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Marie A. Failing

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**NECESSARY LEGENDS: THE NATIONAL EQUAL JUSTICE
LIBRARY AND THE IMPORTANCE OF POVERTY LAWYERS'
HISTORY**

MARIE A. FAILINGER*

“At its essence, the National Equal Justice Library is a Library about an idea and a goal—the goal of equal justice for all embedded in our Constitution, our Pledge of Allegiance, and in our nation’s very soul.”

Justice Earl Johnson, Jr.
Dedication of the National Equal Justice Library

The search for equal justice for all is an historic one. In the United States, the vision that all people should receive a fair and impartial trial has been fought in the courts, in the eddies of administrative practice, in legislative debates, and in less publicly visible arenas, such as the world of the farm owner who bars a lawyer from entering his land to confer with a farmworker,¹ or a husband who threatens his wife with harm if she sees a lawyer. Yet, popular support for the notion that legal representation is indispensable in our complex adversary system and a full public commitment to ensure that the poor have lawyers in criminal and civil proceedings barely go back thirty years.²

Given that national efforts to make legal services available to all are such a recent reality, it is scarcely a wonder that most Legal Services and public defender organizations have not concerned themselves with history, particularly since the movement was founded consciously as progressive and forward-looking rather than traditional. Moreover, in a practice largely driven by the

* Professor of Law, Hamline University School of Law and Member of the Board of Directors, National Equal Justice Library (the views expressed in this article are my own, and are not necessarily shared by the NEJL Board). My gratitude to Justice Earl Johnson, Jr. and Harriet Wilson Ellis who gave information and advice on this article.

1. *See, e.g., State v. Shack*, 277 A.2d 369 (N.J. 1971)(holding that a farmer had no property right to prevent a Legal Services attorney from entering his land to provide federally funded legal assistance to farmworkers with whom the farmer had an employment contract and who resided on the farmer’s land).

2. *See* notes 11 & 14 *infra* and accompanying text. The year 1965 seems a propitious mark for that social commitment, representing the federal funding of civil legal services for the poor in the Office of Economic Opportunity (hereinafter “OEO”) Legal Services Program as well as the widespread implementation of *Gideon*’s mandate to provide public defenders in felony criminal cases.

daily emergencies of individuals whose family or financial stability is measured in days and not decades, for lawyers to spend any time reflecting on history might seem luxurious, even decadent. On a very practical level, law firms and legal assistance attorneys might well ask, “why support the collection of old stories when programs for the poor are crying out for dollars to hire lawyers for the poor?”

My task is to give a brief history of the creation of the National Equal Justice Library, the nation’s new—and only—repository for the history of legal assistance to the poor. I also hope to make a case to Legal Services lawyers, public defenders, bar leaders and community members who support them that attending to history, as the National Equal Justice Library does, makes a difference in their professional lives. Lawyers’ history is not a frill for legal aid and defender practice, or a concession to movement “old-timers” who want to wax poetic about the “olden days” when courageous lawyers for the poor made a profound difference in the law. Rather, it must be a critical concern of a movement that wants to continue to be understood as progressive in the largest sense of the word. My argument is based largely in the past experience of the Legal Services Corporation (hereinafter “LSC”) rather than the public defender or the pro bono branches of the movement for legal assistance because it is the experience I know best, though I must confess that I speak as a (now long-time) outsider to the daily work of LSC lawyers.

In my view, the movement to establish equal justice through the provision of legal services for the poor is at a waiting moment in its history. The decades-old battle to restrict the work of recipients of Legal Services Corporation funding has culminated in recent restrictions on non-federal funding of recipients,³ resulting in decisions by some strong LSC programs to “exit” the Corporation rather than accept restrictions which tie their hands in representing their clients ethically.⁴ Other LSC-funded programs have chosen to stay “within”

3. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. N. 104-134, 110 Stat. 1321 (1996) [hereinafter OCRAA]. Congress imposed a number of new restrictions including a prohibition against using non-federal LSC funds to engage in certain activities such as class action suits and lobbying, representation of illegal aliens, and a prohibition against using LSC funds to litigate or lobby for reform of welfare systems. *Id.* at §§ 504(a), 504(d)(1). See also Note, *Constitutional Law—Congress Imposes New Restrictions on Use of Funds by the Legal Services Corporation—Omnibus Consolidated Rescissions and Appropriations Act of 1996*, Pub. L. No. 104-134, 110 Stat. 1321, 110 HARV. L. REV. 1346 (1997)(hereinafter *New Restrictions*); Lincoln Ornston, *Legal Services Corporation: New Legislation Imposes Restrictions on Use of Funds by the Legal Services Corporation*, 11 GEO. IMMIGR. L.J. 224 (1996)

4. For instance, Mid-Minnesota Legal Assistance (MMLA), a well-known, long-term Legal Services provider decided after the 1996 restrictions were imposed to refuse a reimbursement contract with a Legal Services Corporation funding recipient, Central Minnesota Legal Services (CMLS), on whose Board I sit. Mid-Minnesota’s obligations under other funding contracts and to its existing client population were jeopardized by the LSC restrictions. CMLS continues to provide legal services in matters such as family and welfare cases through a staff attorney model.

the Corporation and accept these difficult restrictions on class actions, legislative and administrative activity, and other strategies, believing that some legal assistance to the poor is better than none. While organizations such as the Project Advisory Group, National Legal Aid and Defender Association, and ABA Standing Committee on Legal Aid and Indigent Defendants have served to maintain the sense of a national “bar” in legal aid and public defender work, these Corporation developments have buffeted national field programs weary of fighting the year-after-year battles for the existence and quality of LSC in Congress and in local communities.

The LSC restrictions have also resulted in cutbacks in both availability of representation and types of cases that LSC-funded programs are able to take.⁵ Financial cutbacks at backup centers that have provided expertise to help local Legal Services general practitioners stay current and highly competent have made this expertise increasingly difficult to provide to the field. The diminution in the dollars going to Legal Services Corporation law firms coupled with the change from presumptive funding to a more competitive bidding process⁶ has created insecurity for Legal Services programs as well as for individual lawyers and staff, and made it difficult for programs to make much headway on retaining experienced lawyers and staff members over time. Value “cuts” have also forced programs to cut back service, especially to rural areas, and eliminate certain types of cases from their load and leave staff positions open.⁷ The irony that this restrictive legislation was ultimately successful on the watch of a Democratic president whose wife formerly chaired the Legal Services Corporation⁸ cannot have gone unnoticed.

In an era of declining resources and a slightly fractured national legal community, program directors and other leaders naturally tend to focus on the future, trying to build a vision for the next century that will account for changes both in the legal needs of the poverty population and in the structural and funding base for Legal Services and public defender programs. I argue that to

5. OCRAA, *supra* note 3, §504.

6. *New Restrictions*, *supra* note 3, at 1345-46. LSC funding was reduced \$122 million from FY 1995 to 1996, for a FY 1996 budget of \$278 million. *Id.* The LSC Board of Directors also imposed a competitive grant system, requiring existing providers to demonstrate that they should continue to be their clients’ lawyers. OCRAA, *supra* note 3, §503. *See also* Rhonda McMillion, *LSC Down But Not Out* 82 A.B.A. J. 118 (1996). The Board also required a strict per capita award system for field services grants and new timekeeping requirements. *Id.*

7. *Id.* ABA President Roberta Cooper Ramo and Standing Committee on Legal Aid and Indigent Defendants chair Laurie D. Zelon said that “the impact. . .has been deep and painful.” *Id.* More than 350 offices were closed due to FY 1996 budget, many in rural areas. *Id.* Financial restrictions have also resulted in restrictions on the types of priority cases offices take: for instance, in some areas of the country, a divorce client may wait months or never even get service if she and her children are not the victims of domestic abuse or in similar hardship.

8. First Lady Hillary Rodham Clinton chaired the board of the Legal Services Corporation from 1978 to 1981.

do so, such leaders must look to the past, not simply to avoid repeating its mistakes. Paradoxically, if lawyers for the poor and their friends do not look to the past, they are threatened with continuing it rather than finding the new moment which the vision and experience of the past makes possible. For it is in the encounter with the stories of the past that each lawyer's—each client's—own story becomes visible and clear to her, and becomes transformed for the future.

The case for attending to the history of legal assistance for the poor is threefold: it is crucial to a vision that will sustain the forward movement of legal assistance programs and successfully beat back propaganda against such programs; it is demanded by the client-centered ethic of these programs; and, it is important to a continued sense of community within the legal assistance movement.

I. THE NATIONAL EQUAL JUSTICE LIBRARY: HISTORY AND PURPOSE

It is perhaps the recentness of concerted attempts toward equal justice—its barely hundred year old time line—that makes the effort to collect that history both odd-seeming and at the same time compelling. After all, it was not much more than a century ago—in 1893—that Clara Shortridge Foltz, the first woman lawyer in the western states, is credited with coming up with the idea for a public defender program for indigents;⁹ and the Supreme Court only recognized the right to counsel in felony cases as an aspect of due process in 1932 in *Powell v. Alabama*.¹⁰ Additionally, *Gideon v. Wainwright*,¹¹ which holds that the Sixth Amendment guarantees counsel for the poor in state criminal cases, is only 36 years old.

