"AND JUSTICE FOR ALL": LEGAL RIGHTS ACTIVITIES IN THE UNITED STATES

by

Roberta Kimmel

Prior to the War on Poverty, many problems of the poor were hidden or ignored. The benefits of most social programs, such as public assistance, were treated as privileges rather than rights. The last two decades, however, have seen a dramatic change in society's perception of the legal needs of the poor; many hitherto obscured problems were exposed and deemed amenable to correction via the legal system. New concepts of entitlements and of procedural due process in the areas of racial discrimination, welfare, housing, education, and employment, for example, emerged.

Lawyers and the Pursuit of Legal Rights, the fourth volume in the Poverty Institute's Poverty Policy Analysis Series, provides a stimulating view of the history and current scope of legal rights activities in the United States. Authors Joel Handler, Ellen Jane Hollingsworth, and Howard Erlanger[1] have based the monograph largely on extensive interviews conducted in 1973 and 1974 with lawyers in a wide variety of practice settings. One is left with little doubt as to the magnitude of the role played by aggressive legal rights organizations.

Early Legal Rights Activities

Until relatively recently there was very little organized legal rights activity for the poor. Reduced-fee or no-fee work (called *"pro bono"*) has traditionally depended on the generosity of individual lawyers in private practice acting in part out of charity and in part out of a desire to justify the public service image of their profession. Efforts in the latter part of the nineteenth century to assist the poor with legal problems produced the first legal aid organizations. A survey of legal aid needs and organizations in the United States, published in 1919, prompted the American Bar Association to establish a standing committee in an effort to strengthen legal aid.

Legal aid offices spread slowly throughout the first half of the twentieth century. They were not, however, meant to replace the *pro bono* activities of private lawyers. A 1947 survey identified only 70 legal aid facilities, and most of these were small in staff size and limited in available time. Although this number grew to 249 by 1963, funding—primarily from community funds—was slender ($4 million, or about $16,666 per program).

A look at the general character of these legal aid programs shows them to stand in marked contrast to the aggressive approach of many subsequent organizations. Legal aid emphasized service to individuals exclusively, assuming that legal problems of the poor lay not in the law itself but in obtaining access to the law. Law reform activities and class action litigation were virtually nonexistent. Constricted funding required strict client eligibility standards, and little or no money was available for community education and publicity.

For criminal cases the dominant form of representation traditionally has been the assigned counsel system whereby the judge assigns a practicing attorney to the case, usually without compensation. Alternatives to this system (i.e., defender programs with salaried lawyers) have been slow to emerge. This is due in part, the authors suggest, to our society's perception about the worthiness of representing the criminally accused as compared with the legal assistance client.

The early history of legal rights is summarized thus:

> Although there had developed a long tradition of charitable legal work for the poor, and although this tradition was supported by the elites of the profession, it remained in fact in the backwaters. . . . Legal aid offices and defender programs were for decades few in number, and even when they became more numerous, they were poorly financed; they were staffed either by lawyers looking for something else or by those seeking security from a competitive society. With few exceptions, young, activist, social-minded lawyers would not join legal aid or defender programs.

But we discover that the pre-1960s also saw a modest amount of aggressive legal work by a few organizations.

At the same time that traditional legal representation for the indigent was expanding, a major thrust toward social reform by means of litigation got underway. The NAACP was among the most influential early organizations to use this strategy. Its Legal Defense and Educational Fund, Inc. (established in 1939), a forceful proponent of class action litigation, has exerted tremendous influence on the subsequent development of legal rights activities—namely, the OEO Legal Services program, consumer and environmental law, and public interest law. Another important organization was the American Civil Liberties Union, which was

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Joel F. Handler, Ellen Jane Hollingsworth, and Howard S. Erlanger

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established in 1920. It has built up a steady tradition of appellate court law reform work.

