2013

Representing the Poor Legal Advocacy and Welfare Reform During Reagan's Gubernatorial Years

Mark N. Aaronson
UC Hastings College of the Law, aaronson@uchastings.edu

Representing the Poor: Legal Advocacy and Welfare Reform During Reagan's Gubernatorial Years

MARK NEAL AARONSON*

Justice, justice shall you pursue . . .
—*Deuteronomy* 16:20

* The author's biography immediately follows the Appendix.

TABLE OF CONTENTS

INTRODUCTION

"Welfare reform" was Ronald Reagan's preeminent political issue as California's governor from 1967 until 1975. His views on the welfare system were also a pivotal feature of his campaigns for the presidency, unsuccessfully as a candidate for the Republican nomination in 1976 and successfully in 1980.[1] As governor, he focused mainly on public assistance programs benefitting poor families. Later, as president, he used the mantle of welfare reform, especially its emphasis on welfare fraud, as an ideological wedge to curtail a broader set of New Deal and Great Society social welfare programs.

This Book's empirical focus is the contentious political and legal battle over California welfare reform in the early 1970s. It is an extended, multifaceted case study of a kind not much found in the literature on social

1. For brief overviews of Reagan's political attention to and promotion of welfare reform, see LOU CANNON, GOVERNOR REAGAN: HIS RISE TO POWER 348–62 (2003) [hereinafter CANNON, GOVERNOR REAGAN]; LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 74–75, 156, 517–19 (1991) [hereinafter CANNON, PRESIDENT REAGAN]; EDMUND MORRIS, DUTCH: A MEMOIR OF RONALD REAGAN 368–76 (1999).

cause lawyering. From an analytical perspective, my purpose is to examine, within the context of American pluralism and constitutionalism, the professional and institutional character of group legal representation for the poor as a strategy for political empowerment and social change. While grounded in political and legal history, this study primarily draws on ideas from political science and political theory about representation and from writings in legal ethics and legal education on professional role responsibilities.

The ideas presented here focus on the tangible, not just symbolic, representation of socially vulnerable groups. The principal thematic points are: (1) Social cause lawyering is a systemic necessity for the democratic and equitable functioning of our governing institutions; (2) the constraints on the role of lawyers for groups or causes have more to do conceptually with understandings about the nature of representation than the applicability of ethical or procedural rules;[2] and (3) the political consequences of such legal advocacy are variable and potentially contradictory. The availability of legal representation for the poor structurally serves dual purposes: On the one hand, having legal representation contributes to reductions in political inequities; on the other, because such representation conveys a sense of procedural or institutional fairness, it enhances the legitimacy of governmental actions no matter how limited their effectiveness.

Part I sets the methodological and conceptual framework for this work. In separate subsections, it addresses the contemporary relevance of the case study conducted, discusses arguments against and in support of public funding of policy-based lawyering for the poor, calls attention to several key issues regarding lawyer role morality and self-discipline when representing groups, and provides an initial framework for thinking theoretically about democratic representation and the representational role of lawyers.

Part II presents the lengthy case study narrative along with historical and sociological background information on American political ideology, social welfare policy, and legal assistance programs for the poor. The

2. On the lack of fit between standard ethical rules and professional dilemmas in providing collective representation and counseling, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyer's Representation of Groups*, 78 VA. L. REV. 1103 (1992); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2449 (1999); Paul R. Tremblay, *Counseling Community Groups*, 17 CLINICAL L. REV. 389 (2010). For an analysis of the limitations of individualistic, democratic, and expert-based ethical or procedural approaches for resolving conflicts among group members in civil rights litigation, see William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997); *see also* Deborah Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

narrative highlights the forceful presence of Ronald Reagan and the pivotal role in representing the welfare poor carried out by Ralph Santiago Abascal, a government-funded legal aid lawyer.[3] To counter Reagan's welfare policy ambitions, Abascal with other legal services lawyers relied on court litigation not in isolation but as part of an overall strategy that also involved legislative and administrative actions and consultations with recipient-led welfare rights organizations.

Part III draws conclusions from the case study narrative and employs ideas earlier presented about lawyer role responsibilities as representatives to develop a concept of group legal representation that addresses both professional and political issues. From a professional perspective, lawyers for the poor often have considerable autonomy when acting as policy advocates. Because formal accountability mechanisms tend to be weak, the nature and extent of lawyer responsiveness to client preferences and goals become especially salient. From a political perspective, American governance presumes the pluralistic participation of all affected groups in the development and implementation of public policies.[4] In a nation which centrally values governing under the rule of law, efficacious participation also involves having competent legal representation.

I. PERSPECTIVES ON LAWYERING FOR SOCIAL CHANGE

A. THE CASE STUDY AND ITS CONTEMPORARY RELEVANCE

Almost four decades ago, I submitted my doctoral dissertation in political science on the changes then occurring in public assistance policy and administration, which in part were in response to aggressive legal advocacy on behalf of welfare recipients.[5] While the dissertation incorporated background perspectives on national developments affecting welfare policy and government funding of legal services for the poor, its empirical focus was on changes in welfare policy and administration at the beginning of Reagan's second term as California's governor. In this Book, the empirical thrust of the narrative is to examine the role and effectiveness of group legal representation at that time as a policy advocacy strategy for protecting and advancing the interests of the welfare poor.

---

3. Throughout this work, I use the terms "legal aid" or "legal services" lawyers generically as a shorthand for lawyers who represent poor clients but are not directly paid by them. In the 1970s, most of these lawyers worked for nonprofit organizations largely funded by the federal government. Much more of this work is now done with funds received from charitable contributions, foundation grants, and other nonfederal sources.

4. *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

5. Mark Neal Aaronson, Legal Advocacy and Welfare Reform: Continuity and Change in Public Relief (1975) (unpublished Ph.D. dissertation, University of California, Berkeley) [hereinafter Aaronson, Legal Advocacy and Welfare Reform].

In conducting the original research, I relied heavily upon open-ended interviews with legal services attorneys, federal, state, and county public officials, and others actively engaged in welfare lobbying or organizing. A little more than half of the interviews were with former or then current California officials. All together, over a two-year period, I conducted interviews with thirty individuals. Among those whom I interviewed was Ronald Reagan.[6]

The person most critical in facilitating my research was Ralph Santiago Abascal. From 1970 until 1975, he headed a welfare policy advocacy unit as Director of Litigation at the San Francisco Neighborhood Legal Assistance Foundation. Working with a network of other antipoverty attorneys and in alliance with grassroots welfare and disability rights organizations, Abascal functioned during this period as the key representative for the welfare poor in clashes over Reagan's proposals for welfare reform. He was the lead lawyer and primary strategist for welfare recipient interests in state and federal court litigation, in lobbying and working with California legislators, and in various administrative proceedings and interchanges. In numerous hours of discussion, Abascal guided me through the ins and outs of welfare law and politics including some explication of the tactical considerations and legal and political objectives that he had in mind at different junctures.[7]

There are a number of reasons for my now revisiting and augmenting the dissertation's case study. The first has to do with a shift in narrative perspective. When I wrote the dissertation, Abascal was my primary field research contact and informant. I was not then focusing on issues of representation. In this reworking, his direct role as the chief architect of the counter-campaign to Reagan's welfare reform measures is the narrative's linchpin. I now look to Abascal as a role model for today's

6. The interview took place in Oakland, California, on March 6, 1975, shortly after Reagan left office as California's governor. To arrange the interview, I did nothing more than write Reagan requesting an interview to talk about his welfare policies. One of his aides contacted me and arranged for me to meet with him immediately before a luncheon speech at a downtown Oakland hotel. I spent approximately forty-five minutes with Reagan sitting across a table with no one else present most of the time. He had good recall of specific events and the reasons for his actions. Throughout, he was exceptionally gracious and charming. The written transcript of this tape-recorded interview is included as an appendix at the end of this work.

7. Abascal began practicing law in 1968 when he was thirty-four. He was a graduate of the University of California, Hastings College of the Law. Prior to law school, he had been a graduate student in economics at the University of California, Berkeley, where he had previously earned an MBA. He spent two years in the U.S. Navy in his early twenties. He was twenty-seven when he obtained a B.S. degree from San Jose State University in 1961. Abascal had a formidable intellect continually honed by extensive reading in the social sciences and liberal arts as well as in the law. Rumpled and unpretentious in manner, he carried himself in a way that exuded legal and political wisdom beyond his years. He spent most of his career at California Rural Legal Assistance ("CRLA"), initially as a staff attorney and then returning as the long-time General Counsel. Abascal died of stomach cancer in 1997 at age sixty-two.

activist lawyers concerned about social justice, as he was for those with whom he worked when he was alive.

What Abascal had was good practical judgment. At the nub of his character and style as a lawyer was his sense of presence and his ability to be responsive and flexible, not formulaic and absolutist, in how he worked with and for clients as their representative. Judgment, a subject about which I have written elsewhere, is contextual.[8] It requires broadly drawing on knowledge and experience while tailoring actions to meet specific circumstances. Context is especially critical in understanding the opportunities and limitations in pursuing strategies for social change, especially the roles undertaken and the choices made by lawyers.[9] Abascal's actions in countering Reagan's welfare agenda serve as a lengthy example of what it means to exercise good lawyering judgment in challenging political times.

The second reason for reconsidering the case study has to do with academic discourse. In the intervening decades, a body of literature both in the social sciences and in law has been produced that questions the appropriateness and effectiveness of a largely lawyer-executed approach to social advocacy for relatively weak demographic groups. It was this type of strategy that was in play during the battle over welfare reform in California in the early 1970s.

In the social science literature on law and social change, the predominant tendency has been to describe and then dismiss policy-oriented litigation strategies for the poor, minorities, or ordinary citizens as largely shortsighted, counterproductive, or ineffective.[10] These studies mainly criticize the effectiveness of public policy litigation viewed in isolation. In other words, these critiques take social cause lawyers and courts to task for being overly confident about what can be expected from litigation alone and as not being sufficiently attentive to institutional limitations and consequences. A few studies have shown,

---

8. Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247 (1998) [hereinafter Aaronson, *We Ask You to Consider*]; *see* Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1 (2002) [hereinafter Aaronson, *Thinking Like a Fox*].

9. "The real issue is, what kind of lawyers, in what kind of relationships with community groups or movements, using what sorts of strategies, makes sense in which contexts?" JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 281 (2006).

10. *E.g.*, MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (2d ed. 2008). In a review of Rosenberg's book written shortly after its initial publication, Malcolm Feeley provides a thoughtful and nuanced analysis of why this extensively cited work is both important and wrong. Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 LAW & SOC. INQUIRY 745 (1992). For works still critical of group legal advocacy but more attentive to circumstantial differences, variations, and consequences when relying on judicial intervention to achieve social change, see ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001), and GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS (2009).

however, that this now conventional position is overblown.[11] Having some faith in the utility of litigation does not mean that the involved lawyers were unmindful of other considerations and the importance of companion strategies, such as grassroots mobilization, legislative lobbying, and media campaigns.[12] Recently, some of the social science critiques themselves have begun to be criticized as not taking into account enough specific historical contexts. The criticism is that the thesis-driven nature of these works results in a failure to fully appreciate the complexity of the circumstances, variability, and impacts of litigation strategies for social change.[13]

In the legal literature on the role of lawyers, there has been a strong emphasis on client-centered and collaborative lawyering.[14] These theories of professional practice underscore the importance of direct client involvement in the decisions made and actions taken by lawyers. The formative perspectives that underlie these theories derive from concerns about how lawyers interact with and treat clients when providing individual representation. When the subject is policy impact group representation, this literature criticizes the use of litigation in isolation and without meaningful client engagement in a collective push for social change.[15] In the works on group representation, the examples of lawyers acting most responsively in interactions with clients usually involve social change struggles at the local level.[16] Not much attention has yet been paid to examining shifts and variations in the role responsibilities of lawyers and their relationships with client groups when the causes require concerted and protracted engagement at state and national levels of involvement.

My empirical case study presents a multidimensional, detailed story of a kind still not much found in published form. The actions undertaken

---

11. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORMS AND THE POLITICS OF LEGAL MOBILIZATION (1994); HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT (1996).

12. *See* Michael W. McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261 (Austin Sarat & Stuart Scheingold eds.,1998); *see also* Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 509 (1999) (concluding, based on sixty-nine semistructured interviews with Chicago civil rights and antipoverty lawyers in 1993 and 1994, that the lawyers "used litigation as part of an arsenal of strategies for securing favorable direct and indirect benefits for clients").

13. *See* Kenneth W. Mack, *Law and Local Knowledge in the History of the Civil Rights Movement: Review of Tomiko Brown-Nagin, Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement*, 125 HARV. L. REV. 1018 (2012).

14. *E.g.*, DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (3rd ed. 2012); GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VIEW OF PROGRESSIVE LAW PRACTICE (1992); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000).

15. For an extensive compilation of these writings, see Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1383–84 n.1 (2009).

16. *E.g.*, Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927 (2007).

did not involve just litigation but a sophisticated mix of legislative, administrative, and judicial advocacy along with grassroots organizing. Aggressive legal representation is neither a panacea nor appropriate in all situations. But when employed astutely, it can play a significant role in the empowerment of vulnerable groups. My hope is that the complexity of the study's story will spur others to develop or refine their own analyses about the competing considerations and perplexities inherent in social cause or policy-directed lawyering.

My third and last reason for turning back to this case study is analytic. The theoretical emphasis in my dissertation was on changes in welfare policy and administration. Here, the analytic focus is different. The case study provides instead a factual context for examining the concept of legal representation when external mechanisms for holding lawyers accountable to clients are weak or nonexistent. In framing the issues, I borrow and modify ideas about democratic political representation and apply them to social cause lawyering where the representatives are not elected public officials but lawyers who are not paid by the clients represented. Typically, these situations involve lawyers who work for nonprofit organizations funded variously by the government, foundations, and individual donors. Such circumstances also may involve law school clinics and lawyers in private practice. The latter may be volunteering their services for free or taking a risk that statutorily or judicially authorized fees paid by an opposing party will be forthcoming.[17] In the voluminous literature on legal professionalism over the last several decades, there is scant attention paid to rethinking the *concept of representation* when, as with Abascal, lawyers not financially dependent on clients engage in social advocacy on their behalf. What does representation entail when those being represented do not have the usual controls for influencing and constraining the actions of representatives?

Before preliminarily approaching this question, I want to address the continuing controversial nature of government-funded group legal representation that involves development and implementation of public policies. To clarify what is at stake analytically, I turn first to what distinguishes group representation from individual representation functionally. I then address several politically significant but for the most part shallow criticisms of antipoverty policy impact lawyering.

17. For an overview regarding funding of public interest litigation, see Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URBAN L.J. 603 (2009).

B. THE POLITICAL CONTROVERSY OVER POLICY IMPACT LEGAL ADVOCACY FOR THE POOR

Legal advocacy for the poor encompasses both individual representation and group representation. The former mainly involves providing direct assistance to an individual in resolving disputes, such as a landlord-tenant problem or a denial of Social Security benefits, and in planning for future events, such as preparing a will, a tax filing, or an application for housing. One-on-one representation is what most legal aid lawyers do most of the time and usually is not controversial. Group representation covers various collective activities, such as legislative lobbying or class action litigation, that are utilized to advance the shared interests of the poor or a segment of the poor. These efforts have continually been mired in controversy.

The distinction between individual and group advocacy becomes blurred when a series of individual actions also are intended to generate systemic pressure for institutional change. In the late 1960s, for example, welfare rights groups aided by legal aid attorneys initiated campaigns to encourage the mass filing of individual claims for special needs allowances as a pressure tactic to increase benefits across-the-board for impoverished families. An important part of the campaigns was the filing of administrative fair hearing appeals when initial special allowance requests were denied for items such as school clothing for children or furniture destroyed because of a fire.[18] Though the distinction between individual and group representation breaks down at the margins, it is useful for underscoring this Book's focus on group representation, not individual assistance.

1. The Functions of Group Legal Representation

The major functions of group legal representation are (1) influencing policymaking; (2) policing compliance with law; and (3) empowering represented groups. In practice, these functions are not independent of one another but are complementary. They overlap and in the best of circumstances reinforce each other.

Influencing policymaking has constitutional, statutory, and regulatory aspects. While judicial strategies to advance the constitutional rights of the poor are part of the policymaking mix, the social welfare policies that are the focus here are overwhelmingly statutory in origin. Landmark constitutional cases are rare. The bulk of policy advocacy concerns the enactment and interpretation of fairly specific, often

18. FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA 63–87 (2007); MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 41–49 (1993).

technical legislation and regulations. The interpretative work is carried out within administrative agencies and by the courts.

Closely related to the policymaking function is the policing function. It is an especially crucial but often overlooked component of effective group representation, particularly with respect to social welfare programs that seek to redress inequities within society and the economy. The implementation of such programs usually entails considerable public costs and relies on bureaucratic processes and procedures. There are recurring opportunities for the exercise of administrative discretion. Such discretion is often subject to political, bureaucratic, and fiscal pressures. Adherence to and implementation of a legislative enactment or court ruling are rarely straightforward in practice. Indeed, the opposite—bureaucratic disentitlement—is a more likely phenomenon.[19] Involved lawyers need constantly to monitor and enforce administrative agency compliance with the law.

Together, the policymaking and policing functions involve first obtaining and then securing tangible public benefits for a particular group. The benefits themselves seek to improve the life circumstances of the group and may be substantive or procedural. An example of the former would be an expansion in public aid eligibility for families with children to include two-parent as well as one-parent households. An example of the latter would be the recognition of a right to a fair hearing before the termination of someone's public aid benefits.

The empowering function is analytically difficult to describe and to assess. It has both sociological and psychological dimensions. Sociologically, the key questions concern the extent to which specific representative actions enhance the political competence of the represented group—that is, its ability to shape and to protect favorable political and legal gains and to prevent and to limit adverse political and legal developments. Psychologically, the issues pertain to states of consciousness and feelings about one's experience and efficacy when acting in a public way as a member of a constituent group. The reality and sense of participation in group advocacy run the gamut from intense engagement of the sort generated by directly planning and participating in public demonstrations to relatively unengaged and passive involvement, such as being a named representative in class action litigation.

Active participation in public affairs in and of itself adds an important dimension to one's life experiences.[20] When widespread, it can contribute significantly to the effectiveness of a constituent group. Yet empowering

19. *See* Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 20 (1984) (describing "bureaucratic disentitlement" as practices and decisions made at low levels within the bureaucracy that negatively impact welfare recipients).

20. ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

individuals is not just the result of what they do directly for themselves. There is an important and necessary place for representation, especially in a society as populous and institutionally complex as ours. While knowing how to fish is valuable and pleasurable, the fundamental need is to eat well whether the food on the table comes from one's own labor or that of others.

2. *Separating Political Rhetoric from Serious Analysis*

Twenty-five years ago, David Luban confronted head-on the main political attacks against legal services for the poor as part of a far-ranging and thought-provoking discussion of professional legal ethics and the pursuit of justice.[21] Luban's ideas regarding ethical reasoning are starting points for my own discussion of the role responsibilities of lawyers when collectively representing clients in policy impact advocacy. I turn to them in the next Subpart. In this Subpart, I track his thought to separate out largely politically motivated, rhetorical arguments against group legal services for the poor from serious analytic and practical concerns about lawyering practice in policy advocacy situations.

Staunch critics of group legal advocacy for the poor have used two main arguments when seeking to condition and defund federally supported legal services. The first argument is that there is something wrong in allowing public funds to be used to support lawyers who advocate for social causes and challenge government actions.[22] This contention, while not without political appeal, is an overly simplistic critique of the legitimacy of utilizing legal advocacy as a form of political action to advance public policy objectives. The second argument is that lawyers for the poor act on their own agendas and not the agendas of those purportedly represented.[23] This assertion, though often employed glibly, raises potentially troubling but resolvable concerns regarding constituent and client control over representatives and representational responsiveness to client interests.

Luban initially characterizes the government funding argument as the *taxation objection*—that is, public funds should not be used to pay lawyers to represent only one side in hotly contested policy matters.[24] He regards the thrust of this objection as not so much about the expenditure of government funds supporting one side rather than another, as about how the money is spent and who benefits. In Luban's view, the hostility expressed mainly is directed at the positions taken by antipoverty lawyers, which often are contrary to majority preferences and reactions, and which

21. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).
22. *Id.* at 302.
23. *Id.* at 303.
24. *Id.* at 304.

typically benefit relatively weak, non-mainstream or minority interest groups.[25] Such criticism has been especially strong when legal services lawyers have relied on courts to check legislative and executive actions. Not surprisingly, the most persistent opponents of federally supported legal services have been political conservatives, who rail against what they characterize as "a radical political and social agenda" carried out by government-funded lawyers with the complicity of an activist liberal judiciary.[26]

The argument emphasizing funding per se has been largely a pretext.[27] Luban contends that it is the perceived frustration of majority will, not any unfair use of federal dollars, that is the main motivating factor for conservative opposition to the federal legal services program. The taxation objection is primarily about majoritarian disdain for policy measures that favor the poor. Accordingly, it devolves to what Luban terms an *objection from democracy*, an objection which he considers profoundly misguided. As he puts it, "the objection from democracy misunderstands the nature of democracy" in the United States.[28]

American governance is not just about majority rule and accountability. The Constitution establishes three coequal branches of

---

25. *Id.* at 305–06.

26. *Id.* at 297–302; *see* BRENNAN CTR. FOR JUSTICE, NYU LAW SCHOOL, HIDDEN AGENDAS: WHAT IS REALLY BEHIND ATTACKS ON LEGAL AID LAWYERS? (2001).

27. Compared to overall federal expenditures, which for fiscal year 2011 were estimated at around $3.8 trillion, the amount spent on federally supported legal services for the poor has been and remains a relative drop in the bucket. This is not to say, however, that the advent of federally supported funding for legal services through the Office of Economic Opportunity ("OEO") as part of President Lyndon Johnson's War on Poverty has not made a difference in the availability of civil legal aid for the poor. In the early 1960s, civil legal aid societies nationally employed the equivalent of 400 full-time lawyers and had a combined annual budget of about $4 million, mostly from private charities. EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 9 (1974). By 1970, the annual budget for OEO Legal Services was $53 million. That year 265 separately funded private nonprofit agencies operated 934 neighborhood offices, employed 2,000 attorneys, and served 900,000 clients. *"Historical Data: Office of Legal Services," Appendix to the Statement by Donald Rumsfeld, OEO Director, Before the H. Comm. on Education and Labor*, 91st Cong. (1970). But federal funding for legal services has not appreciated much in real terms over the years. The fiscal year 2011 budget for the Legal Services Corporation ("LSC"), the entity established in 1974 as the successor agency to OEO Legal Services, is $404 million. Brennan Ctr. for Justice, NYU Law School, Legal Services E-lert (Aug. 1, 2011) (on file with author). As part of the FY 2012 budget process, one House subcommittee has proposed a $300 million annual LSC budget, a 26% cut from the previous year. *Id.* The $300 million figure barely accounts for a more than 450% increase in the overall rate of inflation between January 1971 and January 2011, let alone increases in the poverty population eligible for such assistance, which in 2011 was at an all-time high of 63 million people. *Id.* "In 2010, LSC-funded programs closed 932,406 civil legal aid cases, including 321,000 cases involving family law issues, such as domestic violence, and more than 235,000 cases involving housing matters, such as evictions." Brennan Ctr. for Justice, NYU Law School, Legal Services E-lert (July 26, 2011) (on file with author). While clients served and cases closed are different metrics, it does appear that the LSC-funded caseload overwhelmingly involves providing individual assistance and at a case level not much different than forty years ago.

28. LUBAN, *supra* note 21, at 304.

government and a complicated multitiered federal system. This constitutional framework is specifically designed to protect minority interests from the tyranny of the majority.[29] Such protection, as envisioned and in reality, importantly depends on the independence of the judiciary and an overarching commitment to the rule of law as a governing political as well as legal principle. Constitutional values and limitations affect how government operates in virtually all circumstances. There is an interweaving of law and politics without clear separation, and, as a result, courts wind up exercising political as well as legal functions.

No one questions that wealthy individuals and corporations are able to use lawyers to represent their policy interests in courts, before legislative bodies, and in administrative proceedings.[30] The idea of policy impact legal advocacy for the poor is entirely consistent with American constitutional democracy, especially if one takes seriously the notion of "equal opportunity" as a paramount legal and governing principle. Indeed, the absence of such representation distorts and undermines the basic operation and essential fairness of this nation's commitment to political pluralism and an adversarial system of justice.[31]

Yet critics of legal services for the poor, mainly from the right, have been very effective in imposing and retaining restrictive conditions on the receipt of federal funding. Initially, the focus was on hot-button political issues like abortion, school desegregation, and the military draft.[32] In 1996, Congress enacted a highly onerous and sweeping set of conditions, which included prohibitions on attempting to influence rulemaking or lawmaking, participating in class actions, requesting attorneys' fees under applicable statutes, challenging welfare reform measures, and using nonfederal funds on federally restricted activities.[33] After President Barack

29. THE FEDERALIST No. 10 (James Madison) ("The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection").

30. For a classic, historical study on the role of corporate lawyers in support of the policy agenda of major American corporations, see BENJAMIN J. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942). For a discussion of how corporate interests have shaped the Supreme Court since the 1970s, see Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38; *see also* Confidential Memorandum: Attack on the American Free Enterprise System, from Lewis F. Powell, Jr. to Eugene B. Snydor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971), *available at* http://www.pbs.org/wnet/supremecourt/personality/sources_document13.html (last visited Apr. 2, 2012).

31. *See* David Luban, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209 (2003).

32. *Id.* at 221.

33. Omnibus Consolidated Recissions and Appropriations Act, Pub. L. No. 104-134, § 504(a) (2)–(4), (7), (13), (16), (19)(d), 110 Stat. 1321-54 (1996); 45 C.F.R. §§ 1610.1–.9 (1997); Cummings & Rhode, *supra* note 17, at 620; Luban, *supra* note 31, at 221. In a reelection year for President Bill Clinton, his Democratic administration had no interest in taking on a Republican-controlled Congress over legal services for the poor. Generally speaking, issues directly affecting the poor and not also other constituencies are of no salience to most voters and legislators. *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008).

Obama's election, there was briefly some movement in Congress to remove these restrictions.[34] The political will to remove such restrictions has now largely faltered.

Practically speaking, there is little question that the attachment of such strings adversely affects opportunities for the poor to participate in policymaking. The restrictions on the appropriation of funds compounded by continued underfunding have serious detrimental effects on the ability of the poor to raise political and legal claims. Whether framed as a taxation objection or an objection from democracy, the first argument against government-funded group advocacy for the poor overlooks structural barriers and ignores reasonable aspirations regarding effectively participating in the American political system.

The second argument against legal services programs for the poor questions the connection of the issues being raised to those being represented. Its roots lie in the discretion exercised by lawyers in determining what cases to handle and how to handle them. The first component of this argument focuses on agenda setting and decisions about resource allocation. The second component looks to the role of clients in making specific case decisions.

Luban describes the concern over agenda setting as the *equal access objection* because its proponents have emphasized that the time spent on impact work operationally diverts attention from meeting the needs of individual clients, who otherwise might receive legal assistance and improved access to the legal system.[35] Underlying this argument are contentions that legal services lawyers should only take individual cases that clients bring them, and that supporting policy impact work gives lawyers too much autonomy. Since inevitably there will be limits on the number of cases taken by legal services programs, the core of the objection is the supposed lack of boundaries on attorney discretion. Luban proceeds to show that the real concern is not about access to legal assistance but the autonomy of legal services attorneys in case-acceptance decisionmaking.[36]

Tradeoffs regarding what work to undertake occur in all legal practices. There are always financial, expertise, time, and resource considerations to take into account. Exercises of discretion over which clients to represent and what cases to take are not unique to antipoverty law. For most private practitioners, client and case selection decisions are

34. As part of the LSC budget for FY 2010, Congress lifted the restriction that had barred LSC grantees from seeking court-awarded attorneys' fees from opposing parties. President Barack Obama also had urged Congress to repeal the restrictions on participating in class actions and using non-LSC funds on LSC-prohibited activities. Brennan Ctr. for Justice, NYU Law School, Legal Services E-lert (Feb. 5, 2010) (on file with author). With a Republican majority having taken control of the House of Representatives in 2011, any further removal of restrictions in the near future is unlikely.

35. LUBAN, *supra* note 21, at 303.

36. *Id.* at 306–16.

presumed to be within their prerogative, even though the choices made have individual and societal consequences.[37] In determining whom to represent, private practitioners are free to establish their own business plans. The issue here is what is different about case selection decisions in a legal services practice.

The most obvious difference is the source of funding. Poor people do not personally pay for the legal services received so that there are not the usual free-market, client-choice checks on what lawyers undertake. In terms of financial pressure affecting agenda setting, a legal services program's main concerns are satisfying the requirements or appealing to the interests of public agencies, private foundations, or individual donors. The conditions imposed by external funding agencies do constrain program discretionary management of cases and projects. But going after funds is not an end in itself in most legal services practices. It generally reflects something larger than the specific matters undertaken.

The real difference in case selection decisions for legal services programs—as compared to private practice—is the importance of *mission*, which affects both what funding to seek and what services to offer. While financial viability is crucial, legal services programs for the poor are primarily mission driven, not business driven.

In promoting a nationwide program while seeking to affect local agenda setting, the initial administrators of federally supported legal services had a twofold mission: expand the availability of individual legal services and cultivate law reform work.[38] The latter when originally coined was an intentionally open and malleable concept.[39] The notion of law reform has since served as a shorthand reference for various forms of policy impact advocacy and supportive community organizing. In 1967, a Senate committee report acknowledged and endorsed the high priority

37. There are ethical rules covering the avoidance of conflicts, declining and terminating representation, and a lawyer's undertaking of law reform activities. MODEL RULES OF PROF'L CONDUCT R. 1.7–.12, 1.16, 6.4 (2002). However, no specific ABA ethical rule governs how a lawyer chooses and shapes a practice area.

38. JOHNSON, *supra* note 27, at 132–34. Earl Johnson, Jr., was the deputy director and then director of OEO Legal Services during its early years. He later became a California Court of Appeal Justice. For a nonparticipant's perspectives on the various factions and interests involved in the establishment and development of OEO Legal Services, see Richard M. Pious, *Policy and Public Administration: The Legal Services Program in the War on Poverty*, 1 POL. & SOC'Y 365 (1971), and Richard M. Pious, *Congress, the Organized Bar, and the Legal Services Program*, 1972 WISC. L. REV. 418.

39. In a never officially issued draft instruction (#6140) from the late 1960s, OEO's Office of Legal Services described law reform activities as follows: "Law reform . . . means appellate litigation, legislative change, innovative action at the trial level, group development and representation, economic development and other creative or innovative concepts designed to make a substantial impact on more than an individual client and the cycle of poverty." Aaronson, Legal Advocacy and Welfare Reform, *supra* note 5, at 56 n.10.

placed by Office of Economic Opportunity ("OEO") administrators on law reform along with individual service delivery.[40]

Nonetheless, questions have been raised from the beginning about the feasibility and consequences of such a dual focus. Some critics feared that the involvement of government-funded lawyers in policy impact activities would negatively affect real grassroots participation because short shrift would be given to directly empowering client groups.[41] Others doubted the organizational capacity of legal services programs to do both and disputed the need for and effectiveness of engaging in law reform activities.[42]

There are always practical implementation issues regarding the competing responsibilities of legal aid lawyers. How wisely a dual focus on individual service and law reform gets carried out is one thing; calling into question the legitimacy of lawyers acting on their own mission-driven agenda is quite another. The thrust of Luban's position is that criticisms of law reform as a legal services program priority should not be taken as presenting credible arguments against the institutional legitimacy—constitutionally, pluralistically, or ethically—of providing full-service representation to poor people on policy issues as well as individual matters.

Considerations of mission no less than financial considerations are well within the professional autonomy accorded lawyers to determine their own practice area and case priorities. For legal services programs, the extent to which clients participate in such decisionmaking is a prudential not ethical matter. Without ethical grounding, the equal access objection loses most of its force. The fundamental administrative dilemma, whether in providing national funding or in managing service delivery programs, is always about how to best use limited legal resources for what purposes, for which there is no single pat answer.

Looking ahead to the narrative section, nothing done by Ralph Abascal and his legal services colleagues in confronting Ronald Reagan's state welfare reform initiatives was very different from what privately paid lawyers typically do when representing clients with political issues.

---

40. "[T]he legal services program can scarcely keep up with the volume of cases in the communities where it is active, not to speak of places waiting for funds to start the program. The committee concludes, therefore, that more attention should be given to test cases and law reform." S. Rep. No. 563, at 40 (1967), *as cited in* Johnson, *supra* note 27, at 133.

41. *See* Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970); *see also* Harry Brill, *The Uses and Abuses of Legal Assistance*, 31 THE PUB. INTEREST 38 (1973).

42. *See* Geoffrey Hazard, Jr., *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969); Geoffrey Hazard, Jr., *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242 (1970) (arguing that remedying legal wrongs suffered by the poor may benefit individuals but is not a strategy for the alleviation of poverty). For later arguments why legal services lawyers should do individual client work only and not policy or law reform directed work, see CHARLES K. ROWLEY, THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES (1992).

The only unusual development in the story to be told is the breadth and extent of representation provided the welfare poor, which was at a level typically available only to wealthy and corporate interests. Like the taxation and democratic objections, the equal access objection reflects a distorted understanding about the role and functions of legal advocacy in a representative democracy.

To the extent there are troubling issues to be addressed, Luban finds that they fall under what he calls the *client control objection.*[43] The worry is that in policy impact work, "lawyers rather than clients are calling the shots."[44] An integral related concern is the correspondence between what lawyers consider to be in the client group's interest and how group members perceive their interests.[45] The critical issues are the terms and mutual expectations that circumscribe lawyer and client relationships when advocating for groups. In the next Subpart, I address Luban's response to the client control objection by highlighting and explicating his perspectives on lawyer role morality and the dynamics of group representation.

C. On Lawyer Role Morality and Self-Discipline in Representing Groups

At the heart of the client control objection are fears about unbridled attorney discretion. In tempering such concerns, Luban places a heavy emphasis on lawyer self-awareness and self-discipline. He is confident that if legal services and other similarly situated lawyers "take proper precautions, the client control objection disappears."[46]

I share much of his optimism that with increased lawyer self-awareness, the client control objection loses much of its force as an objection to the broad discretion potentially wielded by attorneys in social cause lawyering. That is not to say, however, that the absence of meaningful client participation is not a matter of concern. The relative

---

43. Luban, *supra* note 21, 303.

44. *Id.*

45. This latter concern is central to revisionist critiques of the desegregation litigation strategy used by the NAACP especially in the aftermath of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). *See* Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale. L.J. 470 (1976). Such critiques question African-American grassroots support for the NAACP strategy of integrating public schools. A recent exhaustive historical study of the civil rights movement in Atlanta indicates that the views of affected African Americans reflected differing interests and were not of one mind. Tomiko Brown-Nagin, Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement (2011). Black middle-class teachers and principals feared the loss of teaching, administration, and clerical jobs held by African Americans at segregated schools, and also viewed the teaching of African-American children by only white teachers at integrated schools as further "white domination." Poor black parents, however, viewed desegregation as a way to get a better education for their children. *Id.* at 346–58, 370–71. The picture on the ground for lawyers representing any large group is often riddled with competing concerns and objectives that are not neatly reconcilable.

46. Luban, *supra* note 21, at 304.

passivity of a represented group may well be indicative of situational circumstances that do have an effect on the extent to which legal advocacy contributes to a group's empowerment.[47]

In developing his ideas about lawyer self-discipline, Luban has a strong concept of professional role morality as being different from ordinary private morality but as requiring careful justification.[48] He rejects what he considers the dominant picture of role morality, which is that a lawyer's societal role and duties within an adversary legal system alone are sufficient to excuse professional actions contrary to common norms and expectations.[49] Provocatively, he forcefully defends lawyers who engage in policy impact advocacy even when they recruit and manipulate clients, take actions opposed by a majority of those represented, and handle cases in light of their own political theories.[50] Because such advocacy is a form of political action, Luban underscores that lawyers may have to get their hands dirty—that is, to say and do things that are distasteful and questionable. He also emphasizes, however, that they should do so only under appropriate conditions and within bounds. For Luban, lawyer role morality is not amorality. Moral aspirations and constraints have a place, but a lawyer's mandates and proscriptions are different from ordinary morality. The critical factor is the quality of one's moral reasoning in specific circumstances.

As a general framework applicable to all lawyering situations, Luban sets forth a four-step process of reasoning to determine whether there is a sufficient excuse for departing from ordinary morality. This system of reasoning involves explicitly considering, sequentially as appropriate, logical linkages between (1) the importance of the role act to carrying out role obligations; (2) the essentiality of the role obligations to the role being performed; (3) the critical nature of the role for the operations of an institution or in support of a cause; and (4) ultimately the moral goodness of the institution or cause itself.[51] The professional legitimacy of the conduct in question depends on the centrality and worthiness of what is at stake at each level in the analysis. To illustrate how to apply this method of reasoning, I provide first an example involving individual representation. I then discuss the relevance of Luban's framework to group representation.

---

47. *See infra* text accompanying notes 446–48.

48. Luban's thought draws on a philosophically sound though not stereotypical interpretation of Machiavellian political theory. For a thought-provoking interpretation of Machiavelli with respect to the special morality required of political actors, see SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 200–05 (expanded ed. 2004).

49. LUBAN, *supra* note 21, at xix–xx.

50. *Id.* at 317.

51. *Id.* at 131.

An example of a morally debatable role act in the context of individual representation would be the harsh, incriminating questioning of a rape victim by defense counsel for an accused rapist. To justify the damage that might be done to the victim's psychological well-being and reputation, one would first analyze the necessity of such questioning as a cross-examination technique—the pertinent role obligation. If a sufficient justification could not be determined at that level, one would move to the next level, where one would address the critical value of cross-examination in the defense of a client. If even further justifications were necessary, one then would consider the importance of defense lawyers to the functioning of an adversarial legal system. The last appeal for morally justifying what would ordinarily be reprehensible behavior, especially if there were little factual basis to support insinuations of the witness' sexual history, would be to the capacity of the particular adversary system for resolving disputes justly. Keep in mind, however, that at each stage such justifications for departing from broadly shared moral values may be insufficient. A legal regime that systematically oppressed women would not have the overall moral credibility to provide a counter institutional interest to a devastating legal attack on a female victim in a specific case.

As applied to lawyering for social change, Luban's overall framework draws attention (1) to specific role act dilemmas in representing groups or constituencies, (2) to the kinds of role obligations typically assumed by lawyers in policy impact actions, (3) to the weightiness of the roles played by lawyers in interest group advocacy within the American system of governance, and (4) to the moral worthiness of American constitutionalism and pluralism including the capacity to encourage and support broad political participation.

With respect to the client control objection, the main focus is on steps one and two and the linkages between them. The issues mostly concern the kind of role dilemmas that arise in group representation and how their resolution comports with a lawyer's responsibilities and allegiances as an advocate in different policy arenas.

Luban specifically addresses two recurring dilemmas. The first dilemma, which is typical in social cause lawyering, has to do with the split loyalty of mission-driven legal services programs. The attorneys involved usually are committed to both clients and a cause. The second dilemma, which occurs in other representational circumstances as well, is that within any group represented, there are likely to be conflicts among its members regarding what to do. Luban describes the first issue as the *double agent problem* and the second as *class conflicts*—a framing which covers class action conflicts in a strict legal sense and other differences and divisions within a group or entity collectively represented.

Luban finds nothing wrong in being committed to a cause as a lawyer. Ethically, lawyers have a strong duty of loyalty to their clients,

but they are never just hired guns. As set forth in the Preamble to the ABA Model Rules, they have additional obligations as officers of the legal system and as public citizens.[52] The latter specifically includes seeking improvement in "the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."[53] Acting on a mission to serve the interests of the poor is consistent with what is expected of a lawyer as a public citizen, but it also complicates decisionmaking and raises difficult issues of professional discretion. In such circumstances, the ABA Preamble admonishes lawyers to exercise "sensitive professional and moral judgment."[54] Working out what this requires in practice is very much what Luban sets out to do when he discusses the double agent problem. The approach he takes involves recognizing and satisfying three tests as integral to one's role obligations as a social cause lawyer.[55]

The key factors for Luban concern the terms on which lawyers act in joint cause with their clients. His objective is to reduce the occurrence of double agent conflicts. His example is a worst-case situation, where lawyers in the interest of the cause manipulate clients, even betraying them by going against what they specifically express as a preference.[56] His method is to impose three major conditions: "(1) the clients also are committed to the cause; (2) the outcome of the manipulation represents the will of the political group; [and] (3) the manipulative behavior is not itself abhorrent to the political group."[57]

Adhering to these constraints is vitally important, and compliance needs to be genuine, not ritualistic. The first condition requires that a lawyer be clear with individuals in the group about the lawyer's own allegiances and the kind of representation being undertaken, while the remaining two place a heavy emphasis on a lawyer's responsiveness to the group's overarching interests and sensibilities regarding tactics and strategy.

With respect to the first point, clients cannot be unaware participants in the effort to achieve policy objectives. They may have an interest in an individual remedy, but they need to realize that the representation they

52. MODEL RULES OF PROF'L CONDUCT Preamble: A Lawyer's Responsibilities [1] (2002). The Preamble is for the most part aspirational. It describes values, principles, and obligations that should be adhered to in carrying out professional role responsibilities.

53. *Id.* at Preamble [6].

54. *Id.* at Preamble [9].

55. For an approach to what it means to exercise professional and moral judgment that also emphasizes contextual reasoning and a lawyer's public obligations but is not so problem specific, see WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998).

56. For a critique of Luban's argument justifying lawyer manipulation of clients to further a cause, see Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 176–89 (1990).

57. LUBAN, *supra* note 21, at 340.

receive is not constrained to only them and that they are joined with others in seeking certain changes in policy or practice.[58] In other words, a bargain of sorts has been struck between the lawyer and the client that the lawyer will act in the interest of the cause over the individual preferences of the client when there is a conflict. As to the second condition, the purpose of the action taken has to reflect some kind of group-based consensus. It cannot be the personal or idiosyncratic concern of the lawyer alone. Regarding the last condition, not all means are permissible. There has to be some common understanding that what the lawyer proposes to do tactically is acceptable to the members of the group being represented.

As a double agent acting in joint cause with a client group, the lawyer in essence has permission to make discretionary decisions on behalf of the group, so long as the group members realize that the lawyer's overriding commitment is achieving the group's goals, the intended result of the action is not objectionable to the group, and the means used are acceptable to the group. These conditions function as constraints on an attorney's discretion. When satisfied, they free lawyers to exercise their independent judgment to determine what courses of action to take to advance the causes and protect the interests of the group represented. In sum, for Luban, to the extent legal services lawyers with dual commitments to clients and causes abide by certain role conditions, they have role-justifiable grounds for acting with a high degree of independence relatively free of direct client control.

In his discussion of class conflicts, Luban begins by emphasizing what he calls the *own-mistake principle*—that is, in a democracy groups are permitted to make their own mistakes provided that those decisions do not violate the rights of others or sound morals.[59] In an idealized representative democracy, representatives adhere to the views of their constituents. In practice, however, a constituency may be insufficiently mobilized, its members may be inadequately informed, there may be considerable uncertainty regarding the consequences of different actions, and there may be conflicting views among existing members and conflicts of interest between present and future generations.

Given that in practice representative relationships fall short of a single idealized version, Luban presents four different conceptions of

58. In discussing social cause lawyering, Luban points in the direction of the importance of informed consent from clients but without using such terminology and without elaboration. Comparing social cause litigation to medical research where patients must give their informed consent before allowing their individual case to be used in a research project, Kevin McMunigal criticizes Luban for not addressing sufficiently the need for informed consent in policy litigation and how obtaining such consent might occur in practice. Kevin C. McMunigal, *Of Causes and Cases: Two Tales of* Roe v. Wade, 47 HASTINGS L.J. 779, 817–18 (1996).

59. LUBAN, *supra* note 21, at 344.

representation applicable to lawyering.[60] Each in turn embraces a successively less direct structure of accountability. The first is *direct delegation*, where the lawyer acts on the actual wishes of class members. In the context of group representation, the group needs to be small enough to consult regularly, which is a rare case in social cause lawyering. The second conception is *indirect delegation*, where the lawyer acts on the preferences of individuals who have been selected by the group as a whole. For this to occur, the group needs to be sufficiently mobilized to choose its own representatives, and there have to be minimal conflicts among those representatives. The third is *interest representation*, where the lawyer consults with class members, for example, named plaintiffs in a consumer class action, whom the lawyer may well have recruited because they seem adequately representative of class interests. A main presumption here is that the interests of present and future generations are not in conflict. The last conception, which Luban terms *best-world representation*, involves lawyers making unilateral decisions and value choices in the best interest of present and future members of a client class in court proceedings or other decisionmaking arenas, where other participants have sufficient institutional reasons for viewing the lawyers as appropriate representatives.[61]

Luban considers *best-world representation* a form of representation because it is part of a process of *responsible representation*, where lawyers exercise self-restraint to bind themselves to the choices of their clients to the greatest extent possible.[62] In his theoretical framing, one defaults to best-world representation as a last resort when conditions are not present to support the other conceptions of representation. Reflective of his approach to role morality generally and the double agent dilemma specifically, Luban regards the deficiencies in client control over attorney actions as minimal and tolerable only when lawyers are highly self-conscious and systematic in how they deliberate about their role commitments. The decisions to be made require attorneys to exercise considerable judgment.

Although not emphasized by Luban, it is implicit in his sense of responsible representation that when lawyers do act on their own, they strive to be empathetic and to account for the views of those represented from their perspectives. Following client wishes consistent with the own-mistake principle is always a reference point. But unlike in a typical case with one person as a client, it is challenging, even practically unrealizable, to obtain consensus directions from client groups, as individual members often have divergent interests and concerns. In most

60. *Id.* at 351.
61. *Id.* at 352.
62. *Id.* at 353.

group representation situations, lawyers need to utilize a good deal of their own critical thinking to determine what needs to take priority. In doing so, however, they still have an ongoing obligation to consider actual group preferences beforehand, whether directly, indirectly, or through surrogates.

In confronting the client control objection to social cause lawyering, Luban concedes that external mechanisms holding attorneys accountable to client groups are weak. Instead, he builds an argument regarding the legitimacy of attorney independence on the need for lawyers to have heightened self-awareness and self-discipline in their interactions with and on behalf of client groups. In my view, Luban overdevelops his ideas regarding role morality to justify actions contrary to the wishes of clients. Actual incidents of betraying members of client groups and acting contrary to their stated preferences are not the norm.[63] Far more common is the erratic mobilization of client groups and the passivity of individual group members. Conversely, he leaves underdeveloped his concept of representation. Drawing on ideas from contemporary normative political theory, I next present some modifications and refinements to Luban's approach to group legal representation as a collective form of political action.

D. A Normative Framework for Thinking About Group Legal Representation as Democratic Political Action

1. *Pitkin on Democratic Representation*

In a seminal book published forty-five years ago, Hanna Fenichel Pitkin comprehensively examines the meaning of representation in a modern democratic state.[64] The book is neither an historical study nor an empirical examination of the behavior of contemporary political representatives or voter expectations about them. Instead, she draws on ideas from traditional normative political theory, most notably from the works of Thomas Hobbes, Edmund Burke, and John Stuart Mills, and utilizes techniques from ordinary language philosophy, to present a

63. Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101 (1996). Southworth interviewed sixty-nine Chicago lawyers in 1993 and 1994. Regarding lawyer dominance of clients in group representation, she wrote, "While it is possible that these lawyers withheld information suggesting that they had manipulated clients in order to avoid implicating themselves in violations of the ethics codes, a plausible alternative explanation is that these lawyers sought to avoid stark conflicts, as they reported, by reaching front-end compromises between their commitments to clients and to causes—by recruiting clients whose interests coincided with the lawyers' plans and by deferring to clients when their interests diverged." *Id.* at 1144–45.

64. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).

conceptual analysis. For Pitkin, "[l]earning what 'representation' means and learning how to represent are intimately connected."[65]

In developing her concept of representation, she directs attention not to "what *causes* people to have a psychological feeling of being represented, but [to] what *reasons* can be given for supposing someone or something is being represented."[66] Her approach is not to focus on issues of agency but to look expansively at what supports or legitimates why someone should be viewed as a representative of another. Though not aimed at lawyering, Pitkin's concept of representation provides, analogously, a suggestive framework for examining those features of group legal representation for the poor that appear to be at odds with conventional suppositions about lawyer-client relationships, particularly those emphasizing client control and accountability.

Toward the end of the book, Pitkin summarizes her understanding of the key elements involved in providing representation to a political constituency as follows:

> The formulation of the view we have arrived at runs roughly like this: representing here means acting in the interest of the represented, in a manner responsive to them. The representative must act independently; his actions must involve discretion and judgment; he must be the one who acts. The represented must also be (conceived as) capable of independent action and judgment, not merely being taken care of. And, despite the resulting potential for conflict between representative and represented about what is to be done, that conflict must not normally take place.[67]

Her conceptualization highlights five characteristics of democratic representation. First, the representative acts in the interest of a constituency. Second, the representative acts in ways that are responsive to the wishes and concerns of a constituency, which involves understanding and accounting for the perceptions of its members. Third, the representative has the autonomy to use discretion and judgment. Fourth, members of the constituency have the capacity and competence to act independently and to exercise judgment. And fifth, notwithstanding the ever-present prospect of conflict between a representative and the represented, actual occurrences of conflict over what to do are unusual.

Pitkin's methodology in developing her concept of representation is to analyze themes. She avoids formalistic definitions. She also de-emphasizes the importance of conceptual problems regarding representational authentication and ratification. Specifically, she downplays the centrality of such issues as how a representative obtains authorization to act, what causes a person to feel represented, and how a

65. *Id.* at 1.
66. *Id.* at 10.
67. *Id.* at 209.

person represented holds a representative accountable. The notion of responsiveness is pivotal but not easily determinable because so much depends on how representatives interact with their constituencies and how they understand and react to conflicting pressures. Representation for Pitkin is neither a simple delegation nor a paternalistic guardianship. It involves real not sham relationships that are not without tensions.[68]

Put succinctly, Pitkin's theoretical approach to representation revolves around the institutional role performed by the representative. Like Burke, she stresses the wisdom of the representative, not the will of the represented.[69] Practical judgment is critical. As with Burke, the preferred reasoning intertwines intellectuality and morality. In real-world application of her thought, both the mind and character of a representative matter a great deal in determining whether there is truly a representative relationship.

Pitkin's conceptual choices have to be understood in light of her main project, which is to develop a concept of representation that distinguishes representative democracies from other forms or claims of representative government, particularly those associated with totalitarian or authoritarian regimes. Her focus is on identifying what reasons can be given for supporting a conclusion that a group of individuals is actually being represented in public matters.[70]

Such a focus shifts attention to how a representative functions within a system of representation. In particular, it opens up discussion for considering factors other than method of selection as a source of democratic legitimation. With respect to interest group representation, a serious additional or even alternative factor is a political body's institutional commitment to having a broad range of representational participation in policy deliberations. If the opportunity for representation is largely symbolic, its worth has very limited practical value for a particular constituency.

From my standpoint, the distinctions Pitkin draws between what lies at the core and what is peripheral in democratic representation provides a roadmap for examining parallel concerns regarding the legitimacy of policy actions undertaken by antipoverty lawyers. While not intended as such, her ideas about representation capture much that is distinctive about policy-impact legal advocacy for the poor.

In looking at policy advocacy lawyering, Pitkin's five basic characteristics of democratic representation can be grouped into three

68. For an insightful discussion of inherent tensions and potential conflicts in the lawyer and client relationship, see GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 153–156 (1978); *see also* Gary Blasi, *Lawyers, Clients, and the Third Person in the Room*, 56 UCLA L. REV. DISC. 1 (2008).

69. PITKIN, *supra* note 64, at 169.

70. *Id.* at 10.

thematic considerations of defining significance. The first goes to an understanding of group legal representation directed at protecting and advancing the interests of a class or constituency, where the role of a representative is to prioritize and act on the concerns of the group as a whole, not the specific preferences of its individual members. The second has to do with the character and quality of legal representation when lawyers have considerable independence and discretion, where what happens largely depends on their responsiveness and judgment. Responsiveness involves how representatives listen to others, how they additionally learn about the needs and desires of a group, and, most importantly, how they internalize and use what they have learned on behalf of the group. Judgment requires practical, critical, morally sound, and non-formulaic thinking and decisionmaking. Pivotal to both responsiveness and judgment is the development of empathy and the ability to garner and maintain trust. The third theme jointly addresses the autonomy of those represented and the avoidance of representational conflict. It involves always keeping in mind that group legal advocacy is not only about achieving substantive objectives, but that the ultimate goal is increasing the legal and political competence while furthering the empowerment of those represented. Accordingly, in responsible group legal practice as in democratic political representation, attorneys need both to respect and account for the capabilities of group members and to act in ways that minimize the occurrence of actual conflicts with them.