Legal aid to indigents began to be provided in New York only in 1876 by Der Deutsche-Rechtschutz-Verein and was expanded to include non-German indigents only in 1890 when it became the Legal Aid Society.¹² Through the tireless efforts of New York Legal Aid Society's president Arthur von Briesen and others, there were at least sixteen city legal aid programs scattered throughout the United States by 1911.¹³ Yet, only through the vast expansion of government-funded legal services to the poor in 1965 through the Office of Economic Opportunity ("OEO") Office of Legal Services and the Court's expansion of the right to a public defender in the 1960's and 1970's did the promise of equal justice start to become a reality.¹⁴

9. Judy Norris, *History of Indigent Defense in the United States* A.B.A.J. 16 (1994).

10. 287 U.S. 45 (1932).

11. 372 U.S. 335 (1963).

12. Norris, *supra* note 9, at 4-5.

13. *Id.*

14. See, e.g., *In Re Gault*, 387 U.S. 1 (1967)(extending the right to counsel to accused children in juvenile court); *Argersinger v. Hamlin*, 407 U.S. 25 (1972)(extending the right to counsel

While the history and contemporary situation of legal assistance have been chronicled by a number of practitioners throughout this century in works such as Reginald Heber Smith's *Justice and the Poor*,¹⁵ Emory Brownell's 1951 survey on legal aid in the United States,¹⁶ and Justice Earl Johnson, Jr.'s history of the OEO program,¹⁷ the idea of preserving the vast oral and documentary history that lay in dusty boxes throughout the nation only gained momentum in 1988. In March, 1988, Justice Earl Johnson, Jr., a judge on the California Court of Appeals and a National Legal Aid and Defender Association (NLADA) Board member, raised the subject with the Board after learning of the recent incapacity of Theodore Voorhees, who had been president of the NLADA at the time the OEO Legal Services Program started.¹⁸ Another NLADA Board member similarly mentioned that the heirs of Clara Foltz Shortridge had burned all of her papers, unaware of her critical place as the mother of the public defender movement and its zealous advocate in legislative debates throughout the country.¹⁹

Realizing that few of the lawyers working in public defender and legal aid offices even knew of the struggle for justice that resulted in the creation of

to misdemeanors or other cases in which conviction could result in a prison term); *U.S. v Wade*, 388 U.S. 218 (1967) (extending the right to counsel from early stages of questioning and line-up through the final stages of appeal); *McMann v. Richardson*, 397 U.S. 759 (1970) (restating the right to effective assistance of counsel). Actual implementation of the right to a public defender was furthered in large part by the Ford Foundation, which contributed \$6 million to the National Legal Aid and Defender Association from 1964-69 to set up 78 new public defender programs around the country to implement *Gideon*. Minutes of the Meeting of the Board of Directors, National Equal Justice Library 1 (June 9, 1993) (on file with the National Equal Justice Library, Washington, D.C.) [hereinafter referred to as the June, 1993 Minutes].

15. REGINALD HEBER SMITH, *JUSTICE AND THE POOR* (1971).

16. EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES* (1951).

17. EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974). For other fine articles that have chronicled aspects of the Legal Aid and public defender movements, see Mark R. Arnold, *And Finally, 342 Days Later. . .*, *JURIS DR.* 32 (1975); Warren E. George, *Development of the Legal Services Corporation*, 61 *CORNELL L. REV.* 681 (1976); Roger Cramton, *Crisis in Legal Services for the Poor*, 26 *VILL. L. REV.* 521 (1980-81).

18. Justice Johnson notes that in the thirty years before 1970, NLADA presidents often came from the private bar, serving as members of local Legal Aid Boards of Directors, and went on to high leadership positions such as the president of the ABA. Voorhees typified this private bar involvement as a partner in the Philadelphia firm of Deckert, Price & Rhodes, who served on the OEO Legal Services Advisory Committee. Interview with Justice Earl Johnson, Jr., former OEO Legal Services Program Director, by telephone from St. Paul, Minnesota (Feb. 9, 1998).

19. *Conference on the 30th Anniversary of the United States Supreme Court's Decision in Gideon v. Wainwright: Gideon and the Public Service Role of Lawyers in Advancing Equal Justice*, 43 *AM. U. L. REV.* 1, 5 (1993); Faye A. Silas, *Equal Justice Library to Highlight, Preserve the History of Legal Services to the Poor*, B. LEADER, July-Aug., 1995 at 6,7; Interview with Justice Earl Johnson, Jr., *supra*, note 18.

their jobs, the NLADA Board began efforts toward the establishment of a repository particularly for unpublished and oral history. James Neuhard, then NLADA President, appointed a Legal Services Library Collection Committee to be chaired by Justice Johnson.²⁰ Their efforts were just in time: NLADA learned that the National Archives was preparing to discard the records of the Office of Economic Opportunity Legal Services Program, the predecessor to the Legal Services Corporation.²¹ The NLADA's action saved these materials for a future library. Moreover, efforts to open the library were particularly timely in view of the 1994-95 commemoration of the 30th anniversary of the National Defender Project, which allowed realization of the constitutional right to counsel in criminal cases as a result of a major gift from the Ford Foundation; the 30th anniversary of the OEO Legal Services Program; the 20th anniversary of the Legal Services Corporation; and the 15th anniversary of the ABA Private Bar Pro Bono Activation Project.²² In addition, 1995 marked the 30th anniversary of the ABA House of Delegates vote, carried without dissent, to endorse federal funding for civil legal services for the poor, under the leadership of then-ABA president and later Justice Lewis F. Powell, Jr.²³

The reality that this library would be the first archive on legal services to the poor, and perhaps the first historical institution honoring the work of lawyers in the U.S.²⁴ was not lost on the founders.²⁵ The NLADA committee

20. Other members of the NLADA committee, who later served on the Joint Exploratory Committee and NEJL Board, included Victor Geminiani, LeAnna Gipson, and Marshall Hartman. Interview with Justice Earl Johnson, Jr., *supra*, note 18.

21. Charles F. Williams, *Plans for Equal Justice Library on the Books*, CHI. DAILY L. BULLETIN, July 8, 1994, at 5.

22. Harriet Wilson Ellis, *National Equal Justice Library Opens Fund-raising Campaigns*, 21 HUMAN RIGHTS 32 (1994). The Pro Bono Activation Program was responsible for increasing the number of organized pro bono programs in the U.S. from 50 to more than 500 programs, using over 150,000 private lawyers to supplement federal, state and local staff programs. Memorandum from Harriet Wilson Ellis to Gary Hengstler and Kerry Klumpe, editors of the ABA Journal 3 (March 11, 1994) (on file with the author). It was developed under the leadership of then-ABA president Wm. Reece Smith, Jr., and in 1981, this program led to a "march on Washington" by state and local bar leaders to protest the proposed zero funding of the Legal Services Corporation by the Reagan Administration. *Id.* The library was also timely in light of the approaching 75th anniversary of the ABA Standing Committee on Legal Aid and Indigent Defendants, first chaired by former Chief Justice Charles Evan Hughes, who also served as president of the ABA. *Id.*

23. Earl Johnson, Jr., *Lest They Forget: Efforts Are in Full Swing to Establish a National Equal Justice Library in D.C.*, 81 A.B.A.J. 6 (1995).

24. Williams, *supra* note 21, at 5. In 1996, after Robert Stein came on as Executive Director of the American Bar Association, he directed efforts to establish an ABA Museum of Law and the Legal Profession at ABA headquarters in Chicago, consisting of an exhibit of photographs, memorabilia, and papers honoring the work of lawyers. Memorandum from James R. Silkenat and Robert Stein to Members of the ABA House of Delegates 1 (May 30, 1996) (on file with the National Equal Justice Library, Washington, D.C.).

worked carefully to convene a historic consortium between the American Bar Association, NLADA, American Association of Law Schools (AALS), and American Association of Law Libraries (AALL) to guide the project through its early stages.²⁶ The consortium, originally called the Joint (Exploratory) Committee for a National Legal Services/Defender Library, and later the Consortium for the National Equal Justice Library, met for the first time in Washington D.C. on October 21, 1989 with representatives from each of the consortium partners in attendance.²⁷ In addition, the ABA provided critical support

25. Memorandum to NLADA Legal Services Library Collection Committee from Justice Earl Johnson, Jr. (May 18, 1988) (on file with the National Equal Justice Library, Washington, D.C.). The first meeting of the NLADA Legal Services Library Collection Committee, as the group that founded the library was called, was scheduled by Justice Earl Johnson, Jr., for the July, 1988 NLADA Board and Committee meetings. *Id.* at 1. The plan for this meeting was to put into place an immediate repository for collecting unpublished materials of the preceding 10-50 years, TV programs such as KCET-TV's documentary on the CLA-Governor Ronald Reagan battles, and other audiovisual materials. *Id.* at 1-2. The long-range goals of the library at that time were seen as providing a resource for Legal Services and public defender programs in legislative and administrative arenas, teaching program policy-makers about historical context, encouraging scholarly research about legal assistance program, and providing legal services lawyers with a "sense of the historical movement in which they are involved." *Id.* at 3. The group was to discuss whether the Library would be a unit of NLADA, where it would be housed (with the ABA/American Bar Foundation headquarters at Northwestern Law School one possibility), budget, funding sources, and planning steps. *Id.* at 4-6. As it became clear that NLADA would not have the resources to begin a meaningful library, the Committee determined to enlist the help of the ABA bar leaders with a history of interest in Legal Services and public defender programs, the AALS because many users of the library would be scholars, and the AALL for its expertise in library design and collection. Interview with Justice Earl Johnson, Jr., *supra* note 18. Clinton Bamberger was among the first to solicit funds for the library, making an unsuccessful overture to the Legal Services Corporation in 1988 for funds to support archival materials preservation in 1988. Memorandum of Justice Earl Johnson, Jr., to NLADA Legal Services Library Collection Committee 2 (Oct. 6, 1988) (on file with the National Equal Justice Library, Washington, D.C.) [hereinafter Oct., 1988 Memo]

26. Silas, *supra* note 19, at 6-7; Williams, *supra* note 21, at 5. Justice Johnson originally proposed that the first exploratory committee consist of the members of the NLADA Legal Services Library Collection Committee, 2-3 representatives of the ABA, 1-2 representatives of AALS, and 1 member of the AALL. Oct., 1988 Memo, *supra* note 25, at 3.

