the impact of the OEO projects" in terms of broad social goals. Champagne, *An Evaluation of the Effectiveness of the OEO Legal Services Program*, 9 Urb. Aff. Q. 466 (1974). See also Berk, *Champagne's Assessment of Legal Services Programs: An Evaluation of An Evaluation*, 9 Urb. Aff. Q. 490 (1974); Champagne, *A Reply to Berk*, 9 Urb. Aff. Q. 510 (1974).

328. The character of the attorney-client relationship depends considerably on administrative organization and client type. See J. Carlin, *Lawyers Ethics* 66-83 (1966) (solo practitioner); J. Handler, *The Lawyer and His Community* (1967) (small town practitioner); E. Smigel, *The Wall Street Lawyer* 261-66, 297-98 (1969) (Wall Street lawyer); R. Wells, *The Legal Profession and Political Ideology—The Case of the Carr Law Firm of Manchester, Iowa* (1963) (Ph.D. dissertation, Univ. of Iowa) (small town practitioner).

329. C. Hosticka, *Legal Services Lawyers Encounter Clients: A Study in Street Level Bureaucracy* 200 (unpublished Ph.D. thesis, Brown Univ. 1976). See also *id.* at 201, 202 n.8, 207-8; Bellow, *The Legal Aid Puzzle: Turning Solutions into Problems*, in 5 *Working Papers for a New Society* 52, 55 (Spring 1977); Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA Briefcase, Aug. 1977, at 106, 108, 117.

330. Bellow, *Legal Aid in the United States*, 14 *Clearinghouse Rev.* 337, 343 (1980). Bellow argues that in many legal services offices "[t]he definition of the client's problems and the 'best' available solutions are not mutually explored and elaborated; they are imposed by the lawyer's view of the situation." Bellow, *supra* note 329, at 108.

331. The response to this problem developed by Gary Bellow has been to propose that legal aid lawyers limit client intake to allow them to provide each client with a detailed preventive law "check-up" reviewing his social and economic problems to determine those which are amenable to legal resolution. See Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA Briefcase, Aug. 1977, at 106, 108, 120; Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. Rev. 337, 355, 358 (1978) (ethical implications of more complete, less attorney-autonomous service to the poor).

Bellow proposes to select clients for this service according to whether they have a particular problem which his reference group, the "client community," is interested in. If the client possesses that "lucky" problem, legal services will address his other difficulties as well. See 1980 *Annual Report of Legal Services Institute*; Grant Proposal of Legal Services Institute (Dec. 14, 1978).

332. Spiegel, *Lawyer and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. Pa. L. Rev. 1, 43 (1979).

333. *Id.* at 73.

334. The rules surrounding the creation of an attorney-client relationship are unclear. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1316-17 (7th Cir. 1978), in which the Court of Appeals for the Seventh Circuit found that explicit consent to an attorney-client relationship is not necessary for its formation. Indeed, "[t]he attorney-client relationship is not dependent on the payment of a fee nor upon execution of a formal contract." *United States v. Constanzo*, 625 F.2d 465, 468 (3d Cir. 1980). See also L. Ray Patterson & E. Cheatham, *The Profession of Law* 245-46 (1971).

ney's responsibilities start with his acceptance of the client. The client controls the selection of the attorney and the purposes for which he is hired. At the same time, the attorney has no obligation to accept employment on any but his own terms. Without the formal constraint of the attorney-client relationship it is easy for a private attorney to argue that he has no obligation to take a case, or inform a client about his legal rights. In the public sector the problem arises because the legal services lawyer has obligations to a particular pool of clients. "An indigent person who seeks assistance from a legal service office has a lawyer-client relationship with its staff of lawyers which is the same as any other client who retains a firm to represent him."³³⁵ However, prior to the creation of the relationship the issue is less clear. The *raison d'être* of the legal services lawyer is service to poor persons for whom he is the attorney of last resort. Having a designated clientele to serve, as well as an individual client, he is also concerned that the largest possible number of that clientele receive legal services. This concern for the unrepresented eligible client is in one sense psychological, a reflection of the concern for social justice that motivates the career choices of many legal aid lawyers. It reflects the harsh fact that the scarcity of resources prevents legal services from meeting the needs of all who request service. Since the poverty lawyer is committed to serve poor persons only, he has a concern for eligible clients in the preclient phase: those to whom he may have to deny services,³³⁶ those who have not yet requested serv-

335. ABA Comm. on Professional Ethics, Op. No. 334 (1974). Note that section two of the Legal Services Corporation Act, Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified at 42 U.S.C. § 2996(b) (1976)), requires that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics and the high standards of the legal profession." The Corporation is expressly forbidden from interfering with the Code's mandates to an attorney. 42 U.S.C. § 2996e(b)(3). See S. Rep. No. 495, 93d Cong., 1st Sess. 13 (1973), where the Committee places particular emphasis on those provisions governing the inviolability of the attorney-client relationship. The issue was further discussed in 119 Cong. Rec. 20,738 & 40,460 (June 21 & Dec. 10, 1973); 120 Cong. Rec. 15,004-05 (May 16, 1974).

336. Meltser & Schrag, Report From a CLEPR Colony, 76 Colum. L. Rev. 581 (1976), relate the following incident which raises this issue acutely:

Ms. Prince had sued our client, Ms. Ward, and we concluded that since Ms. Prince's story kept shifting, it would be desirable to take her deposition. During the deposition itself, the plaintiff (who was still not represented by counsel) told Mary that she was not certain that the defendant hadn't repaid the money to her husband, and that she had actually received \$800 of the \$1500 from the defendant during the course of one week, and had spent it on food and liquor. Of course, one of the conventional purposes of depositions is to obtain admissions, but the students were quite uncomfortable obtaining from the plaintiff concessions that would never have been made had the witness been represented by counsel.

Id. at 618. If the legal aid lawyer follows the traditional rule, he does nothing for his *pro se* adversary.

Does the attorney's dedication to truth and to making the adversary system work require him to steer a middle course in his adversary relations with a *pro se* litigant? Judges properly treat such litigants with indulgence and make certain that their interests are protected. Should the same duty attach to private counsel generally or to legal aid counsel specifically?

If the legal aid attorney does aid the *pro se* adversary in any productive way he might be charged with a lack of loyalty to his client. Would making strenuous efforts to find his adversary a volunteer counsel present similar problems?

A discussion of the rules concerning the giving of legal advice to a potentially adverse unrepresented person may be found in ABA Code of Professional Responsibility DR 7-104(A)(2). Former Canon 9 is also relevant: "It is incumbent upon the lawyer most particularly to avoid

ice, and those who will not request services because of their perception of legal need.

But the concern for the unrepresented client is also pragmatic. Many legal services attorneys fear that allocating resources by client choice will reduce the opportunities to handle nontraditional and often complex litigation. While one cannot prove this point, a consumer preference for service over law reform cases is not unlikely. The use of rationing schemes for divorce and landlord-tenant litigation in some urban areas supports this view. At the same time, a client-oriented approach to legal assistance allocation by no means necessitates the end of law reform or impact litigation for legal services attorneys. Individual poor persons may request service in a particular area in order to further a "collective choice"³³⁷ of the poverty community. The aggressive pursuit of client interests in areas in which the client desires service may well lead to impact litigation. Major test cases such as *Boddie v. Connecticut*³³⁸ and *Shapiro v. Thompson*³³⁹ started out as individual service cases and resulted in major constitutional challenges because that was the only way to obtain legal redress for clients who could not afford to pay court filing fees or were denied welfare benefits because they had recently moved.