Interestingly, much of what Pitkin de-emphasizes corresponds to what is central ethically in the representation of individual clients but what is likely attenuated in the representation of group clients. In individual practice, the extent of representational authorization, the focus on client consultation and control, the need for formal accountability, and the avoidance of internal conflicts of interest among represented clients all are central concerns.[71] Whether they are also similarly central as ethical imperatives for group policy representation is far from clear. Yet, formal rules of professional conduct make little to no distinction between the ethical responsibilities applicable to conventional one-on-one lawyer-client relationships and those applicable to policy impact practice on behalf of groups.

71. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), 1.7 (Conflict of Interest: Current Clients) (2002). For a discussion of ethical parameters as traditionally conceived in representing individual clients, see BELLOW & MOULTON, *supra* note 68, at 52–69.

2. *Applying Pitkin's Thought to Luban's Ideas About Group Representation*

To an important extent, Luban's professional role arguments in *Lawyers and Justice* are directed at compensating for the differences between individual and group representation. One of his key premises is that lawyers, as group representatives, typically have to exercise greater independence of judgment than when they represent individuals. Though his style of moral reasoning is similar in both instances, he frames the justifications and constraints regarding specific role acts differently to reflect the circumstances and the purposes of the representation undertaken. His classification of different types of group representation also presumes that such representation is a distinctive lawyering phenomenon with its own role requirements and ethical boundaries.

The part of Luban's approach that is least developed conceptually is his default claim that *best-world representation* is a legitimate form of group representation. What is most striking initially is that his description of best-world representation lacks any theory of accountability. Further, he fails to spell out what considerations might serve as substitute constraints on attorney behavior. His main proposed check on attorney discretion in such circumstances is a commitment to a method of reasoning as a way to encourage self-discipline and self-restraint. But his method of reasoning is incomplete. There need to be additional guideposts.

Pitkin's multitextured, thematic analysis helps to fill the void in Luban's inquiry. She explicitly emphasizes that in representing the interests of others the important touch points are a representative's responsiveness and judgment, a constituency's autonomy and competency, and conflict avoidance between representatives and represented. These factors or conditions are the ones that need to be examined most closely. Pitkin downplays the conceptual relevance of empirical deficiencies regarding representational authorization, direct client participation, and formal accountability, which are integral to agency conceptions of representation but are attenuated in social cause lawyering.

Where Luban and Pitkin merge is in their shared sense that whether actions of a representative are considered justifiable and legitimate has more to do with the societal importance of the role performed by the representative, and the actual performance of the role, than the extent of delegation and control initiated by the represented. For Luban, this conclusion derives primarily from his ideas about lawyer role morality, while for Pitkin, the conclusion rests on her delineation of what it means to be a democratic political representative.

3. *Four Types of Representation as Derived from Empirical Findings*

Both Luban and Pitkin support their theoretical arguments with examples, but they do not ground their ideas in broad empirical analyses of representation. Jane Mansbridge, a Harvard political scientist, takes a different tack. Though similarly theoretical, she draws on increasingly sophisticated descriptions of how American legislators relate to their constituents to support her own conceptual rethinking of representation.[72] Her conclusions mainly derive from empirical studies that collectively examine both voter expectations about their representatives and the perceptions of representatives about what they need to do to please their constituents. She also references theoretical works on representation.[73]

A major premise of Mansbridge's thought, which she attributes to Pitkin among others, is that "representation is, and is normatively intended to be, something more than a defective substitute for direct democracy."[74] She further explains: "Constituents choose representatives not only to think more carefully than they about ends and means but also to negotiate more perceptively and fight more skillfully than constituents have either the time or the inclination to do."[75] As do Luban and Pitkin, Mansbridge stresses the importance of expectations about the institutional role performed by a representative.

Mansbridge uses findings from various empirical studies to revamp contemporary normative understandings of what constitutes "good" political representation.[76] In developing her ideas, she distinguishes four different types of representation. The first type describes a traditional model of representation, one which has much in common with what Luban, in his fourfold categorization, termed "direct delegation." As applied to electoral politics, this traditional model focuses on the idea that during campaigns representatives make promises to constituents, which they either keep or fail to keep. Mansbridge calls this *promissory*

---

72. Jane Mansbridge, *Rethinking Representation*, 97 AMER. POLI. SCI. REV. 515 (2003) [hereinafter Mansbridge, *Rethinking Representation*]. For other works by Mansbridge on political representation, see Jane J. Mansbridge, *Living with Conflict: Representation in the Theory of Adversary Democracy*, 91 ETHICS 466 (1981) (examining two archetypal forms of representation—a unitary statesman model that focuses on common interests and an adversary model that seeks acceptable outcomes to particular interest group conflicts); Jane Mansbridge, *A "Selection Model" of Political Representation*, 17 J. POL. PHIL. 369 (2009) (positing a "selection model" rather than a "sanctions model" of representation when a representative as an "agent already has self-motivated reasons for doing what the principal wants"); Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"*, 61 J. POL. 628 (1999) (viewing "descriptive representation" as part of a deliberative process and as requiring a contextual weighing of benefits and costs).

73. For a comprehensive list of Mansbridge's empirical and theoretical references, see Mansbridge, *Rethinking Representation*, *supra* note 72, at 526–28.

74. *Id.* at 515.

75. *Id.*

76. *Id.*

representation. She then integrates several decades of empirical work about variations in the actual relationships between elected representatives and constituents to identify three additional types, which she calls "anticipatory," "gyroscopic," and "surrogate" representation.

Though the analytical purposes and consequent framing are different, these three types of representation, when viewed in relationship to one another, parallel Luban's three other conceptions of group legal representation, which he distinguishes by a progressive lessening in direct client control and engagement. For Mansbridge, however, the relationship between representatives and constituents is not so dependent on a single feature. Her emphasis is on the variable and multidimensional nature of the representational relationship.

Mansbridge's capsule descriptions of the three less theoretically acknowledged forms of representation are as follows:

> *Anticipatory representation* flows directly from the idea of retrospective voting: Representatives focus on what they think their constituents [based on their legislative record] will approve in the next election, not on what they promised to do at the last election. In *gyroscopic representation*, the representative looks within, as a basis for action, to conceptions of interest, "common sense," and principles derived in part from the representative's own background. *Surrogate representation* occurs when legislators represent constituents outside their own districts.[77]

Mansbridge regards these four types of representation each as a legitimate form of democratic representation, although only promissory representation follows a classic principal-agent format and meets a conventional notion of democratic accountability. In assessing the legitimacy of representative behavior, she looks to systemic criteria appropriate to the circumstances, not just dyadic accountability criteria that emphasize direct constituent delegation and control. Among the different types, there are important distinctions in the underlying power relation, the role of deliberation, and the applicability of appropriate normative criteria. She readily acknowledges that while highlighting the differences is useful analytically, representative behavior in practice often mixes several of the forms.[78]

In actual situations, different voters may have different expectations about their relationship with their representative, and representatives may view their relationship to constituents in multiple ways. Furthermore, these expectations and perceptions may change over time depending upon the policy at issue, changes in the political landscape, and what is at stake. Representational relationships are variable and fluid.

---

77. *Id.*
78. *Id.*

In promissory representation, the normative criteria track traditional agency norms. The focus is on the will of the represented and a representative's duty to keep promises made in an authorizing election. The underlying conception of power is linear and emphasizes a constituency's ability to get representatives to do something they might not otherwise do and to sanction them if they do not.[79] Promissory representation is consistent with the notion of aggregative democracy, where majority citizen preferences in their aggregate determine what social policies to adopt. The criteria for assessing the other three forms of representation are more complicated and expansive.

In anticipatory representation, there is a temporal reorientation from promises made in a past election to a representative's beliefs about voter preferences in a future election. In Mansbridge's view, this shift in orientation opens up space for increased deliberation and communication, much of it instigated by the representative.[80] Furthermore, it prompts attention to underlying interests, not just preferences, and encourages viewing voters on the upside as educable but on the downside as manipulable. The implicit notion of power is reciprocal and dynamic since it mainly involves mutually influencing future beliefs and predicting anticipated reactions. As characterized by Mansbridge, the incentive structure of anticipatory representation redirects normative focus from the morality of individual promise keeping to an assessment of prudential considerations regarding the quality of deliberation within a representational system. These considerations include minimizing coercive power, equalizing opportunities for access to political influence, addressing interests rather than preferences, discouraging manipulative communication from a legislator, and facilitating quality mutual education between a legislator and constituents.[81] In short, anticipatory representation promotes a more deliberative and less aggregative form of representational democracy.

Gyroscopic representation applies to electoral situations where traditional external mechanisms of accountability are much less relevant. Mansbridge writes,

> In this model of representation, voters select representatives who can be expected to act in ways the voter approves *without* external incentives. The representatives act like gyroscopes, rotating on their own axes, maintaining a certain direction, pursuing certain built-in (although not fully immutable) goals. . . . [They] act only for "internal" reasons. Their accountability is only to their own beliefs and principles.[82]

79. *Id.* at 516.
80. *Id.* at 517.
81. *Id.* at 518.
82. *Id.* at 520.

The democratic legitimacy of this type of representation derives from voter confidence in the commitments and judgment of the representative.

While Mansbridge's choice of metaphor initially sounds odd, the real-life circumstances this concept covers are not unusual. She notes that there are several forms of gyroscopic representation. The narrowest version is the decision of a voter to elect a representative based on a single issue, such as support for or opposition to the legalization of abortion. This narrow conception taps into a broader conception, where the underlying characteristics of the representative that most resonate with constituents have to do with a perceived sharing of similar policy and value preferences. The broadest version is voting for "a person of integrity with a commitment to the public good."[83] A close variation is when voters express nothing more than a preference for a "good type" as in, "He's a good man," or "She's a good woman."[84] As several writers referenced by Mansbridge point out, voters seek representatives they believe are honest, principled, and sufficiently skilled.[85] In all these circumstances, those being represented want someone whom they can trust.

To support her conceptualization of gyroscopic representation as a political phenomenon, Mansbridge cites empirical findings on the congruence of voter and elected representative preferences. One study found that in approximately 75% of congressional districts, no conflict existed between what a majority of the voters wanted and the personal attitudes of their member.[86] This congruence probably reflects the large number of safe Democratic or Republican districts not infrequently due to gerrymandering. Within truly contestable congressional districts, other empirical findings reported by Mansbridge indicate that the crucial factors are perceptions about an incumbent's anticipated future legislative record.[87] In these districts, it is the external dynamics of anticipatory representation, not the internal dynamics of gyroscopic representation, that matter most.

In gyroscopic representation, predictability—not accountability—is the pivotal concern. Voters seek representatives who share their values and interests and are trustworthy and reliable. The initial authorizing election is most important. It is the time when voters and representatives establish their relationship. For the relationship to work, representatives need to be truthful about their commitments. Direct communication and joint deliberation are less important in subsequent elections. The voter's

83. *Id.* at 521.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*

dominant interest is placing someone in the legislature who can be counted on to be an effective advocate for those matters about which the voter cares most. As long as actions are not inconsistent with the initial commitments made, the representative has considerable discretion to act in self-propelled fashion. The voter's goal is to have power within the system, not over the representative. The back-up assurance needed is the ability of voters to reenter the system to replace representatives who fail to adhere to their professed commitments. In sum, according to Mansbridge, the main normative criteria for evaluating the legitimacy of gyroscopic representation are good systemwide deliberation at the time of first selection and relative ease in maintaining or removing representatives subsequently.[88]

Surrogate representation, Mansbridge's fourth type, applies to situations where there is no direct voting relationship with the representative.[89] The representative comes to be identified with interests or causes mainly defined and promoted by nonconstituents. Surrogate representation can be a source of political inequality, or it can be a check on inequity within the political system. The former occurs when the representative is overly responsive to large financial contributors or well-organized, already powerful interest groups. The latter occurs when a representative reaches out to a relatively weak political constituency or takes a stand in support of an unpopular cause. A concern about power within the relationship is an issue with respect to the influence exercised by financial and other contributors, for example, the impact of large monetary or in-kind campaign contributions from a particular industry or labor union on policy positions advocated by a representative. The power dynamic is not so relevant when, as with gyroscopic representation, legislators act on surrogate constituency perspectives and interests consistent with their own convictions, consciences, and identities.[90] An example would be a congressional representative who took a strong early position against the Vietnam or Iraq wars, when it was unpopular to do so. In assessing the democratic worth of surrogate representation, the key criteria focus on the degree to which such representation facilitates the influence of otherwise unrepresented or underrepresented interests, whether in the aggregate by affecting votes cast or deliberatively by introducing fresh or unconventional insights and perspectives. As summarized by Mansbridge, normative scrutiny regarding the legitimacy of surrogate representation shifts from determining constituent-oriented accountability to a concern for redressing systemic inequities in representation.[91]

88. *Id.* at 522.
89. *Id.*
90. *Id.* at 524.
91. *Id.* at 525.

Based on empirical findings about how constituents and legislators relate to each other, Mansbridge rejects using a single normative criterion for assessing democratic legitimacy. Representative democracy is not just about legislators conforming to the preferences of voters in their districts. Instead, she articulates plural and variable criteria for determining when real-world political relationships conform to democratic norms. Getting a full picture of the relationship involves accounting for variations in orientations and expectations of voters and legislators and acknowledging different ways in which systemic commitments to equitable participation and quality deliberation actually might be met.

Analyzing group legal advocacy when attorneys have considerable discretion about what to do invites a similar shift in normative focus. The client control objection assumes a single criterion—an agency model of accountability—for determining the legitimacy of legal representation. While this model fits well standard situations involving individual dispute resolution or transactional planning, it does not capture the circumstances and relationships that typically characterize policy impact advocacy, especially on behalf of relatively weak groups or constituencies.

4. Drawing Parallels and Amalgamating Ideas

Traditional ethical concerns about client control and accountability are too narrow a framework for judging the performance of legal services lawyers as policy advocates. One also needs to grapple with developing an appropriately sophisticated conception of group legal representation as a form of political action, both as a component of the professional role discipline expected of attorneys and as a lens through which to assess the democratic legitimacy of such representation from a systemic perspective. Luban broaches this matter; the writings of Pitkin and Mansbridge help to take his analysis further.

Luban's elucidation of group legal representation builds on his ideas about the special role morality of lawyers. He views mission-driven legal services as systemically justifiable and as requiring considerable attorney self-control. Role morality as a conceptual perspective for guiding and evaluating attorney performance looks both outward to social and cultural context and inward to an individual's capacity for intellectual and moral growth.

Contextually, expectations about attorney behavior reflect the specifics of particular problem or issue settings. They also reflect the interplay of various structural factors, such as the relevance of deeply and broadly held ideological beliefs, the distribution of economic and social resources, and the openness and responsiveness of governing institutional arrangements.

Attorney competence in responding effectively to role expectations, in turn, hinges not only on appropriate knowledge and skill acquisition and an ability to think critically but also on character development. In confronting dilemmas in legal practice, Luban argues for a heightened level of attorney self-awareness and self-discipline that for him involves adopting a particular approach to reasoning morally and institutionally about one's responsibilities as a lawyer. His primary objective is to facilitate the kind of lawyering judgment needed to exercise discretion responsibly. His secondary objective is to provide reasoned justifications for why and under what circumstances actions initiated by lawyers on behalf of client constituencies are a legitimate and necessary aspect of a constitutional democracy.

Luban provides a logical prescription for how to think through role responsibilities, but his analysis lacks a sufficiently strong conceptual middle. His defense of attorney independence falls analytically short in large part because he has trouble breaking away from a fairly conventional notion of representation. He is too wedded to an agency formulation of accountability that classifies types of representation along a continuum marked by stronger to weaker versions of client control. His concept of best-world representation, the weakest, leaves lawyers with virtually unencumbered discretion. The main justification articulated is that such representation is a last resort. Ironically, best-world representation is a worst-case scenario. A lawyer defaults to such a position when accountability to clients, whether direct, indirect, or through surrogates, is not feasible. In policy advocacy circumstances, the absence of client control is for Luban a necessary exception to be forgiven. The legitimacy of legal representation, in principle, still depends on the primacy of client control.

The respective views of Pitkin and Mansbridge offer a different perspective. Their conceptual and normative insights mainly derive from their focus on popular legislative representation, but their specific ideas need not be confined solely to electoral relationships. Their conclusions have general relevance for understanding the routine operations and underlying institutional structure of American political pluralism—that is, who gets represented by whom in what ways and to what extent in legislative and administrative lobbying and in judicial advocacy.

A constitutional democracy is not just about cyclical elections. It requires having effective representation in the everyday deliberations of governing institutions, whether they be legislative bodies, executive agencies, or courts. Voting is but one avenue for exercising influence. To further meaningful political participation on a broad and continuing basis, a constituency definable by similar interests also needs its own lobbyists and lawyers. In American politics, interest group pluralism and the independent role of courts in constitutional governance set the backdrop

for social cause lawyering, just as such structural conditions have long been utilized by resource-rich special interests to affect public policy outcomes.[92]

Pitkin's and Mansbridge's respective rethinking of political representation opens up new ways of understanding the dynamics of primarily lawyer-executed strategies for social change. Like Luban's discussion of attorney role dilemmas, they describe and evaluate the performance of representatives with one eye on context, in particular systemic characteristics and constituent long-term interests, and the other on personal attributes, such as character, skill, judgment and self-discipline. Each of their approaches to the situational nature of representative relationships in a pluralistic society involves a mix of conceptual themes for determining what constitutes responsible democratic representation. Because neither Pitkin nor Mansbridge relies on a single measure for assessing democratic legitimacy, the lack of ongoing client accountability is much less of a problem for them than for Luban. Together they provide an expanded vocabulary and conceptual framework for apprizing the different roles and relationships of legal services lawyers in social policy advocacy.

Pitkin supplies the broad contours of a democratic representative's role. She directs attention to a representative's commitment to advancing a group's interests, not individual preferences of its members, and the importance of having those interests represented in public deliberations. She assesses the quality of representation in terms of a representative's responsiveness and judgment. Responsiveness involves respecting and accounting for the autonomy and competence of those represented and requires genuinely understanding the concerns of others from their points of view. But acting on those concerns is not a straightforward proposition. It calls for judgment, since important policy impact decisions depend on having relevant expertise and contextual experience and repeatedly raise competing considerations that are difficult to reconcile. To make decisions effectively and responsibly, one needs appropriate knowledge, skill, empathy, and wisdom. One also needs sound character. Moral virtues such as integrity, courage, moderation, and fairness are components integral to the development and exercise of good judgment. Pitkin's last general theme is to focus on actual conflicts between a representative and the represented and their relatively infrequent occurrence, unlike the potentiality of conflict, which is ever present. Assessing the democratic legitimacy of representation does not turn on whether a representative acts on his or her own agenda but how well that agenda corresponds with the substantive and strategic interests of those represented.

92. *See supra* note 30.

Mansbridge's explication of four sometimes overlapping models of democratic representation builds on Pitkin's core themes. In setting forth various telling conceptual details, Mansbridge rejects a traditional agency model of representation as the exclusive normative standard for determining the legitimacy of the positions and actions taken by a representative in public policy arenas. Promissory representation captures but one form of the relationship between representatives and their constituencies and in electoral politics is frequently the least characteristic. The same discordance is true with respect to policy impact legal advocacy on behalf of the poor, despite dominant across-the-board presumptions about clients acting as principles and lawyers as agents.

In the legal representation of individual clients, promissory representation is the standard ethical model. Encouraging and enforcing client control and accountability and avoiding conflicts with others lie at the heart of professional rules of conduct. The problem has been that the usual rules often do not fit the realities—the dilemmas and the purposes—of group legal representation.

Luban succinctly makes this point when he discusses the Supreme Court's *Primus* decision.[93] The case involved a volunteer lawyer for the ACLU, who received a public reprimand from the South Carolina state bar for soliciting as a plaintiff a mother who had been sterilized by a doctor against whom the ACLU wanted to file suit. The Court recognized "litigation as a vehicle for effective political expression and association" and that "the efficacy of litigation . . . often depends on the ability to make legal assistance available to suitable litigants."[94] Viewing Primus's letter of solicitation as "within the generous zone of First Amendment protection reserved for associational freedoms,"[95] the Court found the state bar's antisolicitation regulations, which were intended to prevent "ambulance chasing," were applied too broadly without sufficient precision.[96] The *Primus* decision extended to the lawyer-client relationship the Court's analysis developed in previous cases regarding the First Amendment protection afforded legal strategies undertaken by labor unions and civil rights organizations.[97] As Luban comments, all these cases, including *Primus*, "mark a dissonance between the agency-centered ethic of individualized service on which bar codes are predicated and law practice as political action for collective ends."[98]

---

93. *In re* Primus, 436 U.S. 412 (1977); LUBAN, *supra* note 21, at 326–28.

94. *In re Primus*, 436 U.S. at 431.

95. *Id.*

96. *Id.* at 437–38.

97. United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217 (1967); Bhd. of Railway Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

98. LUBAN, *supra* note 21, at 328.

Such dissonance does not occur only in social cause lawyering or antipoverty law practice. Issues of who is the client and what are the respective role boundaries of attorney and client arise in legally recognized processes and settings ranging from various forms of aggregate litigation to corporate law. California law, for example, provides a number of relatively malleable procedural options for filing civil causes of action aimed at remedying collective or public wrongs that otherwise might go unaddressed legally.[99] The availability of such legal remedies challenges conventional notions about lawyer and client role relationships and responsibilities.[100] In corporate law, American jurisprudence employs a fiction that a corporation is a person both for litigation purposes and in defining to whom a lawyer is ultimately responsible in transactional counseling.[101] Nonetheless, the reality is that a corporation is a collection of individuals, who may disagree with one another and may have conflicting interests. Even with a defined hierarchy for making corporate decisions, a lawyer's deference to any single individual or a board of directors as the voice of the client may not be warranted.[102] What is needed is a more expansive and flexible conception of what it means to provide responsible legal representation to a collective client, whether it be in a formal class action, when advising and bargaining for a corporate entity or, as is my focus here, in advocating comprehensively for a specific constituency.

In theorizing about electoral politics, Mansbridge extracts from various empirical studies normative differences in mutual expectations about the relationship of voters and elected representatives. The least of her interests is in promissory representation—the keeping of promises made in the last election. The most suggestive features of her rethinking of representation are her descriptions of anticipatory, gyroscopic, and

---

99. *See* CAL. CODE CIV. PROC. §§ 382 (class action), 526a (taxpayer injunction), 1085 (writ of mandate) (Deering 2013). California also has a private attorney general provision for awarding attorney's fees to any successful plaintiff bringing a civil suit resulting in enforcement of a right affecting the public interest. *See id.* § 1021.5.

100. For a comprehensive reform proposal regarding various forms of aggregate litigation, see Am. Law Inst., Principles of the Law of Aggregate Litigation: Proposed Final Draft (Apr. 1, 2009).

101. Reflective of the legal recognition accorded corporations and the corresponding notion of corporate entity representation, professional responsibility doctrine tends to presume common interests for investors and managers organized as a corporation and conflicting interests requiring separate representation for individuals not as formally affiliated. William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 477 (1984). The effect is to establish a double standard that works against the collective representation of the poor.

102. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (Organization as Client) (2002). For an interesting rethinking of how to reconcile competing allegiances when representing a formal organizational client, see William H. Simon, *Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CALIF. L. REV. 57 (2003). Simon urges lawyers to take into account substantive norms as well as authority norms when determining the merits of an intra-corporate dispute. He terms his approach for resolving internal entity conflicts the Framework of Dealing and likens it to Louis Brandeis's notion of "counsel for the situation." *Id.* at 86–89.

surrogate representation. Her delineation of four models of representation emphasizing their contextual circumstances brings a fresh, multitextured perspective on the conditions and elements relevant for assessing the democratic legitimacy of representation, not only with respect to electoral politics but also, as I see it, when examining policy impact legal advocacy.

As an across-the-board matter, Mansbridge highlights the importance of professional knowledge and experience. She addresses the need for expertise, substantively and in what she terms "ends-means thinking." By the latter, she means how to plan and solve problems strategically to achieve one's objectives. There is also an expectation of expertise. Those represented look to their representatives to negotiate and advocate more skillfully than they might otherwise on their own. Furthermore, they count on representatives putting in the time and staying motivated in ways and to an extent often not practically feasible for them personally. Even when activist groups emphasize the value of direct participation in public affairs, almost any strategy for reform has need for responsible representatives as part of an ongoing process to influence the setting of policy agendas and to achieve favorable outcomes. In a democratic and constitutional republic, having reliable, effective representation is an important indicator of individual and group empowerment and a recurring measure of political and legal competence.

Mansbridge's concept of anticipatory representation covers the prospective orientation of elected officials when their concerns are primarily about getting reelected. Compared to the traditional agency relationship underlying promissory representation, the representative's incentives in relating to constituents focus not on accountability for promises made and the power and will of voters as expressed in the last election but on prudential considerations regarding the education of voters, especially the quality of deliberation, in clarifying interests and justifying positions taken.[103] The most important retention factor during reelections is how constituents respond to the representative's record in office, which is unlikely to be confined to only a determination of whether promises made were kept.

In examining policy impact legal representation, Mansbridge's treatment of anticipatory representation does not offer much to borrow descriptively. The main insight is the importance of one's deeds, not promises, on whether a particular group is apt to continue to work with an attorney on an ongoing or new matter. Normatively, however, her discussion of the dynamics of anticipatory representation puts at issue standard agency conceptions of control and accountability as universally necessary for good representation. As applied to group lawyering, the importance conceptually is a shift of attention from the centrality of

103. Mansbridge, *Rethinking Representation*, *supra* note 72, at 520.

clients formally directing their attorneys to a heightened emphasis on evaluating the quality of attorney-client deliberation and attorney responsiveness to client interests.

What is most striking in Mansbridge's thought is her notion of gyroscopic representation. In comparing it to promissory and anticipatory representation, she writes,

> In all versions of gyroscopic representation, the voters affect political outcomes not by affecting the behavior of the representative . . . , but by selecting and placing in the political system representatives whose behavior is to some degree predictable in advance based on their observable characteristics. Whereas in promissory and anticipatory representation the representative's preferences are induced, in this model the representative's preferences are internally determined. Whereas in promissory and anticipatory representation the voters . . . cause changes in the representative's behavior, in gyroscopic representation the voters cause outcome changes first in the legislature and more distantly in the larger polity not by changing the direction of the representative's behavior but by placing in the legislature and larger polity (the "system") the active, powerful element constituted by this representative.[104]

For the representative to be entrusted with such independence of action while in office, Mansbridge underscores the normative importance of good deliberation at the time of an initial authorizing election and relative ease in maintaining or ending the relationship.[105]

There are parallel analytic considerations when examining mission-driven legal advocacy and its purposes. Luban's characterization of the relationship between antipoverty lawyers and their clients on policy impact matters as a joint commitment to a cause captures much that is at the heart of Mansbridge's concept of gyroscopic representation. Under such circumstances, the model is that attorneys will act in self-propelled fashion on their own initiative. There are, however, normative criteria to be met. For Luban, attorneys are free to exercise considerable discretion, but only insofar as they seek to advance collective client interests on terms consistent with likely client objectives and concerns. The responsiveness and judgment needed is not very different from what is anticipated of elected representatives who are selected based on voter confidence in their character and talent or their commitment to especially salient issues.

For the analogy to work, however, one has to confront a striking institutional difference between social cause lawyering and electoral politics. In group legal representation, there is not the equivalent of periodic elections, where representatives initially and thereafter present themselves to those being represented for approval. In fact, in policy litigation, it is not uncommon for lawyers to recruit clients as plaintiffs. In

104. *Id.* at 521.
105. *Id.* at 522.

effect, the representatives choose the represented, not the opposite. Such relationships can be even more attenuated in legislative and administrative arenas, where there are virtually no formal procedures circumscribing who appears as a representative, and opportunities always exist for self-appointed representatives to come forward with little connection to real constituencies. As a countermeasure, lawyers themselves have to assume heightened responsibility for reaching out to and encouraging deliberation with those whose interests are being represented. It may be that the contacts are with organizers or other intermediaries, not the actual beneficiaries. The point is that in the absence of externally imposed checks on attorney behavior, internally generated relational dynamics have to take hold. How lawyers in such circumstances cultivate and sustain relations with client groups becomes a crucial factor in appraising whether they have acted responsively and with good judgment.

The bottom line is that clients in some meaningful way have to be attuned to the nature of the representation. For both Luban and Mansbridge, the relative independence of the representative has to match the expectations of the represented.

With respect to policy impact advocacy, these expectations include understanding that an overarching purpose of the representation is structural—that is, to have in place in a targeted legal or political body knowledgeable advocates who can give expert and special voice to shared group interests. As an example, when individual public assistance recipients step forward to be named plaintiffs in a class action challenging state welfare policy or practice, they need to be informed, if they do not appreciate already, that their participation is systemically necessary, quite apart from whatever personal stake they have in the outcome.

Accordingly, just as Mansbridge emphasizes the quality of deliberation in authorizing elections, there have to be honest discussions beforehand about the character and circumstances of the legal representation to be undertaken. Thinking ahead, those discussions need to address not only the nature of the representation but also the opportunities for affirming or ending it. A major aim of such initial interviewing and counseling sessions is reasonable client awareness about the purposes, tactics, and terms of representation, with the expectation that the occurrence of actual conflicts warranting termination of the representation are to be avoided and would be unusual.

The troublesome prospect is that the attorney-client relationship is not and never becomes sufficiently genuine. The risk is that the lawyer views the client group as little more than a pretext, where there is no interest in meaningful consultation nor in interacting with a group that has the capacity to exercise independent judgment. The seriousness of this risk depends upon the character of the lawyer. The very purpose of developing a concept of representation reflective of the realities of policy

impact advocacy is to increase attorney self-awareness and ultimately self-restraint about how to behave in such situations. While there is no way to eliminate the prospect of a sham representational relationship, there is also no reason to assume that the vast majority of mission-driven lawyers intend to act in bad faith and without integrity.[106] The need is to arrive at additional guideposts on what it means to be a responsible and responsive representative.

In social cause lawyering, a continuous nexus between the attorneys involved and those represented is necessary to provide ethical and political credibility, especially when attorneys have recruited the clients and are acting in significant part on their own agendas. A strong agency relationship, while the standard lawyering norm, is often not practicable. But obtaining client assent in some meaningful form while engaging periodically in genuine client consultation is entirely feasible. These tasks are especially important when representing groups not themselves able to pay for legal help. Members of such groups typically lack options regarding who to retain and have only weak formal ways of holding lawyers directly accountable to them. They pretty much have to ally themselves with whoever from the bar steps forward. Their principal choice usually involves not choosing among lawyers but deciding how much they care about being legally represented systemically.

In such circumstances, it falls to the attorneys to demonstrate their own responsiveness, which is likely to be intricately tied to how well they deliberate with group members. A major concern when determining the legitimacy of largely lawyer initiated and executed group legal representation is the quality of deliberation between the representatives and the represented both at the outset and ongoing. As with gyroscopic political representation, there are sound conceptual and practical reasons for applying different or modified normative criteria to mission-driven group legal advocacy.

Surrogate representation covers circumstances even further removed from conventional presumptions about democratic representation. In this model, individuals in public office, without regard to whether they have formal electoral ties to those most affected or interested, take on causes that otherwise might not be raised or pushed. The causes themselves often reflect the associational interests or demographic connections of the representative. From a democratic normative perspective, surrogate representation compensates for structural barriers or inequities that preclude or significantly limit the participation of relatively weak interest groups in the development and implementation of public policies. Consistent with egalitarian principles, the main systemic purpose is to give presence and voice to the interests of all relevant parties.

---

106. *See* Southworth, *supra* note 63.

For elected officials who function as surrogate representatives, their relationships on certain specific issues are primarily with nonconstituents, but voters who put and keep them in office still exert checks on what they do. As part of their overall public obligations, such representatives develop simultaneous representational responsibilities to electoral and surrogate constituencies.

Applying surrogate representation to social cause lawyering works differently. While lawyers as members of a public profession have an obligation to act in the common good, their retention or dismissal is always client specific. There are not general mechanisms, like elections, that periodically legitimate how an attorney has performed overall. Rather than being construed as a full-blown alternative theory of legal representation, surrogate representation as a lawyering phenomenon makes most sense conceptually when viewed in time-limited terms, as one stage in providing group legal assistance.

Surrogate representation for lawyers, in my usage, covers circumstances when relationships with individuals sharing common interests or organizational clients have not yet coalesced during a preliminary period, or have become quiescent at intermittent and follow-up junctions. The surrogate's function is to fill resource and personnel gaps as part of interest group efforts to shape policy agendas, influence decisionmaking, police outcomes, and enforce results. The activities specifically undertaken need to respond to and reflect the capabilities and extent of mobilization of the potential or actual client group at a particular time. For example, lawyers who have expertise or an interest in a specific policy area are often in the best position to monitor political and legal developments of likely concern to a particular interest group. Such work might lead to publicizing an emerging problem generally, activating the organizing of a community coalition, or recruiting clients for a class action to be filed in court.

What needs to be done, and when, depends on institutional context. Policies and practices regarding recognizing someone as representing an individual or group vary considerably. The rules governing representation in court are the most restrictive and formalistic. Lawyers need clients with legal standing and then have to file pleadings and make official appearances to participate as a representative in litigation. By contrast, being recognized as a representative in legislative lobbying and in executive agency policymaking is usually determined by the decisionmakers. While a lawyer may have to register as a lobbyist, there are not usually formal tests and conditions that have to be met regarding who qualifies as a representative. As a consequence, it is not uncommon for legislators and administrators to identify on their own knowledgeable individuals whom they consider representative of a particular group or policy perspective for advice and assistance on matters of concern. This

practice can be informative and helpful, but it also can be manipulated and abused by calling on individuals whose main interests are not meaningfully aligned with those purportedly being represented.

With respect to policy impact legal advocacy, surrogate representation is best seen as a temporary or transitional phenomenon, even when it broadens democratic participation. In lawyering, nothing in the idea of surrogate representation is sufficient to offset a lack of direct client checks on attorney discretion. Furthermore, from the standpoint of social change activism, there is a danger that such representation actually does more to legitimate symbolically the existing system than to advance meaningfully the interests of directly affected constituencies. The degree to which someone's participation is both truly representative and practically influential cannot be fully determined ahead of time, as so much hinges on what is said, what gets done, how matters unfold, and what are the consequences.

In rethinking the nature of group legal representation for the poor, the most intriguing idea is that of gyroscopic representation. There are also, however, situations and times when there is a systemic need for surrogate representation to establish and uphold group presence. With both these conceptualizations especially in mind, I now turn to examining the efficacy and legitimacy of the multipronged strategy undertaken by Abascal and his legal services colleagues in response to Reagan's campaign for welfare reform in the early 1970s.

II. LAW AND POLITICS IN WELFARE POLICYMAKING

Law and politics are overlapping public spheres of interactions and discourse that involve the ordering of social life, the resolution of disputes, and the setting of aspirations. How much law and politics overlap varies among cultures and over time. In practice, law and politics start and end with human agency. In writing about law, the prominent legal realist Karl Llewellyn famously said, "[W]hat these officials do about disputes is, to my mind, the law itself."[107]

This Part begins with a number of observations about Ronald Reagan and Ralph Santiago Abascal, the leading actors in this case study of California state welfare reform in the early 1970s. Individuals make a difference. Yet people do not act on an empty slate or in an institutional void. They reflect and respond to historical legacies and circumstances and the play of contemporary social and cultural conditions and forces. Accordingly, my orienting remarks about Reagan and Abascal highlight several salient features of their overall approaches to their respective roles that are reflective of their times.

---

107. KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 3 (1960).

To further situate the case study, this Part then addresses the origin, evolution, and structure of American public relief programs, the first actions taken by legal services attorneys to further the rights and interests of welfare recipients, and the striking expansion in welfare rolls (the number of individuals and families receiving welfare assistance) that occurred during Reagan's first gubernatorial term. Afterwards, I discuss in considerable detail the unfolding of events that comprise the case study's core.

A. THE GREAT COMMUNICATOR AND THE REVITALIZATION OF 19TH CENTURY AMERICAN LIBERALISM

Ronald Reagan's reputation as "the great communicator" and as someone who knew how to use the bully pulpit of high office to his policy advantage largely reflected his unquestioning acceptance and adroit command of deeply felt American beliefs. He was highly competent in defining issues on his terms and in ways that resonated with a substantial section of the general public, which made him a formidable leader and a difficult opponent—especially for those who held progressive views regarding the nature and purposes of social welfare policies.

A significant aspect of Reagan's effectiveness in the social welfare field came from how he tapped into the stereotypes and stigmas commonly attached to welfare recipients. His most frequent invocation was in his fictionalized retelling of the story of the "Chicago welfare queen."[108] Reagan was a master at marshaling bedrock American ideology using vivid anecdotes, both mythical and real. The story of the Chicago welfare

---

108. Lou Cannon, a long-time reporter for *The Washington Post*, described the serious and demagogic sides of Reagan's focus on welfare issues as follows:

> Reagan had made welfare fraud a cornerstone of his reelection campaign for governor of California in 1970 and also exploited the issue in his presidential campaigns. He had dealt constructively with welfare issues in his second term as governor, working with Democratic leaders of the legislature to produce legislation that tightened welfare eligibility requirements and increased the grants of the poorest recipients. But he had dealt demagogically with welfare in his 1976 campaign, when he repeatedly told the story of a Chicago woman who "has eighty names, thirty addresses, twelve Social Security cards and is collecting veterans' benefits on four non-existing deceased husbands.... Her tax-free cash income alone is over $150,000." The woman was convicted in 1977 of welfare fraud and perjury for using two aliases to collect twenty-three public aid checks totaling $8,000. To Reagan she was the "Chicago welfare queen," an enduring symbol of welfare fraud. When congressional leaders called upon the president in early 1981 and asked him how he intended to achieve the budget savings he had promised, Reagan told them the story of the "welfare queen." He also repeated the anecdote in meetings with foreign leaders. During his visit to Barbados on April 8, 1982, Reagan met with J.M.G. (Tom) Adams, then prime minister of the Caribbean nation. When the discussion turned to welfare, [Michael] Deaver [Reagan's deputy chief of staff] recognized the telltale signs. He nudged James Baker [Reagan's chief of staff] and whispered to him, "He's going to tell the story of the Chicago welfare queen next." And sure enough, Reagan did.

CANNON, PRESIDENT REAGAN, *supra* note 1, at 518–19.

queen plays to negative feelings about individuals perceived as not willing to fend for themselves and a government that spends money wastefully. Beneath these popular beliefs, there are strong ideological roots. Reagan capitalized on them.

The ideological mainstream of American politics compared to European nations has been and remains relatively narrow. Our most profound ideological commitments lie in liberal Enlightenment values that encourage individual expression and growth.[109] American conservatives and progressives similarly value personal freedom. Both presume the foundational importance of individual autonomy. They have more in common than is usually acknowledged. Where they differ is in their views about the nature of civil society and about the role of the state in fostering individual opportunity.

From an historical perspective, Reagan's conservative ideas, which still resound mightily today, reasserted and reinvigorated 19th century conceptions of American liberalism. One important core element of 19th century liberalism is a sense that individuals owe little to nothing to society for who they are and what they have. Another important core element is a deep suspicion of state power. Reagan very effectively utilized both of these elements. Much of what he had to say was premised on a strong belief in the ability of individuals to pick themselves up by their own bootstraps relatively unaffected by structural conditions, such as class differences. To this notion of "rugged individualism," he added a much-professed aversion to taxation and "big" government. In large part because of the adept use of political rhetoric, Reagan became the most effective challenger of his generation to then dominant New Deal and Progressive Era assumptions about the need for an expanded role of the state to counter social and economic inequities as they occur in society at large.

Reagan also came to age politically during a period rife with domestic cultural and racial upheavals and major divisions, mainly provoked by the left, over international affairs and the war in Vietnam. Though it was an unsettling period socially and politically, it still was a time when there was a spread of views within both major political parties.[110] Notwithstanding the historical reputation of the late 1960s and early 1970s, the American electoral environment then was not as

---

109. *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955); *see also* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962).

110. When Reagan was elected governor in 1966, Robert Finch, a fellow Republican identified with the party's liberal wing, was elected Lieutenant Governor by a greater electoral margin. Finch, a former aide to Richard Nixon as Vice President, was much more moderate on social welfare issues than either Reagan or Nixon. When Nixon became president, Finch served as his first Secretary of Health, Education, and Welfare from January 1969 through June 1970. *Robert Finch (American politician)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Robert_Finch_(American_politician) (last visited Sept. 16, 2011).

polarized as it has become in the early 21st century. There was more room for significant bipartisan compromise.

In seeking welfare reform at the state level, Reagan had to contend with a progressive legislature controlled by Democrats and limitations set by overriding federal statutory and constitutional law. In fashioning their positions, legislative leaders worked closely with legal advocates for the welfare poor. The result was compromise state legislation.[111] One important calculation of the legislators was to draft certain policy proposals advocated by the Reagan administration so as to be optimally challengeable in court as not in conformity with federal law.[112] The enactment of state welfare reform legislation was only part of the story. Its aftermath was every bit as important.

The actual effects of the welfare changes instigated by Reagan as governor, though certainly substantial and popularly supported, were not all that he advertised. Much of what he claimed as reductions in caseload and costs was derived from estimated projections based on prior annual increases in welfare rolls.[113] Although not widely acknowledged politically, an important reason for the substantial growth in welfare family caseloads and consequent costs during the 1960s was a major increase in the participation rate of eligible households.[114] By the early 1970s, the nonparticipation rate of eligible families for welfare benefits had largely come to an end—that is, most California families entitled to benefits were applying for and receiving them.[115] This had not been the case previously.

From a policy standpoint, Reagan did eventually achieve much of what he wanted regarding welfare reform, but not until he became President of the United States. Once he assumed the nation's highest office, he moved quickly with the compliance of Congress to change the

---

111. Welfare Reform Act of 1971, CAL. STAT. 1971, ch. 578. For two very different perspectives from participants in events leading up to and after the enactment of this legislation, see Anthony Beilenson & Larry Agran, *The Welfare Reform Act of 1971*, 3 PAC. L.J. 475 (1972), and Ronald A. Zumbrun et al., *Welfare Reform: California Meets the Challenge*, 4 PAC. L.J. 739 (1973).

112. *See infra* text accompanying notes 336–337.

113. For an assessment of the impact of Reagan's state welfare reform changes, see Aaronson, Legal Advocacy and Welfare Reform, *supra* note 5, App'x; see also David E. Keefe, *Governor Reagan, Welfare Reform, and AFDC Fertility*, 57 SOC. SERV. REV. 234 (1983).

114. *See* Cynthia Rence & Michael Wiseman, *The California Welfare Reform Act and Participation in AFDC*, 13 J. HUM. RESOURCES 37 (1978); *see also* Barbara Boland, *Participation in the Aid to Families with Dependent Children Program (AFDC)*, *in* JT. ECON. COMM., SUB-COMM. ON FISCAL POLICY, STUDIES IN PUBLIC WELFARE, PAPER NO. 12 (PART I), THE FAMILY, POVERTY, AND WELFARE PROGRAMS: FACTORS INFLUENCING FAMILY INSTABILITY (1973).

115. This development was true elsewhere as well as in California. The expansion in welfare participation in large part was the result of grassroots organizing and mobilizing of welfare recipients, using administrative procedures to assert individual claims for assistance, and initial legal challenges to restrictive policies and practices. For a contemporaneous explication of this strategy for increasing welfare rolls and a description of related activities, see RICHARD A. CLOWARD & FRANCES FOX PIVEN, THE POLITICS OF TURMOIL: ESSAYS ON POVERTY, RACE, AND THE URBAN CRISIS 89–150 (1974).

federal statutory provisions that had frustrated his efforts as Governor of California to clamp down on public assistance benefits—particularly for the working poor.[116] Additionally, he continually attempted throughout his presidency to end funding and curb the advocacy activities of federally supported legal services programs.[117] As I describe at length shortly, Reagan knew firsthand how aggressive legal advocacy on behalf of the poor in courts and in legislative and administrative arenas had constrained his gubernatorial efforts to effectuate his welfare agenda.

B. A STAR IN THE LEGAL WORLD, AND THE STAR STILL SHINES[118]

1. The Measure of the Man

On an autumn day in 1973, three young legal aid attorneys appeared before the California Supreme Court in its Sacramento courthouse, across the street from the California Capitol, which is the location of both chambers of the state legislature and the main office of the governor. Each argued a different welfare case that arose in the aftermath of California's Welfare Reform Act of 1971.[119] Seated next to them at counsel's table, as each case was called in turn, was Ralph Santiago Abascal. The indelible impression forever left in my mind is that of a proud older brother fondly looking on as his younger siblings presented the facts, argued the law, and sought justice.[120] Though roughly ten years older, Abascal had not been practicing law much longer than his co-counsel. He had been a lawyer for just five years.

Abascal's initial job after law school was as an attorney with California Rural Legal Assistance ("CRLA") first in its Salinas office, where he previously had worked as a law student, and then in its Marysville office. Both offices are in major agricultural areas. The Salinas Valley on the central California coast is known as the Salad Bowl of the World because more than 80% of the lettuce grown in the United States

116. Omnibus Budget Reconciliation Act ("OBRA") of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981). This 600-page bill made major changes in federal tax law and substantive policies affecting more than two dozen programs. The Reagan Administration sought twenty-seven changes in the Aid to Families with Children ("AFDC") program, which had been the main target of his state welfare reform efforts. All passed as proposed, except for one provision that gave states the option to enact rather than mandating a compulsory workfare plan for adult recipients. TOM JOE & CHERYL ROGERS, BY THE FEW FOR THE FEW: THE REAGAN WELFARE LEGACY 55–57 (1985).

117. In seven of his eight budgets, Reagan proposed and Congress rejected that no money be appropriated for the Legal Services Corporation, which since 1975 has provided federal funding for legal services programs for the poor. He also appointed individuals to the Corporation's board, who were hostile to its mission and continually sought to severely limit the activities of funded programs. Neil A. Lewis, *The Law; Legal Services: Political Test Looms for Bush*, N.Y. TIMES, Sept. 8, 1989, at B5.

118. Quotation about Ralph Santiago Abascal by former California Supreme Court Associate Justice Cruz Reynoso (Oct. 1, 2011) (email correspondence written to and on file with the author).

119. Welfare Reform Act of 1971, CAL. STAT. 1971, ch. 578.

120. The cases argued are discussed at *infra* text accompanying notes 368–380.

is grown there. Marysville is located in the Sacramento Valley at the northern end of California's highly agricultural Central Valley.

In his first years at California Rural Legal Assistance, Abascal participated in the successful campaign to ban the short-handle hoe, the repetitive use of which often resulted in serious back injuries for farm workers. He also served as counsel in a lawsuit brought on behalf of six nursing mothers who worked in the fields. Filed in 1969, it eventually led to the banning of DDT.[121] This particular suit marked his foray into the intersection of environmental, public health, and poverty issues—an intersection of policy concerns that beginning in the early 1990s came to be known as environmental justice.

In late 1970, Abascal moved to San Francisco Neighborhood Legal Assistance Foundation ("SFNLAF") to become its Director of Litigation. He had been recruited because of his developing expertise in yet another field—public assistance law and policy. He returned to CRLA as its General Counsel five years later.

Along with Cesar Chavez's United Farm Workers Union, CRLA was the *bête noir* of California's large agricultural growers. The growers, in turn, were important supporters of Ronald Reagan's political career. As governor, Reagan continually criticized CRLA's policy advocacy activities and at one point used his gubernatorial prerogative to veto its federal funding.[122]

During his twenty-eight-year career, Abascal played a leading role in more than 200 major legal cases affecting the lives and rights of farm workers, welfare recipients, persons with disabilities, immigrants, and other vulnerable individuals.[123] He also was heavily involved in legislative and regulatory advocacy. This work began during the conflicts over Reagan's proposed changes in state welfare programs. Abascal's ability to develop and maintain strong relationships with legislators and other public officials gave him unusual access and influence in representing the interests of the poor. He was most active legislatively and administratively on issues involving welfare policy, environmental justice, immigration, and funding for legal services.[124]

---

121. Tim Golden, *Ralph S. Abascal, 62, Dies; Leading Lawyer for the Poor*, N.Y. TIMES, Mar. 19, 1997, at A17.

122. CRLA survived Reagan's protracted attack. The outcome involved decisionmaking at the highest levels in the Nixon White House and administration. For an accounting of the struggle from the perspective of two CRLA participants, see Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1 (1972). Cruz Reynoso at the time was CRLA's Executive Director. Edmund G. (Jerry) Brown, Jr., Reagan's successor as governor, appointed Reynoso to the California Supreme Court as an Associate Justice. Michael Bennett was a top CRLA administrator.

123. Rinat Fried & Allyson Quibell, *Ralph Abascal, 'Soul of CRLA,' Dies*, THE RECORDER, Mar. 19, 1997, at 1, 10.

124. One example of the unique role Abascal played in legislation based on the strong ties he had

Abascal's death on March 17, 1997, was deeply mourned throughout the California and national legal community.[125] He was much revered by his peers and was widely regarded as a role model by legal aid, civil rights, and other public interest lawyers, many of whom he mentored.[126]

---

developed with legislators was in California's enactment of one of the nation's first Interest on Lawyer Trust Account ("IOLTA") programs. CAL. STAT. 1981, ch. 789; CAL. BUS. & PROF. CODE §§ 6210–28 (Deering 2003). These programs provide funding for free legal services for the poor out of the interest earned on aggregate client trust accounts, which attorneys use when the amount of money owed clients is minimal or held for short periods of time. No interest previously was paid on these accounts. What would have been the yield was retained by banks. The bill's sponsor was the State Bar of California. At the time, I was the Vice-Chair of the State Bar's Legal Services Section, which was the bar entity that proposed and drafted the legislation. The key participants were executive directors of federally supported legal services programs. Abascal was not directly involved in the bill's drafting, but everyone knew that once the bill was before the legislature for a vote, he had to be involved. The bill passed the Assembly, but its future was uncertain in the Senate.

The Assembly member officially coauthoring the bill was Howard Berman, who later became a long-term member of the U.S. House of Representatives. Abascal and Berman had a close relationship. Berman was newly elected to the Assembly when he first met Abascal in the early 1970s. In recalling that time period in a statement made following Abascal's death, Berman recounted that Abascal "was tying [then-Governor] Ronald Reagan up in knots, and in the process was helping low-income people survive a little better." Fried & Quibell, *supra* note 123, at 10. Berman was one of the speakers at Abascal's memorial service.

On the day of the Senate vote, Abascal and Berman caucused together. Shortly before the vote, I observed Berman on his knees asking for the vote of Senator Rose Vuitch, a somewhat conservative Democrat from the Central Valley. During the vote, a colleague, Peter Reid, the Executive Director of San Mateo County Legal Aid and a principal drafter of the IOLTA bill, observed Abascal at the rear of the temporary Senate chambers (the permanent chambers were under renovation) prodding a dozing Democratic Senator James Mills, the former Senate leader, to wake up. Abascal then literally raised Mills' hand to vote. The bill passed the Senate by one vote.

Since 1984, which was the first year of allocations, the California IOLTA program has distributed more than $350 million to qualifying legal aid programs throughout the state. Email from Stephanie Choy, Managing Director, Legal Services Trust Fund Program, State Bar of California (Jan. 10, 2012) (on file with author).

125. Abascal was survived by his wife, Beatrice A. Moulton, a professor of law at the University of California, Hastings College of the Law and a founding teacher and scholar in the development of modern clinical legal education, and their then-fourteen-year-old daughter, Pilar Cristina Abascal.

126. In 1995, Marsha Berzon, then a prominent appellate attorney and now a U.S. Court of Appeals Judge for the Ninth Circuit, described Abascal as follows: "Ralph has been, for over twenty years, probably the most widely respected public interest lawyer in California." Aurelio Rojas, *Public Interest Is His Interest: Lawyers Honor Ralph Abascal*, S.F. CHRON., May 31, 1995, at A13. After Abascal's death, former California Supreme Court Associate Justice Cruz Reynoso said, "I'd like to see him remembered first as a person who never lost his humanity . . . and secondly as a lawyer of great stature." Dennis Pfaff, *CRLA Pioneer, Advocate for Poor Dies at 62*, S.F. DAILY JOURN., Mar. 19, 1997, at 1–2. Brad Seligman, a Bay Area civil rights attorney and now a California Superior Court judge, encapsulated Abascal's impact and manner as follows:

> Ralph was probably the most successful lawyer in California—if not the nation—in using legislation and litigation to affect people in positive ways. . . . He was not one to use fire and brimstone or a big showboat. . . . His approach . . . was more like, "Let's break bread." Yet he was incredibly rational, intellectual and personal.

Aurelio Rojas, Obituaries, *Ralph Abascal*, S.F. CHRON., Mar. 18, 1997, at A22. In describing how Abascal urged his colleagues to do their jobs, Jose Padilla, CRLA's long-time executive director, related the following:

His professional work ethic was especially legendary. There are numerous stories of his deferring his own pressing assignments to help colleagues, of being found sleeping in his or another lawyer's office after an all-nighter, and of being so intensely focused on his work that he forgot whether he had left his car in San Francisco or Sacramento.

