The Myth of Sisyphus: Legal Services Efforts on Behalf of the Poor

Lawrence E. Rothstein
Sangamon State University

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Law and Society Commons, Legal Profession Commons, and the Social Welfare Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol7/iss3/3

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
THE MYTH OF SISYPHUS: LEGAL SERVICES
EFFORTS ON BEHALF OF THE POOR

Lawrence E. Rothstein*

In Greek mythology there is a story about the tyrant, Sisyphus, who is condemned to suffer everlasting anguish. Eternally, he rolls a huge rock up the steep side of a mountain only to have it roll down again just as he reaches the top. Such is the plight in which the poor person finds himself when confronting the legal system. If the poor individual is able to overcome the massive obstacles placed between him and full, fair litigation of his case, he finds that the rules to be applied to the case are stacked against him. This situation is not necessarily a consequence of corruption or conscious bias on the part of the officials of the legal system; there is no "evil man" at whom to point a finger. The plight of the poor is, rather, the consequence of a legal system to which access is gained on a competitive basis. In this system, those whose lives have been characterized by an inability to participate effectively in the political or economic markets are severely handicapped.

When poor persons turn for aid to a program that provides free legal services, such as Legal Aid or an Office of Economic Opportunity Legal Services program, they turn to programs whose most direct and realistic legal attack on the systemic barriers to justice for the poor has been severely criticized. It is said that by concentrating on group organization and representation, economic development, lobbying and legislative drafting, test cases, and class actions, the attorneys for the poor are sacrificing their clients' interests for their own social and economic predilections. This argument appears to have carried the day with the Nixon administration.

What these critics may have overlooked is the fact that the development of poverty law strategies and techniques is an attempt to offset the use of similar strategies and techniques by members of the bar who rep-

---

* Assistant Professor of Justice and the Social Order, Sangamon State University. B.A., 1966, Carleton College; J.D., 1969, University of Illinois College of Law.

The author wishes to thank Professor Marc Galanter, of the State University of New York at Buffalo, whose unpublished seminar outline, Why the 'Haves' Come Out Ahead, has stimulated many of the ideas expressed in this paper. Thanks are also expressed for thoughtful comments and suggestions from Professors Craig Brown, Doug Morgan, and Conrad Rutkowski of Sangamon State University.


2 Agnew, What's Wrong with the Legal Services Program, 58 A.B.A.J. 930 (1972).
resent powerful, organizational clients. The use of controversial methods in providing legal services for the poor is a natural response to a legal system that gives large, organized interests tremendous legal advantages over individuals, particularly poor individuals. Critics are objecting to the poverty lawyers' trying to function like corporate lawyers in order to wrest a few advantages for the poor out of a system which places a premium on political and economic clout.

I. SUCCESS IN THE LEGAL SYSTEM

Enumeration of certain aspects of the legal system, and the inferences about the successful litigant that can be drawn from these aspects, will help clarify the thesis stated above.

1. The legal system exists within a society characterized by an uneven distribution of resources. The inequalities, however, are dispersed rather than being cumulative. No one individual has all of the resources necessary to consistently influence decisions in his favor.

2. The legal system is a competitive process in which every participant attempts to pyramid resources and use them to influence decisions in his favor. The results of this process are often negotiation and compromise.

3. The official participants in the legal system in most cases apply existing legal norms, phrased for general application, without conscious bias or inequality. As human beings, however, the participants are subject to an array of social and psychological influences, often at a subconscious level.

4. The legal system has complex procedural rules that require the layman to engage specialized assistance for action within the system.

5. The rules applied in the legal system are promulgated and changed in two ways: by imposition from the external political system, and by decisions made as a result of the litigation process.

6. A wide range of disputes which arise in society are referred to the legal system for settlement.

---

3 For a comprehensive discussion of the "pluralist" view of political power in the context of urban affairs see R. DAHL, WHO GOVERNS? (1961).


6 See J. FRANK, COURTS ON TRIAL 146-56 (1963).

7 Fuller, Adjudication and the Rule of Law, in LAW AND THE BEHAVIORAL SCIENCES 736 (L. Friedman & S. Macaulay eds. 1969). The promulgation of court rules by higher courts to lower courts in a judicial system is, in a sense, a product of both imposition from the outside and internal processes.

8 In one of his pithy statements about American society, de Tocqueville remarked that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (1945).
7. The insufficiency of institutional resources in the legal system prevents the full consideration of every case on its merits. The legal system, therefore, discourages parties from commencing litigation and encourages them to settle pending cases.\(^9\)

These aspects of the legal system dictate the conditions under which a party may achieve success.

There are a number of inferences about successful litigants that can be drawn through analysis of the aspects described above. It may be inferred from aspects 1 and 2 that organized interests have an advantage in prosecuting claims in the legal system.\(^10\) And, although it may be assumed for the sake of argument that a litigant is not subject to conscious bias and intentional discrimination, he nevertheless is subject to the subliminal values, expectations, and moods of the official participants in the legal system (see aspect 3). Those who share those values, meet those expectations, and cater to those moods will have a clear advantage over those who are unable or unwilling to do so.\(^11\) Similarly, access to high-quality legal assistance will be positively correlated with success in the legal system (see aspect 4).\(^12\)

Aspect 5 supports the inference that rule changes in the legal system that are favorable to a participant are achieved through the successful pursuit of cases and appeals in both higher courts and legislatures. Success leads to more success; but an initial failure or inability to follow through to higher levels of the legal or political systems severely limits the probability of future success.\(^13\) The legal system is an important arena for the settlement of disputes and cannot generally be avoided except by agreement of the parties or the inability of one party to gain access to the system because of a lack of resources (see aspect 6).\(^14\) Delay, caused by institutional overload, is also an important factor that operates to encourage negotiated settlements (see aspect 7).\(^15\) A party unable to endure delay will be forced into an unfavorable negotiating position. If a party is not able to secure reasonably favorable outcomes in the legal system, his success in the larger political arena will be, or perhaps already has been, severely limited.

