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Challenging Nonprofit Legal Services: Four Cases from New Orleans, 1970 - 2004

Louis Crust
University of New Orleans

Challenging Nonprofit Legal Services:
Four Cases from New Orleans, 1970 - 2004

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Louis Crust

B.A. Honours, University of Manitoba, 1976
M.A., Dalhousie University, 1996

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Foreword

On August 29, 2005, Hurricane Katrina hit the Gulf Coast just to the east of the city of New Orleans. While the city survived the hurricane itself, water overtopped the levees and floodwalls failed causing approximately 80 percent of the city to flood. Eighty percent of the city's population evacuated, and most businesses, including the legal services offices discussed here, either closed for extended periods of time or established offices in unaffected cities nearby. In the time that has passed since the hurricane the city's population has begun to return (and is now at approximately 40 percent of its pre-hurricane level), and the slow process of rebuilding New Orleans has begun. Many of the legal services agencies discussed in this dissertation, including the four offices discussed in depth, have also returned to the city. Their clients, however, remain scattered throughout the country. This dissertation discusses the state of nonprofit legal services in New Orleans before the hurricane, and investigates controversies of 1970, 1998, 2002 and 2004.

Within the four walls of the legal aid offices human life is laid bare. More tragedies and comedies are enacted than can be seen on any stage. The people of the cities march in endless procession through the offices, leaving behind them a composite picture of life in our great cities. . . . As nearly as one group can, they represent the common people. What they think, how they fare, wherein they are handicapped, are matters of concern to every one, for it is to make the lives of just such persons somewhat brighter and fairer that we are trying to build a civilization founded on democracy.

Reginald Heber Smith, Justice for the Poor

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Acronyms

AALS	Association of American Law Schools
ABA	American Bar Association
AC	Advocacy Center
ACCL	Association of Citizens' Councils of Louisiana
ADA	Americans with Disabilities Act
ADD	Advocate for the Developmentally Disabled
LAB	Legal Aid Bureau
CLASP	Center for Law and Social Policy
CLOP	Community Living Ombudsman Program
CORE	Council of Racial Equality
CRLA	California Rural Legal Assistance
DHH	Louisiana Department of Health and Hospitals
EPA	Environmental Protection Agency
GODA	Governor's Office of Disability Affairs
HEW	Federal Department of Health, Education and Welfare
HHS	Federal Department of Health and Human Services
IOLTA	Interest on Lawyer Trust Accounts
IRS	Internal Revenue Service
JLCS	Joint Legislative Committee on Segregation
JJPL	Juvenile Justice Project of Louisiana
KKK	Ku Klux Klan
LAHSA	Louisiana Association of Homes and Services for the Aging
LAB	Legal Aid Bureau
LABI	Louisiana Association of Business and Industry
LAP	Louisiana Appellate Project
LASC	Louisiana Supreme Court
LCPI	Louisiana Center for the Public Interest
LDED	Louisiana Department of Economic Development
LDEQ	Louisiana Department of Environmental Quality
LEDC	Louisiana Economic Development Council
LIDAB	Louisiana Indigent Defense Assistance Board
LNHA	Louisiana Nursing Home Association
LOEO	Louisiana Office of Economic Opportunity

LSC	Legal Services Corporation
LSP	Legal Services Program
LTCOP	Long Term Care Ombudsman Program
NAACP	National Association for the Advancement of Colored People
NALAS	National Alliance of Legal Aid Societies
NCCF	National Committee to Combat Fascism
NLADA	National Legal Aid and Defender Association
NOCEOP	New Orleans Committee for Economic Opportunity Program
NOLA	New Orleans Legal Assistance
NOLAC	New Orleans Legal Assistance Corporation
OAA	Old Age Assistance
OBE	Order of the British Empire
OEO	Office of Economic Opportunity
OLAP	Ombudsman Legal Assistance Program
PAC	Political Action Committee
PAI	Private attorney involvement
PAR	Public Affairs Research Council of Louisiana
PVC	Polyvinyl Chloride
SLLS	Southeast Louisiana Legal Services
SPAN	State Planning Assistance Network
SPDC	Southern Prisoners' Defense Committee
SDS	Students for a Democratic Society
SJCJE	Saint James Citizens for Jobs and the Environment
SWPC	Social Welfare Planning Council
TCA	Total Community Action, Inc.
TELC	Tulane Environmental Law Clinic
TRI	Toxic Release Inventory