In the 1960s, aggressive legal rights activities emerged as a major theme of social reform. The Kennedy Administration's New Frontier was founded on the belief that social justice could and should be achieved through changing the institutions of American society. The crucial force in achieving reform was government agencies, which in turn were to be activated by individual citizens working in reform-oriented organizations. A proliferation of aggressive independent organizations, such as those developed by Ralph Nader, arose. These groups, started essentially to work for the "little person," the consumer, the victim of giant public and private corporations, concentrate today mainly on the failings of federal regulatory agencies.

The use of law to improve the lot of the unrepresented reflects the changing ideology of that decade, the authors suggest: "During the 1960s, there was an initial period of optimism about change through law reform, then a period of radicalism and disillusionment, and finally, at the end of the decade, the acceptance of goals of middle-range change through incrementalism."

Handler et al. categorize current legal rights activities into four areas: (1) public interest law, (2) the private bar, (3) organizations of the private bar, and (4) the Legal Services program.

Charity-supported public interest law firms began to proliferate in the early 1970s, largely with support from the Ford Foundation. Some of them are formally affiliated with another organization (e.g., the Sierra Club), others are independent but typically have organizations as clients. Almost all are small and slimly financed, in comparison with the resources of their adversaries. Most prominently identified with environmental and consumer cases, these firms have been attacked for ignoring the interests of the poor and minorities. In fact, however, much public interest work lies in the areas of employment and voting discrimination, education, criminal justice, and health.

Pro bono activity of the private bar, according to the survey, is clearly traditional in nature. In most cases it consists of general legal advice given during regular practice hours to individuals; very seldom is litigation involved.

In the third category are more systematic attempts by private practitioners to organize *pro bono* work: public interest departments of large and elite private firms, public interest firms funded by bar groups, and law communes (radical versions of private, public interest firms whose primary aim is political activism). On the traditional end of this spectrum are local legal service clinics for the poor, lawyer councils, and clearinghouses.

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FORTHCOMING INSTITUTE BOOK

Fall 1978

Duane Leigh, **An Analysis of the Determinants of Occupational Upgrading**

In this monograph the author examines the occupational advancement of individual workers within the framework of the dual labor market and human capital theories. In doing so Leigh takes a critical look at black-white income differentials, estimating the effects on occupational mobility of length of education, vocational and on-the-job training, and interindustry mobility for male workers.

The results of this study show that education has an important effect on mobility of both blacks and whites, though the relationship is stronger for whites. But formal vocational training and firm-specific training show at least as strong an effect for blacks as whites. In addition, for both blacks and whites the effect of initial industry and geographic location seem relatively unimportant in occupational upgrading because of sufficient mobility between employers. The impact of interfirm and interindustry mobility seem as large for blacks as whites, controlling for personal endowments. Among those workers who remain in the same firm or industry, the evidence indicates that the hypothesis of a systematic racial differential in occupational upgrading within internal labor markets may be rejected.

Leigh argues that the dual labor market hypothesis does not adequately describe the labor market status of black men, and continued policy emphasis on improving initial education and training of black men is called for.

Initially prepared for the Manpower Administration of the Department of Labor, the volume is a further addition to growing Institute literature on dual labor market theories and occupational mobility.

This book will be available from the publisher, Academic Press, 111 Fifth Avenue, New York, New York 10003.

(continued from page 4)

The fourth category, the federally funded Legal Services program, has been the largest and most influential effort.

The Legal Services Program

Established by the Office of Economic Opportunity in 1965 as a component of the War on Poverty, the Legal Services program has grown to be the largest legal rights organization in the country. Funding increased from $27 million in fiscal 1966 to $71.5 million in fiscal 1972; 1976 saw the program reorganized at the national level and the budget increased further. At its peak, it has employed well over 2,000 lawyers. While OEO gradually weakened and died, the authors report that Legal Services generally has enjoyed good publicity, growth, and successful recruitment of young lawyers. But at the same time the program has been the target of considerable controversy, and has felt a variety of pressures at both national and local levels.