The ability to participate successfully in the legal system is thus very much controlled by the nature of the system. The nature of the system,

---

\(^9\) H. JACOB, JUSTICE IN AMERICA 184-87 (1965).

\(^10\) For a discussion of the importance of organization in the pursuit of legal remedies against racial discrimination see C. VOSE, CAUCASIANS ONLY (1959).


\(^14\) S. GOLDMAN & T. JAHNIGE, supra note 5, at 205-14.

as described herein, is “pluralist.” Pluralist systems operating in the political arena have been severely criticized by political scientists. The same criticisms are valid when applied to a pluralist legal system. While such a system hinders some segments of society (particularly the poor) from effectively participating in its benefits, the system pyramids the advantages received by other segments of society. Producing evidence in support of this criticism is a major objective of this article. In the interim, suffice it to say that money and organizational support are important resources for success in the legal system.

The interest-aggregation process ignores some concerns that are shared by many citizens primarily because active, organized, and legitimate groups do not give these concerns a high priority. The problems of consumers long failed to evoke public concern. Until very recently, with the advent of a strong consumer movement, legislation and regulation on behalf of consumers only consisted of prohibitions on fraudulent and deceptive practices. Some attention is now also being paid to problems of high prices, lack of choice, lack of consumer bargaining power, and lack of knowledge about nutrition and safety.

Latent concerns, which might well be of interest to many citizens if they were publicly articulated as issues, are either not identified or are identified only as to superficial aspects of the concern. For example, in the legal system the concepts of standing and actual or threatened injury play a crucial role in determining who may go to court, on what grounds, and for what relief. Although these concepts have been periodically expanded and contracted, there is a large “mobilization of bias” against raising the question of the desirability of making every man the keeper of his brother's legal rights with standing to vindicate these rights in court.

The mobilization of bias in the prevailing system of issue-formation and conflict-resolution discourages the extension of participation to “out” groups, the serious, public consideration of unorganized or unarticulated concerns, and the internal reforms conducive to personal development. Clement Vose, in chronicling the National Association for the Advancement of Colored People’s (NAACP) attack on racially restrictive covenants, notes the existence of the mobilization of bias against integrated housing patterns:

It was through organized activity that white property owners protected their interest in living apart from Negroes. Neighbor-
hood property associations functioned in Los Angeles, Chicago, New York, Detroit, Baltimore, St. Louis, Washington, and other cities. They drafted restrictions, had them officially recorded and guarded against violations. These associations usually worked closely with organized real-estate interests within each city to prevent sale of covenanted property to Negroes. Out of deference to these powers, local newspapers refused advertisements offering to sell real estate in white areas to Negroes. Individual owners were implored not to sell to colored people. When these informal means failed, the white property-owners' groups, called variously protective, improvement, or citizens' associations, brought legal action and gained injunctions from courts which forbade violators from owning or using particular property. Their success in gaining enforcement of these privately drawn covenants developed patterns of racial segregation in northern cities.22

For thirty years, the NAACP engaged in the type of organization and litigation for which lawyers for the poor have been criticized. Finally, racially restrictive covenants were successfully raised to a national issue and subsequently struck down by the Supreme Court. Today, almost thirty years after the decision in Shelley v. Kraemer,23 racially segregated residential housing patterns still exist in most northern cities.

Thus, living conditions and decision-making processes in a modern, pluralistic society are often not conducive to the personal development of its citizens that allows them to lead satisfying lives and prevents apathy, hostility, and violent upheaval.24 That this condition exists in modern American society is the message of the Report of the National Advisory Commission on Civil Disorders. The Commission made this finding particularly with regard to the poor in the legal system:

The belief is pervasive among ghetto residents that lower courts in our urban communities dispense "assembly line" justice; that from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent, that procedures such as bail and fines have been perverted to perpetuate class inequities. We have found that the apparatus of justice in some areas has itself become a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire disorders.25

In the following parts of this article, the operation of the mobilization of bias against the poor in the legal system is more closely scrutinized, and the legal services response to the imbalance of resources available to the poor is outlined.

22 C. Vose, supra note 10, at 250.
23 334 U.S. 1 (1948).
24 Connolly, supra note 16, at 18-19.
II. THE POOR AS PARTICIPANTS IN THE LEGAL SYSTEM

The litigants in the legal system can be divided into two general classes—those whose participation is a unique or rare event, *i.e.* they have only one or a few cases in their lifetime, and those who have a large volume of legal business. Examples of the single-case participant are the spouse in a divorce case, the debtor in a collection case, the defendant in a criminal prosecution, and a welfare recipient in a suit against the welfare agency. Large-volume participants are the various levels of government or their agencies, large business corporations, labor unions, collection agencies, and insurance companies. Large-volume participants are usually organized interests with substantial financial resources and legal business of a specialized nature (*e.g.*, an automobile insurance company defending against personal injury claims). The single-case participant is a considerably smaller economic unit, usually unsupported by organized interests, unfamiliar with the legal process, and financially burdened by the litigation.

This description of the participants in the legal system clearly shows the category in which the poor are found. They are single-case participants. The poor appear in court as individuals and are unlikely to be supported by organized interests. They are generally unfamiliar with and hostile to court and administrative procedures. The poor also lack the financial resources to pursue effective court action. Money is a generalized source of power over people and institutions. The lack of money, *i.e.* poverty, is an extreme form of powerlessness over one's social situation and one's ability to carry out decisions and plans of action.