Abstract

During the past century, lawyers in New Orleans created a number of organizations to provide legal services for the poor, as lawyers did throughout the country. Most of those organizations provided routine service directly to individual clients and received quiet acceptance within the city and the state. However, more aggressive lawyers in other legal services offices engaged in law reform or challenged politically powerful interests. These offices found themselves embroiled in controversy and facing impediments that were placed in the way of their work. This dissertation introduces nonprofit legal services in New Orleans, but focuses on and investigates the experiences of four organizations – the New Orleans Legal Assistance Corporation, the Tulane Environmental Law Clinic, the Louisiana Capital Assistance Center, and the Advocacy Center – that were involved in controversies.

This investigation differs from most prior studies of legal assistance in several ways. First, it discusses a variety of local legal service organizations rather than concentrating on the legal aid movement of the first half of the twentieth century, or the later Legal Services Program and its successor Legal Services Corporation. Secondly, it provides detailed discussion of several New Orleans legal services, which had previously been limited to scrutiny of the Tulane Environmental Law Clinic. Most importantly, it goes beyond description to provide causal explanation for the controversies by reference to social structure, and the social mechanisms and

social processes at work. The dissertation presents access to law by the poor as being a form of "largesse" or charity or gift, which is granted when it is convenient for the powerful, but withheld when it is inconvenient for the powerful. From this perspective, the controversies resulted from the opposing interests of the two major social classes in modern capitalist society, with the politically powerful objecting to certain legal victories or gains achieved by the poor.

In addition to the New Orleans cases, the dissertation refers to other legal services offices throughout the country that experienced similar problems. This demonstrates that the underlying issues are not limited to the city of New Orleans or the state of Louisiana, but are national in scope.

Keywords

nonprofit, legal services, New Orleans, social class, New Orleans Legal Assistance Corporation, Louisiana Capital Assistance Center, Tulane Environmental Law Clinic, Advocacy Center

Chapter 1: Nonprofit Legal Services in New Orleans

Between the early twentieth century and the earliest years of the twenty-first century, lawyers in New Orleans created a number of nonprofit organizations (listed in Table 1) to provide legal services for the poor of the city and of the state of Louisiana, as others elsewhere did for the poor throughout the country. The Declaration of Independence, the United States Constitution, several constitutional amendments and numerous court decisions (listed in Appendix A), have enshrined specific legal rights, including the right to legal representation for defendants in criminal cases, in federal law. The Acts passed at the first session of the Legislative Council of the Territory of Orleans in 1804 (see section 35 of the Acts in Appendix B), and subsequent versions of the Louisiana Constitution, also established the right of defendants in criminal cases to legal representation. Despite these legal and constitutional rights the government of Louisiana has consistently underfunded public defenders offices. Therefore, those offices have been incapable of providing proper legal representation to those who have needed it.[1] To date there is no similar right to representation in civil cases, although lawyers have argued in favor of, and made several attempts to establish, such a right.[2]

There has certainly been a need for legal services for the poor in New Orleans and Louisiana, however. Louisiana has consistently had a poverty rate higher than that of the rest of the country, and New Orleans has had a poverty rate higher than the state's (see Table 2).

