

Should Legal Services Rise Again?

The Legal Services Corporation (LSC), founded by Congress in 1974 to provide legal services for poor people, has been reduced since 1980 to a shell of its former self. Conservative critics from Spiro Agnew to Ronald Reagan charged that LSC lawyers were abusing their charter to enact a liberal agenda. Under the Reagan administration, the LSC's budget has been slashed and funds redirected to conservative causes. An unsympathetic board and several scandals have harmed morale among legal aid lawyers. Finally, strict limitations have been imposed on the kind of activities in which LSC-funded lawyers could engage, chief among these very stringent requirements on filing class actions against the government.

Class action suits have become an emblem for opponents of everything they find objectionable about the LSC. In such suits (it was believed), lawyers recruit a purely nominal plaintiff-of-record representing a class of litigants who have never heard of the case and who may very well oppose the litigation; on behalf of this class, the lawyers proceed to demand widespread restructuring of social institutions, or extravagant damage awards, thereby enacting their own social agenda through the courts in subversion of the democratic will as expressed through legislatures or executive action.

So goes the argument. In reply, LSC supporters point out that only a few percent of the litigation entered by legal aid programs has involved class action suits or attempts to restructure institutions. (In the legal services vernacular, such cases are called "impact" cases.) The overwhelming bulk of the LSC caseload has been individualized service—divorces, child abuse or neglect cases, landlord/tenant cases, Social Security, etc. (In the vernacular, this kind of work is sometimes called "handing out band-aids.")

Both sides of such a debate presuppose that there is something suspicious about impact work. I wish to argue that this presupposition is wrong—that there is absolutely nothing illegitimate about impact work by legal services lawyers, even highly politicized legal services lawyers. On the contrary: law reform of this sort is at once an admirable attempt to further social justice and a professional responsibility to help more clients rather than fewer. It is precisely what lawyers ought to be doing.

Let me answer four objections to it in turn.

The Taxation Objection

To be sure, there are strong arguments for the presupposition that (too much) impact work is illegitimate.

There is, first of all, the argument that it is wrong to use the tax money of people opposed to liberal aims and programs to further them.

This objection seems at first glance to be merely a stupid gripe. People don't like to pay taxes; they do like to complain about them, and about how revenues are spent. As a matter of fact, however, no one can seriously class the dollar-a-year per capita that goes to legal services as (in the words of one well-know critic) an "incredible taxpayer rip-off."

Rather, talk of taxes is a stand-in for a less frivolous argument, based on the ideas (1) that governmentally funded agencies in some sense "stand for" public values and decisions, (2) that such agencies should as a consequence not take sides on hotly contested political issues, and (3) that impact litigation does take sides. The phrase *how my tax dollars are spent*, that is, is a surrogate for *what my government stands for*. And the Taxation Objection then amounts to the claim that the government should not stand for anything as controversial as LSC-funded impact work.

If, however, it is wrong to spend the tax dollars of opponents of integration on attempts to enforce it, it is equally wrong to spend racial minorities' tax dollars to support discrimination. In fact, anything that government does or fails to do about a controversial issue implicates it in values that are antagonistic to one side or the other; any time the government is a party in a lawsuit it is "taking sides" against those who hold its adversary's values. As it stands, then, the Taxation Objection fails to show that governmentally funded legal service work, even when politically controversial, is illegitimate.

The Equal Access Objection

Insofar as impact work diverts legal aid lawyers from handing out band-aids, it might be thought that it is actually inimical to the ideal of equal access to the legal system. For then legal aid officers will turn away clients with "band-aid" problems because the lawyers are too busy filing class action suits, or whatever. If a legal aid office makes a decision to target, for example, public housing cases at the expense of others, legal problems not "on target" will not receive counsel; this is in effect to deny these problems equal consideration by the legal system. Targeting, to put the point another way, treats clients aggregatively rather than individually—a client's problem is addressed only if enough other clients share the same problem. What, then, has become of the ideal of equal access to the legal system that is the *raison d'être* of legal aid?

The answer is that the ideal had its budget cut. Had there been enough money to maintain a larger staff, the office could have taken all cases; as is, some sort of selection or triage principle must be applied. The decision to target a goal such as public housing can be justified by considerations such as the importance of shelter as a basic need and the greater number of people benefited. At this point the ball is in the objector's court: what is her candidate for a triage principle?