The disadvantage at which the poor are placed by possessing the characteristics of single-case participants is exceeded only by the disadvantage of constantly finding themselves opposed by large-volume participants. The poor generally find themselves in court as debtors being sued by collection agencies and business organizations, as prospective or former clients of administrative agencies opposing agency actions against them, as defendants in criminal cases and respondents in juvenile cases being prosecuted by the government, and as tenants being evicted by governmental or corporate landlords or land trusts. Even in family law matters, where the more affluent are usually opposed by other single-case participants, the poor are typically confronted by the state and its agencies. For the affluent, uncontested divorces go smoothly, and custody mat-

---


ters are raised only among family members. For the poor, family law is public, political, and penal in character, with state and local agencies involving themselves in the most intimate family relationships. Family law, for the poor, is a part of the welfare system.30

The position as debtor-defendant in small claims court is characteristic of the role in which the poor find themselves as participants in the legal system. This type of court was originally intended to remove the disadvantages attaching to the single-case, and especially the poor, participant. The features of low cost, lack of formality, and discouragement of representation by counsel in small claims courts were enacted in an effort to put the single-case participant on a par with the large volume participant. The vast majority of the cases in the small claims courts, however, are brought against the poor by businesses, collection agencies, and governmental units. Most of these large-volume participants regularly use the small claims court for collection purposes.31 Here again, the poor must return to the foot of the mountain and commence their laborious ascent.

III. THE PYRAMIDING OF ADVANTAGES OVER THE POOR

A. The Large-Volume Litigant

How does the large-volume litigant pyramid his advantages over the single-case participant in the legal system? The large-volume litigant is likely to have very specialized legal business. This specialization allows for advantages such as economies of scale, routine and efficient treatment of legal matters, and the avoidance of litigation. The resources of the large-volume litigant can be most effectively allocated among its cases to achieve the most propitious results. Through planning, compensatory action can be taken to greatly reduce the uncertainties in the legal system.32

Large-volume litigants use their lawyers' time largely for achieving favorable results, while at the same time trying to avoid litigation.33 Large business corporations, government agencies, and labor unions—often have in-house legal staffs which vie with large law firms in size and excellence.34 Litigation is avoided by incorporating legal advice into business planning. Since World War I, civil business litigation has become a decreasing share of the services of law firms to businesses, while advice and business counseling have greatly increased.35 Large-volume litigants are

32 For the importance of large volume, specialization, and planning in maximizing gains and minimizing losses see J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967).
primarily engaged in preventive law—attempting to foresee contingencies and preparing "boilerplate" to protect their interests. Ideally, each business transaction is taken out of the realm of legal dispute. Preventive law developments have a widespread effect on the many similar legal situations faced by the large-volume litigant. Furthermore, the "boilerplate" provision or other drafting technique developed gains momentum each time it is used in a business transaction. If the development is challenged in litigation at a later date, after many legal relationships have been successfully based on it, the presumption of the development's propriety may be hard to overcome. In other words, large-volume participants are often able to create "bootstrap" law in the form of "customary business practices," which are abundantly recognized in the Uniform Commercial Code, even without resorting to litigation.36

Aside from planning to avoid litigation, large-volume participants, as compared to single-case participants, are able to plan litigation and manage it more efficiently. Economies of scale in handling litigation are present. A collection agency with a large volume of legal business may computerize many of the routine preliminaries to litigation. Computers can keep records, recall them at the appropriate times, type collection letters, and even type pleadings.37 A business firm with retained counsel or its own legal staff can institute legal proceedings without incurring large start-up costs.

Further, the large-volume participant can promise a steady, lucrative flow of similar cases to the legal practitioner. In most instances, this guaranteed flow of business means that the large-volume participant is able to obtain high-quality legal counsel whereas the single-case participant is not. The large volume of similar cases also allows counsel to specialize. The law, like most professions today, is becoming more specialized.38 The specialist can keep abreast of events in his area of legal practice. This task is often too great for more than one or two areas of law. The advantages of specialization are similar to the advantages of large volume. The specialist can handle routine cases more expeditiously than the nonspecialist. He is able to bring more sophistication to bear on problem cases than is the generalist. The specialist is also better able to plan preventive law strategies. Specialization is typically associated with greater competence. The less competent attorneys are often forced into a general practice in order to find enough clients to earn a living.39

The large-volume participant in the legal system has a major advantage over the single-case participant in his ability to develop a litigation strat-

36 M. Mayer, The Lawyers 42-49 (1967). Mayer cites the example of the misprinted indentures for Japanese mortgage bonds which soon became the model for the entire security industry because of their initial success. Id. at 43.
37 See generally Computers and the Law (R. Bigelow ed. 1966). For example, a small western Massachusetts collection law firm handles the caseload of a firm many times its size by using computerized data retrieval.
38 M. Rheinstein, Max Weber on Law in Economy and Society 301-03 (1967).
39 E. Smigel, supra note 33, at 141-60; M. Mayer, supra note 36, at 380-414.
egy to maximize financial gains (or minimize losses) and to obtain favorable rule changes. The financial stake in each case for a large-volume participant is small compared to the money represented by the total volume of cases. A collection agency doing millions of dollars of collection business may have no single case worth more than five thousand dollars. Thus, no single case is a major concern for the collection agency; it can afford to settle or refuse to pursue any case which will not further its litigation strategy. The large-volume litigant is able to achieve the most favorable forum; emphasize different issues in different courts; take advantage of differences in procedure among courts at the state and federal levels; drop or compromise unpromising cases without fear of heavy financial loss; stall some cases and push others; and create rule conflicts in lower courts to encourage assumption of jurisdiction in higher courts. This "lobbying" of the legal system is accomplished through test cases, amicus curiae participation, bringing alternative actions in different forums, broadening the issues through expert witnesses, research and publication, and engaging in other forms of litigation planning.40

The single-case participant, on the other hand, has little ability to plan the litigation of his case when he opposes the large-volume participant. The amount in controversy, though trivial to the large litigant, may be very important to the small litigant. A poor personal-injury plaintiff with out-of-pocket hospital and medical expenses cannot drop his case for the sake of greater financial gain in other cases or for other litigants. He has no other cases and needs the money. Furthermore, the single-case participant can achieve no economies of scale. Nor is he likely to have specialized legal assistance on retainer to counsel him on legal matters and economic planning for his daily life. The "lobbying" techniques of the large-volume participant are unavailable to him. The single-case participant enters the legal system at a distinct disadvantage.