Table 1: Legal Services Organizations in New Orleans, 2005

Year Created	Organization	Service Provided
1935	Legal Aid Bureau	Civil legal services to the indigent
1967	New Orleans Legal Assistance	Civil legal services to the indigent
1984	Advocacy Center	Legal services to the elderly and disabled
1986	The Pro Bono Project	Free civil legal assistance to indigent clients
1986	Catholic Charities Immigration and Refugee Services	Legal services to poor refugees and immigrants
1986	Catholic Charities Project Save	Legal services to victims of domestic violence
1989	AIDSLaw of Louisiana	Legal services to indigents with HIV/AIDS
1993	Louisiana Capital Assistance Center	Legal services to indigent death penalty defendants
1997	Juvenile Justice Project of Louisiana	Advocates to transform the juvenile justice system
1999	Center for Equal Justice	Legal services to individuals facing the death penalty
2000	Capital Post-Conviction Project of Louisiana	Legal representation to indigent persons under the sentence of death, and advises lawyers with defendants facing a death sentence
2001	The Capital Appeals Project	Represents indigent prisoners on death row.
2001	Innocence Project New Orleans	Legal representation to indigent prisoners serving life sentences who are likely innocent
2003	Advocates for Environmental Human Rights	Legal advocacy services to help communities achieve their fundamental human right to a clean environment

Nonprofit legal service organizations help to fill the gap in legal representation that government offices and programs have left. Half of the nonprofit organizations – the Legal Aid Bureau, New Orleans Legal Assistance, the Advocacy Center, the Pro Bono Project, Catholic Charities Immigration Legal Service, Catholic Charities Project Save, AIDSLaw of Louisiana, and Advocates for Environmental Human Rights – provide legal services in civil cases. Four

Table 2: Poverty Statistics, 1960-2000

Year	United States		Louisiana		New Orleans / Orleans Parish	
	Number	Percent	Number	Percent	Number	Percent
1960	39,851,000	22.2	n.d.	n.d.	n.d.	n.d.
1970	25,420,000	12.6	932,671	23.6	156,776	26.8
1980	29,272,000	13.0	764,848	18.6	143,793	26.4
1990	33,585,000	13.5	967,002	23.6	152,042	31.6
2000	31,139,000	11.3	851,113	19.6	130,896	27.9

Sources: U. S. Census Bureau[3]

organizations – the Louisiana Capital Assistance Center, the Center for Equal Justice, the Capital Post-Conviction Project of Louisiana, and the Capital Appeals Project – provide legal services in capital cases.

The Juvenile Justice Project of Louisiana provides legal services to juveniles within the justice system, and the Innocence Project New Orleans works to overturn the convictions of people whose records they have reviewed and who they consider are probably innocent. Law schools at Tulane and Loyola Universities operate a number of law clinics (listed in Table 3) that also serve the poor.

Staffing and Funding

Nonprofit legal service organizations have made significant contributions to legal representation in New Orleans, as Table 4 indicates. In 2002 the 14 organizations discussed employed over 75 legal staff, including attorneys and paralegal employees.[4] This does not indicate the full extent of their influence and effectiveness, however. The Pro Bono Project, which does not provide legal services directly, coordinates the pro bono work of 1,400 lawyers in

Table 3: University Law Clinics in New Orleans

University	Clinic
Loyola	Gillis Long Poverty Law Center
Loyola and Tulane	The Public Law Center
Tulane	Civil Litigation Clinic
Tulane	Criminal Defense Clinic
Tulane	Domestic Violence Clinic
Tulane	Environmental Law Clinic
Tulane	Juvenile Litigation Clinic

New Orleans, and AIDSLaw of Louisiana has access to 80 volunteer lawyers throughout the state.

