Michigan Law Review

Volume 93 | Issue 6

1995

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Recommended Citation

Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401 (1995).
Available at: <https://repository.law.umich.edu/mlr/vol93/iss6/13>

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POVERTY LAWYERING IN THE GOLDEN AGE

Matthew Diller*

BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973. By *Martha F. Davis*. New Haven: Yale University Press. 1993. Pp. ix, 187. \$26.50.

The 1960s was a decade of extremes. The decade opened with an almost-unbounded sense of optimism about America. With the nation led by a charismatic young President, it seemed that all problems and challenges could be solved if given sufficient attention. The United States, it was claimed, could even put a man on the moon. Despite NASA's success, the decade ended with a tumult of dashed hopes — defeat in Vietnam, economic stagnation, political assassination, Chappaquidick, and, ultimately, the disillusionment of Watergate. Views on poverty during the 1960s track this fall from optimism to disillusionment. The "war on poverty" declared by President Johnson was based on a faith that poverty could be eliminated after a brief pitched campaign led by a handful of social scientists. The aftermath of this "war" was an era of despair in which poverty was widely regarded as intractable.

Martha Davis's *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*,¹ provides a well written and engrossing account of the efforts of a few young lawyers to wage war on poverty on their own terms. Davis focuses on the development and execution of Edward Sparer's plan to beat poverty in the courtroom through a series of test cases designed to create a judicially recognized "right to live" — a right of access to the essentials of subsistence.² The plan ended in failure when the Supreme Court

* Associate Professor of Law, Fordham University. A.B. 1981, J.D. 1985, Harvard. — Ed. Portions of this review draw heavily on my experiences as a staff attorney in the Civil Appeals and Law Reform Unit of The Legal Aid Society in New York City from 1986 until 1993. I am grateful to many people for their help on this project and comments on drafts, including Jane Booth, Tracy Higgins, Katherine Kennedy, Christopher Lamb, Yvette LeRoy, Peter Margulies, Nancy Morawetz, Russell Pearce, Terry Smith, and Bill Treanor. I would also like to thank John Butler, Peter Mignone, and Daniel Towell for their assistance in research.

1. Martha Davis is a staff attorney for the NOW Legal Defense and Education Fund.

2. The right to live was derived from the scholarly work of Delafield Smith and Joseph Tussman, & Jacobus tenBroek. A. DELAFIELD SMITH, *THE RIGHT TO LIFE* (1955); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949); see also Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). For a more recent

resoundingly rejected not only the right to live thesis but also any heightened judicial scrutiny for programs that dispense means of subsistence.³ On the legislative level, Congress's rejection of President Nixon's Family Assistance Plan, which was opposed by both the left and the right, marked the end of serious efforts to achieve a federally guaranteed minimum income for families with children (pp. 138-39).

Davis has chosen fertile ground. Like the war on poverty itself, Sparer's litigation strategy was a failure when judged by its own goals. But it nonetheless produced substantial and lasting intermediate triumphs that have had profound repercussions. This tantalizing mixture of success and failure makes the story of Sparer and his colleagues ripe for examination. Their successes give rise to the question: Why did ultimate victory prove elusive? This question implicates basic issues concerning the role of litigation and lawyers in bringing about fundamental changes in society. More simply put, what should lawyers for the poor do, and what can they accomplish?

Brutal Need is also timely and important because it has arrived at a period when legal scholars have shown renewed interest in the theory and practice of poverty law.⁴ Much of this literature has fo-

argument in favor of judicial recognition of a constitutional right to a subsistence income, see Peter B. Edelman, *The Next Century of Our Constitution: Rethinking our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). A number of scholars have critiqued the right to live thesis. See Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695; Richard A. Epstein, *The Uncertain Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201; Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

3. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

4. Examples of this work include: GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88) [hereinafter Alfieri, *Antinomies*]; Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992) [hereinafter Alfieri, *Disabled Clients*]; Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) [hereinafter Alfieri, *Reconstructive Poverty Law*]; Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687 (1992); Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971 (1992); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Austin Sarat, "... The Law is All Over": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 948 n.3 (1992) [hereinafter Tremblay, *Rebellious Lawyering*]; Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123 (1992); Lucie E. White, *Goldberg v. Kelly On the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990) [hereinafter White, *The Paradox of Lawyering*]; Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88); Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) [hereinafter White, *Subordination*]; Lucie E. White, *To Learn and Teach: Les-*

cused on the relationship between poverty lawyers and their clients. Davis's account adds fuel to this discussion because it traces how the lawyers implementing Sparer's test-case strategy strayed from the social movement agitating for welfare rights. Although Davis does not attempt any definitive assessment of the impact of this trend, she does conclude that "the failure of Sparer's welfare rights litigation strategy mitigates against reliance on litigation as the sole focus of a broad effort to promote change in the welfare system" (p. 145).

In developing her account, Davis carefully weaves together a number of stories, including a history of legal representation of the poor (pp. 10-21), an account of the social protest movement agitating for welfare rights (pp. 40-55), and short biographies of key individuals (pp. 22-27, 82-86). Accounts by other writers deal more comprehensively with a number of these subjects, such as the founding of the Legal Services Program,⁵ the welfare rights movement,⁶ and the Supreme Court's handling of poverty litigation.⁷ *Brutal Need*, however, connects these subjects in a way that enriches our understanding of each of them.⁸

Written for a general readership, *Brutal Need* does not provide detailed analysis of the Supreme Court's welfare decisions between 1967 and 1973. Nonetheless, its fascinating accounts of the lawyering that led up to those decisions are a notable contribution to the literature. These accounts have all of the attributes of vintage war stories. They are filled with clashes of strong personalities, strategic maneuvers to influence the Supreme Court's docket, missteps at oral argument, and other details that together convey a flavor of the times and the cases.

These war stories, of course, are more than simply entertaining. The accounts highlight the lawyers' strategic choices in crafting law-

sons from Driefontein on *Lawyering and Power*, 1988 Wis. L. Rev. 699 [hereinafter White, *To Learn and Teach*].

5. See EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974).

6. See NICK KOTZ & MARY LYNN KOTZ, *A PASSION FOR EQUALITY: GEORGE A. WILEY AND THE MOVEMENT* (1977); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 264-359 (1977).

7. See SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* (1990).

8. Barbara Sard has also written a perceptive analysis of litigation strategies in the welfare context. See Barbara Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367 (1988). Edward Sparer has provided an insightful evaluation of the strategy he originated. See Edward V. Sparer, *The Right to Welfare*, in *THE RIGHTS OF AMERICANS: WHAT THEY ARE — WHAT THEY SHOULD BE* 65 (Norman Dorsen ed., 1971); see also LAWRENCE, *supra* note 7, at 48-51 (discussing Sparer's strategy); ARYEH NEIER, *ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* 130-40 (1982) (same); Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 REC. ASSN. B. CITY N.Y. 320, 335-42 (1974) (same).

suits to serve as building blocks for the right to live principle. In this way, *Brutal Need* places the cases in the context of Sparer's overall plan. For example, instead of viewing *King v. Smith*⁹ as a Social Security Act case, *Shapiro v. Thompson*¹⁰ as a right-to-travel case, *Goldberg v. Kelly*¹¹ as a due process case, and *Dandridge v. Williams*¹² as an equal protection case, all four cases emerge as pieces of the larger strategy.

Davis's account of the lawyering in *Goldberg* (pp. 81-118) is particularly well developed. She has interviewed most of those involved in the case, including Professor Charles Reich, whose articles provided the intellectual underpinnings for the case;¹³ Justice Brennan and two of his law clerks who worked on the opinion of the Court; Judge Wilfred Feinberg, who wrote the opinion for the three-judge court that heard the case initially; the attorneys who argued the case for the plaintiffs and the defendants at the trial level and on appeal; and the attorneys at Mobilization for Youth Legal Services — a New York City neighborhood law office — who performed the initial intake interview with John Kelly and put together the case.¹⁴

In this review, I will first examine Davis's discussion of the relationship between Sparer's test-case strategy and the social movement seeking welfare rights. I will also consider a number of objections leveled by academics at lawyer-dominated strategies for social change. In the second portion of this review, I will consider the legacy of the work of Sparer and his contemporaries in terms of its impact on poverty lawyers practicing today. I will also consider the claim of a number of academics that this legacy has contributed to the creation of a crisis in contemporary poverty law.

I. THE TEST-CASE STRATEGY

A. *Development of the Strategy*

In the early 1960s, the idea that lawyers had a role to play in eliminating poverty was new. Prior to the 1960s, legal aid societies provided legal representation to the poor as a means of allowing access to the justice system (pp. 10-21). Although legal aid work

9. 392 U.S. 309 (1968).

10. 394 U.S. 618 (1969).

11. 397 U.S. 254 (1970).

12. 397 U.S. 471 (1970).

13. See Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

14. Davis has also drawn on archival material, including drafts of the opinions and reactions of the Justices to various drafts. Unfortunately, Davis was not able to locate the plaintiff, John Kelly.

made the justice system more fair and helped many individuals resolve disputes, legal aid lawyers did not perceive their mission as the eradication of poverty through the reform of social and legal institutions. In an effort to serve greater numbers of clients, few cases were litigated, and even fewer appealed.¹⁵

The successes of the NAACP Legal Defense Fund, however, created a new image of the lawyer — as agent of social change.¹⁶ To some, this new conception seemed transferable from the realm of civil rights to the arena of economic rights. The analogy proved controversial, even among advocates for the poor. In particular, the young activist lawyers who promoted the idea of using legal representation as a means of fighting poverty relentlessly criticized the existing legal aid societies and their “band-aid” work.¹⁷ The legal aid societies, well connected with the established bar, fought back.¹⁸ The establishment of the Legal Services Program of the Office of Economic Opportunity in 1965 made clear the triumph of the “law reform” vision. The inclusion of the Legal Services Program in the agency spearheading the war on poverty was an acknowledgement that legal representation was a weapon to be deployed in the war.¹⁹

Although Davis recounts this tension between the advocates of law reform and the defenders of traditional legal aid (pp. 33-34), the disputes among the law reform activists are more central to the issues with which she deals. The activists did not agree among themselves on the issue of how lawyers for the poor should go about reforming the law.²⁰ They developed at least three models of achieving social change. The first school of thought viewed the law-

15. Pp. 10-21; JOHNSON, *supra* note 5, at 3-19.

16. The limitations of the Legal Defense Fund's accomplishments were not apparent in the early 1960s. The difficulties of translating victories in the courtroom into changed realities have since become widely recognized. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42-106 (1991). Moreover, critics have questioned whether the strategy of seeking integration and the establishment of legal rights has promoted equality. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978). For fuller treatments of the Legal Defense Fund's litigation strategy, see JACK GREENBERG, *CRUSADERS IN THE COURTS* (1994); MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-61* (1994) [hereinafter TUSHNET, *MAKING CIVIL RIGHTS LAW*]; MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

17. JOHNSON, *supra* note 5, at 45-47, 51.

18. *Id.* at 47-49.