V. SOCIAL UTILITY ARGUMENTS FOR RESOURCE ALLOCATION

The preceding sections have indicated that the prevailing approach to resource allocation in legal services is based on some form of utilitarian theory, reflecting the view that resources should be allocated to yield the greatest good for the greatest number. The strongest argument for utilitarian resource allocation is that with demand exceeding available resources, it better accommodates the general welfare of those eligible for service by bringing cases that mean relief for the largest number of people.³⁴⁰ In a situation of scarcity there are two ways the general welfare of people eligible for service can be increased by a utilitarian allocation; legal services lawyers may bring lawsuits that affect the largest number of poor persons, or they may choose litigation that is designed to change the condition of the poor as a class. Since all individuals cannot be served, individual representation is rejected as a realistic goal and cases involving certain programs such as welfare, public housing, and Medicaid, which by definition create categories of beneficiaries, are given priority

everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law." ABA Canons of Professional Ethics No. 9 (1908). See also ABA Comm. on Professional Ethics, Formal Ops. No. 5 (1924); id. No. 9 (1926); id. No. 58 (1931); id. No. 101 (1933); id. No. 160 (1936).

337. Such choices might otherwise remain latent because the poor are unlikely to organize as an interest group. See M. Olson, *The Logic of Collective Choice* 165-67 (1965).

338. 401 U.S. 371 (1971).

339. 394 U.S. 618 (1969).

340. This characterization of the argument as one based on social utility is correct only if one accepts the argument's operative assumption—that the maximization of happiness or the interests of the poor will necessarily result in the maximization of happiness for society generally. To do so one must either view social relations as a nonzero sum game or consider the satisfaction of the desires of the poor as productive of more happiness than those desires which the rich are required to give up to provide the stated benefits to the poor.

because these programs affect large numbers of people. The utilitarian view justifies a legal services program limiting cases to such areas because the effort improves the legal status of the largest number of people and is, therefore, the most socially efficient use of legal aid funds.

Under this version of utilitarian theory, the rights of the individual to service are subordinate to the interests of a larger number of the poor. A case may be chosen because the aggregate effect of successfully pursuing it may negate the necessity for litigating similar individual cases. The individual whose case is rejected, however, does not necessarily benefit from the case taken on. In rejecting a specific client's request for service, the latter's rights of access to a lawyer are offended. The only way we can say that even the rejected client benefits from the lawyer's case selection is if we assert that the aim of legal services is to serve the poor as a class. In practice, the utilitarian rationale for grounding decisions of resource allocation and client selection on serving the greatest number of individuals reduces to an argument that views the poor as a class who share a community of interests.

The utilitarian argument, however, is often put differently. It is argued that equal justice for the poor cannot be attained without redistributing wealth and power in society. Based on this view, the most socially efficient use of legal aid funds requires priority-setting criteria for choosing cases that bring the most monetary benefit to the poor, Earl Johnson, former director of the OEO Legal Services Program, articulates this explicit utilitarian rationale:

[W]hen issues affecting hundreds of thousands of poor people and involving millions of dollars in potential benefits go unappealed because each individual case is merely a small claim, while millions of dollars are being spent on divorces, there seems reason enough to pose the question of cost-effectiveness in the expenditure of government funds.³⁴¹

In another study, Johnson calculated the dollar benefit of legal aid "law reform" activity.³⁴² In his view, the large sums that putatively accrue to the

341. *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* 219 (M. Cappelletti, J. Gordley & E. Johnson eds. 1975). This view is argued well in S. Nagel, *Improving the Legal Process* 271-310 (1975).

342. *Toward Equal Justice*, *supra* note 341, at 167-184. One may wonder whether this "simple economic loss-gain argument" only "equates forced transfer of funds [from poor defendants to equally poor plaintiffs] with social gain." Brakel, *Styles of Delivery of Legal Services to the Poor*, 1977 *Am. B. Found. Research J.* 219, 238.

By engaging in "simplistic multiplications" of law reform victories and settlement amounts to compute the benefit of law reform efforts, Johnson neglects to consider whether "the so-called economic losses of one side may be passed right back—more or less directly—to the economic 'beneficiaries' of the other side." *Id.* at 239 (criticizing E. Johnson, *supra* note 173, at 178 & nn.90-92). Thus, significant evidence suggests that landlord-tenant litigation in some legal aid contexts may not, in fact, improve the housing situation of the poor. See Note, *Legal Services and Landlord-Tenant Litigation: A Critical Analysis*, 82 *Yale L.J.* 1495, 1499-1503 (1973). Habitability laws may provide tenants with a weapon against housing code violations and a defense against nonpayment of rent, but they also can force rents upward with no comparable increase in housing quality benefits. See Hirsch, Hirsch & Margolis, *Regression Analysis of Effects of Habitability Law Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 *Cal. L. Rev.* 1098, 1130, 1133-36 (1975) (receivership laws result in increased rents) (testing the hypotheses of Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Hous-*

poverty community from the use of social utility selection criteria make obvious the virtue of conscious priority-setting. Thus, legal services programs should pick cases that serve the largest number of the poor because that is cost-effective. The utilitarian theory also serves the original goals of the legal services program. As one spokesman for the Corporation stated, equal justice requires that:

the burdens on the poor and the rights accorded them . . . [be] equal to those of other segments of the population Thus legal services work and achieving equal justice for the poor requires confronting poverty and the conditions that produce poverty and challenging the individuals and institutions which perpetuate it.³⁴³

This perspective is the legacy of President Johnson's War on Poverty.³⁴⁴ Unlike the British welfare state approach, which aimed at providing certain goods to its citizens, the War on Poverty focused primarily on the redistribution of wealth in society and allowed for personal service or individual welfare grants only to the extent resources permitted.³⁴⁵ Most followers of the social utility

ing Subsidies and Income Redistribution Policy, 80 Yale L.J. 1093 (1971), and Komesar, Return to Slumville—A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor, 82 Yale L.J. 1175 (1973). See also Ackerman, More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar, 82 Yale L.J. 1194 (1973).

The issue has arisen in the welfare context as well. As a result of the huge increase of requests in the 1960's by militant welfare recipients for fair hearings on special grant requests, see L. Jackson & W. Johnson, Protest By the Poor 114 (1974); Rabagliati & Birnbaum, Organizations of Welfare Clients, in *Community Development in the Mobilization for Youth Experience* 102-36 (H. Weissman ed. 1969), local and state governments abolished the discretionary special grant system and instituted a universal flat grant system at amounts lower than those possible under an individualized need-based allocation. See F. Piven & R. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* 303-07 (1977). The victory in *Goldberg v. Kelly*, 397 U.S. 254 (1970) (notice and evidentiary hearing required prior to termination of government benefits) may have prompted more rigorous initial eligibility determinations. J. Handler, *Protecting the Social Service Client* 70 (1979); Brill, *The Uses and Abuses of Legal Assistance*, 31 *The Public Interest* 38, 43-44 (1973). But see Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 *N.C.L. Rev.* 1133, 1139, 1151-52 (1976).

343. Houseman, *Legal Services and Equal Justice for the Poor: Some Thoughts on our Future*, 35 *NLADA Briefcase* 44, 45 (1978).

344. Rejecting the Biblical view that "the poor shall never cease out of the land," Deut. 15:11 (King James), the proponents of the War on Poverty sought to provide not only cash and in-kind payments to the poor but also to change their social and economic condition. As one writer pointed out:

The Great Society's antipoverty strategy was three-fold. First, placing emphasis upon the presumed desirability of changing the poor, the Great Society improved the provision of diverse services, focusing on educational opportunities and training. Second, the Great Society legislation aimed at changing American institutions to allow the poor a greater voice in determining their own destiny, including the planning and implementation of programs in aid of the poor. Third, the Great Society expanded direct assistance to the poor through the provision of in-kind services including health care, shelter, and nutrition.

S. Levitan, *Programs in Aid of the Poor* 131 (3d ed. 1976). See also J. Donovan, *The Politics of Poverty* (1967); R. Elman, *The Poorhouse State* (1966); S. Levitan, *The Great Society's Poor Law: A New Approach to Poverty* (1969).

345. The announcement by the Community Service Association of New York that it was discontinuing casework is an interesting instance of this attitude. The Executive Director of the agency pointed out:

If you don't deal with the pathology of the ghetto, all the individual counseling you do with a person is not going to help. The situation is not just a matter of persons with problems but rather of whole areas afflicted with social ills. If the individual is to be

model accept the view that a conscious strategy of "law reform" involving a concerted effort to change substantive rules of law in favor of the poor is the best way to maximize benefits for the poor. Others, however, followed the social utility model but felt that law reform strategy was ultimately futile.³⁴⁶ In their view, only the development of economic self-sufficiency breaks the poverty cycle. Thus, Legal Services resources should be used in the drive for community economic development.