If the equal access objection is taken seriously, the only candidate for a triage principle is first-come-first-serve or even a "lottery," for nothing about a potential client's case can be taken into account except the bare fact that the client has requested legal services. First-come-first-serve treats everyone's problem as of precisely equal worth to everyone else's. Never mind that it may lead to a very inefficient allocation of scarce legal resources. Never mind that the total service thus rendered to the poor population has little to do with its net needs and desires. Never mind that it's crazy—it may be crazy, but it's fair.

Clearly, however, it is too crazy to be fair. By ignoring differences in urgency among cases, first-come-first-serve ignores the connection between access to the legal system and people's reasons for wanting access to the legal system. And once their link with human projects and values is broken, it becomes hard to see why legal services should exist at all. A woman faced with court-ordered sterilization needs a lawyer faster and more desperately than does her neighbor who wants to make Montgomery Ward honor the warranty on her dryer; first-come-first-serve, however, in effect puts both their names in the hat. It disconnects demands for legal aid from needs for legal aid, and thus abdicates the very

judgment on which the importance of legal aid rests.

If urgency can be taken into account, however, it is difficult to see why a legal aid office's decision to target an issue such as public housing is ruled out. One dimension of urgency—"intensive urgency"—concerns the importance of the interests at stake; another dimension of urgency—"extensive urgency"—concerns the number of people affected. Targeting by a legal aid office usually means going after cases that are urgent in both these senses. The purpose for seeking law reform or high impact, instead of handing out band-aids, is that the former will help more people in more important ways. This, I submit, is quite a reasonable ground for choosing cases.

The Client Control Objection

A third objection is that in impact work lawyers rather than clients are calling the shots, using the legal system to achieve ends that the lawyers have chosen independently of the wishes of the people they ostensibly represent. Let me begin by conceding the accusations that lie at the basis of this objection: that public interest lawyers bent on law reform sometimes recruit clients as plaintiffs; that they occasionally pressure their clients on behalf of The Cause; that they may even file class actions when a large part of the class—maybe even a majority—opposes them.

What I do not concede is that there is anything wrong with this.

This is clearly so in the question of lawyers recruiting clients for law-reform activities. It does not matter whose idea the project is: all that matters is that the client, like the lawyer, becomes committed to the project. There are obvious reasons why a plaintiff might have to be recruited by lawyers in a law reform case. Potential plaintiffs might not know that what is being done to them is illegal or may assume that action against it is out of the question. It takes guts to litigate against an institution that has its thumb poised over your eye.

The accusations that lawyers rather than clients have seized control are more troubling. Consider an example. Ms. *P* belongs to a tenants' organization and agrees to be the plaintiff in a suit against *D* Real Estate ("unhealthiest tenements in town"). *P* is represented pro bono by *L*, a committed tenants' rights lawyer who hopes that *P* v. *D* will set an important precedent. *D* does not want the precedent and tries to "buy out" *P* with a cash settlement before the trial. It is clearly in *P*'s personal interest to accept the offer. Should *L* counsel her to do it? If she wants to accept it, should *L* nevertheless try to pressure her into going to trial? Who is *L* representing—*P* or "the cause"?

Similar problems can arise in class action suits. When the "class" in such a suit is itself divided on the issue at hand, lawyers will be acting in opposition to the wishes of some—perhaps even a majority—of the very people whose interests they claim to represent. In several cities, for example, NAACP attorneys' commitment to racially integrated schools has led them to file

From a 1981 Conservative Caucus direct mailing:

Dear Friend:

If America is as conservative as the polls tell us, why do you keep losing, and the liberals keep winning?

Especially on issues like taxes, welfare, crime, busing, defense, quotas, food stamps, OSHA and energy.

One big reason for liberal victories and conservative defeats is the taxpayer-funded Legal Services Corporation...

The LSC funds a nationwide network of liberal activists, who use your money to... lobby for new laws and administrative rulings which will further socialize America... [and] get liberal judges to write new laws in court that can't be passed in Congress.