Nonprofit organizations had budgets that totaled over $10 million in 2002. These organizations receive funding from a variety of sources, including bar associations, corporate donations, private donations, and fund-raising activities such as educational programs, social programs, and the charging of fees.[5] Several of the services, including the New Orleans Legal Assistance Corporation, the Advocacy Center and the Capital Post-Conviction Project of Louisiana, are government-mandated and receive substantial government funding, as independent programs that are not government-mandated also may. For example, Catholic Charities Immigration and Refugee Services received funding from the Louisiana Department of Health and Hospitals, the Louisiana Department of Education, the Louisiana Office of Community Service, the Louisiana Commission on Law Enforcement and the City of New Orleans.[6] The Juvenile Justice Project of Louisiana received funding from the Louisiana Indigent Defense Assistance Board,[7] and the Pro Bono Project received funding from HUD. This

Table 4: Organizations' Staff and 2002 Revenue

Organization	2002 Revenue	Legal Staff
Advocacy Center	$2,875,387[8]	13 attorneys, 5 paralegals[9]
AIDSLaw of Louisiana	$248,437[10]	3.5 attorneys[11]
Capital Appeals Project	$350,634[12]	4 attorneys[13]
Capital Post-Conviction Project of Louisiana	$996,465[14]	5 attorneys[15]
Catholic Charities Immigration Legal Services	$649,418[16]	n.d.
Catholic Charities Project Save	n.d.	n.d.
Center for Equal Justice	$221,836[17]	1 attorney[18]
Innocence Project New Orleans	$98,662[19]	5 lawyers[20]
Juvenile Justice Project of Louisiana	$758,281[21]	4 attorneys[22]
Legal Aid Bureau	$279,651[23]	n.d.
Louisiana Capital Assistance Center	$770,488[24]	6 attorneys[25]
New Orleans Legal Assistance Corporation	$2,772,903[26]	~23 attorneys ~6 paralegals[27]
Pro Bono Project	$362,758[28]	n.a.[29]
Totals	**$10,384,920**	**75.5 legal staff**

Sources: This information is from organizations' IRS Form 990s and organizations' internal documents, as explained in end notes.

government support was not necessarily unusual since, during the early 1980s, the nonprofit sector depended on government for one-third to one-half of its funding.[30]

Legal Representation and Unmet Need

These programs provided legal representation to significant numbers of clients. During 2002 the New Orleans Legal Assistance Corporation completed work on 4,549 cases that affected 14,928 individuals while it also opened 4,869 new cases that involved 14,717 individuals.[31] Lawyers associated with the Pro Bono Project served 1102 clients,[32] AIDSLaw of Louisiana served 1038 clients,[33] and the Catholic Charities Project Save assisted 371 clients.[34]

University law clinics provided additional services as students received practical experience through their work in the community.

In spite of the time, energy and funds that the lawyers at these offices devoted to providing legal services to the poor, they satisfied only a small part of the need. Louisiana does not have a single, consistent, state-wide system for providing legal representation to the poor in criminal cases. Rather, the state is divided into 41 judicial districts, each of which has its own indigent defense board. Some districts have a salaried public defender with an office and support staff, some districts employ part-time public defenders who have no support staff, and others appoint private lawyers to take capital cases. Judges appoint board members, and the boards receive some funding from the state, but depend on court fines such as traffic tickets for the greatest part of their funding. This system results in inconsistent and inadequate funding of offices, low staffing levels, high case loads, excessive delays and inadequate legal representation.[35] In 2002 the state of Louisiana spent about $29 million on criminal defense, compared to the $55 million that the National Association of Criminal Defense Attorneys said that the state needed to spend, and the $75.7 million which district attorneys spent on prosecutions.[36]

The indigent defender program of Orleans Parish (which is collocal with New Orleans) "has been scandalously ineffective for decades."[37] In 1993, an Orleans Parish judge decided that public defender Rick Teissier could not provide effective representation to his indigent clients, and that the system for funding indigent defense was unconstitutional. At the time Teissier was representing 418 defendants, including 70 active felony cases, and the indigent defender program's three investigators, who needed to provide assistance in 7,000 cases per year, could

offer no support. The Louisiana Supreme Court later overturned that decision, but also decided that indigent defense did not always meet constitutionally mandated standards and that trial judges could stop trials if judges determined that indigent representation was not adequate.[38] A 1997 report stated that some public defenders devoted a minimal amount of time on defender duties, they almost never met with their clients outside the courtroom, they did no legal research, they were frequently not prepared for trials, they risked conflict of interest by representing co-defendants, they rarely used expert witnesses, and they violated almost every American Bar Association principle for public defense and standard for defense services.[39] Defendants often accepted plea deals rather than wait for their cases to go to trial because, due to delays, they could get out of jail on to time already served.[40]