27. Summary Report of Joint Exploratory Committee Meeting (Oct., 1989). Justice Johnson, of the California Court of Appeals, served as President of the original joint committee. M. Victor Geminiani, Executive Director of Legal Services of Northern California, served as an NLADA representative and initiated the idea to expand the project to include oral histories. As first chair of the oral history committee, he was active in efforts to collect oral histories for the library. Other legal aid and defender representatives included LeAnna Gipson, Monroe County Legal Assistance Program; Marshall Hartman, then with the Lake County (IL) Public Defender and later the Illinois Capital Resource Center; James Neuhard, Michigan State Appellate Defender; Charles Dorsey, executive director of Baltimore's Legal Aid Bureau; and Robert Raven, former ABA president from Morrison and Foerster representing the American Bar Association. Arturo Flores, Golden Gate University law Library, served as the first AALL representative and chaired the library design committee. Original AALS representatives were Profs. Stanley Herr of

including a home base for these early efforts.²⁸ The site for the library at Washington College of Law, American University, was selected in 1991 after an open competition of Washington-area law schools.²⁹ Charles Dorsey proposed the name that would ultimately be adopted, the National Equal Justice Library.³⁰ Harriet Wilson Ellis, first public affairs director for the Legal Services Corporation, soon agreed to serve as the development and acquisitions consultant for the library.³¹

By November 10, 1992, the Consortium organized itself into a nonprofit corporation and held its first annual meeting. The Board was comprised of members chosen by the American Bar Association, the National Legal Aid and Defender Association, and the American Association of Law Schools, along

the University of Maryland Law School and Marie Failing of Hamline University School of Law. Management Information Exchange, *supra* note 14, at 36-38. Members who joined the joint committee before incorporation included Professor Henry Rose of the Loyola-Chicago law school, replacing Stanley Herr, and Clinton Bamberger, professor of law at the University of Maryland and formerly OEO Legal Services Program director. See, *Justice: The Newsletter of the Consortium for the National Equal Justice Library* 7 (Winter 1995) (on file with the National Equal Justice Library, Washington D.C.).

28. Staffers such as Lynn Sterman helped to find ABA resources for some of the initial expenses of the committee.

29. Interview with Justice Earl Johnson, Jr., *supra*, note 18. Justice Johnson and Lynn Sterman made an initial exploratory site meeting to Washington D.C., visiting with the deans of local law schools. *Id.* After discussing other possible locations for the library, the Consortium determined that the Baltimore-Washington area would be the best location to accommodate researchers, legal services and public defender lawyers, people involved in federal legislation affecting the Legal Services Corporation, and members of the general public who were exploring various aspects of United States history in the vast array of museums and historical buildings in this area. *Id.* The Consortium invited all of the law schools in this area to apply to be a site for the library, but Georgetown and George Washington were unable to offer dedicated space for such a library. *Id.* Capital University, University of Maryland, and American University presented strong and enthusiastic applications for the library, but American University was selected to enter negotiations as the potential site of the library in July, 1991. *Id.* A memorandum of agreement between the Consortium and American University was signed on August 14, 1992. Agenda, Annual Meeting of the Consortium for the National Equal Justice Library, Inc., at part 5 (Nov. 10, 1992) (on file at the National Equal Justice Library, Washington, D.C.) [hereinafter Nov., 1992 Agenda].

30. Interview with Justice Earl Johnson, Jr., *supra*, note 18.

31. Silas, *supra* note 19, at 7. Ellis also assisted then-Chair of the Board, Hillary Rodham Clinton, served as ABA public information liaison for the ABA Legal Services Division beginning in 1970 and served as director of the ABA Office of Presidential Programs and Special Events. Memorandum from L. Stanley Chauvin, Jr. to the ABA Board of Governors 1 (January 23, 1990) [hereinafter Chauvin memo]. In this position she was responsible for obtaining a \$10,000 grant from the ABA for the organizational needs of the Library. *Id.* at 3. She was the first non-lawyer honored by the Chicago-based Legal Aid Bureau of Metropolitan Family Services in 1995 for her 25 years of work in improving public understanding of the importance of legal assistance for the poor. Press Release, Metropolitan Family Services (Dec. 7, 1995) (on file at the National Equal Justice Library, Washington, D.C.).

with Board-elected members for ten “at large” seats provided in the by-laws.³² These seats included one seat for an American University representative that was filled by Patrick Kehoe,³³ one for a representative from the client community filled initially by Nell Hollie,³⁴ and a seat for the Chair of the Development Council, to be held by Chesterfield Smith, a former ABA president.³⁵ The Development Council was created to serve as a fundraising arm for the Library, which targeted a \$2 million goal for operating expenses and a library endowment that would pay the initial costs of acquiring, preparing and cataloging the bulk of materials initially collected as well as the core ongoing costs of the library. The late Justice William J. Brennan, Jr., Senator Warren Rudman, and Sargent Shriver, first head of the OEO program, agreed to serve as honorary co-chairs of the Library.³⁶

The first officers of the new corporation were Justice Earl Johnson, Jr., President; Robert Raven, Vice-President; Marshall Hartman, Secretary; and LeAnna Gipson, Treasurer. Other members of the original committee who were elected to the new Board—James Neuhard, Charles Dorsey, Victor Gemiani—as well as Clinton Bamberger³⁷ were joined by distinguished new Directors such as Cruz Reynoso,³⁸ and Richard Fishman.³⁹ AALL was represent-

32. The first Nominating Committee was comprised of Robert D. Raven, LeAnna Gipson, James R. Neuhard, and Professor Henry Rose with assistance from Harriet Wilson Ellis.

33. Kehoe is the director of the law library for the Washington College of Law, American University. The vote to make the American University and Development Council Chair permanent designated seats on the Board occurred on November 10, 1993.

34. Hollie was a former Board member of NLADA and legal services client.

35. Development Council Members who chair regional councils have included Anthony Barash, Los Angeles; Michael Lowenberg, Dallas; William P. Mahoney, Jr., Phoenix; F. Wm. McCalpin and William H. Bates, Missouri; Llewelyn G. Pritchard, Washington State; Robert D. Raven and Thomas F. Smegal, Jr., San Francisco; John E. S. Scott, Detroit; former ABA president Wm. Reece Smith, Jr., Florida; Randolph W. Thrower, Georgia; Harvey Saferstein and John Van de Kamp, Los Angeles; David C. Weiner, Ohio; and Robert P. Cummins and Terence F. MacCarthy, Chicago. Brochure, *The National Equal Justice Library Thanks the Following Major Donors* [hereinafter NELJ Brochure].

36. Ellis, *supra* note 22, at 32.

37. Bamberger was the first director of the OEO Office of Legal Services and Executive Vice President of the Legal Services Corporation. He is credited with developing strong national support for the program as well as creating its first policies on structure, funding and representation. He also served a distinguished career as Dean of Catholic University Law School, and as a law professor and clinician at the University of Maryland law school. Since retirement Bamberger continues with clinical education and pro bono work in places such as Nepal, South Africa and his local community. Bamberger received, among many honors, the ABA Litigation Section's John Minor Widom Public Interest Award.

38. Currently a law professor at UCLA, Reynoso served as California Rural Legal Assistance director in Sacramento from 1968-72, and as a California Supreme Court Justice, in addition to his work for the EEOC and private law firms in California. He has served on the United States Commission on Civil Rights since 1993.

ed on the new Board by James Milles and Jean Stefancic.⁴⁰ Although the AALS dropped out as a consortium member, the Library board believed that law school support was vital and created two legal educator seats to which original committee members Henry Rose and Marie Failing were elected. Phillip von Mehren, of Milbank Tweed was chosen as first counsel to the new corporation.

In the interim, the Library began soliciting at-risk materials from prominent lawyers and advocates historically involved in the legal assistance movement. With the enthusiastic support of Father Robert Drinan, Georgetown University Law School had agreed in 1989 to store these materials until a permanent repository could be secured.⁴¹ Due to zoning problems encountered by American University,⁴² the dedication of the National Equal Justice Library (NEJL) was deferred from its planned 1995 opening until 1997. American University donated a 2,000 foot space adjacent to its law library for NEJL use.⁴³

The American Bar Association was active in its support of the library in these first years. At the request of President L. Stanley Chauvin, Jr. and past president Robert Raven, the ABA Board of Governors at its February 1990 midwinter meeting agreed to provide a \$10,000 grant to the Library and to authorize ABA staff to assist the Library in pursuing \$25,000 in outside funding

39. When he was elected to the Board, Richard Fishman was a lawyer for Milbank Tweed and facilitated early pro bono legal assistance to the library.