Evidence of the use of litigation planning to maximize financial gains is abundant in the settlement practices of automobile insurance companies. Statistical studies indicate that approximately 85 percent of all personal injury claimants recover something. However, the later in the negotiation or litigation process that a final disposition of the claim is made, the more likely is the claim to be underpaid (below any reasonable compensation for injuries), and the less likely is the plaintiff to recover anything.41 In other words, insurance companies fight the cases in which they are likely to succeed and settle doubtful cases quickly, thereby saving themselves much time and money. The same type of planning, albeit for a maximization of speedy convictions rather than for financial gains (although financial savings is an issue), infuses the plea bargaining process.


Single-case participants, defendants in these actions, are induced to bargain for their liberty with large-volume participants, governments, in a process which results in the conviction of 79 percent or more without trial.42

Both substantive and procedural rules are changed through the litigation process. The planned litigation strategy of the large-volume participant can therefore be directed to favorable rule change as well as to the maximization of immediate monetary gains. Cases which will make "good" law for the large-volume participant can be contested and appealed, while those which might produce unfavorable outcomes can be settled. The poor, single-case participant must settle for whatever financial gain he can get in that single action. His choice is limited by his own financial considerations and by the fact that he has but one case.43 Although the single-case participant may choose to vindicate his position rather than gain financially, realistically this choice is rarely perceived or made. The rarity of an individual's choice to ignore financial gain is illustrated by the accident case of Mr. Lin, who instructed his attorney not to negotiate for a settlement at the pretrial conference. The judge was so shocked by this attitude that he appointed a psychiatrist to examine Mr. Lin.44 Furthermore, the canons of ethics would prevent an attorney for a single-case participant from trying to influence his client to drop a case that would create a bad precedent for other clients with similar cases.45 On the other hand, the canons of ethics do not prevent an attorney from advising a corporation not to pursue some of its cases in order to prevent setting a bad precedent for its other cases.46

The large-volume litigant is a regular participant in the business of the courts in which its specialized cases are heard. The regular participant becomes an important part of the daily worklife of court personnel. He is recognized as one with whom business must be done to his satisfaction; the next day he will be back again. If the regular participant is antagonized, he will be most unwilling to allow continuances, to make stipulations, and to waive formalities without argument. These little courtesies are necessary if the workload in the legal system is to remain tolerable.47

43 See generally S. MACAULAY, supra note 13.
45 ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Considerations 4-5.
47 See Blumberg, The Practice of Law as a Confidence Game, 1 LAW & SOC'Y REV., June, 1967, at 15.
In this way, the large-volume participant has leverage in the legal system to a degree that the single-case participant does not.48

As Jerome Frank points out, litigation is a process of communication.49 The parties must communicate their views to the judges, clerks, and bailiffs. The large-volume litigant, being a regular participant in a certain court or before a certain judge, has a store of shared experiences and meanings upon which to base this communication. The single-case participant is less likely to have these common understandings upon which to rely. A newly appointed, black judge in Boston, Massachusetts, once remarked that his knowledge of the common English usage of West Indians had given him an interpretation of a witness’ testimony that was entirely different from the understanding gleaned by the attorneys and other court officials.50 The decision in the case hinged on this testimony. Similarly, the views of polluters have more credibility with pollution control boards whose membership is heavily weighted with representatives of polluting industries than with boards which are not so weighted.51

The real problem, however, is perhaps more subtle than the two examples would indicate. Large-volume litigants make up the repeat business of courts and administrative agencies. Therefore, these bodies must be oriented to the problems and desires of these litigants in order to achieve efficient and effective administration. Furthermore, judges are most often recruited from the ranks of attorneys who serve large-volume litigants. It is the language of business with which judges are most familiar. It has been this writer’s experience that whenever a test case challenges the business practices of a large-volume litigant, i.e., a business organization or government agency, the questioning of the judge centers upon the effect that a ruling against the challenged practice would have on the cost and efficiency of the handling of transactions of the large-volume litigant.

This judicial attitude is often manifested by hostility toward the poor, single-case participant, his attorney, and his legal claim. The bench and bar widely reflect the opinion that since the poor, by definition, do not have the kinds of property or business interests that require legal action, their legal claims must be frivolous.52 When a government-funded legal services program represents poor litigants, the poor and their attorneys are faced with the hostility of the bar toward both “socialized law” and the encouragement of nugatory litigation.53 These attitudes cannot help

---

48 This leverage is moderated to the extent that a single-case participant’s attorney is a regular participant in a particular court with a large volume of similar cases. There are times when this form of social leverage acts upon the large-volume participant to channel his behavior into acceptable modes. But the acceptable modes themselves, for example, the canons of ethics, are generally favorable to the large volume, organized, financially well-off participant. Id.
49 J. Frank, supra note 6, at 186-89.
50 Statement made to court watchers under supervision of author.
52 Carlin & Howard, supra note 12, at 387.
but redound to the benefit of the large-volume business or governmental litigant.

B. The Stratified Legal Profession

That those with more money have some advantages in court over those who have considerably less is not necessarily a shocking or intolerable situation. However, revelation of the full extent of these advantages and of the rigid stratification of the legal profession goes well beyond the expectations of most citizens and even most lawyers. It is at this point that the original pluralist assumptions face their most crucial test and, in the eyes of many, do not stand up.

As reported by Carlin in his study of the New York bar and confirmed by several studies of lawyers in other geographical areas, a stable system of social stratification pervades the legal profession.

The elite in this system are the lawyers in large firms (21 per cent of the bar), while the lowest stratum is composed of lawyers in small firms and individual practice (64 per cent of all lawyers); the remaining 15 per cent are the middle stratum lawyers in the medium-sized firms. Large firm lawyers have the highest average income, represent the most affluent and highest-status clients, and have most contact with higher levels of the judiciary and government. Individual practitioners and small-firm lawyers have the lowest incomes, represent the least affluent and lowest-status clients, and deal largely with lowest-level courts and agencies.