19. *Id.* at 39-43. Although the leadership of the Legal Services Program placed a heavy emphasis on law reform work, *id.* at 167, the program funded traditional legal aid societies, as well as new organizations dedicated to achieving social change, *id.* at 101.

20. Earl Johnson provides a more thorough discussion of this debate than does Davis. *Id.* at 39-64.

yer as part of a team of professionals who would work comprehensively with individuals to provide a package of social, educational, and legal services.²¹ This model, which formed the basis of a short-lived program in New Haven, was rooted in the view that "cultural poverty" causes economic poverty. The second view focused on neighborhood activism.²² This model, as developed by Edgar and Jean Cahn, asserted that poverty lawyers should serve as a resource for poor communities to make local government and other institutions more responsive on a local level and to assist poor communities in developing their own institutions and leaders.²³ The third alternative, devised by Sparer and social analyst Elizabeth Wickenden, called for the development of a planned series of test cases designed to achieve judicial recognition of a constitutional right to a subsistence income.²⁴

Sparer's premise was radically different from the other conceptions. Although the New Haven model and the Cahns' proposal reflected the war on poverty's general emphasis on eliminating localized pockets of poverty, Sparer's model sought reform on the national level.²⁵ It is not difficult to see how Sparer's communist past (pp. 22-24) led him to reject diagnoses of poverty that focused on lack of opportunity due to personal or cultural deprivation. For Sparer, poverty was not due to a lack of skills or education; it was caused by a deprivation of power. Litigation was a means of achieving power in order to redistribute resources.

Davis does not pursue the progress of legal services programs that sought to implement the Cahns' model.²⁶ Instead, she traces the establishment of the legal unit directed by Sparer at Mobilization for Youth (MFY) in New York City and the efforts to implement Sparer's strategy (pp. 26-39). There is a certain irony to the fact that MFY, a comprehensive neighborhood social service program, provided the initial venue for the implementation of Sparer's plan — Sparer's approach was the least neighborhood-oriented of all the proposals. Not surprisingly, Sparer and MFY quickly were at odds with one another, and the legal unit separated from its parent organization (pp. 31-32). Going a step further, Sparer soon concluded that the press of the caseload in a neighborhood law office made it impossible to focus on test cases. In 1965, he left the legal

21. See *id.* at 25-27.

22. See Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1334-52 (1964).

23. See *id.*

24. JOHNSON, *supra* note 5, at 23-24.

25. See BRYANT GARTH, NEIGHBORHOOD LAW FIRMS FOR THE POOR 21-22 (1980); JOHNSON, *supra* note 5, at 23-24.

26. The New Haven model was never fully implemented. See JOHNSON, *supra* note 5, at 27.

unit to found the Center on Social Welfare Policy and Law ("the Center"), which would become an office devoted to strategic activities, rather than direct service (pp. 34-36).

B. *The Evolution of the "Think Tank" Approach to Poverty Litigation*

The progression from a legal component of a social service organization to an independent law office to a specialized office dealing only with strategic litigation suggests an evolution in which the lawyers assumed more and more autonomy. Freed from the demands of serving the day-to-day legal needs of poor individuals and organized groups, the lawyers could set their own agenda and then find the clients necessary to bring the cases. The increasing distance between the Center and its client base is a major theme of *Brutal Need*.

Sparer did not conceive of the test-case strategy as calling for such lawyer domination over the litigation agenda. Instead, Sparer intended to integrate his strategy with the political and social movement for reform (p. 73). Once again, the civil rights movement presented a model. Sparer intended the Center to collaborate closely with the National Welfare Rights Organization (NWRO) — the leading organization of welfare recipients — just as the Legal Defense Fund's activities in the courtroom worked in synergy with the demonstrations and civil disobedience of the civil rights movement.²⁷ Thus, under Sparer's direction, the MFY legal unit and the Center focused on organizing and educating recipients. For example, they initiated a campaign to urge New York City recipients to apply for welfare grants for specialized needs (pp. 46-51). Although under the law these grants were available, case workers rarely issued them. The special grants campaign was taken up by NWRO and proved to be an effective tool for educating and mobilizing recipients.

Davis traces the waning of the Center's commitment to working in tandem with the social movement (pp. 72-76, 99-100). Sparer left the Center in 1967 to begin a career in teaching. By that time, Davis concludes, the staff viewed the Center as "a sort of high-powered think tank, generating its own legal strategies" (p. 73). She depicts Lee Albert, who eventually replaced Sparer, as having stellar legal credentials but no experience in poverty law and, more

27. Although the NAACP Legal Defense Fund did not foment social action in the way that Sparer advocated, the two strategies nonetheless complemented each other. ROSENBERG, *supra* note 16, at 147. Moreover, the Legal Defense Fund supported the social movement by representing protesters. See GREENBERG, *supra* note 16, at 267-69; TUSHNET, *MAKING CIVIL RIGHTS LAW*, *supra* note 16, at 305-06.

importantly, no interest in nurturing relations with welfare recipient groups (p. 74).

As Davis describes it, under Albert's direction the Center's work with the NWRO dwindled, and the Center acted aggressively to set and control the course of law reform litigation in the welfare area.²⁸ These efforts included elbowing neighborhood legal services programs aside on important cases and jockeying to get Center cases in front of the Supreme Court before other cases raising similar issues.²⁹ Not surprisingly, Sparer disliked both Albert and the direction in which he steered the Center (pp. 75, 139-40).

Although Davis focuses on how Albert and the Center staff steered a course away from Sparer's original vision of the Center as an arm of the social movement, the tensions seem inherent in Sparer's original conception. Accordingly, the split cannot be attributed solely to Albert's personal manner and agenda. From its outset, the litigation campaign was developed in large part on a theoretical level, not deduced from the demands of the NWRO and other recipient organizations. Sparer developed a list of litigation objectives that he derived from academic literature, discussion with other intellectuals, and his own analysis based on his experience at MFY.³⁰ Although he later criticized lawyers who view themselves as the "grand strategists" of the movement,³¹ it is clear that Sparer was such a strategist himself.

The fact that the agenda was set by the lawyers is not surprising. The test-case strategy focused on convincing the Supreme Court to adopt a series of principles. This goal called for an ongoing dialogue between the lawyers and the Court. By its nature, the strategy demanded careful planning in choosing the cases that would provide the contexts for this dialogue and in deciding how far to push the Court in each case.³² In short, it called for legal analysis and judgment of the highest order. No individual client or even client group would have had the expertise to plan such a strategy.

28. Pp. 74-75. Although this depiction would undoubtedly be disputed by some of those involved in the events, Davis's documentation makes clear that her descriptions of the Center are based on contemporaneous views.

29. Despite the Center's careful planning about which issues should be presented to the Court and in which contexts, events seldom went according to plan. As Davis observes, the Center's "debates concerning welfare rights litigation strategy [were] largely theoretical." P. 76. The problem stemmed from the fact that Sparer's broad promotion of the test-case model spurred neighborhood legal services offices around the country to jump in and file cases raising the claims that Sparer had written about. In retrospect, it is clear that the Center had neither the monopoly on welfare test cases nor the supervisory power over neighborhood offices to enforce a patient and disciplined approach to litigation. See LAWRENCE, *supra* note 7, at 46-48.

30. See Edward V. Sparer, *Social Welfare Law Testing*, PRAC. LAW., Apr. 1966, at 13-31.

31. See Sparer, *supra* note 8, at 84.

32. See LAWRENCE, *supra* note 7, at 41 (noting that strategic litigation calls for "a great deal of centralization and coordination").

More fundamentally, Sparer's belief that the test-case strategy could work in tandem with the social movement failed to recognize that the goal of building a grass-roots movement is distinct from that of pushing the courts to adopt particular legal principles. For example, welfare recipient groups were most concerned with issues relating to the adequacy of benefit levels (p. 72). In contrast, the Center's litigation agenda called for an initial focus on eligibility and procedural issues. This focus was based on an assessment that adequacy questions were more ambitious and should be deferred until the proper groundwork had been laid (p. 72). It also reflected the idea that the inadequacy of benefit levels could be attacked indirectly by expanding welfare rolls to create a crisis that would necessitate a federal takeover of state welfare programs.³³ Neither rationale addressed recipients' immediate demands for benefit increases. Sparer's model provided little guidance for resolving such a conflict between the long-term litigation strategy and the perceptions and demands of recipients.³⁴

Any traditional view of lawyer-client relations would dictate that the desires of the client groups should take precedence.³⁵ If so, what is left of the test-case strategy? A basic premise of the strategy was that a series of cases was needed in order to make the ultimate goals attainable. Upsetting the sequence would jeopardize the project. If the more ambitious adequacy cases were brought first and were unsuccessful, the test-case strategy could be left in shambles. The logic of the test-case strategy called for an incrementalism that was difficult to reconcile with the immediate demands of the social movement.

33. Frances Fox Piven and Richard Cloward developed, and the NWRO adopted, this "break the bank" strategy. P. 44.

The lack of enthusiasm of the recipient groups for a concentration on eligibility issues may be attributable to the fact that, by definition, recipients have been found eligible for benefits. The constituency for expanding eligibility undoubtedly existed but was unorganized. The recipient groups thus did not reflect the full potential constituency with an interest in receipt of benefits.

34. *Goldberg v. Kelly* was one of the few lawsuits that facilitated both goals of establishing precedent and contributing to grass-roots organizing. *Goldberg's* treatment of welfare benefits as a property interest rather than a mere gratuity was critical to the right to life concept. At the same time, the right to a hearing prior to the termination of welfare benefits that *Goldberg* established provided activist recipients with a measure of protection against retaliation by welfare workers. *Goldberg v. Kelly*, 397 U.S. 254 (1970); see Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 562-63 (1984); White, *The Paradox of Lawyering*, *supra* note 4, at 869-71.

35. Paul Tremblay has recently proposed an alternative model under which legal services attorneys would be permitted to consider the overall interests of their client community in making decisions concerning legal representation. See Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990). Under Tremblay's model, it would be appropriate for legal services lawyers to exercise independent judgment as to whether a particular client group's agenda advances the larger interests of the office's client community. *Id.* at 1102-04.