Because they are concerned with social change, adherents to the social utility perspective see the stated mission of Legal Services as far different from that of ensuring "equal access to the system of justice . . . for individuals who seek redress of grievances" and "who would be otherwise unable to afford adequate legal counsel."³⁴⁷ In their view, equal access to justice is impossible in an unequal society. They wish to be conscious agents of social change using the law as a means to organize the poor and redistribute wealth. Thus, the clients of Legal Services are not only individual litigants, but the client community or the poor as a class. Litigation decisions are made to forward the best interests of the greatest number of eligible clients, and priorities are set with the needs or desires of the client community, rather than individual clients, in mind.

Many consider case selection on utilitarian grounds the only sensible response to a situation of budgetary crisis and overwhelming demand in which all individuals cannot be served. For example, emotive analogy with the "battlefield" concept of triage is the basis for recommendations by the OMB to the Corporation:

As in the case of medical treatment, the concept of triage must be applied—the relative need must be further defined in terms of resources available and the worth (both social and economic) of the rights at issue. . . . Only when resources are sufficient to meet all "needs" is the luxury of a policy which need not make such distinctions reasonable.³⁴⁸

If the goal is equal justice, one could still say that the principal aim of legal services is to respond to the needs of individuals and to pave the way for effective access to the justice system for as many poor people as possible. The rhetoric of effective access to the legal system is continually on the lips of Corporation spokesmen, who suggest that lack of resources, not lack of will,

helped, someone has to deal with the complex of social ills that bears on the individual, not just on the individual himself. We are convinced that an approach that focuses primarily on individuals may help some people, but will not really alleviate the basic problem of a sick community. Instead of starting out by saying that the individual is the client, we're going to say that the community is the client.

W. Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America* 263-64 (1974).

346. See, e.g., Hazard, *Law Reforming in the Anti-Poverty Effort*, 37 U. Chi. L. Rev. 242, 244 (1970); Hazard, *Social Justice through Civil Justice*, 36 U. Chi. L. Rev. 699 (1969).

347. 42 U.S.C. § 2996(1), (2) (1976) (amended 1977).

348. Letter from OMB to LSC, quoted in *Amicus Curiae Brief*, at 10, *Calvert v. West Va. Legal Servs. Plan, Inc.*, 464 F. Supp. 789 (S.D.W. Va. 1979).

fosters priority-setting. Josephine Worthy, a client representative on the Corporation Board, has both urged that legal services should be "a resource available to all low income people" and that legal services should pursue priorities "which benefit low income people to the greatest extent possible."³⁴⁹ But the writing of many in the legal services arena makes it clear that even if there were adequate resources, they would not consider it incumbent on them to serve individual clients regardless of the social worth of their claims. The basis of this view is that equal justice cannot be achieved by dealing with the problems of individual clients. Rather, individual problems that take time away from major litigation, and advocacy of legislative and administrative policy, are marginal to the goals of the program.³⁵⁰

Gary Bellow discusses the implications of the view that, in times of scarcity, the needs of the individual must be eclipsed by the needs of the community for the sake of greater impact.³⁵¹ He presents the case of a public interest law firm that decides "to focus the program's activities on reform of the city's public housing program." Specifically, it would focus "on cases involving tenant selection and assignment practices" that have resulted in racial and ethnic disparities in the city's housing developments. Bellow considers the possibility that the program would accept clients "only if they were referred by, or were members of, the city-wide public housing Tenants' Council." He correctly categorizes this as a delegation of the program's decision-making authority and says that the code of ethics permits this. Lawyers would retain the freedom to refuse clients from within this group, but not the freedom to serve clients outside the group. Under these circumstances, Bellow suggests, the tenants council "would have . . . control over which and in what ways individual clients were represented, because the lawyers would be bound by the conflict-of-interest provisions" of the code of ethics to turn away individual tenants whose personal goals did not track the group goals of the tenants association.³⁵² This approach would provide legal assistance only to those groups and for those cases that a community group considers important.³⁵³

This technical defense of community-based selectivity avoids the harder political and ethical problems. The community-based model suggests that government grants for legal assistance are the same kind of political tools as

349. Hearing Before the Senate Comm. on Labor and Human Resources, 95th Cong., 2d Sess. 67 (Feb. 7, 1978) (nomination hearing for LSC Board of Directors) (testimony of Josephine Worthy).

350. See, e.g., *Sabot v. Lavine*, 42 N.Y.2d 1068, 369 N.E.2d 1173, 399 N.Y.S.2d 640 (1977), is an example of the tension between the spectrum of individual desires for legal assistance and the most socially useful distribution of legal resources. The issue in the case was whether the plaintiff, a welfare mother, had to deplete her children's bank accounts before she was eligible to receive welfare. She was refused legal aid on the grounds that "even if she won, not too many indigent defendants would benefit from her case." The legal aid attorney apparently did explain to her the mechanics of legal research and directed her to two law libraries. *Molotsky, Welfare Mother v. State of New York*, N. Y. Times, Oct. 15, 1977, at 25, col. 3.

351. Bellow & Kettleison, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. Rev. 337 (1978).

352. *Id.* at 349.

353. *Id.* at 348-53.

other government welfare grants. It ignores all claims for legal assistance based on access rights principles. While this Article does not reject the power of government to provide in-kind grants to community groups to use as they see fit, such a subsidy does not satisfy the individual claim for legal assistance under access rights principles. Whether or not one provides funds for community-based programs, one would still have a responsibility to provide funding for programs focused on individual access rights.

Bellow, in his comments on this hypothetical, confines himself to discussing whether its policies are in conflict with provisions of the Code of Professional Responsibility. While the subordination of the claims of eligible clients to the needs of the community or interest group served by legal aid may not conflict with the language of the Code, such an approach minimizes the value of an individual's claim for legal services.³⁵⁴ Bellow's view, which derogates attorney autonomy in resource allocation, tracks the implied logic of the Corporation's priority-setting process. That process is premised on a reformulation of the attorney's focus from client to community.³⁵⁵

William Simon justifies this reformulation in his studies of attorney roles in the adversary system. He charges that the focus on "the ideal of lawyer-and-client as a self-contained relation between individuals"³⁵⁶ deflects attention from the political effect of legal representation on "the distribution of power in society"³⁵⁷ towards "issues of personal relations."³⁵⁸ He extends this critique to the argument for client control of the resource allocation process. Such "sensitivity to the personal needs of individual clients"³⁵⁹ is a reflection of a "[p]sychological [v]ision"³⁶⁰ of man that "has no principles by which any want or desire can be ranked in terms of any other."³⁶¹ In Simon's view, a client-centered model of advocacy lacks any conception of authentic human nature.³⁶² "The attempt to coordinate and focus the scarce legal resources available to the poor so as to achieve the broadest possible benefit to the community as a whole" is "the only rational approach to providing the poor with . . . access to the legal system."³⁶³ This effort requires that attorneys or program boards choose a resource allocation schedule that is most beneficial to the poverty community, regardless of the wishes of eligible clients.

Some critics of the client-oriented perspective have suggested that this ap-

354. *Id.*

355. See Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 *Stan. L. Rev.* 487 (1980).

356. *Id.* at 504. Simon calls this interaction a "community-of-two." *Id.* at 496-505.

357. *Id.* at 505. Perhaps the classic exposition of this theme may be found in Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95 (1974).

358. Simon, *supra* note 355, at 505.

359. *Id.* at 511.

360. *Id.* at 517.