Few lawyers represent those who cannot afford the minimum recommended fee. Those who do represent the poor are of the lowest status within the legal profession. These attorneys have attended the least prestigious law schools, have graduated with the fewest honors, and are generally the least competent. The socioeconomic background of a lawyer's parents typically determines what status he will have in the profession. Furthermore, the low-status lawyers who represent a significant number of poor clients spend less time on, and provide fewer services for, these clients as compared with their other clients. As one commentator states:

In giving advice about types of actions, places of jurisdiction, gathering of evidence, negotiation and litigation, a lawyer must consider carefully his client's finances. Sound professional guidance is useless if the client cannot pay the costs involved.

54 NYC Bar Survey, supra note 46 at 11-40.
57 Ladinsky, supra note 55, at 53-54.
58 Carlin & Howard, supra note 12, at 384.
59 H. O'Gorman, supra note 55, at 61.
In other words, even private lawyers who serve the poor and are concerned about the welfare of these clients must nevertheless deny them vigorous representation because of the cost of such representation. The affluent client does not encounter this barrier.

The stratification of the bar is evidenced by the types of cases handled by large firms, small firms, and individual practitioners respectively. The great majority of large-firm lawyers are specialists, while a very small percentage of individual practitioners specialize. Although a majority of the work of all lawyers is business related, the amount of nonbusiness and nonprobate work done by large-firm lawyers is infinitesimal. Within the business law practice, large corporations are represented by large-firm lawyers. Large-firm lawyers handle antitrust, securities, financing and organizational matters. Small-firm practitioners serve small businesses. Individual practitioners are likely to serve small businesses by doing personal work for employees or businessmen, minor labor relation matters, zoning permits, and licenses. The bulk of criminal, divorce, and personal injury work is done by the lowest-status segment of the bar.\(^{60}\)

Large-firm lawyers spend considerably less time in court than do individual practitioners. The large-firm attorneys are business advisers whose practice is largely preventive law. When the large-firm lawyer deals with a court, an administrative agency, or a government official, it is at a high level: the federal courts, federal agencies and only the highest level federal and state officials.\(^{61}\)

The income of the large-firm lawyer is also considerably higher than that of the small-firm lawyer or individual practitioner.\(^ {62}\) Social distance between lawyers of different statuses is great. High-status lawyers in big cities are differentiated from low-status lawyers by religion, social class origin, race, choice of college and law school, and grades in law school. Partners in large firms are predominantly white, Anglo-Saxon, Protestant, and Ivy League graduates with high grades. Except for being white, very few individual practitioners meet any, let alone all, of these criteria.\(^{63}\) Furthermore, lawyers primarily have contact with other lawyers, judges, and officials of a similar status as their own. In the Carlin study of the New York bar, three-fourths of the individual practitioners reported no contact with large-firm lawyers.\(^{64}\) This interaction pattern makes identification with and understanding of the problems of low-status lawyers and their clients difficult.

With the bar stratified in this manner, it becomes clear who has access to the highest status, most highly competent attorneys. These attorneys come at a high price. Only those with great financial resources and a large volume of business over which to spread costs, generally large business organizations, can afford the services of these attorneys. The lawyers who

---

\(^{60}\) NYC Bar Survey, supra note 46, at 25-26.

\(^{61}\) Id. at 26-27.

\(^{62}\) Id. at 27.

\(^{63}\) Id. at 28-32; Ladinsky, supra note 55, at 47-54.

\(^{64}\) NYC Bar Survey, supra note 46, at 34-35.
are not trained as well become sole practitioners or work in small firms and handle mostly individual clients. David Riesman has characterized, perhaps too strongly, the view of the high-status lawyers toward the low-status membership of the big city bar as an "intellectual slum" where "a largely ethnic bar carries on the Anglo-Saxon rites of trial by jury and 'contaminates' the legal ideal with the demagogic practice."66

C. Other Hindrances

In addition to counsel fees, other costs make vigorous and competent litigation efforts by poor individuals difficult. Court costs, witness fees (especially for experts), investigation costs, court reporter fees, discovery costs, transcript costs, and the cost of any bond needed to secure opponents' damages, all make litigation an expensive task, thereby giving the advantage to those with large financial resources.67

The settlement practices of automobile insurance companies68 clearly show the use of financial leverage, as do the other forms of litigation planning. Delay is a powerful weapon of the financially secure. The poor person whose auto is wrongfully repossessed may need it immediately but is unable to post the replevin bond or pursue his claim through the courts. He, therefore, is likely to either settle, by paying money he may not owe, or merely reconcile himself to the loss of his car. Statutes that allow confessions of judgment and repossession without resorting to the courts, as well as bond requirements and summary procedures for replevin, eviction, and injunctive relief, have the effect of putting the financially secure litigant in possession or control of the subject matter of the litigation.69 The litigant with financial resources and the subject of the litigation already in his control can use his expert legal assistance to prolong the procedural delay inherent in the present legal system.

The norms of the legal system, whether substantive or procedural, may be altered by political processes as well as by the judicial branch of government. Statutes can operate to the advantage of the financially powerful interest. Organization and financial resources are also the foundations of success in the political system. Large, organized interests have powerful lobbies and support in legislatures,70 administrative agencies (which supposedly regulate the activities of these powerful interests),71 and the executive branch.72 The circulation of high-status lawyers between industry, Washington and New York law firms, and the federal government has

65 Ladinsky, supra note 55, at 53-54.
67 S. MOORE, JR., RELIEF OF INDIGENTS FROM FINANCIAL BARRIERS TO EQUAL JUSTICE IN AMERICAN CIVIL COURTS 37-57 (1971).
68 See note 41 and accompanying text supra.
been thoroughly documented. Since poor, single-case participants in the legal system do not have access to these high-status lawyers and are not members of organizations with large financial resources, they are unlikely to be able to instigate rule changes favorable to them through the legislative or administrative processes of government. The poor are even less able to influence the myriad private decisions made by large-scale business organizations. These decisions then become the basis for the legal sanction of contractual rights and customary business practices. That these decisions affect the poor and their success in the legal system is recognized even by the staunchest supporters of the corporate form of business organization.