Toward the end of his life, Abascal received several prestigious awards for his work on behalf of the poor. These included the American Bar Association's Thurgood Marshall Award, the National Legal Aid and Defender Association's Kutak-Dodds Prize, and the State Bar of California's Loren Miller Award. In accepting the Thurgood Marshall Award, he urged antipoverty lawyers to carry on despite hostile forces. He said, "Tennyson's poem 'Ulysses' concludes with 'to strive, to seek, to find, and not to yield.' To me that represents an injunction to persist and not to feel a sense of defeatism."[127]

2. *The Nature of the Times*

Abascal stood out among a generation of lawyers who finished law school in the late 1960s and early 1970s, when an infusion of federal government dollars, initially through the OEO as part of President Lyndon Johnson's War on Poverty, brought new breadth of coverage and new aggressiveness to the civil representation of the poor.[128] During the previous decades, social and economic injustices had built up, and all three branches of government, nationally and in California, in different ways and to varying degrees were responsive to the claims of the poor for improvements in policies and practices affecting their well-being. But the period of favorable attention and relatively easy victories for the poor through civil protest and community organizing, administrative and legislative advocacy, and litigation did not last long.

In California, the political backlash began early, starting in 1970 at the end of Reagan's first gubernatorial term and continuing throughout his second gubernatorial term. In response, Abascal acted on the need for political and legal sophistication and adroitness in working with and representing the poor. His strategy was comprehensive and involved compromises and risks, as he interacted with welfare recipient groups, legislative leaders, high-level administrators, lawyers, and judges. He was ultimately a pragmatist and, throughout his career, never let ideology

---

> He would tell us, "You can spend your entire legal career throwing out life preservers to people drowning in a river," . . . But he would add, "If you are working for CRLA, you have to walk up the river and find out who is throwing people off the bridge, and that's who you sue."

Fried & Quibell, *supra* note 123.

127. Fried & Quibell, *supra* note 123.

128. Social Security Act of 1965, Pub. L. No. 89-97, 79 Stat. 286; Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508.

blind him to reality.[129] His commitment was to alleviating the everyday pangs and suffering of poverty and to keeping the state honest in its policies and practices regarding the poor.[130]

For Abascal, there were no sure fixes or silver bullets to end poverty, only constant skirmishes to try to make people's lives a little better or, as a necessary fallback, to prevent them from becoming worse off. Nor would Abascal take for granted governmental compliance with the law, whether it originated in legislation or court order. Particularly when social welfare programs benefitted stigmatized groups and involved significant public expenditures, he well-understood that there were going to be enormous political pressures, in the short run, to circumvent the law and, in the long run, to change the law to cut welfare rolls and costs.

Abascal acted as a legal representative of the welfare poor, sometimes but not always in close collaboration with those whom he represented. His interactions with the leaders of the emerging disability rights movement of the early 1970s, most of whom were severely physically challenged, were very tight in the planning and execution of strategies and specific courses of action. His relationships with leaders of welfare rights organizations largely composed of adult AFDC recipients, while always respectful and consultative, were not as continually close when key decisions were made. In short, depending upon the circumstances, Abascal varied his approach to representation. He did not interact with his clients in a single, fixed way.

Yet even when Abascal acted with considerable autonomy, he had the trust of grassroots leaders. It was trust gained because of how he interacted with and listened to them. Kevin Aslanian, who in the 1970s was the President of the Welfare Recipients League of Santa Clara County, described Abascal as "not arrogant or elitist" and knowing how to disagree "not in a demeaning way."[131] In summing up what was distinctive about Abascal as a lawyer, Aslanian said, "The main thing is he made himself accessible."[132] Abascal had and conveyed a sense of presence that truly connected with and reassured others.

In representing the welfare poor, Abascal sought to take full advantage of opportunities within our institutionally fragmented and divided political and legal system to assert the interests of the poor, whether in legislative halls, executive offices, or court chambers. In doing so, he was not naive about the ideological and resource disadvantages that needed to be overcome and the likely limited responsiveness of

129. Interview with Jay-Allen Eisen, a legal aid attorney who worked closely with Abascal in the early 1970s (July 23, 2005) (on file with author).

130. *Id.*

131. Interview with Kevin M. Aslanian, Executive Director, Coalition of California Welfare Rights Organizations (Aug. 19, 2011) (on file with author).

132. *Id.*

American political and legal institutions to claims on behalf of very poor individuals. Much of what he did depended on legal expertise regarding complicated statutory and regulatory programs and on predicting what courts would do. As a problem solver, Abascal was as Aslanian observed "an issue by issue person," who focused on specific goals.[133] In a complex statutory and regulatory area like public assistance benefit programs for the poor, substantive knowledge is exceedingly important. Attention to detail in drafting legislation and regulations, in monitoring administrative compliance, and in framing lawsuits can have very substantial consequences. Again in Aslanian's words, "Ralph knew how to play all the forums together."[134] It was the joint and complementary use of legislative and administrative lobbying and group impact litigation that especially distinguished Abascal's representation of the welfare poor during the Reagan gubernatorial years.

Abascal was part of a new lawyering phenomenon that for the first time brought full-service, aggressive legal representation to the poor. There were relatively recent developments in civil rights advocacy upon which to build, but addressing poverty directly had its own unique challenges. Though racial, ethnic, and gender factors were never unimportant, the ideological and institutional obstacles impeding meaningful change regarding poverty were substantial and deeply embedded in their own way in American political culture. There was also much to learn about how to carry out one's role as a lawyer.

C. AMERICAN SOCIAL WELFARE POLICY AND LEGAL ADVOCACY FOR THE POOR

1. *Tudor and New Deal Roots of American Social Welfare Policy*

The origins of American social welfare policy go back to the Elizabethan Poor Laws of Tudor England, which encompassed both programs for the care of the poor and separate labor legislation compelling employment.[135] The great accomplishment of the Elizabethan Poor Laws was the government's assumption of responsibility for providing subsistence support for the poor. Previously, religious and charitable institutions shouldered this responsibility, not governmental entities.

The main policy principles upon which Elizabethan poor relief was based were local governmental control, forced work requirements, and

133. *Id.*

134. *Id.*

135. The most famous and important of Tudor poor law statutes was 43 Eliz. c. 2 (1601). The most notable labor legislation was the Statute of Artificers, 5 Eliz. c. 4 (1562). For a comprehensive and provocative review of the legal history of California public relief until the mid-1960s, see Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. 1–3), 16 STAN. L. REV. 258, 900 (1964), 17 STAN. L. REV. 614 (1965).

moral condemnation of recipients.[136] The 16th century English emphasis on local control reflected institutional interests in social control, fiscal conservatism, and discretionary administration.[137] The reasons for coerced employment reflected concerns about minimizing public expenditures on direct financial relief, providing a remedy for vagrancy and idleness, and having a disciplined and available workforce to meet labor market needs.[138] The basis for moral condemnation was a widely shared "characterological theory of poverty, which defined the poor as 'the victims of their own vices.'"[139] Poverty was seen as the pathological product of individual moral failings. These underlying principles, not all with the same force, persist to this day in the shaping of American public aid programs.

The equating of poverty with moral disrepute has had an especially enduring, pervasive, and pernicious effect.[140] Much of the appeal is that such an equation comports with highly individualistic political presumptions about people being responsible for their own fates, the most dramatic expression of which can be found in social Darwinist thought at the end of the 19th century. For William Graham Sumner, the 19th century American sociologist, poverty was the mark of inferior, nonproductive beings. He concluded, "Under the names of the poor and the weak, the negligent, shiftless, inefficient, silly, and imprudent are fastened upon the industrious and prudent as a responsibility and duty."[141]

Until the New Deal, state and local governments enacted and funded governmentally supported cash aid programs for the poor in California and elsewhere. The federal government played no role. All states but Georgia and South Carolina had mothers' pension legislation to provide assistance to children whose fathers were dead.[142] In 1931, there were approximately 100,000 families nationally receiving such

136. tenBroek (pt. 1), *supra* note 135, at 262–79.

137. *Id.* at 262–70.

138. *Id.* at 270–79.

139. Jacobus tenBroek, *The Two Nations: Differential Moral Values in Welfare Law and Administration, reprinted in* CRISIS IN AMERICAN INSTITUTIONS 350, 353 (Jerome Skolnick & Elliott Currie eds., 1970).

140. For a historical synopsis regarding the persistence of moral classifications in American welfare legislation, see JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY 44–131 (1991); see also Lucy A. Williams, *Race, Rat Bites, and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debates*, 22 FORDHAM URB. L.J. 1159 (1995). For influential, contemporary, American social policy analyses based on theories about poverty that morally blame the poor, see LAWRENCE MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP (1986); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984). For a critique of legislation and social policy analyses that equate poverty and moral disrepute, see MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE (1989).

141. WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER (1883), *as cited in* tenBroek, *supra* note 139, at 354.

142. *See* WINIFRED BELL, AID TO DEPENDENT CHILDREN ch. 1 (1965).

assistance, almost all of whom were white.[143] Many states also had special programs for elderly or blind adults.

In addition, legislation in most states mandated local governments to provide general assistance or general relief programs for those not eligible for other public aid programs.[144] Among the general assistance population are those whom we now tend to type as homeless. The statutory lineage of such general assistance legislation generally, and specifically in California, dates directly back to the Elizabethan Poor laws.[145]

The seminal legislation that changed the role of the federal government was the Social Security Act of 1935. It established federally authorized insurance-type programs for those with qualifying employment histories and categorical public aid programs for those without steady attachment to the labor force.

The federal government directly administered the insurance-type programs, the most prominent of which was social security for the elderly.[146] Eligibility for these programs was not income based, and their administration was less discretionary and onerous in operation. Their funding depended on the imposition of a specific payroll tax on employers and employees, which further added to the popular perception that the promised benefits were like having a guaranteed insurance policy. The underlying cultural assumption was that these programs mainly benefitted those who had shown their moral worth by working.[147]

State and local governments had the responsibility for implementing the categorical aid programs, with the federal government paying a share of the costs and exercising administrative oversight. The categorical aid programs targeted populations whose claims for assistance continued to be considered morally dubious because the intended recipients for the most part had not recently worked or were not able to work. Their claims for assistance, however, were not as morally dubious as those receiving benefits from programs for which there still were no federal subsidies.[148] In enacting policies and structuring programs to redress poverty, the Social Security Act—notwithstanding its progressive thrust—underscored and perpetuated longstanding, critical distinctions in American social welfare policy between programs for individuals viewed as deserving and programs for those viewed as less deserving.

---

143. *Id.* at 9.

144. *E.g.*, CAL. WELF. & INST. CODE § 17000 (2011).

145. *See* tenBroek (pt. 1), *supra* note 135, at 291–98, 306–17; tenBroek (pt. 2), *supra* note 135, at 939–44; tenBroek (pt. 3), *supra* note 135, at 614–15.

146. Act of Aug. 14, 1935, c. 531, Title II, Federal Old-Age, Survivors, and Disability Insurance Benefits, 49 Stat. 622, 42 U.S.C. §§ 401 *et seq.* (2011).

147. HANDLER & HASENFELD, *supra* note 140, at 44–131.

148. *Id.*

From 1935 until the early 1970s, there were a number of key changes in coverage regarding the categorical aid programs. The Social Security Act initially established categorical aid programs for the elderly, blind, and needy and dependent children in primarily female-headed families.[149] In 1950, Congress extended categorical assistance to cover the permanently and totally disabled.[150] Subsequent amendments to the Social Security Act revised definitions affecting needy and dependent children so that not just children but also caretaker adults[151] and eventually families with unemployed parents[152] all were eligible for assistance.

The decision whether to adopt each of the particular categorical assistance programs rested with state government. Once the states adopted the particular programs, they were responsible for upholding applicable federal standards and conditions for the receipt of assistance. While the federal government formulated basic policy and provided matching funds for the support of the categorical aid programs, the states determined the actual level of benefits and retained operating control over the programs either directly or indirectly through supervision of county implementation.

In the early 1970s, the California categorical aid programs were known as Old Age Security, Aid to the Blind, Aid to the Needy Disabled, and Aid to Families with Dependent Children ("AFDC").[153] California adopted the Aid to the Needy Disabled program in 1957, seven years after the 1950 amendments to the Social Security Act authorizing such assistance.[154] It took a major legislative compromise in 1963, two years after authorizing federal legislation, before California enacted the necessary legislation to establish AFDC eligibility for families where the father was in the home but unemployed.[155] The main opposition to what became known as AFDC-U came from agricultural counties, where politicians and large farm owners feared that this expansion in AFDC eligibility would not only increase public expenditures but also would stimulate a raise in farm labor wages in order to insure that income from agricultural work would remain greater than from public aid.

---

149. Act of Aug. 14, 1935, c. 531, Titles I, IV & X. Old Age Assistance, 49 Stat. 620, 42 U.S.C. §§ 301–04, 306 (1973); Aid to Families with Dependent Children, 49 Stat. 627, 42 U.S.C. §§ 601 *et seq.* (1973); Aid to the Blind, 49 Stat. 645, 42 U.S.C. §§ 1201 *et seq.* (1973).

150. Act of Aug. 28, 1950, c. 809, Title III, Part 5, § 351, 64 Stat. 555, 42 U.S.C. §§ 1351 *et seq.* (1973).

151. Act of Aug. 28, 1950, c. 809, Title III, Part 2, § 323(a), 64 Stat. 551, 42 U.S.C. § 606 (1973).

152. Act of May 8, 1961, P.L. 87-31, § 1, 75 Stat. 75, 42 U.S.C. § 607 (1973).

153. CAL. WELF. & INST. CODE §§ 12000–252 (Old Age Security); §§ 12500–850 (Aid to the Blind); §§ 13500–801 (Aid to the Needy Disabled); §§ 11200–507 (Aid to Families with Dependent Children) (Deering 1969).

154. CAL. STAT. 1957, ch. 2411.

155. CAL. STAT. 1963, ch. 510.

Changes in the structure and terms of welfare programs for the poor have been and remain hot-button political issues. Sometimes the underlying considerations are structural in an economic sense, such as the interest in having a sufficient number of farm laborers available to work at minimal wages, but most frequently the main concerns are fiscal and ideological. The fiscal lament focuses on saving taxpayer dollars. Social welfare programs are costly. Ideologically, much depends on who among the poor is viewed as deserving or undeserving, something which changes over time and which affects how particular programs are structured and characterized.[156]

The elderly poor have much benefitted from the framing of Social Security as a form of insurance paid for by past payroll taxes, for which virtually all over a certain age are eligible. The widespread popular support for Social Security now also extends to Medicare, even among conservatives. A recent book on Tea Party participants reports overwhelming support for "earned" government benefits like Social Security and Medicare, notwithstanding that expenditures for these programs pose our most serious long-term domestic budgetary problem.[157]

By contrast, as in 16th and 17th century England, when a group is viewed as morally undeserving, there is a strong tendency to de-emphasize societal causes of poverty and to blame the individuals themselves, whether the underlying circumstances involve long-term unemployment, child rearing, physical disability, or mental illness. In America, such perceptions of unworthiness further reflect the evolving yet persistent impact of antagonistic racial, nativist, and patriarchal beliefs.[158] Given the demographics of poverty in the United States, the AFDC program post-1960s not surprisingly disproportionately assisted minorities.[159] There also has been the long shadow cast by Reagan's vivid imagery of the "welfare queen."[160] Most often, the consequences of such

156. HANDLER & HASENFELD, *supra* note 140, at 44–131.

157. THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM (2011).

158. *See, e.g.*, LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE (1994); JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994); Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983).

159. In 1994, a few years before the enactment of successor legislation, *see infra*, note 164, African Americans constituted 37.2% of the AFDC population; Latinos, 17.8%; Asians and other minority groups, 6.1%; and Caucasians from non-Latino backgrounds, 38.9%. STAFF OF H.R. COMM. OF WAYS AND MEANS, 1964 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 428–29 (1994), *as cited in* JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 47–48 (1995).

160. Wahneema Lubiano describes the powerful political message of this imagery as follows:

> Categories like "black woman," "black women," or particular subsets of those categories, like "welfare mother/queen," are not simply taxonomies, they are also recognized by the national public as stories that describe the world in particular and politically loaded ways—and that is exactly why they are constructed, reconstructed, manipulated, and contested. They are, like so many other social narratives and taxonomic social categories, part of the

stigmatization are found in the extent to which state or local government, not the federal government, controls the program administratively and program policies compel recipients to seek and retain employment.

AFDC was the most controversial and volatile form of public assistance during the Reagan gubernatorial years. Nationally, the administration of President Richard Nixon proposed as a replacement for AFDC a guaranteed income program known as the Family Assistance Plan that would have standardized and federalized income support payments for poor families, but it was defeated because of opposition from the right and the left.[161] Reagan was the most prominent national political opponent.

The major federal structural change that did occur affected recipients of adult categorical aid, not the families who relied on AFDC for support. In late 1972, Congress enacted a new pension-like Supplemental Security Income ("SSI") program to be directly administered by the Social Security Administration as a replacement for the Old Age Security, Aid to the Blind, and Aid to the Needy Disabled categorical aid programs.[162] There was little contentiousness in California regarding this new assumption of administrative responsibility by the federal government. There was, however, as I discuss later,[163] a major battle over the cash supplement to be paid beneficiaries by California, as the federal legislation authorized but did not require states to augment the standardized SSI base amounts provided by the federal government.

After the enactment of SSI, the stigma of unworthiness that historically marked the receipt of public relief largely applied to poor families and to adults receiving general assistance. Since the 1980s, homeless and recently homeless individuals are the most identifiable beneficiaries of general assistance programs. It is the subsistence support programs for poor families and poor non-elderly or temporarily disabled single adults that have retained the characteristic features of the

---

> building blocks of "reality" for many people; they suggest something about the world; they provide simple, uncomplicated, and often wildly (and politically damaging) inaccurate information about what is 'wrong' with some people, with the political economy of the United States.

Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 323, 330–31 (Toni Morrison ed., 1992).

161. *See* DANIEL P. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN (1973). The guaranteed income for a family of four would have been $2,400 annually.

162. Act of Oct. 30, 1972, P.L. 92-603, Title III, § 301, 86 Stat. 1465, 42 U.S.C. §§ 1381 *et seq.* (2011) (adding new Title XVI to the Social Security Act).

163. *See infra* text accompanying notes 401–411.

Elizabethan Poor Laws, especially the demeaning assumption that the poor themselves are primarily responsible for their own poverty.[164]

In seeking to use the law to advance the interests of welfare beneficiaries, Abascal not only had to contend with the mixed policy provisions of the Social Security Act but also, at a deep societal level, enduring Tudor beliefs about relief giving and causes of poverty. Though there had been recent favorable judicial developments affecting the rights of the welfare poor, the cultural legacy of the Elizabethan Poor Laws that treated certain groups as morally unworthy was still, from a practical standpoint, an operative part of the statutory, ideological, and fiscal backdrop. Moreover, these moralistic determinations in application very much tracked America's agonizing history regarding racial minorities, new immigrants, and women.

Abascal embarked on what was a task of Sisyphus, one which largely took place after the eventually frustrated, ambitious efforts of other lawyers to transform the nature of the entire welfare system in a progressive direction. While not grandiose, there would be rewards for those whom Abascal and his colleagues represented.

2. *The Initial Grand Legal Strategy*

The great visionary for a fundamental transformation in the law of the welfare poor was Jacobus tenBroek. He was a remarkable teacher, scholar, and activist.[165] Blind since childhood, tenBroek's organizational

---

164. Though it is beyond the historical scope of this project, it is worth emphasizing that when, at the behest of President Bill Clinton, the Republican-controlled Congress in 1996 ended welfare for poor families as we then knew it, the legislation enacted did not look forward to the 21st century but backwards to the 16th century. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, tit. I, § 103, 110 Stat. 2105 (codified as amended at 42 U.S.C. §§ 601 *et seq.* (2011)). Congress established a state block grant system for poor families that significantly increased the discretion given the states in the fashioning and administering of the successor programs to AFDC. Entitled Temporary Assistance to Needy Families ("TANF"), this federal block grant program provides only time-limited assistance for recipient families. The intended effects are to establish a new enforcement mechanism for compelling adult recipients to become employed and to limit public expenditures. To comply with TANF and as a successor program to AFDC, the California legislature enacted the California Work Opportunity and Responsibility to Kids ("CalWORKs") program. CAL. WELF. & INST. CODE §§ 11200 *et seq.* (Deering 2001).

With TANF, the association of poverty with moral disrepute has renewed legislative vitality. For my analysis of why this happened, see Mark Neal Aaronson, *Scapegoating the Poor: Welfare Reform All over Again and the Undermining of Democratic Citizenship*, 7 HASTINGS WOMEN'S L.J. 213 (1996). On the need to focus social policy on eradicating poverty and not attacking welfare and welfare recipients, see Julie A. Nice, *Forty Years of Welfare Policy Experimentation: No Acres, No Mule, No Politics, No Rights*, 4 NW. J.L. & SOC. POL'Y 1 (2009). For a comprehensive historical analysis of post-1960s American social welfare policies, see MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE (updated ed. 2008).

165. For most of his career, tenBroek was a professor at the University of California, Berkeley, first in the Speech Department and then in the Political Science Department. He had graduate degrees in law and political science. He died of cancer in 1968 at age fifty-six. *See* FLOYD MATSON, BLIND JUSTICE: JACOBUS TENBROEK AND THE VISION OF EQUALITY (2005).

activities included the founding of the National Federation of the Blind and serving thirteen years as a leading member of the California State Board of Social Welfare, the last three of which as its chairman from 1960 until 1963. Until the California legislative compromise that resulted in the enactment of the AFDC-U program, the Board had substantial policy oversight regarding the implementation of the federal categorical aid programs in California.

In his seminal article setting forth the legal history of California's public relief programs, tenBroek articulated what became the initial agenda for legal services lawyers seeking constitutional and statutory changes in the welfare system. His clarion call was as follows:

> When "the mere state of being without funds is a neutral fact—constitutionally an irrelevance"; when classifications based on poverty and handicap are measured by equal protection standards of constitutional purpose and proper classification; when constitutional rights cannot be sacrificed as a condition of granting public assistance; when law enforcement and penal intrusions into the law of welfare are fully restrained by the fourth, fifth, and fourteenth amendments; when free movement is recognized as a constitutional right forbidding residence restrictions in welfare; when the highest court in the land as well as the highest court in California see responsibility of relatives provisions as arbitrary and discriminatory taxation; when welfare classifications and constitutional classifications coincide; when the granting and withholding of assistance and the variation of requirements among and between programs are subjected to due process and equal protection norms; when a presumption of competence and responsibility of clients becomes a welfare counterpart of the criminal law presumption of innocence—when these things happen, then indeed will the law of the poor feel the full impact of the pronouncement that "separate" is "inherently unequal," generating among aid recipients "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[166]

In less than a decade after tenBroek's prescient words, the Supreme Court in a number of landmark rulings gave credence to his faith in the American constitutional order and legal system. But he did not live to see these developments nor the later reversals in constitutional direction that would occur.

The story of the initial, national, legal welfare strategy as executed by antipoverty attorneys has been superbly told by Martha Davis and need not be repeated here in detail.[167] The leading legal tactician was Edward Sparer, who in late 1965 started the Center on Social Welfare Policy and Law under the auspices of Columbia University's School of Social Work.[168] Although Sparer wanted to house the program at

166. tenBroek (pt. 3), *supra* note 135, at 682.

167. *See* DAVIS, *supra* note 18.

168. *Id.* at 34–35.

Columbia Law School, his request was turned down because his intention to sue governmental agencies on behalf of welfare clients was too controversial within the law faculty.[169] At the time, most legal academics, like most welfare officials and most Americans, considered public assistance a charity, a privilege, and not in any way a legally enforceable right.

Taking a cue from the civil rights movement, Sparer wanted to begin the welfare litigation campaign with a case from the South both because conditions of poverty generally were worse in the southern than the northern states, and because he wanted welfare rights to be seen as a civil rights issue.[170] The intent was to challenge state practices in federal court, and it was poor southern blacks who most egregiously suffered from arbitrary state and local administration of welfare programs. Consistent with Sparer's plan, the first AFDC case to reach the Supreme Court, *King v. Smith*,[171] originated in Selma, Alabama. The plaintiff was a poor black woman with four children, who was visited by a married man unrelated to her children and from whom she received no financial support. Under Alabama's "substitute father" rule, a variation of man-in-the-house regulations then found in eighteen states including California, she and her children were cut off from welfare benefits because she regularly and frequently cohabited with a man regardless of whether he was obligated to provide or provided any support.[172]

In a unanimous Supreme Court ruling, Chief Justice Earl Warren found that there was federal jurisdiction to decide the case, an open issue at the time, and that Alabama's policy plainly conflicted with federal law. Though constitutional issues were raised, only Justice William O. Douglas in a concurring opinion addressed them. The other justices joined the Chief Justice in deciding the case on statutory grounds because Alabama's AFDC policies were not in compliance with the Social Security Act. Specifically, the Court held that "legally fatherless children cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father."[173] In reaching this conclusion, the Court rejected the State's assertion that its "interest in discouraging illicit sexual behavior and illegitimacy" was a legitimate justification for AFDC disqualification.[174]

Looking back on the history of welfare litigation, *King v. Smith* is especially important because the Supreme Court recognized for the first time that welfare recipients themselves had a legal right of action to

169. *Id.* at 35.
170. *Id.* at 56–69.
171. 392 U.S. 309 (1968).
172. DAVIS, *supra* note 18, at 60–61.
173. *King*, 392 U.S. at 334.
174. *Id.* at 320.

enforce federal statutory policies in disputes with state welfare agencies. Before the *King* case, the primary remedy for holding states accountable to federal policies was infrequently convened federal administrative conformity hearings. It is noteworthy that in acknowledging what was, in effect, a new legal remedy, the Court engaged in no analysis and simply referenced 42 U.S.C. § 1983 without discussion. This section was a 1871 Civil Rights Act provision that had lain dormant for ninety years until 1961, when the Supreme Court relied on it to establish a federal cause of action for a Fourteenth Amendment constitutional violation involving police practices.[175] Immediately following *King*, § 1983 became a principal statutory basis for bringing federal causes of action to enforce the Social Security Act and other social welfare legislation. The scope of its application, however, has been legally contentious and is now highly circumscribed.[176] In terms of the ability to access the courts to protect the legal interests of the welfare poor, nothing is written in stone.

The *King* decision was also seminal because it sealed the demise of blatant state and local efforts to regulate and punish the sexual conduct of AFDC mothers by withholding cash benefit assistance for them and their children. In the summer of 1960, for example, Louisiana had dropped approximately 23,000 children from its AFDC rolls mainly on the ground that homes were not "suitable" if an illegitimate child had been born subsequent to the receipt of public assistance.[177] In California, the most notorious practices, including an especially egregious incident in January 1963 in Alameda County, involved unannounced late night or early morning raids on welfare recipient homes in order to determine whether there was an unreported man in the home.[178] *King* laid to rest an important legal pretext for highly moralistic and excessively intrusive governmental actions, but it did not much lessen subtler distinctions in

175. *See* Monroe v. Pape, 365 U.S. 167 (1961).

176. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (holding that § 1983 creates a private right of action only where the plaintiff has "an unambiguously conferred right"); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) (holding that § 1983 can only be used to remedy violations of federal "rights" and assigns a three-part test to determine whether a right has been created); Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) (holding that even if a state violates a statutory right, there is no private right of action if Congress has already provided a comprehensive enforcement scheme); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (holding that there is no private right of action if Congress did not intend to confer primary rights on individuals); Maine v. Thiboutot, 448 U.S. 1 (1980) (holding that § 1983 can be used to remedy both a government violation of a statute as well as the Constitution).

177. *King*, 392 U.S. at 322.

178. tenBroek (pt. 3), *supra* note 135, at 668; *see* Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1355 (1963). The Alameda County case became the subject of a lawsuit brought by Benny Parrish, a county social worker, who was fired because he refused to participate. Parrish happened to be blind. The California Supreme Court ordered his reinstatement finding that he had reasonable grounds to believe that the raids violated the rights of recipients and were unconstitutional. Parrish v. Civil Service Comm., 66 Cal. 2d 260 (1967). Attorneys associated with the ACLU represented Parrish.

the structuring and administration of welfare programs based on perceptions about the general moral worthiness of recipients.

The high watermark for welfare rights litigation, especially constitutional litigation, occurred during the following two Supreme Court terms after the *King* decision. Then followed a number of important high court setbacks, one exceptionally critical.

In *Shapiro v. Thompson*,[179] a landmark opinion, the Court declared unconstitutional on equal protection grounds the practice prevalent in almost all states of holding individuals ineligible for public assistance if they did not meet a durational residency requirement. This residency requirement was typically one year. The interest at issue was the constitutional protection afforded the right to travel. The Court explicitly rejected assumptions rooted in the Elizabethan Poor Laws that linked the receipt of public assistance with controlling vagrancy. It found that the expressed legislative justification of inhibiting migration by needy persons into a state, primarily for fiscal reasons, was constitutionally impermissible.[180] In strong terms, the Court concluded that welfare recipients are guaranteed the same opportunity to travel and settle where they want as other American citizens.

The next term, in *Goldberg v. Kelly*,[181] another landmark opinion, the Supreme Court held that in accordance with the due process clause of the fourteenth amendment, state welfare agencies could not terminate or suspend AFDC grants without providing the affected recipients with advance notice of the reasons for the action, the right to appeal the proposed action before an independent adjudicator, and an opportunity to have a prior evidentiary hearing before termination or suspension. In writing the majority opinion, Justice William J. Brennan, Jr., denoted the benefits received by welfare recipients as an "entitlement" and characterized them as more like "property" than a "gratuity."[182] In support of this groundbreaking judicial conceptualization of welfare benefits, Justice Brennan referenced the work of Charles Reich, then a young Yale Law School professor.[183] Reich had analogized various forms of government largess, such as job licenses and welfare payments, to traditional forms of property. He then argued such new forms of property similarly deserved legal protection from potentially impermissible or arbitrary governmental conditions and actions. The effect of Justice Brennan's opinion was to give heightened legal status to welfare benefits.

---

179. 394 U.S. 618 (1969).

180. *Id.* at 628–29.

181. 397 U.S. 254 (1970).

182. *Id.* at 263 n.8.

183. Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Charles A. Reich, *The New Property*, 73 YALE L.J. 768 (1964) [hereinafter Reich, *The New Property*].

No longer would they be construed as mere charity—a privilege, not an enforceable right. For welfare administration, the time had come to lie to rest the discretionary paternalism that had long characterized the implementation of public assistance programs, sometimes to the benefit of individual recipients but often not. Governmental agencies now had to meet meaningful, not minimal, standards of procedural due process.[184]

Shortly after *Goldberg*, the Supreme Court issued three other key AFDC decisions. The first two involved statutory issues. The third raised a highly novel constitutional claim.

In *Rosado v. Wyman*,[185] the Court found that states had to update standards of subsistence need and account for certain special allowances in determining benefit amounts. The critical ruling, however, was that states could elect to pay only a "percentage reduction" of those amounts as a cash benefit.[186] Welfare recipient lawyers unsuccessfully argued that such a "percentage reduction" was unlawful. Their position was that based on family size the standard of need and benefits paid should be the same. The case originally arose as a result of widespread failures by the states to make cost-of-living adjustments in AFDC benefit amounts. In terms of requiring an upward adjustment in benefit amounts, the *Rosado* decision gave with one hand and took away with the other.

In *Lewis v. Martin*,[187] a California case, the Court extended the reasoning in *King v. Smith* to welfare policies which did not result in the termination of families from assistance but, instead, reduced their grant amounts on the grounds that there was a man-in-the-house. The state's assumption was that funds were available to the family for basic support without regard to whether the man voluntarily paid support or was legally liable for support based on a law of general applicability. The Court rejected the use of both absolute presumptions regarding the availability of child support and separate rules for AFDC families regarding legal liability for child support. The *Lewis* decision established important legal propositions for the administration of AFDC programs. States in practice, however, narrowly confined its holding to the underlying facts. In comparable situations, state policies continued to rely on

184. Six years later, in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), a case concerning the extent of constitutional due process to be accorded recipients of Social Security disability benefits prior to termination, the Supreme Court in determining the specific procedural safeguards that would apply framed a balancing test that gave more weight to governmental interests and fiscal considerations than in Goldberg. This balancing test has been widely applied ever since in administrative procedural due process cases involving governmental agencies.

185. 397 U.S. 397 (1970).

186. In the AFDC program, states enacted both standards of need and standards of assistance. The former presumably represented the amount a family needed to meet subsistence living expenses, such as housing, food, and clothing costs. The amounts calculated were often approximations and tended to be on the low side. The latter represented the amount actually to be paid a recipient family.

187. 397 U.S. 552 (1970).

assumptions about the availability to a family of income or resources to deny AFDC eligibility or pay much reduced grant amounts.[188]

The most consequential and unmitigated early setback experienced by antipoverty lawyers was *Dandridge v. Williams*,[189] where the most important contested issue concerned an equal protection challenge to how states set categorical aid benefit amounts. In establishing a grant structure, Maryland set benefit amounts in accordance with standards of need up to a fixed family unit size. After that, there was an upper limit on benefit amounts without regard to family size and need. The Court upheld the Maryland regulation as violating neither the Social Security Act nor the Fourteenth Amendment. In rejecting the constitutional claim, the Court applied a deferential "reasonable basis" test because it regarded the regulation as falling within the social and economic field and wanted to avoid acting in a way "reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'"[190] The Court acknowledged that there was a dramatic difference between state programs to meet the needs of impoverished individuals and state business or industry regulation, but it found no basis for applying a different constitutional standard.[191]

Sparer characterized the initial multipronged legal challenge to the welfare system as a "grand" strategy.[192] The objectives were to raise benefit levels, to end exclusionary requirements unrelated to economic need, to remedy a lack of fair procedures, and to curb local and state discretion.[193] The first cases to reach the Supreme Court accomplished these objectives to a remarkable extent, at least from the standpoint of underlying legal doctrine. *Dandridge* was the wake-up call that case law developments occur incrementally and slowly and that courts over the long run were not likely to be especially receptive to the claims of the welfare poor.

At the center of Sparer's strategy was an attempt to establish constitutionally a right to welfare, which he termed a "right to live."[194] In the Supreme Court, the idea was dead on arrival. It received nary a mention in the *Dandridge* majority opinion or in the two dissents. The time for landmark constitutional rulings lasted only a few short years.

A right to welfare is a social right. Conceptually, social rights are not an easy fit for American constitutional law and underlying political

---

188. *See, e.g.*, *infra* text accompanying notes 368–380.

189. 397 U.S. 471 (1970).

190. *Id.* at 484 (citation omitted).

191. *Id.* at 485.

192. Edward V. Sparer, *The Right to Welfare*, *in* THE RIGHTS OF AMERICANS 84 (Norman Dorsen ed., 1972).

193. *Id.* at 66.

194. *Id.* at 84. For a critique of the right to live as a tenable judicial doctrine, see Samuel Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare*, 58 MINN. L. REV. 211 (1973).

ideology. Social rights have to do with the social welfare of individuals in a broad sense and focus on such concerns as education, healthcare, subsistence income support, and job guarantees.[195] They address issues of social equity and economic security and are not self-executing. They usually require the establishment and operation of costly governmental programs. Their aim is to provide measures of insurance against societal uncertainties. To the extent Americans acknowledge social rights, it is through the enactment of legislative programs, not through constitutional interpretation.[196] American constitutional guarantees of individual rights are directed at the evils of government, not the evils of the social and economic order. The *Shapiro* and *Goldberg* decisions fell within the traditional framework of American constitutional law. The claims raised in *Dandridge* did not.

Later AFDC cases before the Supreme Court have turned by and large on questions of legislative interpretation alone. Beginning with the ascendancy to the Supreme Court of Republican appointees Warren Burger as Chief Justice and Harry Blackmun as Associate Justice, even constitutional arguments building on established doctrine were likely to be unpersuasive when applied to welfare policies and practices. In *Wyman v. James*,[197] the Court's 6–3 majority opinion authored by Justice Blackmun held that it was not an unconstitutional or unreasonable search under the Fourth and Fourteenth Amendments to require welfare recipients to submit to warrantless and usually unannounced searches of their homes. The Court's only reservation was that a late night or "early morning mass raid upon the homes of welfare recipients" would "present another case for another day."[198] In short, after *Dandridge*, in terms of protecting the legal interests of welfare recipients, much depended on maintaining the status of welfare benefits as statutory entitlements, something which was not a sure bet given the dominance in American ideology of deeply held beliefs about rugged individualism, picking yourself up by your own bootstraps, and blaming the poor for their own

195. *See* MAURICE ROCHE, RETHINKING CITIZENSHIP: WELFARE, IDEOLOGY AND CHANGE IN MODERN SOCIETY 3 (1992).

196. The closest the U.S. Supreme Court has come to recognizing a social right as constitutionally based is in *Plyler v. Doe*, 457 U.S. 202 (1982), where the Court held that undocumented children, just like other children, were entitled to a free elementary and secondary education.

197. 400 U.S. 309 (1971).

198. *Id.* at 326. Wyman v. James was the first majority opinion authored by Justice Blackmun, who had taken his seat on the Court shortly before oral argument in the case. While Justice Blackmun is seen as exemplifying change and growth in a sitting justice, he never changed his mind about the Wyman decision. Late in his tenure, he noted, "I have never regretted my vote in that litigation and would vote the same way again." LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 63 (2005).

poverty.[199] Sparer was not wrong in fearing what would happen if a right to welfare were not grounded in the Constitution.

While litigation was the chief tactic in Sparer's grand strategy, it was not the only tactic. Antipoverty lawyers also worked in support of local and national welfare rights organizations. Nowhere was this more evident than in the special needs campaigns initiated in the mid-1960s.[200] A number of states at the time, including California and New York, calculated AFDC grant amounts based on individual family needs, which included allowances as special needs for items like furniture, clothes, dishes, and cleaning equipment. Welfare rights organizations mainly led by recipients took the lead in helping individual claimants apply for and obtain special need allowances, with legal aid attorneys providing back-up support for grant applications and representation at fair hearings in the event of denials.

The campaigns were successful both as organizing tools and in obtaining benefits. Local welfare rights organizations grew in membership, and the National Welfare Rights Organization played an influential role in national welfare politics in the late 1960s. Cash grants to recipients also went up dramatically. In New York City, for example, the average special grant per person for clothing and furniture alone, between May 1965 and June 1968, rose from $24 to $192.[201] Special needs campaigns marked the high point in welfare rights organizing. By the early 1970s, most states adopted a flat grant system, which provided little to no room for requesting special additional benefits.[202]

Although aggressive legal advocacy and grassroots organizing aimed at AFDC beneficiaries emerged at about the same time, most welfare rights organizations were not able to sustain meaningful levels of participation and activity over time. Sparer described the legal and lay

199. Congress's enactment in 1996 of state block grant legislation to replace the AFDC program explicitly added as part of its purpose clause in new Social Security Act section 401(b) the following language: "No individual entitlement—this Part shall not be interpreted to entitle any individual or family to assistance under any state program funded under this Part." Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, tit. I, § 103, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 601(b) (2011)). Generally speaking, the reported cases citing this provision find that TANF benefits are not statutory entitlement in the same way AFDC benefits were, but that denials, terminations, or conditioning of benefits are still subject to constitutional review, though typically at a lesser degree of protection. *See, e.g.*, Marchwinski v. Howard, 309 F.3d 330 (6th Cir. 2002) (drug testing of beneficiaries); Westenfelder v. Ferguson, 998 F. Supp. 146 (D.R.I. 1998) (durational residency requirements); K.M. v. W. Va. Dept. of Health and Human Resources, 575 S.E.2d 393 (W. Va. 2002) (pre- and post-termination hearings); Weston v. Cassata, 37 P.3d 469 (Colo. App. 2001) (pre-termination notices).

200. *See* DAVIS, *supra* note 18, at 40–55.

201. Sparer, *supra* note 192, at 78.

202. For a more detailed discussion of the importance of special benefit grants as an organizing and welfare reform tool in the 1960s and 1970 on the East Coast, see DAVIS, *supra* note 18, at 41, 48–49.

forces as "sometimes cooperating, sometimes working independently, never quite sure of their proper relationship to each other and—consequently weaker—in their joint effect."[203] Sparer's observation was as true in California as elsewhere.

3. *Rising Welfare Rolls and the Rise of Advocacy in California*

In fall of 1966, California voters elected Ronald Reagan their governor. One of his main campaign issues consisted of attacks on increasing welfare rolls and costs.[204] Once in office, however, he found that he had neither the knowledge about welfare programs nor the degree of control over the state bureaucracy which he felt necessary to take effective action.[205] It took time for his administration to develop the expertise, the staff, and the confidence to propose and carry out substantial revisions in welfare policy and practice.

Although Reagan campaigned vigorously against welfare state "handouts," his first term as governor was marked by unprecedented growth in public assistance costs and in numbers of individuals receiving welfare benefits. This was particularly true for AFDC. In 1967, the California monthly AFDC caseload averaged 174,891 families. By 1971, there were 421,799 families who each month received AFDC benefits. In terms of the cost, total annual expenditures for AFDC grants in California during this period almost tripled, rising from $372,239,647 in 1967 to $954,519,582 in 1971.[206] Despite a forcefully articulated conservative philosophy, an overarching interest in curbing state expenditures, and a core political constituency not known for its sensitivities to the claims of the poor, Reagan exerted surprisingly little influence over spiraling increases in public relief rolls and expenditures during his first term.

One major contributing reason was the emergence of forceful statewide welfare rights advocacy by both legal services attorneys and organizations of the AFDC poor. The organization of welfare rights groups in California preceded by several years the expansion of federally funded legal aid as part of President Johnson's War on Poverty.[207]

In April 1963, several months after the Alameda County early morning raids on the homes of AFDC families, members of the International Longshoremen's Workers Union initiated the formation of the Oakland Welfare Rights Organization. In conducting an unemployment

---

203. *Id.* at 65.

204. CANNON, GOVERNOR REAGAN, *supra* note 1, at 157.

205. Interview with Ronald Reagan, *supra* note 6.

206. Public Welfare in California, 1972-73, App'x F, State of Calif., Health & Welfare Agency, Dept. of Social Welfare. The data reported are for the fiscal year, which in California runs from July through June.

207. For a history of the formative years of federally supported legal services as initiated by the Federal Office of Economic Opportunity, see JOHNSON, *supra* note 27.

survey, they had discovered a woman and seven children without food or money. For months they sought to obtain relief for the family from the Alameda County Welfare Department but without satisfaction. Partly out of frustration and partly out of a conviction in the power of organization, these union members decided to form a grassroots group capable of pressing recipient claims upon a frequently unresponsive county welfare agency. They were soon joined by dissatisfied county social workers including Benny Parrish, who had refused to participate in the infamous raids.[208]

Parrish brought with him copies of the various California regulations and handbooks concerning public assistance, which at the time were not readily available to the public, and proceeded to train members of the organization as lay advocates knowledgeable in the multitude of requirements determining welfare eligibility and assistance. The organization opened an office which was staffed to provide assistance to present and potential recipients. It also conducted mass action activities including a sit-in one weekend to protest the Alameda County policy of sending unemployed mothers to do farm labor. Although the Oakland group at first was dominated by professionals, it soon came to be composed largely of African-American AFDC mothers. Following the Oakland example, welfare rights organizations began to develop throughout the state.

Legal aid societies with highly limited resources existed in major California cities well before the advent of federal funding. They were rarely active in the public assistance field. In 1965, one of the first agencies nationally to receive a substantial infusion of federal funds was the Alameda County Legal Aid Society in Oakland. The following year, programs were initiated or expanded throughout California. The new funding for the most part resulted in the hiring of recent law school graduates. These new attorneys had few preconceptions about the precise problems that they would confront and the kinds of actions that they would have to take. They were encouraged by OEO officials to engage in both individual service delivery and group advocacy for the poor. At the beginning, there was seldom much statewide planning of group advocacy strategies.

With respect to California welfare policies and practices, no one initially fulfilled the chief tactician role undertaken by the New York-based Ed Sparer, who focused on litigation brought in the eastern and southern states.[209] By and large, the early actions undertaken by California

208. *See* Marilyn J. Blawie, Law and Politics of Welfare Rights Organizations 18–19 (1970) (unpublished paper delivered at the 66th Annual Meeting of the American Political Science Association).

209. There were some experienced California attorneys who laterally joined the new OEO legal services programs from other legal practices. To my knowledge, none had a specific welfare advocacy

antipoverty lawyers were ad hoc and more than anything else reflected each individual attorney's own experiential learning curve about the needs of the poor, barriers and opportunities within the law for social change, and the resourcefulness and obstinancy of political leadership.

At the same time, welfare recipients were on their own learning curve. Several attitudinal surveys indicated that in the mid-1960s most public aid beneficiaries were not especially conscious of the legal remedies available to them.[210] Only rarely did they conceive of themselves as rights-bearing citizens. Restrictive eligibility tests, intrusions upon privacy, lack of information about entitlements, all tended to foster attitudes of submission rather than self-assertion.[211] Shortly thereafter, these baseline attitudes began to change, as substantial numbers of welfare recipients for the first time sought legal help from welfare rights organizations and then, after the advent of federal funding, a much-bolstered network of free legal services programs.

The most visible actions initially taken by legal services attorneys involved the commencement of class action lawsuits against state and county welfare officials. The AFDC actions filed raised similar issues as those filed elsewhere in the country, though there usually was not a great deal of coordination until issues reached the U.S. Supreme Court. The first wave of major lawsuits in California included challenges to durational residency requirements,[212] deficient procedural due process safeguards,[213] assumptions about financial contributions and responsibilities of unrelated males,[214] and maximum AFDC grant amounts not based on family size or determination of need.[215] In almost all instances, the cases ended with favorable judicial decisions.[216] The main exception was the vacating and the eventual reversal of the California court decision on setting maximum grant amounts as a result of the Supreme Court's pivotal ruling in *Dandridge v. Williams*[217] not to apply a strict scrutiny equal protection standard when reviewing welfare classifications.

---

agenda in mind.

210. *See* Scott Briar, *Welfare from Below: Recipients' Views of the Public Welfare System*, 54 CALIF. L. REV. 370 (1966); *see also* Joel F. Handler & Ellen J. Hollingsworth, *How Obnoxious Is the "Obnoxious Means Test"?: The Views of AFDC Recipients*, 1970 WISC. L. REV. 114.

211. Briar's study, which was based on a small but intensely interviewed sample of California AFDC-U recipients, revealed that most tended to view themselves as "suppliants" with unquestioned obligations to welfare agencies and little cognizance of their own rights. Briar, *supra* note 210.

212. Burns v. Montgomery, 299 F. Supp. 1002 (N.D. Cal. 1968), *aff'd*, 394 U.S. 848 (1969).

213. Wheeler v. Montgomery, 296 F. Supp. 138 (N.D. Cal. 1968), *rev'd*, 397 U.S. 280 (1970); McCullough v. Terzian, 2 Cal. 3d 647 (1970).

214. Lewis v. Montgomery, 312 F. Supp. 197 (N.D. Cal. 1968), *rev'd and remanded sub nom.* Lewis v. Martin, 397 U.S. 552 (1970). *See supra* text accompanying note 187.

215. Kaiser v. Montgomery, 319 F. Supp. 329 (1969), *vacated and remanded*, 397 U.S. 595 (1970).

216. For a comprehensive review of California AFDC cases decided from the end of 1967 until the middle of 1970, see Peter Sitkin, *Welfare Law in California*, 1970 CALIF. LAW 559.

217. *See supra* text accompanying notes 189–191.

At the beginning of the legal services movement, the decentralized character of the federally supported legal services program resulted in relatively little overall coordination among various local California projects in the filing of lawsuits. When attorneys with the Alameda County Legal Aid Society, for example, challenged California fair hearing regulations on due process grounds in an action instituted in state court, they were not aware of a similar case already filed in federal court by San Francisco Neighborhood Legal Assistance Foundation.[218] Conflicting judgments were entered in the two cases within several weeks of one another. The federal action, *Montgomery v. Wheeler*,[219] was decided against the claims of the welfare recipients and was successfully appealed to the U.S. Supreme Court, where it was the companion case to *Goldberg v. Kelly*.[220] In the state court proceeding, *McCullough v. Terzian*,[221] legal aid attorneys immediately obtained injunctive relief, which led to the institution in California of prior notice and pretermination hearing requirements two years before the landmark *Goldberg* ruling. Several years later, largely at the instigation of Abascal, the degree of explicit coordination among California legal services programs on welfare policy advocacy increased substantially.

On an everyday basis, legal service attorneys working in the welfare field spent most of their time assisting individual welfare recipients in disputes with county welfare departments. Much of this work involved providing representation at administrative fair hearings or in facilitating settlements with county welfare agencies prior to the actual holding of a hearing.

Daniel Brunner, an attorney with the Long Beach Legal Aid Society from 1969 until 1976, estimates that during that time period he probably assisted close to 1000 welfare recipients in fair hearing proceedings, either directly himself or supervising others.[222] He came to know firsthand the range of practical and legal problems which poor families regularly confronted when applying for or seeking to retain public assistance benefits. Building on this experience, Brunner would work closely with Abascal on fashioning and implementing the litigation strategy undertaken after the enactment of the Welfare Reform Act of 1971.

---

218. Interview with Thomas Schneider, staff attorney, Legal Aid Soc'y of Alameda County (Feb. 1, 1974) (on file with author).

219. Wheeler v. Montgomery, 296 F. Supp. 138 (N.D. Cal. 1968), *rev'd*, 397 U.S. 280 (1970).

220. Goldberg v. Kelly, 397 U.S. 254 (1970).

221. No. 379011 (Alameda Cnty. Super. Ct. May 2, 1968), *aff'd*, 2 Cal. 3d 647 (1970).

222. Interview with Daniel Brunner (Aug. 29, 2011). Brunner served as the General Counsel for the Department of Benefits Payments during Jerry Brown's first term as California's governor from 1976 through 1978. He then returned to legal services work with the Western Center on Law and Poverty from 1978 to 1981, where he co-facilitated a statewide welfare task force that had assumed the role and functions in coordinating California welfare advocacy first undertaken by Abascal.

In California as well as elsewhere, the initial instinct of the first generation of antipoverty lawyers, most of them just out of law school and heavily influenced by the Civil Rights Movement, was to think in broad constitutional and policy terms. There were glaring legal defects in the existing welfare system, and they were easiest to perceive and to challenge. But relatively quickly, legal services lawyers learned from their representation of individual recipients in administrative proceedings that the bottom line was not the evolution of legal doctrine but how much money recipients had to support themselves.

This meant cash in their pockets, not just the establishment of new rights that might or might not be enforced. As Beulah Sanders, a founder and later chair of the National Welfare Rights Organization, put it: "Everyone has their own plan on what to do with welfare recipients. Well, the only thing you can really do is get up off your Seventeenth Century attitudes, give poor people enough money to live decently, and let us decide how to live our lives."[223] California legal aid lawyers came to share her perspective. In describing his work in the early 1970s, Brunner said that he mostly thought of himself as a "tax-lawyer for poor people" whose goal was to "get more money for poor people—more money in their hands."[224] An increase in cash assistance was a tangible gain. The efficacy of anything else was highly uncertain.

Questions about benefit levels required, however, untangling and then mastering a labyrinth of fairly obscure welfare statutes and regulations. The impacts of landmark court rulings on eligibility and benefit levels were the tip of the iceberg. Welfare is a highly regulated field. The full range of issues affecting the receipt of cash assistance was not immediately obvious. The issues also changed over time. For the lawyers initially involved in welfare advocacy, the learning curve was multipronged and steep. One notable example of such learning was the collaboration between legal services attorneys and welfare rights organizations on grassroots campaigns to obtain special benefits.

The most sweeping joint effort in California took place in 1967 and 1968. It involved a mass campaign to establish educational trust funds for AFDC children.[225] Under state regulations, previously seldom implemented, sums either earned or unexpectedly received by AFDC families could be set aside for future educational needs of the children. The amounts were then not subject to inclusion in the ordinary computations that govern

223. Beulah Sanders, Statement to the Presidential Commission on Income Maintenance (June 5, 1969), *as cited in* Felicia Kornbluh, *The Goals of the National Welfare Rights Movement: Why We Need Them Thirty Years Later*, 24 FEMINIST STUDIES 65 (1998). On another occasion, Sanders similarly stated: "We have a plan to end poverty. It's called money." Aaronson, Legal Advocacy and Welfare Reform, *supra* note 5, at 65.

224. Interview with Daniel Brunner, *supra* note 222.

225. Aaronson, Legal Advocacy and Welfare Reform, *supra* note 5, at 119.

determinations of eligibility and benefit level. Welfare rights groups publicized the availability of educational trust funds, while legal services attorneys instituted legal challenges whenever there was significant official resistance to their creation. Successful for a time, the campaign came to an end when the Reagan administration took decisive action and repealed virtually all regulatory authorization for the establishment of such funds. Both recipient groups and legal services lawyers learned how unhesitatingly public officials could and would act to counter efforts to increase cash benefits for the poor.

Notwithstanding collaborative actions like the educational trust campaign, the overall relationship between welfare rights organizations and legal services programs in California, as in other states and nationally, was problematic. From the beginning, there were difficult, inherent tensions between the requirements of effective grassroots organizing and the existence of government-supported, free legal representation.