40. James Milles was the head law librarian at St. Louis University Law Library, and Jean Stefancic was the librarian at the University of Colorado Law Library.

41. Harriet Ellis, then with the ABA Office of the President, had told Father Drinan about the library at a chance meeting. Oct., 1988 Memo, *supra* note 25, at 2. As a result of these conversations, the Director of the Georgetown law library agreed on January 9, 1989, to act as an interim repository for up to fifty (50) boxes of "at risk" material for a period of no longer than five (5) years. Memorandum of Justice Earl Johnson, Jr. to NLADA Legal Services Library Collection Committee 1 (Feb. 23, 1989) (on file with the National Equal Justice Library, Washington, D.C.). The Library also agree to provide confidentiality to any donors who requested it. *Id.* at 1-2. Justice Johnson discovered in his library tour that the Georgetown Library had acquired the papers of General Decker, a leader in the public defender movement. *Id.* at 2.

42. American University originally hoped to build a new building to house the law school, including the National Equal Justice Library. However, university neighbors challenged the rezoning of the tract of land to be used for the building, taking the case up to the District of Columbia Court of Appeals. While American finally won the appeal, by June, 1993 the university had decided to renovate an existing building to house the law school and the Library, and the building was completed at the end of 1995. June, 1993 Minutes, *supra* note 14; Minutes of Meeting, National Equal Justice Library (Oct. 26, 1995) (on file with the National Equal Justice Library, Washington, D.C.) [hereinafter Oct., 1995 Minutes].

43. Silas, *supra* note 19, at 6. American University also provided an interest-free loan of \$25,000 which was forgiven at the dedication in 1997. Agenda, Consortium for the National Equal Justice Library Board Conference Call (Apr. 16, 1996) (on file at the National Equal Justice Library, Washington, D.C.).

for the planning phase of the library.⁴⁴ ABA President George Bushnell also praised the library efforts in a speech, urging that the library

would serve as a 'constant reminder' of why the profession does not need to launch a formal public relations campaign to improve its image. . . . The best way for lawyers to improve their profession's image . . . would be to go to the Equal Justice Library, look at the work being preserved there—and then emulate those efforts.⁴⁵

Other members of the organized bar pitched in to give the new Library a good early start. The ABA Section on Litigation was the first section to give a financial donation to the library, in support of a collection on the development of pro bono programs; and the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison made an early contribution to honor its firm's early pro bono efforts which initiated private bar interest in a national pro bono program.⁴⁶ Other major law firms similarly contributed in honor of firm lawyers who had made outstanding contributions to Legal Aid, public defender and pro bono services in the United States: Boston's Hale and Dorr remembered its late partner Reginald Heber Smith, the early leader and chronicler of the legal aid movement in the U.S. through the first law firm contribution to the library; and Arnold & Porter in Washington made a substantial gift in memory of Clarence Gideon's pro bono lawyer, Abe Fortas, a former member of the firm.⁴⁷ The Patrick and Anna Cudahy Fund gave a \$10,000 grant after the ABA for the purpose of funding a site selection process and creating a consortium in 1989.⁴⁸ The Mellon Foundation and the Ford Foundation also joined to assist the Library in getting started.⁴⁹

Bar leaders who joined the Board during this period included Nicholas deB. Katzenbach, former ABA president Jerome Shestack, Harold Rock, Brooksley Born, Marna Tucker, Anthony Barash, Fern Schair and Richard

44. Interview with Justice Earl Johnson, Jr., *supra* note 18; NLADA National Library Committee Report (Mar. 23, 1990); *see also* Chauvin Memo, *supra* note 31, at 3. Harriet Wilson Ellis worked on the proposal for the first \$10,000 and Joy Creamer, Director of Annual Gifts for ABA's Resource Center, was a key adviser in early development efforts. The ABA also provided a \$20,000 loan to the Library in 1993. June, 1993 Minutes, *supra* note 14, at 2; Letter from Harriet Wilson Ellis to the Carnegie Foundation (Dec. 4, 1992) (on file with the National Equal Justice Library, Washington, D.C.).

45. Williams, *supra* note 21, at 16.

46. Ellis, *supra* note 22, at 33. Members of the Section on Individual Rights and Responsibilities also made an early major contribution to the Library. NELJ Brochure, *supra* note 35.

47. Ellis, *supra* note 22, at 33. Other early major law firm donors included Holland & Knight, Miami; Philip H. Corboy, Chicago; Fulbright & Jaworski, Houston; and Jenner & Block, Chicago. *Id.* at 32-33; NELJ brochure, *supra* note 35.

48. Interview with Justice Earl Johnson, Jr., *supra* note 18.

49. Ellis, *supra* note 22, at 32-33.

Hubbard.⁵⁰ Currently, legal services and public defender representatives such as Archibald Murray, Ernesto Sanchez, Elaine Jones, Lillian Johnson, and Ira Mickenberg also sit on the Board of Directors, along with librarians Pamela Gregory and Bruce Kleenschmidt.⁵¹ In June 1997, the Library hired as its first employee curator Danna Bell-Russel,⁵² and moved into the renovated library space⁵³ under its new leadership.⁵⁴ The Library was dedicated on September

50. Minutes of Meeting by Teleconference, Consortium for the National Equal Justice Library (July 18, 1995) (on file at the National Equal Justice Library, Washington, D.C.). Katzenbach, former Attorney General, has been a long-time supporter of legal aid and defender programs and took the seat left empty by the death of Charles Dorsey. *Id.* Rock, from the Kutak Rock firm in Omaha and a member of the ABA Board of Governors, replaced Robert Raven. *Id.* In addition to these ABA appointees, the Board includes at-large members Jerome Shestack, ABA president from Wolf, Block, Schorr and Solis-Cohen in Philadelphia; and Marna Tucker from Feldesman, Tucker, Leifer, Fidell & Bank in Washington, former head of the ABA Section of Individual Rights and Responsibilities. Consortium for the National Equal Justice Library Roster (Jan. 15, 1997) [hereinafter 1997 Roster]. Former Executive Director Fern Schair from the Association of the Bar of the City of New York replaced Elaine Jones on July 15, 1997. *Id.* Richard Hubbard, from Arnold & Porter in Washington D.C., a major contributor to the library, serves as Pro Bono Legal Counsel to the Library. *Id.* Brooksley Born, currently Chair of the Commodity Futures Trading Commission, is a former Chair of the ABA Board of Governors' Program Committee and member of the NLADA Board. Consortium for the National Equal Justice Library Roster (Mar. 9, 1995) [hereinafter 1995 Roster]. Practicing with Arnold & Porter, she was Fundraising Chair of the Board. *Id.*

51. 1997 Roster, *supra* note 50. Ernesto Sanchez from Idaho Legal Aid Services represents NLADA along with Leroy Cordova, formerly Executive Director of Texas Equal Access to Justice Foundation in Austin; Ira Mickenberg, formerly Public Defender Service for the District of Columbia, and James Neuhard represent NLADA public defenders; Lillian Johnson is Executive Director of Community Legal Services; Elaine Jones directs the NAACP Legal Defense & Educational Fund; Pamela Gregory is current AALL representative from Prince Georges County law library along with Bruce Kleenschmidt of the Indiana University School of Law, succeeding James Milles. *Id.*

In the years from 1990-1995, several other prominent lawyers and other leaders served terms on the Board, including Bruce Morrison, Congressman from Connecticut (elected 1993); Elaine R Jones, Director of the NAACP Legal Defense Fund (elected 1993); Esther F. Lardent, Director of the ABA Law Firm Pro Bono Project and current President of the Pro Bono Institute (elected 1993); Jill Miller, NLADA Public Defender Representative (elected 1993); and Carol Alpert, AALL Representative (replacing Jean Stefancic in 1994). 1995 Roster, *supra* note 50.

52. Minutes of Conference Call Meeting, National Equal Justice Library 1 (July 15, 1997) (on file with the National Equal Justice Library, Washington, D.C.) [hereinafter July, 1997 Minutes]. Russel was previously an archivist for the Washington D.C. Community Archives, reference librarian at Marymount University's library, and librarian/archivist for the Henry Lee Moon Library and Archives of the NAACP. Resume of Danna Bell-Russel (on file with author).

53. July, 1997 Minutes, *supra* note 52. With the help of Patrick Kehoe and American University Library staff, at risk materials stored at Georgetown and newly arriving materials were collected at American University beginning in summer, 1993. June, 1993 Minutes, *supra* note 14, at 2.

54. In 1997, officers of the Library included James Neuhard, President; Archibald Murray, Executive Director of the Legal Aid Society of New York, Vice-President; Marshall Hartman,

19-20, 1997, at a gala program featuring a special tribute to the late Justice William J. Brennan, Jr., made on behalf of the Library by noted actor E.G. Marshall and accepted by Mrs. Brennan.⁵⁵ A panel on Legal Aid programs around the world, and a Town Hall Meeting on "Justice in America" were also part of the dedication.⁵⁶

In addition to targeting a wide constituency for its work,⁵⁷ the Consortium identified five purposes that the National Equal Justice Library will serve:

Secretary; Anthony Barash from Bowater Incorporated, Greenville, South Carolina, Treasurer; and Justice Johnson as Immediate Past President. Harriet Wilson Ellis completed her term as Development and Acquisitions Consultant to the Library in 1997, and the Secretariat to the Library was assumed by Terry Brooks, ABA Standing Committee on Legal Aid and Indigent Defendants, in 1997. Roster, 1997, *supra*, note 50.