One result of this tension is that the Center has been blamed for moving both too quickly and too slowly. As Davis recounts, frustration with the Center's cautious approach contributed to the rift between the Center and the NWRO (pp. 72-73). Concern over the risk of bringing litigation that would make "bad law" could easily be interpreted as a lack of responsiveness to the needs and demands of recipients. At the same time, observers of the judicial system have faulted the Center for rushing the litigation agenda and not permitting the judiciary to become accustomed to the propositions that the Center was urging on the courts.³⁶

C. *Evaluation of the Test-Case Model*

For the reasons described above, the test-case model by its nature tended toward lawyer-dominated decisionmaking. In a brief concluding chapter, Davis offers a tentative evaluation that recognizes this inevitability. She concludes that the test-case model "may be ill suited to the poverty law context because it puts lawyers — whose knowledge of the issues facing poor clients is at best second hand — at the center of power and decision making in the movement" (p. 143). She also writes that the test-case strategy tended to "undermine the often fragile organizing power of the grass roots movement."³⁷

These conclusions converge with the overall thrust of recent academic literature on poverty lawyering. Sparer's criticism of Albert's approach resembles the distinction that Gerald López has drawn between "regnant" lawyering and "rebellious" lawyering.³⁸ López identifies regnant lawyers as those who "consider themselves the preeminent problem solvers" and who believe that lawyers should assume leadership in campaigns on behalf of the disempowered.³⁹ In contrast, the rebellious lawyer works at the grass-roots level and collaborates with disempowered individuals and groups to assist them in mobilizing to improve their own lives.⁴⁰

36. Samuel Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of Judicial Process*, 58 MINN. L. REV. 211, 244-45 (1973). Subsequent events, however, make clear that over time the political and judicial climate became more, not less, hostile to efforts to create a guaranteed minimum income. Had a twenty-year campaign been launched in 1967, it would have reached its culmination during an era in which the Supreme Court decidedly unsympathetic to challenges to government policies concerning poverty. See *infra* note 96. On a political level, the idea of federally guaranteed minimum income is once again outside the bounds of mainstream discourse.

37. P. 143. Davis does not level this criticism as an assertion that the strategy was therefore illegitimate. She acknowledges its accomplishments, as well as pointing out its potential costs. Pp. 142-43.

38. LÓPEZ, *supra* note 4.

39. *Id.* at 24.

40. Sparer's work does not fit comfortably into López's categories. Sparer's strong belief that poverty lawyers should defer to organized recipient groups, Sparer, *supra* note 8, at 86-87, is characteristic of what López describes as a rebellious approach. Sparer's test-case

López concludes that regnant lawyering is not only inferior to rebellious lawyering but harmful to those it seeks to serve: "[B]reaking away from the regnant idea presents a central challenge for all those engaged in the modern struggle against subordination."⁴¹ He further explains that regnant lawyering "helps undermine the very possibility for re-imagined social arrangements that lies at the heart of any serious effort to take on the status-quo."⁴² Other recent scholars have also sounded this theme. Anthony Alfieri has written that poverty lawyers engaging in habits of lawyer domination over clients "negate the poor as an historical class engaged in political struggle, thereby decontextualizing, atomizing, and depoliticizing that struggle."⁴³ He concludes that "the best hope for combating poverty lies not with lawyers, but with the poor themselves. It follows that empowering the poor should be the political object of poverty law."⁴⁴

The tensions among the lawyers recounted in *Brutal Need* make clear that these recent calls for the reorientation of poverty law are preceded by a long history of debate. In fact, much of the recent scholarship is reminiscent of criticisms of lawyer domination that were voiced twenty years ago. By 1971, Sparer was arguing that "the first step in a grand strategy for lawyers in advancing welfare rights is to serve, and thereby help build, an independent rights movement."⁴⁵ Around the same time, the Cahns took aim at law offices, such as the Center, that focused on strategic activity. They wrote that they had seen

lawyers "for" the poor decide what in their professional collective wisdom is in the best interest of the poor. Consequently, they draft legislation; they handle test cases, and for the most part studiously avoid all contact with those insights which come from neighborhood offices, from contact with live clients, from group representation or from structural mechanisms of accountability to the constituency they ostensibly serve.⁴⁶

In fact, for over twenty years, the critics of the test-case approach have dominated the literature.⁴⁷ They have painted a portrait of the test-case lawyer as someone who uses legal represen-

model, however, inevitably tends toward regnant methods because it places lawyers in a central role.

41. LÓPEZ, *supra* note 4, at 28.

42. *Id.* at 29.

43. Alfieri, *Antinomies*, *supra* note 4, at 665.

44. *Id.*

45. Sparer, *supra* note 8, at 88.

46. Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession? — The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1040 (1970).

47. See Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970); see also JACK KATZ, *POOR PEOPLE'S LAWYERS IN TRANSITION* 179-96 (1982). But see DAVID LUBAN, *LAWYERS AND*

tation as a means of advancing his or her own social vision while doing little of real value for clients.⁴⁸ *Brutal Need* provides a historical context that can be used to assess some of the critics' assertions.

I take it as a given that Sparer's test-case strategy could not ultimately be successful without some base of public or political support for its goals. The right to live is neither apparent on the face of the Constitution nor obviously implicit in its terms. Because its declaration would have profound social and financial repercussions throughout society, courts were unlikely to perform the intellectual maneuvering necessary to find such an implied right, unless the reasoning would resonate with a broad spectrum of the public or with politically powerful elites.⁴⁹ The test-case strategy was highly unlikely to succeed on its own because it was not oriented toward building the public support or political pressure that was necessary for its success.⁵⁰

But the Center was not the exclusive actor in promoting welfare rights. At the same time that the Center focused on the test-case strategy, there were hundreds of other poverty law offices across the country.⁵¹ More importantly, there was an active welfare rights movement among recipients, with momentum provided by the civil rights movement. Although the civil rights movement avoided wel-

JUSTICE: AN ETHICAL STUDY 317-57 (1988) (defending strategic litigation by poverty lawyers that could be viewed as manipulation of clients).

48. See Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1750-51 (1994) (reviewing LÓPEZ, *supra* note 4).

This point has long been a centerpiece of conservative critiques of legal services programs. See William F. Harvey, *LSC — The Greatest Fraud Ever?*, in *LEGAL SERVICES FOR THE POOR* 81 (Douglas Besharov ed., 1990). In fact, there is a large overlap between progressive and conservative criticisms of poverty lawyers. See, e.g., Douglas J. Besharov, *An Agenda for Reform*, in *LEGAL SERVICES FOR THE POOR*, *supra*, at 3, 3-5 (objecting to lawyer-dominated priorities of legal services programs).

49. See LAWRENCE, *supra* note 7, at 159; ROSENBERG, *supra* note 16, at 336; Greenberg, *supra* note 8, at 340-41. Of course, Supreme Court decisions may be controversial. But even the Court's most controversial decisions are strongly supported by significant segments of the public. For a fuller discussion of the relationship between public opinion and constitutional adjudication, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). Friedman explains that "constitutional interpretation is an elaborate discussion between judges and the body politic." *Id.* at 653. He argues that though the judiciary is not always in step with the other branches of government or with public opinion, judges are constrained by the political system. When they stray too far from public sentiment, pressures build to bring them back into line. *Id.* at 679; see also LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* 12 (1988) (arguing that the "Court maintains its strength by steering a course that fits within the permissible limits of public opinion"); Ruth Bader Ginsburg, *Speaking with a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205-09 (1992) (arguing that constitutional adjudication usually follows rather than leads changes in society and that though the Court can reinforce or facilitate social change, a large gap between the Court and the political branches creates a risk of backlash).

50. This point is applicable to any ambitious strategy to achieve social change through litigation. Although it is true that court decisions can have an impact on public opinion, this influence is usually subtle and gradual. See Friedman, *supra* note 49, at 668-71.

51. JOHNSON, *supra* note 5, at 99.

fare issues (p. 120), it built a base of support for the proposition that society was unfair to minority communities. Even though the Center may have downplayed its efforts to support recipient organizing, it worked in a context in which others engaged in organizing efforts.

The real question, then, is whether there was room for the test-case strategy, and the lawyer domination that it entailed, as part of a broader effort to combat poverty. If López and Alfieri are correct that such a strategy is unhelpful at best and potentially harmful to efforts to mobilize groups of poor people, one might conclude that the test-case strategy simply has no place among the approaches used by poverty lawyers.⁵²

It is not difficult to postulate a number of dynamics that would render test-case litigation counterproductive. First, small successes won in litigation may reassure the public that society is responsive to the grievances of poor people and may lead to opposition to further demands.⁵³ Second, an agenda set by lawyers may be based on misperceptions of the true interests and needs of the client community. Third, the goals and contours of a test-case agenda will inevitably be shaped by the strength of legal claims and other factors that bear on the potential for success in the courtroom, rather than on the needs of clients.⁵⁴ Fourth, lawyer-dominated litigation strategies may send an implicit message that poor people cannot attain power by themselves but must rely on the altruism of poverty lawyers.⁵⁵ Fifth, poor people who would otherwise work to improve their own lives may instead forebear, in the belief that improvements will come through litigation.⁵⁶

The practical significance of these objections is impossible to evaluate in any definitive or objective way. *Brutal Need*, however,

52. Neither López nor Alfieri rule out the initiation of class action litigation. Rather, they view lawsuits as appropriate when they grow out of an organizing effort. See López, *supra* note 4, at 32; Alfieri, *Antinomies*, *supra* note 4, at 689 n.186.

53. All strategies based on incremental change pose this risk.

54. White, *To Learn and Teach*, *supra* note 4, at 757 (discussing the "risk that litigation will co-opt social mobilization" by shaping and limiting the demands of subordinated groups).

55. Alfieri has argued that the lawyer-client relationship places the poor person in the role of the passive client who is dependent upon the lawyer. See Alfieri, *Antinomies*, *supra* note 4, at 674. López suggests this argument in his assertion that regnant lawyers dispense rights in the same manner in which the state dispenses benefits. See López, *supra* note 4, at 75.

56. Lucie White has noted that "[l]itigation may falsely raise in the community the expectation that appeal to 'the law' can somehow give it power. Thus the community may put its energy into litigation instead of the much more difficult work of organizing itself." White, *To Learn and Teach*, *supra* note 4, at 742; see also KATZ, *supra* note 47, at 102.