With respect to litigation, the first major policy impact cases served as important rallying points for expanding membership in welfare recipient groups in that successful lawsuits underscored the effectiveness of organized challenges to governmental policies. Later, along the same line, antipoverty attorneys frequently included the California Welfare Rights Organization or a comparable group as named parties in class action litigation. This practice, which had certain legal advantages as a way to avoid mootness, provided noteworthy, added publicity for the group. Welfare rights organizations, in turn, were an important resource in the planning of litigation. In particular, they played a key role in finding and referring individual recipients whose factual claims were most likely to bolster whatever legal contentions were being advanced.

Yet, viewed from an organizing perspective, the results in the end were not entirely salutary. Major litigation, especially successful litigation, had a lulling effect on political organizing. It focused attention on the courts, on the role of lawyers, and on legal argumentation rather than self-help actions by recipients themselves. Reliance on litigation produced results but with minimal participation and self-sacrifice on the part of affected beneficiaries, which is the kind of engagement usually needed to build and to expand grassroots organizations.

According to a prominent welfare rights organizer, it was not, however, law reform activities but routine services provided by legal aid offices that most damaged recipient efforts at self-organization.[226] For grassroots organizations, providing a benefit, such as free legal assistance, can be a key factor in attracting and retaining members. When welfare

226. Interview with Timothy J. Sampson, former high-level NWRO staff member (Feb. 8, 1974) (on file with author). Following his time at NWRO, Sampson returned to the San Francisco Bay Area, where he was a social work professor and highly active community organizer.

rights groups first began in California, they were the only organizations actively engaged on a broad scale in assisting AFDC beneficiaries. The expansion of free legal services by the federal government created a competing and eventually superseding network of advocacy organizations. Legal services programs exacted no cost, financial or otherwise, from their clients and promised professional rather than lay representation. It did not take long for legal aid offices, not welfare rights offices, to become the preferred place for ordinary recipients to seek individual help. By 1971, welfare rights organizing in Alameda County, where California efforts to organize AFDC recipients first began, had come to a standstill.

The period from the beginning of Reagan's first gubernatorial term to late 1969 involved strong disagreements between welfare recipient advocates and state welfare officials but without hostility or animosity. The Director of the State Department of Social Welfare ("SDSW") was John C. Montgomery, a Reagan appointee who was previously a member of the Ventura County Board of Supervisors. During his tenure in office, Montgomery made few adjustments in SDSW's policymaking staff, which was composed largely of holdover personnel from the latter years of the prior Democratic administration of Governor Edmund G. "Pat" Brown, Sr. Montgomery had, much of the time, a surprisingly free hand in administering the SDSW with relatively little interference from either the Governor's Office or the Secretary of Human Relations, the gubernatorial cabinet member to whom he was directly responsible.

At the end of 1969, under fire from others in the Reagan administration for having let welfare rolls and costs skyrocket, Montgomery resigned his position. In his final press statement, he stated the following:

> Here in California we have been challenged on dozens of issues all of them coming back to the fact that for the first time, the poor have real and effective advocacy. . . . This . . . is the significant point transcending all other considerations and consequences. An era of advocacy has begun out of which, I am sure, public assistance is never going to be the same.
>
> Not only is this happening through the courts, but also in meetings and hearings of welfare boards, advisory commissions and administrators at every government level. The poor have come out of their apathy, and our accountability for what we do and why we do it is theirs to know—as it always has been under the law but never before so vocally sought.[227]

Having had to confront an unexpected and unprecedented series of challenges from welfare recipient groups and legal services lawyers, Montgomery was able to accept what had occurred as a promising step in the enfranchisement of the poor.

---

227. Sitkin, *supra* note 216, at 607 (citing Montgomery's press statement).

Through Montgomery's tenure, SDSW vigorously defended its policies and practices against attack. There was, however, a willingness to accommodate contrary views, particularly when ordered by a court. This was not to last. After Montgomery's resignation, the Department's position became one of constantly challenging statutory requirements and judicial developments with which the Reagan administration disagreed by seeking new legislation and exceptions to federal policy and by circumventing and resisting adverse court rulings. For the conservative and ambitious governor, the specter of continually rising welfare rolls and costs had to be brought under control.

Meanwhile, Abascal and his legal services colleagues had become expert not only in the law but in the practicalities of welfare policy and administration. They were not of a mind to abandon litigation, but their perspective was highly pragmatic. Litigation would be used as part of an overall strategy that included legislative and administrative lobbying. Substantively, the key questions before initiating actions were how much money was at stake for intended beneficiaries, and how many recipients were likely to benefit. Although there was ample respect for legal principles and advancing the constitutional and statutory rights of the welfare poor, the primary approach taken would be technical and mundane. It was quite different from Sparer's grand strategy initiated just a few years before.

D. THE POLITICS OF WELFARE REFORM

1. Prelude: Setting an Agenda and Reshaping the Bureaucracy

Total annual expenditures in California for all categorical aid and general assistance programs had nearly doubled during Reagan's first term of office, from $925 million to more than $1.8 billion.[228] To call attention to these increases without accepting political responsibility for them, Reagan mounted a formidable case against the existing welfare system. His approach was twofold.

First, he strongly identified his interests with that of the taxpayer. Welfare in California became more than ever an issue explicitly tied to tax relief. Reagan's most persistent refrain was that a reduction of welfare expenditures would ease the burden on the taxpayer. In July 1970, in a letter to the chairmen of all county boards of supervisors, he stated, "The fact is California taxpayers are looking to their elected representatives in government—at every level—to make the kinds of tough decisions necessary for bringing runaway welfare costs back in

228. Public Welfare in California, 1972-73, *supra* note 206, App'x A.

check."[229] Though old hat now, the extent to which Reagan was able rhetorically to bind welfare policy to tax relief was novel at the time.

Second, Reagan placed the blame for rising costs on others. At various times, he and his top administrators attributed the increases to previous state legislation, cumbersome federal requirements, laxity in administration by counties and individual social workers, recalcitrance on the part of middle level bureaucrats within SDSW, unwarranted interference by courts, antipoverty attorneys, welfare rights organizations, and the suspect behavior of welfare recipients themselves.[230] Although the allegations were exaggerations and had inaccuracies, they were not entirely off base. Some of what he underscored indeed had contributed to an unwelcome, from his standpoint, liberalization in welfare policy and administration.

In discussing specific reforms, Reagan's main policy themes recalled to a striking degree the Tudor poor law vocabulary long associated with public relief. He spoke of compulsory employment for those capable of working, of strengthening family ties, of increasing assistance to the "truly needy," and of purifying the welfare system by uprooting those who were not strictly entitled to benefits—usually conceived of as the "non-needy."[231] These themes were largely symbolic.

In talking about jobs for welfare recipients, state officials neither consulted nor incorporated specific data about the prospects for private or public sector employment.[232] They had only the slightest awareness of actual labor market needs. Furthermore, they took few steps to establish the necessary day care facilities for children who were to be left unattended while their mothers sought work. The bulk of potentially employable adults who received public aid were AFDC mothers. The appeal being made was about "work" as an abstract value, not the establishment of a meaningful program for employment.

Recommendations to strengthen family relationships, which centered on increasing the financial responsibilities of relatives for the support of welfare beneficiaries, had a similar hollow ring. In practice, such provisions placed a considerable strain on bonds of affection and family ties, since they imposed additional economic obligations in situations where individuals were often least able to bear the monetary burden.

The commitment to the "truly needy" was no less wrought with inconsistencies. The conception, like older notions such as the "deserving poor," appeased altruistic impulses but in application was elusive. The

229. Attachment to Press Release of Governor Ronald Reagan #356 (July 10, 1970).

230. *See* CAL. DEP'T OF SOCIAL WELFARE, WELFARE REFORM IN CALIFORNIA . . . SHOWING THE WAY (1972) [hereinafter WELFARE REFORM IN CALIFORNIA].

231. *Id.* at 10.

232. Interview with Robert B. Carleson, former California Director of Social Welfare (Jan. 1971–Mar. 1973), in D.C. (Feb. 25, 1974).

"non-needy" more often than not turned out to be the families of working adult recipients who, entitled under federal law to having their grants calculated after taking into account reasonable work-related expenses and certain financial incentives for working, were struggling to get off the welfare rolls. For the poor there was no escaping political stigmatization. If they were not working, they did not want to work and had to be compelled to seek employment. If they were working, they were "non-needy" and thus, by implication, were wrongfully receiving public aid benefits.

The Reagan welfare campaign gave new authority to old ideas and placed his opponents on the defensive. The reforms he proposed set the agenda to which others, including Abascal and his colleagues, had to respond. But Reagan was too masterful a politician to rely on rhetoric alone. He took deliberate and comprehensive action to transform SDSW into an administrative agency that vigorously carried out proposals he wanted implemented in a concerted drive to curtail welfare costs.

In August 1970, Reagan appointed a special task force on public assistance to conduct an extensive review of all laws and regulations affecting welfare programs and to develop detailed organizational and fiscal analyses concerning the administration of public assistance. The work of the task force was not widely publicized so as to avoid premature controversy. The four individuals selected to serve on the task force had no previous experience either in social work or public assistance policy. Three came from the Departments of Agriculture, Conservation, and Public Works, respectively. The fourth was the Governor's Appointment Secretary. The report summarizing the task force's work described them as "men with proven management capabilities."[233] Their professional staff consisted of attorneys and fiscal experts.

At the beginning of December, shortly after Reagan's resounding reelection for a second term, the task force completed its work and delivered findings and proposals for a broad welfare reform program. The main conclusions, as set forth in the formal report issued, were as follows:

> Many state and federal laws had been "broadened, expanded and twisted" by implementing regulations.
>
> "Interpretations" of federal and state law were being made by social work professionals without sufficient legal knowledge or research.
>
> The original system, which was set up essentially to provide social services and manned primarily with social worker skills, had since become a huge management and fiscal operation for the issuance of "unrestricted direct money grants," while the necessary shift in personnel skills to accommodate the change in circumstances had not occurred.

233. WELFARE REFORM IN CALIFORNIA, *supra* note 230, at 9.

> . . . the tightening of eligibility and grant determination regulations was assessed to be central to reform.[234]

In short, the report called for a restaffing of SDSW and a thorough reworking of state provisions governing the distribution of welfare benefits.

After the submission of the report, Reagan selected Robert B. Carleson, a member of the task force and previously the Chief Deputy Director of the State Department of Public Works, to be the Director of Social Welfare.[235] He also named James Hall as the Secretary of Human Relations, the cabinet-level position with oversight responsibility for social welfare policy and administration. Hall was a close and trusted cabinet member, who had been serving as Secretary of Business and Transportation. Both Carleson and Hall assumed their new positions in early January 1971. According to Carleson, he met regularly with Governor Reagan for the first two months after his appointment. At these meetings, the proposals of the special task force on public assistance were transformed into a concrete program for change. After this initial period, Carleson's continuing contacts with Reagan were mainly through Hall.[236]

The first priority in the administrative restructuring of SDSW was the removal from all positions of authority persons regarded as overly sympathetic to the claims of the poor. Reagan generally referred to these individuals as "professional welfarists."[237] He meant mainly social workers, who for years composed the Department's policymaking staff.

Carrying out Reagan's directions to remove high-level administrators with social work backgrounds, Carleson vacated the positions and then reclassified the jobs to require that they be filled by individuals with fiscal, managerial, or legal experience rather than social work training. Social workers in mid-level positions with responsibilities for welfare benefit programs were transferred into a community service program for treating the mentally ill. Their previous positions, too, were similarly reclassified. What happened was subsequently described in the following vivid terms:

> Out the window went the tradition of having the Department run by social workers or unwitting captives: in the door marched a management-legal-fiscal-oriented team intent upon reshaping welfare

---

234. *Id.* at 9–10.

235. Carleson replaced Robert Martin, a lawyer, who served in the position for about a year as Montgomery's successor. High Reagan administration officials quickly came to regard Martin as lacking the necessary administrative skills for the job but wanted to wait until after the election to make a change, so as to avoid any appearance of political instability within the administration during the campaign.

236. Interview with Robert B. Carleson, *supra* note 232.

237. Interview with Ronald Reagan, *supra* note 6.

> into a viable system under which both the genuinely needy and the troubled taxpayer would find equanimity and relief.[238]

Acting expeditiously, Carleson dismantled SDSW's existing bureaucratic structure and thereby preempted the prospect of any internal dissent to or moderation of the governor's welfare policy agenda and its eventual implementation.

One of Carleson's chief assistants was Ronald Zumbrun, an attorney who worked with him at the Department of Public Works and who was a staff member of the special welfare task force. Zumbrun assumed the newly created position of Deputy Director for Legal Affairs.[239] The creation of the Legal Affairs Division was the most novel development in Carleson's overall restructuring of decisionmaking within SDSW.

At the end of 1970, prior to Carleson's changes, SDSW employed about five full-time attorneys. They worked out of a simply designated bureau known as the Legal Office. The formal authority of the Office extended only to providing in-house legal advice and to supervising through a chief referee the state fair hearing system. Under Carleson, the position of chief attorney became a deputy directorship with immediate supervisory control over federal coordination, legislative matters, regulations development, administrative proceedings, security operations, and a priority task force on welfare fraud. Within a year, in line with these expanded functions, the legal staff of the Legal Affairs Division grew to thirty-five attorneys.

In addition, Carleson took advantage of the election of Evelle Younger, a Republican Attorney General succeeding a Democrat, to have a special unit of ten deputy attorneys general physically placed within SDSW headquarters. This was a highly unusual move. The California Attorney General is responsible for representing all state departments and agencies in litigation. While pivotal litigation decisions are made by client departments and agencies, deputy attorneys general ordinarily view themselves as independent legal advisors. The placement in SDSW of this group of attorneys, though they were not the only deputy attorney generals to work on welfare cases, had the effect of increasing further SDSW's internal legal capability and its leverage in controlling the handling of court cases.

It is noteworthy, however, that on all major judicial issues the Attorney General's Office consulted independently with the Secretary of

---

238. WELFARE REFORM IN CALIFORNIA, *supra* note 230, at 11.

239. Following his state government service (c. 1973), Zumbrun became a principal founder of the Pacific Legal Foundation, where he initially served as the Executive Director of Legal. One of the earliest conservative public interest law organizations, the Pacific Legal Foundation has played and continues to play an especially prominent role in advocating for constitutional limits on the power of government to take and regulate private property.

Human Relations.[240] This continuing high level involvement reflected the political priority placed on welfare reform by the governor and his closest advisers.

On March 3, 1971, Reagan transmitted to the California Legislature his program for welfare reform.[241] This was the most significant legislative message of his administration. The stakes involved were extraordinarily high, as the message was intended not only to present proposals for legislation but also to showcase an entire blueprint for change. Having presidential ambitions, Reagan wanted a conservative public assistance program that would counter the Nixon administration's proposed Family Assistance Plan.

To Carleson, the message gave explicit authority to take whatever action was necessary to carry out the welfare reform program. In doing so, he self-described his operational style as confrontational.[242] He felt that previous SDSW Directors had been too conciliatory in interactions with opponents or dissenters. In support of a highly aggressive approach to welfare reform, he was able to call upon the entire resources of California's executive branch of government. Any objections within the administration were dealt with by Hall at the cabinet level.[243]

After only several months in office, Carleson successfully completed the restructuring and restaffing of SDSW, a major objective of which was to centralize departmental authority in the hands of a few like-minded individuals. A welfare bureaucracy once dominated by social workers was no more. The reorganization resulted in a greatly bolstered role for lawyers but in ways that tied them closely to the administration's welfare policy objectives. Carleson had done what was expected of him. The Reagan government had new confidence in its ability to promote and defend its welfare reform agenda, including challenges from public assistance recipients and their attorneys.

2. *Combat: Defiance and Delay in Complying with Law*

a. Preparing for a Strategy of Conflict

While most California legal aid programs were involved to one degree or another in welfare-related activities, one program, San Francisco Neighborhood Legal Assistance Foundation ("SFNLAF"), came to

240. Interview with Jay Linderman, former deputy attorney general (Feb. 18, 1974) (on file with author).

241. RONALD REAGAN, GOVERNOR OF CAL., MEETING THE CHALLENGE: A RESPONSIBLE PROGRAM FOR WELFARE AND MEDI-CAL REFORM (Mar. 3, 1971) [hereinafter MEETING THE CHALLENGE].

242. Robert Carleson, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, Ronald Reagan Gubernatorial Era Series, Stemming the Welfare Tide: Oral History Transcript 52 (1986).

243. Interview with Ronald Zumbrun (Oct. 25, 1973) (on file with author).

occupy the dominant role in the early 1970s. The first steps were taken by Peter Sitkin, a Reginald Heber Smith Community Lawyer Fellow,[244] assigned to the San Francisco program. Sitkin developed an early expertise in public assistance law. His most prominent case was *Wheeler v. Montgomery*, which he handled from the trial stage through oral argument in the U.S. Supreme Court, where the case was jointly heard with *Goldberg v. Kelly*.[245] In addition to providing direct representation himself, Sitkin regularly provided welfare law advice to other California legal services lawyers and, in that capacity, initiated under SFNLAF sponsorship the first of several in-state welfare training sessions for California antipoverty attorneys and lay advocates.

Sitkin left SFNLAF in mid-1971. Before his departure, he recruited Abascal to work at the San Francisco program. They had previously co-counseled on welfare litigation. Upon taking over most of Sitkin's statewide welfare advocacy responsibilities, Abascal encouraged SFNLAF to formalize the loose, guiding role the program previously had been performing in the welfare area. The result was the creation of a special "law reform" unit under Abascal's direction to oversee welfare advocacy in California. In an unusual development, a unit of a local legal services program formally assumed major responsibility for the initiation and coordination of welfare recipient advocacy for an entire state.

It was no coincidence that during roughly the same period that Carleson acted to expand the number and intensify the coordination of SDSW lawyers, Sitkin preliminarily and then Abascal systematically embarked on a comparable course regarding legal advocacy for the welfare poor. Both sides realized that they had to prepare for heightened levels of ongoing conflict. For welfare recipients, legal services attorneys began to account for the prospect of increasing political as well as legal resistance to their challenges. Each course of action they took depended more and more on what they expected might be the reactions of administrators and legislators as well as judges. In similar fashion, the Reagan administration focused on multiple ways to preempt and forestall welfare recipient advocacy efforts. The governor was ready to act aggressively on legislative, administrative, and judicial fronts. In short, the actions of legal services attorneys and the Reagan administration increasingly centered on expectations about the other side's likely behavior and anticipated responses. Each had to plan not

244. Holders of this fellowship were commonly referred to as "Reggies." Leaders of the OEO Legal Services Program initiated the Reggie Fellowships in 1967 as a primary method for recruiting to antipoverty law practice recent law school graduates with strong academic credentials. One of the objectives of the Reggie program was to establish a cadre of talented lawyers who were likely to be aggressive "law reform" advocates for the poor.

245. *See supra* text accompanying notes 181–184, 218–221.

just one step ahead but several steps ahead. The two opposing sides came to be engaged in a complicated chess game.

This kind of mutual, anticipatory engagement is what Thomas Schelling has called a "strategy of conflict."[246] Schelling took the term from game theory, where in a game of strategy, "the best course of action for each player depends on what the other players do . . . , [and the focus is] on the interdependence of the adversaries' decisions and on their expectations about each other's behavior."[247] In winning the 2005 Nobel Prize for Economic Sciences, Schelling commented that in game theory, "everyone's best choice depends on what others are going to do, whether it's going to war or maneuvering in traffic."[248] And so it was during the intense conflicts over welfare policy and administration in the early 1970s.

A strategy of conflict presumes that there will be bargaining. In 1971 and 1972, the Reagan administration and antipoverty advocates, however, seldom bargained directly. While their respective decisionmaking was interdependent and anticipatory, resolutions usually required the intervention of other governing institutions. The bargaining was indirect and very much relied heavily on the actions of others.

For Abascal and his colleagues, this meant that they had to become broadly attuned to what Reagan administration officials were likely to do offensively as well as defensively. But the playing field was not level. In a game of strategy, Reagan had far more chits to play given his political stature. Nonetheless, to a surprising extent welfare recipient advocates held their own, even as the underlying political and legal terrain became less hospitable. An especially dire development was the Reagan administration's waning respect for the rule of law.

When Montgomery was SDSW Director, there was a willingness to accept in good faith legal constraints on executive authority. Once welfare reform became the highest political priority of the Reagan administration, there was no longer the same deference to legal limits. In complying with court orders and legislation viewed as adverse to the governor's objectives, state welfare officials adopted the narrowest interpretations possible and then proceeded to implement them only at the last conceivable moment prior to the issuance of sanctions. Defiance and delay became standard procedures in responding to the challenges mounted by welfare recipients and their attorneys, by legislators, and by the federal government. Even on the clearest issues there was no sense of voluntary compliance with provisions or rulings favorable to the poor.

---

246. THOMAS SCHELLING, THE STRATEGY OF CONFLICT 3 (1970).

247. *Id.* at 3 n.1.

248. Matt Moore & Josef Feldman, *Game Theory Wins Nobel For 2*, S.F. CHRON., Oct. 11, 2005, at A2.

b. *Conflict over Cost-of-Living Adjustments*

A particularly illuminating example of this pattern of behavior involved the Reagan administration's resistance to making adjustments in AFDC grants and standards of need in accordance with federally mandated cost-of-living provisions. The main statutory issue reached the Supreme Court in *Rosado v. Wyman*, a New York case.[249] The California saga was far more complicated. The dispute originated during Montgomery's tenure as Social Welfare Director and continued for almost three years, with the most politically and legally convoluted machinations occurring as Reagan initiated his welfare reform agenda and while Carleson was SDSW Director. It was played out in multiple decisionmaking arenas including the unusual institution of federal administrative conformity hearings and lawsuits in both federal and state courts.

As in *Rosado*, the dispute centered on the implementation of section 402(a)(23) of the Social Security Act, a provision enacted by Congress in 1967, which required California as a "maximum grant" state to update by July 1, 1969, dollar amounts used to determine for AFDC families both individual need calculations and any maximums imposed on grant benefits paid. Like most states, California failed to meet the statutory deadline. Top state welfare officials were not in a hurry to comply because they assumed that the issue would be resolved politically, not legally. According to a former mid-level welfare administrator, their belief was "that they would not be called to account for their failure to follow federal law and that there would be no day of reckoning since the Republican Administration in Washington would not jeopardize the position of a Republican Administration in California."[250]

Federal welfare officials did not share the same set of assumptions. During Nixon's first term, the federal department with oversight responsibility for AFDC, then known as the Department of Health, Education and Welfare ("HEW") and subsequently as the Department of Health and Human Services, was controlled by individuals from the moderate wing of the Republican Party. With few exceptions, they continued many of the agency policies put into effect during eight years of Democratic administration. At the time, the Department was under considerable pressure from the National Welfare Rights Organization and from the filing of lawsuits to systematically enforce federal legislation. The effect was that for the first time in more than thirty years, HEW initiated formal administrative conformity hearings to determine whether a number

249. *See supra* text accompanying notes 185, 186.

250. Declaration of Marion Chopson, former Chief of SDSW's Income Maintenance Division (Sept. 4, 1970), *submitted as part of the record in* Bryant v. Martin, Civ. No. 51909-AJZ (N.D. Cal. complaint filed Aug. 6, 1969).

of states including California were in compliance with federal law. The decisions were made with full concurrence of the HEW Secretary and Under Secretary. California's noncompliance with federal law was not viewed as an especially distinctive political problem.[251]

To give states additional time to comply voluntarily with federal requirements, decisions to hold federal conformity hearings were not announced until early summer 1970, a year after required cost-of-living adjustments were to have been made. As of the previous January, thirty-one states had not yet met the standards imposed by § 402(a)(23). By June, eleven states still had not made the necessary adjustments. By July, only California, Indiana, and Nebraska were considered out of compliance.

In late spring 1970, California welfare officials made a modest effort to get the governor and his cabinet to authorize a legislative proposal to raise maximum grant amounts in accordance with federal requirements. The cabinet failed to act in timely fashion, and the governor never submitted the necessary legislation. There was some sentiment within the Reagan administration to cast responsibility for any eventual action taken against California on the Democratic controlled legislature, since it was the legislatively enacted maximum grants that constituted the most serious failure to comport with federal law. While the legislature was derelict in not initiating action on its own, the Director of Social Welfare under state law had authority to make adjustments in state provisions whenever necessary to comply with superseding federal welfare enactments.

The prospect of an adverse HEW decision was not the only threat that California had to confront. In August 1969, welfare recipients pursuing their own legal remedies had filed in federal court a suit raising many of the same issues that were to become part of the federal administrative proceedings.[252] Throughout the conformity struggle, there were distinct but parallel administrative and judicial actions.

The HEW hearing was held in San Francisco on August 25, 1970. State welfare officials were not permitted by their superiors to testify at the inquiry. Only SDSW's chief legal officer was in attendance, and his instructions were to invoke the attorney-client privilege as grounds for not conveying any substantive information.[253] The state's case was handled in its entirety by deputies to the Attorney General.

Upon the completion of the hearing, which lasted two days, the state moved to defer all judicial action in the federal suit already initiated by welfare recipients until after a final HEW decision. The motion was

---

251. Interview with John Twiname, former Administrator of the Social and Rehabilitation Service, the specific HEW division charged with overseeing state AFDC administration (Feb. 25, 1974) (on file with author).

252. *Bryant*, Civ. No. 51909-AJZ.

253. Interview with Rudolf H. Michaels, former SDSW Chief Legal Officer (Aug. 30, 1973) (on file with author).

rejected by the federal district court. Shortly thereafter, in early September, the court issued its first major ruling in the matter—a partial summary judgment upholding the contentions of recipients. The State was given sixty days to meet the requirements of § 402(a)(23). In the accompanying memorandum opinion, Judge Alfonzo J. Zirpoli stated, "Regardless of the 'practical and political consequences' involved in State adherence to the provisions of § 402(a)(23), the State cannot continue to frustrate the will of Congress without incurring the risk of an injunction against the payment of Federal moneys to the State."[254]

In complying with the court's ruling, the state had the option of either increasing the existing maximum limitations on grant amounts or adopting legislatively a "ratable reduction" system. The latter was a method for computing grant levels that set cash benefits at a certain percentage of a family's imputed standard of need. As part of the judicial order, the state was also under instructions to upgrade calculations of need.

Reagan's public response to Zirpoli's decision was colorful and blunt. He minced no words in criticizing not just the ruling but any role for judicial review in welfare decisionmaking. In expressing his administration's intention to file an appeal, Reagan proclaimed,

> We don't think a judge has a right to tell any state what they are or are not going to pay in welfare.
>
> I think the judge was absolutely wrong. If I sound mad, then I am. We're going to fight this out if we have to secede.[255]

On October 6, several weeks after the district court's order, the HEW hearing examiner announced his recommended findings. He too found California in violation of § 402(a)(23). In his opinion, he underscored the impact on AFDC families of the state's failure to keep pace with rising costs of living, one of the major problems being increased malnutrition among AFDC children.[256]

At the end of October in a hearing before Judge Zirpoli, the state proposed to comply with § 402(a)(23) by raising need standards 21.4% and by instituting, at the same time, a ratable reduction so that only 74% of the recognized need standard would be paid recipients. The 21.4% figure was based on cost-of-living increases incurred since January 1962, not October 1957 as plaintiffs contended and as the court had first ordered. The January 1962 base year was one agreed to by federal and state officials as part of the continuing HEW conformity proceedings. On November 17, Judge Zirpoli amended his earlier order by accepting the new base period. But he rejected the state's proposal to institute a ratable

254. *Bryant*, Civ. No. 51909-AJZ (memorandum filed Sept. 16, 1970).

255. *Reagan Charged by Welfare Group*, SACTO OBSERVER, Oct. 29, 1970, at A-4.

256. *See* Peter E. Sitkin, Welfare Law: Narrowing the Gap Between Congressional Policy and Local Practice, *printed in* Jt. Econ. Comm., Subcomm. on Fiscal Policy, Issues in Welfare Administration: Studies in Public Welfare, Paper No. 5 (pt. 2), at 42 (Mar. 1973).

reduction, as it was a change in the method for computing grant levels not authorized by California legislation. The Reagan administration was given sixty additional days to comply with the judgment.[257]

Two days later SDSW issued several emergency regulations: One raised the dollar maximums by 21.4%; another eliminated any cash benefits for recipients from such increases by limiting the grant amount received by a family to 69% of its computed standard of need, a figure even lower than that originally proposed by the state and already rejected by the district court. The regulations were never implemented.

The same day these emergency regulations were adopted the California Welfare Rights Organization filed suit in Sacramento Superior Court challenging the authority of the Director of Social Welfare to institute a percentage reduction in grant amounts without legislative approval.[258] The state court immediately issued a temporary restraining order prohibiting the implementation of the 69% limitation on benefit payments, the effect of which was to uphold grant amounts at 100% of the revised standard of need.

On November 24, a week after the restraining order was issued, California submitted to the federal district court its proposal to increase the maximum grant amounts on paper but to reduce actual payments to 69% of the computed need standard. The proposal was filed in an affidavit allegedly in compliance with the district court's amended judgment. It was, however, inconsistent with that judgment and also, by this time, contrary to the outstanding superior court order. California welfare officials were not overly concerned about complying with Judge Zirpoli's ruling as they had already taken steps to appeal the decision to the Ninth Circuit Court of Appeals.

In early December, the Court of Appeals stayed the partial summary judgment issued by Judge Zirpoli pending a full review on the merits. At about the same time, the Sacramento Superior Court issued a preliminary injunction reaffirming the proscription against the 69% limitation on grant payments. On December 18, in light of the Court of Appeals stay, Judge Zirpoli, who still retained original jurisdiction over the federal case, revised the time for compliance with his order to give the state until March 1, 1971, to meet the requirements of § 402(a)(23).

Several days later, a third court action affecting the issue was filed in Los Angeles Superior Court. In an order that conflicted with the injunction previously issued in Sacramento, the Los Angeles court enjoined all increases in grant maximums, not just the imposition of the ratable reduction.[259] The effect of this order was to provide the state with a

257. *See* Bryant v. Carleson, 444 F.2d 353 (9th Cir. 1971).

258. CWRO v. Martin, No. 207231 (Sacto. Cnty. Super. Ct. complaint filed Nov. 19, 1970).

259. Levine v. Martin, No. NWC-21865 (L.A. Cnty. Super. Ct. complaint filed Dec. 21, 1970).

judicial basis for not raising grants immediately. By the end of 1970, welfare recipients had not yet received the cost-of-living adjustments to which they were statutorily entitled one and one-half years earlier.

On the morning of January 8, 1971, John Twiname, the Administrator of the Social and Rehabilitation Service, acting for the HEW Secretary, adopted the recommendation of the federal hearing examiner and issued a final decision concerning California's continuing violation of Congressional statutory requirements. Because of procedural objections to the scope of the formal notice received by the state, the issue resolved concerned only whether California had updated its AFDC grant maximums. Twiname concluded that the state had not and, thus, had failed to comply with § 402(a)(23). He then ordered, effective April 1, that all federal financial assistance for the California AFDC program be withheld until such time as California conformed with federal requirements. The termination of the federal share of public aid costs was the only sanction available to him. Several hours later Twiname withdrew and rescinded the final decision.

During the course of the conformity proceedings, Twiname continually had informed those federal officials who he thought had a conceivable interest in the matter. They were HEW's Secretary and Under Secretary, Kenneth Cole (the chief assistant to John Ehrlichman in the White House Domestic Affairs Council), and Vice-President Spiro Agnew—who was in charge of intergovernmental relations. Until January 8, the only questions about the actions being taken had come from Elliot Richardson when he succeeded Robert Finch as HEW Secretary. Once Richardson understood the issues, he indicated full support for Twiname's handling of the proceedings. It was Secretary Richardson who, in a sudden reversal, directly ordered Twiname to retract the California decision.[260]

Immediately after the state and other affected parties received advance notice of the decision, Governor Reagan first contacted Vice-President Agnew and then Secretary Richardson. The objective was to arrange yet further time for a settlement of the matter. In describing what happened, newspaper accounts citing the governor reported the following:

> . . . [W]hen [Reagan] learned of HEW's threat he telephoned Vice-President Spiro Agnew late Thursday and told him there had been a misunderstanding. "He called me back and told me that (HEW) Secretary Elliot Richardson would be calling me. . . ."
>
> Reagan said he told Richardson it was a misunderstanding and the Secretary "called off the press conference (announcing the cut) and ordered them not to take action."[261]

During the telephone conversation Reagan gave Richardson personal assurance that California had taken appropriate steps to conform with federal requirements. The governor's reference was to the two emergency

260. Interview with John Twiname, *supra* note 251.

261. *$700 Million Welfare Aid Is Restored*, S.F. CHRON., Jan. 9, 1971, at 1, 12.

regulations that were presently enjoined by lower state court rulings. To expedite a final judicial ruling on the California plan, Reagan indicated that the state administration had already petitioned the California Supreme Court to take jurisdiction over the cases.[262] The alleged "misunderstanding" was over whether the proposed regulations constituted a reasonable effort to comply with § 402(a)(23).

By this time, it was perfectly clear to all parties, though never explicitly stated, that the state administration lacked the legislative authority to initiate on its own a percentage reduction in the amount of grants afforded recipients. Nonetheless, pressured by the Vice-President and wary of directly confronting Reagan himself, HEW decided to give California yet another opportunity to take corrective action without the imposition of federal sanctions. The pending action in the California Supreme Court provided a convenient basis for granting the extension. In his statement to the press concerning the rescission of his initial decision, Twiname stated,

> With the full expectation that the Supreme Court of California is assuming jurisdiction and will expedite a decision and break the judicial deadlock, I am willing to withhold the drastic action previously contemplated for the expected short time it will take the court to resolve the matter one way or the other.[263]

Expedited legal action had become grounds for yet further delay.

Two and one-half months later, the California Supreme Court in a unanimous decision sustained the position advanced by welfare recipients and found that the State Director of Social Welfare had the authority to increase maximum grants, but had no authority to implement a 69% ratable reduction.[264] What was obvious from the very beginning now had the authoritative approval of the state's highest court.

On March 26, the following day, Twiname sent to Carleson, who was now the California Director of Social Welfare, a letter requesting by no later than April 2nd the state's timetable for implementing the increases in maximum grants. On April 1, Carleson responded by asking for additional time. He complained, "Because of the numerous legal, fiscal, and administrative uncertainties with which we are presently faced, it is not possible at this time to provide you with a definite answer regarding how and when we can proceed to comply with § 402(a)(23)."[265] Carleson also suggested that action on the governor's welfare reform proposals by the California Legislature would in all likelihood resolve

262. Telegram from Governor Ronald Reagan to Elliott Richardson and John Twiname (Jan. 8, 1971).

263. John Twiname, Statement to the Press (Jan. 8, 1971).

264. CWRO v. Carleson, *sub nom.* CWRO v. Martin, 4 Cal.3d 445 (1971).

265. Letter from Robert Carleson to John Twiname (Apr. 1, 1971).

the entire matter. The day after Carleson's response, the following article appeared in the *San Francisco Chronicle*:

> Governor Reagan made clear yesterday that his administration is in no hurry to have the State conform either with Federal regulations or a recent court decision on the Aid to Families with Dependent Children program. "There is no great and immediate problem on this," the Governor told reporters at his news conference.
>
> Asked about a "deadline" of today, supposedly set by the U.S. Department of Health, Education, and Welfare, Reagan said only that "they just wanted . . . the knowledge that we are proceeding."
>
> "We are talking to each other," he said.[266]

Reagan's comment about "talking" to the federal government was a classic understatement. The same day that the article was published, Reagan met with President Nixon at the Western White House in San Clemente, California. The two discussed matters privately for about one hour before they were joined by other officials from their respective administrations. These officials included HEW Secretary Richardson, Caspar Weinberger (Reagan's former finance director and at the time Nixon's Director of the Bureau of the Budget), and Hall (California's Secretary of Human Relations).[267] The main purpose of the San Clemente meeting was for Nixon and Reagan to reach a political agreement on conflicting welfare reform proposals. Although recipients and poverty attorneys suspected a major item on the agenda was yet further evasion of § 402 (a)(23), there was apparently no extended discussion of this issue during these sessions.[268]

The meeting ended with important concessions to the state concerning Reagan's proposed welfare reform program.[269] Having obtained major federal commitments on this highly significant issue, the Reagan administration finally was prepared to comply with the requirements of § 402(a)(23). Further resistance only antagonized HEW officials from whom specific waivers of federal law had to be obtained if the general settlement reached by the President and the governor was to be transformed into concrete policy proposals. Although actual conformity was not to come for several more months, the San Clemente meeting marked the end of state resistance to federally mandated cost-of-living adjustments. Compliance with § 402(a)(23) was now a distracting side issue to the state administration's overriding concern for comprehensive welfare change.

---

266. *Reagan in No Hurry on Child Aid*, S.F. CHRON., Apr. 2, 1971, at 10.

267. Robert Fairbanks, *Nixon and Reagan Talk, Find Views on Welfare Are Similar*, L.A. TIMES, Apr. 3, 1971, at 1, 22, Part 1.

268. Interview with Ronald Reagan, *supra* note 6.

269. *See infra* text accompanying notes 312–321.

At the press conference held immediately after the San Clemente meeting, Richardson announced that he had granted California a new deadline of June 30 to implement cost-of-living increases for AFDC families. On April 5, Twiname, acting for Richardson, extended until April 12 the time the state had for submitting a plan that would comply with § 402(a)(23).

California's response was a general letter from Carleson to Twiname indicating that conformity in all likelihood would be achieved prior to July 1. Since the state had not offered assurance of immediate compliance, Twiname decided to reissue on April 16 the decision that he had originally prepared on January 8. It was a move designed to clarify any ambiguity as to HEW's intentions regarding compliance with § 402(a)(23). It also reflected continuing pressure from aggrieved welfare recipients.

Uncertain about what precisely occurred at the San Clemente meeting and still fearful of further delays in the receipt of cost-of-living adjustments, Abascal on behalf of the California Welfare Rights Organization had filed the week before yet another lawsuit concerning the much delayed implementation of grant increases. The action was brought in federal district court.[270] It alleged a conspiracy among state and federal officials to deprive California AFDC families of their rights under law. The named defendants included President Nixon and Governor Reagan.[271] For the plaintiffs the purpose of the suit was "to vindicate their belief that no man, not a governor nor a president, is above the law."[272] The case itself—novel and difficult to prove—was eventually resolved in favor of the defendants, but the basic contentions advanced were far from frivolous. They underscored what was by then almost two years of official procrastination and misconduct during which state defiance and federal vacillation mocked the rule of law as a constraint on executive authority.

In the middle of April, Judge Zirpoli in the *Bryant* case, the first action filed against California, had occasion to comment on the state's continuing failure to comply with § 402(a)(23). Anguished and exasperated, he stated,

> Between July 1, 1969, and today, the State of California has been told indirectly by the United States Supreme Court in *Rosado*, and directly by this court, the California Supreme Court, the Superior Court of Sacramento County and the Department of Health, Education, and Welfare that it is not in compliance with Federal law. It has been ordered by several of these tribunals to comply *forthwith* with Federal law. Yet in what can only be described as a flagrant disregard of these bodies, indeed of the authority of the U.S. Congress whose statutes are involved, the State has refused to take any meaningful corrective

270. CWRO v. Reagan, No. C-71676-ACW (N.D. Cal. complaint filed Apr. 8, 1971).

271. The others were Vice-President Spiro Agnew, Elliot Richardson, John Twiname, James Hall, and Robert Carleson. Collectively the defendants were referred to as the San Clemente Seven.

272. Complaint for Injunctive and Declaratory Relief, *CWRO*, No. C-71676-ACW.

> action, while at the same time it continues to accept Federal moneys. The court has at all times acted on the assumption that the State was proceeding in good faith, but this assumption becomes increasingly strained as weeks become months and months become years without a single welfare recipient receiving grants calculated in accordance with Federal law.[273]

The court's statement aptly summarized the Reagan administration's questionable good faith and insensitivity regarding the constitutional limits imposed upon executive office.

On April 29, Carleson notified Twiname that he had filed that day an emergency regulation readjusting grant maximums in accordance with the HEW decision. Because of a surplus in the specific appropriation for AFDC in the fiscal year to expire on July 1, Carleson made the readjustment effective on June 1 rather than waiting the additional month allotted the state for compliance. This was not the only news that day.

At the same time, Carleson also announced the promulgation of another emergency regulation on an entirely different and separate matter that promised to remove from the AFDC rolls 27,500 recipients. This proposed regulation affected households with working adult recipients and was inconsistent with other federal provisions. It was adopted in response to an Alameda County Superior Court ruling in a suit brought by the counties against the state. The specific substantive issue involved limiting to four months a recipient family's period of eligibility for income exemptions under federal work incentive requirements. Although SDSW officials were the named defendants in the original action, the state on appeal was the main advocate for the retention of the regulation. The litigation throughout had overtones of collusion between the counties and the state. In expeditious action, on the motion of Alameda County Legal Aid Society attorneys representing intervening welfare recipients, the California Supreme Court unanimously reversed the lower court decision.[274] The effect of the ruling was to void the pending cutoff of AFDC households with eligible working adult recipients. Had California's highest court not acted quickly, HEW officials were prepared once more to institute conformity proceedings against the state.[275] There was no letup in the need to monitor constantly the actions of California's welfare officials.

At the beginning of May, Twiname informed all the interested parties that the proposed California increases in grant levels were satisfactory, a decision that was formalized at the end of June after California had actually complied. In the interim, the Ninth Circuit in the *Bryant* case

---

273. Bryant v. Martin, Civ. No. 51909-AJZ (N.D. Cal. memorandum, opinion, and order filed Apr. 19, 1971); *see* Sitkin, *supra* note 216, at 45.

274. Cnty. of Alameda v. Carleson, 5 Cal. 3d 730 (1971).

275. Telephone conversation with Eugene Rubell, former special assistant to SRS Administrator John Twiname (Feb. 13, 1974).

affirmed the federal district court judgment issued the previous November.[276] The main question that now remained was whether welfare recipients were to receive not only prospective but also retroactive increases. The estimated sum involved if retroactivity were to be afforded was $90 million.[277]

Since the adjustments were to have taken place on July 1, 1969, recipients were legally entitled to the increased allowances withheld from them, but the judicial decision to grant retroactivity is discretionary. In August, Judge Zirpoli held that California was at last officially in compliance with § 402(a)(23). Fearful of a pending fiscal and budgetary crisis, he then found that despite the state's prior unlawful action, the financial burden would be too great to warrant retroactive increases. The following July, three years after the initial date for conformity, the Ninth Circuit upheld Judge Zirpoli's judgment on retroactivity.[278] Citing the lower court's opinion, the Court of Appeals stated, "While the State has no one to blame but itself for being thrust on the brink of bankruptcy in the administration of its welfare program, this Court will not push it over the edge."[279]

Notwithstanding the constant claims of the Reagan administration, the state was not on the brink of bankruptcy. Six months later, with a substantial surplus in state revenue, the governor was able to propose and eventually obtain legislation that granted to Californians sizeable income tax credits for the coming year. It was a cash rebate that benefitted few welfare recipients.

The American political system, with its separation of powers and multiple levels of government, provides numerous opportunities for affected parties to challenge and influence official decisions. In seeking to implement congressionally mandated AFDC cost-of-living adjustments, legal services attorneys on behalf of California welfare recipients initiated lawsuits and argued at the appellate level in multiple cases in federal and state court. They also closely monitored the federal conformity hearing process. Litigation was critical both in seeking to hold the Reagan administration legally accountable and in creating a form of counter-pressure on the federal government not to back down in its effort to obtain California compliance with federal law. This extensive litigation was not about extending constitutional rights nor even about the meaning of congressional legislation, something which the U.S. Supreme Court had definitively interpreted relatively early in the *Rosado* case. In these protracted proceedings, California antipoverty attorneys found

276. Bryant v. Carleson, 444 F.2d 353 (9th Cir. 1971).

277. Legal services attorneys estimated the figure as $50 million to $60 million. The courts, however, based their decisions on the state-supplied figure of $90 million.

278. Bryant v. Carleson, 465 F.2d 111 (9th Cir. 1972).

279. *Id.* at 114.

themselves fully engaged—not in influencing policymaking—but in the arduous and time-consuming task of policing state administrative compliance with governing law.

For the Reagan administration, the disputes were mainly about political will. During this period, the governor and his subordinates wanted to show that they were serious about cutting back on AFDC costs. The same fragmented American system of government that opened up opportunities for welfare recipient participation also provided opportunities for state governmental delay. Throughout the § 402(a)(23) compliance proceedings, California welfare officials had no hesitancy in playing one institution against another. Until the end, there was little concern for conforming to federal requirements. At each step along the way, deputies in the Attorney General's Office had advised state welfare officials that what they were proposing was presumptively illegal.[280] Yet, with respect to enforcement, there were practical constraints on the abilities of both HEW and the courts to take timely and definitive action against California.

Regarding federal administrative conformity proceedings, the only sanction against the state—the termination of federal funds—was too drastic. The impact of any cutoff of federal funding in all likelihood would have been borne by AFDC beneficiaries, whose grants ultimately would have been reduced accordingly. HEW officials could threaten and cajole, but actually to impose the sanction would have been contrary to the very purpose of the legislation being enforced.

The courts faced a similar dilemma regarding the imposition of sanctions. Legal disputes rest on the assumption that conflicting parties act in good faith. Judges are very hesitant to draw an opposite conclusion. For elected officials, it is always possible to flout judicial authority with little fear of direct recrimination, as courts sensitive to their own limitations usually strive to avoid ultimate clashes with other institutions of government. The contempt power is seldom imposed. Even Reagan's very public defiance of the judiciary was not sufficient to overcome such caution. The entitlements of the poor are not the kinds of issues over which governments quake.

There is another striking subtext to this story. The underlying issue regarding the need to update the benefit amounts received by AFDC recipients was something with which the Reagan administration was in sympathetic agreement. According to Carleson, his overarching welfare system policy objective was "to direct a finite amount of money to those who need it the most."[281] In an oral history interview he gave in 1983, he cited as a particular example his concern that there had been no increase

280. Interview with Jay Linderman, *supra* note 240.

281. Carleson, *supra* note 242, at 40.

in AFDC benefit levels since 1958 and that a family of four still received in 1970 the same $221 to which it was entitled back then.[282] He also reported that when he informed the governor about this, Reagan had said, "Oh, my."[283] Carleson and apparently Reagan both realized the inadequacy and inhumaneness of current benefit levels, but their emphasis on capping welfare costs resulted in protracted confrontations with the federal government and with welfare recipient lawyers in federal and state courts. From the Reagan administration's standpoint, the three-year fight was not about what was lawful nor about what was right but about minimizing welfare expenditures no matter what.

Although AFDC beneficiaries eventually received cost-of-living adjustments, the results achieved were but partial victories. Not only did they not receive retroactive benefits, there also were questions regarding the reliability of the percentage amounts used to adjust upward their maximum benefits, which had remained virtually unchanged since 1951 and arguably should have been set higher.[284] Worse still, from a welfare recipient advocacy perspective, the struggle over implementation of § 402(a)(23) underscored for the Reagan administration the advantages in prolonged if not ultimate resistance to legal mandates, notwithstanding formidable opposition from welfare rights groups, antipoverty lawyers, the judiciary, and HEW. For the next few years, conflicts over how California implemented welfare legislation would follow a similar pattern. The Reagan administration was not, however, just about defiance and delay. It also had its own welfare policy agenda to enact.

3. *Compromise: The California Welfare Reform Act of 1971*

Reagan's ability to command public attention and his aggressiveness in asserting fairly traditional and highly accepted ideas about public relief enabled him to dominate events concerning welfare reform in California, whether they involved decisionmaking in Sacramento or Washington, D.C. His opponents, fearful of the political liabilities attached to identification with runaway welfare costs, after extracting some modifications, generally fell in line behind his proposals. To institute changes in California, Reagan obtained waivers of federal law from HEW Secretary Richardson, who was widely perceived as personifying "all there is of personal and official integrity in the Nixon administration."[285] The governor also gained the reluctant support of Democratic legislative

---

282. *Id.* In this recollection, Carleson cited as the time benefits had last been increased a date similar to that put forth by legal services attorneys. During the actual litigation, the state contended and the court eventually used January 1962 as the base period for updating aid amounts. *See supra* text accompanying notes 256–257.

283. Carleson, *supra* note 242, at 41.

284. *See* Beilenson & Agran, *supra* note 111, at 483.

285. John Osborne, *Reagan's Welfare Deal*, THE NEW REPUBLIC 11 (May 15, 1971).

leaders including State Senator Anthony Beilenson, the Chairman of the Senate Health and Welfare Committee, who more than once during the legislative proceedings wanted to disassociate himself from the eventually enacted welfare reform bill, of which he was the chief sponsor.

In one of those ironies that occurs in politics, the governor's effectiveness in dealing with opponents stemmed in part from shared expectations among the various political actors about the actions of legal services attorneys. The prospect of judicial intervention initiated by antipoverty lawyers had the unintended effect of easing the moral and legal defenses of those who questioned the Reagan proposals. Federal officials and state legislators found themselves in a position where, in anticipation of legal challenges from welfare recipients, they could make highly dubious concessions to the state administration without feeling responsible for their programmatic impact. The ultimate decisions would come from the courts. Prior to the advent of federally supported legal services, governmental administrators frequently ignored the statutory and constitutional claims of the poor because there was little chance of legal redress; now federal and state officeholder were prepared to barter such claims precisely because there would be judicial challenges. Calculations about legal advocacy for the poor became part of the political bargaining process.

a. Reagan's Message

During the first four years of his administration, Reagan introduced each legislative term the same package of twelve welfare measures. It was usually only with great difficulty that he was able to find a Republican legislative sponsor for the proposals.[286] His welfare message on March 3, 1971, marked a new turn of events, as he promised comprehensive and novel legislation. He also promised massive savings: $220 million at the state level and a corresponding $73 million and $283 million at the county and federal levels, respectively.[287]

Having just been convincingly reelected and having had an entire gubernatorial term to consolidate control over the California Republican Party, Reagan was in an extraordinarily strong political position. With few exceptions, he enjoyed the solid if not always enthusiastic backing of Republican legislators. Since a two-thirds vote in each house of the legislature was necessary under state law either to enact welfare changes involving budgetary appropriations or to override a gubernatorial veto, Reagan had more than sufficient legislative strength to block any

286. Interview with Tom Joe, former advisor on welfare in the Assembly Office of Research (Feb. 26, 1974) (on file with author).

287. Beilenson & Agran, *supra* note 111, at 477. Those amounts were large numbers at the time.

counter-proposals initiated by the Democrats, who had slim majority control in both the Senate and the Assembly.[288]

In the political vocabulary of public assistance, "welfare reform" connotes governmental efforts to tighten the conditions for receiving assistance. It is the reaction that sets in after a period of expansion and liberalization in programs for the poor.[289] The Reagan proposals were not directed at improving the life circumstances of AFDC recipients but at curbing welfare expenditures and minimizing opportunities for suspected recipient abuse and fraud.

A few months after Reagan submitted his welfare message to the Legislature, he addressed the convention of the California Republican Assembly, an association of conservative Republican Party supporters. The governor stated,

> We must declare an end once and for all to the idea that welfare is a right and certain jobs are more disgraceful than welfare.... I've had a bellyful of people who think tinkering with the social welfare system is lacking in compassion. But the majority of poor have been herded into a great big government feed lot and been told to just raise hell until you get a larger trough.[290]

Reagan's vow to end welfare as it then had become was far more colorfully put than President Clinton's similar promise twenty-five years later.[291] There was no hesitancy in Reagan's seeking to stamp out the recently recognized but still fragile rights of the welfare poor. And he was confident in the popular appeal of his message in no small part because his agenda for change was not new but old. It represented a return to and reinvigoration of longstanding seventeenth century English principles of public relief.

Relying mainly on the general recommendations of the special task force on public assistance that he had appointed in August 1970, the governor's plan for reform focused on AFDC provisions, some changes in the Aid to the Needy Disabled program, and revisions in Medi-Cal, the state's program of medical assistance for the poor.[292] The major changes proposed in the AFDC program were subsequently described as follows:

---

288. The breakdown in the Senate was twenty-one Democrats and nineteen Republicans; in the Assembly, forty-two Democrats and thirty-eight Republicans. CAL. STAT. 1971, A121–24.

289. *See* Francis FOX PIVEN & RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 111 (updated ed. 1993).

290. *Welfare War (cont.)*, S.F. EXAM. & CHRONICLE: THIS WEEK'S NEWS IN REVIEW, May 9, 1971, at 5, 6.

291. Upon signing the 1996 welfare reform legislation eliminating AFDC, Clinton said, "Today we are taking a historic chance to make welfare what it was meant to be: a second chance, not a way of life." Francis X. Clines, *Clinton Signs Bill Cutting Welfare; States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1.

292. MEETING THE CHALLENGE, *supra* note 241.

> 1. Eliminate the Maximum Participation Base [the system of statutorily established maximum grants] with its open-ended budget in favor of an equitable apportionment with a modified close-ended budget.
>
> 2. Sustain an intensive effort to reduce the welfare rolls through a tightly controlled qualification program to provide for only those entitled to participate.
>
> 3. Assist those able to work to become economically self supporting through a comprehensive work experience program.
>
> 4. Eliminate aspects of the welfare system which weakened family responsibility and intensify efforts to collect child support.[293]

These proposals and the terms used require brief clarification.