361. *Id.*

362. *Id.*

363. *Id.* at 531.

proach can be faulted for "artificially individualizing all conflicts."³⁶⁴ This approach, it is argued, is based on "a bourgeois conception of individual rights."³⁶⁵ While such a view is consonant with an avowedly political conception of the role of the legal services attorney, it does violence to the access principles by which legal services derives its claim to government subsidy.³⁶⁶

The central issue, as Simon recognizes, is the "validity of alternative . . . conceptions of lawyering."³⁶⁷ While it may well be the case that the social and economic problems of the poor can best be solved by "group organization,"³⁶⁸ that is a different enterprise. The contemporary attempt to merge community organization with client-oriented advocacy is a result of an expanded understanding of the legal enterprise that is inappropriate in the public sector under principles of access rights. The individual's claim against the state for the provision of counsel does not extend to the expanded, avowedly political, conception of the legal enterprise. The client-oriented perspective underscores this understanding of the public lawyer's purpose and role.

The problem of deciding what is the legal aid lawyer's purpose and role is complicated by the problem of defining who is the client. Until recently, very few people questioned the idea that the client of the legal aid lawyer, like the client of any lawyer, was an individual or a concrete group of individuals. The lawyer's role was that of zealous advocate for his client.³⁶⁹ As has been eloquently suggested, "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."³⁷⁰ At present, however, many legal aid lawyers are uncertain about the focus of their loyalty. Some favor the traditional model. Others accept, either implicitly or explicitly, the notion that their role is to serve the poverty community and that the interests of the poor as a class complement the interests of poor individuals. They want to serve as 'general counsel' to the poor.³⁷¹ This is a complex con-

364. Alcock, *Legal Aid: Whose Problem?*, 3 *Brit. J. L. & Soc'y* 151, 156 (1976).

365. Lewis, *Unmet Legal Needs*, in *Social Needs and Legal Action* 73, 94 (P. Morris, R. White, & P. Lewis eds. 1973).

366. Simon attempts to force the attorney-client relationship into a psychological model to bring to bear the recent critiques of self-actualization as an ethical theory. The attorney-client relationship, however, will not fit so easily into this procrustean analysis. In claiming that the "community of two," as he puts it, obscured "the political character of lawyering" he ignores the moral character of the fiduciary relationship between lawyer and client. By postulating for attorneys a Hobson's choice between political strategist or psychologist, Simon neglects the traditional role of the lawyer as translator, an agent who translates his client's desires and goals into legal language. The lawyer who accepts the client-oriented perspective sees his role as enabling his client to effectuate through law those choices which the client himself makes. By so doing, the attorney recognizes the legitimacy of client autonomy over substantive policy ends. Simon, *supra* note 355, at 492, 558.

367. *Id.* at 531.

368. Alcock, *supra* note 364, at 156.

369. M. Freedman, *Lawyers' Ethics in an Adversary System* (1975); Curtis, *The Ethics of Advocacy*, 4 *Stan. L. Rev.* 3 (1951); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *Yale L.J.* 1060, 1065-76, 1080-87 (1976). See also Martin, *The Lawyer as Friend*, 32 *Rutgers L. Rev.* 695 (1979).

370. D. Mellinkoff, *Lawyers and the System of Justice* 510-11 (1976), quoting Broughan's speech in the House of Lords (Oct. 3, 1820), as reported in 2 *Trial of Queen Caroline* 8 (1821).

371. A Director of LSC, Howard Sacks, explains that "[i]n a sense, legal services acts as a 'general counsel' to the poor and significant segments of the poor who share common problems to

cept. Individual clients are identifiable. A poverty community—at least in a specific geographical area—can also be identified, although problems of definition abound. What it means to represent the interests of the poor as a class is less clear and, although widely used, represents a claim that is more metaphysical than empirical.

Although many issues are raised by the characterization of the poor as a “social object,” the relevant point for our purposes is the view that “the interests and well-being of the group are more valuable than those of the individual and ought to override them.”³⁷² Essentially, this view ignores an individual poor person’s interests that are not synonymous, or at least compatible, with the interests of the poor taken generally. It also discounts the view that his interests are entitled to equal weight in the distribution of services.³⁷³ Even if an individual shares the same interests as the group and recognizes class solidarity, he might not be motivated to sacrifice personal preferences for communal goals. Indeed, “every human being is at any moment a member of a great number of distinct groups.”³⁷⁴ An individual poor person might see his primary group as one of nation, race, religion or geographical place although others might ascribe primacy to his income level or class. It might be more appropriate to contrast the poor as a class with the group of poor persons presently eligible for legal services. That group might better be described as “a conceptual assemblage.”³⁷⁵

Thus, representing the poor as a class ignores “the simple and obvious fact that humanity is divided into separate persons”³⁷⁶ and indeed, as separate persons, have a “moral title to equal concern and respect.”³⁷⁷ There is as little homogeneity among the poor as there is among the rich.³⁷⁸ Poor persons may

insure that their voice is heard in societal decision-making. Legal services must be judged on the extent to which they address the needs of significant segments of the poor and not only on actions with respect to specific clients.” H. Sacks, *Legal Services Corporation: A Plan for the Future* 5 (Mar. 6, 1981) (unpublished report).

372. Quinton, *Social Objects*, 76 *Proc. Aristotelian Soc’y* 1, 12 (1975-76).

373. In other words, the fact that the individual poor person holds a position contrary to those attributed to the group does not make “the moral convictions of the group . . . more worthy of acceptance than the deliverances [*sic*] of the individual conscience where the two conflict.” *Id.* at 13.

374. B. Barry, *Sociologists, Economists and Democracy* 36 (1978).

375. See Quinton, *supra* note 372, at 21.

376. Hart, *Utilitarianism and Natural Rights*, 53 *Tulane L. Rev.* 663, 676 (1979). Hart suggests:

Individual persons, for maximising Utilitarianism, are therefore merely the locations where what is of value is to be found. It is for this reason that as long as the totals are thereby increased, one individual’s happiness or pleasure, however innocent he may be, may be sacrificed to procure a greater happiness or pleasure located in other persons. Such replacements of one person by another are not only allowed but required by Utilitarianism when unrestrained by distinct distributive principles.

Id. See also J. Rawls, *A Theory of Justice* 187 (1971). Hart has argued that this criticism of utilitarianism may go too far. See Hart, *Between Utility and Rights*, 79 *Colum. L. Rev.* 828, 831 (1979).

377. R. Dworkin, *Taking Rights Seriously* 273 (1977), discussed in Hart, *Between Utility and Rights*, 79 *Colum. L. Rev.* 828, 831 (1979).

378. Marxist and neo-Marxist theory is wedded to the view that the poor (at least the working poor) have class interests that transcend their individual desires and that once they become con-

have radically opposing interests in an array of legal problems, and may even be litigating against each other. Some commentators suggest that when the interests of the poor require litigation against other poor persons, representation ought not be provided.³⁷⁹ They argue that participation in such intra-poverty disputes goes against the very grain of the legal aid enterprise. A weaker variant of that position requires the legal services attorney to prepare a "poverty impact statement"³⁸⁰ before commencing litigation to ensure that no conflict exists. Even at this level, the poverty lawyer is still a lawyer for the poor as a class. He can only accept representation in a matter where the client's interests do not conflict with other segments of the poverty community. He is thus expected to make allocation decisions in ways which will not pit poor against poor.

It may well be the client's responsibility to consider the effect of his action on others and on the community. Often positions pressed by clients, while legally correct, may have deleterious effects on others. The attorney, by appropriately directing the client's attention to these effects, should point out the possible social consequences of insisting on a legal solution. Good counseling practice demands that the attorney do so, even suggesting that if it were up to him he would refrain from litigation. Nonetheless, the ultimate decision must be left in the hands of his client. Nor should specific groups be refused legal service on grounds that they are being served through "impact litigation." It is not the job of Legal Services to choose among groups. The Corporation recognized this principle when it opposed congressional efforts to mandate service to specific groups.³⁸¹

VI. APPLYING THE CLIENT-ORIENTED PERSPECTIVE

Can one develop a method of case selection that will not violate an indi-

scious of the bonds that unite them they will coalesce into a unified group. The possibility of such class consciousness is a major predicate of Marxist thought. See generally G. Lichtheim, *George Lukacs* 50-73 (1970); G. Lukacs, *History and Class Consciousness* (1971).