Additionally, when successful, law reform litigation may yield consequences that were never anticipated or desired by those who filed the case. See ROSENBERG, *supra* note 16, at 338-39; Peter Margulies, "Who are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. REV. 213, 231-39 (1990).

does not make out a strong case that the social movement could have accomplished more had the Center not undertaken the test-case strategy. The 1960s was one of the rare periods in American history in which many poor people mobilized to assert and expand their rights collectively.⁵⁷ The atmosphere of protest fostered by the civil rights movement, urban unrest, and opposition to the Vietnam War, together with the economic prosperity of the era, created an extremely favorable climate for poor communities to demand a greater share of society's resources.⁵⁸ Nonetheless, all the organizing strategies described in *Brutal Need* either failed immediately or yielded only short-lived successes. Although the special needs grant campaign brought short-term organizing successes, these successes proved impossible to sustain. When the State of New York responded by eliminating special needs grants in 1968, the welfare rights groups "had little to offer recipients" and a succession of NWRO organizing strategies failed.⁵⁹

It is difficult to believe that these failures could have been reversed had the Center refocused its efforts on organizing. The failure of the NWRO stands as a testament to the enormous barriers to organizing poor people around the issue of welfare rights. Moreover, the influence of the NWRO was overwhelmed by a backlash in public opinion that began with the elections of Ronald Reagan as governor of California and Richard Nixon as President. The forces that fueled this tide were far too powerful to be stopped by a handful of poverty lawyers.⁶⁰ In short, the ultimate failure of the welfare rights movement cannot be laid at the doorstep of Lee Albert or the Center staff.⁶¹

57. See PIVEN & CLOWARD, *supra* note 6, at 6-14.

58. See generally *id.* at 264-74 (discussing the rise of the welfare rights movement).

59. Pp. 53-54; see also JOEL HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 159 (1978) ("When the special grants were sharply reduced, welfare rights organizations withered.").

60. Poverty lawyers did, however, play a role in creating the backlash. By the end of the 1960s, the victories of the test-case model and the work of the NWRO had resulted in the expansion of welfare rolls that created budget crises in many states. The backlash grew out of the realization that the middle class would be called upon to pay for the new welfare rights in the form of increased taxes. See KOTZ & KOTZ, *supra* note 6, at 285-87 (describing the growing public hostility to welfare).

61. Supporters of the movement have disagreed over the lessons about organizing strategies to be drawn from the collapse of the NWRO. Piven and Cloward argue that the movement failed to achieve its potential because its leadership became preoccupied with winning acceptance in mainstream political circles instead of maintaining its early emphasis on social protest. PIVEN & CLOWARD, *supra* note 6, at 324-31. Sparer drew the opposite conclusion and argued that any future strategy should focus on forging alliances with other groups and eschewing divisive tactics. See Edward Sparer, *Discussions, Ten Years of Legal Services for the Poor, in A DECADE OF FEDERAL ANTIPOVERTY PROGRAMS* 324, 324-27 (Robert H. Haveman ed., 1977); Edward V. Sparer, *Legal Services and Social Change: The Uneasy Question and the Missing Perspective, 1976-77 N.L.A.D.A. BRIEFCASE* 58.

In fact, it appears more likely that the test-case strategy had little role in creating or destroying the social movement. Instead, Sparer and his colleagues rode the crest of a wave. When the social movement was powerful and the impulse in society for reform was strong, the test cases flourished. When the movement ebbed and a backlash set in, the strategy foundered.

Given its marginal impact on recipient organizing, the benefits of the test-case strategy appear to outweigh its downsides. Although the Supreme Court rejected the right to live thesis, the accomplishments of the strategy were remarkable. When Sparer published his agenda in 1965 and 1966, most of his objectives appeared utopian. Sparer's list included goals such as the elimination of residency laws, "man in the house" rules that disqualified mothers who cohabitated with men, and midnight raids to check up on recipients.⁶² It also included the establishment of due process protections and a right to adequate benefits.⁶³ At the time Sparer articulated his agenda, no federal court had ever invalidated a state welfare practice or policy. The accomplishment of Sparer's agenda would require sweeping changes in the legal status of welfare.

By 1971, the Supreme Court had upheld the jurisdiction of federal courts to review challenges to state welfare policies,⁶⁴ struck down residency laws,⁶⁵ invalidated man in the house rules,⁶⁶ and found that determinations to terminate welfare benefits are subject to the requirements of due process.⁶⁷ The Supreme Court's decision striking down man in the house rules alone made 500,000 children eligible for public assistance (p. 68). Moreover, during the 1970s, poverty lawyers were able to use the principles established by these Supreme Court cases to challenge many other restrictive eligibility rules and unfair procedures.⁶⁸

It is hard to imagine that a campaign of picketing, demonstrations, and sit-ins could have accomplished all that was achieved by the Center through litigation.⁶⁹ Although the prospects for using litigation to achieve social change may ultimately be dependent upon larger political forces, litigation can yield benefits that could not be obtained through the political system alone. For example, it is unlikely that recipient groups had the political clout to persuade

62. Sparer, *supra* note 30, at 15-18.

63. *Id.* at 28-30.

64. *King v. Smith*, 392 U.S. 309, 312 n.3 (1968).

65. *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

66. *King*, 392 U.S. at 333-34.

67. *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970).

68. In this respect, *King* and *Goldberg* proved to be particularly important. See Sard, *supra* note 8, at 375-80.

69. See Earl Johnson, Jr., *Discussions, Ten Years of Legal Services for the Poor, in A DECADE OF FEDERAL ANTIPOVERTY PROGRAMS*, *supra* note 61, at 315, 315-16.

forty state legislatures to repeal the public assistance residency requirements that the Court struck down in *Shapiro v. Thompson*.⁷⁰ Most important, the strategy cashed in on the favorable political and judicial climate of the times in order to establish legal principles that have endured long after the political tide has ebbed.

Most of these principles are now under attack. The new Republican majority in Congress is seeking to end the "entitlement" status of the basic federal cash assistance programs.⁷¹ The proposed "Personal Responsibility Act"⁷² would revive the use eligibility restrictions to control the "morality" of public assistance recipients.⁷³ The Supreme Court has even come close to reconsidering the issue of residency requirements for receipt of assistance.⁷⁴ This onslaught was preceded by a period of erosion in which the Department of Health and Human Services (HHS) granted states dozens of waivers exempting their programs from federal requirements designed to assure fair treatment of recipients.⁷⁵

The current assault on the victories of the Center underscores the limitations of litigation as a tool for achieving fundamental and enduring change in society. At the same time, it also calls for re-

70. 394 U.S. 618, 627 (1969).

71. See Robert Pear, *Welfare Debate Will Re-Examine Old Assumptions*, N.Y. TIMES, Jan. 2, 1995, at A1, A9.

72. H.R. 4, 104th Cong., 1st Sess. (1995).

73. The bill begins with a statement that it is the "sense of the Congress" that "marriage is the foundation of a successful society." H.R. 4, 104th Cong., 1st Sess. § 100 (1995); see also H.R. 4, 104th Cong., 1st Sess. § 101 (1995) (denying aid to children whose paternity has not been established); H.R. 4, 104th Cong., 1st Sess. § 105 (1995) (bar on aid to children born to unmarried mothers under 18 years of age, removable only by marriage of mother to the father of the child); H.R. 4, 104th Cong., 1st Sess. § 106 (1995) (bar on aid to children born to AFDC recipients); H.R. 4, 104th Cong., 1st Sess. § 107 (1995) (state option to withhold aid to children born to unmarried mothers between the ages of 18 and 20). Proponents of these measures have argued for the revival of shame and stigma as a response to the rise in single motherhood. See, e.g., Gertrude Himmelfarb, *The Victorians Get a Bad Rap*, N.Y. TIMES, Jan. 9, 1995, at A15.

74. *Anderson v. Green*, 115 S. Ct. 1059 (1995) (dismissing as moot appeal from decision striking down restriction on public assistance benefits based on residency). The issue is likely to return to the Court's docket as residency requirements are making a comeback in many states. See, e.g., *Mitchell v. Steffen*, 504 N.W.2d 198 (Minn. 1993) cert. denied, 114 S. Ct. 902 (1994); *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992); see also Stephen Loffredo, "If You Ain't Got the Do Re Me": *The Commerce Clause and State Residence Restrictions on Welfare*, 11 YALE L. & POLY. REV. 147 (1993).

75. See generally Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare "Reform"*, 26 MICH. J.L. REFORM 741, 743-44 (1994) (discussing HHS procedures for granting waiver applications); Lucy A. Williams, *The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard*, 12 YALE L. & POLY. REV. 8 (1994) (arguing that many state waiver requests should not be granted because they are not limited research projects as required by the statutory grant of authority to waive federal requirements); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992) (discussing the content of recent demonstration projects approved by HHS). HHS's willingness to waive basic federal eligibility standards could be viewed as a *de facto* return to the pre-King era when states were permitted to limit eligibility subject only to loose federal scrutiny.

newed appreciation of the accomplishments of the test-case strategy. The threat of a return to an era when states and administrators punitively manipulated eligibility for public assistance so as to stigmatize and terrorize recipients,⁷⁶ makes the accomplishments of Sparer and his colleagues appear all the more remarkable.

I do not offer these conclusions as an endorsement of everything that the Center did. In particular, a more open approach to recipient groups and neighborhood legal services offices may have strengthened its efforts. But the criticisms of the lawyer domination inherent in test-case strategies voiced by Davis and more fully developed in scholarly writing seem overstated. Although the political and judicial context may not always be right for such a strategy, it suffers from no inherent flaw that will always make it inappropriate.

II. THE LEGACY OF THE 1960s

A. "Law Reform" in the Contemporary Era

The work of Sparer and his colleagues has had an enduring impact on the way that poverty law is practiced in this country.⁷⁷ As a result of their work, poverty lawyers no longer view their role as functionaries of the justice system, limited to the goal of providing equal access.⁷⁸ Instead, the core insight of Sparer and his contemporaries — the idea that poverty law offices are or should be engaged in an effort to reform and improve political and social institutions that affect poor communities — has become deeply ingrained in the culture of poverty law practice.⁷⁹ Rather than exclu-

76. See MIMI ABRAMOVITZ, REGULATING THE LIVES OF POOR WOMEN 318-29 (1988) (discussing exclusionary and punitive policies and practices that characterized the AFDC program prior to the 1960s); WINIFRED BELL, AID TO DEPENDENT CHILDREN (1965) (same); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 128-30 (2d ed. 1993) (same).