The elimination of statutorily enacted maximum grants and the institution of "equitable apportionment," a concept coined by the Reagan administration, meant that individual grant amounts would vary in accordance with fluctuations in the overall size of the state's public aid caseload. The proposed system was a floating variation of ratable reduction schemes that existed in other states. For the poor it held out the constant prospect of decreased levels of assistance. Quarterly increases in the number of people receiving aid automatically would lead to decreases in the cash benefits provided recipients. The objective was to ensure that relief expenditures would remain within an annual budgetary ceiling.

A "tightly controlled qualification program" was simply another way of talking about stringent income or "means" testing, which was still the defining feature of the eligibility process for public relief. The governor's proposals called for increased verification of applicant and recipient information through computerized cross-checking of state tax and employment records.

The proposed comprehensive work program, a central and much publicized aspect of welfare reform, involved the establishment of certain work requirements as conditions for receiving assistance. These requirements were offered as alternatives to federally conceived ideas about earned income disregards as incentives for encouraging recipients to seek employment. Similar mandatory employment legislation had existed in California in the 1930s.[294] At that time, the stated reasons for compulsory work provisions were that "work would keep 'the indigent from idleness . . . assisting in his rehabilitation and the preservation of his self respect,' reduce the burden on the county by enabling the recipient to contribute to his own support, and demonstrate 'to the welfare authorities the sincerity and good faith of the applicant.'"[295] The rationale for Reagan's work proposals was much the same.

---

293. *See* Zumbrun et al., *supra* note 111, at 477.

294. CAL. STAT. 1933, ch. 761 § 1.

295. tenBroek (pt. 2), *supra* note 135, at 942–43.

The measures to strengthen family responsibility broadened the financial and legal liabilities of relatives for the support of persons who received public assistance. The main target groups were stepfathers and adult children whose parents were aid beneficiaries. The Reagan recommendations also included an intensification of efforts to collect child support payments from absent fathers.

In addition to what was said publicly, the Reagan administration had as a principal priority an expansion of state administrative discretion in implementing public assistance programs. Hemmed in by what they regarded as unduly restrictive national and legislative standards, they wanted exceptions to and reversals of prevailing federal and state law. In exchange for increased administrative leeway, they were prepared to concede even such essential features of the initial reform proposals as equitable apportionment and a close-ended state welfare budget. They calculated that with increased regulatory latitude, they would have all the additional authority needed to curb welfare expenditures.

There were two main ways to cut public assistance costs. The first was to reduce the number of persons who received benefit payments; the second was to lower the actual welfare allowances provided individual recipients. As a catchall in referring to these dual objectives, state officials usually talked about "closing welfare loopholes." The term was vague and somewhat misleading in that the point was not so much to eliminate welfare loopholes as to substitute ones beneficial to the state treasury for those beneficial to the poor. Immediate savings were, however, to be minimal, as the governor promised to transform most of the retained revenue for the first year into higher benefits for those he termed the "truly needy."

To reduce the actual welfare caseload, welfare officials concluded that the most efficient method required stringent administration of the initial eligibility process. They considered later efforts to remove beneficiaries from the welfare rolls as marginal, since the normal process of attrition insured that a majority of current recipients soon would no longer be receiving public assistance.[296] In 1971, less than one-half of California's AFDC families remained on the relief rolls for lengths of time longer than eighteen months.[297] For state welfare administrators, the main problem was that the "means test" as presently administered was not adequately screening out aid applicants. In rather graphic terms, they referred to eligibility decisionmaking as a spurting artery in desperate need of a tourniquet.

---

296. Interview with Robert B. Carleson, *supra* note 232.

297. DHEW, SRS, Natl. Ctr. for Social Statistics, Findings of the 1971 AFDC Study, Part I—Demographic and Program Characteristics, tbl.12 (Dec. 22, 1971).

The solution which they foresaw revolved around a new set of administrative options that could be selectively employed to reduce the number of persons who, in the first instance, qualified for assistance. These options were to replace those regulatory mechanisms that had recently been eliminated or eroded as a result of court decisions following welfare recipient challenges. In a word, the Reagan administration needed a series of substitute devices that could fulfill the screening functions previously performed by such traditional programmatic features as residency requirements and man-in-the-house rules.

Primarily, SDSW planned to rely on job and job seeking requirements, cumbersome application and monthly reporting forms, and extensive verification of beneficiary-provided information. The overall purpose was to make the AFDC application process increasingly unpleasant. State officials even began to talk in earnest about the "inconvenience factor," the point at which applying for aid became so intrusive, so demeaning, and so frustrating that a certain percentage of potential recipients would forego trying.[298]

The Reagan administration was equally methodical about how to approach the implementation of grant reductions. Although the protracted resistance of the state to federally mandated cost-of-living adjustments suggested otherwise, state welfare officials claimed that they actually favored raising welfare grants for the most destitute. Carleson as SDSW Director, in particular, professed no objection to annual cost-of-living indexing for AFDC families.[299] What he did not favor was legislation that automatically mandated such changes without new legislative action because he wanted to be able "every year to bargain the increase to get something else."[300] Carleson maintained that it was possible both to raise maximum grant allowances and to cut overall public relief expenditures.

The hope for achieving such a formidable fiscal feat centered on reducing the actual cash benefits received by individuals who had access to non-welfare resources. This meant mainly lower grant amounts for the working poor who under existing law still qualified for AFDC benefits and for AFDC households where not all the members were eligible for such assistance. The reason for state optimism was that the mechanics for computing grant levels for working recipients and households with both AFDC and non-AFDC individuals were sufficiently malleable that a number of key changes could be expected to produce substantial state savings. It was projected that a number of adjustments in the formulas used to account for earned income and other financial and in-kind resources would result in considerable reductions in grant amounts to

298. Interview with Jay-Allen Eisen, former staff attorney in the SFNLAF welfare unit (Feb. 21, 1974) (on file with author).

299. Interview with Robert B. Carleson, *supra* note 232.

300. Carleson, *supra* note 242, at 93.

certain families. The size of the reductions depended on the latitude afforded the Reagan administration in shaping state regulations.

The counties were among the first to respond to the governor's proposed welfare legislation. They were most concerned that a good share of the asserted fiscal savings at the state level represented cost shifts to the counties. Most of the large counties did their own fiscal analyses of the administration's recommendations. The Welfare Director for Sacramento County estimated that the Reagan "reform proposals would add a net cost to the county of $6,580,000."[301] A supervisor from the same county termed the legislation "the same old thing. He [Reagan] is just shifting costs back down to the county level again."[302] A report of the County Supervisors Association of California found support for some of the proposed savings, but it also concluded that other estimates were too high or could not be reliably computed and that several of the changes were legally questionable.[303] Recommendations for equitable apportionment and a close-ended state welfare budget especially perturbed county officeholders, since they feared heavy recipient pressure on local government for additional benefit supplementation in the event of reductions in state grant levels.[304] Under California law, the county is the welfare agency of last resort.[305]

The leadership of the Assembly and Senate shared the governor's and counties' concern for rising welfare costs. But they were much less confident about what could be done at the state level. The nonpartisan Legislative Analyst's Office reported that the projected savings from the governor's program were seriously exaggerated.[306] Most legislative leaders saw a federal solution as ultimately necessary. They therefore supported President Nixon's Family Assistance Plan. Even though they were not optimistic about the effectiveness of new state legislation, in anticipation of the governor's legislative suggestions, they proceeded to develop their own program of state welfare reform.

Their proposals covered much the same ground as those put forward by Reagan. Like the governor, they stressed closing welfare loopholes, which at times resulted in families with significant income still being eligible for supplemental aid benefits. Although legislators expected little actual savings from these provisions, they felt that even the relatively few cases of abuse associated with existing provisions unnecessarily undercut

---

301. Jim Lewis, *Reagan Plan Boosts Costs*, SACTO UNION, Mar. 4, 1971, at 3.

302. *Id.*

303. County Supervisors Ass'n of Calif., Governor's Welfare Reform Proposal Analysis, App'x B (Apr. 23, 1971).

304. *Id.* App'x A, at 2.

305. CAL. WELF. & INST. CODE § 17000 (Deering 2013).

306. *See* OFFICE OF CAL. LEGISLATIVE ANALYST, COMPARISON OF SAVINGS (COST) ESTIMATES OF STATE DEPARTMENT OF SOCIAL WELFARE (SDSW) AND LEGISLATIVE ANALYST (June 14, 1971).

the integrity of the welfare system.[307] Other recommendations covered state-initiated job programs, comprehensive family planning, and child care facilities. The most significant feature was an increase in AFDC benefits that would have raised the maximum grant to an AFDC family of four from $261 per month, the figure set as a result of § 402(a)(23) litigation, to about $314 per month.[308] This latter figure was the "standard of need" that SDSW set as the amount minimally necessary for a family of four to meet basic living costs.

Reagan strongly attacked the bill proposed by the Legislature's leadership. He argued,

> This is not welfare reform. It is a blatant attempt to force a frantic tax increase on the people. The Democratic leadership has apparently seized on the welfare reform issue as a means of raising taxes—a goal they have announced repeatedly. I intend to continue to push for responsible welfare reform which serves the interests of all the people including the taxpayers, whose patience has been stretched to the breaking point.[309]

The governor never wavered in linking welfare reform and tax relief.

After extensive public hearings, the Democratic welfare package passed the Senate Health and Welfare Committee. A few days later on July 11, 1971, the governor's program, which was embodied in several different bills, died in Committee. Near the end of July, the Democratic version of welfare reform was adopted by a majority vote of the Senate but lacked the two-thirds support necessary to retain key appropriation provisions. At this point, the legislative leadership decided to enter into direct negotiations with Reagan.

The Democratic legislators were especially worried that if they did not reach agreement with the governor on welfare reform, he would propose and submit for popular vote a welfare reform initiative. They already had been subjected to a grassroots cards and letters campaign calling for welfare reform that was instigated by Reagan's political supporters.[310] A welfare initiative was viewed as a political lightening rod that would generate Republican votes and cost Democrats their slim control of the state legislature if it were to appear on a statewide ballot. For Reagan, the threat of a welfare initiative meant that he was prepared to hold tough on his legislative proposals. If they were killed by the Legislature, he was fully committed to campaigning hard for an initiative, the main provisions of which already had been written by his welfare team.[311]

---

307. Beilenson & Agran, *supra* note 111, at 478.

308. S. B. 796, Reg. Sess. (Cal. 1971), as amended June 7, 1971.

309. Richard Rodda, *Reagan's Welfare Program—And What He Really Got*, SACTO BEE, Aug. 22, 1971, at 1, 4.

310. Carleson, *supra* note 242, at 76.

311. *Id.*

In the meantime, the governor and his welfare advisors were in deep consultation with HEW officials. Their approval also was necessary if the state administration was to have sufficient authorization to make the full range of changes proposed.

b. Taking out the Federal Government

Negotiations with the federal government began several months before the governor's bargaining sessions with the Legislature. Reagan's objective in the HEW negotiations was to obtain waivers of certain federal requirements, which circumscribed the state's receipt of public assistance funds. The state administration considered that three-fourths of the reform effort could be carried out through regulations and without new state legislation. The problem was that many of the proposed changes conflicted with existing federal law. Without the requested waivers, each step taken by the governor was likely to be met by delays incurred as a result of recipient-instigated litigation and by administrative protests from HEW officials.

The key meeting was the one between President Nixon and Governor Reagan at San Clemente on April 2, 1971. The President was meticulously briefed as to the differences between his welfare proposals and those of the governor. He was also carefully forewarned as to the delicate political considerations involved. In a confidential memorandum, Nixon was told:

> We want to leave the meeting with the Governor with (a) his maximum possible long-term public support for your welfare and health reform programs and (b) the minimum, possible exposure of these reforms (and the Administration more generally) to attack from other quarters. These objectives are not easy to reconcile. The line we walk should be clearly defined; a successful meeting will require a precise balancing of benefits and risks.[312]

In the spring of 1971, the Nixon administration still had substantial hopes about enacting significant national welfare reform legislation including a second version of the Family Assistance Plan. As the leading political figure opposed to these measures, Reagan had support not only from conservative Republicans, but also from conservative Democrats in Congress. For the President, the task was to defuse Reagan's opposition without losing pivotal legislative backing from moderates and liberals.

The recommended course was to emphasize the "striking elements of commonality" between the two proposals for welfare change. This was the conclusion to be announced publicly at the end of the meeting. At the same time, the President was advised to make concessions only in

312. Memorandum from Elliot L. Richardson, Secretary, DHEW, to President on San Clemente Meetings of April 2—California Welfare Reform (Apr. 1, 1971). Much of the information on the federal negotiations was obtained in confidential interviews and from originally confidential documents. Interview notes and document copies are on file with the author.

general terms. It was felt that to make specific commitments during the meeting would jeopardize support for the Nixon administration's own proposals. It was also felt that the immediate granting of waivers to Reagan would intensify pressure for similar treatment from other governors.

In support of a general statement about commonality, HEW identified sixty-six separate items in Reagan's program that were of potential federal interest and concluded that thirty-nine appeared not to pose a significant legal or policy problem. The most ticklish issue, on which there was not agreement, concerned the treatment of the "working poor." While the federal government stressed the importance of work incentives to encourage the poor to take and hold jobs, the Reagan proposals created penalties for meaningful employment by undercutting the economic benefits for families with wage earners.

Besides political reservations, HEW officials also had legal and programmatic qualms about the granting of the waiver requested by the governor. A 1962 amendment to the Social Security Act gave the HEW Secretary broad discretion to waive compliance with federal requirements and to provide special additional federal funding for certain experimental state projects.[313] This discretionary power was to be exercised to support demonstration projects likely to be supportive of AFDC beneficiaries and was not to be used to fund broad, continuing, statewide programs. HEW officials found "no supportive, credible precedent for granting" the waivers requested by California. Reagan sought permission to reduce benefit levels. Furthermore, he intended to establish programmatic changes that would have a statewide impact. The waiver authority had never before been used either on the scale suggested or as a basis for justifying benefit reductions.

Another cause of discomfort was that the Reagan administration, as of the end of March 1971, had not yet submitted any actual proposals in support of the waiver request. HEW officials felt that "program integrity and 'due process' require an evaluation of 'demonstration' projects on the merits of the proposals in fact submitted." Nonetheless, in the event the request was to be granted, they were prepared to counter negative reactions, and to defend against any litigation initiated, by having the HEW Secretary adhere to all proper procedures before exercising his discretion. In light of the broad authority conferred on the Secretary, procedurally correct action was not likely to be vulnerable to substantive challenges.

At the conclusion of the meeting between the President and the governor, Nixon announced to the press that he and Reagan, at their "summit conference on welfare reform," had found "many areas of

313. Social Security Act § 115, 42 U.S.C. § 1315 (1973).

agreement" and had established to their mutual satisfaction that "major details" of the governor's proposals "can be implemented without being in violation or contrary to the federal regulations or federal law."[314] After the announcement, the President left the governor and Secretary Richardson to answer the questions of reporters. Richardson stated that there was "really no problem" with thirty-eight of the Reagan proposals, and that most others entailed "no significant problem" because "they are consistent with the Administration's own welfare proposals."[315] The Secretary added, however, that before the waivers could be granted, members of his staff and the governor's would meet in Sacramento to review the issues.[316] John Osborne, one of the reporters present, concluded that the "occasion reeked of a deal."[317]

In summing up what took place, Osborne stated:

> There is a certain satisfaction to be had from watching Richard Nixon being taken by Ronald Reagan and it is just possible that the President may derive a needed lesson. He is committed to approving the "major details" of the Reagan program. Reagan is committed to nothing. For all of his talk about cooperating with Mr. Nixon in getting "welfare reform at the national level," Reagan remains adamant in his opposition to a guaranteed federal floor under the incomes of dependent families and to the inclusion as a matter of national policy of underpaid "working poor" among those who are eligible for federal and state welfare support. Without these elements, the Nixon program would be as harsh and inhuman as the Reagan "reform" is in its worst aspect.[318]

At his meeting with Nixon, Reagan promised to temper his criticism of the federal government from whom he still needed specific waivers. He conceded virtually nothing else. The President meanwhile emphasized that he and Reagan were working "toward a common goal."[319] Notwithstanding his professed commitment to the Family Assistance Plan, Nixon shared many of the governor's views about compulsory work requirements, welfare cheating, and rising public assistance costs. It was officials within HEW who had different points of view. In dealing with the governor, they in reality had little actual room to maneuver. The President's support for their positions was lukewarm, and Reagan politically was too powerful to antagonize.

Following the San Clemente meeting, Secretary Richardson's main tactical decision was to have discussions about the California waiver request in Sacramento rather than Washington, D.C. HEW's objective

---

314. Osborne, *supra* note 285.

315. *Id.* In this article, either the Secretary or the reporter was in error. There was no disagreement on thirty-nine issues.

316. *See* Fairbanks, *supra* note 267, at 22.

317. Osborne, *supra* note 285, at 11.

318. *Id.* at 12–13.

319. *Id.* at 11.

was to minimize interference from others in the Nixon administration, most notably Vice President Agnew. Most of the discussions were between high-level state and federal officials. Carleson and Hall were the main negotiators for California. Reagan and Richardson met together on July 15. The major issue over which there was substantial disagreement concerned Reagan's request to establish the Community Work Experience Program ("CWEP"). In this program, employable welfare recipients would be required to work up to twenty hours per week in public sector jobs in exchange for their family's welfare grant. They would receive no additional wages. HEW officials regarded the proposal as indefensible. Under the Social Security Act, it imposed an impermissible penalty on the receipt of public assistance. They also regarded the work experiences as unlikely to lead to permanent employment and a reduction in welfare dependency. For Reagan, CWEP was central to his conception of welfare reform, as it symbolized most graphically his commitment to "workfare" not welfare.

A briefing memorandum to the White House described the governor's position in the following way:

> The Governor has made it clear that the work provisions are the most important part of his program. His feeling is that there are a great many recipients of welfare today who are not motivated to seek employment and are content to remain on the welfare rolls despite the fact that under the present rules they will be better off economically if they do go into competitive employment. Therefore, in order to insure that a person will want to seek competitive employment, his present situation must be made less appealing. The mechanism to be used is to require the recipient to work for twenty hours a week without any additional benefit. The Governor reasons that if he is working already, he will actively seek competitive employment since, if he has to work anyway, he might as well benefit from it economically.[320]

Reagan's premises regarding CWEP's utility were ideological, not factual. They were not backed by data about the availability of jobs for which employable recipients were likely to be qualified.[321] Furthermore, they reflected deeply and widely held beliefs that impoverished individuals would rather receive welfare than work, a proposition for which there was no credible factual support.[322] What was at play was an underlying ideology about poverty that harkened back to Tudor England.

While HEW officials balked at the Reagan work relief plan, it was to no avail. In the middle of August, Nixon and Reagan met once more

---

320. Memorandum from John G. Veneman, Under Secretary, DHEW, on Status of Discussions with California on Welfare Reform and Items that the Governor Will Probably Discuss with the President (Aug. 13, 1971) (copy on file with author).

321. Interview with Robert B. Carleson, *supra* note 232.

322. *See* LEONARD GOODWIN, DO THE POOR WANT TO WORK? A SOCIOLOGICAL STUDY OF WORK ORIENTATIONS (1972).

to discuss welfare reform. Following the meeting, Nixon ordered that a waiver be granted California's Community Work Experience Program. To temper the effect of the order, HEW imposed several programmatic conditions: Authorization for CWEP would terminate after three years unless specifically renewed by the Secretary, the mandatory work requirements would not affect more than 48% of the AFDC caseload, and project funds would be set aside for a state in-house evaluation and a large-scale federal evaluation. Some federal officials also hoped that the conditions set would facilitate legal challenges by antipoverty attorneys. In September, Secretary Richardson signed a set of waivers approving CWEP and a majority of Reagan's other requests. Having just reached agreement with the California Legislature on welfare reform, Reagan had all the authority that he deemed necessary to institute sweeping changes in the AFDC program.

c. Negotiations with the Legislature

Playing to general public antipathy for public assistance programs, Reagan made welfare reform the critical political issue for his administration. It was not, however, a legislative matter that much concerned California's major economic interests. Even powerful agricultural lobbyists, who in the past kept a watchful eye on public relief policy, displayed little interest in the governor's proposed legislation. The same was true for general business and labor interests. During legislative negotiations, only representatives of the counties, social workers, and the poor themselves took a direct and immediate interest.

Early in the year, the state administration decided to pursue a strategy that pressed for the adoption of the entire package of welfare amendments at once.[323] The theory was that tradeoffs among organized opponents could defeat any single measure separately introduced but not a complete set of proposals intricately tied together. State welfare officials hoped to pit nonsupporters of the legislation against one another so that opposition to the governor's program would remain fragmented and divided.

Throughout the legislative proceedings, there was little in the way of cohesive opposition to Reagan's proposed reforms. The County Supervisors Association of California focused almost exclusively on provisions that shifted costs to the counties. Association lobbyists obtained some modest changes in the proposed formulas for dividing the nonfederal share of public assistance expenditures, and they played a decisive part in eliminating from the final legislation administrative recommendations concerning equitable apportionment and a close-ended welfare budget. Organizations of social workers, meanwhile, concentrated almost

323. Interview with Robert B. Carleson, *supra* note 232.

entirely on sections of the legislation that affected the employment of social workers. The most tenacious opponents to the entire Reagan program were representatives of the poor, of whom the most active and deft was Abascal.

The actual legislative negotiations began in late July 1971, and lasted nearly two weeks. There were numerous breakdowns and near breakdowns. Reagan himself personally headed the state administration's negotiating team. For the first week, until agreement was reached on basic provisions, he participated on a full-time basis in the discussion sessions. Afterward, for the specific drafting of the agreed legislation, the principal negotiator for the administration was Edwin Meese, III, the Executive Assistant to the Governor.[324] State Social Welfare Director Carleson and Ronald Zumbrun, the Deputy Director for Legal Affairs, were also in attendance throughout the intense discussions with legislators.

During the direct discussion with the governor, Bob Moretti, the Speaker of the Assembly, was the lead participant on the five-member legislative negotiating team. He was institutionally and in reality the most powerful figure in the California Legislature. The other legislators were Senator Beilenson and Assembly Members Leo McCarthy, John Burton, and William Bagley.[325] All except Bagley, who was Chair of the Assembly Welfare Committee, were Democrats. All opposed or criticized Reagan's welfare program.[326] The direct and sustained participation of the governor and the Speaker of the Assembly in the negotiations were unprecedented in recent state legislative history.

During the negotiating process, Reagan proved to be a strong and talented negotiator. He grasped the varying significance of different issues and maintained throughout a tough bargaining position.[327] It was not until the second stage of the negotiations, during the drafting of the legislation after the governor was no longer a direct participant, that the legislators and their staff were able to modify the likely impact of certain provisions through draftsmanship.[328] The result was a tempered version of the

---

324. During the Reagan presidency from 1985-1988, Meese served as the 75th Attorney General of the United States.

325. Beilenson & Agran, *supra* note 111, at 479.

326. In his recollection of the Welfare Reform Act discussions, Carleson was especially struck by the strong connections of the legislative negotiators to major proponents of the Nixon Administration's Family Assistance Plan. Within HEW, a chief advocate for FAP was Under Secretary John Veneman, a former California Assembly member who was close to Bagley and like him a liberal Republican. A major congressional supporter was Democratic Representative Phillip Burton, John Burton's brother. Carleson, *supra* note 242, at 49–51.

327. Interview with Robert B. Carleson, *supra* note 232.

328. Interview with Larry Agran, former Committee Counsel, California Senate Health and Welfare Committee (Oct. 8, 1973) (on file with author).

governor's final proposals but one, nevertheless, fully consistent with his basic objectives.

In entering into negotiations with the governor, the Democratic legislative leadership was intent upon reaching some kind of agreement with the state administration. They were also prepared to allow Reagan to claim full credit for the final bill. For a number of reasons, they did not consider it feasible either to do nothing or to enact substitute legislation over the governor's opposition.

In the first place, the governor had cast so much attention on welfare as a problem that not to accede to his requests in some way was likely to have nasty repercussions for Democrats in the coming election still a year away. If they failed to act, Reagan would hold them fully responsible for past and subsequent increases in public assistance costs. On a very practical and very partisan level, the objective was to slay the "welfare monster" now so that it would not be a negative issue to be used against them in the next election.

Secondly, the legislators seriously worried about the consequences of a voter-approved, Reagan-drafted welfare initiative. Fearful of the impact upon aid beneficiaries of untempered Reagan administration proposals, even liberals in the legislature felt compelled to participate in and to enact compromise legislation no matter what the eventual outcome.

Lastly, there was some expectation that in bargaining with the governor, arrangements could be reached that would prove beneficial to welfare recipients. These efforts centered on increasing the basic grant received by recipients, adopting mandatory annual cost-of-living adjustments for AFDC beneficiaries, and preventing the prospect of across-the-board grant reductions. It was also hoped that in the drafting of the provisions it would be possible to posit language that would facilitate judicial challenges. Sleight-of-the-hand draftsmanship was, however, a precarious course of action. The final bill contained no general purpose clause. Since the legislative language was lengthy, highly technical, and sometimes contradictory, judicial construction would be a puzzling and arduous task.

Organizations of welfare recipients by and large maintained a low legislative profile. Not wanting to fuel further already substantial political antagonism, they engaged in few public demonstrations. Instead their main activities consisted of testifying at public hearings, preparing statements for the media, and maintaining a careful watch over those legislators regarded as their staunchest supporters. In terms of actually affecting the legislative negotiations, Abascal was the key representative for the welfare poor. Because of his prior and continuing involvement in litigation, Abascal

had close connections to leaders of both AFDC welfare rights groups and the emerging disability rights movement.[329] He had their full trust.

California legislators had highly competent and knowledgeable staff support. Abascal's contribution to the legislative process was, therefore, not so much knowledge about the public assistance system as predictive insight into the likely actions of courts. The negotiators for the legislature wanted to avoid intransigence and, ultimately, political responsibility for costly welfare provisions. But they also wanted to compromise as little as possible the interests of the poor. Their intention was to defer to the judiciary decisions about what they regarded as legally questionable sections conceded the governor. The result was that Abascal found that he had unexpected political leverage, as the specialized knowledge that he and other legal services attorneys had developed during several years of intense welfare litigation now meshed with the interests and needs of the Democratic-controlled legislature.

There also was an element of personal magnetism involved.[330] It had to do with Abascal's deep confidence and trust-inducing presence. He was not a dynamic speaker, and his style was in no way flamboyant or self-aggrandizing. One would not describe Abascal as charismatic in any usual sense. He was very thoughtful and paid attention to the politics in play as well as the law at issue. When he expressed himself, there was a strong sense of conviction, but he never exaggerated or oversold his opinions and views. He explained matters carefully and concisely, and his explanations were neither ideological nor strident. He straightforwardly said what he thought and what was likely to happen. While his ideas usually were cast as suggestions, his words were taken by others as golden. Abascal was, of course, not infallible. It mainly was his honesty, integrity, and sincerity that led others to always have a great deal of confidence in him. This included legislators whom he got to know in the early 1970s, a number of whom remained close friends and important political contacts for the rest of his life.

During the negotiations concerning the Welfare Reform Act, legislative leaders regularly and closely consulted with Abascal. Since the propriety of legislative lobbying was a sensitive issue within the OEO Legal Services Program, he participated in the proceedings while on

---

329. Abascal's representation of the California Welfare Rights Organization intensified during the struggle to implement section 402(a)(23) of the Social Security Act. *See supra* text accompanying notes 249–284. He also developed very close relationships with disability rights activists during an attempt by the Reagan administration in summer 1970 to cut back on spending for homemaker and attendant care services for aged, blind, or disabled recipients, whose plight garnered considerable public sympathy. Regarding the cutback in attendant care services, the Reagan administration did back down, but only after protest activities at the state capitol, high-visibility media attention, and a court-issued injunction. Interview with Ralph Abascal (Feb. 11, 1973) (on file with author).

330. Interview with Marjorie Gelb, a former legal services attorney who worked with Abascal in the early 1970s (Oct. 15, 2005) (on file with author).

leave of absence from San Francisco Neighborhood Legal Assistance Foundation. This precautionary measure was necessary, as critics of federally funded legal services, which included most relevantly Governor Reagan, viewed anything other than routine individual legal assistance as illegitimate. The well-founded fear was that Reagan would seek to defund government-supported legal services programs in California.[331]

The basic role that Abascal fulfilled was the kind usually reserved for individuals who represented the strongest lobbying interests. He lacked, however, their ability to influence both the positive and negative sides of political compromise. He was in a position where he could impede attempts to cut welfare benefits, but he was not in a position where he could significantly expand the economic and political interests of welfare beneficiaries. Lodged in a small backroom office of the California Capitol, Abascal reviewed and wherever possible subtly revised all concessions granted the Reagan administration. He was later to spearhead numerous legal challenges against many of the provisions that he helped to draft.

His most critical work was during the drafting stage of the negotiations after the governor personally was no longer a direct participant. The Reagan administration was not initially aware of Abascal's involvement. On the Saturday morning after the first week of discussions—which had resulted in some basic agreements in principle—Carleson and Zumbrun went over to the state capitol to try to find out why they had not yet received a working draft of the proposed legislation. Unexpected and unannounced, they walked into an interior office of the legislative counsel's office and saw Abascal working with legislative staff on the drafting of the bill's proposed language. Also present was Coleman Blease, who represented the ACLU and a social workers union.[332] Taken aback, Carleson asked Bob Rosenberg, the chief legislative aide, why Abascal and Blease were there. Rosenberg admitted that they had been called.[333] Carleson subsequently commented that the draft being prepared "looked like the stuff we'd agreed to, but they had changed sentences, they had changed phrases, they had made many, many, many changes which almost would reverse in many respects" sections already negotiated.[334] What followed was a week of very intense negotiations over actual language, but off of the draft prepared by the legislature with Abascal's very direct participation. Throughout the process, he continued to provide counsel to the legislature's negotiating team.

---

331. For a description of Reagan's concerted effort to defund CRLA, see Bennett & Reynoso, *supra* note 122.

332. Carleson, *supra* note 242, at 84. Blease, who later became a California Court of Appeal Justice, was an experienced state lobbyist. On AFDC issues, he supported Abascal but was not the lead.

333. *Id.* at 85.

334. *Id.*

Now fully aware of the extent of Abascal's involvement, the Reagan administration was vigilant in trying to counter the legislative negotiating team's initial proposed language regarding statutory changes. Carleson later explained:

> All of the issues were our issues and our elements. We knew that this paragraph was not doing the same thing that . . . [it once did. You] practically had to be a lawyer to see the differences between these two paragraphs. . . . It was very carefully done and very skillfully done by the other side.
>
> One of the reasons that was so important was because we were having to ride a very careful line about federal law, because our welfare [code] had to be consistent with federal law. . . .
>
> They were trying to write it, their lawyers, their welfare lawyers, not their in-house lawyers, were writing it to make sure it would go down in flames in court if it passed. . . .[335]

A mutually understood strategy of conflict over welfare reform was in full bloom. Each side was very much on top of what to expect in response from the other.

Abascal provided the legislative negotiators with a practicing attorney's understanding of what was necessary procedurally and factually to expedite and optimize chances for welfare recipient litigation success. The recommendations that he made reflected judgments about the requirements of judicial advocacy. Contrary to what Carleson assumed, a significant part involved not changing the Reagan administration's proposed language. A major thrust of Abascal's counsel was to reject moderation in the framing of the welfare reform provisions. The following example illustrates the reasoning behind and risks involved in adopting this position.[336]

Federal law at the time permitted welfare recipients who were employed to set aside earnings to meet all work-related expenses actually incurred. This set aside provided a method for making sure that the extra expenses that resulted from employment were not overlooked in computing supplemental welfare benefits. The provision was one of several authorized by the Social Security Act as a financial incentive to encourage aid beneficiaries to seek work.[337]

The Reagan administration proposed an absolute $50 limitation on all such expenses except child care. The legislative negotiators wanted to cushion the limitation with a tempering clause, which would have allowed amounts in excess of $50 in instances of extreme hardship. Abascal argued against the inclusion of the tempering clause because the effects of the basic provision then would have been inconclusive. A

335. *Id.* at 87–88.

336. Example provided by Ralph Abascal. Interview with Ralph Abascal, *supra* note 329.

337. *See* 42 U.S.C. §§ 602(a)(7), (8)(ii) (1970).

blanket limitation sharpened the legal distinctions that could be raised in later argumentation.

Procedurally, courts also would have been inclined to await the development of state practices under the enactment before determining whether the provision as qualified conflicted with federal law. Since a straight $50 limitation did not involve any significant factual questions, it was immediately ripe for judicial challenge and an early summary judgment decision. The prospect of litigation delay was an important factor in the calculations of the legislature and the state administration. In the absence of expedited judicial proceedings, the Reagan reforms were likely to remain in force for lengthy periods of time whatever the eventual determinations about their legality.

The legislators accepted Abascal's judgment. The governor got what he initially had requested. If the legislators had not considered the probable effects of subsequent legal challenges to the legislation, the final work-related expense provision probably would have contained a tempering clause. On the one hand, a modified provision minimized the opportunities for quick judicial reversal; on the other, an unqualified provision maximized such opportunities but heightened the costs for recipients in the event of defeat. The decision to accept the governor's proposal involved risks. The ultimate judicial outcome was not by any means a certainty.

On August 13, 1971, in a rare show of bipartisan comradeship, Governor Reagan signed into law the Welfare Reform Act of 1971.[338] He was flanked by Speaker of the Assembly Moretti and by Senator Beilenson, who officially sponsored the legislation as revised Senate Bill No. 796. A few days before, the bill had passed the State Senate on a 31-8 vote and the State Assembly on a 62-9 vote. The opposition votes in the Assembly came mainly from black representatives who regarded the bill as racist and antithetical to the interests of poor constituents. In the Senate, the negative votes for the most part were cast by conservatives who considered the provisions of the bill too generous. For most others including the governor, the final legislation was a much heralded solution to California's welfare woes. Assembly Member Bagley quipped, "Politicians in and out of office won't have welfare to kick around any more."[339] This was hardly to be the case.

The Welfare Reform Act was designed not to settle difficult public policy problems but to appease the voting public. As a reporter for *The Sacramento Bee* noted, the "big question is who got the most political

338. Welfare Reform Act of 1971, CAL. STAT. 1971, ch. 578.

339. *Comprehensive Welfare System Reform Sent to Governor's Desk*, LODI NEWS-SENTINEL, Aug. 12, 1971, at 1, 2; *see* Eldon Rosenthal, Observations on the Welfare Reform Act of 1971 as a Political and Legal Battleground 5 (Dec. 1971) (unpublished Stanford University paper) (copy on file with author).

mileage out of the lengthy welfare debate—Moretti or the governor?"[340] The Democratic legislative leadership hoped to turn welfare into a nonissue so that rising public assistance expenditures could not be used against them in coming elections. With an eye on the presidency, Reagan hoped to find in restrictive welfare policy and administration a nationally marketable campaign issue. Given the governor's single-minded concern for conserving public aid costs and his considerable competence in utilizing the media, conflicts over public relief were scarcely likely to die a quiet death. Neither the negotiations nor the eventual legislation in any way altered the complexion of factors that made welfare policy for poor families an intractable issue subject to political manipulation but not a sensible solution.

From the standpoint of public aid recipients, the final legislation despite its shortcomings was an improvement over the initial Reagan proposals. It did not include provisions on equitable apportionment and the establishment of a close-ended state welfare budget. Instead, as in the past, state appropriations for public assistance were to be made on an as-needed basis in accordance with a legislatively enacted maximum grant schedule. This meant that grants to AFDC families and the disabled, the two categories to which equitable apportionment was to apply, would not be reduced as caseloads grew. There were also no changes in the definition of "disability" for receipt of Aid to the Needy Disabled, though severe restrictions had been among the original reforms proposed.

Additionally, through various parrying back and forth and a complicated set of actions, the governor and legislature reached agreement on provisions that significantly raised the basic allowances received by most AFDC beneficiaries but reduced the supplemental welfare allowances received by working recipients. The provisions concerning how to take into account the wage earnings of working recipients were among the most contentious discussed. According to Carleson, getting the language the Reagan administration wanted "was the major piece of the whole thing."[341] It was estimated that, as a result of these revisions, two-thirds of AFDC families would realize grant increases, while one-third would suffer grant decreases.[342]

The very positive development for welfare beneficiaries was the enactment of permanent legislative authorization for an annual cost-of-living adjustment ("COLA") in AFDC payment and need standards.[343] Previously, such automatic increases applied only to the adult categorical aid programs. The inclusion of a COLA provision for the AFDC program in the reform package was especially remarkable given the

340. Rodda, *supra* note 309.

341. Carleson, *supra* note 242, at 91.

342. Beilenson & Agran, *supra* note 111, at 481.

343. Welfare Reform Act of 1971, CAL. STAT. 1971, ch. 578 § 29.1.

state's longstanding prior inaction and recent defiance regarding the updating of AFDC benefit amounts. It was also unusual in that in almost all other states annual AFDC adjustments were considered entirely too costly to warrant serious legislative attention. For welfare recipient advocates, the COLA provision was the most important offsetting benefit to all that was conceded to Reagan. The first automatic increases took effect on July 1, 1973. Annually thereafter, for almost two decades, AFDC families received upward adjustments in benefit amounts worth collectively hundreds of millions of dollars.[344] It is highly unlikely that such steady increases in grant levels ever would have occurred if politically they required separate authorizing legislative action each year. Furthermore, even if they were enacted annually, the legislative bargaining cost in terms of new restrictions affecting other aspects of the AFDC program was apt to have been heavy.

Taken as a whole, however, the Welfare Reform Act was very much Reagan's bill. In characterizing his reforms as workfare not welfare, he took advantage of the resiliency within dominant American ideology of old Anglo-Saxon ideas about the poor and poverty. Any moderating restraints on implementing the changes Reagan most wanted would have to come from the courts as a result of challenges brought by Abascal and other legal services attorneys largely relying on overriding federal statutory law.

4. *Aftermath: Full Employment for Lawyers*

a. *Perceptions and Expectations About the Role of Courts*

The Democratic legislative leadership and Governor Reagan had very different views about the role of the courts in welfare policy administration. Fully appreciating that the judiciary has the final word on determining the constitutionality of legislation and the supremacy of federal law, the negotiators for the legislature counted on the prospect that the courts would be in a position to nullify some effects of various concessions given the governor. For Reagan, the courts had no business telling the states how to run welfare programs, especially when he regarded their rulings as defying common sense. A good example was the governor's insistence on reinstituting a durational residency requirement

344. The COLA provision enacted by the Welfare Reform Act of 1971 continued to cover the setting of AFDC maximum aid payments until 1990. Between 1990 and 2010, California legislation most years authorized suspending the implementation of the COLA provision, first as applied to the AFDC program and then to the successor CalWorks (federally TANF) program. As of the 2010-11 fiscal year, the legislature must enact by specific statute any COLA adjustment in CalWorks cash benefits. CAL. WELF. & INST. CODE § 11453 (Deering 2012). In other words, California legislation regarding an annual adjustment in welfare benefits for families with children is now back to what it was prior to the 1971 Welfare Reform Act.

as part of the Welfare Reform Act,[345] notwithstanding clear precedential decisions regarding the unconstitutionality of such requirements.[346]

In commenting on the reasoning of the legislators, Senator Beilenson offered the following explanation:

> Our strategy was to give the Governor a watered-down unconstitutional residency requirement in exchange for real program benefits.... Passing the buck to the courts is, of course, not the preferred way to legislate. But in terms of the ultimate effects on poor people, the trade off in this instance seemed reasonable.[347]

This concession to the governor was relatively risk free. As expected, Abascal and his colleagues brought suit and successfully obtained an injunction preventing the state from implementing the new durational residency requirement.[348] Although the state threatened to appeal the ruling, it did not.[349] Reagan's understanding of constitutional limits on legislative policymaking was strikingly different from Beilenson's. For Reagan, the decision in the durational residency case was an especially telling example of wrongheaded judicial decisionmaking.

When I interviewed the governor and future president several years after the issuance of the injunction in this case, one of my questions was what he regarded as the judicial role in reviewing welfare policies and practices of the state government. His reply was as follows:

> I think that all too much the courts have ... had the same attitude there that they have had with regard to crime itself in the permissiveness and the leniency. Can I give an example? It just happened not too far from here and not too long ago.
>
> Two men and their families moved here from Dallas, Texas. They had been welders down there. They decided they wanted to live in California. They worked for the same company there. They came up, and they were neighbors. They lived in the same neighborhood here. They couldn't get welding jobs here. So they applied for welfare.
>
> Well, under our new system of checking and our reforms, we checked with their employer. And he said, "Not only are their jobs still open," but he said, "I have openings for forty more welders." Now here are two men in California applying for welfare, trained welders, and there's a man in Dallas, Texas, where they voluntarily came from who is looking for forty-two welders like themselves. So we denied them

345. CAL. STAT. 1971, ch. 578, § 24.65. The Welfare Reform Act provision imposed a twelve-month durational residential requirement that applied only to the adult share of a grant for AFDC families in counties with unemployment rates in excess of 6%.

346. Shapiro v. Thompson, 394 U.S. 618 (1969); Burns v. Montgomery, 299 F. Supp. 1002 (N.D. Cal. 1968), *aff'd*, 394 U.S. 848 (1969).

347. ACLU Southern California Open Forum (Oct. 1971), *as cited in* Rosenthal, *supra* note 339, at 30.

348. Brown v. Carleson, No. 217636 (Sacto. Cnty. Super. Ct. injunction issued Feb. 15, 1972).

349. Frederick Doolittle & Michael Wiseman, *The California Welfare Reform Act: A Litigation History* III.16 (Income Dynamics Project, Univ. of Cal., Berkeley, Dep't of Econ., Working Paper No. 71, 1976).

> welfare. They took the case to court. They sued us. And a judge ruled that to not give them welfare interfered with their constitutional right to travel and live where they wanted to live.
>
> Now, it is very precious that you and I have the right to vote with our feet, to move across the state line, to live wherever in this country we want to live. But I'll be damned if we have a right to live there knowing that the only way we can subsist if we decide to live in that place is on the largess of our fellow citizens.
>
> So I went to one of our lawyers after that case and I said, "Look, I want to ask you—give you a hypothetic." I said, "In a few months I'll no longer be Governor." I said, "My main occupation was motion picture actor. So when I'm no longer Governor I can be an unemployed motion picture actor." I said, "Suppose I decide that I want to go back and live in the small town where I grew up in Dixon, Illinois. Now they don't make movies in Dixon. There are no jobs for movie actors, but under his decision am I eligible to go back to my home town and say I am an unemployed motion picture actor and apply for welfare and they have to give it to me?"
>
> And he said, "That's exactly what the decision meant."
>
> Now, we lost that case. I claim that the judge was wrong—that this is a wrong interpretation of the Constitution. Any common sense or reason says to you that you can't say to the people of the United States you can just go out and search for a place that cannot possibly provide you employment and then move there and stop working for the rest of your life and your neighbors take care of you. But this is what a judge really ruled.[350]

Reagan was not interested in theoretical propositions. His approach to a conceptual question about the role of courts was to give an example—to tell a story. He governed not with ideas about the rule of law and separation of powers in mind but by anecdote. He focused on practical, substantive outcomes—not the applicability of abstract legal principles. I doubt that Reagan ever thought of himself as acting lawlessly or as encouraging others in his administration to act lawlessly. He simply discounted as illegitimate interpretations of law with which he disagreed.

For Reagan, it was all about what he considered common sense. And what he considered common sense in welfare policy, as for most Americans, was rooted in longstanding beliefs about public relief. In this constellation of beliefs, durational residency requirements are powerful and recurring political symbols.[351] They connote a perception of the poor

350. Interview with Ronald Reagan, *supra* note 6.

351. In California, there were two more attempts in the 1990s to implement a durational residency requirement. In both instances, District Court Judge David Levi, the son of Edward Levi, the late, distinguished legal scholar and former U.S. Attorney General in the Gerald Ford administration, found the provision unconstitutional. *See* Roe v. Anderson, 966 F. Supp. 977 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998), *aff'd as violating the privileges and immunities clause sub nom.* Saenz v. Roe, 526 U.S. 489 (1999); Green v. Anderson, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe*, 513 U.S. 557 (1995). The evidentiary record before Judge Levi in the *Roe* case included declarations and statistical studies supporting the conclusion that the "welfare magnet"

as irresponsible vagrants not wanting to work for a living and preferring to move to places where they can get the highest benefits. Reagan's hypothetical was an exaggeration, as there were far more barriers to his receipt of welfare than simply being an unemployed actor. Yet the story he told had considerable popular appeal. His ability to tap into widely shared, persistent political and social beliefs gave him confidence that he could maintain the political legitimacy of his welfare reform program no matter how much was legally overturned.

The number of lawsuits filed involving the Reagan reforms was unprecedented. The durational residency case was only the tip of the iceberg. One study published five years after the passage of the Welfare Reform Act detailed thirty-two different cases.[352] Abascal called the legislation "the Legal Services Employment Act of 1971."[353] As a backroom participant in the bill's drafting, he was fully aware of its numerous infirmities.

To establish some degree of coordination over the legal challenges that would be forthcoming, Abascal arranged in early September 1971 a weekend conference at Camp Loma Mar in the Santa Cruz Mountains for California antipoverty attorneys known to be involved in welfare litigation.[354] The purpose of the conference was to organize an integrated strategy that, on the one hand, would halt implementation of the Act's onerous provisions and, on the other hand, would not impede those sections that improved cash and other benefits for the poor. At the conference, litigation areas were assigned to different attorneys from legal aid programs throughout the state. The overall legal advocacy campaign involved dozens of legal services lawyers. San Francisco Neighborhood Legal Assistance Foundation, the local program for whom Abascal worked, would function as the back-up center for the forthcoming litigation. Abascal along with Jay-Allen Eisen, another SFNLAF attorney, served as co-counsel for AFDC recipients in most of the litigation initiated. Daniel Brunner of the Long Beach Legal Aid Society also played an instrumental role in coordinating the statewide advocacy effort.

Welfare recipient organization lay leaders participated in the initial September conference and several other statewide informational and planning sessions over the next few years. Brunner recalls these sessions

---

theory, which hypothesizes that recipients in significant numbers make decisions where to live based on the level of welfare benefits paid, was factually invalid. *Roe*, 966 F. Supp. at 981–82. Facts and strong judicial precedents notwithstanding, durational residency requirements have had enduring political appeal.

352. Doolittle &Wiseman, *supra* note 349, § III. This study includes both reported cases and non-reported cases decided at the trial stage without an appeal.

353. Tom Goff, *Two Rights Lawyers Predict Suits over Welfare Measure*, L.A. TIMES, Aug. 11, 1971, at 3, 34.

354. Rosenthal, *supra* note 339, at 8.

as not having a "huge structure or hierarchy. [They were] just collaborative."[355] Lay leaders were part of the overall decisionmaking, but the specific decisions necessarily called on the special expertise of lawyers.[356] Approximately, fifty legal services lawyers were in attendance.[357] The issues overwhelmingly involved questions of legal tactics and legal resources. The follow-up role of grassroots, welfare rights organizers was principally to help in the identification of individual recipient plaintiffs and to have their organizations serve as plaintiffs whenever tactically appropriate.[358] In both the legislative fight over welfare reform and its aftermath, legal aid lawyers and leaders of welfare rights groups were on the same page. There were no significant differences over strategy and tactics.

The California Legislature early on became aware of the Reagan administration's questionable and selective implementation of policies and practices after the enactment of the Welfare Reform Act. In late November 1971, a special Senate-Assembly Subcommittee on Implementation of Welfare Reform held hearings on various actions taken and not taken by the State Department of Social Welfare and Robert Carleson, its Director. Yet the Legislature took only a few halting steps against SDSW. Legislative attention focused mainly on reducing the Department's administrative budget, especially funds for expanding the Legal Affairs Division. The legislators had come to the unhappy conclusion that lawyers within SDSW were employed for the most part to develop ways of avoiding legal responsibilities rather than carrying them out. They also used the power of the purse to compel the removal of the special ten-person Attorney General's unit from its physical lodgings within SDSW headquarters. The only other major legislative action was to transfer budgetary responsibility for child care programs from SDSW to the Department of Education. The move was dictated by Carleson's refusal to initiate necessary funding arrangements for an expansion of statewide child care facilities.

John Miller, an African-American Assembly Member from Alameda County, who later became a California Court of Appeal Justice, was especially appalled and anguished at what he had learned. At the Subcommittee hearings directing his comments to Carleson (who had just testified), Miller stated:

---

355. Interview with Daniel Brunner, *supra* note 222.

356. The welfare rights, grassroots activists present included Catherine Jermany from Los Angeles, and Moiece Palladino from San Francisco. Both at the time were prominent leaders of the California Welfare Rights Organization. *Id.* Jermany's later career focused on paralegal training and alternative dispute resolution; Palladino subsequently became a California licensed attorney.

357. *Id.*

358. Interview with Kevin M. Aslanian, *supra* note 131.

> As I see it, there is just one fundamental issue, and I mean only just one.
>
> The State Department of Social Welfare, Mr. Carleson, has completely, it seems to me, abandoned any semblance of lawful behavior in implementation of the so-called Welfare Reform Act.
>
> It is obvious to me that you and your people are caught with a promise to deliver massive savings and welfare dollars to the Governor, promises which you cannot deliver because your welfare reform proposals are fiscal lies from the very beginning, since legal, and I emphasize legal, implementation of the so-called Welfare Reform Act of 1971 cannot produce the promises and the savings. . . .
>
> They [Mr. Carleson and his staff] know that the course will catch up with them eventually . . . , but to them it is worth the gamble because they are counting on not being forced to make retroactive payments of illegally denied benefits, and they are counting on county government not to be able to find everybody who has been stolen from in this case.
>
> They also have started to begin to put the blame on the courts, and on the counties, for the redress that will inevitably come. I am certain of that.[359]

Miller's plaintive and prescient observations notwithstanding, it was largely left, as all expected, to Abascal and his colleagues to take the actions necessary to hold the Reagan administration legally accountable to governing state and federal law.

The issues involved challenges to provisions of the Welfare Reform Act, to regulations issued without new authorizing legislation, and to changes in administrative practices. Most of the issues were highly technical and concerned matters like determining the availability of income from stepfathers, the treatment of in-kind resources, the valuing of assets, bureaucratic accounting and verification practices, and calculations of eligibility and grant amounts for families with earned income. Some of the cases were not especially consequential, others were mainly important symbolically, and still others entailed serious benefit and cost consequences. Not taking into account the varying significance of the different cases and acknowledging sometimes mixed or not easy to classify results, my best reading is that welfare recipients were on the winning end and the Reagan administration on the losing end in three-fourths of the cases filed.

b. Three Post-Welfare Reform Act Skirmishes

To highlight the range and nature of the contested issues, I now turn to case developments concerning three different aspects of the Reagan administration's implementation of welfare reform. This accounting of post-Welfare Reform Act litigation is not comprehensive but illustrative.

---

359. *Hearings of S. Assemb. Subcomm. on Implementation of Welfare Reform*, 1971 Leg., Reg. Sess. (Cal. 1971), Transcript 3, at 39–42 (statement of John Miller).

The first example discusses SDSW's mismanagement of recipient due process safeguards; the second discusses the use of non-rebuttable presumptions to reduce grant amounts to eligible families; and the third discusses the symbolic importance of forced work programs and the high stakes involved in calculating eligibility and grant amounts for families with working members.

i. Due Process Mismanagement

In instructing counties and notifying recipients of changes in the grant structure, the State Department of Social Welfare ("SDSW") was reluctant to conform to the specific notice requirements mandated by the Supreme Court in the jointly decided *Goldberg* and *Wheeler* cases.[360] The opinion in these cases required that all recipients receive in advance and in writing the precise reasons for any contemplated reduction or termination in welfare benefits. Such notification was considered an essential prerequisite for a fair hearing.

To inform recipients of changes in their status or benefit levels as a result of the Welfare Reform Act, Reagan administration officials advised the counties to send to all beneficiaries a standard, generalized notice. A "suggested" format for the notice was sent to each county welfare director on September 2, 1971, as part of a lengthy telegram concerning various welfare reform revisions. The recommended notice included the following statement: "Under provisions of the Welfare Reform Act of 1971, your grant beginning October 1st, 1971, may be changed, or you may no longer be eligible for a welfare grant. One or more of the following changes may affect you."[361] The notice then cited the four grant-affecting sections of the new legislation. No other information was to be provided recipients.

The day after SDSW sent the telegram, the Department formally filed with the California Secretary of State a revised set of regulations concerning notice and fair hearing requirements. SDSW had prepared the regulations over a period of several months in compliance with judicial orders issued by the federal district court in the *Wheeler* case after the remand from the U.S. Supreme Court. These regulations clearly indicated that recipients were to receive precise and specific information on how and why a change in policy affected them. The issuance of a generalized notice conflicted with SDSW's own revised standards of fair practice.