55. Dedication Program, An International Panel Discussion and Town Hall Meeting (Sep. 19-20, 1997) [hereinafter Dedication Program]. E. G. Marshall was the star of the TV series, *The Defenders*, that debuted in 1961. Marshall, who feted Justice Brennan at the Formal Dedication on September 19, was honored as a "special friend" of the Library for the work he has done bringing public visibility to the Library. James Brady, *In Step With E.G. Marshall*, WASHINGTON POST, Oct. 12, 1997 (Parade Magazine), at 22.

56. Dedication Program, *supra* note 55. The international panel on "Legal Aid in Other Countries: Learning From Each Other" was moderated by Washington College of Law Dean Claudio Grossman. Speakers included Dean Jeremy Cooper, Law Faculty, Southampton Institute, England; Professor Fred Zemans, Osgoode Hall Law School, Toronto, Canada; Professors Elliott Milstein and Richard J. Wilson from Washington College of Law; and Nan Aron, President of the Alliance for Justice. *Id.* The Town Hall Meeting, an examination of the history and future of legal representation for the poor, was moderated by Angela Jordan Davis, American University law professor and former Director of the Public Defender Service for the District of Columbia. *Id.* Speakers included Jerome Shestack, President of the American Bar Association; Alan Houseman, Executive Director of the Center for Law and Social Policy; and Dean Norman Lefstein from Indiana University Law School in Indianapolis, former SCLAID member and former Chair of the ABA Criminal Justice Section. *Id.* Responding panelists for the Town Hall meeting were Alexander Forger, former LSC President; Clinton Lyons, Executive Director of the NLADA; F. Wm. McCalpin, LSC Board Member; Professor Edgar Cahn, District of Columbia Law School; Professor Florence Roisman, Indiana University Law School and former Legal Services housing lawyer who won important victories on the implied warranty of habitability and good cause eviction in rental housing; Daniel Greenberg, Executive Director, the Legal Aid Society of New York; Stephen Bright, Executive Director, Southern Center for Human Rights; board members Cruz Reynoso and James Neuhard; former board member Esther Lardent; and Professors Zemans and Cooper. *Id.*

57. Nov., 1992 Agenda, *supra* note 29, at 1 of part 3. The Library identified five particular audiences that might be interested in its work besides the general public: academics (including law professors, historians, social science educators) interested in researching or teaching about legal assistance and developing law-related curricula; legislators, legal services advocates and others interested in public policy formation and legislation; bar association committees, legal services and public defense providers interested in the design of projects and improvements; individual legal assistance and pro bono lawyers who might be inspired by the history of these movements; and students and writers. *Id.*

First, it will house collections of books, articles and archival materials on legal assistance in the United States as well as a collection of materials on Legal Aid programs internationally.⁵⁸ For instance, Justice Earl and Barbara Johnson have funded a collection of materials on legal representation of the poor in foreign countries.⁵⁹ Archival materials will include private papers, oral histories, and memorabilia on the Legal Aid, public defender, and pro bono movement in the United States.⁶⁰ Some of the materials already collected have included the early minute books from 1887 board meetings of New York's German Legal Aid Society; case documents from Arnold & Porter's pro bono work on *Gideon v. Wainwright* including a copy of Clarence Gideon's handwritten appeal; historical records of the National Legal Aid and Defender Association; and the first draft of what would become the Legal Services Corporation Act.⁶¹ Posters, banners and photographs from early OEO days, saved by former director Clint Bamberger, are also in the collection;⁶² along with important films, TV series and videos, such as *Gideon's Trumpet*, *A Day of Justice* chronicling the diversity of clients and lawyers in the legal services movement, and public television's series, *America's War on Poverty*.⁶³ Significant oral histories of key figures like First Lady Hillary Rodham Clinton, Howard Westwood, an early legal services supporter formerly with Covington & Burling; *Gideon's Trumpet* author Anthony Lewis, and founders or early directors of many significant legal assistance programs have already been preserved.⁶⁴ Ultimately, most of the written materials will be available worldwide

58. Silas, *supra* note 19, at 6. In 1994-95, there was some controversy on the Board over the inclusion of an international collection, which was resolved in favor of having at least a collection of published papers from other countries. Letter of Justice Earl Johnson, Jr. to Clint Bamberger (Jan. 7, 1995) at 3, 4 (on file with the National Equal Justice Library, Washington, D.C.). In addition, there was Board discussion about whether IOLTA programs, non-publicly funded programs that served specific constituencies, programs not focussed exclusively on the poor such as programs for the disabled and elderly, organizations which are focussed on the interests of ethnic or racial groups, and general public interest groups advocating for women, environmental and consumer law should be included as part of the library. *Id.*

59. Ellis, *supra* note 22, at 33.

60. Silas, *supra* note 19, at 6.

61. *Id.* at 7.

62. *Id.* at 6.

63. The National Equal Justice Library Introduction - The Need and Concept for the National Equal Justice Library 5 (Jan. 4, 1996) (on file with the National Equal Justice Library, Washington, D.C.) [hereinafter Library Introduction].

64. *Id.* at 6-7. For instance, the collection includes Thomas Erlich's recollections of his experiences as first LSC president, along with the recollections of Bruce Allen, a founder of Legal Services of Northern California in 1956; John Rosenberg, Director of Appalachian Research and Defense Fund of Kentucky; Vincent Aprile, former counsel to the Kentucky Department of Public Advocacy; Randolph Stone's experiences at the D.C. Defender Service and as chief Cook County Public Defender; Peggy Santos' experiences in developing the National Client's Council;

via computer and telecommunications links.⁶⁵ Already collected in the library are papers from the Legal Services Corporation, the NLADA and many individual lawyers. Named collections will also be created on the early history of these movements.⁶⁶

Second, using photos, videos, text, graphics and memorabilia in a standing exhibit, the Library will teach library visitors about the history of legal assistance to the poor in the United States. As President of the Library's Board of Directors James Neuhard notes, "the National Equal Justice Library offers an unprecedented opportunity in the history of the legal profession to reinforce public confidence in our justice system and the practicing bar."⁶⁷ For instance, the Library has acquired the desk of Arthur von Briesen, a patent lawyer whose compassion for the poor resulted not only in the expansion of the New York Legal Aid Society during his presidency but ultimately in the movement that established legal aid programs around the U.S.⁶⁸

Third, the Library has begun an oral history project to collect videotaped interviews with major figures in the creation and expansion of private and government-funded programs for legal assistance for the poor, and the stories of modern-day lawyers and their clients.⁶⁹

Fourth, the Library will continue to permanently honor those who have made contributions to equal justice in America through its Wall of Justice, acknowledging those who have been recognized for their outstanding achievement by the National Legal Aid and Defender program, the American Bar Association and other organizations.

The final and critical goal of the library is to be "a dynamic center for advancing and improving the delivery of legal services and criminal defense for

Abe Krash's reminiscences of work with Abe Fortas and his opponent Bruce Jacobs' recollections on *Gideon*. *Id.*

65. The NEJL has established a website at <http://www.nejl.wcl.american.edu>.

66. The Library anticipates named collections on the civil legal aid movement (1876-1920), the charitably funded civil legal aid period (1920-1965); the OEO era; the LSC era, pre-*Gideon* defense of the poor; the *Gideon* era and the modern period of criminal defense dating from 1962, as well as legal representation in commonwealth countries, England, and developing countries, along with the oral history project. Announcement, A Resource for the Study and Advancement of Legal Representation of the Poor 2 [hereinafter Library Announcement].

67. Faye Silas, *Equal Justice Library Will Open in September*, 22 B. LEADER 30 (1997).

68. Silas, *supra*, note 19, at 6.

69. As outlined by the first oral history committee chair, Victor Geminiani, the oral history project was conceived in three phases: videotaping interviews of selected persons at local conferences, such as NLADA and the Southeast Project Directors' meetings; teaching project directors how to do local histories, including publication of a handbook and putting articles in legal assistance newsletters; and working with an expert university-based oral history project to develop a comprehensive set of oral histories around a critical event in legal services and public defender history, such as *Gideon v. Wainwright* or the creation of the Legal Services Corporation. Summary of National Equal Justice Library Conference Call Meeting (Feb. 16, 1990) (on file at the National Equal Justice Library, Washington, D.C.).

the poor . . . [and] to present [these existing and new systems] as models not only for current and future generations here, but abroad, particularly for newly emerging democracies."⁷⁰ To that end, the Library will conduct special educational and public policy programs directed at bar leaders, legislators, and others who make policy on legal assistance to the poor.⁷¹ It will also work to increase public knowledge about the history and future of these programs,⁷² ultimately through traveling exhibits, multi-media presentations, and conferences on legal assistance.⁷³ Already, the Library has worked with the American Bar Association to produce a 64-page curriculum entitled "Equal Justice Under Law," which introduces K-12 students to the history and figures involved in these efforts, and poses modern-day problems in the delivery of legal services to the poor, distributed by the ABA to teachers throughout the country. Moreover, the Library was featured in a 1996 program on the Legal Aid Society of New York which it co-sponsored, an ABA Presidential Showcase, a program on legal aid in Chicago, and a 1993 program with the University of Maryland law school on legal aid in Europe and Canada.⁷⁴ In addition, the library at the

70. Library Announcement, *supra* note 65.

71. Johnson, *supra* note 23, at 6. Originally, the Committee decided that it would not overlap with the National Clearinghouse for Legal Services, which collects materials on current cases and developments in Legal Services and public defender programs. However, in late 1995 and early 1996, the NEJL Board and the Clearinghouse Board did have initial discussions about the possibility of cooperation or merger, should Clearinghouse Review be jeopardized because of the loss of LSC funds. Oct., 1995 Minutes, *supra* note 42.