IV. The Confrontation Between Attorneys for the Poor and the Legal System

A. History

Early efforts to provide legal assistance for the poor could not really be called a confrontation with the legal system for two reasons: first, because of the limited scope of the efforts, and second, because the efforts were motivated by a fear of unrest among the poor combined with great confidence in the fairness of the substantive law. The turn of the twentieth century saw the beginning of an organized movement to provide legal assistance for the poor. By 1919, fifty thousand persons had received legal aid with an expenditure of less than ninety thousand dollars. In that year, Reginald Heber Smith, in his classic work *Justice and the Poor*, stated:

The administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.

Yet in 1951, Emery Brownell in his study, *Legal Aid in the United States*, commented colorfully, but with classic understatement:

Like the Red Queen of Alice in Wonderland, the Legal Aid forces have been obliged to run as fast as they could to stay where they were.

---


75 Pipkin, *Legal Aid and Elitism in the American Legal Profession*, in *Justice and the Poor* xi-xii (P. Smith ed. 1972).


77 R. Smith, *Justice and the Poor* 8 (1919).

At that time, less than two million dollars were being spent on civil legal aid in the United States. By 1969, however, free civil legal assistance was provided to the poor in over one million cases at a cost of over fifty million dollars. The need for legal services is virtually insatiable. Five hundred million dollars is considered not an unreasonable estimate of the cost of adequate legal services for the poor. Every American could use legal advice and preventive legal assistance; few can afford it.

The major reason for the dramatic rise in the caseload and expenditures for legal assistance to the poor was the creation of the Office of Economic Opportunity (OEO) Legal Services Program. This program was established in 1965 under Title II of the Economic Opportunity Act of 1964. The purposes of the program were:

1. To provide quality legal service to the greatest possible number consistent with the size of the staff and the other goals of this program.
2. To educate target area residents about their legal rights and responsibilities in substantive areas of concern to them.
3. To ascertain what rules of law affecting the poor should be changed to benefit the poor and to achieve such changes either through the test case and appeal, statutory reform or changes in the administrative process.
4. To serve as advocate for the poor in the social decision-making process. [i.e.] to provide for the poor the same type of concerned advocacy that others have long enjoyed.
5. To assist poor people in the formulation of self-help groups such as cooperative purchasing organizations, merchandising ventures, and other business ventures.
6. To involve the poor in the decision-making process of the legal services program, and to the extent feasible, to include target area residents on the staff of the program.

These purposes were sufficiently broad to include several theories of how legal services should be delivered to the poor. These theories, propounded in response to the realities of the legal system and defects in existing legal services to the poor, developed along lines similar to those evolved by private practitioners. The major role of the private legal practitioner has progressed from individual client representation on an ad hoc and remedial basis to planned and more aggressive litigation, retainer

---

71 Pipkin, supra note 75, at xxv.
72 That this is true even for the nonpoor is indicated by the increased usage of lawyers by members of prepaid group legal services programs. See Calame, Call My Lawyer, Wall Street Journal, May 17, 1971, at 1, col. 1.
arrangements, lobbying for and maintenance of business organizations (from the late 1800's to the 1930's), and finally to direct participation in the creation, financing, and economic planning of large scale business organizations. Similarly, poverty law theories have progressed from the legal aid theory of individual, ad hoc, and remedial services to theories (both local control and grand strategy theories) that emphasize group representation, legal maintenance of community organizations, and planned, aggressive, test-case litigation and finally to theories that stress economic development and planning, legal self-sufficiency, and avoidance of litigation. The theories or approaches to legal services will be explained in more detail.

The traditional legal aid approach, by its very label, connotes a long-standing method of providing legal services to the poor. This approach was the one espoused by the leaders of the legal aid movement at the turn of the twentieth century. Such an approach was directed toward dealing with the problems that individuals encountered in their daily lives—domestic problems, creditor harassment, landlord-tenant disputes, and problems with government agencies. Each case was handled on an ad hoc basis using the techniques of accommodation, compromise, and, as a last resort, litigation. The theory presumed that the poor needed only to assert their established legal rights in order to improve their condition.

B. Criticism of Past and Existing Programs

Legal aid societies have been consistently criticized for the quality of their services. Much of this criticism can be answered by the fact that the societies have traditionally been underfinanced and understaffed. Attorneys serve on a voluntary basis or are paid meager salaries. In 1964, immediately prior to the inception of the OEO Legal Services Program, each legal aid attorney in New York City averaged well over 1,000 cases annually, Only 2 percent of the private attorneys in New York annually handled more than 500 cases each, while half of the private attorneys annually handled less than fifty cases each.

More fundamental criticisms, however, were not so easily answered. Marvin Frankel suggested to the American Bar Association that the legal aid societies were prevented from providing high quality legal assistance to the poor by several institutional problems: their old and established nature led to the negative impacts of routine and settled bureaucratization; the treatment of legal aid as a charitable program of the bar and the business community, without any participation of the poor, smacked of welfare colonialism; legal aid societies traditionally had a centralized downtown office which was not easily accessible to many of the poor; and the societies had failed to do more active outreach and educational work.

85 Note, Neighborhood Law Offices: The New Wave in Legal Services for the Poor, 80 Harv. L. Rev. 805, 807 (1967).
among the poor. Monrad Paulsen added to these criticisms by charging that legal aid had failed to aim for constructive social changes, which required focusing on social reform and attacking established institutions, practices, and rules.