77. Apparently, at one point Ms. Davis was considering expanding the scope of her project to include a discussion of current law reform efforts by poverty lawyers. She interviewed me on that subject while I was a staff attorney at The Legal Aid Society in New York City.

Although Davis writes about the 1960s from a historical perspective, she is a participant in the current debate about welfare. As an attorney for the NOW Legal Defense Fund, Davis has worked to mobilize feminists to focus on poverty issues. See Martha Davis, *Women on the Move: Civilian Responses to the War on Poor Women*, 21 SOC. JUST. 102 (1994). Davis's perceptive account of the 1960s suggests that her evaluation of the contemporary work would have been well worth reading.

78. The arguments used to support continued federal funding for legal services, however, have reverted to the rhetoric of equal access to the justice system. Thus, the Legal Services Corporation places a heavy emphasis on the goal of access to legal counsel. See KATZ, *supra* note 47, at 170.

79. See *id.* at 105-06, 178. In part, the continuation of law reform work is due to an expanded view of what it means to provide access to competent counsel. See generally Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 34-39 (1984) (arguing that law reform work is consistent with the goal of providing equal access to the justice system because individual clients have an interest

sively providing service to individuals, most programs strive to engage in some active efforts that benefit poor people in the community who are not directly represented. Furthermore, Sparer's test-case strategy has created a vibrant tradition of using litigation as a tool in this effort.

Nonetheless, much has changed since the 1960s. In reading *Brutal Need*, one is struck by how differently poverty lawyers today perceive their role. Davis depicts an era in which poverty lawyers possessed the energy and optimism that accompanies a new enterprise. Because the idea of using legal representation as a means of fighting poverty was new, the debates about strategy were unconstrained by preexisting routines. In addition, these debates were passionate because the participants believed that the potential for fundamental social change existed. At a time when welfare recipients were staging so many acts of social protest that the New York City Welfare Department had to establish a "war room" (p. 53), a focus on recipient organizing held out the promise of mobilizing hundreds of thousands of welfare recipients. Correspondingly, the groundbreaking decisions of the Warren Court made it possible to think in terms of using litigation to achieve major breakthroughs.

Few contemporary poverty lawyers experienced these heady early days of the legal services program. Most have come of age in an era in which the possibilities for broad-based social change appear to be far more limited. As a result, most poverty lawyers are skeptical of the original core premise of the legal services program — that legal representation can play a major role in ending poverty in America. Although committed to using legal representation as a means of fighting poverty, most contemporary lawyers have much more sober assessments of its potential.

Furthermore, contemporary poverty lawyers work in a context of shrinking resources and contracting programs.⁸⁰ After twelve

in using the justice system to reform institutions and because law reform efforts by legal services attorneys are analogous to services provided by private counsel).

Although the idea that lawyers should work to alleviate poverty is no longer seriously debated by poverty lawyers, challenges periodically arise from other quarters. See Marshall Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282 (1982). The most recent challenge was the Gramm Amendment, which would have prohibited programs that receive funds from the Legal Services Corporation from using those funds to "file or maintain in any Federal or State court any action that would have the effect of nullifying any provision of Federal or State law which seeks to reform welfare." 140 CONG. REC. S9402 (daily ed. July 21, 1994). The Senate only narrowly defeated this legislation with a 56-44 vote. *Id.* at S9439. The vote on the Gramm Amendment is a sharp reminder of the fact that federal funding for legal services cannot be taken for granted. This issue is certain to resurface in the 104th Congress. See William Mellor, *Want Welfare Reform? First Fight Legal Services Corporation*, WALL ST. J., Feb. 1, 1995, at A13.

80. See LUBAN, *supra* note 47, at 241-42. Luban reports that by 1983 the number of poverty law offices funded by the Legal Services Corporation had dropped by 25% and that programs had abandoned whole areas of practice in which they previously had engaged. *Id.*; see also Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More*

years of executive branch hostility to federal funding for legal services, the resources that legal services programs can bring to bear on problems have shrunk, and the resources available for law reform work have been hit particularly hard. Shortages of funds have forced programs to choose between closing small neighborhood offices or laying off staff⁸¹ — a dilemma never envisioned by the proponents of decentralized neighborhood offices in the 1960s.⁸² The results of the 1994 mid-term election assure that legal services programs will once again be fighting to survive. Indeed, depending on the outcome of this struggle, the practices discussed in this section may soon no longer be 'contemporary.'

Recent efforts at law reform reflect the more limited goals of poverty lawyers. Legal services lawyers no longer spend time planning long-term strategies for ending poverty. Instead, their strategies typically focus on improving particular government agencies or programs in significant, but limited, ways. Often strategies are solely defensive — designed to stop cutbacks in social welfare programs.⁸³ In the 1960s, the lawyers described in *Brutal Need* would

than *Charity?*, 96 W. VA. L. REV. 367, 371 nn.14 & 15 (1993-94) (describing cuts in funding for the Legal Services Corporation). These problems have continued. The current budget of the Legal Services Corporation would have to be more than doubled in order to attain the same ratio of one lawyer for every 10,000 poor people that existed in 1981. William J. Dean, *The Legal Services Corp.*, N.Y.L.J., Sept. 2, 1994, at 3.

Allen Redlich has questioned the proposition that legal services programs are in dire financial straits. See Allen Redlich, *A New Legal Services Agenda*, 57 ALB. L. REV. 169, 176-79 (1993). He points out that the statistics commonly offered to show the severity of funding cuts all use 1981 as a reference point, which was the highwater mark of legal services funding. *Id.* Although there is some validity to this point, it overlooks the fact that funding trends create a dynamic of their own. Thus, even if absolute levels of funding were lower in the 1970s than they are today, the programs operated in a context of continuous growth. In contrast, today they operate in the context of decline and retrenchment, making it difficult for attorneys to think in terms of expansion and new projects. Simply put, the same amount of money may seem like a large sum or a small one, depending on one's starting point. Finally, a true comparison of funding levels would have to adjust for inflation and take into account the increase in the number of poor people who form the client base for legal services programs.

81. Personal communication with Catherine Carr, Supervising Attorney, Community Legal Services (CLS), Philadelphia, Pennsylvania. The attorney staff of CLS is slightly over half the size today that it was fifteen years ago. Neighborhood offices have been closed in order to avoid even greater reductions.

Some programs have managed to replace dwindling federal aid with grants from state or local governments. Such grant programs are usually dedicated to funding representation for specific purposes. See Michael B. Glomb & Jane Hardin, *Alternative Funding Mechanisms for Legal Services Providers*, 25 CLEARINGHOUSE REV. 484 (1991). Reliance on such programs raises the danger that state and local government will be able to exert a significant influence on the activities of legal services programs, thereby compromising the ability of such programs to challenge actions by these levels of government.

82. See Daniel H. Lowenstein & Michael J. Waggoner, Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967).

83. The Center for Social Welfare Policy and Law has tracked over fifty cases filed by legal services programs challenging cutbacks in public assistance programs that have been active during a recent three-year period. See CENTER FOR SOCIAL WELFARE POLICY & LAW, WELFARE CUTBACK LITIGATION 1991-1994 (July 1994).

probably have dismissed these efforts as band-aid work on a large scale because such efforts seek to make being poor less harsh but do not seek to end poverty.⁸⁴

Litigation still figures prominently as a tool of law reform work.⁸⁵ Law reform litigation today, however, frequently bears only outward similarities to Sparer's test-case strategy. Although contemporary law reform litigation may have goals apart from the particular relief sought, such as building public awareness of a problem, putting pressure on government officials to change policies, or even supporting sympathetic government officials who are constrained by other elements within the government,⁸⁶ poverty lawyers rarely bring cases for the purpose of urging the courts to adopt principles that will be of use in the future.

The reasons for this shift are obvious — the federal courts have become inhospitable to claims of poor people. Poverty litigators in federal court are confronted with a battery of jurisdictional and other technical defenses,⁸⁷ the judiciary's deference to administrative agencies,⁸⁸ and a judiciary appointed by Republican presidents committed to making sure that the judicial activism of the 1960s does not recur.⁸⁹ Although poverty lawyers have been urged to refocus their efforts on state courts,⁹⁰ state courts have traditionally been reluctant to issue decisions or order relief that has the poten-

84. As early as 1970 Sparer complained about poverty lawyers who function as "technical aide[s] who smooth[] the functioning of an inadequate system and thereby help[] perpetuate it." Sparer, *supra* note 8, at 84.

85. Although there can be no doubt that litigation continues to play a major role in poverty lawyers' strategies, it is difficult to generalize about how much poverty lawyers rely on litigation to the exclusion of other advocacy methods. *See infra* note 131. In my own experience, poverty lawyers frequently engaged in informal lobbying and negotiation with government officials. Poverty lawyers also worked in coalitions with other advocacy organizations and attempted to use the media to educate the public. Sometimes lawyers used class action litigation as the sole means to address a problem, and sometimes they used such lawsuits as the focal point for a broader effort.

86. *Cf.* HANDLER, *supra* note 59, at 209-22 (discussing common indirect purposes of law reform litigation); SUZANNE GLUCK MEZEY, *NO LONGER DISABLED* 147-48 (1988) (discussing the role of litigation as a catalyst for other actors in the political process); White, *To Learn and Teach*, *supra* note 4, at 699, 758-60.

87. *See, e.g.,* Suter v. Artist M., 503 U.S. 347 (1992); Grant v. Shalala, 989 F.2d 1332 (3d Cir. 1993); Stowell v. Ives, 976 F.2d 65 (1st Cir. 1992).

88. *See* Chevron U.S.A. Inc. v. Natural Resources Def. Council Inc., 467 U.S. 837 (1984).

89. *See* Robert D. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 301 (1993). By 1993, 70% of active federal district court judges were appointed by Presidents Reagan and Bush. Patricia M. Wald, *Ten Admonitions for Legal Services Advocates Contemplating Federal Litigation*, 27 CLEARINGHOUSE REV. 11, 16-17 (May 1993). Although this percentage has obviously declined, any shift in the outlook of the federal judiciary will be gradual. *See* Stephan Labaton, *President's Judicial Appointments: Diverse, but Well in the Mainstream*, N.Y. TIMES, Oct. 17, 1994, at A15.

90. Adam Cohen, *Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter*, 38 EMORY L.J. 615 (1989); Sard, *supra* note 8, at 381-82, 388.

tial to cause confrontation with the other branches of government.⁹¹ Although poverty lawyers have had some recent successes at the state level,⁹² state courts appear as attractive forums only by comparison with their federal counterparts.