72. Johnson, *supra* note 23, at 6.

73. Library Announcement, *supra* note 66.

74. The New York Legal Aid Society event held on May 15, 1996 at the New York Supreme Court rotunda, co-sponsored with the Society, honoring the 120th anniversary of the Society's founding, featured Chief Judge Judith S. Kaye of the State of New York, a video made about the Legal Aid Society and an exhibit of memorabilia honoring the society. The ABA Presidential Showcase entitled "In Celebration of More than 100 years of Legal Aid and Indigent Defense in America," held August 9, 1993, at the ABA meeting, honored General Decker, former Director of the National Defender Project, for his important work in criminal defense, along with the Ford Foundation for its contribution to national public defender programs and Junius Allison, former Executive Director of NLADA. Sargent Shriver, director of the OEO in 1965 who implemented the Legal Services Program, and former Senator Warren Rudman who has led the fight to preserve the LSC Act were also honored, along with Justice Lewis Powell for his ABA leadership in the creation of the OEO program in 1964-65. The showcase featured a panel on meeting lawyers' MRPC 6.1 voluntary pro bono responsibilities, moderated by Arch Murray; speakers included Ellen Chapnick, Director of Public Interest Programs at Columbia Law School; Manlin Chee, Greensboro, and Edward Kelaher, South Carolina, recipients of ABA Pro Bono Awards; Morton P. Fisher, Jr. chairing the ABA Section of Real Property, Probate and Trust Law; Alex Forger, Chair of the New York Legal Aid Society Board; Robert Hirshon of the Standing Committee on Lawyers' Public Service Responsibility; Harvey Saferstein; Fern Schair; and Katherine McG. Sullivan of Aetna. The program was co-sponsored by the Legal Aid Society of New York; New York State Bar Association; Association of the Bar of the City of New York; Washington College of Law; the California state bar; and several ABA sections. Press Release, September 19, 1993.

Washington College of Law co-sponsored a program observing the 30th anniversary of *Gideon v. Wainwright* in 1993.⁷⁵

This vision for a living library and resource center depends on the commitment and participation of many who have labored in the legal assistance movement. In addition to providing the library with the materials that make up its heart, attorneys, administrative staff, project directors, boards, legislators, and supporters of Legal Services, public defender and pro bono programs will need to be actively involved in identifying the need for research and education on legal assistance in the U.S. and abroad, and in using the library's resources to improve the quality of legal assistance for the poor. This task can only be accomplished if the legal assistance community understands the significance of history as a critical resource for moving into the future.

II. TAKING CARE OF POLITICS: HISTORY AND THE PROGRESSIVE VISION

Since the very beginning of the Office of Economic Opportunity, critics of federally funded Legal Services have worked hard to get popular acceptance for the idea that legal assistance has been largely an ideology rather than a historical movement in American culture. Among its earliest and most visible critics, then-Governor Ronald Reagan vetoed OEO funding to California Rural Legal Assistance on December 26, 1970, justifying his veto on the basis that CRLA attorneys had "a disposition to use their clients as ammunition in their efforts to wage ideological warfare."⁷⁶ In 1972, Vice President Agnew, heading the Nixon Administration's attacks on the OEO Legal Services Program, indicted the program's "tax-funded social activism [that] transfers great power in community affairs from elected officials to self-appointed ones."⁷⁷ Washington insiders like Howard Phillips, in what can only be described as zealotry, have continued to barrage the OEO and later the Legal Services Corporation with charges that its lawyers are pursuing a Marxist, socialist, or what-have-you leftist social "agenda" incompatible with the desire of the American public to appoint low-cost public lawyers for the routine needs of the poor, such as divorce and consumer conflict representation.⁷⁸

75. June, 1993 Minutes, *supra* note 14, at 1.

76. George, *supra* note 17, at 685.

77. *Id.* at 694.

78. Letter from Howard Phillips, Chairman, The Conservative Caucus, Inc., to Dear Friend (Jan. 12, 1981), *cited in* Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 U.C.L.A. L. REV. 474, 483 (1985). As another example, Phyllis Schlafly claimed that LSC was a "monster which is fomenting radical and revolutionary programs at the taxpayer's expense." See discussion of history in Cramton, *supra* note 17, at 531-32, *quoting* Phyllis Schlafly, *Lawyers for the Poor Loaded with Fat*, ST. LOUIS GLOBE-DEMOCRAT, Mar. 13, 1984, at 16A. These attacks continue: Rep. Dan Burton in 1996 accused the LSC of pursuing a "radical agenda" and "engaging in dubious litigation that is of no real benefit to poor people." New Restrictions, *supra* note 3, at 1346.

While even friends of the legal assistance movement have persisted in characterizing it as “ideological,”⁷⁹ this surrender to the label not only wrongly concedes ground to the forces that have successfully battered (though not broken) the legal assistance movement, but it also badly distorts the historical reality of this movement. Ironically, I would argue only history can free the legal assistance movement from the ill-fitting ideological mask which has been pressed upon it and permit those within and without to understand its true dynamic. By fighting for public recognition of the distinction between movement and ideology, a distinction dependent upon the historical task, lawyers for the poor stand a chance of unpacking and defending against these charges.

In my view, anti-Legal Services advocates may correctly describe the advent of OEO and later LSC-funded legal services as a movement, but they stray far from reality when they describe the struggle for legal assistance as an ideology. The effort to create a Legal Services program is indeed a movement within history—a thick historical narrative with a plot line and an argument. It represents the dynamic convergence of many, many individual stories of pain and hope into a practical demand by the poor and their advocates for a concrete response—a government program, OEO Legal Services, that would make their search for equal access to justice more than a pipe-dream. That story of their demand for an office for federally funded legal services for the poor has a theme, to be sure, much like any complex drama—it tells of the hope that lawyers might help radically change the relationship between the poor and their adversaries, from the one-building landlord to the mighty federal government. And it is true that the change conceived by the Legal Services Program’s framers was intended to be multi-faceted and fundamental in nature. The thick and complex river of unjust structures and relations fed by many tributaries of injustice—by byzantine government programs, indifferent landlords, crooked sellers, absent parents, opportunistic employers, and others—was to be altered through the legal assistance movement. In the movement’s vision, the daily experience of the poor and those who held their fate would move from a relational dynamic of largesse and oppression to one marked by dignity and reciprocity, brought about by (where necessary) aggressive advocacy.

That the relational change between the poor and their previous “benefactors” was meant to be fundamental does not, however, mean that it was essentially ideological. As Hannah Arendt taught us, ideology defines the movement of history according to the logic of “an idea,” treating a historical course of events as though it followed the logical “law” of that “idea.”⁸⁰ Ideologies, she argued:

79. Remarks of Dean Jeremy Cooper, dedication of the National Equal Justice Library (on file with the National Equal Justice Library)

80. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 469 (1973)

pretend to know the mysteries of the whole historical process—the secrets of the past, the intricacies of the present, the uncertainties of the future—because of the logic inherent in their respective ideas. Ideologies are never interested in the miracle of being. . . Ideologies always assume that one idea is sufficient to explain everything in the development from the premise, and that no experience can teach anything because everything is comprehended in this consistent process of logical deduction.⁸¹

A frank review of the historical legal assistance movement, which awaits the careful attention of legal historians, will disclose a very different process of vision-building than the surreal straitjackets that characterize true ideologies. First, it is important to remember that, like any sub-history that is mostly hidden in the memories and papers of those who lived it, the legal assistance movement has been described by foes and even friends by reference to a very small number of those who labor in the legal assistance vineyard.⁸² As many contemporary legal historians have successfully argued, political adversaries and legal historians have often neglected the routine in legal history—contract and tort doctrines, the practice of average lawyers and trial judges—in favor of major constitutional battles and intellectuals' claims, thereby bypassing significant social transformations made by the everyday practice of obscure lawyers and their clients.⁸³

So too, the story of “the field,” the daily work of legal assistance lawyers and staff, has been largely neglected in Congressional battles over funding Legal Services. Critics have instead chosen to focus on selected writings of the elite lawyers and intellectuals of the movement, those whose task has been to provide a long-term vision and direction for the work; and a handful of “horror” stories from the field, often dramatically distorted to “prove” the case against Legal Services. In doing so, they have neglected not only the daily experiences of field attorneys and their clients, but also the extensive social science research done on legal services delivery.⁸⁴ An objective historical view,

81. *Id.* at 469-470.