A number of county officials regarded the state administration's suggested notice as legally defective. But when they approached Ronald

360. Goldberg v. Kelly, 397 U.S. 254 (1970); Wheeler v. Montgomery, 296 F. Supp. 138 (N.D. Cal. 1968), *rev'd*, 397 U.S. 280 (1970).

361. Report to the Legislature, S. Assemb. Subcomm. on Implementation of Welfare Reform 27, Mar. 17, 1972.

Zumbrun—SDSW's Deputy Director for Legal Affairs—and expressed their reservations, he insisted that the notice met all necessary requirements of law. Zumbrun's opinion was backed by some vague threats that those counties which failed to comport with the state notice would be "claim cut." A claim cut meant that the counties would not receive state reimbursement for any funds spent in contravention of an administrative order. Reluctantly, the counties sent out the suggested notice.

Abascal and co-counsel quickly obtained a temporary restraining order against the defective notice.[362] The counties were told to issue immediately supplemental grants to all recipients whose benefits were illegally reduced or terminated. However, still under the threat of an administrative claim cut, the counties were urged by Carleson and his deputies to disregard the judicial order. Some of the counties complied with the court ruling; others, fearful of state administrative repercussions, took no corrective action.

At the end of October, the three-judge federal panel reviewing the matter ratified on the merits the previously issued temporary restraining order.[363] The judges found the proposed notice's lack of specificity a serious departure from the requirements of due process. They further concluded that none of the deficiencies could be justified by any showing of countervailing governmental interest, not even the need to effect changes in the grants of a large number of recipients. The court's opinion placed the responsibility on SDSW Director Carleson and his deputies for the continued failure of some counties to take required remedial action. This failure was seen as due to "the influence exercised by defendant Carleson and those acting under his direction in the State Department of Social Welfare."[364] Carleson denied any such responsibility and attempted to shift the blame for any illegal action to the counties, over whom he maintained that he had no effective control.

Several months later, in yet another order, the three-judge panel once again had occasion to draw attention to Carleson's role. The court stated:

> In spite of defendant Carleson's remonstrance that he does not have the power effectively to coerce compliance with his directions and orders, the records in this case are replete with proof that he does. Moreover, there is not the faintest suggestion in those records that any county agency has ever refused to comply voluntarily in the past, or

362. Wheeler v. Montgomery, Civ. No. 48303 (N.D. Cal. TRO and Order to Show Cause filed Sept. 28, 1971). Because the case involved constitutional issues, it was before a three-judge district court panel. A single judge had authority to issue a TRO pending further resolution by the entire panel.

363. *Id.* (order and opinion filed Oct. 29, 1971).

364. *Id.* at 9.

> would ever refuse to comply voluntarily in the future, with an instruction from defendant Carleson.[365]

Turning to the obligations of the Social Welfare Director to insure adequate, statewide, fair hearing notices, the court then stated, "In short, the responsibility for insuring the adequacy of those notices is committed by statute to defendant Carleson, and defendant Carleson may not, as he has tried to do in these proceedings, seek to displace that responsibility onto the counties or this court."[366] Afterwards in rather terse language, the judges proceeded to lecture Carleson on precisely what he had to do to meet the requirements set down in the prior order of October 29, 1971.

The Social Welfare Director's immediate response to the court's reprimand was to convene a press conference to explain his version of the case. At the press conference, he persisted in his attempt to shift the blame to the counties, and he hinted that in order to correct the situation he might have to remove some county directors of welfare and run the local departments himself.[367] Some of the directors were among the county officials who initially attempted to dissuade the issuance of the original notice.

In a clumsy and single-minded effort to institute grant cuts as quickly as possible, SDSW urged the use of an illegal generalized notice. The improperly terminated or reduced benefits, which the court ordered restored, meant that projected savings for the first months of welfare reform were nonexistent. In this instance, Carleson's defiance of law resulted in a substantial setback in the implementation of the governor's welfare reform program. The Reagan administration was made to pay a price for cavalierly disregarding the due process procedural rights so recently accorded AFDC recipients. This turn of events would not have happened but for the vigilant policing of state administrative behavior by legal services attorneys working with welfare rights organizations.

ii. The Unborn Baby and Other Resource Presumptions

For poverty attorneys the most trying issues generally concerned newly adopted administrative regulations. These regulations were part of an extensive effort to accomplish through executive action alone what the governor was unable to achieve legislatively. Some of the regulatory changes were ostensibly interpretations of new legislative provisions; others were accompanying administrative reforms that either had nothing directly to do with the Welfare Reform Act or initiated policy changes specifically rejected by the Legislature. A number of these regulations

365. *Id.* at 3 (order and opinion filed Feb. 24, 1972).

366. *Id.* at 4.

367. *See* William Cooney, *Court Ultimatum to Welfare Chief*, S.F. CHRON., Feb. 25, 1972, at 1.

shared a common approach, which was to impute financial resources to recipient households without regard to their actual availability or worth. The purpose was to reduce the amounts of individual subsistence grants and thus public assistance costs overall.

The most bizarre action taken by the state concerned an administrative attempt to deny pregnant women supplemental grants for their unborn children. The policy of granting such aid had existed in California for years. Welfare officials acted to reduce the size of such grants on the theory that an unborn infant in an expectant mother's womb had the equivalent of free room and board and thus was not in need of a full allowance. The state's position was that "the mother's body constitutes a 'resource' of the fetus, the economic value of which 'resource' may be deducted from the assistance grant otherwise payable to the mother upon pregnancy."[368] The California Supreme Court unanimously concluded that the administration's argument was without merit and contrary to a longstanding state policy designed to insure that a pregnant woman's increased needs for nourishment and other care were adequately met.[369]

On the same day that the unborn baby case was argued, the California Supreme Court heard two other cases, *Cooper v. Swoap*[370] and *Waits v. Swoap*,[371] which involved comparable imputations about the availability of what the Reagan administration characterized as noncash economic benefits.[372] *Cooper* concerned the computation of grants when different members of the same household were eligible for different categorical public assistance programs. The most common circumstances involved an adult caretaker who received disability benefits and therefore was not part of the AFDC family budget unit. *Waits* mainly affected AFDC families where the supervising adult was not a welfare recipient. The underlying factual situations usually involved children living with grandparents who, because they were receiving social security or pension benefits, were not themselves eligible for public aid. The challenged regulations in both cases invoked presumptions about reduced housing needs.

Unlike the unborn baby case where the decision had been authored by one of the Court's more conservative members, these two cases sharply divided the justices. The decisions were not issued until two and one-half

368. CWRO v. Brian, 11 Cal. 3d 237, 239 (1974), *cert. denied* 419 U.S. 1022 (1974).

369. *Id.* at 243.

370. 11 Cal. 3d 856 (1974), *cert. denied* 419 U.S. 1022 (1974).

371. 11 Cal. 3d 887 (1974), *cert. denied* 419 U.S. 1022 (1974).

372. The impression of Abascal conveyed previously, at *supra* text accompanying note 120, drew on my recollection of the oral arguments in these three cases. The legal services attorneys who respectively argued each of the cases before the Court, with Abascal at counsel's table in a supportive role, were Jay-Allen Eisen and Edmund Schaffer from SFNLAF and Marjorie Gelb from Alameda County Legal Aid Society.

months after the decision in the unborn baby case. It had taken considerable effort on the part of Justice Mathew O. Tobriner, who authored the Court's opinions, to get the four votes necessary for a majority.[373] In each case, the Court held that the challenged regulation was inconsistent with the establishment of the flat grant system mandated by the Welfare Reform Act and with federal law.

A main principle of California's revised grant structure after the enactment of the Welfare Reform Act was that benefits were to be awarded recipients based on the number of eligible AFDC members without regard to specific factual circumstances other than actually available income. The legislation specified fixed minimum need standards and set at lower amounts fixed maximum payment standards. The differences reflected the value of Food Stamps for which families of different sizes were eligible. The major purposes were to cut AFDC administrative costs by standardizing grant calculations and "to eliminate welfare paternalism by allowing recipients to allocate grant money according to their own priorities."[374]

Nonetheless, SDSW promulgated several regulations, including those at issue in *Cooper* and *Waits*, which reintroduced determinations about need as a way to reduce levels of assistance. These determinations of need were based on administrative assumptions about the value of an in-kind resource, not an individualized calculation about its actual value. In *Cooper* and *Waits*, the Court found that the Legislature, in adopting a flat grant system, explicitly had rejected determining individual families' needs as a basis for setting grant payments.[375] The Court further concluded that shared housing with non-AFDC recipients was consistent with the Legislature's intention to give families leeway to save in one area to meet less-flexible expenses in another.[376] Lastly, as a separate basis for rejecting the state's approach, the Court held that using fictitious rather than actual figures for valuing in-kind resources was inconsistent with governing federal law.[377]

The close California Supreme Court decisions in *Cooper* and *Waits* underscored the risks involved in relying on the judiciary to hold the state legally accountable in its administration of welfare programs. The plain language of the new welfare legislation did not directly address the contested issues. To determine whether the Reagan administration had authority to act on its own required the Court to account for at times

373. Several years after the issuance of the decisions, Eisen ran into Justice Tobriner and asked him what accounted for the delay. Tobriner stated that initially he had only one other vote, and it just took him awhile to bring along the others. Interview with Jay-Allen Eisen, *supra* note 129.

374. *Cooper*, 11 Cal. 3d at 862.

375. *Id.* at 864.

376. *Id.* at 866.

377. *Id.* at 870; *see* Waits v. Swoap, 11 Cal. 3d 887, at 894 (1974), *cert. denied* 419 U.S. 1022 (1974).

vague state legislative history and often convoluted state and federal regulatory history. In such circumstances when selecting what to marshal for support, judges have ample discretion to interject their own values and sense of justice.

The dissent of Justice William P. Clark, Jr. in *Cooper* and *Waits* is especially striking in this regard. Prior to his appointment to the California Supreme Court, he had served as Reagan's Chief of Staff.[378] To support his dissent, Clark unabashedly relied on a law review article by Ronald Zumbrun, who as the chief of SDSW's Legal Affairs Division had been a principal architect and defender of the Reagan administration's welfare reform program including the policy approach and regulatory provisions at issue in *Cooper* and *Waits*.[379] At the very least, Clark's reliance on this material, which easily could be construed as biased, was inappropriate. Given his prior role as a close aide to Reagan, he certainly knew of Zumbrun's involvement in the development of the challenged policies.

Governors, like Presidents, can be surprised by appointments to high judicial positions. Indeed, then California Supreme Court Chief Justice Donald Wright, whom Reagan reportedly regarded as his Earl Warren, joined Justice Tobriner in forming the majority in *Cooper* and *Waits*. Nonetheless, the handwriting was on the wall: Conservative chief executives with little sympathy for the legal claims of welfare recipients more often than not were likely to identify and appoint individuals to the judiciary with predilections like Clark's, not Wright's. The legal rights of public assistance beneficiaries, which only recently had come to be judicially recognized, lacked firm footing in American political culture. Given the latitude afforded judges in their decisionmaking, ample opportunities existed for laws and policies to be interpreted in ways that trumped the interests of the welfare poor.

State efforts to impute economic and other resources to recipients, as in the unborn baby (*CWRO v. Brian*), *Cooper,* and *Wait* cases, extended as well to interpretations of the Welfare Reform Act. For

---

378. When Reagan became President, Clark resigned from his judicial position and served during Reagan's first presidential term as National Security Advisor and then Secretary of the Interior.

379. In an early footnote, Clark wrote,

> For a helpful discussion of the administrative, legislative, and litigative history of California's welfare reform program, see Zumbrun, Momboisse and Findley, *Welfare Reform: California Meets the Challenge (1973)*, 4 PACIFIC L.J. 739, relied on throughout this opinion. The authors are members of the Pacific Legal Foundation, a non-profit, public interest law firm recently founded in Sacramento. Pacific Law Journal (University of the Pacific (McGeorge School of Law)) specializes in the analysis of significant California legislation.

Cooper, 11 Cal. 3d at 880 n.2 (Clark, J., dissenting). Clark neglected to note that the Zumbrun article in large part was a rejoinder to an earlier article also appearing in the *Pacific Law Journal* by Democratic State Senator Anthony Beilenson. Beilenson & Agran, *supra* note 111.

example, the new legislation reinstituted stepfather liability for the financial support of stepchildren. This was accomplished through a complicated formula involving a wife's community property interest in the earnings of her husband. In applying this provision to AFDC families, state welfare officials sought to increase the percentage of a stepfather's income available to a recipient family by employing a set of largely non-rebuttable assumptions. The assumptions involved attributions of financial and in-kind support for stepchildren irrespective of the stepfather's actions or intent. Because of continuing administrative circumvention, antipoverty attorneys had to file two complementary suits on the same issue before they were able to obtain reasonable compliance with an already fairly stringent legislative provision.[380]

Compared to the judicial fate of administrative reforms initiated without legislative authorization, actual provisions of the Welfare Reform Act more frequently survived legal challenge. Even unsuccessful challenges, however, had certain benefits for welfare recipients. The publicity around the filing of litigation not infrequently functioned as an additional method for alerting beneficiaries to forthcoming, negative policy changes. Most importantly, preliminary relief when obtained delayed implementation of adverse policies. It is also noteworthy that legal services attorneys in at least one instance—though unsuccessful in court—were afterwards able to obtain legislative repeal of a disputed Welfare Reform Act change.[381]

iii. Work: Damned if You Don't and Damned if You Do

All the major cases following the Welfare Reform Act, save one, were filed by legal aid attorneys. The exception was a suit initiated by Reagan administration officials to obtain a declaratory judgment affirming the legality of the Community Work Experience Program ("CWEP").[382] The state's filing of this suit was a highly unusual development. The objective was to place public aid administrators on the offensive in upholding the validity of CWEP. They named as the nominal defendant in the case the California Welfare Rights Organization. Convinced that CWEP was an ill-conceived program and would prove unworkable, antipoverty lawyers and the California Welfare Rights Organization were reluctant to participate in the

380. Camp v. Swoap, No. 216154 (Sacto. Cnty. Super. Ct. preliminary injunction issued Oct. 19, 1971, judgment after trial entered June 20, 1974); Riddles v. Carleson, No. 221684 (Sacto. Cnty. Super. Ct. preliminary injunction issued Apr. 27, 1972).

381. *See* CAL. STAT. 1973, ch. 1216, at 2912, § 37; CAL. WELF. & INST. CODE § 12350 (Deering 2013); Swoap v. Superior Court, 10 Cal. 3d 490 (1973). The issue involved provisions of the Welfare Reform Act related to an adult child's liability to reimburse the state for aid paid to a parent under state-supported public assistance programs.

382. Hall v. CWRO, No. 72-1278 (C.D. Cal. filed June 8, 1972).

litigation. Their expectations turned out to be correct. Although initial state projections specified that CWEP would provide work for 58,000 persons annually, state government tracking reports as of mid-1974 indicated that each year there had been fewer than 1200 participants.[383] In June 1973, the U.S. Supreme Court in a case arising out of New York held that states could establish for public aid beneficiaries compulsory work programs not specifically authorized by the Social Security Act.[384] The CWEP suit raised similar issues. In its 1974 session, the California Legislature acted to repeal legislative authorization for CWEP, but to no one's surprise Governor Reagan vetoed the bill.[385] Coerced employment remained the symbolic centerpiece of his welfare reform agenda. The real impact of his welfare reform measures, however, would be borne not by nonworking recipients but by those recipients who were working on their own.

In this confusing maze of litigation, one case stood out as the most significant challenge to the Welfare Reform Act. The case entitled *Villa v. Hall* was brought as an original writ filed directly in the California Supreme Court.[386] The main issue concerned the new legislative requirement that the earned income of recipients be deducted—not from a family's recognized need standard—but from the lower payment standard. This change was likely to save each year $100 million in AFDC expenditures.[387] It was what Carleson referred to as "the major piece of the whole thing."[388] Legal services attorneys contested the revision on federal statutory grounds as inconsistent with the Social Security Act's stipulation that the income or resources of AFDC recipients be taken into consideration when determining needs, not payment amounts.[389] The history of the suit further illustrates how the changing composition of the judiciary affected legal outcomes.

Although the *Villa* case was filed in late August 1971, the California Supreme Court did not decide to take jurisdiction until September 29, just two days before the Welfare Reform Act was to become operative. As a preliminary move to maintain the status quo, the Court immediately stayed all AFDC grant revisions pending a full review of the dispute on the merits. The stay delayed both reductions in grants to families with working members and increases in aid to families without any outside resources. The following day, the Court in a slight modification revised

383. *See Reagan Work-for-Welfare Plan Poorly Run, State Audit Finds*, L.A. TIMES, May 8, 1974, at 3.

384. N.Y. State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973).

385. *See Welfare Reform Veto*, S.F. CHRON., Sept. 7, 1974, at 6.

386. 6 Cal. 3d 227 (1971).

387. This amount was the cost consequences alleged by California in its request for review in the U.S. Supreme Court. *See* Petition for Writ of Certiorari at 8, Hall v. Villa, 406 U.S. 965 (1972).

388. *See* Carleson, *supra* note 242, at 340.

389. 42 U.S.C. § 602(a)(7) (1970).

the order so as to avoid unanticipated confusion about the effect of the stay on state and county authority to participate in the AFDC program.[390] The section of the legislation that was enjoined also contained general authorization concerning the payment of AFDC grants. Reagan's response to the ruling was to launch a broad attack against the judiciary for what he termed "hasty and uninformed decisions." He particularly criticized the State Supreme Court calling its modified stay "a feeble, eleventh-hour attempt . . . to correct its own error."[391] James Hall, the Secretary of Human Relations, delivered an equally strong attack. He declared that the Court had been "used" by antipoverty lawyers.[392]

At the beginning of December, the California Supreme Court in a unanimous opinion upheld the substantive claims advanced by the *Villa* petitioners.[393] The effects of the decision were to raise AFDC maximum payments in accordance with the amounts specified in the Welfare Reform Act while still requiring, as before, that nonexempt income be deducted from standards of need. In issuing the ruling, the Court ordered Social Welfare Director Carleson to make all grant adjustments retroactive to October 1, 1971. This meant that all AFDC beneficiaries, including working recipients, were entitled to benefit increases.

The California Supreme Court's opinion was not the final judicial word. Already the U.S. Supreme Court's docket contained a public aid case from Texas that raised some of the same issues. In early 1972, the nation's highest court issued its opinion in *Jefferson v. Hackney*.[394] On the crucial question for California, the justices upheld by a 5-4 vote the Texas requirement that nonexempt income be deducted from payment standards rather than need standards in computing actual grant levels.[395] A week after the *Jefferson* decision, the Supreme Court, granted a writ of certiorari in the *Villa* case, vacated the ruling of the California Supreme Court, and remanded the matter for further consideration in light of the *Jefferson* opinion.[396]

---

390. *See* Robert Fairbanks, *Courts Bungled on Welfare—Reagan*, L.A. TIMES, Oct. 2, 1971, at 1, 21.

391. *Id.*

392. *Id.*

393. Villa v. Hall, 6 Cal. 3d 227 (1971).

394. 406 U.S. 535 (1972). The Jefferson case was initially scheduled for argument prior to the confirmation of Justices Lewis Powell and William Rehnquist, President Nixon's last two appointees to the Supreme Court. A delay in the transmission of the record on appeal had resulted in a postponement of the argument. When the issues were finally heard by the Court, they were among the first to be decided by the newly reconstituted Court sitting as a whole. Justice Rehnquist wrote the majority opinion in the case. He was joined in the decision by all the Nixon appointees including Justice Powell. Had the case been heard when originally scheduled, the issues of concern to California would have been decided in all likelihood by a 4-3 vote in favor of the welfare recipient petitioners. The delay in transmitting the record on appeal occurred as a result of an oversight when the legal services attorney who first represented the petitioning beneficiaries left Texas for a position in California.

395. *Id.* at 539–44.

396. Hall v. Villa, 406 U.S. 965 (1972).

In September 1972, almost a year after the Welfare Reform Act went into effect, the California Supreme Court unanimously concluded that the similarities between the Texas and California provisions required that the Reagan proposal for deducting the income of working recipients from the payment standard be upheld.[397] The *Villa* reversal also signaled to the California justices that in the future they should be very wary about overruling state welfare provisions on grounds of federal nonconformity. For the Reagan administration, the second *Villa* decision justified the entire welfare reform effort. It meant substantial savings in AFDC expenditures, and it legitimated the overall attempt to tighten the existing welfare system through a reduction of benefits to working recipients.

Notwithstanding this significant judicial precedent, the state was not able to obtain similar support for other measures directly affecting the working poor. Neither an across-the-board income limitation on public aid eligibility nor the $50 limitation on work-related expenses—key provisions in the attempt to cut supplementary grants to working recipients—survived subsequent administrative or judicial scrutiny. The general income limitation required federal approval that HEW refused to grant. No effort was ever made to implement the provision. The ceiling on work-related expenses was put into effect, but shortly thereafter the Sacramento Superior Court preliminarily enjoined application of the limitation as inconsistent with superseding federal law.[398] In 1974, the California Supreme Court upheld the lower court decision.[399] Its ruling followed the decision by the U.S. Supreme Court regarding a comparable Colorado requirement.[400] Abascal's practical judgment in advising the legislature's negotiators not to include an exception clause proved correct. He was able to obtain an immediate injunction preventing the implementation of the $50 limitation on work-related expenses, and the courts eventually found the entire provision legally impermissible.

5. *Setting SSI Benefit Levels*

In the middle of the intense three-year period of litigation over the Reagan administration's implementation of its AFDC reform agenda, a second major welfare legislative battle took place. The issues concerned the adoption of state legislation to implement the federal government's new Supplemental Security Income ("SSI") program.[401] SSI was the enacted part of the Nixon administration's attempt to restructure the

397. Villa v. Hall, 7 Cal. 3d 926 (1972).

398. Conover v. Hall, No. 215815 (Sacto. Cnty. Super. Ct. preliminary injunction issued Oct. 8, 1971).

399. Conover v. Hall, 11 Cal. 3d 842 (1974).

400. Shea v. Vialpando, 416 U.S. 251 (1974).

401. H.R. 1, Act of Oct. 30, 1972, P.L. 92-603, Title III, § 301, 86 Stat. 1465, 42 U.S.C.S. §§ 1381 *et seq.* (1973).

entire welfare system. Its effect was to federalize the administration of the adult categorical aid programs—Old Age Security, Aid to the Blind, and Aid to the Needy Disabled. Rather than remaining county implemented programs under state supervision, they became the direct administrative responsibility of HEW's Social Security Administration.

This federal legislation marked the institutionalization of an elementary change in perception about the adult categorical aid programs. These programs were no longer pejoratively talked about as "welfare." Instead they were viewed more-or-less as "pension" programs. At the time, changes in social mores and preoccupation with AFDC had much reduced, though not totally eliminated, the traditional stigma that attached to adult categorical assistance. The administration of benefits for the elderly and blind ever since has been fairly uncontroversial. Almost forty years later elements of disrepute still characterize aspects of the eligibility and benefits-receipt process for those disabled for reasons other than blindness. Specific legislation has been enacted to prohibit eligibility based on severe drug addiction alone.[402] It is also common place for individuals to be found not disabled because they are viewed as malingering rather than being unable to work.

In 1973, the struggle over SSI in California centered on the level of assistance provided to the aged, blind, and disabled by the state. The federal legislation established a nationally uniform basic allowance. It was then left to each individual state to determine the amount of any supplemental payments. These supplemental payments were to be included as part of the same checks, which the Social Security Administration would send out each month. The initial federal legislation contained "hold harmless" provisions that insured the states against having to meet costs greater than their existing expenditures.[403] Subsequent federal legislation mandated state supplementation for all *present* recipients so as to foreclose the prospect of any reduction in existing levels of benefits.[404]

In the battle with the Democratic controlled legislature, Earl Brian, Jr., the Secretary of Health and Welfare (previously Human Resources), was the most visible and prominent representative of the Reagan administration. Since the governor's cabinet secretaries tended to maintain a low public profile, this development, generally speaking, was unusual. It was, however, characteristic of Brian's tenure as Health and Welfare Secretary. A young political protégé of the governor, he became a member of the Reagan cabinet in July 1972 and served until February 1974, when

402. Contract with America Advancement Act of 1996, P.L. 104-121, § 105, 110 Stat. 852, 42 U.S.C. § 423(d)(2)(C).

403. H.R. 1 §§ 401–02.

404. The Renegotiation Act of 1973, Act of July 9, 1973, § 212, P.L. 93-66, 87 Stat. 155.

he resigned to seek, unsuccessfully, the Republican nomination for the U.S. Senate.

Basically opposed to the federalization of the adult public aid categories and the loss of direct state control over administration of these programs, Reagan hoped to constrain future state expenditures for SSI by setting the formulas for state supplementation below those likely to be offered by Democratic legislators. The liberally dominated legislature was, however, intent on not permitting 1973 to become a replay of 1971. Welfare benefits for the elderly, disabled, and blind were not as politically volatile or controversial as support for the AFDC poor. The legislative leadership was prepared to resist, fully and forcefully, any Reagan proposal they deemed inadequate.

The debate over SSI benefits began in earnest in spring 1973. At that time, under the existing categorical programs, an aged recipient received $214 per month; a disabled person got $197; and a blind person received $225. The proposed minimum federal SSI grant was $130. The Reagan administration favored boosting the support of adult recipients to $221 for the aged and disabled and to $237 for the blind. But the governor's proposal also contained new limitations on special need allowances and on the amount of outside income recipients could earn without suffering a grant reduction. These limitations would have had the effect of decreasing monthly benefits to about 125,000 recipients. The initial Democratic sponsored measure proposed raising the level of assistance to $275 for all adult categorical recipients. It also included a provision which insured that no beneficiary would receive a decreased grant. Secretary Brian termed the bill "an attempt to bankrupt the state."[405]

By the end of the regular legislative session in September 1973, the governor and Democratic legislators were still unable to reach agreement. The last Democratic bill set monthly grants for the aged and disabled at $230 and for the blind at $255. It passed the Assembly by a vote of 62-17, but as a result of gubernatorial opposition fell two votes short in the Senate of the two-thirds majority necessary to enact appropriation measures.[406] The legislature adjourned without adopting the legislation needed to implement the new SSI program scheduled to begin in less than four months. The danger was that California would lose all federal financial assistance for support of adult welfare beneficiaries.

Armed with an informal opinion from California's Republican Attorney General, Reagan maintained that his administration had

405. *See* Dennis J. Opatrny, *The Hot Debate on State Welfare*, S.F. EXAM & CHRON., May 27, 1973, at A14.

406. *See* Dennis J. Opatrny, *Legislative Aid Boost in Doubt*, S.F. EXAM & CHRON., Sept. 16, 1973, at A1, A4.

authority to implement SSI without new legislation. The plan which he proposed to enact specified an average SSI grant of $221, a figure which he claimed would hold state expenditures for public aid within existing budgetary limitations. Leaders in the Senate and Assembly maintained that the administration lacked the necessary authority under state law to take such unilateral action. They also were aware that antipoverty attorneys were prepared to file an immediate challenge to the governor's assertion of political authority. If the legal challenge was indeed successful, Reagan would have no realistic option but to convene a special legislative session sometime before Christmas.

In late September 1973, Abascal filed an original writ in the California Supreme Court to prevent the Reagan administration from implementing its version of SSI. The objective of the suit, against the background of an impending federal deadline, was to compel the governor to accede to legislatively developed grant standards. While there were significant legal principles at stake, the primary goal was to invoke judicial review in such timely fashion as to exert strong, tangible political pressure upon the legislative process. The aim was to alter institutional power relationships while there was still time to enact necessary legislation. This conception of litigation signified for legal services attorneys a strikingly new sense about the place of legal advocacy in a highly political context. Suits were not just ways to fashion and enforce rights or to check unwelcome legislative and administrative developments. The purpose of litigation here was to serve as a catalyst for and a constraint on practical political bargaining.

In mid-November, a three-judge state court of appeal panel, to which the California Supreme Court had referred the SSI case for initial disposition, issued its decision on the legality of the Reagan administration's proposed plan. In a unanimous opinion, the appellate judges held that the executive branch lacked the authority to implement the SSI program without enabling state legislation.[407] There then followed one and a half weeks of frantic activity during which administration officials, on the one hand, sought to overturn the court ruling and, on the other hand, reopened informal discussions with key legislators. Finally, at the end of the month, Lieutenant Governor Ed Reinecke, acting on behalf of the absent Reagan, announced the formal convening of a special legislative session. The decision to convene the special session was made after Democratic Assembly Speaker Moretti and Health and Welfare Secretary Brian indicated that they had reached "verbal agreement" on emergency legislation.

The "verbal agreement" was, in essence, a euphemism for the administration's capitulation to the Democrat-controlled legislature. The

407. Cal. League of Senior Citizens v. Brian, 35 Cal. App. 3d 443 (1973).

central elements in the final bill were increases in benefits for the aged and disabled to $235 and for the blind to $265.[408] These amounts were, respectively, $5 and $10 higher than the Democrats had been willing to accept at the close of the regular session. The legislators also included in the SSI package several sections that repealed or qualified aspects of the 1971 Welfare Reform Act. The most prominent revision was the reestablishment of the pre-1971 "relatives' responsibility" liability standards. This was legislation that framed slightly differently had been previously twice vetoed by Reagan. On December 5, 1973, after quick passage by the Assembly 69-1 and the Senate 28-5, the SSI bill was signed into law by Acting Governor Reinecke.[409] On New Year's Day 1974, the Social Security Administration took over operational responsibility for all adult public assistance categorical programs including those in California.

Throughout the struggle over the California implementation of the SSI program, Abascal and legal services lawyers worked closely with a broad mix of grassroots welfare recipient organizations, church groups, and federal, state and county legislative staff. The culminating organizing and informational events were the planning and holding of two conferences in mid-December 1973. The first was held in Berkeley on December 11 and 12; the second, in Los Angeles on December 18.[410] The conferences were planned both to explain the new legislation and to identify uncertainties and open issues so as to best protect the interests of program beneficiaries.

More than 250 individuals attended the Berkeley conference. In preparation, Abascal and Timothy Sampson, a social work professor at San Francisco State University and a former deputy director of the by-then defunct National Welfare Rights Organization, oversaw the writing of a general information packet and a more comprehensive set of materials for lawyers and lay advocates. In addition, attorneys with SFNLAF and CRLA's Senior Citizens Law Center preliminarily trained about a dozen lay resource trainers. Abascal and the Reverend Robert Davidson were the Berkeley Conference cochairmen.[411]

Abascal invoked litigation astutely as a key element in the political bargaining over the setting of California SSI benefit amounts. But that was a starting point, not an ending point. Ultimately, meaningful representation is about empowering others. Abascal well understood the importance of educating and training affected beneficiaries and their lay

408. Assemb. B. 134, CAL. STAT. 1973, ch. 1216. The aid payment schedules were codified as CAL. WELF. & INST. CODE § 12200 (Deering 1974).

409. *See* Peter Weisser, *State Raises Aid for Old, Disabled*, S.F. CHRON., Dec. 6, 1973, at 1, 32.

410. N. Cal. Ecumenical Council, Summary of Conference on Federalization of Welfare for Aged, Blind and Disabled, at First Congregational Church, Berkeley, Cal. (held on Dec. 11 and 12, 1973) (copy on file with author).

411. *Id.*

as well as legal services allies, so that not just lawyers were in a position to be effective counselors and advocates. In the implementation of social welfare programs, there is a constant need to monitor programmatic developments and to counter the wielding of administrative discretion in ways that disentitle rather than entitle eligible claimants and recipients. The level of engagement needed requires the vigilance and participation of a village. A single piece of litigation is rarely if ever the last word.

6. *And the Beat Goes on*

A good part of the difficulty confronted by antipoverty attorneys in arguing post-Welfare Reform Act cases reflected a series of sudden reversals in previously stated federal administrative policies. Since the main litigation issues frequently concerned questions of federal statutory interpretation, these changes, which always narrowed relief benefits, were potentially highly devastating. Notices of such changes usually took the form of informal memorandum statements prepared well after the commencement of litigation against disputed state regulations. The issuance of these statements was a national phenomenon and led one Georgia federal district court to comment at some length about HEW's present "ineptness" in interpreting its own regulations.[412] California courts, in particular, began to view with skepticism many of HEW's revised interpretations.[413] In the past, the federal agency's opinions about the Social Security Act had been afforded substantial deference by the judiciary.

The reversals in federal administrative policies started at about the time California Social Welfare Director Carleson became the HEW Commissioner of Welfare. Carleson was appointed to his post by Caspar Weinberger, who had succeeded Elliot Richardson as the HEW Secretary in February 1973. Previously, Weinberger had served as Reagan's State Director of Finance and then during Nixon's presidency in a number of posts, most immediately before as the Director of the Office of Management and Budget, where he had the nickname "Cap the Knife" for his cost-cutting ability. In the Reagan presidential administration, Weinberger would serve as Secretary of Defense for almost seven years.[414] Carleson's work under Weinberger in the Nixon administration foreshadowed changes in welfare policy and direction at the federal level that would occur in a more sweeping way during the Reagan presidency.

---

412. *See* Barron v. Saucier, Civil Action No. 17159 (N.D. Ga. Sept. 27, 1973) (unpublished opinion).

413. *E.g.*, *In re* Hypolite, 32 Cal. App. 3d 979 (1973). *Cf.* Mitchell v. Carleson, 35 Cal. App. 3d 879 (1973).

414. *See Secretaries of Defense*, U.S. DEP'T OF DEFENSE, www.defense.gov/specials/secdef_histories (follow Casper W. Weinberger hyperlink) (last visited Apr. 2, 2012).

With Carleson's departure from California, a certain relaxation in SDSW's methods of operation began to take place, especially with respect to litigation. For the first time in several years, disputing parties in a welfare case were able to discuss together possible ways of resolving legal differences. By February 1974, Abascal was meeting directly with state public assistance officials to go over various policy disagreements.[415] There was also now a sense of ending lawsuits on a conciliatory note. Thus, though not usual, state administrators were no longer averse to soliciting ahead of time the opinions of antipoverty attorneys on whether proposed regulatory changes fully met the specifics of a governing judicial order. Legal services lawyers and Reagan state administration officials still disagreed over many welfare issues, but the total bitterness of the recent past had largely waned.

In engaging in an ongoing strategy of conflict with the Reagan administration, Abascal and his colleagues did not have unrealistic expectations. They viewed the judiciary and the legislature pragmatically and tactically, not through rose-tinted glasses. A "grand strategy" for expanding the rights of the poor judicially was not part of the agenda. Furthermore, the governor's veto power insured that there were few occasions for recipient friendly legislative reforms. Nonetheless, turning to the courts and working with legislators who shared their concerns provided meaningful but circumscribed advocacy opportunities for influencing welfare policy and practice. For most of the contested provisions regarding California welfare reform, Abascal's principal objective was to hold the state administration accountable to governing federal and state statutory law and to favorable court orders. The result was that Reagan was not able to reduce individual grant payments and welfare costs as much as his administration wanted. As a consequence, welfare recipient families had more money available for meeting their basic living expenses than otherwise would have been the case.

III. LAWYERS AS REPRESENTATIVES

A. THE MAJESTY OF THE LAW

The prominent mid-20th century political scientist Robert Dahl described the evolution of American democratic political theory as follows: "A central guiding thread of American constitutional development has been the evolution of a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decision."[416] In both his theoretical and empirical work, Dahl emphasized the importance in American politics

415. Interview with Ralph Abascal, *supra* note 329.

416. DAHL, *supra* note 4, at 137.

of mobilized groups and elected leaders as mediators. His ideas expanded on the work of earlier interest group theorists.[417] In Dahl's most famous book, he conducted a case study of New Haven politics and found that the extent to which a group was influential in political decisionmaking varied with the issue.[418] His chief conclusions were that there was no dominant elite that exercised power across the board, and that modern American politics was fundamentally pluralistic, not oligarchic.[419]

Dahl mainly looked at decision outcomes, ignoring both how issues came to be political issues and the relative importance of different issues. Some outcomes are more consequential than others. A fuller analysis of who exercises power involves understanding not only which interest group has prevailed on a specifically decided issue, but also what issues, how they have been defined, how they have come to be on the political agenda, and why those issues as framed (and not others) are up for decision.[420] I regard Dahl's theoretical statement about American politics as normative. Though he intended otherwise, it is still prescriptive and not a wholly accurate description. For the poor especially, pluralistic participation remains a work in progress. In studying who governs, the accompanying questions that also need to be asked are: Who benefits, in what ways, and how much?

Notwithstanding its ideals and aspirations, the American political and legal system favors certain group claims over others. The reasons are mainly economic and ideological. As Anatole France ironically observed, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[421] Class still very much matters in the United States. While there are opportunities for all groups to assert themselves, the playing field is not level. The rich, in particular, are always in a prime position to affect both what kinds of policy claims receive serious attention and how significant issues get resolved. Also, ideology still very much matters. Especially with respect to issues that most immediately affect the poor, deeply held cultural

417. *E.g.*, ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT (1908); DAVID TRUMAN, THE GOVERNMENTAL PROCESS (1951).

418. ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961).

419. *Cf.* C. WRIGHT MILLS, THE POWER ELITE (1959).

420. E. E. Schattschneider coined the phrase "mobilization of bias" to describe how some "issues are organized into politics while others are organized out." E. E. SCHATTSHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 71 (1960). For a contemporaneous critique of Dahl's one-dimensional conception of power, see Peter Bachrach and Morton S. Baratz, *Two Faces of Power*, 56 AMER. POLI. SCI. REV. 947 (1962), *reprinted in* PETER BACHRACH & MORTON S. BARATZ, POWER & POVERTY 3–16 (1970). For a breakthrough analysis conceptualizing three dimensions of power, see STEVEN LUKES, POWER: A RADICAL VIEW (2d ed.) (2005).

421. ANATOLE FRANCE, LE LYS ROUGE (THE RED LILY) ch. 7 (1894).

beliefs play an important part in creating the space and setting the limits on what can be raised and argued most effectively in public.

From a political culture standpoint, the United States as compared to Europe has been ideologically slow and hesitant in recognizing and institutionalizing social rights to counter the inequities that occur in society at large. Social rights include such entitlements as a right to education, a right to medical care, a right to housing, a right to a job, and a right to subsistence income support.[422] These rights address what a society comes to regard as essential life conditions. They aim at providing measures of insurance against the uncertainties of society and the economy.

Social rights stand in contrast to civil rights and political rights.[423] Civil rights seek to promote individual freedom by limiting the scope and curbing the arbitrariness of governmental actions. The right to own property, freedom of expression, and freedom of religion are examples of civil rights. So are guarantees regarding equality under the law and due process of law. Political rights define accessibility to governmental processes. The right to vote and the right to hold public office are political rights.

The activation of civil and political rights largely relies on individual self-initiation. The opposite is the case with respect to social rights. Their implementation almost always involves dependence on governmental bureaucracies and substantial public expenditures.[424] Given the extent of governmental involvement and support that is needed, social rights push against the grain of widely shared beliefs about American individualism—about being able to pull yourself up by your own bootstraps, about the goodness of a market economy, and about the evils of big government.

One important contributing reason for the stunted development of social rights in the United States is that class consciousness has less political saliency than in Europe. Recent polling indicates that Americans acknowledge that there are rich people and ordinary people with limited means, but they believe that the distinction is a transitory condition, not the result of a caste system. A survey taken in December 2011 found that 43% of those surveyed said the rich became wealthy "mainly because of their own hard work, ambition or education."[425]

---

422. *See* ROCHE, *supra* note 195, at 30.

423. *See* T. H. MARSHALL, CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT 78–79 (1965).

424. Charles Reich had an artful approach when he analogized governmental largess, including public assistance benefits, to traditional property. Reich, *The New Property*, *supra* note 183. But a government benefit is not the same as owning a piece of property or even a copyright. It invokes a different type of relationship. Traditional property interests as civil rights establish protected areas of social and economic activity, where individuals are free to initiate actions and make claims often in spite of rather than with the support of the state.

425. The survey was conducted by the Pew Research Center as reported in the *New York Times*. The survey also found that two-thirds of those polled believed that there are "strong conflicts" between rich and poor, a 19% increase from a similar survey taken in 2009. In explaining this striking

A central dilemma in seeking to advance the rights of the welfare poor is that our constitutional law vocabulary comfortably embraces civil rights and political rights but not social rights. Not surprisingly, Sparer's effort in the Supreme Court to constitutionalize a right to live as a basis for public assistance programs fell on deaf ears.[426] It would have been a totally unprecedented and remarkable landmark opinion.

Political and legal acknowledgment of an interest as a right is not in itself a solution for a social ill. But it is a step in the right direction. The language of rights gives notable additional weight to whatever claims are being asserted. In writing about welfare rights, Bill Simon described the utility of rights generally as follows: "Appeals to right occur only when activities and goals conflict; their function is to determine whose side the state will take."[427] Put another way, changes in perception that an interest is a right can be an important resource to be used against competing claims and considerations in legislative, judicial, and administrative proceedings.

To the extent our political culture recognizes social rights, they are viewed as statutorily based and are often somewhat controversially termed statutory entitlements. While the relatively weak legal footing of social rights in American political culture stymied Sparer's constitutional ambitions, there was by the end of the 1960s a significant transformation in how recipients, lawyers, and politicians viewed public relief benefits. Recipients came to see themselves not as suppliants but as rights holders,[428] while for lawyers and politicians the notion of welfare benefits as mere privileges not subject to judicial review largely fell by the wayside. Even contestable and compromised claims of rights can change the political landscape and create opportunities for effective legal advocacy. The statutory claims of the welfare poor had come to be taken seriously, whether characterized as rights or entitlements.[429] Though the

---

change in perception, a senior editor at the Pew Research Center noted "a confluence of factors . . . probably including the Occupy Wall Street movement, which put the issue of undeserved wealth and fairness in American society at the top of the news throughout most of the fall." Sabrina Tavernise, *Survey Finds Rising Strain Between Rich and the Poor*, N.Y. TIMES, Jan. 12, 2012, at A11, A13. It remains to be seen whether the poll reflects any notable long-term changes ideologically and politically.

426. *See supra* text accompanying notes 192–194.

427. William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 29 (1985). Most writers attribute the application of rights language to public assistance benefits as first occurring in the 1960s. In a carefully researched historical inquiry, Karen Tani finds substantial evidence of "a vibrant language of rights within the federal social welfare bureaucracy during the 1930s and 1940s." She argues that "federal administrators used rights language as an administrative tool, a way to solve tricky problems of federalism and administrative capacity at a time in which poor relief was shifting from a local to a state and federal responsibility." Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314 (2012).

428. *See supra* text accompanying notes 210–211.

429. Even after Congress declared that TANF, as the successor program to AFDC, was not a statutory entitlement, courts have continued to scrutinize whether substantive conditions are arbitrary and whether there are fair procedures prior to denying or terminating benefits. *See supra* note 199.

absence of federal constitutional resonance constrained legal advocates, there was new political and legal room for advancing and protecting the interests of welfare beneficiaries that had not existed previously.

Other obstacles to actualizing the rights of the welfare poor still remained formidable. In particular, the weak cultural underpinnings accorded social rights exacerbated several additional structural dilemmas inherent in relying on legal advocacy and legal rights arguments for progressive social change. The first is fiscal, the second is institutional, and the third is sociological. It is these dilemmas that most confounded the campaign that Abascal led to counter Reagan's welfare reform measures.

As the current economic crisis confronting Europe vividly demonstrates, public expenditures for social welfare programs can become fiscally unsustainable.[430] In Europe, benefits from such programs are viewed as fundamental rights and as an integral part of a nation's social contract with its people.[431] Under such circumstances, governmental cutbacks are highly precarious politically. The resulting popular turmoil can put the very legitimacy of a governing regime on the line.

In the United States, the political dynamics run counter to this. In the face of perceived short-term and long-term budgetary crises, there is instead intense opposition to raising taxes and taking on additional public debt and waning electoral support for social welfare programs, though Social Security and Medicare are still broadly popular. Concerns about the fiscal costs of social welfare programs are real. European nations, generally speaking, have been slow to react. In the United States, we are prone to rein in the costs too quickly.

In promoting welfare reform, Reagan's most prominent refrain was the need to cut costs. His argument had considerable popular appeal because of how effectively he tied curbing such expenditures to popular perceptions about tax relief. There is nothing unusual about arguing over fiscal consequences when addressing legislatively the scope and level of welfare benefits. But there also was a perverse side to the Reagan administration's overwhelming focus on costs, most tellingly exemplified by the extraordinary delays in complying with statutory mandates or court rulings, and by policies and practices such as the bizarre presumption that a pregnant woman's grant should be reduced because the fetus was getting

430. For example, a *New York Times* article on the economic and Euro crisis confronting France in early 2012 quotes Nicholas Baverez, an economist and historian, as describing the real problem as "the unsustainable social and economic model of the last three decades." The article then states, "France, like other European countries, benefitted from cheap credit leading to a society in which nearly two-thirds of the economic growth depended on consumption, partly financed by social transfers. Those, in turn, were financed by public debt that has ballooned to 86 percent of the gross domestic product in 2011 from 20 percent in 1980." Steven Erlanger, *France's Gloomy Economic Outlook Haunts Nation's Presidential Race*, N.Y. TIMES, Jan. 16, 2012, at A4, A10.

431. Citizenship for most Western European nations has involved an ongoing vesting of civil, political, and social rights. MARSHALL, *supra* note 423, at 78.

free room and board.[432] It was the need to counter this perverse side that largely shaped Abascal's counter-campaign.

For legal services lawyers invoking the statutory claims of the poor, the main objective was to get as many dollars in the hands of welfare recipients as soon as and for as long as possible. For the Reagan administration seeking to distinguish between the deserving and the undeserving poor, the opposite primarily was the objective. Ideological assumptions underlay political differences over welfare reform, but the main battles were over dollars.

In this struggle, Reagan had the upper hand. His administration was always in a position to move quickly to impose cutback measures and to delay implementing measures favorable to recipients. If a contested policy or practice were found legally impermissible, there would be prospective relief ordered, but a judicial day of reckoning for past wrongs would be unlikely. Wishing to avoid ultimate clashes with another branch of government, judges even in the most exasperating circumstances were reluctant to hold state officials in contempt. They also were reluctant to order retroactive payments to welfare recipients when told that there would be dire fiscal consequences.[433] Even when ordered to pay back benefits wrongfully denied, state welfare officials could count on most recipients affected not obtaining the amounts owed them. A substantial percentage of recipient households received AFDC for relatively short periods of time, usually not much more than two years.[434] Once off the welfare rolls, the county welfare departments lost touch with adult caretakers, and legal services lawyers had a hard time identifying and reaching them.[435] Invoking judicial review was beneficial for welfare

---

432. *See supra* text accompanying notes 368–369.

433. *See supra* text accompanying note 279.

434. An Urban Institute report prepared shortly before TANF superseded AFDC as the federal support program for low-income families found that 42% of adult caretakers received AFDC for less than twenty-five months. LaDonna Pavetti, *Who Is Affected by Time Limits?*, *in* WELFARE REFORM: AN ANALYSIS OF THE ISSUES 31–34 (Isabel Sawhill ed., 1996).

435. In the mid-1980s, California legal services attorneys as part of a settlement of four AFDC class actions got the agreement of the California Department of Social Services to publicize the availability of retroactive benefits. The state agreed to do an extensive media outreach. At least $140,000 was spent on television ads and $126,000 on radio buys. There were also newspaper ads and posters on display in governmental offices. The settlement also provided for the state to pay for an audit by Price Waterhouse of individual claims for back benefits processed by eleven counties covering about 70% of the state's population. The estimated retroactive benefits amount due was $100 million. The eventual payout in the counties surveyed was slightly more than $3 million, approximately 3% of the projected total. Email from Tricia Berke Vinson, Directing Attorney, Legal Aid Soc'y of San Mateo County, with attached memos dated July 3, 1985, and Mar. 11, 1987 (Feb. 17, 2012) (on file with author).

In the early 1990s, Abascal and other legal services attorneys unsuccessfully sought to use California's *cy pres* statute, CAL. CODE CIV. PROC. § 383, to have the amount of undistributed AFDC retroactive benefits used to further the purposes of the underlying cause of action rather than having the funds retained by the state. Plaintiffs' Reply Memorandum of Points of Authorities re:

recipients though tempered by the uncertainties and complexities of achieving full enforcement.

Abascal expected the Reagan administration to interpret the Welfare Reform Act provisions selectively and to use the Act's adoption as an opportunity to instigate additional changes in policy and practice outside its coverage. In working with state legislators to draft specific welfare provisions, he conveyed the importance of being able to file facial challenges to questionable legislation so as to be in the best position to obtain immediate injunctive relief. Any time delay in bringing litigation and getting an enforceable order worked against the interests of welfare beneficiaries. But only so much could be anticipated legislatively.

Most of the lawsuits filed by Abascal and his legal aid colleagues were the result of constant and vigorous monitoring of state administrative behavior. While Abascal had no way of knowing ahead of time what specific actions would be taken by the Reagan administration, he could count on legal services attorneys and welfare recipient activists throughout the state to identify almost immediately particularly pressing issues. They needed only to survey their individual client service caseloads. Sporadically, Abascal also relied on information provided by contacts within local county welfare departments. In sum, there already was in place an effective network for policing state welfare directives. No Reagan administration action went undetected for long.

For welfare beneficiaries, having knowledgeable lawyers readily available to respond to state welfare reform promulgations was absolutely critical to their receiving benefits that otherwise would have been denied them. Though the amounts paid out after successful litigation were not all that they should have been, they were substantial overall and for individuals living marginally, they were financially meaningful.

Along with raising serious conflicts over funding, the structuring and implementation of social welfare programs have implications and consequences for the safeguarding of individual autonomy. Institutionally, any expansion of social rights or entitlements heightens the potential for governmental intrusiveness in people's lives. From a programmatic standpoint, there are almost always accompanying obligations and conditions to be met.[436] The more culturally ingrained is the right or entitlement, the less invidious the obligations and conditions.

In the United States, the extent and character of such burdens depend on the nature and circumstances of the interest at stake and

---

Applicability of CAL. CODE CIV. PROC. § 383, Coalition of Cal. Welfare Rights Orgs. v. Anderson, No. 512491 (Sacto. Cnty. Super. Ct.) (attached to cover memo from Ralph Santiago Abascal to Peter Reid (Sept. 6, 1995)) (copy on file with author).

436. The sociologist Reinhard Bendix characterized this phenomenon as the tendency of social rights to broaden not only the benefits but also the obligations of the citizenry. REINHARD BENDIX, NATION-BUILDING AND CITIZENSHIP 107 (1969).

perceptions about the specific beneficiaries. Minor children have the right to a free elementary and secondary education, but their parents have an obligation—a relatively benign obligation—to enroll their children in school. The terms for receiving Social Security for the elderly also are relatively benign. Packaged as a social insurance program, Social Security eligibility and benefit levels mainly involve having previously paid required payroll taxes at a job programmatically covered. More onerous conditions attach to the receipt of public assistance benefits. These programs still carry a strong moral stigma and have much less popular support. While midnight searches of a welfare recipient's home are likely a thing of the past, the prospect of unannounced case worker visits during regular business hours in accordance with the Supreme Court's decision in *Wyman v. James* is not.[437] In accepting public aid, poor families give up expectations of privacy that the rest of America enjoys.

A significant number of the Reagan administration's cost-cutting measures imposed legal responsibilities not required of others on welfare families and those associated with them. These measures were subtler than privacy infringements. Some telling examples were the various regulations promulgated to impute income from stepparents or grandparents as available to meet the needs of those household relatives who received public assistance.[438] Stepparents and grandparents in these circumstances generally do not have a legal obligation to provide such financial support. These special welfare regulations were at odds with what would apply in non-welfare situations in two ways: They presumed the availability of income not knowing the family's actual circumstances, and they imposed a duty of support on relatives not otherwise legally liable. The effects were to reduce the amount of cash aid received by the eligible family members and to impinge on the autonomy of relatives not legally liable for their financial support. Although these regulations had a certain appeal as a kind of quid pro quo for receiving governmental benefits, they were found to be unlawful as inconsistent with federal and state law regarding the adoption of a flat-grant system based on family size rather than individual determinations of need, and state law regarding who are legally responsible relatives.

It was arguments like these that most comprised the legal basis for challenging Reagan's welfare reform program. The success of such challenges was far from certain in part because such intrusions in the family relationships of the welfare poor that would be questionable or unacceptable in other circumstances were not widely perceived as unreasonable conditions for receiving welfare benefits. While important

437. *See supra* text accompanying notes 178, 197–198.

438. *See supra* text accompanying notes 370–380.

political and legal inroads had been made to undo what tenBroek termed California's historical dual system of family law, the legacy lived on in the framing and implementation of Reagan's welfare reform measures and was a manifestation of how expansions in social welfare programs intensify opportunities for governmental interference in decisions about family relationships usually left to adults to make on their own.

The dilemmas confronting welfare recipient advocates were not only fiscal and institutional but also sociological. Welfare rights organizing and legal advocacy in the 1960s and early 1970s affected how the poor came to see themselves and how a good many public officials came to view their claims. For the courts, the recognition of welfare benefits as rights or entitlements was a new development, but a development not universally accepted. Reagan's welfare proposals were more counter-reformation measures than real reforms. They harked back to 16th century English conceptions of poverty and rekindled 19th century American conceptions of the role of the state. Reagan's retrenchment regarding social welfare programs, which had substantial popular appeal, seriously constrained the options available to Abascal and other legal services lawyers in representing the welfare poor. They had to confront social, political, and legal circumstances as they were, not as they hoped them to be.