The Orleans Parish Indigent Defense Board regularly operated with deficit balances (see Table 5) as many Indigent Defense Boards in the state did. The Board had an income of $2,288,724 in 2002, and prior to Hurricane Katrina in 2005 had 42 lawyers and six investigators.[41] However, board members said in 2006 that the office needed at least $7 million to $10 million and 60 lawyers to properly represent indigent defendants.[42]

Table 5. Orleans Parish Indigent Defense Board Revenues and Expenditures, 1999-2002

Year	Total Revenues	Expenditures	Deficit Balance
1999	$1,955,853	$2,236,206	($280,353)
2000	$2,177,685	$2,353,198	($175,513)
2001	$2,655,850	$2,145,256	($510,594)
2002	$2,288,724	$2,653,557	($364,833)

Source: Appendix H: Four-Year Analysis of Indigent Defense Board Revenues & Expenditures, in National Legal Aid & Defender Association, In Defense of Public Access to Justice: An Assessment of Trial-level Indigent Defense Services in Louisiana 40 Years after *Gideon*, p. 111-114.[43]

Concerning representation in civil cases, the Louisiana Legal Consortium reported in 1991 that existing programs addressed the legal needs of only 7.17 percent of Louisiana's poor. This was only one-half to one-third of the 15 to 20 percent of the civil legal needs of the poor that programs across the nation were meeting.[44] William Quigley, assistant professor of law and Director of Loyola University's Gillis Long Poverty Law Center, stated in 1993 that all legal services offices and law schools in Louisiana served only 7.5 percent of civil legal needs of the poor in the state.[45] Clearly, while the nonprofit organizations are providing needed legal services, a significant proportion of the need is not being met.

Opposition to Nonprofit Legal Services

Despite the service that these organizations provide, and the great need that remains, several of these services have faced opposition and been caught up in controversy. Two federal agencies investigated the New Orleans Legal Assistance Corporation, and its guiding agency in Washington,. D.C. threatened to close it completely. The Louisiana Supreme Court placed new restrictions on the legal representation that students at the Tulane Environmental Law Clinic (as well as at other law clinics) could undertake, and the Court also changed the rules concerning the practice of law by non-citizens, which hindered the Louisiana Capital Assistance Center, among other law offices. The Louisiana state government investigated the Advocacy Center for conflict of interest and threatened it with loss of funding. Such actions against legal service providers impede legal representation for the poor and cause greater hardship for them. The following chapters discuss the four nonprofit legal service organizations and investigate the origins and causes of the controversies that engulfed them.

Period of Study

This dissertation covers events that occurred over a period of approximately 50 years, and events at the federal level have often affected or served as a catalyst for activities in Louisiana. During the 1950s many whites in Louisiana, as well as in other southern states, resorted to "massive resistance" as a strategy for defying federal court rulings and laws requiring that segregation be ended. During the more liberal and optimistic 1960s, the civil rights movement gained acceptance and support throughout most of the country, and the Johnson administration launched the War on Poverty, which included the Legal Services Program (LSP). These activities of the 1950s and 1960s contributed significantly to the context in which the New Orleans Legal Assistance Corporation appeared. The Johnson administration's 1965 amendments to the Social Security Act also created Medicare and Medicaid which spurred development of the nursing home industry which would figure prominently in the controversy involving the Advocacy Center four decades later.

Richard Nixon's 1968 election to the presidency brought a more conservative Republican administration to power, and the Office of Economic Opportunity and the Legal Services Program began to exert more control over local LSP affiliates, including NOLAC. Nixon eventually transformed the LSP into the Legal Services Corporation and imposed new restrictions on the services that its lawyers could provide.