82. Thus, law professors such as Gary Bellow, Jeanne Kettleon, Edgar and Jean Cahn, and Joel Handler along with a small group of lawyers in backup centers and the field, like Alan Houseman, have largely directed the intellectual discourse about the provision of Legal Services and litigation strategies.

83. See, e.g., Lawrence M. Friedman, *Heart Against Head: Perry Miller and the Legal Mind*, 78 YALE L.J. 1244 (1968)(book review); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* xii (1977). See also, Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WILL. & MARY L. REV. 663, 664-65, 668 (1982)(book review).

84. Alan Houseman, *Legal Services to the Poor and Disadvantaged in the 1980's: The Issues for Research 3-8* (undated)(on file in the National Equal Justice Library). Houseman notes that much of the past research done by LSC, such as the four-year Delivery Systems Study, the study of access of special groups to legal services, the Quality Improvement Project, and other papers such as the study on retrenchment in 1981-82, have not been disseminated outside of legal ser-

however, is likely to demonstrate that those who initiated and those who now work within the movement do not construct their view of the past and the correctives of the future ideologically, do not see their work and clients through the lens of a leftist programme. Nor do they surrender every strategic choice in representing their clients to the dictates of the idea.

Rather than ideology—as an objective, comprehensive review (even of the “intellectual” history) of this period will show—the vision of Legal Services advocates has been framed by practical compassion. That is, legal assistance advocates have consistently found their voice and argument not in the pages of a theory book, but in the experience of the client. It is from their client’s troubles, his pain or her hopes that they construct their demand, and from the client’s past their “agenda” for a future, whether that agenda is making sure the client has a lawyer, or working cooperatively in a national network to fight for invalidation of a welfare law. A fair reading of the development of early Legal Aid programs suggests that it was practical compassion—the very involvement of the advocates with the plight of their clients, the specificity and concreteness of those moments of injustice—and not ideology that drove these advocates both to seek structural change in the delivery of legal services and to cooperate through strategies such as the class action.

That compassion has not borne unified, airtight worldviews that categorize and define clients, their adversaries and the conflicts they live out, theories in which historical realities are subsumed to the definitions of grand abstraction. Rather, the Legal Services movement has engendered values and principles—open-ended ideas about the forms of justice that respond flexibly to the challenges of the future and of every individual client, that indeed are driven by the face of the client, while avoiding the vagueness of relativism. And the movement has borne much research and thinking about the *practicalities* of legal services delivery—not to what goal or end they should be delivered, but how they should be delivered effectively.⁸⁵

Critics might, of course, argue that the rhetoric of the legal assistance movement sounds suspiciously univocal to be simply a synergistic convergence of compassionate lawyering. They might claim that the construction of fundamentally new (and often ballyhooed) legal concepts such as the “right to welfare” or the “implied warranty of habitability” and their careful odyssey through the federal courts can only be explained as a carefully developed programme to undermine traditional culture crafted by an ideologically disciplined

vices (some of it not even widely within the Corporation) and has not been published in journals or books. *Id.*

85. *Id.* at 30-39. Houseman gives a good example of this pragmatic visioning. Rather than concentrating on a particular political or social vision, it focuses on the ways in which legal services can more effectively serve its clients, suggesting that questions be asked about the effectiveness of alternative dispute resolution, involvement of private attorneys, relationships with other organizations, and staff retention.

cadre within the Legal Services movement. And they might wave around some tidbits of historical support in the litigation memos of Legal Services back-up centers or training books of Legal Services state support programs, or threads of conference calls among Legal Services lawyers litigating similar cases throughout the country. (Certainly, there are days when Legal Services lawyers have wished for litigation on a national scale to be so well-organized. . . .!)

But the historical record will, I believe, reflect that such charges are paranoid or manipulative more than factual, that there is no significant evidence supporting claims that LSC, for example, is simply an ideology created by elites for mass consumption at the local program level. Historians will rather find the rise of a national language of “welfare rights” or “habitability” in the 1960’s and 70’s to reflect the pragmatic spirit of lawyering. Lawyers are “natural scavengers”:⁸⁶ they use what they can find that works, that brings the kind of results their clients need; and legal assistance lawyers are no different in this respect. Just as any new legal doctrine—from emotional infliction of mental distress to the entrapment defense—finds its way into the complaints and briefs of lawyers throughout the nation once a court has taken it seriously, the similar strategy found in Legal Services cases reflects not the carefully disciplined dissemination of an ideology, but the practical zeal of advocates searching for a new legal handle on their clients’ often desperate problems.

A more genuine problem facing the legal assistance field is that, without attention to history, the values and principles that have provided a loose glue for the work of legal assistance advocates will not be successfully applied to the realities of the future. It is an academic and political commonplace to declare the “liberal project” (again, misnamed to suggest a monolithic Enlightenment ideological structure) to be gasping its last breath; and national political events hardly gainsay that diagnosis. For the values that have driven the legal assistance movement—concepts such as “equal justice for all,” “the dignity of the person,” and “due process of law”—to retain their responsive, living quality in these moments between theory paradigms, legal assistance lawyers need to pay attention to the stories—the individual narratives and the large national histories—from which those values and principles arose.

This use of history does not bind the present, like the constitutional originalist would do, demanding that legal assistance lawyers define everything from client populations to legal theories against the long shadow of those who fought for the advances of the poor. It may well be, for instance, that clients of the legal assistance movement in future years will largely be displaced farmers or refugees where once they were single working welfare mothers and

86. Kathryn Abrams, *Law’s Republicanism*, 97 YALE L.J. 1591 (1988), quoted in Barry Friedman, *Book Review: The Turn to History*, 72 N.Y.U. L. Rev. 928, 958 (1997)(reviewing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996)).

urban minorities. It may well be that the hard fight for the recognition of rights for the poor—*Goldberg's* due process protections to *Douglas's* right to a lawyer on appeal⁸⁷—will be transformed into concepts and relationships of a new era, for example, a focus on mutual responsibility of government and its citizens for each other. Conversely, legal assistance lawyers may find the need to “dig in their heels” against principles masquerading as helpful legal paradigms for the future that are simply means to obscure the destruction of protections for the poor. Sorting what must inevitably come from what is rhetorical illusion, what represents a genuine human advance from an evil old disguise cannot be done within a battle of abstractions. It is only history—the stories of earlier clients and their lawyers, how their claims and strategies succeeded and failed to make a difference in clients' lives—that can help distinguish promise from pretense.

Nor can a review of the past be purely instrumental: we cannot find history to tell history what we want it to teach us. It would be a mistake for the legal assistance movement to search for bits and pieces of the past simply to shore up a set of practices and beliefs that are being overtaken by time and the new realities of needy clients. Lawyers for the poor must avoid the temptation to go out to “find” histories that will permit them to justify living out their professional responsibilities inside a set of values and principles that no longer serves their clients though it has come to feel comfortable to them after years of practice.

An aggressive attempt to ground the future in history is not only internally required; it is also a political necessity. Even in arguments with adversaries, to find a “usable” past, the movement must avoid the temptation simply to use history as a tactic instead of an attempt to understand what has really happened: “What we do can only have the meanings we suppose it to have if it is located in a history we believe *real*. If our beliefs in that history are shattered, our actions lose their point and, in dramatic cases, our lives their purpose.”⁸⁸ To the extent that the legal assistance movement must be “eternally vigilant,” looking for new forms of oppression that spring up just as the older ones are being wrestled to the ground,⁸⁹ a clear-eyed view of the movement's history

87. See *Goldberg v. Kelly*, 397 U.S. 254 (1970), which initiated the expansion of civil procedural due process protections for those dependent on government entitlements, while *Douglas v. California*, 372 U.S. 353 (1963), *reh. denied*, 373 U.S. 905 (1963), was a high water mark for the expansion of appointed counsel in judicial review of criminal cases.

88. ARTHUR C. DANTO, *NARRATION AND KNOWLEDGE* 133 (1985), *quoted in* Friedman, *supra* note 83, at 965.

89. See, Gary Bellow, *Turning Solutions Into Problems*, 34 NLADA BRIEFCASE 106, 107 (1977). Bellow noted that as legal gains were won by the poor, new “patterns of domination” arose in their place: for instance, landlords forced to provide tenants with protections passed those costs on in the form of higher rents to already strapped poor people; credit companies restricted in their abusive collection practices simply abandoned low-income areas. *Id.*

can permit no nostalgic justification of the legal assistance status quo. The selective molding of anecdotes and isolated charges into a political case against the Legal Services Corporation, for example, cannot be fought by selective counter-anecdotes, or even by painstaking demonstration that the charges are patently false, the fantasies of alleged ideological zealotry. In a war of anecdotes, legal assistance advocates must fail because the public onlookers to the battle are most likely to react cynically, much like they react to battling expert witnesses, disbelieving both advocates and critics of legal assistance programs. And cynicism is the most direct enemy of the legal assistance movement, which is built on the belief that the actions of lawyers, judges, legislators and other advocates *do* matter, that their work in partnership with their clients has a purpose and can have a lasting effect.

A cynical public, one that is successfully encouraged to doubt the promise of equal justice or the possibilities for its delivery, will have no commitment to sustaining the financial support that providing lawyers for the poor entails. Only careful history, honestly undertaken and widely presented for the purpose of understanding and not for winning political wars, has the chance of opening the hearts and minds of the public to the possibility that, unlike so many of its fights against violence, poverty, disease, the provision of the means for the poor to seek equal justice is a modest and achievable goal.