1. Neighborhood-Controlled Legal Services—The War on Poverty, in answer to criticisms of other services to the poor, was conceived as a wide-spectrum, centrally planned attack on the problems of the poor. The architects of the OEO, fearing that a massive, federally directed approach might override or ignore the real interests of the poor, sought a gadfly to constantly bring the local needs of the poor into focus. For this reason, the neighborhood-controlled legal services concept was developed. The major statement of this concept was made by Jean and Edgar Cahn. The essence of this approach to legal assistance was the funding of legal services projects in local communities to serve as advocates for neighborhood groups. The priorities of the projects would be set by the client groups themselves. The purpose of this approach was to ensure continuous responsiveness to the needs of the poor by the legal services projects and, through the advocacy of the poverty lawyers, by the forces of the War on Poverty.

While the neighborhood control approach seems to answer some of the criticisms of the traditional legal aid approach, most notably those of Frankel, it is not necessarily responsive to Paulsen's criticism. If what is necessary is a centrally planned legal attack on established institutions, practices, and rules in the interest of broad social reform, then the decentralized, neighborhood-controlled offices are not the appropriate instruments for such a policy. Each neighborhood office would respond to different priorities set by different people. Poor neighborhoods have local establishments, leadership, institutions, practices, and rules which allow some people to benefit at the expense of others. Neighborhood offices might fall under the control of the local establishment or, at the very least, be prevented from challenging established neighborhood groups and practices for fear of losing their credibility and support in the neighborhood. The defects in the neighborhood offices were pointed out most eloquently by the Cahns themselves:

The typical neighborhood law firms today look very much like the legal aid offices they were to improve upon with the exception that they are decentralized and take cases heretofore not handled by anyone.

---

88 See Cahn & Cahn, supra note 12.
90 For an excellent, concrete example of the tension between the neighborhood control and the grand strategy approaches implied by the foregoing criticisms see Carlin, *Storefront Lawyers in San Francisco*, 7 TRANS-ACTION 64 (1970); cf. Brill, supra note 1.
The case load mounts steadily. Demand begins quickly to edge past the point of conscientious performance—and neighborhood staff lawyers shortly find themselves inundated with demands for service.

The client is almost invariably an individual already in some kind of difficulty. Assistance is typically after the fact.

Achievements by and large must be counted in terms of individual clients helped—and occasionally, new precedents established—but not in terms of administrative or commercial practices demonstrably altered.

Little if any research is being carried on that could effect significant legal change unconnected with specific cases.

There is a pervasive absence of any relationship between legal service programs and the organization of citizen groups such as tenant councils, welfare mothers' organizations, or consumer groups.

. . . .

Nonprofessionals are receiving very little training that would enable them to carry out functions now performed unnecessarily by lawyers because few offices have been established with a lead time for planning or a built-in training and internship program.91

2. The Grand Strategy Theory—This approach uses the desegregation litigation strategy of the NAACP as a model. Major attention is paid to the representation of groups concerned with reform of the social and governmental structure affecting the poor. Law reform through aggressive complaint, protest, lobbying, and litigation is stressed.92 This approach became the officially encouraged OEO Legal Services policy with the appointment of Earl Johnson to the directorship in 1966. He used three criteria for evaluating the performance of local projects: a) whether and to what extent the project engaged in law reform activities, particularly test-case litigation; b) whether and to what extent the project engaged in community education; and c) whether the project had representatives of the poor on the governing board.93

The grand strategy theory of legal assistance for the poor meets Paulsen's criticism and fits into the original, central-planning concept of the War on Poverty. The Cahns, as usual, phrased the theory more eloquently in terms of the "consumer perspective." The task was to stimulate the poor's demands for effective redress through the legal system. This was to be accomplished by a) encouraging and aiding the assertion of heretofore nominally or ambiguously conferred rights and entitlements; b) the legitimation of previously unacknowledged grievances; c) the raising of expectations and awareness which would allow the recognition of grievances and injuries done to the poor; d) lowering the cost in social re-

92 Hazard, supra note 84, at 701-02.
93 Pious, supra note 89, at 378.
sources (sophistication, perseverance, deprivation of benefits, articulateness, humiliation) through organized professional advocates to assert rights and grievances.\textsuperscript{94}

The argument against the grand strategy approach is that it leads to the sacrifice of individual client services for time- and resource-consuming law reform efforts which do not and can not remedy the structural defects in the economic and political systems that make and keep people poor. In one critic’s terms: social justice for the poor is not realizable through civil justice. Many legal wrongs committed against the poor can be remedied without substantial improvement in their living conditions. For example, housing codes in poor neighborhoods may be strictly enforced. However, this drives the cost of the housing up and drives out many of the poor. And, while courts may require welfare procedures and benefit distribution to be more equitable, they cannot require that benefits match the cost of living. In other words, the basic issue for the poor is the distribution of wealth. Legal strategies have been notably unsuccessful in changing this distribution.\textsuperscript{95}

3. Encouragement of Community Autonomy—Another approach to legal assistance for the poor addresses the problem of poor communities functioning in a market economy. This strategy utilizes what has been the hallmark of the modern, successful lawyer—the ability to assist the organization, financing, and planning of economic enterprises. The attorney becomes corporate counsel to the poor and works to attract public and private investment in the poor community. He helps create housing corporations, retail stores, manufacturing, investment and banking firms operating within and controlled by the poor community.\textsuperscript{96} The ideal of this approach is the self-sufficient, cooperatively organized neighborhood, which might even develop into a politically autonomous governmental entity.

This approach too is not free from criticism. Deteriorating communities are risky areas for investment. Small businesses of any kind are not in an advantageous economic position. The expertise required for large-scale economic enterprises often is available neither in poor communities nor in legal services projects.

Against this background of approaches to providing legal services, it must be realized that a given legal assistance project does not wholly or solely act according to one of the above theories. Rather, the techniques used by lawyers for the poor have been developed in response to the same demands that exist for the rest of the legal profession. Lawyers for the poor have merely borrowed from the weapons arsenal of lawyers for large-volume participants in the legal system, in an attempt to duplicate, or rather to offset, the advantages of these large-volume participants. Not

\textsuperscript{94} Cahn & Cahn, supra note 91, at 942.