Ronald Reagan tried to eliminate the Legal Services Corporation after his presidential election in 1980, but Congress continued to fund the corporation at a reduced level and under new restrictions. While Reagan worked to reduce government-provided services, some of his changes to tax laws encouraged the development of non-profit organizations of all types, and

obligations placed on Legal Services affiliates contributed to the growth of pro bono legal work and the Pro Bono Project in New Orleans.

The Republican Party retained control of the federal government for the next 25 years – through the Reagan and the G. H. W. Bush presidencies, the Republican majority in Congress during the mid-to-late nineties, and the G. W. Bush presidency – and adhered to a pro-business ideology. Once in power the Republicans reduced regulation of business activities, and reduced government-sponsored social programs as well. This pro-business attitude can be seen in the three later legal services controversies discussed in this dissertation, as the Republican Party grew in popularity in Louisiana, and the legislature, governments and courts became more conservative.

Historical Perspective and Significance of the Study

This dissertation is written in the tradition of historians such as George V. Plekhanov, Marc Bloch and Edward Hallet Carr. They argued that the goal of historical research is to study the past, to search for causes of events in order to understand and master the present[46] and to be a "spur to action."[47] They explained that history does not study the actions of isolated individuals, but the relations of individuals in society and the social forces which produce the results of their actions.[48] While it is true that individuals can influence some details of social life, the structure of the society within which those individuals live determines the roles that they may assume and the social significance that their actions may have.[49] In fact, individuals are themselves products of a particular social structure and of a particular set of social relations, and therefore their actions will tend to follow a general trend that is already underway.[50]

For these reasons this dissertation provides causal explanations for the legal services controversies by reference to the prevailing social structure and to the social mechanisms and social processes at work. (See Appendix C for a discussion of methodology.) Following the writings of Plekhanov, Bloch and Carr, the dissertation is, at the same time, a work of history, analysis, policy and advocacy.

By presenting detailed discussions of four controversies involving nonprofit legal services, this dissertation sheds light on some of the true values and priorities of modern society. It demonstrates the power and influence that the business community wields, and the extent to which the powerful are willing to sacrifice the rights, and even the lives, of the poor and powerless. One or two such cases may be considered accidental or coincidental, but three or four cases begin to display a discernable pattern, and the existence of similar cases throughout the country (discussed in the conclusion) indicates a pervasive set of attitudes and behaviors. This dissertation challenges us to question our ideas about the people around us and type of society that we live in, and it challenges us to act to build the type of society that we wish to live in.

End Notes

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3. National figures are from: Table A-1 Status of People by Family Relationship, Race, and Hispanic Origin: 1959 to 2000, in Poverty in the United States: 2000, Current Population Reports, Consumer Income, Series P60-214, (Washington, D.C.: U. S. Government Printing Office, 2001):18. Louisiana and New Orleans figures (1980-2000) are from: U.S. Census Bureau "USA Counties" internet site at http://censtats.census.gov/cgi-bin/usac/usatable.pl accessed on 19 March 2007. Louisiana and New Orleans figures (1970) are from: Table 58. Poverty Status in 1969. . . .: 1970, The State, and Table 124. Income and Poverty Status in 1969 for Parishes: 1970, Orleans Parish 1970 Census of Population - General Social and Economic Characteristics - Louisiana

4. I use the year 2002 for reporting statistics about nonprofit legal services since, at the time of writing, it was the last year in which the New Orleans Legal Assistance Corporation operated as a separate entity. In 2003 it merged with Southeast Louisiana Legal Services. This had the effect of the eliminating the new agency Advocates for Environmental Human Rights from the funding and staff totals.