In a groundbreaking work analyzing social cause lawyering, Stuart Scheingold distinguished between the "myth of rights" and the "politics of rights."[439] He characterized the myth as involving overly confident assumptions about the willingness of courts to declare new rights, the ability of courts to remedy rights violations, and the recognition and realization of rights as tantamount to real social change. For Scheingold, the myth needed to be transformed into a politics of rights, where the ideological and symbolic value of rights contributed to a range of political activities, not just litigation. He saw ideas about rights as helpful in activating political consciousness, in spurring political organization, and in facilitating a realignment of resources and values supportive of changes in public policy.

Scheingold's distinction between the myth of rights and the politics of rights points to the importance of examining the specific conditions under which legal advocacy takes place. Self-perceptions about rights provide individuals with motivation to stand up for themselves, seek help and allies, and make demands. The recognition of rights changes the dynamics of how disputes get resolved, whether before courts or other political bodies. But the actual benefits of legal advocacy for a targeted constituency are variable and contextually specific.

---

439. STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2d ed. 2004).

In representing the welfare poor in the early 1970s, Abascal and his legal aid colleagues had to be highly opportunistic because the underlying cultural and political conditions in support of progressive social welfare policies were mixed at best. Although there had been a significant change in the legal status of public relief benefits, it was a partial and counter-majoritarian development. Conceptualizing such benefits as statutory rights or entitlements only had a marginal effect on reducing mainstream moral stigmas attached to their receipt. Reagan easily capitalized on popular antipathy for those on welfare. Fearing the consequences for the poor of a Reagan-sponsored electoral initiative on welfare reform, Abascal and his allies in the California legislature knew that there would have to be a welfare reform bill that Reagan could claim as his own.

An interesting feature of the legislative fight over welfare reform was the non-involvement of any private interest groups other than advocates for the poor. Unlike in the adoption of the AFDC-U program in the early 1960s, large agricultural growers had no concerns about the impact of welfare benefits on farm labor wages. Nor did any other wealthy special interest have any distinct concerns. The legislative dispute was among public officials over social welfare policy. The only non-state direct participants were representatives for the counties and for antipoverty groups. The absence of any pressure from moneyed interests made it easier for legislators to side with poor families to the extent that they felt they could without jeopardizing popular support in their home districts.

Welfare rights organizations also were not directly evident in the legislative struggle. First, no one thought that mass demonstrations would be helpful. The prospect that the publicity generated would prove politically embarrassing for Reagan was extremely slight.[440] Additionally, legislators recognized Reagan had substantial popular support for his welfare reform goal and wanted to low key their differences with him. There was no meaningful audience for protest actions. Second, it was far from clear that welfare rights leaders could mobilize sufficient numbers of recipients. The heyday of welfare rights organizing had lasted only a few years and was pretty much in a lull.[441] The activist leadership remaining did not necessarily have a large or broad enough participant base to make a difference politically. Third, the work of reaching legislative compromise took place behind closed

440. By contrast, recent rallies organized in support of in-home supportive services for elderly or disabled individuals had been effective. There, the targeted beneficiary groups were relatively sympathetic with significant middle-class ties, and the imagery conveyed portrayed elderly or disabled persons left alone to fend for themselves. Cutbacks in AFDC for very poor families did not induce similar sympathies. Moreover, the imagery most frequently associated with the program was that of the welfare queen.

441. *See supra* text accompanying note 226; *see also* KORNBLUH, *supra* note 18, at 63–87.

doors. The legislators had competent policy aides. The outside help they needed was in how best to draft specific provisions in light of overriding federal law and other legal considerations. No matter how well-informed, lay welfare rights leaders neither had nor would be expected to have the breadth and depth of knowledge required.

Abascal's opportunity to influence the legislative process arose because key legislators supportive of progressive welfare policies needed the kind of legal expertise he and other legal aid attorneys had developed over the preceding several years. The advent of government-supported legal services for the poor was an important precondition. The push for law reform as well as individual service delivery encouraged antipoverty lawyers to consider underlying policy issues when representing their clientele. As a result, there was now available a group of lawyers who could bring to bear their direct knowledge and experience regarding public relief programs, which they had gained through representation of individual welfare recipients, not only to litigation but also to legislative lobbying. The role that legal services lawyers came to play in the legislative process was an entirely new development, and Abascal was in the forefront.

The confidence legislators had in Abascal was unusual. For them, he was not just in the right place at the right time, he was the right person. The reason for their confidence had much to do with the specific professional traits that shaped his overall approach to lawyering. Those characteristics also led welfare rights leaders to trust him as their representative both as a lobbyist and as a litigator.[442] It is hard to imagine that the events of California welfare reform would have unfolded as they did without Abascal's personal, pervasive, and persistent presence.

After the enactment of the Welfare Reform Act, grassroots activists from welfare rights organizations attended several large planning meetings convened by Abascal. While they did facilitate the litigation undertaken by helping to identify issues and by recruiting or having their organizations serve as plaintiffs, they did not play a leading role in the judicial aftermath. Abascal and legal aid attorneys working with him decided what suits to file, where to file them, and how to argue them. Like the operation of a gyroscope, the legal representation provided was largely self-generated and self-directed. The lawyers shared with welfare rights leaders a common mission to promote the interests of the welfare poor and a common focus on tangible benefits, but they had a great deal of discretion to determine what actions to take.

The effectiveness of post-Welfare Reform Act litigation for the welfare poor was in large part a reflection of the times. While there are always different judicial points of view, courts in the early 1970s were more

442. *See infra* text accompanying note 457.

open to the claims of welfare recipients than is the case today. As an example, scant doctrinal attention was paid then to threshold jurisdictional issues, such as whether recipients had a private right of action to enforce federal statutory provisions if disregarded or violated by a state welfare agency. In *King v. Smith*, the first major AFDC case to reach the Supreme Court, the justices asserted without offering any actual analysis that § 1983 created a basis for such lawsuits.[443] This kind of issue is not now apt to be as easily sidestepped.[444] One new factor is that Congress explicitly stated that TANF, the successor program to AFDC, is not a statutory entitlement.[445] Whereas there was before congressional silence on the legal status of welfare benefits, there is now an unfriendly declaration to be confronted. Moreover, judicial activism is today at least as much a characteristic of right-leaning courts as left-leaning courts, notwithstanding still widely held opinions to the contrary.[446] Given the changing makeup of the federal and state judiciary, decisions about whether and where to bring social policy litigation are now much weightier. For good reason, antipoverty lawyers this century have to be far more hesitant than Abascal and his colleagues were before turning to the courts to protect the group interests of poor individuals.

Federally funded legal services for the poor and grassroots welfare rights organizations began separately in the mid-1960s. By the early 1970s, the relationship between the two in California was cooperative but problematic. Welfare rights leaders, most of whom had been or were AFDC recipients, worked with Abascal and other antipoverty lawyers on welfare reform issues, but their role was principally to be supportive of the initiatives undertaken by their legal representatives. With respect to the collective empowerment of the welfare poor, there was a disjuncture between what can be termed legal competence and political competence.

For most of our history, a group's legal competence—its ability to use law to achieve policy changes—was an adjunct to its overall political competence. With some exceptions, only wealthy interests had the capacity to call on lawyers to bring lawsuits and help in administrative and

443. *See supra* text accompanying note 175.

444. For a history of the narrowing of the use of private rights of action under 42 U.S.C. § 1983 in the intervening decades, see Sasha Samberg-Champion, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838 (2003). As an alternative to a § 1983 cause of action, federal courts of appeals have consistently held that beneficiaries of federal spending programs may seek prospective injunctive relief directly under the Supremacy Clause against state laws and regulations preempted by federal statutory provisions. *See, e.g.*, Independent Living Ctr. of S. Cal., Inc. v. Shewry, 543 F.3d 1050, 1058–63 (9th Cir. 2008) (citing consistent holdings in other circuits). According to Matt Murray and Stephen Berzon of the San Francisco law firm Altshuler Berzon LLP, the Supreme Court has yet to expressly confront this Supremacy Clause issue.

445. *See supra* note 199.

446. *See* Geoffrey R. Stone, *Citizen United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485.

legislative lobbying. The exceptions usually involved organized interests with significant preexisting collective support, for example, labor unions, the ACLU, and civil rights groups like the NAACP. The emergence of government-funded legal services programs for the poor with a dual individual service and law reform mission changed this default relationship. It held out the prospect of groups being represented legally on policy issues without any organized collective client commitment to political action. The hope was that access to legal representation would facilitate grassroots activism and direct political participation.[447]

In the end, such was not the case for AFDC recipients. The welfare poor as a constituency were too vulnerable ideologically and too isolated socially and politically to garner sufficient support within the population generally and from politicians. Welfare rights organizing had a relatively short political life. As a movement for social change, it never attracted and sustained the breadth and depth of support necessary for longer term survival.

Meanwhile, legal advocacy for AFDC recipients had developed its own momentum. For public assistance beneficiaries, having lawyers argue for their common interests was a form of political competence. Welfare policy provisions are highly technical. To navigate the policy issues administratively, legislatively, and judicially called on the special expertise and skills of lawyers. Most of the representation provided was analogous to how tax lawyers work with wealthy individual and corporate clients to obtain favorable and to avoid unfavorable tax consequences. The problem was that legal competence is but one component of political competence, not the entire package. Within a democratic constitutional system of government, competent legal representation alone can accomplish only so much. There are inevitably additional political and societal developments that require attention

In countering Reagan's welfare reform actions, Abascal took maximum advantage of the legal and political opportunities available to represent the collective interests of families in need of public assistance. The popularity of Reagan as a political leader, the vicissitudes of the legislative process, the composition and predilections of the judiciary, and a mixed relationship with welfare rights organizing were all important factors that affected the direction and substance of Abascal's advocacy

447. For an analysis of the use of litigation for grassroots organizing, see Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 553–57, 563 (1989) (illustrating through case studies the potential for advocacy litigation to create "spin off" grassroots political efforts which can not only strengthen the litigation directly, but also generates solidarity among poor people, their advocates, and their political community); see also Lucie E. White, Goldberg v. Kelly: *On the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 885 (1990) (positing that "momentary political leverage" can be gained through plaintiffs' mobilization, "even without any conventional political currency to draw upon").

efforts. The focus was on the operations of a safety net program that provided subsistence cash assistance. The main practical objective was to get as much money as legally feasible into the hands of AFDC recipients.

After President Clinton in 1996 signed his welfare reform legislation, Abascal had occasion to express some misgiving about the work he had done twenty-five years earlier in challenging Reagan's welfare reforms. It was less than a year before he died. He said, "We should have been strong advocates of getting people into work. . . . Had we done that then, we would not have had this welfare bill now."[448] Abascal's regret and disappointment reflected the underlying contradiction in AFDC advocacy. It was a strategy to hold the welfare system legally accountable to its own terms so that poor families could live somewhat better, but it was not a strategy that addressed the root causes of poverty.

Redressing poverty involves a host of public policy fields from jobs to education to housing to healthcare to social services to crime prevention. Public relief programs are residual measures. They need to be there when all else has failed. They are not a way out of poverty. With respect to poor families, we have yet to have the collective political will to comprehensively attack the reasons for poverty. To do so is initially an expensive proposition, though over time there are potentially huge benefits. In the political short run, it is still much easier in America to provide minimal cash benefits, to blame poor individuals for their own destitution, and to assume that the indigent need to be coerced to seek employment.

My own view is that Abascal spent his time wisely. Developing a jobs policy that truly helps poor people get permanent employment in a free market economy is an immense challenge. It is a challenge that cannot be met without sufficient popular support for a more activist government that on multiple fronts takes seriously redressing unfairness within the economy and the society. Should we have a more comprehensive approach to poverty and less demeaning public relief programs? Of course. But what we have instead is majoritarian support for welfare reforms like those promoted by Reagan as governor in 1971 and again as president in 1981 and by yet again Clinton as president in 1996.

Gwendolyn Mink has written, "Real welfare reform entails rooting out the premises, presuppositions, and stigma that drive welfare policy—not modifying the behavior and restricting the choices of mothers who need welfare."[449] As a political culture over the last few decades, we have

448. Tim Golden, *supra* note 121. By "getting people into work," Abascal would have meant addressing structural problems of unemployment and providing appropriate support services for employment, not sanctioning and threatening to sanction poor parents for not working.

449. GWENDOLYN MINK, THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE 1917-

progressed little and arguably have regressed. Without a stronger people's movement with which to work, Abascal with exceptional competence did what lawyers under the circumstances could do responsively and realistically. He worked with legislators and relied on the courts to maximize the benefits available to his clients within the existing welfare system.

Given the pervasive difference that wealth makes in effectively gaining and maintaining political access and the perseverance of deeply rooted ideological beliefs, American antipoverty lawyers in the early 1970s had an uphill battle in using legal advocacy to achieve social change for the poor. In assessing the impact of the Abascal-led campaign against Reagan's welfare reforms, the most noteworthy outcomes are not in the disappointments and limitations, but in how much was accomplished in difficult political circumstances. For the welfare poor, having Abascal and his colleagues in place as representatives in bringing legal expertise to legislative compromise, in policing bureaucratic actions, and in invoking judicial review made a difference. It resulted in hundreds and hundreds of millions of dollars legally owed the poor actually being received by them, and that would not have happened had the Reagan administration gone unchallenged.

Therein lays the true recurring majesty of the law. It is not in the establishment of rights, which are rare moments, but in how lawyers for the poor use factual and legal arguments on the ground to affect public policies and their implementation. Social cause lawyering addresses not only big picture issues but also a myriad of everyday policy and practice issues, whether political or legal, that continually affect how people live and flourish. The absence of aggressive legal advocacy is politically and socially debilitating.

In the American democratic polity, interest group politics and liberal ideology, both 19th and 20th century versions, are dominant. Yet governance is in accordance with the rule of law and the precepts of a constitutional republic. Under such structural circumstances, effective group legal representation is an institutional necessity, no less for advancing and protecting the interests of the poor than for any other definable constituency.

B. LAWYERING PROCESS VALUES: ACCESSIBILITY, RESPONSIVENESS, AND JUDGMENT

Having commented on the social impact of and political necessity for group legal representation of the welfare poor, I now return to the nonconventional character of such representation. My approach is to build on the initial discussion of how Pitkin's and Mansbridge's theoretical ideas

---

1942, at 190 (1995).

about political representation augment Luban's approach to social justice lawyering. I start with Mansbridge's concept of gyroscopic representation as most closely capturing Abascal's role in the campaign against Reagan's welfare reforms. I then step back to integrate Pitkin's foundational understanding of legitimate democratic representation before focusing on three defining attributes of responsible group legal representation: *accessibility*, *responsiveness*, and *judgment*. Drawing on references to the case study, my purpose is to derive conceptual guideposts applicable to group legal representation when, in the absence of direct client control, social cause lawyers have good reasons for acting with independence and discretion.

In describing gyroscopic political representation, Mansbridge postulates that voters expect their representative to act in ways that they would approve without external incentives—that is, without having to be directly held accountable in a competitive election. The voters depend on the representative's commitment to the same basic values, interests, and concerns that matter most to them, and they assume the representative is honest, principled, and sufficiently skilled.[450] In short, they trust their representative to act in their interest, but with a great deal of autonomy, so long as nothing happens to break that confidence. They count on the convictions, talent, and character of their representative.

This emphasis on the inner drive and bearing of the representative fully resonates with the mission-linked relationship between legal services lawyers and welfare activists and individual beneficiaries in the extended struggle over California welfare reform. While welfare rights leaders were in touch with Abascal and other legal aid lawyers, and while individual recipients were recruited as parties to litigation brought, the lawyers were on their own in determining the actual courses of action. There were mutual expectations about what the lawyers would seek to do in that there was no disagreement that the principle objectives were to prevent cutbacks and, if at all possible, seek improvements in AFDC eligibility standards and grant amounts. At the same time, no one expected that those represented would be asked to endorse or check the specific actions taken on their behalf. All understood that the circumstances and the tasks played to the strengths of lawyers. Based on past experiences, California welfare rights leaders trusted that Abascal and his colleagues both shared their commitments and had the integrity, knowledge, skill, and time to provide competent representation.

This was especially the case with respect to Abascal's role in working with legislators on the drafting of the Welfare Reform Act of 1971. Because of the need to act quickly, Abascal made all decisions without consulting either other legal aid lawyers or welfare rights activists, though

450. Mansbridge, *Rethinking Representation*, *supra* note 72, at 520–21.

he had help from the ACLU's experienced Sacramento lobbyist. His partners in countering Reagan and his aides were legislators and their closest staff. For them, in the legislature's backrooms, Abascal was the voice of welfare beneficiaries. Functionally, he became a surrogate representative. His surrogacy was a situation-specific and time-limited manifestation of his mission-driven commitment to representing the interests of the poor.

In lobbying for impoverished individuals, Abascal embodied legislative access at a level usually attainable only by the strongest of special interests. This high degree of influence on public assistance legislation did not last long, but for those several weeks it mattered a great deal in tempering Reagan's welfare program.

Although Abascal and other legal services attorneys had considerable discretion strategically and tactically, they were not acting on their own imagined agenda but on an agenda shaped by the daily experiences of welfare claimants and recipients. The lawyers knew from the client caseloads of legal services offices and welfare rights organizations the issues that most affected AFDC eligibility and benefit amounts. While there are always competing considerations on how best to expend limited resources, in this instance all the relevant players were on the same page regarding substantive priorities and advocacy approaches.

Luban would view favorably the actions taken by Abascal to advance and protect the interests of the welfare poor. The goals sought, the results intended, and the means used were all aimed at improving the immediate living conditions of welfare beneficiaries. In all respects, Abascal's actions meet Luban's tests for responsible social justice lawyering when direct client accountability mechanisms are weak.[451] He also in all likelihood would applaud the situation as an example of lawyers and mobilized beneficiaries acting in joint cause. Yet, as I have explained previously, Luban's analysis invokes a conventional appreciation of legal representation. Even when lawyers act entirely independently, Luban still assumes the primacy of client-control and agency principles of accountability.[452]

Though not directed at social cause lawyering, Pitkin's understanding of democratic political representation, which is foundational for Mansbridge's conception of gyroscopic representation, makes no such assumption. Instead, she mainly views the process of representation from the standpoint of the representative's responsibilities. The effectiveness of mechanisms for holding representatives directly accountable to those represented is a secondary concern in her thought.

---

451. LUBAN, *supra* note 21, at 340.

452. *Id.* at 351–53.

In setting forth her concept of representation, Pitkin posits a number of expectations that clearly track how Abascal and his legal aid colleagues represented the welfare poor: that the representative act in the interest of the represented; that the representative act independently; and that notwithstanding the potential for conflict between representative and represented about what to do, the actual occurrence of conflict is unusual.[453] Pitkin looks to representatives to take initiative but always in the interest of those represented and always mindful of minimizing conflicts with those represented. In the struggle over welfare reform, legal services lawyers acted in line with those core conditions. But there are also certain descriptive qualities regarding how a representative acts that need to be taken into account.

Integral to both Pitkin's sense of the independence of representatives and Mansbridge's framing of gyroscopic representation are a representative's ability to act responsively and to exercise good judgment. Neither examines in any detail what is meant by responsiveness and judgment.[454] Luban's thought on lawyer role morality and responsible representation similarly places high value on responsiveness and judgment as aspects of good decisionmaking yet is also non-specific about what each entails. However, before commenting further on the meaning of these terms in social cause lawyering, I address several other issues raised by Pitkin and Mansbridge about the nature of representation.

Pitkin examines representation principally from the representative's frame of reference. It is the representative's predispositions and attitudes that matter the most. In discussing the characteristics of those represented, she highlights that the constituent group itself has to have or has to be conceived of having the capacity to exercise independent judgment. Representation for her is not to be confused with paternalistically taking care of others.[455] For there to be meaningful representation and not some

453. PITKIN, *supra* note 64, at 209.

454. For an insightful explication of the multidimensional character of responsiveness as an attribute in electoral representation, see Heinz Eulau & Paul D. Karps, *The Puzzle of Representation: Specifying Components of Responsiveness*, 2 LEGIS. STUD. Q. 233 (1977). Eulau and Karps posited a fourfold concept of "responsiveness." The first is "policy responsiveness," which covers policy issues of concern to a representative's voters, *id.* at 242; the second, "service responsiveness," which refers to the advantages and benefits a representative obtains for particular constituents, *id.* at 243; the third, "allocation responsiveness," which has to do with pork-barrel politics and anticipating district and constituent needs and engaging in relevant bargaining, *id.* at 245; and fourth, "symbolic responsiveness," which covers the significant gestures needed to generate and maintain constituent support, *id.* at 246. Their article was a response to both a path-breaking empirical study of congressional and constituent relationships which too narrowly focused on policy issue "congruence," see Warren E. Miller and Donald E. Stokes, *Constituency Influence in Congress*, 57 AMER. POLI. SCI. REV. 45 (1963), and a lack of specification in Pitkin's concept of representation regarding how to determine and measure responsiveness.

455. PITKIN, *supra* note 64, at 209.

other kind of relationship, the representative needs to fundamentally respect the decisionmaking competence of those represented.

In a similar vein, Mansbridge regards the legitimacy of gyroscopic representation as involving respectful mutual education, not manipulation and duplicity. In delineating the bounds of representation, she emphasizes the importance at the outset of opportunities for dialogue and, subsequently, relative ease in retaining or removing the representative. To Pitkin's underscoring of respect for those represented, Mansbridge directs attention to informed deliberation and the prospect of constituent control as key factors in determining the character and quality of the representational relationship.

Although Mansbridge downplays elections when distinguishing gyroscopic representation, she does not ignore the potential effect of elections as a check on the views and actions of a representative. Elections provide recurring opportunities for those represented to express aggregate preferences. Even when there is great trust in the representative, voters are able periodically to reconsider their support. The electoral process enables the represented to make ultimate decisions and thereby influence a representative's behavior.

The fee clients pay lawyers serves a similar practical function in the usual lawyer-client relationship. But in antipoverty lawyering, no residual mechanism is available to the client for asserting comparable influence. The poor themselves have no structured economic leverage over the lawyers who represent them. To the extent that there are financial pressures on how legal services lawyers behave, they come from other sources.

Within today's literature on lawyering, questions continually are raised about how to respond to inequalities in the relationship of lawyers and clients. Rules of professional conduct provide some guidance but by and large are only sporadically enforced. They also address in only very limited ways dilemmas in group legal representation. The point is that the formation of a lawyer's role identity involves a more expansive understanding of professional responsibilities than is found in ethical codes alone. Indeed, a major premise underlying client-centered lawyering is the need for heightened consciousness and reflection regarding an attorney's self-responsibility for fostering and managing professional relationships that truly respect a client's independence as a decisionmaker.[456] The development of such self-awareness is especially significant when clients receive free services.

---

456. *See* DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 147–55 (1977) (arguing that ultimate decisions should be based on providing the "greatest client satisfaction" and that "by and large, lawyers cannot know what value clients really place on the various consequences").

The most problematic situations involve group legal representation. Vulnerable constituencies are frequently in a state of flux. In social cause lawyering, the extent of an activist group's mobilization and cohesiveness varies greatly and is always context specific. Under such changing circumstances, relations with lawyers are apt to become attenuated. To counter this tendency, lawyers have to pay continuing attention to cultivating their own self-accountability to those whom they represent.

The client dynamics of group lawyering for the poor resemble but are not in all respects the same as Mansbridge's framing of gyroscopic representation. The bottom line is that there is no single regularized method for furthering ultimate client control. Its absence, however, is not fatal. The antidote lies in the professional dispositions and developing character of lawyers who provide services not directly paid for by clients. The challenge is in how to inculcate the kind of underlying characteristics that Pitkin and Mansbridge proscribe for democratic political representation.

In my view, we need to pay more attention to what I call "process values." These are professional role values that fundamentally shape how a lawyer as a representative interacts with clients and brings to bear his or her knowledge and skill. One set of concerns, which is especially critical when there are no or only weak formal accountability mechanisms, involves having genuine respect for the client's autonomy, maintaining meaningful levels of professional interaction, and sharing mutual understandings about the actual terms of the relationship. The term I want to use to embrace these considerations as a lawyering phenomenon is "accessibility." In group legal representation, responsiveness and judgment are other pivotal lawyering process values.

My use of the term accessibility is not drawn from any article or text. It is the descriptive trait used by Kevin Aslanian, a welfare rights leader and former AFDC recipient, when I asked him to describe what was special about Abascal as a lawyer.[457] Aslanian first mentioned that Abascal was "not arrogant or elitist." He next commented on how Abascal knew how to disagree in a non-demeaning way. But it was his concluding thought that has most stuck with me. Aslanian said, "The main thing is he made himself accessible." The clear emphasis in Aslanian's phrasing was on how Abascal held himself out and related to others.

Abascal had a way of conveying respect for others that positively affected their interest and comfort in interacting with him. It was a presence or bearing that put people at ease whether one was a member of a client group, a legal colleague, a public official, or even an opponent.

457. Interview with Kevin M. Aslanian, *supra* note 131. For more than twenty-five years, Aslanian has been the Executive Director of the Coalition of California Welfare Rights Organization, which is a legal services back-up center mainly supported with funds from California's IOLTA program. There are several lawyers on the organization's staff, though Aslanian himself is not a lawyer.

While he had great confidence in his own sense of a situation and what needed to be done, he was open and never closed off to the viewpoints of others. In working with client groups and allies, Abascal invited and supported their involvement in planning and decisionmaking. The degree of interaction varied depending upon the circumstances, but there usually were opportunities for meaningful interchange. The hallmarks of Abascal's accessibility were a profound respect for and genuine openness to others, combined with considerable candor in expressing his own views.

As a result, when Abascal did act on his own, he was not acting unpredictably or in isolation. In the battle over welfare reform, Abascal provided leadership and direction, but he drew on a network of support from other legal services lawyers, from welfare rights leaders, and directly and through them from individual beneficiaries themselves. He was not a lone ranger sweeping in to save the poor. He utilized not only his own formidable abilities but also the collective knowledge and experience of clients and colleagues. For Abascal accessibility was a two-way street. It allowed for mutual exchanges of information and opportunities for mutually influencing one another.

While Abascal had strong relations with California welfare rights leaders, they were not highly formalized or structured. For the most part, they reflected his personality and temperament and his general inclination to work collaboratively with others. The specific nature of such collaborations, however, left significant room for him to exercise his own discretion. Furthermore, it was unlikely that he was very explicit about the actual terms of the relationships he forged with client groups. In the 1970s, antipoverty attorneys addressing policy issues in conjunction with or on behalf of client organizations spelled out little, if anything, in writing about the purposes of the representation, expectations regarding attorney and client responsibilities, or the duration of the representation.[458] There would have been instead largely implicit understandings.

The informality that characterized Abascal's relationships with client constituencies has continuing relevance for social cause lawyering. Particularly when groups are not formally structured or are erratically mobilized, addressing the terms of the representational relationship formally can be awkward and potentially counterproductive. For example, when a community coalition first comes together around a policy or practical problem, organizational relationships are likely to be highly fluid and with no clear leadership structure. The lawyer does not want to appear to be favoring some members and not others. It may well be best for the attorney to wait to see how the group develops organically before being too explicit about managing the attorney-client relationship. This

458. Written retainer agreements were not and still are not required in California when there is no fee involved. *See* CAL. BUS. & PROF. CODE § 6148 (Deering 2013).

kind of situation is an opportunity for the lawyer to nurture ties with group members without potentially chilling relationships by being professionally rigid. The objective is to foster mutual respect and shared openness and thereby a sense among group members that the attorney is not a foreboding but an accessible figure who can be trusted. To the extent certain fundamentals about the lawyer-client relationship warrant attention, they can be raised more flexibly and sensitively in discussion at later group meetings or in individual exchanges.

Accessibility sets the framework for the lawyer-client relationship, but the value of the relationship largely depends on the lawyer's knowledge and skill. Substantive expertise alone is not sufficient. What most distinguishes the character and quality of an attorney's competence as a representative, especially when involved in policy advocacy, are responsiveness and judgment.

Responsiveness in some respects is the opposite of accountability, as it requires an open-ended approach in how to respond to specific situations and changing circumstances.[459] Where accountability directs attention to the limiting of a representative's discretion, responsiveness presumes a broadening of discretion. In acting responsively, a representative has to be flexible and adaptive in order to account for a host of competing political, legal, and policy considerations. The danger is that such openness deteriorates into unprincipled opportunism.

The need is for responsible flexibility and discriminate adaptation, the guidance for which comes from a strong sense of purpose, like that which drives social cause lawyering. When transformed into specific objectives, such purpose becomes a source of standards for determining whether representatives have acted responsively in the interests of those represented. In fashioning and realizing those objectives, the representative has to be discerning and self-reflective and have the capacity to self-correct if mistakes are made or unanticipated developments happen in the course of the representation.

Responsiveness for a representative, in effect, involves a three-step process. The first step has to do with having a shared purpose or set of purposes with those represented. The representative has to understand the priority values, interests, and concerns of a represented group and commit to seeking their accomplishment. The strength of this bond as a guide for purposeful action mostly depends on the integrity of the representative—that is, the representative's continuing willingness to act consistently with the encompassing reason for the representation. The second step has to do with the resourcefulness of the representative. An

459. *See* PHILLIPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 73–113 (2001). In framing my initial ideas about responsiveness in lawyering, I have drawn on the jurisprudential thought of the sociologists Phillipe Nonet and Philip Selznick. Note, however, that they address the institutional competence of law in the quest for justice, not the role of lawyers.

overarching sense of purpose needs to be formulated into concrete objectives that address particular problems. This narrowing of focus raises questions of substance and means. There are always choices to be made about what policy issues to address and what approaches or techniques to use to advance the interests of those represented. The representative has to be flexible and adaptable. Rigidity is the bane of responsive representation, which is inevitably context specific. The third step has to do with the ability of a representative to learn from experience. The flexibility and adaptability associated with responsiveness continually call for critical assessment of situational factors and one's own role. Standards for determining the effectiveness of actions undertaken have to take into account direct and indirect effects, both those which further and those which push back against the representational objectives. In what is a reiterative process, the responsive representative is ever alert to making adjustments in light of changing circumstances and new insights.

Abascal's approach to and later reflection on the campaign to counter Reagan's welfare reforms exemplifies the pushes and pulls of responsive group legal representation. From his days in law school, he was committed to working to improve the life conditions of poor people. At CRLA, he saw firsthand the effects of oppressive agricultural labor conditions and arbitrary welfare policies and practices. The late 1960s saw an unprecedented increase in AFDC rolls and expenditures primarily due to welfare rights organizing and legal advocacy. When Reagan decided to push back administratively and legislatively, Abascal did not wait to file lawsuits, he aggressively lobbied, first along with welfare rights leaders and other legal services lawyers with welfare administrators, and then virtually singlehandedly in the legislative bargaining that preceded the enactment of the California Welfare Reform Act of 1971. His legislative lobbying on behalf of the welfare poor was at the time a totally innovative turn. It also was a very pragmatic turn in difficult political circumstances. But for Abascal's initiative there would not have been the opportunity to influence the detailed drafting of the legislation in ways that involved risks but ultimately were advantageous for AFDC beneficiaries collectively.

In the aftermath, Abascal then launched an unprecedented, multi-case litigation campaign using federal statutory provisions to check state policies and practices. The extent of litigation was in response to the intransigence, almost ruthlessness, of Reagan welfare administrators in resisting legislative provisions and judicial rulings with which they disagreed. The focus of the litigation overall was not on the establishment of new rights but on forcing the state to meet and implement existing welfare policies in compliance with the rule of law. The coordination of multiple lawsuits, filed with the backing of welfare rights leaders and involving a group of legal services attorneys, was yet another innovative and pragmatic turn instigated by Abascal. The potential effectiveness of

this strategy depended on an assessment of then-existing legal and judicial circumstances.

Although legal services lawyers won most of the cases, Abascal especially regretted the loss in *Villa v. Hall*, which involved how to compute the earned income of working AFDC recipients when determining grant benefits for a family.[460] The case went to the heart of public policies regarding the use of financial incentives as transition measures to support employment of adult welfare beneficiaries. The loss was the result of a Supreme Court decision in a case brought in Texas that, had there not been a delay in the transmission of the record on appeal, probably would have been decided differently.[461] It was a fortuitous loss. While towards the end of his life Abascal expressed concern about not doing enough to facilitate jobs for the welfare poor, the link between welfare and employment was always an issue of utmost concern for him. I view his later doubts primarily as manifestations of the seriousness with which he critically examined actions he took and his awareness of the limits, even contradictions, in what he had done.

Judgment, as I use the term here, is a process of reasoning directed at action or policy, not abstract theoretical issues. Philosophers refer to this type of deliberation as "practical judgment."[462] It is akin to the kind of professional judgment most admired in lawyering.[463] The crux of practical judgment, and most certainly in social cause lawyering, is what the political theorist Hannah Arendt, translating from the French *le bon sens*, called "good sense."[464]

Arendt's focus was on political judgment and, in particular, how effective exercises of judgment ultimately depend on the ability to persuade others of the good sense of one's position. She characterized this method of using reason to influence decisionmaking as a process of

---

460. *See supra* text accompanying notes 386–397.

461. *See supra* note 394.

462. Practical judgment has much in common with the Aristotelian concept of phronesis or practical wisdom. ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS, Book VI, chs. 5–13, at 176–92 (J. A. K. Thomson trans., 1953). Practical judgment also has roots in Kant's conception of reflective judgment, which he differentiated from determinant judgment. THE PHILOSOPHY OF KANT 270 (Carl J. Friedrich ed., 1949). Determinant judgment describes the process of applying an established rule to a particular set of facts. Reflective judgment begins with the particular and involves a search for the universal—that is, what principle, standard, or other decisionmaking heuristic might best apply to resolving the matter at hand. Modern legal writers sometimes use the term "practical reason" or "practical reasoning" rather than practical judgment. *See, e.g.*, Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995).

463. Former Yale Law School Dean Anthony Kronman in emphasizing the critical importance of judgment in lawyering uses the terms practical judgment and practical wisdom interchangeably. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

464. HANNAH ARENDT, BETWEEN PAST AND FUTURE 221 (1977).

wooing.[465] It is not coercive. Although having judgment speaks to an individual's intellectual and, as I shortly explain, moral development, it is in application directed primarily at others. Judgment is very much related to understanding what others regard as "common sense" so as to be persuasive with them. While judgment involves finding something in common with other persons, good sense better captures the deliberative as well as intuitive aspects of what it means to use judgment. There is nothing common about good judgment.

Having written elsewhere about the meaning and teachability of lawyering judgment, I discuss here only what I have come to regard as the key characteristics of practical judgment as applied to lawyering.[466] These descriptive features, which are overlapping rather than distinct and separate, are (1) the contextual tailoring of knowledge, (2) a dialogic form of reasoning that accounts for multiple points of view, (3) an ability to be empathetic and detached at the same time, (4) the intertwining of intellectual and moral concerns, (5) an instrumental and equitable interest in human affairs, and (6) a heavy reliance on learning from cumulative experience.[467] The ability to act responsively and the development of judgment are complementary.

Practical judgment is always context specific. It entails the tailoring of general knowledge and past experiences to resolve complex problems when there is no clear decisionmaking metric to use. In ways sensitive to particular circumstances, practical judgment provides the insights that give direction and coherence to the weighing and prioritizing of competing considerations. The process of reasoning involves taking into account how an event or situation looks from multiple points of view. Whether engaged or not in discussions with others, one needs to have an inner dialogue with oneself. The reason is that in exercising practical judgment a person incorporates as part of his or her own considerations the interests, concerns, views, and objectives others may have regarding the specific matter.

The critical dynamic in developing good judgment is the ability to be empathetic and detached at the same time.[468] Empathy involves imaginatively putting oneself in someone else's shoes. It is not the same thing as sympathy, since it is not a matter of sharing or agreeing with someone else's beliefs, thoughts, or feelings. It is a matter of understanding that person from his or her standpoint as best one can. To make this human connection fully, one needs to rely on both intellect and feelings.

---

465. *Id.* at 122.

466. *See* Aaronson, *We Ask You to Consider*, *supra* note 8.

467. For a fuller explication of these key characteristics, see Aaronson, *Thinking like a Fox*, *supra* note 8, at 30–38.

468. *See* KRONMAN, *supra* note 463, at 66–74; *see also* RONALD BEINER, POLITICAL JUDGMENT 102–28 (1983).

Detachment requires distancing oneself from personal attachments in order to identify a host of considerations that may bear on what is going on and what needs to be done. In distancing oneself, one needs to suspend feelings but not to deny them. The process of detachment is further complicated by the need to double distance oneself by stepping back from one's own interests and feelings, not just the interests and feelings of others. The effort to be empathetic and detached at the same time induces notable internal tension.

Exercising practical judgment has a moral as well as an intellectual dimension. The connection originates in Aristotle's concept of practical wisdom, which he defined as follows: "Practical wisdom is a rational faculty exercised for the attainment of truth in things that are humanly good and bad."[469] The aim is to make use of knowledge not abstractly for its own sake but instrumentally in terms of how it can be applied equitably for the betterment of humanity.[470] Luban's conception of role morality similarly focuses on the soundness with which lawyers make decisions regarding what is right or wrong or good or bad under the circumstances and in light of a lawyer's special role responsibilities. While one can problem solve and manipulate information and situations cleverly and shrewdly, such behavior can belie what it means to say someone has good judgment. Destroying or burying an important piece of evidence might win a case, but it is not going to lead anyone to say that a lawyer who has so acted has good judgment.

Practical lawyering judgment develops over time and with experience. Its nurturing and maturation usually require exposure to a variety of problem situations and repetitive practice. As with all learning, few things happen automatically. Individuals optimally learn from experience when they explicitly consider, through self-reflection and in discussion, what has been experienced.[471] Initially, one has to work at developing appropriate habits of mind and heart and the ability to assimilate critically, in proper measure, new information. Eventually, how one deliberates and the core of what one knows become deeply imprinted in one's consciousness. The reasoning process of individuals with experience is different from those new to a field. While a novice often needs a roadmap to identify the surest way to get from point *A* to point *B*, the expert with experience often sees instantly what has to be done.[472] Less than optimal courses of action are rejected without much conscious consideration. Whether

469. ARISTOTLE, *supra* note 462, at 177.

470. For a suggestive Aristotelian treatment of what this means for the judiciary, see MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 79–121 (1995).

471. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 64–66 (1995).

472. Gary Blasi calls this "forward reasoning." Gary L. Blasi, *What Lawyers Know: Lawyering, Expertise, Cognitive Science, and the Function of Theory*, 45 J. LEGAL EDUC. 313, 345 (1995).

individuals have good practical judgment is a statement about the quality and character of how they deliberate and their intellectual versatility and sensitivity to human situations, all of which take time to develop.

In the protracted battle over California welfare reform, Abascal's judgment was continually tested in legislative, judicial, and bureaucratic arenas. He had to constantly make judgment calls.

One example was the decision as part of the legislative drafting of the Welfare Reform Act of 1971 to *not* authorize any exception to the use of a standard flat amount for work-related expenses in determining AFDC grants for households with a working parent.[473] Abascal persuaded California legislators to accept the Reagan administration's $50 absolute limitation. The legislators were concerned that it would be an inadequate amount and would significantly reduce a family's available income for basic necessities. Viewing the specific problem, Abascal brought to bear his knowledge about federal welfare law and the likelihood of a successful facial legal challenge. In figuring out what to do, he had to weigh the risks and consequences for welfare families were he wrong, and he had to commit to filing follow-up litigation to right the wrong. At each step of the way, he had to take into account how others would view the matter and how to be persuasive with them. Some of the key legislators were quite skeptical about making this concession. In the end, it was not just his analysis that led them to follow his counsel, but their confidence in his character and commitment to the welfare poor.

Abascal was an exceptional social cause lawyer. He was held in high regard from the beginning of his legal career. He was very bright, and he worked extraordinarily hard. Yet one can only speculate what accounted for his paramount good sense.

He came from a working-class background. His father was a Basque immigrant whose two brothers fought for the Republican cause in the Spanish Civil War, and his mother's family was from southern Spain and initially immigrated to Hawaii where they were agricultural workers. Neither of his parents had much formal education. His father had a stroke when Abascal was fifteen. As the oldest sibling, he had to assume major responsibility for maintaining the family's income. Yet his early years as an adult were not promising. He drifted and did not do well at first as an undergraduate.[474]

Abascal eventually found his way as a student and completed an MBA and work towards a Ph.D. in economics. He came to law school with a solid interdisciplinary background. Compared to most new lawyers starting out in legal services at the time, he was relatively old with more life experiences behind him. But unlike other attorneys his age who had

473. *See supra* text accompanying notes 336–337.

474. Telephone conversation with Bea Moulton, Abascal's widow (Apr. 20, 2012).

moved laterally into legal services positions, he did not carry with him the effects of having practiced law elsewhere. His first legal experiences all came in working on problems of extreme poverty. Committed to seeking social justice, he saw his role with fresh but seasoned eyes. He remained an antipoverty lawyer all his life.

From my perspective, Abascal's legal advocacy for the welfare poor stands as a model of how to be a social cause lawyer when the interests of a vulnerable group are otherwise unlikely to be effectively represented in the enactment and implementation of public policies. Abascal was unique. For the rest of us concerned about social justice, it does not hurt to have some conceptual guideposts.

To repeat what Pitkin said at the beginning of her book on democratic political representation: "Learning what 'representation' means and learning how to represent are intimately connected."[475] Those who represent the poor need to be highly self-conscious about their professional role responsibilities including what it means to be a representative. At its core, such learning calls on lawyers to focus on how to be accessible and responsive to client constituencies and how to develop over time perspectives, dispositions, and skills for exercising good judgment in uncertain and changing circumstances.

Yet when all is said and done, there is a cultural specificity to what can be achieved through group legal advocacy. Constitutional ideals notwithstanding, the American political and legal landscape is asymmetrical. It is far harder to use legal representation to achieve progressive social change than to uphold the existing order.

C. The Limits of Legal Advocacy[476]

The options available to antipoverty attorneys in the late 1960s and early 1970s were bound to the general political predicament of their impoverished clients. Abascal and his legal services colleagues did not have the advantages of representing a group with widespread popular support or substantial political resources. The victories won in court were always subject to frustration. But the frustration inherent in litigation was also a source for improvisation. Legal advocacy for welfare recipients was a reformist strategy limited but not controlled by existing power configurations. The legal strategy employed during this period evolved dialectically in response to official resistance and in ways which built on prior developments.

The first legal cases concentrated on altering legal doctrine. The issues ranged from extending due process safeguards to public assistance

475. Pitkin, *supra* note 64, at 1.

476. This final part is a slightly edited version of the conclusion to my 1975 doctoral dissertation. Aaronson, Legal Advocacy and Welfare Reform, *supra* note 5, at 279–81.

decisionmaking, to eradicating moral conditions on welfare eligibility, to efforts to secure public aid payments as a social right. Although the attempt to embed the right to welfare in the Constitution proved unsuccessful, public relief did achieve in case after case judicial recognition as a statutory right. In an important conceptual and cultural development, a social welfare benefit previously characterized as mere charity came to be considered an interest deserving of significant legal protection.

Relying on the deference, however variable, that American politicians and administrators afford the judiciary and principles of law, Abascal along with other legal services attorneys utilized doctrinal advances already obtained and predictions about prospective court actions both in legislative bargaining and as grounds for policing administrative practices. The results were an expansion and a preservation of tangible benefits for the welfare poor that in the absence of legal intervention would not have happened. For individuals who had very little else upon which to rely, the availability of legal representation set new opportunities in political as well as legal affairs.

Bolstering the legal competence of the poor had political implications, but ones which tested rather than transformed American values and patterns of power. The incremental advancements obtainable through law contained contradictions. Welfare recipients benefitted from access to legal assistance and from developments in American law, but so did the political system. The actions of antipoverty attorneys channeled the demands of welfare beneficiaries for equality and fair treatment into the legal order. Handled as legal rather than social conflicts, these demands led to resolutions that left existing economic and political relationships virtually undisturbed. Indeed, the legal adjustments which took place affirmed and reinforced the very constitutional values employed by the society to legitimate dominant institutional arrangements. Little headway was made in redressing the causes of poverty. The ambitions of a legal welfare strategy were inextricably subject to the 19th and 20th century ideological undercurrents of the American liberal tradition and the ebbs and flows of American interest group politics.

Lastly, legal advocacy for the poor during this period suffered from and varied in accordance with the precariousness of a government provided service. Political, fiscal, and caseload pressures affected legal aid programs much as they affected the operation of public welfare agencies. An effective legal welfare strategy required constant vigilance with regard to official policies and practices by legal services attorneys, but such vigilance was politically controversial, expensive, and time consuming. The decline of welfare rights organizations and the absence of external mechanisms for holding antipoverty lawyers accountable to their clientele held out the continuing prospect of an erosion and routinization of the legal services provided welfare recipients. In California, Abascal and a

handful of attorneys developed a fairly comprehensive and sophisticated series of actions on behalf of the welfare poor. Their sustained representation, however, was self-defined and circumstantial. There was little in the way of broad institutional support to suggest that what was accomplished yesterday would be maintained today or tomorrow.

APPENDIX: INTERVIEW WITH RONALD REAGAN

What follows is the transcription of a tape-recorded interview with former President Ronald Reagan, shortly after the end of his second term as California's Governor. The interview was conducted by Mark Aaronson at The Leamington Hotel in Oakland, California, on March 6, 1975. The subject of the interview was the changes that took place in welfare in California during Reagan's two terms as governor.

Mark Aaronson: The welfare rolls and costs began to rise rapidly during your first term in office; yet, the administration didn't really come to grips with this problem until sometime in the middle of 1970. Why was there this delay in terms of any concerted effort?

Ronald Reagan: Well, there was a concerted effort and the trouble was this: We had to learn and we had to learn about the ability of bureaucracy to resist and how welfare was getting along. We had programs in which we had high hopes. We started at the very first recognizing that that was a problem that previously the administration before, over the eight years, had built up to the place where they literally were out soliciting people to be on welfare. And we could see the increasing line. We knew where it was going and that we were faced with the inevitable bankruptcy, literally, of our state or going down the thankless road of having to raise taxes at least every year or every two years just to meet the cost of welfare, but we started on plans.

Now, our problem was that being new and a new administration faced with what was a nationwide problem and no one had found the answer to it. We started the experimental program in Fresno that we believed would lead toward what our goal was, which was to use welfare as a temporary aid with the goal being to funnel people through there and back out into private enterprise jobs as quickly as possible.

Well, you see, we had this—we got our information from the professional welfarists. We had to depend on them for implementing these plans that we put forward. And you waste a year or more and find your experiment isn't working—your pilot program, not an experiment—pilot program isn't working. So you try again.

And then it was that, finally, before 1970, in 1969, we put a task force to work and we went to the outside. We had fifteen young lawyers, who volunteered their services.

Mark Aaronson: I know about a task force in August of 1970. Was there one earlier, in 1969?

Ronald Reagan: Well, now maybe, you know, eight years runs together. I'm trying to think when.

Mark Aaronson: I know it's hard to—

Ronald Reagan: I'm trying to think. I'm trying to think when the—

Mark Aaronson: There was a Special Governor's Task Force put together in August of 1970.

Ronald Reagan: Was it put together in August? I'm just confused and I was thinking August then was when they came out with their report.

Mark Aaronson: No, they came out, I think, in December, something like that.

Ronald Reagan: Well, I know they worked about seven months on this.

Mark Aaronson: Yes.

Ronald Reagan: Well, you may be right, so I'll stand corrected by you, because I'd have to go back and check the list.

Mark Aaronson: I know I'm asking some specific questions.

Ronald Reagan: Yes.

Mark Aaronson: And I know it's very hard to keep the exact dates in mind.

Ronald Reagan: Yeah. You'd be surprised. Things kind of flow together through those eight years.

Mark Aaronson: Yes.

Ronald Reagan: Well, anyway, whenever, whatever the date, when we finally saw the failure of our efforts and these things like this pilot program to control this, we turned to the task force route, which we had used so successfully at the beginning of our administration in so many areas of government. After seven months this task force did, I imagine, the most comprehensive study that's ever been done on welfare and came up with the most comprehensive proposal for reform that's ever been attempted in the country.

But, having this outside help, for the first time we were no longer dependent on the bureaucracy itself. Now, these lawyers, for example, were able to comb through not only the regulations, but the Congressional acts, and the laws, and so forth and find were some of these regulations based on law or were these just departmental regulations that had become kind of law through just common usage.

And they came back with the recommendations of what we would do administratively, what would require legislation, and recommendations then that would go further and require waivers for some of the federal regulations at HEW.

Mark Aaronson: Who in the bureaucracy—what in the bureaucracy did you find most resistant, the State Department of Social Welfare and its personnel or were there others in the counties?

Ronald Reagan: [_____] except in some of the rural—more rural counties or some of the big, vested interests that are created by—you know, it's like Dr. Parkinson in his book when he said that government hires a rat catcher, who soon becomes a rodent control officer.

And this we found was very typical of what had happened to welfare. Now, on the other hand, we have to pay a debt to many people, professional welfarists, who shared our feeling and who, being involved in it, knew where some of the problems laid. And so much of our task force help came from people in welfare who—and curiously enough, to show you what the problem was, in some instances, who had to come, you might say, by the back door and say, "Please. I'll help. Don't identify me."

This is how emotional this problem was.

Mark Aaronson: Were these state welfare personnel?

Ronald Reagan: Both state and from the county level. See, in California, welfare is administered at the county level.

Mark Aaronson: Yes.

Ronald Reagan: So you really had three sets of regulations overlapping. First, the great multitude were federal regulations. Then, over the years those have been augmented by state regulations, as they then pass the money and the burden onto the counties to administer, and then the counties would pass some of their own.

And through all of this, literally, it was like, you know, the more words you put in a basket the more meaning and interpretation people can get out of it. And so, between all these regulations they literally could find out anything they needed to do whatever they wanted to do.

So, make it plain that when I criticize the great bureaucracy, we're indebted to some among them, who were conscientious, public servants, who damn well wanted to help.

Mark Aaronson: One of the first major proposals was in the spring of 1970 and that concerned a cutback of $10 million in the attendant care program for the disabled. It was one of the first across the board, at the state level, cutback in a particular program. What were the reasons for taking initial action in that area?

Ronald Reagan: Well, this was one of the things we found and one of the first places where we found abuses. Now, this would give you an example of what the bureaucracy can do when you attempt to curtail their empire building or their activities.

What we were aiming at was cases where family members, for example, had discovered that they could put in—if they had someone in their family disabled or something—a mother taking care of her own child could put in for income from the taxpayers for caring for her own child. We found one example of a couple—a married couple—both public employees—a gross income between them in excess of $60,000—and getting an allowance from welfare to provide for a disabled child.

Now, we were well-aware and we made every effort for those people—you know, the truly disabled and the ones who had to have this care—but this is not who we were aiming at. And we thought that we had put out regulations and so forth with this cutback that would make sure that didn't happen. We hadn't reckoned on the ingenuity of the bureaucracy.

The first thing we knew was the bureaucracy just issued an order cutting it off to the people in greatest need.

Mark Aaronson: That would be the State Department of Social Welfare in this instance?

Ronald Reagan: Yeah. And the implementation of it. Now, wait a minute. I wish I had Swoap here with me, because would this have been at the state or at the local administrative level?

Mark Aaronson: Well, there was a state announcement of the regulation.

Ronald Reagan: Well, the state, yes.

Mark Aaronson: Then it would have to be implemented by the—

Ronald Reagan: But I think it was at the implementation level, so this would have been, I think, where welfare was being implemented, at the county level. But at any rate, suddenly you had television, as if by magic, on news programs the most helpless, pitiful looking, quadriplegics being displayed on television and stating their case that their attendant was being taken away from them like the first of the month. And you know, there's a person that was so helpless and desperate, I had to say, you know, "What am I going to do?"

Well, I got home one night and it came very close to home. One of the civil servants working in our house in Sacramento is the sole support of both an invalid mother and invalid aunt. She couldn't work and support them if she couldn't have help in providing someone to be with them during the day to take care of them. I came home. My wife was waiting for me at the door. Nancy said she has just told me this story. They just received a call telling them that as of Thursday they can no longer have an attendant. And so she feels she's going to have to quit government service and try to get two kinds of jobs so that she can afford to hire someone.

Well, I went over, back to the office, and I was

mad as hell. We'd been having these other cases, we'd been seeing this stuff on television and I called a press conference and I went into the press conference and I said, "We have to rescind this order, not because we don't believe in it, not because it isn't right, but because we've found we don't have the means to enforce on the welfare personnel the administering of this as we had proposed it be administered. They are sabotaging it by taking the help away from the very people who need it most and whom we never intended to take it away from." And so I said, "We hereby rescind the order."

Mark Aaronson: I understand that. Because of time, I'm going to go rapidly on to some other questions. Who were your major advisors on welfare at various times during your eight years in office? Who did you rely on most for assistance in the kinds of actions you were proposing to take?