There was criticism on legal ethics issues (mostly involving solicitation of clients and violations of client eligibility guidelines) and objections were raised about the types of cases taken or the ways in which they were handled. Where programs had main and branch offices, friction was generated by lack of communication and by caseload distribution. Finally, external pressure to reduce the amount of class action and law reform work clashed with internal pressure to do more of it.

From the start, the most fevered debate centered on the degree to which the program's services would be traditional—that is, service-oriented in the legal aid mold, or aggressive—law reform-oriented and stressing social change through litigation.

The early leadership pushed for an aggressive program emphasizing law reform, and this approach became the target of much criticism on political and pragmatic grounds. First, it was argued that vigorous reform work might alienate the local establishment (including bar associations), and that it would sap funds from service activities. Second, doubts were raised as to the efficacy of law reform and its appropriateness to the program. Third, critics claimed that this approach affected recruitment patterns by attracting primarily graduates of elite schools who were interested only in law reform and appellate work, and who departed after a short period of service.

The Handler et al. study addresses these criticisms, and refutes several other popularly held beliefs about the program, the kinds of activities Legal Services lawyers engaged in, and job satisfaction among the lawyers themselves.

It is based on a questionnaire which was administered to large samples of 1967 Legal Services lawyers and 1972 Legal Services lawyers. Numerous issues are included: the kinds of clients served, the types of problems dealt with, the legal services performed, the mix of law reform and service cases, and the extent to which these activities have changed over time. Let us highlight some of these findings.

The work of the offices. The four principal areas of Legal Services activity (accounting for almost 80% of all activity), in 1972 as in 1967, were family, consumer, housing, and welfare law. Table 1 breaks down total workload by type of work. Over time, family and consumer law have decreased while housing and welfare law have increased.

As for the distribution of time between service work and law reform work, there was little change. Lawyers in 1967 report, on average, spending 25% of their time on law reform; for 1972 the figure is 31.2%. Typical activity of this sort would be done on behalf of welfare rights organizations against state or county welfare departments.

Table 1
Work Done by Legal Services Lawyers

	Percentage of total workload	
Type of work	1967	1972
Family	30.4	21.7
Consumer	24.1	21.6
Housing, landlord-tenant	18.2	23.3
Welfare	6.2	12.2
Employment	2.9	5.3
Juvenile	2.0	4.6
Criminal	4.4	.5
Others mentioned (each less than 2%)	11.8	10.8
Total	100.0	100.0

Source: Joel F. Handler et al., *Lawyers and the Pursuit of Legal Rights* (New York: Academic Press, 1978).

Other reported activities besides service and law reform were community work (speaking, counseling, and organizing), economic development, legislative work, and lobbying.

Another aspect of a Legal Services job is the amount of court activity. In 1972, two-thirds of Legal Service lawyers report that more than 20% of their time is spent in court (an increase over 1967), the bulk of it in lower state and local courts. Another increased activity is dealing with government agencies, primarily those relating to welfare.

One steady, overwhelming problem has been caseload pressures. Legal Services lawyers average 100 open files at a time, much higher than the number for private practitioners or public defenders. According to recent estimates, about 17 million poor people ostensibly covered by Legal Services have approximately 4 million legal problems a year.[2] Since Legal Services is able to handle just over a million cases a year, a severe gap obviously exists.

Job satisfaction and morale. In both 1967 and 1972, job satisfaction among Legal Services lawyers was high. Almost 90% of the 1972 respondents reported being either satisfied (59.3%) or very satisfied (27.9%) with their work, and the figures for 1967 are not appreciably different.

Most, too, thought quite highly of their program, which probably accounts in large part for the high satisfaction rate. An important finding with regard to program evaluation was the fact that "lawyers who spent proportionately more time in law reform were inclined to view their programs more favorably than lawyers who spent more time in service work."