As a result of this judicial climate, when poverty lawyers bring litigation, they often structure their cases differently from the way Sparer and his colleagues did. The poverty lawyers of the 1960s hoped for victories predicated on broad legal grounds so as to establish helpful precedent. Judge Patricia Wald has written that as poverty lawyers in the late 1960s and early 1970s, she and her colleagues "felt confident . . . raising constitutional issues freely — almost profligately . . ." ⁹³ Moreover, they wanted their cases to go to the Court, both because they viewed the Court as a more receptive forum than many lower courts and because they sought to establish nationally binding precedent.⁹⁴

In contrast, poverty lawyers today are most successful when they shape their cases to avoid creating broad precedents that would make many lower court judges uncomfortable and would increase the likelihood of Supreme Court review.⁹⁵ Because the lower federal courts have been more receptive to claims by poor people than the Supreme Court in recent years,⁹⁶ the most secure victories are those predicated on narrow grounds that are unlikely to result in Supreme Court review. Decisions based on factual find-

91. Cf. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127-28 (1977) (arguing that state judges are more susceptible to majoritarian political pressures than federal judges).

92. See, e.g., *Abbott ex rel. Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *Jiggetts v. Grinker*, 553 N.E.2d 570 (N.Y. 1990); *McCain v. Koch*, 511 N.E.2d 62 (N.Y. 1987). But see *Mitchell v. Steffen*, 504 N.W.2d 198 (Minn. 1993), cert denied, 114 S. Ct. 902 (1994); *Savage v. Aronson*, 571 A.2d 696 (Conn. 1990); *Bullock v. Whiteman*, 865 P.2d 197 (Kan. 1993); *Hope v. Perales*, 634 N.E.2d 183 (N.Y. 1994).

93. Wald, *supra* note 89, at 12.

94. See, e.g., pp. 100-01.

95. Gary Blasi has described how a hostile judicial climate led poverty lawyers in Los Angeles to avoid an ambitious broad-based challenge to the administration of the county's general assistance program. See Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, 16 N.Y.U. REV. L. & SOC. CHANGE 591 (1987-88). Instead, the attorneys opted for a series of six narrower lawsuits. *Id.* at 596 & n.33.

96. For the past fifteen years, Supreme Court decisions on public benefits issues have mostly taken the form of reversals of lower court decisions in favor of poor people. See, e.g., *Sullivan v. Stroop*, 496 U.S. 478 (1990) (reversing a Fourth Circuit decision striking down a restrictive AFDC rule); *Sullivan v. Everhart*, 494 U.S. 83 (1990) (reversing a Tenth Circuit decision striking down a restrictive rule in the Supplemental Security Income program); *Lyng v. International Union, UAW*, 485 U.S. 360 (1988) (reversing a lower court decision invalidating a restriction on food stamp eligibility); *Bowen v. Gilliard*, 483 U.S. 587 (1987) (reversing a district court decision striking down a restrictive AFDC statute); *Bowen v. Yuckert*, 482 U.S. 137 (1987) (reversing a decision of the Ninth Circuit striking down a restrictive rule in the administration of disability benefit programs); *Lukhard v. Reed*, 481 U.S. 368 (1987) (reversing a Fourth Circuit decision invalidating a restrictive AFDC rule).

ings are the most secure from appellate review.⁹⁷ Thus, poverty lawyers today are most likely to prevail when they bring cases that are designed to pose narrow legal or factual questions and that consequently will be of limited use as precedent in the future.

Many poverty lawyers have a greater realization than their predecessors of the limitations of litigation that results in a broad declaration of rights.⁹⁸ Although litigation over formal administrative rules and standards can be productive, such lawsuits do little to address the ingrained institutional problems in many social welfare agencies. Social welfare agencies frequently engage in tactics of "bureaucratic disentanglement" that deny recipients benefits due to them under the formal eligibility criteria.⁹⁹ This problem has grown more acute as twenty years of lawsuits have educated administrators of social welfare agencies and made them more sophisticated defendants. Regulations and policy statements only infrequently state propositions that are baldly illegal. Instead, policy statements are often couched in qualified or ambiguous terms that protect them from facial challenge but that nonetheless convey unlawful policies to agency personnel familiar with deciphering the intended meanings.¹⁰⁰

Litigation that focuses on the actual practices of social welfare agencies, as opposed to their professed policies, may not run afoul of the judiciary's reluctance to recognize new entitlements, but it contains its own difficulties. Legal challengers must present proof of systematic practices in order to rebut the inevitable defense that a few mistakes do not justify broad relief.¹⁰¹ Litigation of such fact-

97. See FED. R. CIV. P. 52 (making factual findings reviewable on clearly erroneous standard).

98. These limitations have become apparent in other contexts as well. See HANDLER, *supra* note 59; ROSENBERG, *supra* note 16; Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

99. See Michael Lipsky, *Bureaucratic Disentanglement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984); see also PIVEN & CLOWARD, *supra* note 76, at 374-78 (describing the administrative strategy of making the application process more difficult as a means of cutting public assistance rolls in a way that would survive court challenges); Anna Lou Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Programs*, 17 N.Y.U. REV. L. & SOC. CHANGE 231 (1989-90) (describing how thousands of public assistance cases in New York City are closed for administrative reasons unrelated to the recipients' actual eligibility); Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 524-33 (1987-88) (describing tactics of bureaucratic disentanglement employed by the County of Los Angeles in the administration of its general assistance program).

100. See *Hyatt v. Sullivan*, 899 F.2d 329, 234 (4th Cir. 1990); *Dixon v. Sullivan*, 792 F. Supp. 942 (S.D.N.Y. 1992) *affd sub nom.*, *Dixon v. Shalala*, 1995 WL 231487, at *1 (2d Cir. Apr. 19, 1995).

101. See *In re Sullivan*, 904 F.2d 826, 850-51 (3d Cir. 1990); *Hyatt* 899 F.2d at 335; *Floyd v. Bowen*, 833 F.2d 529, 532 (5th Cir. 1987); *Morel v. Giuliani*, No. 94 Civ. 4415, 1995 WL 5902, *10-12 (S.D.N.Y. Jan. 4, 1995); *Brown v. Giuliani*, 158 F.R.D. 251 (E.D.N.Y. 1994); *McQueen v. Grinker*, 551 N.Y.S.2d 493 (App. Div. 1990).

intensive issues requires extensive discovery and may also require expert witnesses and statistical studies. Few poverty law offices can afford to litigate these kinds of cases or are equipped to process large volumes of documents and depositions.¹⁰² Additionally, remedies in such cases are frequently complex, and courts may recoil from the degree of entanglement that they entail.¹⁰³ When such remedies are ordered, they are difficult to monitor and require an ongoing commitment of resources.¹⁰⁴

Despite a hostile judiciary, shrinking budgets, and more difficult legal claims, poverty lawyers have managed to eke out a surprising number of successes over the past fifteen years. Although a full discussion would not be appropriate here, the efforts of poverty lawyers to combat the Reagan administration's constriction of the disability benefit programs of the Social Security Act provide a good example of successful law reform strategies in the modern area.

During the early 1980s, the administration announced its intention to shrink the disability rolls by tightening eligibility standards for new applicants and by reviewing the cases of benefit recipients under these stricter standards.¹⁰⁵ The effort was undertaken through both the promulgation of restrictive rules¹⁰⁶ and techniques of bureaucratic disentanglement in which the rules actually applied by the Social Security Administration were stricter than the publicly stated standards.¹⁰⁷ As a result of these efforts, the allowance rates for initial claims dropped from forty-six percent in 1977 to a low of twenty-nine percent in 1982.¹⁰⁸ In addition, approximately 500,000 benefit recipients were purged from the rolls on the ground that they were no longer disabled.¹⁰⁹

Poverty lawyers responded to these developments with a barrage of class action lawsuits. In general, lawyers crafted these law-

102. Cf. HANDLER, *supra* note 59, at 31. Legal services programs have been slow to adapt to the institutional demands of such cases. For example, few legal services offices have paraprofessionals who perform litigation support functions.

103. *Id.* at 24; Wald, *supra* note 89, at 13.

104. HANDLER, *supra* note 59, at 24; *see, e.g., McCain v. Dinkins*, 639 N.E.2d 1132 (N.Y. 1994).

105. *See* MEZEY, *supra* note 86, at 59-65, 72-73, 86-87.

106. *See, e.g., Heckler v. Campbell*, 461 U.S. 458 (1983) (upholding regulations requiring disability adjudicators to adhere to fixed criteria in making vocational assessments).

107. Suzanne Mezey has attributed the decline in disability awards in this period principally to a "harsher adjudicative climate" rather than to new regulations. MEZEY, *supra* note 86, at 72-73.

108. HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS 64 (tbl. 9) (Comm. Print 1993) [hereinafter COMMITTEE ON WAYS AND MEANS, THE GREEN BOOK].

109. Robert Pear, *Reagan Reported to Stop Cuts in Disability*, N.Y. TIMES, Mar. 24, 1984, at A1.

suits narrowly to focus on specific administrative policies or practices.¹¹⁰ Few, if any, of these cases individually held out the potential for fundamental change. For example, the administration could easily respond to a successful lawsuit focused on one aspect of the disability determination process by tightening standards at another point. The sheer number of lawsuits, however, and the wide variety of issues that they addressed created an atmosphere in which the Social Security Administration was under siege.¹¹¹ Gradually, the agency lost its ability to control the flow of events, and allowance rates drifted upward.¹¹² The lawsuits also served as a catalyst for congressional action. They led Congress to pass the Disability Benefits Reform Act of 1984,¹¹³ which put an end to a number of the Administration's harshest policies.

Although there are still many problems with the administration of the disability programs, the Reagan administration's assault on the programs must, in large measure, be counted a failure.¹¹⁴ The litigation over the disability programs shows that strategic litigation can still be a productive strategy, but that to be successful, poverty lawyers cannot ordinarily rely on a single class action lawsuit to establish broad principles that bring about sweeping change.

B. *Is Poverty Law in Crisis?*

As noted above,¹¹⁵ a number of legal scholars have taken a different view of poverty lawyers' track record. For these scholars, the legacy of the test-case model has principally been negative — an overemphasis on lawyer-dominated litigation at the expense of mobilizing poor communities. These scholars see not only a crisis of

110. MEZEY, *supra* note 86, at 19.

111. Although litigation formed the centerpiece of advocacy efforts on this issue, it was by no means the only activity undertaken by poverty lawyers. Lawyers lobbied Congress, engaged in public relations efforts, and worked with other advocacy groups. *See id.* at 154-57.