\textsuperscript{95} Hazard, supra note 84, at 706-11; cf. Brill, supra note 1, at 42-43.

\textsuperscript{96} Memo from Burt Griffin, OEO Legal Services Director, to legal services programs, July 16, 1968.
only have legal assistance techniques been developed in response to the same problems faced by private practitioners, but the techniques have also developed in the same relative chronological order, although in a compressed time frame.

Large-volume participants have access to highly trained legal specialists for whom the large-volume client's caseload is a priority matter. The OEO Legal Services Program has, in this regard, made a relatively successful attempt to attract high-quality law school graduates as full-time staff for its local agencies and back-up centers. The attraction for these young lawyers has been non-monetary. They have come to participate in a new and exciting type of legal work, to serve a hitherto unrepresented community, and to effect social change. What many of these lawyers lack in experience, compared to their high-status counterparts in private practice, they make up for in commitment and ingenuity. The local legal services projects that have been most successful in maintaining a dynamic, social-change-oriented approach have been able to compete with the best law firms for top law school graduates.

Specialization has also been brought to bear on the problems of the poor. A local project that has more than two attorneys usually refers certain types of cases to particular staff attorneys. Each attorney thereby develops expertise in and efficient techniques for handling matters in particular areas of law. He may be able to join and consolidate cases if the facts warrant such action, and he can quickly become aware of major problem areas in his community. Furthermore, the Legal Services Program has enlisted the aid of many universities to provide back-up centers for research into particular areas of law. Presently, there are eighteen such centers and a clearinghouse that provide specialized research, training, advice, and a nationwide communications link-up to legal services project attorneys. In some areas of law, the resources available to attorneys for the poor even exceed those available to large, prestigious law firms.

Attorneys for the poor have also attempted to offset the advantages that large-volume participants have in generating favorable rule changes. The frequent use of class actions on behalf of the poor is an effort to plan litigation so that a case becomes of economic consequence to the large-volume litigant who opposes the claim. The case can not easily be settled by the large-volume litigant, even if losing might mean the establishment of a bad precedent. Those persons within the poor-client class whose cases may not be as favorable as others can be dropped from the class and their cases pursued separately. The loss of a few members of the class through settlement or disinterest does not prevent the claim from being litigated through higher courts. Test cases can be developed and pursued

---


98 As this article is going into print, actions by the Nixon administration with regard to OEO and the Legal Services Program jeopardize these and other resources available to attorneys for the poor.
to effect reforms in the law. Every local project, tied together by the communications network, can screen clients for the proper fact situations on which to base a test case. As more than one project director has said to a back-up center: "You give me the case and I'll find you a client." The existence of nationwide and regional communications between legal services projects allows advance preparation for test cases, forum shopping, the preparation of amicus curiae briefs, and the creation of appellate court disagreements to facilitate review in higher courts. Collective action has meant that the poor can also lobby the judicial system.

The aggressive case-handling techniques and the access to research centers and clearinghouses have enabled the legal services projects to practice preventive law and to create "bootstrap law" favorable to the poor. The Center for Social Welfare Policy and Law, established at Columbia University in 1965, has engaged in critical research into the workings and content of the welfare system. As a result of this research, legal materials on residency requirements, maximum grants, fair hearings, and several other aspects of the welfare system have been made available to legal services projects. Legal services attorneys are prepared in advance for the contingencies that may affect their clients. Similarly, the Housing and Economic Development Project at Berkeley, California has prepared model briefs, complaints, motions, and answers for establishing new defenses and affirmative actions in landlord-tenant cases. They have developed collective bargaining agreements and tactics manuals for tenant unions. The back-up centers also draft model legislation and regulations, assist efforts to lobby for legislation favorable to the poor, and provide continuing tax, financing, and development information for community organizations. 99

Legal services projects also have attempted to encourage organization among the poor. Organization may take the form of tenant unions, community development corporations, housing corporations, and profit-making businesses. Legal services attorneys then serve as house counsel to these organizations and, in that way, overcome the disadvantages of serving a single-case participant. The attorney can aid the organization in incorporating and, thereafter, can function in the same manner as a corporate attorney—picking and choosing the most favorable cases for legal action and participating in planning the group's activities. Very often a legal grievance shared by a large number of people and recognized by the legal services attorney becomes the basis for an organization; aggressive legal action helps the organization expand its constituency. 100 The political and economic advantages that an organization with access to expert assistance can gain will accrue, at least to some extent, to the poor.

Finally, legal services projects have attempted to make the poor self-sufficient by conducting community education programs dealing with legal

100 Finman, supra note 97, at 1015-20.
problems, training members of the poor communities as advocates in legal matters, working to delegalize many of the problems which constantly face the poor, and helping the poor to obtain public and private funds for their own programs and businesses. Primary or preventive legal service requires that the poor client know when to consult an attorney and how to conduct his daily activities so as to avoid legally disadvantageous situations.

Most of these tactics and resources are used, to some degree, by every lawyer who serves the poor in legal services projects or legal aid societies. The degree of use, however, depends on the theory of legal services delivery held by the particular attorneys in the agency.

V. CONCLUSION

The criticism of the scope and aggressiveness of legal services' attack on the problems of the poor is not well taken. The critics show an incredibly selective blindness to the nature of the legal system and to the regular practices of those who represent large economic and political organizations. Objections to the wholesale adoption by legal services agencies of the legal techniques that are common to the dominant organizations in American society may be more to the point. However, the poor are also entitled to have their attorneys respond to legal disputes in ways that have proved successful in meeting the exigencies of a pluralist legal system.

101 Id.
102 Id. at 1062-76. See generally K. Fisher & C. Ivie, Franchising Justice: The Office of Economic Opportunity Legal Services Program and Traditional Legal Aid (1971).
103 See generally Law Against the People (R. Lefcourt ed. 1971).