Most Legal Services lawyers viewed their positions as temporary, for such reasons as the desire to earn more, the desire to be in private practice or have another kind of job, or reservations about the nature of the job. But the evidence indicates that the average stay in Legal Services—about three years—was not too much less than the first-job tenure of their peers who did not enter the program.

"Thus," the authors conclude, "not only is turnover, or attorney retention, less of a problem than many believe, but it may be more an aspect of the career mobility of young lawyers than of the Legal Services organization itself."

Six Years Later: The Fate of Activist Lawyers

Do activist lawyers tend to "burn out" after a few years? Do they continue to do reform-oriented work and to represent low status clients but in another setting? Are their commitments to legal activist work of brief or long duration? To answer these questions on the subsequent career paths of Legal Services lawyers, part of the survey involved a comparison of jobs held in 1973 by the 1967 Legal Services lawyers with jobs held in 1973 by other lawyers who were bar members in 1967.[3] In order to eliminate the substantial effects of race, sex, and year of graduation the book focuses discussion on results for white males; and the year of graduation of lawyers in the comparison group has been standardized to have the same distribution as that of the Legal Services lawyers.

Table 2 shows that, contrary to popular belief, Legal Services lawyers are much less likely to be in private practice (39% as compared with 67%) and more likely, furthermore, to be in jobs oriented toward legal rights or public service activity than are other lawyers. Table 3, which for

Table 2
Adjusted Professional Positions at Time of Interview[a]

	Percentage	
	1967 Legal Services lawyers	Lawyers in bar
Private practice		
Solo	17	19
Firm of 2-4 members	17	25
Firm of 5-9 members	4	11
Firm of 10+ members	1	12
Subtotal	39	67
Salaried positions		
Counsel for business	1	9
University position	3	2
Activist government agency[b]	5	1
Legal rights work[b]	5	0
Other	13	10
Subtotal	27	22
Legal services		
Same legal services job	22	—
New legal services job	7	—
Other		
Nonlaw	4	9
Retired, unemployed	1	2
Total	100	100
N	228	981

Source: See Table 1.

[a]White males only; year of graduation of lawyers in the bar standardized to that of lawyers in Legal Services.

[b]Defined in text.

Table 3
Professional Positions at Time of Interview for Lawyers Who Left Legal Services[a]

	Percentage	
	Former Legal Services lawyers	Lawyers in bar
Distribution within private practice		
Solo practice	43	27
Small firm (2-4 lawyers)	43	37
Medium firm (5-9 lawyers)	10	17
Larger firm (10+ lawyers)	4	18
Total	100	99
N	92	621
Distribution of other jobs		
Nonlaw job	13	30
Salaried counsel for business	3	30
Legal rights work[b]	15	2
Activist government agency[b]	16	2
Other salaried counsel (mostly government agencies)	43	30
University faculty	10	7
Total	100	101
N	77	306

Source: See Table 1.

[a]White males only; year of graduation of lawyers in the bar standardized to that of lawyers in Legal Services.

[b]Defined in text.

Legal Services shows only the lawyers who left the program, illustrates this more clearly. Only 16% of Legal Services lawyers are salaried counsels for business corporations or working in nonlaw jobs, as opposed to 60% of lawyers in the bar. Former Legal Services lawyers who are not in private practice are heavily concentrated in nonbusiness pursuits—doing legal rights work (e.g., in a public defender's office), working for government agencies, or teaching law.

Former Legal Services lawyers in private practice tend to have practices oriented away from wealth and power; most are affiliated with solo or small firms, and deal primarily with the affairs of modest income individuals or small businesses. Lawyers in the bar, in contrast, tend to practice in larger firms.

As for type of professional work, Legal Services lawyers are much less likely to designate business and real estate, more likely to list criminal and marital law; they report less litigation activity and less work with wills, trusts, and estates. (To some extent, of course, type of work is a reflection of the smaller size of the firms they are with.) They report doing more hours of *pro bono* work, and more of it is for underrepresented individuals and groups.