112. COMMITTEE ON WAYS AND MEANS, *THE GREEN BOOK*, *supra* note 108, at 64 (tbl. 9).

113. Pub. L. No. 98-460, 98 Stat. 1794 (codified as amended in scattered sections of 42 U.S.C.); *see also* MEZEY, *supra* note 86, at 3, 176-77.

114. Two unique factors contributed to the success of litigation in this area. First, because federal judges review individual denials of disability benefits, they are familiar with disability benefit cases, and the cutbacks had an immediate impact on judicial dockets. *See* Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 817, n.64 (1990). Second, because social security disability insurance benefits are funded by payroll taxes and are only available to individuals with a recent work history, claimants appear more sympathetic to federal judges than other groups of applicants for or recipients of public benefits. *Cf.* Jacobus tenBroek & Richard B. Wilson, *Public Assistance and Social Insurance — A Normative Evaluation*, 1 UCLA L. REV. 237, 239-51 (1954) (discussing differences in attitudes toward social insurance programs and means-tested benefit programs).

115. *See supra* notes 38-48 and accompanying text.

poverty but a crisis of poverty law. Edgar Cahn, for example, has recently written:

There is a fundamental need to "reinvent poverty law." If we are to be candid, our mission, whether equal justice or empowerment, cannot be achieved through linear expansion in the ranks of lawyers serving the poor. Without a more fundamental change, legal services for the poor will remain mired, fighting valiantly, winning more than losing — but unable to make major inroads on poverty and disenfranchisement.¹¹⁶

Anthony Alfieri has also voiced this view. He has written that "[p]overty law is a field in crisis, its practice failing to alleviate either economic impoverishment or sociolegal powerlessness."¹¹⁷ Paul Tremblay has observed that these recent alarms are but the latest salvo in a long history of criticism of poverty lawyers by progressive academics. As Tremblay notes, "Poverty lawyers have been described as oppressors, as domineering, as unreflective, as poor lawyers, or as unfeeling bureaucrats."¹¹⁸

These pronouncements of a crisis flow from the premise that because poverty has expanded and intensified over the past twenty years,¹¹⁹ poverty lawyers must be doing something terribly wrong. These claims are based on a continued faith that poverty lawyers can have a major impact on reducing or ending poverty in America.¹²⁰ According to these critics, the accomplishments of poverty lawyers in expanding access to public benefits or staving off potentially devastating cutbacks in public benefits are of little consequence because they do not have the potential to bring about an end to poverty.

I will address two of the most recurrent criticisms made by these theorists. First, they argue that poverty lawyers should dramatically refocus their efforts on building and nurturing grass-roots social protest movements.¹²¹ Second, they argue that the traditional relationships between poverty lawyers and their clients contribute to the disempowerment of poor clients and thereby bolster the status quo.¹²²

116. Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, 2134 (1994).

117. Alfieri, *Disabled Clients*, *supra* note 4, at 775.

118. Tremblay, *Rebellious Lawyering*, *supra* note 4, at 949; see Redlich, *supra* note 80, at 170-72; Ronald Silverman, *Conceiving a Lawyer's Duty to the Poor*, 19 HOFSTRA L. REV. 885, 1031-40 (1991).

119. Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1316-19 (1993).

120. See, e.g., Alfieri, *Antinomies*, *supra* note 4, at 711 ("The goal of poverty law should, indeed, *must* be the abolition of poverty.").

121. See LÓPEZ, *supra* note 4, at 335-36; Alfieri, *Antinomies*, *supra* note 4, at 664, 704-11.

122. LÓPEZ, *supra* note 4, at 44-56; Alfieri, *Antinomies*, *supra* note 4, at 683-87; Alfieri, *Reconstructive Poverty Law*, *supra* note 4, at 2118-23.

Turning first to the issue of grass-roots organizing, I agree with the critics that the attainment of political strength provides the best, and perhaps the only, prospect for the lasting and fundamental transformation of poor communities.¹²³ The crisis theorists, however, overstate the potential impact of lawyers to promote such change through a renewed emphasis on grass-roots organizing. Just as the events of the 1960s demonstrated that lawyers could not defeat poverty in the courtroom, they also demonstrated that the long-term attainment of power through grass-roots protest by poor communities is far easier to describe than to accomplish.

The potential for poverty lawyers serving as advisors to a social protest movement has dimmed since the 1960s. The NWRO disintegrated in the mid-1970s, and no comparable group has taken its place.¹²⁴ As noted above, even the welfare rights movement of the 1960s — the pinnacle of social protest by welfare recipients — was fragile and fleeting. Organizing welfare recipients has become only more difficult since then. The decline of public assistance benefit levels¹²⁵ and the multiplication of bureaucratic requirements to maintain eligibility¹²⁶ have increased the degree to which public assistance recipients must engage in a daily struggle for survival. Moreover, it is difficult for public assistance recipients to rally behind a set of demands and to forge alliances at a time when they are demonized in mainstream political debate.¹²⁷ Although group action by welfare recipients has not completely disappeared, it has become the exception rather than the norm.¹²⁸

Poverty lawyers can and should be supportive of poor people's organizations when they exist. Perhaps they have not been sup-

Although these are two of the most prominent themes in recent literature, they are not the only critiques of poverty law practice. For example, a number of scholars have argued that law reform efforts of poverty lawyers have made public benefit programs more legalistic and bureaucratic without improving them. See, e.g., KATZ, *supra* note 47, at 179-96; William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 35-36 (1985); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983). There have been a number of responses to this line of criticism. See, e.g., Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position of the Rule of Law*, 92 YALE L.J. 1270 (1983); Sparer, *supra* note 34, at 560-67.

Moreover, although I have attempted to distill a number of recurrent themes, recent critics of poverty law practice do not agree on all points, and there are significant differences in the focus and emphasis of their work.

123. See Loffredo, *supra* note 119, at 1323-28.

124. HANDLER, *supra* note 59, at 161; KATZ, *supra* note 47, at 103.

125. Since 1970 benefit levels have declined by an average of 45%. See COMMITTEE ON WAYS AND MEANS, *THE GREEN BOOK*, *supra* note 108, at 666-67 (tbl. 14).

126. See Dehavenon, *supra* note 99, at 235-50.

127. See Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961, 1961-66 (1993); Lucy A. Williams, *supra* note 75 at 34-35 (1994).

128. A number of recipient organizations do exist. For example, the National Welfare Rights Union was formed in 1987. See Marian Kramer, *Remarks on the National Welfare Rights Union*, 21 SOC. JUST. 9 (1994); see also Davis, *supra* note 77.

portive enough. But the forces that enable social movements to form and gain power are driven by trends that poverty lawyers cannot shape. Lawyers cannot create organizations out of whole cloth, and they cannot create a powerful social protest movement where none exists.¹²⁹ It may be that a time will come when poor communities mobilize to force a redistribution of social resources. Perhaps, the ferocity of recent attacks on welfare recipients will lead in time to a new era of activism. I suspect, however, that such activism would take different forms and would focus on different issues than the NWRO of the 1960s. If there is a new era of activism, poverty lawyers will most likely play a valuable, but decidedly auxiliary, role in the effort.¹³⁰

Contemporary methods of poverty law reform must be understood within this social and political context. They offer techniques and expertise in extracting resources from society in order to benefit poor individuals and communities. Without any ability to pose a credible political threat, poverty lawyers have become adept at squeezing resources out of hostile agencies and legislative bodies at all levels of government. If poverty lawyers abandoned their work at the state and national levels to pursue purely local grass-roots strategies, a void would result. Many more illegal policies and prac-

129. Apart from all other problems, Congress has drastically undercut the ability of legal services programs to play such a role. When Congress created the Legal Services Corporation in 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996 et seq. (1988 & Supp. V 1993)), it imposed a battery of restrictions aimed at keeping legal services programs out of any activities that could be construed as political. Thus, legal services programs cannot use their federal funds to "support or conduct training programs for the purpose of advocating particular public policies or encouraging political activities," 42 U.S.C. § 2996f(b)(6) (1988 & Supp. V 1993), or to "initiate the formation, or act as an organizer, of any association, federation or similar entity," 42 U.S.C. § 2996f(b)(7) (1988 & Supp. V 1993).

Although these restrictions are subject to qualifications and programs can engage in such activities with funds obtained from other sources, they provide a strong disincentive to focusing on grass-roots organizing as anything more than an adjunct to other work.

130. Moreover, it is easy to romanticize the image of the lawyer as servant of the social movement. In reality, legal representation of grass-roots organizations poses its own difficult questions about the role of the lawyer. For example, grass-roots organizations tend to have weak decisionmaking structures. This weakness frequently leads to internecine conflict. See KATZ, *supra* note 47, at 97-102; PIVEN & CLOWARD, *supra* note 6, at 349-53. Additionally, grass-roots organizations working on the same issues often disagree about strategies and goals. How is the lawyer to know which organization is more representative of the larger community? Lastly, grass-roots organizations may be dominated by subgroups with interests that do not coincide with other constituencies of the group. For example, some have claimed that the NWRO focused on protecting the interests of public assistance recipients in large urbanized states to the detriment of those in rural communities. See, e.g., DANIEL P. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME* 334 (1973).

In sum, my point is not that lawyers should avoid grass-roots organizations but only that such work also places lawyers in situations where any action they take could be viewed as an exercise of power. The underlying issue is who is the client. Is the client the leadership of the group, each of the individual members, or the larger community whose interest the group seeks to promote? For a fuller discussion of the issues raised by group representation, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992).

tices would go unchallenged. Social services agencies would become even harsher and more punitive as the deterrent effect of poverty lawyers' work eroded.

Similarly, the much-criticized reliance of poverty lawyers on litigation stems not from a lack of imagination but from the fact that litigation, limited as it is, is one of the few vehicles for change in American society that can be used without a political power base.¹³¹ It provides a means of presenting claims as legal entitlements, rather than as toothless political aspirations.¹³² Moreover, it can act as a catalyst to prod other actors in the political process.¹³³ In an era when the administrative state is buffeted by countless competing demands, litigation can play a critical role in focusing the attention of officials and of the public on an issue.¹³⁴

A second objection posed by academic critics is that the techniques developed by poverty lawyers disempower poor clients be-

131. The extent to which poverty lawyers rely on litigation should not be overstated. As Ann Southworth has recently pointed out, the claims of recent critics that poverty lawyers have adopted a narrow litigation-oriented approach to issues appear to be exaggerated. Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 STAN. L. REV. 213, 230 (1994).