III. TOWARD A SUSTAINABLE ETHICAL PRACTICE: HISTORY AS CRITICAL TO THE LAWYER-CLIENT RELATIONSHIP

As early as 1977, Gary Bellow warned that legal services programs were in danger of “supporting the very inequalities that brought a federally financed legal aid program into being” by recreating bureaucratic structures in staff-model legal services programs.⁹⁰ He suggested that “routinized” responses to clients fed by high caseloads, class bias, and emotional detachment coupled with lawyers’ beliefs that individual “service” cases were not vehicles for true change would ultimately result in client experiences in Legal Services that were not too different from those they had with other bureaucracies they confronted.⁹¹ More recently, Charles J. Ogletree, Jr., has sounded a similar alarm about public defenders, claiming that unless public defenders are provided motivation for their work beyond the standard “adversary system excuse,”⁹² the

90. *Id.* at 108.

91. *Id.* at 109-110.

92. See, David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: THE LAWYERS’ ROLES AND LAWYERS’ ETHICS* 83, 89 (David Luban, ed. 1983). The “Adversary System Excuse” is the term David Luban uses for the argument that the adversary system best effectuates social goals for finding the truth, protecting the vulnerable client against the state, and doing justice; and that lawyers’ tactics are justified because of the adversarial roles they need to play in that system for it to work properly.

cycle of lawyer burn-out and abandonment of the criminal poor threatens “the ability of the system to fulfill its commitment to [the] ideals [of justice for the criminal defendant].”⁹³

Bellow pointed out the tragic flaw in a legal services delivery system which retains its focus on the present:

[T]he legal aid attorney, as an individual, is sympathetic and concerned about the plight of clients. Most legal services lawyers are not aware of the patterns [of cautious, detached, client-controlling service] that have begun to emerge. Their actions are experienced as reasonable responses to client difficulties. . . [their most common attitude] is that the clients are victims of an unresponsive and essentially *unchangeable* system.⁹⁴

In another vein, Ogletree describes the tension faced by public defenders, conflicted between their belief in the necessity of public defense and the reality that they know many of their clients have committed significant wrongdoing. In his experience, eventually “abstract theoretical justifications fall short in the face of reality. For example, public defenders who are motivated by a belief that no individual is guilty until proven so, soon find that such moral indeterminacy does not comport with their daily experiences.”⁹⁵

Bellow locates one antidote to the re-creation of bureaucracy in a rigorous effort at self-scrutiny enhanced by more effective client participation, fed by education and a more political vision that can challenge the deficiencies in the lawyers’ own vision for the possible and the political strengths of the opposition.⁹⁶ Ogletree, by contrast, argues that public defender programs must focus on developing empathy and a sense of “heroism” in public defenders to sustain them in their daily tasks.⁹⁷ In his view, only the public defender who can both understand “the experiences, behavior and feelings of others as they experience them” and who heroically can “conquer what others cannot” is likely to survive.⁹⁸

Both Bellow and Ogletree thus suggest that legal assistance lawyers must be able to step outside their own skins, to view things from the perspective of the client and to engage him as a responsible other in decision-making, if they are to serve as effective advocates over time. Some lawyers for the poor will be able to do so more naturally than others; because of similar life experiences or an exceptionally reflective character, they will have the ability to challenge their own perceptions and to see their worlds from the perspective of their cli-

93. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1241 (1993).

94. Bellow, *supra* note 89, at 109.

95. Ogletree, *supra* note 93, at 1269.

96. Bellow, *supra* note 89, at 119-20.

97. Ogletree, *supra* note 93, at 1271-77.

98. *Id.* at 1272, 1275.

ents. As Ogletree notes, and Bellow's argument suggests, however, for many lawyers for the poor, these are skills that must be taught, whether through formal self-evaluation and staff development programs, as Bellow advocated,⁹⁹ or through law school clinical education exercises that permit students to imagine themselves in the place of their clients or to work with clients in a highly structured, setting focused on reflection, as Ogletree suggests.¹⁰⁰

History has a role to play in the development of these perspectives: both the ability to step outside oneself and to see things from the perspective of the other, what Ogletree calls "empathy;" and the ability to re-vision a world "outside the lines," where assumed rules are swept away for new, more just rules, something like what Ogletree describes as "heroism." As both authors suggest, the encounter with clients itself, while it is a key factor in lawyers' ability to retain this perspective, can often become shaped by lawyers' superior control and personal needs into a routine bureaucratic encounter. Indeed, it is a paradox of legal assistance that representing more and more clients, rather than sharpening the challenge of the other by exposing the lawyer to many more individuals' experiences of injustice, may deaden the lawyer's ability to feel his or her client's pain.

By its very unlikeness from the daily routine, however, history forces the lawyer to re-evaluate what he or she does, not to conform it to historical patterns but because history provides a new lens for viewing one's own experience. Like a metaphor, history is both like and unlike our current situation, and it is exactly those similarities and differences which force us to re-think our present, to discover what the ongoing issues of injustice and response have been over centuries, as well as to understand what is new about our situation and what is likely to change in the future.

History also presents us with narratives, stories that can be as emotionally compelling as the stories of existing clients. Yet, the narratives of history present lawyers with a different demand—the demand to imagine instead of acting for clients, the demand to reflect rather than immediately to respond. In history, lawyers see not just the beginning of a narrative as they do with their clients, but how it turned out, how lawyering made a difference. They can see the grand scheme of things, the salient points of a plethora of cases lost and won in the past, rather than just the complex detail of those cases as they work through them in current time. Thus, history—the narratives of individual clients living through vast legal and social changes—serve to shore up the development of empathy that relationships with real clients create. And, history permits the development of the large, encompassing vision—not an ideology, focused on one idea, but a vision in the "heroic" sense Ogletree is talking

99. Bellow, *supra* note 89, at 120-21.

100. Ogletree, *supra* note 93, at 1290-91.

about, a vision founded on enduring values but constantly recreating the social relations that instantiate those values in the real world.

IV. HISTORY AS SOCIAL: REMEMBRANCE AND SOLIDARITY

Any movement that hopes to survive over time must foster a sense of community among those who share its values. Ideological communities are sustained over time by the repression of criticism, increasingly intense testing of members' loyalty to the preconstructed creed often through persecution of enemies (who may just be critical former insiders), and sometimes even attempts to create crises to stir group members to protect each other and their ideals. By contrast, in a looser confederation built on values and principles, forward movement is often sustained by friendship, the critical interaction of people who have known each other for a long time. Friendship permits those in the community to accept both criticism and change. Without such room for disagreement, for the ability to be self-critical and to change, any movement is liable to stagnate, to become the adversary it once decried. In the early stages of such a more loosely confederated movement, the excitement of building a new structure where nothing existed, or challenging the "demonic" powers against which the movement was formed, can sustain the ties of friendship—or more accurately, solidarity—that bind friends to common political or social strategies and objectives.

As such a looser confederation based on values and principles, the legal services and public defender movement has faced a critical turning point in its life over the past decade or more. It has expanded in size beyond the point at which lawyers, or even project directors, can maintain the personal relationship that is necessary to create bonds of solidarity. Many lawyers bound for decades by the early struggles to create and then defend the existence of these programs have moved on to the academy or other work; many are facing retirement or death. In their place have come idealistic younger lawyers who did not personally experience the heady conflict of building the Legal Services Corporation or the public defender system, who did not take part in the developing camaraderie among the early beleaguered project directors. Yet, they are the ones faced with the task of trying to sort out a sustainable future for their programs and to identify the emerging needs of their clients. Their attempts to create bonds of solidarity must be even more successful than in the past, for with the passage of many of the restrictions conservatives have fought for, they lack the clear "enemy" that could arouse the field. Instead, they are being cornered into a less dramatic fight over finances and devolution instead of the more principle-driven argument about the right to representation itself.

The sustenance of solidarity over generations, a community of support for a set of values embedded in diverse forms of legal argument and practice, depends largely upon the ability of the legal services movement to teach and to mentor, to pass on not simply the practicalities of practice, but the stories of

success and defeat that have sustained public defenders, Legal Services attorneys and pro bono lawyers over time. This paideia cannot be left to happenstance, anymore than it can be dictated as a training curriculum for new attorneys. To be successful, this paideia depends on the personal, on the ability of the elders of the movement to capture both the essence of their journey and the particulars that have made it so compelling as a life's work for many. As traditional societies understand, the most effective teaching is face-to-face, the ritual passing of narratives from elder to younger. Yet, in a movement that spans states and even perhaps nations, history in the form of dramas, videotaped and transcribed oral histories, books and symbolic remembrances may be the only effective way of transmitting the past to those who are to be bonded to it as they must be to carry it on.

To sustain that solidarity, places such as the National Equal Justice Library are vital gathering places for those within the legal assistance movement as well as outsiders both critical and sympathetic to its aims. Part of the work of the Library and other history centers must be to tell truth to power: to make society see what it has done to poor people, over and over again. Part of it must be to tell truth to the truth-tellers: to locate pretension and neglect in the provision of legal services to the poor, to understand how lawyers have failed the poor and have contributed to their circumstances, to understand the true relationship of visionary demand and practical compromise. Remembrance that is clean, that celebrates without distorting the past, that confesses failure and commits to amends, sustains a future for the poor and their lawyers.