It is one thing to describe the career patterns of these lawyers and compare it with that of lawyers who were not in Legal Services; it is another to evaluate the differences—to separate program effects from self-selection effects. To clarify the issue, regression analysis was employed; this is a statistical technique that specifies the strength of relationships when other variables (i.e., social background variables, in this case) are taken into account or controlled. The authors conclude that their control variables (e.g., family and education characteristics) have little effect on the tendency for Legal Services lawyers to avoid those types of practice that have traditionally been accorded high status and to do more reform-oriented *pro bono* work. Variation in experience within the program (i.e., law reform versus service work) affects subsequent career patterns somewhat, but not as much as participation itself.

The authors are optimistic about the future of Legal Services. In 1974 the program became, by a statute of Congress, the Legal Services Corporation. It is run by an 11-person board of directors appointed by the President. The statute attempts to cut down on the more controversial aspects of Legal Services (for example, law reform litigation and contracting with public interest law firms are restricted; certain political activities are proscribed for lawyers in its employ). Still, the aggressive tradition from which Legal Services sprung has sympathy in its current leadership; and the service component (which constitutes the bulk of its work) takes a basically nontraditional approach employing more litigation and a client perspective. →

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Selected Articles

Howard Erlanger, "Social Reform Groups and the Subsequent Careers of Participants: A Follow-Up Study of Early Participants in OEO Legal Services." *American Sociological Review* 42 (April 1977): 233-248. Institute for Research on Poverty Reprint no. 233.

Howard Erlanger, "Young Lawyers and Work in the Public Interest: A Problem of Supply or Demand?" *American Bar Foundation Research Journal* 1978, no. 1. Forthcoming Institute for Research on Poverty Reprint.

Howard Erlanger and Douglas Klegon, "Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns." Institute for Research on Poverty Discussion Paper no. 434-77.

Joel Handler, "Public Interest Law: Problems and Prospects." In *Law and the American Future,* ed. M. Schwartz (Englewood Cliffs, N.J.: Prentice-Hall, 1976).

Joel Handler, "Social Reform Groups and Law Reformers." Institute for Research on Poverty Discussion Paper no. 375-76.

Ellen Jane Hollingsworth, "Ten Years of Legal Services for the Poor." In *A Decade of Federal Antipoverty Programs,* ed. Robert H. Haveman (New York: Academic Press, 1977).

Conclusion

Legal rights organizations have grown tremendously in budget and staff size during the last twenty years. With this growth a number of important functions have evolved. First, they have sensitized the country to the legal needs of the poor and provided long neglected services to the poor. With regard to the intrinsic benefits of services delivered, analysis has shown Legal Services to be a highly cost-effective antipoverty program.[4] The effects, however, must be gauged not only by numbers but also by the individuals who participate.

The Legal Services program has consistently attracted a large number of applicants and recruits representing a broad spectrum of young lawyers. It has provided a structured opportunity for those lawyers who want to work in legal rights. It performs a cycling function as well: Lawyers in the survey left after a period of service averaging three years, but with reinforced commitments to legal rights activities in subsequent jobs.

The single most important policy implication to arise from this study, the authors state, concerns provisions to increase the number of lawyers working on legal rights activities. To this end we must increase the number of structured opportunities available for new recruits proportionate with the increase in the bar. Otherwise, they warn, "a major opportunity to increase the rights of groups underrepresented in the legal system will be lost."

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[2]L. H. Goodman and M. H. Walker, *The Legal Services Program: Resource Distribution and the Low Income Population* (Washington, D.C.: Bureau of Social Science Research, 1975).

[3]All analysis of "current jobs" refers to the predominant job—defined as the one from which the respondent received 60% or more of his income—held at the time of the interview.

[4]See Earl Johnson Jr., *Justice and Reform: The Formative Years of the OEO Legal Services Program* (New York: Russell Sage Foundation, 1974).

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