Our goal is to completely eliminate the Federal Legal Services program and to reject any and all funding for it.

Remember the only battles we lose are the ones we fail to fight.

Sincerely,
Howard Phillips
Chairman

class actions even though black parents preferred upgrades in the quality of education in all-black schools over integration.

In terms of the bar's ethical codes, both problems involve forbidden conflicts of interest between lawyers and their clients. I want to suggest, however, that lawyers and their clients can engage in a political mode of action that differs significantly from the ordinary lawyer-client relationship.

When a client engages the services of a lawyer for everyday business, they enter a contractual relationship, in which the element of reciprocity consists in the client's promise to pay the lawyer in return for services. At that point, however, the lawyer becomes the client's *agent*, and the duties are no longer mutual. An agent has a primary one-way commitment to her principal and a derivative one-way commitment to successfully carrying out the various pieces of business transacted on behalf of the principal.

When attorney and client are engaged in politicized public interest law, by contrast, their relationship is one of mutual political commitment. Political allies have a primary one-way commitment to their political cause and a derivative *mutual* commitment to each other, undertaken freely and reciprocally by people who regard each other as political equals.

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Return now to Ms. *P*, the member of the tenants' organization who now wishes to settle her precedent-setting case against *D* Real Estate because *D* has made her an offer she doesn't want to refuse. Ms. *P* engaged in the suit to further the goals of the tenants' organization, and lawyer *L* represented her pro bono because of his commitment to those goals. At this point, Ms. *P* is on the verge of betraying *L*, her other allies in the tenants' organization, and the cause for which they were all working. Since *L*'s relationship with her is a relationship of mutual political commitment, of primary commitment to the cause and only secondary commitment to Ms. *P*, it is entirely appropriate for *L* to pressure her to decline the settlement even though doing so is not in her personal interest.

Problems of class conflict in class action suits can be resolved by a closer look at what it is for a lawyer to represent the will of a political group. Who is the NAACP's client class? Is it the black parents in the city that the lawyers are trying to desegregate, or is it all American blacks, whose interests in racial integration

may be adversely affected if large local pockets of segregation are left undisturbed? More importantly, the NAACP may have to take into account the interests of future generations of blacks in and out of the city. If this intergenerational conflict of interest is real, the demand for representativeness cannot require the lawyers to conform their actions to the wishes of the parents.

Yet the NAACP lawyers must side with one class or the other, since if they do nothing they are doing exactly what one part wants them to do. It seems to me that they have only one recourse, and that is to do what, in their considered judgment, is the best thing. We must not forget that many black parents in Topeka wanted school improvement rather than integration and opposed the NAACP's suit in *Brown v. Board of Education*. Had the NAACP lawyers refused to act in cases of class conflict and division, segregated schools would still be legal today.

The Objection from Democracy

The Objection from Democracy says that it is wrong for groups that are unable to get what they want through ordinary democratic means to frustrate the democratic will by obtaining in court what they cannot obtain in the political rough-and-tumble. In a democracy, law is to be made by majoritarian legislatures, and the role of the courts is restricted to protecting the rights of minorities, not making law themselves.

But in reality legislatures themselves do not work on majoritarian principles. Democratic control over the action of elected individuals is exercised only indirectly, through pressure groups or interest groups, which need not represent the viewpoint of electoral majorities. The most effective pressure groups are often the best organized, best connected, and most affluent special interests, and these are not likely to reflect the majority point of view. The costs for majorities to organize are prohibitive; it is simply too tempting for each individual to "free-ride" on the time and energy invested by others. Between 80 and 90 percent of public TV watchers make no voluntary contribution to its funding, even when they agree that it is a bargain at the price. Political organization is less of a bargain and the price is higher.

Critics often lose sight of the fact that the class-action device was introduced precisely to overcome such economic blocks to organization. Their use can enhance democratic decision-making by allowing courts to police legislative failures based on the free-rider problem. They give a voice to the silent majority. And if it is democratically appropriate for the courts to intervene in the political process because it has failed to be democratic, then it is appropriate for lawyers to advocate such intervention. It is a service to democracy, not an assault on it.

—David Luban

This article is excerpted and adapted from David Luban's forthcoming book *Lawyers and Justice: An Ethical Study*.