379. Marvin Schick, the chairman of the Board of Legal Assistance of the Jewish Poor in Brooklyn, New York, presented a statement to the October, 1977 meeting of the Legal Services Corporation Board of Directors, in which he charged that "legal service funds are being used against the poor. Congress did not intend this result and I am confident that the use of federal funds to hurt the poor was not the intention of OEO Legal Services and is not the aim of the National Legal Services Corporation." Minutes of LSC Bd. of Directors Meeting app. B 5-6 (Oct. 7-8, 1977) [hereinafter cited as *Minutes*]. Schick cited various New York City neighborhoods where Black and Puerto Rican poor coexist and where the latter frequently have been denied adequate participation in poverty programs. *Id.* at 3. "[E]lderly and poor whites . . . bear the brunt of some of the activism of legal service lawyers who use the vulnerable as easy targets . . . [notably] elderly Jews on the Lower East Side and Chassidic Jews of Williamsburg." *Id.* at 4-5. See also 123 Cong. Rec. 33,761 (1977) (statement of Rabbi Joseph Langer of the United Jewish Council of the East Side relating experience of elderly New York City Jews).

At the Directors' meeting, Nathan Lewin argued that "prompt referral to another legal services office to represent the defendants or the targets" of an inter-poverty dispute was imperative to assure adequate and fair representation. See *Minutes*, supra, at 48-49. See also *id.* at 4.

380. At the October LSC Directors' meeting, the possibility of promulgating a "regulation which requires local agencies to examine the possible adverse impact on the poor resulting from class action or other litigation" was discussed. See *Minutes*, supra note 379, app. B, at 6.

381. See text accompanying notes 132-33 supra.

vidual's right of access to legal assistance? One way of distributing the limited resource of legal services would be to divide it equally among all who have a claim to it, as through a voucher program.³⁸² In the same way that ration coupons allocate food during a shortage, a voucher scheme for legal aid would allocate to each indigent a specific number of hours of an attorney's time. Each individual would be free to choose the purposes for which he used his allocation of legal services. There are two problems with such a voucher scheme. First, equal distribution of the existing budget for legal aid is not likely to allow each person adequate lawyer time for even the most minor problem. Second, one needs an attorney for a specific purpose—to solve a legal problem or to pursue a legal claim—not for a specific amount of time. Some indigents will not have any legal problems while the vouchers are valid. Others may have numerous or complicated problems needing many more hours of lawyer time than those allotted to them. One cannot easily say to a man who is about to be evicted that he has used up his number of lawyer hours. For both reasons a voucher program is an inadequate way of providing equal justice for all indigents.

Another possible allocation mechanism is a lottery or random scheme. This method recognizes each individual's right of access to the legal system. With modifications this method has been used in a number of government programs, including the draft and the allotment of public housing authority apartment slots. Randomness has a special virtue when it is applied to the allocation of scarce "rights" in that it eliminates the claim of injustice in the distribution of a good that is not available to all.³⁸³ While randomness does not stop persons from being denied their right to legal assistance, it does remove any injustice in its distribution of that good.³⁸⁴

There are many problems in applying a random distribution model. For example, how would one deal with the problem of "backlog"? Would the lottery be held daily or yearly? Who would participate in the lottery, those eligible clients requesting service or the entire pool of eligible clients? A practical variation on randomness might be temporal priority.³⁸⁵ This method was

382. Available sources indicate that the one voucher study begun, see LSC, *Delivery Systems Study* 147-48 (1977), was never completed but was transformed into a *judicare* project during the course of the delivery system study. R. Schwartz, *Research Methods in the Delivery Systems Study of the Legal Services Corporation: An Interim Report* 11 (Mar. 18, 1980) (critically reviewing the entire delivery systems study). See also 42 U.S.C. § 2996f(g) (1976). For a discussion of voucher schemes in education see Cohen & Farrar, *Power to the Parents?—The Story of Education Vouchers*, 48 *Pub. Interest* 72 (1977); Coons & Sugarman, *Vouchers for Public Schools*, 15 *Inequality in Educ.* 60 (1973).

383. Note, *The Equality of Allocation by Lot*, 12 *Harv. C.R.-C.L.L. Rev.* 113, 120 (1977). The virtue of randomness as an allocation mechanism is discussed in Barzel, *A Theory of Rationing by Waiting*, 17 *J.L. & Econ.* 73 (1974). See *United States v. Holmes*, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842) (No. 15,383) (when the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot).

384. See Taurek, *Should the Numbers Count?*, 6 *Philosophy & Pub. Aff.* 293 (1977); see also Parfit, *Innumerate Ethics*, 7 *Philosophy & Pub. Aff.* 285 (1978).

385. James Childress considers temporal priority as a "natural" form of randomness or chance and views lottery selection as "artificial" randomness. Childress, *Who Shall Live When Not All Can Live?*, in *Ethics and Health Policy* 199, 205 (R. Veatch & R. Barnson eds. 1976).

ostensibly used by legal aid offices before attorneys arrogated the distribution decision to themselves or to local communities. Temporal priority excludes considerations of the social worth of a claim. It is assumed that all members of the local community have access to the office. Luck and intensity of desire determine who receives an attorney's services. Intensity of desire is indicated by an indigent's willingness to queue and the amount of time he is willing to devote to this process, just as in the private sector a person shows his intensity of desire by the amount he is willing to pay for legal services.

But to ensure effective access to a lawyer for every eligible client, total reliance on temporal priority is not possible. As Posner points out, "[A] major cost associated with queuing as a method of rationing goods is the opportunity cost of the time people spend in the queue."³⁸⁶ It is much more costly for the working poor than for the non-working poor to spend time waiting. Neither the elderly nor the infirm are physically able to stand in line for long periods of time.³⁸⁷ The institutionalized would be excluded from access completely, so that special efforts and funds would have to be allotted to place lawyers in mental hospitals, nursing homes or prisons.³⁸⁸ Because legal aid has a monopoly on legal services, allocation systems must treat indigents equally.³⁸⁹ Yet consideration must also be given to emergency situations. A totally random allocation system would not make these adjustments.³⁹⁰

A legal services office has to give emergency cases priority just as a doctor ought to treat an individual with a heart attack before one with a headache. When time is of the essence in a legal or a practical sense there must be a way to fine tune the random distribution system. An example of the first case is when an eviction notice is filed against an indigent tenant. If he does not receive legal aid, he will default and be evicted. This emergency is created by

386. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 445 (1973).

387. Temporal priority is a very rough approximation of a lottery system. It is not only those with the physical capacity to get to an office early and wait who have an advantage under such a scheme. Those with the best access to information about the availability of legal aid, those who live close to neighborhood offices and those without jobs also have an advantage.

388. The argument for targeting service to groups with special needs was recognized implicitly by the Corporation when it pointed out that "the very fact of institutionalization means no access to legal assistance, unless a legal services provider has an office in the institution or sends its workers there." 1980 Hearings, *supra* note 287, at 122.

389. The problem of monopoly and equitable access is not confined to public legal services and the poor. The private market may also fail to accommodate clients with unpopular views. In such cases the organized profession or the courts may have to step in to ensure available representation. Thus, civil rights cases in the 1960s were "not an object of general competition among Virginia lawyers." *NAACP v. Button*, 371 U.S. 415, 443 (1963). In Mississippi the largely white private legal sector provided an "inadequate reservoir" of attorneys prepared to take on civil rights cases. *Sanders v. Russell*, 401 F.2d 241, 245 (5th Cir. 1968). See also *Lefton v. City of Hattiesburg*, 333 F.2d 280 (5th Cir. 1964). As the organized bar was not prepared to fulfill its duty to ensure access to the legal market, the court allowed a new market definition by striking down restrictive *pro hac vice* rules. See A. Katz, *Admission of Non-Resident Attorneys Pro Hac Vice*, Am. B. Found. Research Contributions No. 5 (1968). I am indebted to Professor Katz for this insight.