Ronald Reagan: Well, you went through your secretaries of health and welfare.

Oh, golly. What was his name, the first one? Who was it?

Mark Aaronson: Jim Hall?

Ronald Reagan: No, before Jim Hall. Well, it was Vandergriff. And before him though—oh, what's his name? Oh, he ran for attorney general in '66.

Third Person: Oh, you mean Spence Williams.

Ronald Reagan: Yeah. Spence Williams was the first. And then came Lucian Vandergriff. Then came Jim Hall. And following Jim Hall was Earl Brian. But it was under Jim Hall that we began to. The other two had led in the various efforts and experiments that had failed or the pilot programs. And I don't blame this on them, as I say. It just fell to their lot. By the time Jim Hall came along we had all the lessons of what had failed and what we were up

against and this is when we went to the task force route under him.

Mark Aaronson: So you would usually rely on the Secretary for Health and Welfare for most of your personal advice?

Ronald Reagan: Yeah.

Mark Aaronson: How did your relationship with the State Department of Social Welfare change over the eight years? That would have been a department under that secretary. Did your degree of contact with that department, your sense about it, change as your administration progressed?

Ronald Reagan: Well, it was typical of so many other departments. We were engaged in a war with bureaucracy, and there was no question they were not sympathetic to our efforts to reduce the size and costs and power of government. And this was typical of them, but as we met frustration after frustration, we began getting tougher in that particular area and getting people in there that would. The secretaries always were sympathetic to what we were trying to do. And out of the task force came this kind of personnel and there were some changes in personnel in the department.

Mark Aaronson: So, you felt the department was more responsive to your program when Robert Carleson, who was on that task force—

Ronald Reagan: Bob Carleson. Earl Brian in the health field.

Mark Aaronson: In '71 you had your welfare reform proposals you were developing and President Nixon had his concerning the Family Assistance Plan. And there was also, at the same time, a major controversy between the federal government and state government on cost of living adjustments under what was called § 402(a)(23), and you and President Nixon met around April 1, 1971, at San Clemente.

Shortly thereafter, the state did comply with the cost of living adjustments. This was some two years after the initial statutory deadline. What was the relationship between what happened at San Clemente in your discussions with President Nixon and your administration's decision to comply with the cost of living increases under previous federal statutes?

Ronald Reagan: No, that meeting at San Clemente was actually a meeting in which we were given a briefing, probably the first briefing that any state had been given. We were given a briefing on the governments Family Assistance Plan, the government's approach to a Family Assistance Plan.

Mark Aaronson: So that meeting was mainly about the Family Assistance Plan?

Ronald Reagan: Yeah.

Mark Aaronson: There was no discussion of the pending problem of federal funds? The federal funds were going to be cut off for the AFDC Program unless California was in compliance. There had been several court rulings and there had been an administrative ruling by HEW, but it had been stayed for a period of several months.

Ronald Reagan: I can't recall any discussion about that. I really can't. I better check the files on all of this. I think, unless I'm badly mistaken, I think that was the meeting at which we heard for the first time the plans of a new federal program. And at the time, the way it was presented we were optimistic about it.

Mark Aaronson: I think that was the major purpose of the meeting, but if the two events are happening at the same time I was wondering if the other came up at all.

Ronald Reagan: That was coincidence. Yeah.

Mark Aaronson: Okay. What was the reasoning behind your support for the Community Work Experience Program and the various cutbacks as part of welfare reform in benefits for the working core? What did you see as the reasons behind those two aspects of welfare reform?

Ronald Reagan: Let me sum it up this way as to what I think was the whole finding of our task force and what was our philosophy. First of all, with everyone seeing there must be some whole new approach to welfare, my own interpretation literally went back to all right, what is the basis of welfare and why was it passed and why do we have welfare. And I found nothing wrong with the basic philosophy. That is that you've got two groups of people. You got one group that is permanently going to be dependent on you unless you throw them out in the street to die. Those are the disabled or the aged and so forth. All right. Do for those as much as you possibly can. Hopefully, afford even some of the luxuries that make life worth living for those people.

The second group you have to consider temporary. These are the people who, through some reason, whether it's lack of motivation, lack of training, whatever it might be, are unable to maintain themselves out in the competitive labor market. Now, the original concept of welfare, borne out of The Depression, was that this was temporary, that these were people that were temporarily unable to take care of themselves. You were going to take care of them and you were going to try to help solve their problem and make them self-sufficient, self-sustaining.

Now, the Work Project thing—oh, first of all, on the part-time, the people who had some outside income, part-time working or whatever it was and not enough so that we augmented it with welfare. Under the regulations that were

designed to protect the sensitivity of welfare recipients, we were told that we had to accept their word for their eligibility. We could not check on them in any way. Now, a government recognizes the right to check on you and me or anyone else whether we paid our taxes or not. They don't take our word for what our income was. They check with our employer and match it against it. We asked for that same right.

What we discovered mainly was no one in the United States knew how many people were on welfare, no one. They only knew how many checks they were sending out and we had reason to believe that there were many people drawing it. We found a county, for example, that had 194 full-time county employees, who were also drawing welfare. We didn't think this was what welfare was set out to do. So we got, as part of our reforms, the right to check, and we found, in checking, the first 10,000 names we ran through we found 41% of them had actually misstated their outside income and the adjustments were made on the basis of misstatement of fact.

Now, the matter of the Community Work Project was we believed also that welfare had come up in size to such a place that if you add to welfare the no necessity to work for it, you have made it much more attractive than employment that might be available. So thinking back to the WPA, which was not, as so many people remembered as a boondoggle. WPA was very practical. We said why should not government get useful services performed that it would have performed if it had the manpower and the resources. But let us say we have the manpower and the resources: These are the able-bodied, welfare recipients being paid from public funds. And so we had to fight like hell to get HEW in Washington under Elliot Richardson to give us a waiver. And they would not give it to us statewide. They specified only thirty-five counties, and we had to negotiate that. It was like bargaining with them and they

wouldn't let us have such big counties as Los Angeles.

And our experiment was that, number one, the communities would have to submit to us projects that were meaningful, that had some reason for doing. We weren't just going to go for telling them they had to go and rake leaves and then un-rake them again or dig holes and fill them up. Useful projects—monitors in school corridors and playgrounds, crossing guards—I can't think of all of them, but legitimate projects. Then these able bodied were going to receive an order in these counties to report, and they only had to work eighty hours a month, half-time, so there was no fear that their grant might amount to less than minimum wage or something. And also, because we wanted to allow time, if their problem was job training or job seeking, time for that. The rest of the time was to be spent in either job training or looking for a job.

Then we assigned personnel to this project that we called Job Agents, formerly caseworkers, but now Job Agents, whose whole job was to find employment for these people. And what really happened was we never did have more than a few thousand people at a time in the Work Projects because these Job Agents were so successful once we got them reporting for work and a chance to see them, and they themselves now were motivated because they were going to have to work anyway. But in one year we funneled 57,000 welfare recipients through that program into private enterprise jobs, and this was how the program worked.

Now, some of the legislators, who objected to it and called it slave labor, they discovered only, you know, 3,000 people or something in the Work Projects and they said it's a failure. They stopped short of seeing how many were passing on through the program and getting jobs.

They also never paid any attention to the thousands and thousands of welfare recipients, who just disappeared and never asked for another welfare check. In other words, these had to be people who were cheating and once they knew they had to report for a job, they couldn't, because they were cheating, and they just disappeared and we've never heard from them again. So we had a double break there.

Mark Aaronson: Were you worried that some of the cutbacks on the benefits to the working poor would result in a disincentive to work and that if they didn't find a job there would be some circumstances given the pyramiding of welfare state benefits, they'd be better off not working. For example, there was proposed a 150% limitation in terms of standard of need for the amount of grant.

Ronald Reagan: No, we weren't. What we think—and I still don't think we have been successful in this regard—I don't think anyone in the country has—we've come closer than anyone with our reforms. HEW in Washington had its objectives rejected. Our own legislature, which held out for five months, as you know, and wouldn't even let me present the reforms to them in a joint session. The compromises we had to make kept us from this fact that one of our problems is that welfare with all of these regulations, with the additional goodies that were added on had simply become more attractive than employment.

There was no incentive to get a job. We found such things, for example, in the regulations: Here is, let's say, a woman with children on the Aid for Dependent Children program is getting $335 a month grant. Now she gets a job in an office at $550 a month. Every citizen, I'm sure, would say well, automatically, no more welfare, but the regulations had grown to the point that she could wind up still collecting her full welfare, which

also made her eligible for food stamps and for Medicaid.

Now, here's a woman working in an office and her income isn't $550. Her income is $885 a month. She's got—because of the manner in which they said, well, for eligibility, out of your $550 she can buy a new car and the car payments are considered transportation to work.

Mark Aaronson: I think there are always those kinds of examples. But did you have any sense how prevalent they were? You always have those kind of, you know, extreme cases.

Ronald Reagan: Yeah. I just gave you 194 in county employees.

But, what happened was now what happens to the other gals in the office, who see her much better off than themselves, and they're making $550. Now, they never were on welfare. They can't get on welfare while they're working. So suddenly, when the job market was good, the gal would say well, why don't you talk to my caseworker. And a caseworker—and there were those who would do this—would say to the gals, "Well, you quit your job and I can get you on welfare." Now, under the same terms, she comes back to work to the same job, gets her job back again, and now she's making more than $800 a month.

People thought that we were just picking out horror stories. *The Examiner* thought that in San Francisco. *The Examiner* sent a reporter out to see whether we were telling the truth, and they sent him out to get on welfare. He went out one day and came back and wrote his story. He had gotten on welfare four times, under four different names in the same office on the same day, and *The Examiner* joined our crusade. Then, I must say, they followed up and they found all sorts of things that they dug up.

Mark Aaronson: Can I ask one last question?

Third Person: Yes. I was just going to say we—

Mark Aaronson: Okay. And that is what do you regard as the role of the courts in reviewing welfare policies and practices of state government?

Ronald Reagan: Well, I think that all too much the courts have been in the same—have had the same attitude. There are too many of them that have had the same attitude there that they have had with regard to crime itself in the permissiveness and the leniency. Can I give an example? It just happened not too far from here and not too long ago.

Two men and their families moved here from Dallas, Texas. They had been welders down there. They decided they wanted to live in California. They worked for the same company there. They came up, and they were neighbors. They lived in the same neighborhood here. They couldn't get welding jobs here so they applied for welfare.

Well, under our new system of checking and our reforms, we checked with their employer and he said, "Not only are their jobs still open," but he said, "I have openings for forty more welders." Now, here are two men in California applying for welfare, trained welders, and there's a man in Dallas, Texas, where they voluntarily came from, who is looking for forty-two welders like themselves. So we denied them welfare. They took the case to court. They sued us. And a judge ruled that to not give them welfare interfered with their constitutional right to travel and live where they wanted to live.

Now, it's very precious that you and I have the right to vote with our feet, to move across the state line, to live wherever in this country we want to live. But I'll be damned if we have a right to live there knowing that the only way we can

subsist if we decide to live in that place is on the largess of our fellow citizens.

So I went to one of our lawyers after that case and I said, "Look, I want to ask you—give you a hypothetic." I said, "In a few months I'll no longer be Governor." I said, "My main occupation was motion picture actor. So, when I'm no longer Governor I can be an unemployed motion picture actor." I said, "Suppose I decide that I want to go back and live in the small town where I grew up, in Dixon, Illinois. Now, they don't make movies in Dixon. There are no jobs for movie actors, but under his decision am I eligible to go back to my hometown and say I am an unemployed motion picture actor and apply for welfare and they have to give it to me?"

And he said, "That's exactly what the decision meant."

Now, we lost that case. I claim that the judge was wrong—that this is a wrong interpretation of the Constitution. Any common sense or reason says to you that you can't say to the people of the United States you can just go out and search for a place that cannot possibly provide you employment and then move there and stop working for the rest of your life and your neighbors take care of you. But this is what a judge really ruled.

Mark Aaronson: Is there any evidence that you found that people, in fact, systematically do move with that kind of consideration in mind?

Ronald Reagan: Well, whether they—oh, I don't think that they knew they couldn't get jobs as welders. I will give them that. I'm quite sure they were sure that they could come to California and they would have money and they wanted to go to work here. But instead of when they couldn't get work here, instead of doing what citizens have always done in the past and moving back and getting their old

jobs back, they applied for welfare. And now, a judge has said you can do that.

What we did find was there's no question that California had a chalk mark on its door. Sixteen percent of the people in the United States drawing welfare were getting it in California. And we knew people that came here had relatives on welfare. They left particularly some of the rural states where welfare was not as generous as it was here. We also know that with the reforms there was a letting up of that kind of traffic, because suddenly the word was out.

I could tell you a humorous one here that one of my own cabinet members, who owns a farm in Oregon came to me and showed me a letter written by his foreman. The foreman was giving him all the news. He sold seventeen calves and he bought a load of alfalfa and he'd done this and that. His P.S. at the bottom of the letter was, he said, "I was thinking of quitting the job and coming to California and getting on welfare," but he says, "I heard your Governor has fixed it up so we can't do that. Must be a mean old bastard." I was very proud of that.

Third Person: Excuse me. We're going to have to stop you.

After the tape was turned off, Governor Reagan continued to speak for about two minutes on his welfare reform proposals. What he wanted to emphasize was that his proposals had raised substantially by some 43% to 46% the benefits received by those whom he called the neediest. That a major effort on his part was to redistribute the kind of welfare benefits that California was giving out so that those who were not so in need would no longer be receiving benefits, and those who were the most needy would be getting higher benefits than they did before, particularly since these previous benefits were totally inadequate given the kinds of cost circumstances that exist in the United States.

This is the standard emphasis that he continually made throughout about his welfare reform program. The distinction between the needy and the non-needy is never one that is specifically clarified, and I did not have time in this interview to specifically pursue that subject.

Now I will turn to some general comments about the interview itself. Governor Reagan was about twenty minutes late. He had been tied up in Walnut Creek. When he arrived, I was already in the office of the Rotary Club. He immediately shook my hand and sat down at a table across from me, and we began our questioning. At all times he was attentive to the kinds of questions that I was asking. He looked at me directly. He spoke in an easy conversational style with great charm and at times humor.

My sense was that for the most part he was providing answers that he had given on other occasions. There were, however, specific questions, which I did ask that did require him to contemplate his answers, and it seemed to me that he was making an effort to recall in his own mind specific events and circumstances. Although he was being careful in terms of the amount of information he was revealing, I did not get a sense that he was giving me a response that in any way was not related to how he specifically felt about the subject matter.

It was interesting that in granting this interview to me he delayed making his appearance at a Rotary Club convention that was to follow the interview. He also avoided some polite formalities beforehand with members of the Rotary Club and other civic association types in the City of Oakland. There also were considerable demands being made, as I understand them, from both local newspapers and local television stations. Nonetheless, for some reason, a reason that I have no way of quite knowing, he felt that it was important that he speak to me and that I was very definitely firmly scheduled in his rather rigorous schedule. The individual that arranged this was Peter Hannaford, someone I had not met before. At the end, I thanked him very much for arranging this opportunity.

AUTHOR BIOGRAPHY

Mark Aaronson received his A.B. (1965), M.A. (1966), and Ph.D. (1975) in political science from the University of California, Berkeley. He took a leave of absence from the Ph.D. program to attend the University of Chicago Law School, from which he received a J.D. in 1969. At Berkeley, he was active in the civil rights, free speech, and anti-Vietnam War movements. At Chicago, he headed for two years the Law School's chapter of the national Law Students Civil Rights Research Council, the main on-campus progressive student activist organization. In summer 1968, he and two other law students established and oversaw the law office that provided free legal assistance to demonstrators at the Democratic National Convention in Chicago. He also participated in the *University of Chicago Law Review*'s groundbreaking empirical study of the Chicago legal and judicial system's response to the mass arrests of mainly African Americans in civil disturbances following the assassination of Martin Luther King, Jr.

Upon graduation from law school, Aaronson was for two years a Reginald Heber Smith Community Lawyer Fellow, first at the Mandel Legal Aid Clinic at the University of Chicago Law School and then at Hartford Neighborhood Legal Services in Connecticut. He provided representation to individual clients and worked on policy advocacy matters involving police practices, student rights, and public assistance.

In 1971, he returned to Berkeley to complete his Ph.D. studies. He was a graduate fellow at the Center on the Study of Law and Society and the recipient of National Institute of Mental Health fellowships in law and society. After receiving his Ph.D., he taught in the Political Science Departments at the City College of New York and at the Davis and Berkeley campuses of the University of California.

From mid-1977 until mid-1990, Aaronson was the Executive Director of the San Francisco Lawyers' Committee for Urban Affairs (now the Lawyers' Committee for Civil Rights of the San Francisco Bay Area). During his tenure, the organization—which combines the resources of a fulltime legal staff and large numbers of pro bono volunteers—provided individual and group representation on civil rights, antipoverty, and immigrant and refugee issues.

At the Lawyers' Committee, Aaronson participated in California's Statewide Welfare Task Force coordinated by the Western Center on Law and Poverty. As part of a comprehensive campaign challenging changes in federal law promoted by Ronald Reagan after he became President, he was lead counsel in a major AFDC case that raised two distinct sets of issues. The first had to do with the intelligibility and adequacy of due process notices received by recipients informing them of cutbacks in their benefits. Eventually, this matter was favorably settled

resulting in California's implementation of a new system, still in use, for reviewing such notices prior to their issuance. The second set of issues involved changes in methods for calculating AFDC grants for households with working recipients. After obtaining injunctive relief in a district court and a favorable decision from the Ninth Circuit Court of Appeals, Aaronson argued the case before the Supreme Court, which in a unanimous opinion reversed the lower court's decision.[477]

During his years with the Lawyers' Committee, Aaronson also worked closely with grassroots organizations in the Tenderloin neighborhood of San Francisco on land use issues. The Tenderloin is a low-income neighborhood abutting San Francisco's Civic Center, high-end Union Square retail district, and upscale Nob Hill residential area. Working collaboratively with Tenderloin advocacy and planning groups, he participated in a series of actions to forestall the gentrification of the Tenderloin, which included negotiating and drafting an early version of a community benefits agreement with the developers of several luxury hotel sites.

After leaving the Lawyers' Committee and pursuing his interest in land use policy, Aaronson worked for the law firm of Adams and Broadwell (now Adams, Broadwell, Joseph, and Cardozo), which as part of a labor organizing strategy has a unique practice of representing mainly construction trade unions in actions supporting compliance with applicable environmental laws. For specific land use projects, the result is an unusual alliance between labor unions and pro-environmental groups.

In 1992, Aaronson joined the faculty at the University of California Hastings College of the Law, where he is presently a tenured professor of law. He was hired specifically to establish U.C. Hastings' in-house clinical program. He is the founding director of the Civil Justice Clinic ("CJC") and initially taught in its Individual Representation Clinic. U.C. Hastings is located on the fringes of San Francisco's Tenderloin. In 2000, at the request of Tenderloin neighborhood leaders, he started a Community Economic Development Clinic as part of the CJC's course offerings. Its principal focus is to provide nonlitigation assistance on policy and operational issues to nonprofit advocacy and social service organizations seeking to improve the quality of life of low-income Tenderloin residents.

Aaronson also teaches a course on Problem Solving and Professional Judgment in Practice. His scholarly writings are in the fields of social welfare policy, legal education, and legal professionalism.

He has been married to Marjorie Gelb for forty-three years. The great joys of their lives are their two daughters, two sons-in-law, and two granddaughters.

---

477. *See* Heckler v. Turner, 470 U.S. 184 (1985).

ACKNOWLEDGMENTS

This Book would not have been possible but for Ralph Santiago Abascal. At the start of my empirical research in 1973, he was a key participant in the unfolding events that were my focus of attention and my main field contact. Ever since, he has been my model of how a lawyer should go about representing the poor on policy matters, both when I act as a lawyer and when I teach about lawyering.

As a member of the U.C. Hastings Board of Directors (1981–1993), Ralph also played an important role in the legislative lobbying that resulted in California State funding to expand the College's clinical education curriculum, which led a few years later to my being hired to establish the in-house clinical program. The actual proposal was written by Bea Moulton, Ralph's wife and now a retired U.C. Hastings faculty member, who is one of the founders of the modern clinical legal education movement. Bea's knowledge and support have been invaluable as I re-crafted my doctoral dissertation to focus on what it means to represent the poor and Ralph's specific background and contributions.

U.C. Hastings has been my academic and community lawyering home for the past twenty years. I have greatly benefitted from the intellectual and supportive comradeship of U.C. Hastings faculty and staff colleagues, particularly within the Civil Justice Clinic, and from having had the privilege to work with wonderfully engaged students. I am especially appreciative that as a tribute to Ralph and with financial support from The Lawrence M. Nagin '65 Faculty Enrichment Fund and the Scholarly Publications Department, U.C. Hastings sponsored a conference in his memory on March 16, 2012, a day short of fifteen years since his death. The conference was entitled Representing the Vulnerable and Remembering Ralph Santiago Abascal.

A near final version of my manuscript served as an organizing document for the conference. More than 150 persons attended. The warm welcoming remarks were by U.C. Hastings Chancellor and Dean Frank Wu. The first panel was specifically on my work. The moderator was Academic Dean Shauna Marshall (U.C. Hastings College of the Law); Professor Sameer Ashar (U.C. Irvine School of Law) provided a summation of the manuscript's ideas and narrative; and the commentators were Professor Gary Blasi (UCLA School of Law), Professor Martha Davis (Northeastern University School of Law), and Professor Bill Hing (USF School of Law). The featured luncheon speaker was Professor Gerald López (UCLA School of Law). The early afternoon panel was on Teaching and Practicing 21st Century Social Justice Lawyering. The moderator was Professor Reuel Schiller (U.C. Hastings College of the Law); and the panelists were Professor Scott

Cummings (UCLA School of Law), Center for Social Justice and Public Service Assistant Director Deborah Moss-West (Santa Clara University School of Law), Professor Ascanio Piomelli (U.C. Hastings College of the Law), Professor Ann Southworth (U.C. Irvine School of Law), and Professor Stephanie Wildman (Santa Clara University School of Law). The final panel session was on Remembering Ralph Abascal. The moderator was Peter Reid, the founding Executive Director of the Stanford Community Law Office and former San Mateo County Legal Aid Executive Director. The panelists were Stephen Berzon, senior partner at Altshuler Berzon; the Honorable John Burton, Chairman of the California Democratic Party and former California legislator and U.S. Congressman; Professor Cruz Reynoso (U.C. Davis School of Law), who is also a former California Supreme Court Associate Justice and a former CRLA Executive Director; and Professor Florence Roisman (Indiana University Robert H. McKinney School of Law). I am profoundly grateful for the participation of all the panelists, their thoughtful comments on my manuscript and social justice lawyering today, and their fond, moving, and at times humorous recollections of Ralph and his down-to-earth character and extraordinary work as a preeminent lawyer for the poor.

I presented at the UCLA/University of London Sixth International Clinical Conference (Lake Arrowhead, CA, October 27–30, 2005) an earlier version of the narrative regarding the multi-pronged actions taken by Ralph and other legal service lawyers and activists during the early 1970s to counter California welfare reform proposals as initiated by Governor Ronald Reagan. Five years later, at the UCLA/University of London Seventh International Clinical Conference (Lake Arrowhead, CA, November 4–7, 2010), I delivered a paper raising the conceptual concerns now addressed in Parts I and III of this Book. I truly appreciated the rich exchanges that took place at those lively, scholarly conferences and the helpful responses from other participants to my presentations. I also want to express my gratitude to the conference organizers for inviting me to participate.

In updating the original research and drafting this manuscript, I was fortunate to have the assistance and support of several hardworking compatriots. Professors Ascanio Piomelli (U.C. Hastings) and Paul Tremblay (Boston College Law School) carefully read the first Part. I then used their respective written and oral comments to clarify its analytic assumptions and direction. Looking back on events that had taken place more than three decades ago, Kevin Aslanian, Dan Brunner, and Jay-Allen Eisen provided important additional factual details as well as particularly illuminating perspectives. I also had the help of two superb student research assistants, Allison Zamani (J.D. 2010) and Jennifer Kunz (J.D. 2012), both of whom were exceptionally diligent,

resourceful, and thoughtful. In addition, Grace Takatani from the U.C. Hastings Law Library staff went out of her way to track down and confirm newspaper citations. Lastly, I am especially indebted to Tom McCarthy, director of the U.C. Hastings Scholarly Publications, who personally promoted, reviewed, and assisted in editing the manuscript, and Editor-in-Chief Dane Barca and Executive Production Editor Stephanie Alessi along with the student editors of the *Hastings Law Journal.*

This work began as my doctoral dissertation in political science at the University of California at Berkeley. I am even more appreciative now than I was back then for the openness and candor of all those whom I interviewed. Any mistakes in historical reporting are mine. Though I have changed the analytic focus of the dissertation, I still owe much in my approach and critical thinking to the members of my doctoral committee: William K. (Sandy) Muir, Jr. (Political Science Department), Philippe Nonet (Center for the Study of Law and Society), and especially the late Michael Paul Rogin (Political Science Department).

I dedicate this Book, as I did the dissertation, to my best friend since law school, the love of my life, Margie Gelb.

* * *

HASTINGS LAW JOURNAL

UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF THE LAW

ARTICLES

NOTES

VOL. 64, NO. 4 MAY 2013

HASTINGS LAW JOURNAL

VOLUME 64 2012–2013

BOARD OF EDITORS

EDITORIAL STAFF

FACULTY ADVISORS

PUBLICATION AND SUBSCRIPTION INFORMATION

Published in December, January, March, April, June and August (six times per volume year) by the students of the University of California, Hastings College of the Law

The *Hastings Law Journal* (ISSN 0017-8322) is published by the University of California, Hastings College of the Law, 200 McAllister Street, San Francisco, CA 94102-4978. Periodicals Postage Paid at San Francisco, California, and at additional mailing offices. Mailing Address: 200 McAllister Street, San Francisco, CA 94102-4978. Editorial offices located at 100 McAllister Street, 23rd Floor. Telephone (415) 581-8960. Fax (415) 581-8992. E-mail hlj@hastingslawjournal.org. Website: http://www.uchastings.edu/hlj/index.html. POSTMASTER: Send address changes to O'Brien Center for Scholarly Publications, 200 McAllister Street, San Francisco, California 94102-4978.

Subscription price is $48.00 per year (US$58.00 foreign). Special rates available to subscription agencies. If notice of termination is not received before the expiration of a subscription, it will be renewed automatically. Domestic claims for nonreceipt of issues should be made in writing within 90 days of the month of publication, overseas claims within 120 days of publication. Thereafter, the single issue rate will be charged for replacement. Submit claims to scholarp@uchastings.edu.

Single issues of the current and previous volumes and symposium issues are available from the *Hastings Law Journal* at $33.00 per copy (US$38.00 foreign). Back issues for Volumes 1–62 of the *Hastings Law Journal* are available and reprints of single articles are available from the O'Brien Center for Scholarly Publications office; contact scholarp@uchastings.edu for further information. The *Journal* is also on file with University Microfilms International (UMI), 300 N. Zeeb Road, Ann Arbor, Michigan 48106, (734) 761-4700.

Citations generally conform to *The Bluebook* (19th ed., 2010), copyright by the *Columbia, Harvard,* and *University of Pennsylvania Law Reviews* and the *Yale Law Journal.*

The *Journal* gratefully acknowledges the financial support of the Hastings 1066 Foundation.

The *Journal* is indexed in *Contents of Current Legal Periodicals, Current Law Index, Index to Legal Periodicals, Legal Resources Index, Westlaw,* and *LEXIS.*

The *Journal* gladly considers unsolicited manuscripts for publication. The *Journal* also welcomes both formal and informal responses to articles appearing in the *Journal* and will consider such responses for publication. Articles must be single-spaced, printed double-sided on 8.5" by 11" paper, with footnotes in the body of the manuscript. Citation must conform to *The Bluebook* (19th ed., 2010). The *Journal* regrets that it can only return those manuscripts for which the author provides a pre-addressed, postage-paid envelope.

HASTINGS COLLEGE OF THE LAW

DIRECTORS

BRUCE L. SIMON, A.B., J.D., Chair ..... *Hillsborough*
DONALD BRADLEY, B.A., J.D., LL.M. ..... *Pleasanton*
TINA COMBS, B.A., J.D. ..... *Oakland*
MAUREEN E. CORCORAN, B.A., M.A., J.D. ..... *San Francisco*
MARCI DRAGUN, B.A., J.D. ..... *Burlingame*
CARIN T. FUJISAKI, B.A., J.D. ..... *Walnut Creek*
CLAES H. LEWENHAUPT, J.D.* ..... *Fort Irwin*
BRIAN D. MONAGHAN, B.S., J.D. ..... *San Diego*
CARL W. "CHIP" ROBERTSON, B.A., M.B.A., J.D. ..... *Los Angeles*
SANDI THOMPSON, B.A., J.D. ..... *Woodside*

**Great-great-grandson of Hon. Serranus Clinton Hastings, Founder of the College*

DIRECTORS EMERITI

MARVIN R. BAXTER, B.A., J.D. ..... *Fresno*
WILLIAM R. CHANNELL, B.A., J.D., Retired Justice ..... *Lafayette*
JOSEPH W. COTCHETT, B.S., LL.B. ..... *Hillsborough*
LOIS HAIGHT HERRINGTON, A.B., J.D. ..... *Walnut Creek*
JOHN T. KNOX, A.B., J.D. ..... *Richmond*
JAMES E. MAHONEY, B.A., J.D. ..... *Los Angeles*
CHARLENE PADOVANI MITCHELL, B.A., M.A., J.D. ..... *San Francisco*
JOHN A. SPROUL, A.B., J.D. ..... *El Cerrito*

ADMINISTRATION AND INSTRUCTION

FRANK H. WU ..... *Chancellor and Dean*
SHAUNA I. MARSHALL, A.B., J.D., J.S.M. ..... *Academic Dean and Professor of Law*
C. KEITH WINGATE, B.A., J.D. ..... *Associate Academic Dean and Professor of Law*
EVAN TSEN LEE, A.B., J.D. ..... *Associate Academic Dean for Research and Professor of Law*
JOEL PAUL, B.A., M.A.L.D., J.D. ..... *Associate Dean for International and Graduate Programs and Professor of Law*
AMY SOLLINS ..... *Senior Assistant Dean for Institutional Advancement*
GREGORY CANADA, M.A. ..... *Assistant Dean of Admissions*
MICHAEL TREVINO, A.B., M.ED., J.D. ..... *Assistant Dean of Communications and Public Affairs*
GINA BARNETT, B.A., M.A. ..... *Director of Student Records*
RUPA BHANDARI, J.D. ..... *Director of Student Services*
LINDA BISESI, B.S. ..... *Director of Financial Aid*
ROBIN FELDMAN, B.A., J.D. ..... *Director of the Law and Bioscience Project and Professor of Law*
MIYE GOISHI, B.A., J.D. ..... *Director of the Civil Justice Clinic and Clinical Professor of Law*
MARIE-ANN HAIRSTON ..... *Executive Director of Human Resources*
JAN JEMISON, B.S., M.B.A., J.D. ..... *Director of the Legal Education Opportunity Program and Adjunct Assistant Professor of Law*
DAVID J. JUNG, A.B., J.D. ..... *Director of the Center for State and Local Government Law Director of the Public Law Research Institute, and Professor of Law*
GRANDE LUM, B.A., J.D. ..... *Director of the Center for Negotiation and Dispute Resolution and Clinical Professor of Law*
LISA NOSHAY PETRO, B.P.S., J.D. ..... *Director of the Disability Resource Program*
KAREN B. MUSALO, B.A., J.D. ..... *Director of the Center for Gender and Refugee Studies, and Director of the Refugee and Human Rights Clinic, and Clinical Professor of Law*
ERIC NOBLE ..... *Director of Information Technology*
SHINO NOMIYA, B.A. ..... *Executive Director, Alumni Center*
BILL PALMINI, B.A., M.P.A. ..... *Director of Safety and Security*
JENNI PARRISH, B.A., M.L.S., J.D. ..... *Director of the Law Library and Professor of Law*
DAVID SEWARD, B.A., M.B.A. ..... *Chief Financial Officer*
NANCY STUART, B.S., J.D. ..... *Director of Externships and Pro Bono Programs and Clinical Professor of Law*
LYNNETTE TETI, B.S. ..... *Director of Annual Fund, Alumni Center*
DEBORAH TRAN, B.A., M.A. ..... *Controller*
ELISE K. TRAYNUM, B.A., J.D. ..... *General Counsel and Secretary of the Board of Directors*
JOAN C. WILLIAMS, B.A., M.C.P., J.D. ..... *Distinguished Professor of Law and Director of the Center for Worklife Law*
TONI YOUNG, B.A., J.D. ..... *Director of the Moot Court and Legal Writing and Research Program*
LAURIE ZIMET, B.A., J.D. ..... *Director of the Academic Support Program*
SARI ZIMMERMAN, B.S., J.D. ..... *Director of Career Services*

PROFESSORS EMERITI OF LAW

GAIL BOREMAN BIRD, A.B., J.D. ..... *Professor of Law, Emeritus*
RICHARD B. CUNNINGHAM, B.S., J.D., LL.M. ..... *Professor of Law, Emeritus*
JOSEPH GRODIN, B.A., J.D., PH.D. ..... *Professor of Law, Emeritus*
WILLIAM T. HUTTON, A.B., J.D., LL.M. ..... *Professor of Law, Emeritus*
MARY KAY KANE, A.B., J.D. ..... *Professor of Law, Emeritus*
STEPHEN A. LIND, A.B., J.D., LL.M. ..... *Professor of Law, Emeritus*
BEATRICE MOULTON, J.D., LL.M. ..... *Professor of Law, Emeritus*
LEO J. O'BRIEN, A.B., J.D., LL.M. ..... *Professor of Law, Emeritus*
STEPHEN SCHWARZ, A.B., J.D. ..... *Professor of Law, Emeritus*
HON. WILLIAM W. SCHWARZER, A.B., LL.B. ..... *Professor of Law, Emeritus*
GORDON VAN KESSEL, A.B., LL.B. ..... *Professor of Law, Emeritus*

PROFESSORS OF LAW

MARK N. AARONSON, A.B., M.A., J.D., PH.D. ..... *Professor of Law*

HADAR AVIRAM, LL.B., M.A., J.D. ..... *Associate Professor of Law*
MARGRETH BARRETT, B.A., M.A., J.D. ..... *Professor of Law*
GEORGE E. BISHARAT, A.B., M.A., PH.D., J.D. ..... *Professor of Law*
KATE BLOCH, B.A., M.A., J.D. ..... *Professor of Law*
RICHARD A. BOSWELL, B.A., J.D. ..... *Professor of Law*
STEPHANIE BORNSTEIN, A.B., J.D. ..... *Visiting Assistant Professor of Law*
N. DARSHAN BRACH, J.D. ..... *Lecturer in Law*
ABRAHAM CABLE, B.A., J.D. ..... *Associate Professor of Law*
JO CARRILLO, B.A., J.D., J.S.D. ..... *Professor of Law*
MARSHA N. COHEN, B.A., J.D. ..... *Hon. Raymond L. Sullivan Professor of Law*
JOHN CRAWFORD, B.A., M.A., J.D. ..... *Associate Professor of Law*
BEN DEPOORTER, M.A., J.D., PH.D., J.S.D., LL.M. ..... *Professor of Law*
JOHN L. DIAMOND, B.A., J.D. ..... *Professor of Law*
WILLIAM S. DODGE, B.A., J.D. ..... *Professor of Law*
CHRISTOPHER ELMENDORF, B.A., J.D. ..... *Visiting Professor of Law*
DAVID L. FAIGMAN, B.A., M.A., J.D. ..... *John F. Digardi Distinguished Professor of Law*
LISA FAIGMAN, B.S., J.D. ..... *Lecturer in Law*
ROBIN FELDMAN, B.A., J.D. ..... *Director of the Law and Bioscience Project and Professor of Law*
HEATHER FIELD, B.S., J.D. ..... *Professor of Law*
CLARK FRESHMAN, B.A., M.A., J.D. ..... *Professor of Law*
MIYE GOISHI, B.A., J.D. ..... *Clinical Professor of Law and Director of the Civil Justice Clinic*
BRIAN E. GRAY, B.A., J.D. ..... *Professor of Law*
KEITH J. HAND, B.A., M.A., J.D. ..... *Associate Professor of Law*
GEOFFREY C. HAZARD, JR., B.A., LL.B. ..... *Thomas E. Miller Distinguished Professor of Law*
ELIZABETH HILLMAN, B.S.E.E., J.D., PH.D. ..... *Professor of Law*
CAROL IZUMI ..... *Clinical Professor of Law*
DAVID J. JUNG, A.B., J.D. ..... *Director of the Center for State and Local Government Law*
Director of the Public Law Research Institute, and Professor of Law
PETER KEANE ..... *Visiting Professor of Law*
CHIMENE KEITNER, A.B., D. PHIL., J.D. ..... *Associate Professor of Law*
JAIME S. KING, B.A., J.D., Ph.D. ..... *Associate Professor of Law*
CHARLES L. KNAPP, B.A., J.D. ..... *Joseph W. Cotchett Distinguished Professor of Law*
FREDERICK LAMBERT, A.B., J.D. ..... *Professor of Law*
EUMI K. LEE, B.A., J.D. ..... *Associate Clinical Professor of Law*
EVAN TSEN LEE, A.B., J.D. ..... *Associate Academic Dean for Research and Professor of Law*
JEFFREY A. LEFSTIN, Sc.B., J.D., Ph.D. ..... *Professor of Law*
JOHN LESHY, A.B., J.D. ..... *The Harry D. Sunderland Distinguished Professor of Real Property Law*
DAVID I. LEVINE, A.B., J.D. ..... *Professor of Law*
RORY K. LITTLE, B.A., J.D. ..... *Professor of Law*
GRANDE LUM, B.A., J.D. ..... *Director of the Center for Negotiation and Dispute Resolution and Clinical Professor of Law*
JOHN MALONE, B.S., LL.B. ..... *Professor of Law*
CHRISTIAN E. MAMMEN, J.D. ..... *Acting Assistant Dean for International and Graduate Programs and Visiting Professor of Law*
ANN MARIE MARCIARILLE, B.A., J.D. ..... *Visiting Professor of Law*
RICHARD MARCUS, B.A., J.D. ..... *Horace O. Coil ('57) Chair in Litigation*
SHAUNA I. MARSHALL, A.B., J.D., J.S.M. ..... *Academic Dean and Professor of Law*
LEO P. MARTINEZ, B.S., M.S., J.D. ..... *Professor of Law*
CALVIN R. MASSEY, A.B., M.B.A., J.D. ..... *Professor of Law*
UGO MATTEI, J.D., LL.M. ..... *Alfred and Hanna Fromm Chair in International and Comparative Law*
JAMES R. MCCALL, B.A., J.D. ..... *Hon. Raymond Sullivan Professor of Law*
SETSUO MIYAZAWA, M.A., M. PHIL., PH.D., LL.B., LL.M., J.S.D. ..... *Visiting Professor of Law*
SUSAN C. MORSE, A.B., J.D. ..... *Associate Professor of Law*
STEFANO MOSCATO, B.A., J.D. ..... *Visiting Professor of Law*
KAREN B. MUSALO, B.A., J.D. ..... *Director of the Center for Gender and Refugee Studies, and Director of the Refugee and Human Rights Clinic, and Clinical Professor of Law*
MELISSA LEE NELKEN, B.A., M.A., J.D. ..... *Professor of Law*
OSAGIE K. OBASOGIE, B.A., J.D., PH.D ..... *Associate Professor of Law*
ROGER C. PARK, A.B., J.D. ..... *Distinguished Professor of Law*
JENNI PARRISH, B.A., M.L.S., J.D. ..... *Director of the Law Library and Professor of Law*
JOEL PAUL, B.A., M.A.L.D., J.D. ..... *Associate Dean for International and Graduate Programs and Professor of Law*
ASCANIO PIOMELLI, A.B., J.D. ..... *Clinical Professor of Law*
ALICIA PLERHOPLES, M.P.A., J.D. ..... *Visiting Professor of Law*
HARRY G. PRINCE, B.A., J.D. ..... *Professor of Law*
RADHIKA RAO, A.B., J.D. ..... *Professor of Law*
AARON RAPPAPORT, B.A., J.D. ..... *Professor of Law*
DORIT RUBENSTEIN REISS, LL.B., PH.D. ..... *Associate Professor of Law*
NAOMI ROHT-ARRIAZA, B.A., J.D., M.P.P. ..... *Professor of Law*
MICHAEL B. SALERNO, J.D. ..... *Clinical Professor of Law and Associate Director of the Center for State and Local Government Law*
REUEL SCHILLER, B.A., J.D., PH.D. ..... *Professor of Law*
LOIS W. SCHWARTZ, B.A., M.A., M.L.S., J.D. ..... *Lecturer in Law*
DARIEN SHANSKE, B.A., M.A., PH.D., J.D. ..... *Associate Professor of Law*
GAIL SILVERSTEIN, B.A., J.D. ..... *Associate Clinical Professor of Law*
JAMES SLOAN, LL.B., LL.M., PH.D. ..... *Visiting Professor of Law*
MAI LIHN SPENCER, B.A., J.D. ..... *Assistant Clinical Professor of Law*
NANCY STUART, B.S., J.D. ..... *Director of Externships and Pro Bono Programs and Clinical Professor of Law*
DAVID TAKACS, B.S., M.A., J.D., LL.M., PH.D. ..... *Associate Professor of Law*
ALLYN TAYLOR, B.A., J.D., LL.M., J.S.D. ..... *Visiting Assistant Professor of Law*
KEVIN H. TIERNEY, A.B., M.A., LL.B., LL.M. ..... *Professor of Law*
STEPHEN TOLLAFIELD, B.A., J.D. ..... *Assistant Director of Legal Writing and Research and Moot Court and Professor of Law*

MICHIEL L. VAN EMMERIK ..... *Visiting Professor of Law*
WILLIAM K.S. WANG, B.A., J.D. ..... *Professor of Law*
JOANNA K. WEINBERG, J.D., LL.M. ..... *Lecturer in Law*
D. KELLY WEISBERG, B.A., M.A., PH.D., J.D. ..... *Professor of Law*
LOIS WEITHORN, PH.D., J.D. ..... *Professor of Law*
JOAN C. WILLIAMS, B.A., M.C.P., J.D. ..... *Distinguished Professor of Law*
Director of the Center for Worklife Law
C. KEITH WINGATE, B.A., J.D. ..... *Associate Academic Dean and Professor of Law*
FRANK H. WU ..... *Chancellor and Dean*
MICHAEL ZAMPERINI, A.B., J.D. ..... *Visiting Professor of Law*
Richard Zitrin, A.B., J.D. ..... *Lecturer in Law*

ADJUNCT FACULTY

ARSHAD AHMED, J.D. ..... *Assistant Professor of Law*
GARY ALEXANDER, J.D. ..... *Assistant Professor of Law*
DENISE ALTER, J.D. ..... *Assistant Professor of Law*
DONALD AYOOB, A.B., J.D. ..... *Assistant Professor of Law*
ROY BARTLETT, J.D. ..... *Assistant Professor of Law*
MARK BAUDLER, J.D. ..... *Assistant Professor of Law*
BRANDON BAUM, B.A., J.D. ..... *Assistant Professor of Law*
MARSHA BERZON, J.D. ..... *Assistant Professor of Law*
CORY BIRNBERG, B.A., J.D. ..... *Assistant Professor of Law*
JAMES BIRKELUND, J.D. ..... *Assistant Professor of Law*
DANIEL BLANK, J.D. ..... *Assistant Professor of Law*
STEPHEN BONORRIS, J.D. ..... *Assistant Professor of Law*
LAWRENCE BOXER, B.A., J.D. ..... *Assistant Professor of Law*
HON. CHARLES BREYER, A.B., J.D. ..... *Assistant Professor of Law*
DANIEL BROWNSTONE, B.A., J.D. ..... *Assistant Professor of Law*
MICHAEL BRUNO, B.A., J.D. ..... *Assistant Professor of Law*
EMILY BURNS, J.D. ..... *Assistant Professor of Law*
KAREN CARRERA ..... *Assistant Professor of Law*
CARL CHAMBERLIN, A.B., J.D. ..... *Assistant Professor of Law*
ANDREW Y. S. CHENG, B.A., J.D. ..... *Assistant Professor of Law*
KARL CHRISTIANSEN, J.D. ..... *Assistant Professor of Law*
RICHARD COHEN, B.A., J.D. ..... *Assistant Professor of Law*
PAMELA COLE, J.D. ..... *Assistant Professor of Law*
MATTHEW COLES ..... *Assistant Professor of Law*
C. CHRIS COMPTON ..... *Assistant Professor of Law*
KRISTIN CORNUELLE, B.A., J.D. ..... *Assistant Professor of Law*
PAUL CORT, J.D. ..... *Assistant Professor of Law*
JAMES CREIGHTON, J.D. ..... *Assistant Professor of Law*
MARK D'ARGENIO, B.A., J.D. ..... *Assistant Professor of Law*
JOHN DEAN, J.D. ..... *Assistant Professor of Law*
ANN DIEM-PATTON ..... *Assistant Professor of Law*
TERRY KAY DIGGS, B.A., J.D. ..... *Assistant Professor of Law*
ROBERT DOBBINS, J.D., LL.M. ..... *Assistant Professor of Law*
MARY PAT DOOLEY, B.A., J.D. ..... *Assistant Professor of Law*
ALICE DUEKER, J.D. ..... *Assistant Professor of Law*
JENNIFER DUNN, J.D. ..... *Assistant Professor of Law*
DEREK ELETICH, J.D. ..... *Assistant Professor of Law*
JAMES B. ELLIS ..... *Assistant Professor of Law*
RANDALL S. FARRIMOND, B.S., M.S., J.D. ..... *Assistant Professor of Law*
TAMARA FISHER, B.A., J.D. ..... *Assistant Professor of Law*
JOHN FORD ..... *Assistant Professor of Law*
ROBERT FRIES ..... *Assistant Professor of Law*
MICHAEL GOWE ..... *Assistant Professor of Law*
JOSEPH GRATZ, J.D. ..... *Assistant Professor of Law*
CHARLES TAIT GRAVES, J.D. ..... *Assistant Professor of Law*
JONATHAN GROSS, J.D. ..... *Assistant Professor of Law*
PAUL GROSSMAN ..... *Assistant Professor of Law*
JAN GRUEN ..... *Assistant Professor of Law*
GEOFFREY A. HANSEN, B.A., J.D. ..... *Assistant Professor of Law*
HILARY HARDCASTLE, B.A., J.D., M.L.I.S. ..... *Assistant Professor of Law*
JAMES HEAD, B.A., J.D. ..... *Assistant Professor of Law*
CANDACE HEISLER, B.A., J.D. ..... *Assistant Professor of Law*
HOWARD HERMAN, A.B., J.D. ..... *Assistant Professor of Law*
JENNIFER HERNANDEZ ..... *Assistant Professor of Law*
DENNIS HIGA ..... *Assistant Professor of Law*
ANGELA HOLLOWELL-FUENTES ..... *Assistant Professor of Law*
SARAH HOOPER ..... *Assistant Professor of Law*
ROBERT HULSE, B.S., M.S., J.D. ..... *Assistant Professor of Law*
MATHEW HULT ..... *Assistant Professor of Law*
ABRAR HUSSAIN ..... *Assistant Professor of Law*
TERI JACKSON, B.A., J.D. ..... *Assistant Professor of Law*
PEEYUSH JAIN ..... *Assistant Professor of Law*
MARIA-ELENA JAMES, B.A., J.D. ..... *Assistant Professor of Law*
JULIA MEZHINSKY JAYNE, J.D. ..... *Assistant Professor of Law*
JAN JEMISON, B.S., M.B.A., J.D. ..... *Director of the Legal Education Opportunity Program and Adjunct Assistant Professor of Law*
STEPHEN JOHNSON, J.D. ..... *Assistant Professor of Law*
JEANNE JORGE-GROVE ..... *Assistant Professor of Law*

KENNETH KANN, B.A., J.D. ..... *Assistant Professor of Law*
ANNE KENNER, B.A., J.D. ..... *Assistant Professor of Law*
S. MICHAEL KERNAN, J.D. ..... *Assistant Professor of Law*
ARLENE KOSTANT, B.A., M.A., J.D. ..... *Assistant Professor of Law*
CLIFFORD T. LEE, J.D. ..... *Assistant Professor of Law*
JONATHAN U. LEE, J.D. ..... *Assistant Professor of Law*
CECILY MAK, J.D. ..... *Assistant Professor of Law*
BRIGID MARTIN, J.D. ..... *Assistant Professor of Law*
CHRISTOPHER MARTZ ..... *Assistant Professor of Law*
HON. KEVIN MCCARTHY, B.A., J.D. ..... *Assistant Professor of Law*
MARY MCLAIN, J.D. ..... *Assistant Professor of Law*
JASON MEEK, J.D. ..... *Assistant Professor of Law*
ALAN MELINCOE ..... *Assistant Professor of Law*
THERESA DRISCOLL MOORE, B.A., J.D. ..... *Assistant Professor of Law*
SADHANA D. NARAYAN ..... *Assistant Professor of Law*
JESSICA NOTINI, B.A., J.D. ..... *Assistant Professor of Law*
DANIELLE OCHS-TILLOTSON, B.A., J.D. ..... *Assistant Professor of Law*
MARJA-LIISA OVERBECK ..... *Assistant Professor of Law*
ROGER PATTON, B.S., J.D. ..... *Assistant Professor of Law*
TAMSEN PLUME ..... *Assistant Professor of Law*
DAVID PRIESS ..... *Assistant Professor of Law*
RACHEL PROFFITT ..... *Assistant Professor of Law*
SHEILA PURCELL, J.D. ..... *Assistant Professor of Law*
ERIC QUANDT ..... *Assistant Professor of Law*
MARTIN QUINN, B.A., J.D. ..... *Assistant Professor of Law*
JENNIFER A. REISCH, B.A., J.D. ..... *Assistant Professor of Law*
KEVIN ROMANO, J.D. ..... *Assistant Professor of Law*
MATTHEW ROSEN, J.D. ..... *Assistant Professor of Law*
KATIE ROSS ..... *Assistant Professor of Law*
DOUGLAS SAELTZER, J.D. ..... *Assistant Professor of Law*
ROBERT SAMMIS, B.A., J.D. ..... *Assistant Professor of Law*
JONATHAN SCHMIDT, J.D. ..... *Assistant Professor of Law*
JAMES SCHURZ, J.D. ..... *Assistant Professor of Law*
NINA SEGRE ..... *Assistant Professor of Law*
ERIC SIBBITT ..... *Assistant Professor of Law*
JONATHAN SOGLIN ..... *Assistant Professor of Law*
ROCHAEL SOPER ..... *Assistant Professor of Law*
LINDA SPATH ..... *Assistant Professor of Law*
MARK SPOLYAR ..... *Assistant Professor of Law*
JAMES SUTTON ..... *Assistant Professor of Law*
KIM SWAIN ..... *Assistant Professor of Law*
NICHOLAS TARG. ..... *Assistant Professor of Law*
SHEILA THOMAS ..... *Assistant Professor of Law*
RONALD TYLER, B.S., J.D. ..... *Assistant Professor of Law*
CLINTON WAASTED, J.D. ..... *Assistant Professor of Law*
BRUCE WAGMAN, B.S., J.D. ..... *Assistant Professor of Law*
JAMES WAGSTAFFE, B.A., J.D. ..... *Assistant Professor of Law*
CRAIG WALDMAN ..... *Assistant Professor of Law*
LISA WALKER ..... *Assistant Professor of Law*
JEFFREY WHITE ..... *Assistant Professor of Law*
THOMAS WILLGING ..... *Assistant Professor of Law*
JEFFREY WILLIAMS ..... *Assistant Professor of Law*
JEANNE WOODFORD ..... *Assistant Professor of Law*
JOHN S. WORDEN, B.A., J.D. ..... *Assistant Professor of Law*
LING ZHU, J.D. ..... *Assistant Professor of Law*

Hastings Alumni Association: Building Community and Support

The mission of the Alumni Association is to strengthen and nurture the bond between Hastings colleagues and the school by providing outstanding opportunities for personal and professional growth through a lifetime connection to one another and to Hastings.

As a graduate, you are part of the 18,000 member-strong Association, and we invite you to participate in the school's thriving community of alumni, students and scholars. The Hastings family spans the globe and includes living alumni going back more than seventy years. Tap into this network—you will be amazed by the depth of resources and knowledge available.

As members of the Association, our alumni give their time, talent and resources to build a strong and vibrant Hastings community. They are essential to maintaining Hastings at the forefront of legal education.

To find out more about how you can make a difference, contact the Alumni Center at (415) 565-4615 or email us at alumni@uchastings.edu. Or, visit the Alumni Center at 200 McAllister Street, San Francisco.

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
ALUMNI ASSOCIATION
200 McAllister Street, San Francisco, California 94102-4978
Tel: (415) 565-4615 · Fax: (415) 581-8844
Email: alumni@uchastings.edu
http://uchastings.edu/alumni/index.html