Allen Redlich, on the other hand, criticizes legal services programs as "in a sorry state" because they are *under* litigious. Allen Redlich, *Who Will Litigate Constitutional Issues for the Poor?*, 19 HASTINGS CONST. L.Q. 745, 749 (1992). Redlich's conclusion is based on Westlaw and LEXIS data concerning legal services involvement in federal and state appellate litigation that results in judicial decisions included in these data bases. These data show a significant drop in the total level of such involvement and a wide variation among programs. *Id.* at 765-74. Redlich does not focus on law reform litigation *per se*. *Id.* at 760-61, n.115. But, if accurate, his conclusions about the quality of legal services lawyering cannot be viewed as restricted to the area of direct service work.

It is difficult to evaluate the reasons for this decline. Several explanations other than a decline in the quality of legal services lawyering may account for it. First, many types of litigation do not routinely result in reported judicial decisions though other types of litigation yield such decisions frequently. A program that focuses on landlord-tenant work will appear less litigious than a program that concentrates on representation of clients seeking federal disability benefits. Second, the lack of receptivity of the federal courts to lawsuits brought by legal services programs may lead programs to decrease their reliance on federal litigation. The corpus of adverse precedent that has developed over the past fifteen years also makes it difficult to simply shift lawsuits to the state courts. See *supra* note 96. The decline in litigation may be due to a realistic appraisal of the decreasing prospects for success, without indicating that legal services programs have lost either their litigation skills or their zeal. As Southworth suggests, programs may have turned to other approaches. Lastly, the trend could reflect the sorry state of funding for legal services, without indicating the decline in competence that Redlich suggests.

132. See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, 159-65 (1991); Sparer, *supra* note 34, at 516-52. For a critique of rights discourse, see Mark Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984).

133. See MEZEY, *supra* note 86, at 147-48, 160-62, 176-77.

134. At this point, there is a substantial literature refuting the notion that litigation can bring about fundamental social change and criticizing its use as a tool for that purpose. Gerald Rosenberg, for example, likens litigation to a flypaper that attracts and traps social reformers. See ROSENBERG, *supra* note 16, at 341; see also Abel, *supra* note 4, at 593-606 (discussing the limitations of the legal system as a vehicle for social change). The point that litigation cannot transform society, however, should not blind us to its value in achieving more limited goals.

cause they rely upon strategies that substitute lawyers' versions of events for those of clients.¹³⁵ According to this argument, poverty lawyers' accounts frequently stress the weakness and victimization of clients, thereby perpetuating stereotypes of poor people as helpless and dependent.¹³⁶ As Alfieri has put it, the poverty lawyer "takes" the client's dignity.¹³⁷

Scholarly literature that assists and encourages poverty lawyers — and other lawyers — to listen with more care to their clients and to explain their analysis and advice more fully is extremely valuable. But I am not persuaded that the basic methodology of poverty lawyers is flawed. The criticism assumes that clients view legal representation more as a vehicle for self-expression than as a means of obtaining stated material outcomes.¹³⁸ Most clients represented by legal services programs, however, have a material objective of unusual importance, such as avoiding eviction or obtaining critically needed subsistence benefits. Because this objective can only be obtained by persuading some kind of decisionmaker, such as a judge or administrator, its attainment depends on casting the claim in a form that will be comprehensible and compelling to this third person, both in terms of equities and the legal framework that the decisionmaker will employ. Poverty lawyers are uniquely skilled in translating¹³⁹ the accounts of poor clients into claims that can persuade decisionmakers who are separated from such clients by vast cultural, economic, and racial barriers.¹⁴⁰ Although the ultimate

135. See Alfieri, *Disabled Clients*, *supra* note 4, at 811-12; see also Gilkerson, *supra* note 4, at 944-45; White, *Subordination*, *supra* note 4, at 46.

136. Gilkerson, *supra* note 4, at 944-45; White, *Subordination*, *supra* note 4, at 46.

137. Alfieri, *supra* note 48, at 1751.

138. See Alfieri, *Reconstructive Poverty Law*, *supra* note 4, at 2146 ("Winning the case . . . may extend beyond material benefits and compensation to encompass . . . affirmation of individual or group identity and dignity."); Gilkerson, *supra* note 4, at 916 ("The client's narrative goal, expressed in the telling of her story, may not always be attained through traditional measures of success."). Litigation does have expressive and symbolic aspects that may be important even apart from the material outcome of the case. Cf. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7, at 666 (2d ed. 1988) (arguing that hearings required by due process provide a "valued human interaction" that acknowledges the dignity of those affected); Frank Michelman, *Formal and Associational Aims in Procedural Due Process*, in XVIII NOMOS 126, 127-28 (J. Roland Pennock & John W. Chapman eds., 1977) (due process procedures "may . . . be psychologically important to the individual: to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential").

139. See Clark Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

140. Recent scholarship has focused on the gaps between lawyers and poor clients but has ignored the gap between decisionmakers and poor clients. Ninety percent of the appointees of Presidents Reagan and Bush to the federal district courts and courts of appeals were white. Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 287, 293 (1993). Eighty percent were white males. *Id.* A third of President Bush's appointees to the district courts were millionaires. *Id.*

choice of strategy must remain in clients' hands, if lawyers ceased to translate their clients' narratives in this way, rather than coming away from the experience "empowered," many clients would come away empty-handed.¹⁴¹

Many poor clients understand the importance of strategy in legal advocacy and are readily familiar with the concept of presenting facts in a manner that is likely to persuade. Thus, rather than experiencing representation as an event in which, as Alfieri puts it, they are "silenced"¹⁴² and their experiences "falsified,"¹⁴³ clients may be receiving the services they sought.¹⁴⁴

Although it is possible that translating the client's claim in this fashion reinforces the status quo in some sense, such an effect would be marginal compared with the other much more powerful forces that work to maintain it. For example, Alfieri criticizes poverty lawyers for depicting claimants for disability benefits as incapacitated.¹⁴⁵ Any effect of such advocacy in reinforcing images of poor people as helpless is dwarfed by the impact of a statutory scheme that requires poor persons to show incapacity in order to qualify for subsistence benefits.¹⁴⁶

Thirty years of experience demonstrates that poverty lawyers should approach their work with a degree of realism and humility about what they can accomplish. Lawyers must think in terms of chipping away at poverty bit by bit, rather than sweeping it away in

141. Paul Tremblay has observed that critics who argue that poverty lawyers should focus on giving voice to their clients are favoring the long-term goal of empowerment over the short-term goal of obtaining a material end. See Tremblay, *A Tragic View of Poverty Law Practice*, *supra* note 4, at 134-37. He questions whether many clients would make this choice. See Dinerstein, *supra* note 4, at 987-88.

142. Alfieri, *Disabled Clients*, *supra* note 4, at 823-32.

143. Alfieri, *Reconstructive Poverty Law*, *supra* note 4, at 2135.

144. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994). Professor Miller notes, "A client might *choose* silence or a lawyer narrative over her own narrative to improve her chances of winning or to achieve some other goal." *Id.* at 525.

145. See Alfieri, *Disabled Clients*, *supra* note 4, at 811-28.

146. See 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1988). Even on its own terms, the issue of stigma is complex. In my experience as a disability lawyer, one reason clients seek disability benefits is that they view the classification of "disabled" as less stigmatizing than the alternative of being labeled a shirker — an individual who has the capacity to work but chooses not to do so. Although one can readily take issue with the fairness or accuracy of labeling all individuals who are not working as indolent, society imposes this label in many ways, such as the exclusion of such individuals from federal cash benefit programs. An award of disability benefits thus not only provides income that is often desperately needed but also removes the stigma that accompanies the denial of a claim by the government.

Although advocacy for such benefits could be seen as "buying into" these classifications, poor clients must live with these categories and sometimes internalize them. Moreover, many clients gain a sense of empowerment and vindication through the realization of their material objective that transcends the issue of whether the lawyer or the client crafted the winning strategy.

a tide of reform.¹⁴⁷ They are engaged in a long-term fight, rather than a glorious struggle, as Sparer and his colleagues envisioned. This realization calls for strategies that have the potential to achieve limited successes, rather than the constant pursuit of impossible goals. Moreover, strategies aimed at forestalling cutbacks may preserve past gains until the legal and political climate is more amenable to claims of poor people.

The realization that lawyers will not be able to put an end to poverty also calls for a recognition that there is no single correct way to practice poverty law. Recent scholarship has been most valuable when it has suggested new approaches to old problems, rather than in its critique of current methods of practice. I would encourage lawyers to read the work of recent scholars and to seek to implement the principles elucidated in the literature. I am not convinced, however, that all other modes of practice are either ineffectual, counterproductive, or illegitimate. Poverty lawyers should not casually abandon techniques they have refined over the years that can yield tangible successes. Instead, there is ample room for a diversity of approaches and methods, each of which has some benefits to offer.

CONCLUSION

In the Introduction to *Brutal Need*, Davis writes that the book is intended "to provide both inspiration and perspective" to the poverty lawyers seeking to build on the work of their predecessors of the 1960s (p. 3). *Brutal Need* is successful in both these respects. The passion, creativity, and energy of the book's protagonists present a challenge to today's poverty lawyers and to those in generations to come to stretch themselves to do more and to experiment with new approaches to long-standing problems. All such challenges to rethink accepted truths and norms are valuable, and there is much that could be improved in poverty law practice.

At the same time, much recent scholarly literature has been too judgmental of the work of contemporary poverty lawyers. The work of contemporary poverty lawyers is less flamboyant or dramatic than that of their predecessors. Detached from any grand theory of social change, the current work in this area may appear ad hoc and piecemeal. But any fair assessment must acknowledge that contemporary poverty lawyers work in a harsh and increasingly hostile climate. Poverty lawyers in the 1960s worked in the context of an active social movement and a rich progressive culture that generated ideas and support for their efforts. In contrast, contemporary poverty lawyers work in an era in which allies are few and

147. See HANDLER, *supra* note 59, at 233.

far between. Since the 1960s, the forces seeking social justice have fallen into a state of confusion and disarray, leaving poverty lawyers and their clients standing virtually alone.¹⁴⁸

It is no wonder that in this environment, the work of poverty lawyers appears to lack an overriding theory. Instead, it is rooted in the practical realities of the moment. It strives for attainment of what is possible. On these terms, it often succeeds. That is no small accomplishment.

148. As Michael Katz has written, progressive social thought has "failed to assemble a powerful and popular new defense of equality and social justice." MICHAEL KATZ, *THE UN-DESERVING POOR* 166-84 (1989).