390. There are obvious difficulties in bringing exceptions into a randomization or temporal priority framework. Childress is against it but concedes its occasional necessity in the allocation of scarce medical resources. "If we recognize exceptions would we not open Pandora's box again just after we had succeeded in getting it closed?" Childress, *supra* note 385, at 209.

legal process. A different problem arises after a tenant is actually evicted. Although he has found other living arrangements, he wants to return to his home. While time is no longer of the essence in a legal sense, as a practical matter the tenant may be severely injured if he cannot receive legal aid immediately. When individual A wants legal aid to effect a name change and individual B wants legal aid because he has been evicted, one could argue that a lawyer who can serve only one should accept B's case. As a practical matter, however, the emergency exceptions, given existing resources, may well exhaust available attorney time. Scarce resources may even require one to choose among emergencies. It may be easy to choose the eviction case over the name change. It is harder to choose when both cases are emergencies, for example, if A is a battered spouse and B an elderly person whose utilities are about to be disconnected.

The emergency exception reflects a theoretical limit on randomness and on temporal priority. Recognizing that some uses for legal aid are more *urgent* than others, many circumstances lead us to conclude that some uses are more *important* than others. The relative importance of claims is twofold: the importance to the individual and the aggregate social utility of the claim. The problem is how to organize an objective preference schedule. While all may agree on employing a ranking, there are clearly difficulties in developing general principles of ranking. We reach the same problems of substituting the poverty lawyer's or the community leader's judgment about a claim's importance. Third-party assessment of the personal utility of a lawsuit to individuals is obviously problematic.³⁹¹ Nevertheless, it is unclear whether it is a violation of the principle of equal rights of all individuals to a lawyer, to decide that X should be served and not Y when Y wants a lawyer to execute a name change and X wants a lawyer to pursue a claim against his landlord, on the basis that landlord-tenant problems are more important than name changes and should have preference in situations of limited resources.

An acceptable general ranking principle might be one in which preference is given to claims that are worth more to a client. In the private market, clearly this could be ascertained by seeing which client would be willing to pay the highest amount for a lawyer. If we say that, in legal services, an office should choose to serve those clients who would have been willing to pay the highest amount if all potential clients were wealthy, how do we assess intensity of desire? One way would be by the amount at stake for the client. A paying individual is usually more willing to pursue a risk for a claim when a great deal is at stake. Similarly, an individual probably would be prepared to pay more in a case in which there was certainty of success. Thus, the seriousness of the claim and the probability of success could be interpreted as barometers measuring the intensity of desire for a rational indigent. But in a client-oriented perspective a client's expression of desire must count more than a third

391. An extensive literature has developed regarding the legitimacy of mature interpersonal comparisons of utility and the extent to which such comparisons may lead to a rise in the overall level of satisfaction of wants. See, e.g., Jeffrey, *On Interpersonal Utility Theory*, 68 *J. Philosophy* 647 (1971).

party's inference of the intensity of that desire by either of the above criteria: we would have to accept the seemingly idiosyncratic obsession of an individual for an issue that everyone else would deem trivial. Thus under a client-oriented approach a man who felt that a name change was vital for his welfare could not necessarily be relegated to the end of the line to free up time for legal services to be given to a landlord-tenant suit.

Decisions in legal service resource allocation, moreover, must cover not only who will receive services for which subject matters, and in what priority, but also the amount and quality of legal services an indigent should receive.³⁹² When resources are limited, the more hours of attorney time an individual receives the less time remains to be distributed among other clients, and fewer cases can be taken on. We have said that equality of access cannot mean equal numbers of hours of lawyer time for every indigent. Different legal problems require different amounts of lawyer time. If a person's right to a lawyer is based on the right of access to a forum for the fair resolution of disputes, then he must get sufficient quality lawyer time to ensure effective access. It would not do for a legal services program to choose to serve many clients inadequately rather than a few clients well.

The client-oriented perspective would not force a program into the spectre of the uncontrolled caseload. The client-oriented perspective allows programs to reject clients for a variety of valid reasons. Foremost among these is the lack of resources. If a lawyer has a large enough caseload so that he could not handle any more clients adequately, he is free to decline service. Indeed, the ABA Code of Professional Responsibility requires that attorneys refuse cases when they will be unable to do a professional job.³⁹³ This also means that if any attorney lacks the necessary expertise to handle a case adequately, he should refrain from accepting it. If an attorney in a legal aid office has a conflict of interest, he must of course decline representation. In certain circumstances this rule has been relaxed in legal aid contexts because the client has no other source of legal aid and the lack of a pecuniary interest diminishes

392. The Corporation considers that when resources are limited, multiple uses of the program by the same individual should be scrutinized carefully, even when each claim is meritorious.

During hearings before the House Judiciary Committee on the 1977 Amendments to the Corporation Act, Thomas Ehrlich was asked how LSC deals with the problem of excessive use "by one or a numerous group of clients." He responded:

By the policy the Corporation has established of requiring each program to set its own priorities. In the process, it insures client involvement in setting those priorities. It may well be that the program would have to say one of these priorities is not to treat an individual's problems who has been here so many times before that even though the particular substantive problem involved might be relatively high on the priority list, there is sufficient indication of his having come and cried wolf a dozen times, and that other people have to be treated before at least this one can be again. This is the surest protection.

Hearings on H.R. 3719 Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 66-67 (1977). The issue of repeated calls for service is somewhat ambiguous here in that Ehrlich's reference to the client's "having come and cried wolf a dozen times" suggests the lack of merit of the previous claims, but in general his answer deals with the repeat client who has many problems, all of which are meritorious claims.

393. ABA Code of Professional Responsibility DR 6-101 (1975).

concern that the attorney may betray his client's trust.³⁹⁴

But the problem of how extensive is an individual's right to legal service remains to be resolved. Is there some lower limit of quality of service encompassed in the concept of a right to legal aid? Given unlimited resources is there an upper limit? Clearly, quality of service cannot be reduced to a level at which malpractice may result. Nonetheless, it remains unclear whether the legal aid lawyer should be expected to provide the kind of legal effort that a large law firm would provide to a corporate client. Should he provide a lesser level of service—perhaps that which a lower-middle-class client might secure if he went to a solo practitioner for a minor problem?³⁹⁵ In the private sector, some rough constraint on service is available through determining the amount a client is willing to pay. In public sector legal services the analogous cost constraint is, by definition, unavailable. If the amount of legal care provided depended on the desires of the client, a tenacious yet irrational client could control a legal aid office's appointment book. At the same time the amount of legal aid provided cannot depend merely on the idiosyncracies of the attorney.³⁹⁶

Like private sector attorneys, legal aid attorneys have a duty to refuse cases they consider frivolous. A frivolousness standard, however, will do little to divert pressure from a legal aid office's caseload as claims with little chance of success on the merits will often pass muster under such a standard. The need for some standard of meritoriousness is noncontroversial. Few would argue that the right to a lawyer encompasses a claim on a lawyer's time when a problem is not suited to legal resolution. The issue, of course, is what standard will be used. Many supporters of legal aid, however, have expressed fears that use of a higher standard for selecting legal aid cases than the frivolousness standard generally in use will adversely affect those indigent clients with innovative legal claims. They argue that it is unfair to limit legal aid intake further than the standard of meritoriousness applicable to the profession generally.

Nonetheless, access rights to legal services traditionally have been conditioned on some standard of meritoriousness in the various *in forma pauperis* statutes³⁹⁷ designed to "open the United States courts to a class of citizens who

394. See generally Breger, *Ethical Problems of Conflict of Interest and the Legal Services and Public Interest Lawyer* (manuscript 1981).

395. Gary Bellow has urged that those poor persons whose problems are taken on by legal services should receive a demonstrably higher level of service than the lower middle class client. He argues that the poor should be proffered a complete preventive legal check-up so that an individual entering a legal services office for a housing problem will receive legal aid and advice on other legal problems as well. Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA Briefcase, Aug. 1977, at 106, 108.

396. Contrast, for example, an indigent who secures Medicaid. He requests numerous second opinions for the same symptoms. At a certain point the doctors would refuse. As commentators have suggested, a patient-centered doctor will continue to provide numerous services to a patient and will tend to give the specific patient he or she is treating more than his fair share of services. For this reason commentators have suggested that physicians ought not to serve on committees reviewing the level of services provided to their patients. For an analysis of the role of professional standards review organizations (PSROs), see Havinhurst & Blumstein, *Coping with Quality/Cost Trade-Offs in Medical Care: The Role of PSROs*, 70 Nw. U.L. Rev. 6 (1975).

397. See *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1938); *Duniway, The Poor*

have rights to be adjudicated"³⁹⁸ but cannot afford the costs of litigation. The statutes do not waive fees to all and sundry. Both indigency and merit tests are employed. "Vexatious" litigants³⁹⁹ are excluded. "Frivolous or meretricious actions"⁴⁰⁰ are to be dismissed. Some courts require plaintiffs to have a reasonable chance of success,⁴⁰¹ others merely require plaintiffs to present a rational argument.⁴⁰² Through judicial interpretation of these statutes, courts have developed a conditional entitlement of access to the legal system for poor persons. The wealthy, absent frivolousness, are free to dispute for principle or personal preference restrained only by the limits of their purse and the threat of malicious prosecution. In contrast, those who request government subsidy must meet some higher standard of merit.⁴⁰³

While comparisons between England and America are fraught with danger, a review of the British approach to screening for meritoriousness may prove helpful. In England the decision to provide service is conditioned on a test of meritoriousness, or more precisely, a test of reasonableness.⁴⁰⁴ The test may be summarized as follows: "would the lawyers adjudicating upon the application for legal aid have advised a paying client of their own to pursue the matter?"⁴⁰⁵ Reasonableness criteria are drawn up by local solicitors serving on legal aid committees who screen the merits of each proposed case. Inevitably there are "variations in the criteria adopted by different committees."⁴⁰⁶ While the issue has been debated, one critical commentator has suggested that "legal aid is primarily given for the 'sitting duck' type of case."⁴⁰⁷ A similar, if not stronger, test is applied in Israel where legal aid applicants' cases are taken only if "reasonably well-founded in law, in fact, or

Man in the Federal Courts, 18 Stan. L. Rev. 1270 (1966). See also Moore, Relief of Indigents from Financial Barriers to Equal Justice in American Civil Courts (1971); Note, Petitions to Sue *in Forma Pauperis* in Federal Courts: Standards and Procedures for the Exercise of Judicial Discretion, 56 B.U.L. Rev. 745 (1976). The federal rule can be found at 28 U.S.C. § 1915 (1976).

398. H.R. Rep. No. 1097, 52d Cong., 1st Sess. 1 (1892).

399. *Id.*

400. 28 U.S.C. § 1915(d) (1976). For an example of the application of this view, see *Burket v. Schultz*, 62 F.R.D. 1 (E.D. Wis. 1974).

401. See, e.g., *Jones v. Ault*, 67 F.R.D. 124 (S.D. Ga. 1974); *Smith v. Firestone Tire & Rubber Co.*, 255 F. Supp. 905, 907 (E.D. Pa. 1966).

402. See, e.g., *Coppedge v. United States*, 369 U.S. 438 (1962), in which an *in forma pauperis* claim was deemed not clearly frivolous if the plaintiff "makes a rational argument on the law or facts." *Id.* at 448. See also *Harbolt v. Aldredge*, 464 F.2d 1243 (10th Cir. 1972); *Blair v. California*, 340 F.2d 741 (9th Cir. 1965).

403. Indeed, historically plaintiffs who wished to sue *in forma pauperis* had first to have an attorney certify that the petitioner had a good cause of action. See *Lilly's Reg.*, ed. 1745, 851, tit. *Forma Pauperis*, cited in *Maguire, Poverty and Civil Litigation*, 36 Harv. L. Rev. 361, 377 (1923).

404. Legal Aid Act, 1974, ch. 4, § 7(5).

405. S. Pollock, *Legal Aid—The First Twenty-Five Years 40-44* (1975); Pollock, *Legal Aid: The Factor of Reasonableness*, 118 Solicitors J. 123 (1974); White, *Being Reasonable About Legal Aid*, 117 Solicitors J. 883, 885 (1973). See also 1 Royal Commission on Legal Services, *Final Report*, Cmnd. No. 7648, at ¶ 13.24 to .26 (1979).

406. B. Abel-Smith & R. Stevens, *In Search of Justice* 245 (1968).

407. *Id.* at 246. See *R. v. No. 1* (London) Legal Aid Area Comm. ex parte *Rondel*, [1967] 2 Q.B. 482; *R. v. No. 14* (London West) Legal Aid Area Comm. ex parte *Bunting*, [1974] 118 Sol. J. 254. See also B. Abel-Smith & R. Stevens, *Lawyers and the Courts* 331 (1967).

as to evidence."⁴⁰⁸

The focus on the hypothetical paying client can lead to skewed determinations, particularly if purely fiscal judgments are made. Many poverty law claims may fail the test because the cost of an attorney may prove greater than the amount of the consumer or welfare claim itself. For the reasonableness calculus to succeed it must take into account both the seriousness of a claim and the litigant's intensity, not merely the dollar value of the case.

The present legal services scheme contains no utilization review procedure.⁴⁰⁹ The statute requires that the local program director approve any proposed class action to ensure that taking on such a case does not unduly tax the program's resources.⁴¹⁰ Apart from other normal administrative supervision, no specific control on the supply side exists that would constrain an attorney from throwing all his resources into a case. On the demand side a client grievance committee exists. Its function, however, is to review refusals to provide service, not to inquire into the amount and quality of the service provided.⁴¹¹

This returns us to the question of legal need. How much service does a person need to handle a problem adequately? Disputes over what quantity of service a client is entitled to will arise in a limited number of instances. The vast bulk of cases handled by legal services, like the bulk of problems handled by practitioners for the lower middle class, are cases that require a routine response. Only in the unusual instance will time considerations come into play. The problem is whether one should impart market considerations into the government subsidy process. Should the amount of legal services a client may claim reflect the stakes involved to the parties, or the merits of the cause? A standard of reasonableness would set the outer limits of the access right. It suggests that one could not claim a government subsidy to litigate if the chance of success is slight or the damage sustained *de minimus*. This standard would provide a principled rationale to limit service. Such a limiting condition is, of course, difficult to implement. The question of the quality of legal services an individual can claim raises significant problems with allocation procedures based on access principles.

An alternate method of limiting caseload is to provide some shadow mar-

408. Israel Legal Aid Law 5732-1972, § 4, 26 Laws of the State of Israel 5732-1971-72, at 115.

409. The medical profession, which has more extensive experience in third party payments, has developed a variety of review techniques for cost constraint purposes. Most of these mechanisms, such as PSRO legislation or utilization review committees are peer review programs in which the level or amount of care provided by a doctor is reviewed by his peers and a decision made whether past care was necessary and whether future care should be provided. Such decisions do not prevent a doctor from providing "excess" levels of care or prevent the patient from requesting additional care. The levels merely prevent the government from paying for such care and prohibit public subsidies for future care.

The philosophy behind the PSRO program has traditionally been cost driven. Its focus has been to prevent unnecessary expenditures due to care that was, or could be considered, wasteful. The concern was to fit the level of care provided to the needs of the patient and to set reasonable limits to such care when it would not prove productive. See generally 42 U.S.C. § 1320(c-1) to (c-19) (1976).

410. See 42 U.S.C. § 2996f(d) (1976); 45 C.F.R. § 1617.3-4 (1980).

411. See 45 C.F.R. § 1621.1 (1980) (providing remedy for person who believes legal assistance has been denied improperly or who is dissatisfied with the assistance provided).

ket constraint such as a co-payment mechanism by which eligible clients must make partial payment for legal services proffered. Such a mechanism would test, albeit grossly, client intensity in a scarce resources context. A co-payment formula will reduce demand on legal services and meet equity considerations as well. The co-payment formula may take two forms. It could require some modest payment, such as five or ten dollars, designed to reflect some client commitment to the litigation. The sum chosen, of course, cannot be so great so as to prevent clients from bringing just claims to a program. A second approach would be to develop a partial-payment formula based on a sliding scale of need. This latter approach, used in the English *judicare* scheme, would mean that the poorest clients pay nothing towards legal service while others pay a proportion of a standard fee depending upon income and economic situation. The adoption of some variant of a co-payment scheme might be considered both as a practical revenue-raising venture and as a method of increasing an equitable distribution of services by capturing, at least in part, some measure of client intensity and thus some measure of legal need.

VII. CONCLUSION: THE ROLE AND FUNCTION OF LEGAL SERVICES

This Article has explored the implications for the distribution of legal aid resources of a principle of access rights. It is written in anticipation of "the possibility of conversation"⁴¹² with those who espouse competing views regarding the provision of legal services and is an effort at justifying one approach to the struggle for scarce legal aid resources.⁴¹³ It seeks to develop principles that both recognize a social responsibility for the provision of legal aid and stake out the limit of state responsibility as well.

As an attempt at conceptual analysis the Article does not pretend to document fully the nuances of actual resource allocation among the more than 337 legal services programs. In assessing the extent to which present practices conform to a client-oriented model, the Article recognizes that local programs can only approximate programmatic norms. Nonetheless, the implicit ideology of legal services tells us a good deal both about what programs wish to do and about what they in fact do.

In the end the debate over the role of government subsidy of legal aid is in some sense a debate over the role of law and lawyers in modern society. To the extent that courts and the legal process are viewed as capable of performing active law reform and social change roles, proponents of a particular ideology will attempt to use legal aid to advance their political vision. From this perspective, the most efficient use of legal aid resources may be to withdraw from individual representation wherever possible and to focus adversary efforts on group representation, test-case litigation and legislative advocacy.

412. B. Ackerman, *Social Justice in the Liberal State* 5 (1980).

413. Thus Ackerman underscores that "[r]ights talk presupposes only the *conceptual* possibility of an alternative way of regulating the struggle for power—one where claims to scarce resources are established through a patterned cultural activity in which the question of legitimacy is countered by an effort at justification." *Id.* [emphasis in original].

By this view, persons will support legal aid not because of a commitment to access-to-justice principles, but because of favorable political attitudes towards the goals of the legal aid attorneys. If one views the legal order as responsive to and a facilitator of social needs and aspirations,⁴¹⁴ then law becomes a political weapon. As a result, persons with differing political views will naturally oppose legal aid funding. Thus, a maximalist vision for the legal services enterprise carries within it the seeds of incessant political controversy. The transformation of the principle of equal access to justice into a political dispute between liberals and conservatives is an unfortunate consequence of the use of the social utility perspective in the organization and distribution of legal aid resources. Definitions of social utility are at best idiosyncratic and are, in some sense, political. Importing utility perspectives with their concomitant focus on group advocacy and mass representation has brought legal aid to the limit of the national consensus regarding access rights, thus endangering its very existence.

In contrast, the client-oriented model places responsibility for the allocation of legal services resources on clients themselves. To that extent, it seeks to model legal services on private-sector attorney-client relationships. The client-oriented perspective in legal services, however, is not wed to any organizational structure or subsidy arrangement. Nor is it tied to any particular political goal or agenda.⁴¹⁵ Should local community organizers succeed in arousing community support for a "law reform" issue, citizens who bring such concerns to a legal aid office should receive service. Should clients in the community not make such demands, legal aid attorneys should service the requests that are brought. Thus, the orientation and classification of a program's caseload will depend on the political and social character of its client community.

The central challenge faced in applying the client-oriented perspective is the series of difficult and complex choices forced on the legal services lawyer by the undeniable scarcity of resources. The severity of these micro-allocation problems is inextricably bound up with macro-allocation decisions regarding legal aid. Should Congress or the individual states increase the funding

414. This concept of responsive law is developed in P. Nonet & P. Selznick, *Law and Society in Transition: Toward Responsive Law* 73-113 (1978). It sees the "legal order [as] redistributing resources and groups." R. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* 195-96 (1976). The legal services lawyer is viewed as engaged in "a deliberate effort to make the legal process an alternative mode of political participation" to effectuate such a redistribution. R. Nonet & R. Selznick, *supra*, at 96. The role of law in consciously advancing social ends is questioned in Griffiths, *Is Law Important?*, 54 N.Y.U.L. Rev. 339 (1979). The extent to which public interest lawyers (and by extension activist legal service attorneys) serve as a legitimating instrument of post-liberal capitalism is reviewed in Castelnuevo, *Public Interest Law: Crisis of Legitimacy or Quest for Legal Order Autonomy*, in 2 *Research L. & Soc.* 231, 235-36 (S. Spitzer ed. 1979).

415. See, e.g., Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. Rev. 337, 389 (1978), recognizing that increasing client autonomy may be on a collision course with many of the real world outcomes that the authors support. "We are, of course, aware that if, as we propose, lawyers assume greater responsibility for the fairness or morality of the outcome they help clients achieve they may be more likely to subvert their client's autonomy—particularly the autonomy of relatively powerless clients." *Id.* at 388.

formula for legal services to a level necessary to meet "unmet legal needs" many of the issues developed in this paper would become moot.

While it is clear that present funding levels are inadequate, it is not clear that the solution to the allocation problem of legal services is simply more of everything. The call for yet more legions, while well intentioned, may be misplaced. It envisions a society in which all disputes are resolved in formal legal settings. A focus on courts as the primary mode of resolving personal and social disputes may fail to serve clients adequately and may well create systemic pressures on the operation of our legal system in ways we are only beginning to understand.

A second approach to the micro-allocation problem of scarcity would be to refashion the rules by which our legal system works so that effective access rights need not require the assistance of counsel at all times.⁴¹⁶ Such a radical change in our legal culture would require the increased use of informal dispute resolution and other diversion techniques as substitutes for formal litigation.⁴¹⁷ These techniques may include arbitration, mediation, small-claims courts, and neighborhood justice centers. It would also require extensive efforts at simplifying legal processes so that the technical expertise of a lawyer would not be necessary for effective access. If one could thus reduce the flow of formal litigation, legal services could satisfy more claims of individual clients while preserving access rights. Our goal, after all, "is not to make justice 'poorer,' but to make it accessible to all."⁴¹⁸

Such changes in our legal culture may also result in the provision of wider roles for paralegals or lay advocates in legal services programs. It may even allow lay persons to plead their own cause with minimal assistance from legal services programs. If our societal dependence on legal expertise is reduced, the problem of scarcity in resource allocation will be lessened. Access rights would then require the assistance of counsel for both rich and poor in special situations only and the problems of distributing legal aid would be lessened.

The existence of scarcity, then, should focus attention on the need to

416. One approach to resolving the problem of scarcity not analyzed in this Article is to develop alternative means of providing legal services which require fewer attorney resources. The developing interest in informal dispute resolution, legal clinics and *pro se* representation reflects this concern. When the Florida Supreme Court recently found a secretary-paralegal who prepared divorce pleadings to be engaged in the unauthorized practice of law, it ordered the Florida Bar "to begin immediately a study to determine better ways and means of providing legal services to the indigent." *Florida Bar v. Furman*, 376 So. 2d 378, 382 (Fla. 1979), appeal dismissed, 444 U.S. 1061 (1980). See Center for Governmental Responsibility, *The Legal Needs of the Poor and Underrepresented Citizens of Florida: An Overview* (1980). Assuming that dispute resolution is possible without formal lawyer input, the legal services dollar could serve more people. Similarly if courts were to appoint attorneys to provide counsel without a fee or if some form of mandatory *pro bono* service were instituted, the size of the legal services pie would increase. These solutions to the problem of scarcity are not explored in this Article.

417. Some of these possibilities are discussed in *No Access to Law: Alternatives to the American Judicial System* 3-110 (L. Nader ed. 1980).

418. Cappelletti & Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *Buffalo L. Rev.* 181, 292 (1978). Cappelletti and Garth properly point out that "[j]udicial and procedural reforms . . . are not sufficient substitutes for political and social reform." *Id.* at 289. An attempt to ensure a just allocation of access rights, then, is not inconsistent with a healthy realism about the state of justice in our social order.

restructure our legal rules and legal culture to accommodate access to the legal system without requiring assistance of counsel. This quest, while perhaps utopian, may point the way to achieve allocative efficiency without abjuring those values of justice and equality embedded in the notion of access rights.