5. Both Catholic Charities Immigration and Refugee Services, and the Legal Aid Bureau charge fees for services. As an example of the range of organizations that contribute to legal service organizations, the 2001 Annual Report of the New Orleans Legal Assistance Corporation (now New Orleans Legal Assistance) list the following funders for 2001: Legal Services Corporation; Louisiana Bar Foundation; United States Department of Justice; UNITY for the Homeless; Civil

District Court for the Parish of New Orleans; City of New Orleans; Internal Revenue Service; Gillis Long Poverty Law Center (Loyola Law School); Tulane Law School; New Orleans Bar Association; American Bar Association, Section on Litigation; Brunswick Foundation; Baptist Community Foundation; New Orleans Artists Against Hunger and Homelessness. The report also acknowledged in-kind support from the Microsoft Corporation and the Adobe Acrobat Corporation.

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17. "Item 12 Total revenue" on the Center for Equal Justice's IRS Form 990 Return of Organization Exempt from Income Tax for 2002, available from the internet site www.GuideStar.com accessed 1 August 2004.

18. Items 25 (Compensation of officers, directors, etc) and 26 (Other salaries and wages), Part V (List of officers, directors and key employees) and Schedule A, Part I (Compensation of the five highest paid employees other than officers, directors and trustees) accompanying the Center for Equal Justice's 2002 IRS Form 990.

19. "Item 9 Total revenue" on the Innocence Project New Orleans's IRS Form 990EZ Short Form Return of Organization Exempt from Income Tax for 2002, available from the internet site www.GuideStar.com accessed 1 August 2004.

20. "People" page of the Innocence Project New Orleans internet site at http://www.ip-no.org/staff.htm accessed on 21 April 2005.

21. "Item 12 Total revenue" on the Juvenile Justice Project of Louisiana's IRS Form 990 Return of Organization Exempt from Income Tax for 2002, available from the internet site www.GuideStar.com accessed 23 June 2004.

22. "Staff" page of the Juvenile Justice Project of Louisiana internet site at http://www.jjpl.org/AboutUs/Staff/staff.html accessed on 22 June 2004.

23. "Item 12 Total revenue" on the Legal Aid Bureau's IRS Form 990 Return of Organization Exempt from Income Tax for 2002, available from the internet site www.GuideStar.com accessed 29 September 2004.

24. "Item 12 Total revenue" on the Louisiana Crisis [Capital] Assistance Center's IRS Form 990 Return of Organization Exempt from Income Tax for 2002, available from the internet site www.GuideStar.com accessed 10 July 2004.

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Chapter 2: Legal Services and Largesse

Lawyer Deborah M. Weissman described the provision of legal services to the poor in civil matters as being a form of largesse. She observed that the principle of the "rule of law" is basic to the ideals of democracy, justice and fairness in the United States. However, she also argued that, due to the strongly-held value of self-sufficiency (which implies independence and individualism), the public views those who do not succeed at providing for themselves with suspicion and scorn, and provides limited and grudging assistance, including limited and grudging legal assistance, to those failed individuals. This attitude transformed access to legal representation for the poor from an ideal objective to a form of welfare or charity. As such, she saw the provision of civil legal services to the poor as being subject to change depending on changes in economic and political conditions.[1]

Weissman considered that the rule of law itself ceased being a right and became discretionary,[2] and that limits placed on civil legal services for the poor during the 1990s made those legal services tentative and problematic.[3] She tied those restrictions on civil legal services to changes in the country's political economy, occurring at a time when corporate influence was growing and laissez-faire economic policies were renewed.[4] Ultimately, Weissman argued that the limitation and denial of civil legal services to the poor undermined the principles of equal

justice[5] and denied to the country's most vulnerable citizens the means to protect their basic rights and to ensure satisfaction of their essential human needs.[6]

Weissman argued that these attitudes toward legal services for the poor originated with the rise of the capitalist state and liberal political theory which promotes free exchange in the market.[7] Liberal political theory views the jobless, able-bodied poor who have nothing to contribute with suspicion and as being unworthy of assistance, while the poor who are unable to work are viewed as being worthy of minimal assistance.[8]

I would assert that Weissman's comments regarding legal services in civil cases being a form of largesse also apply to legal services in criminal cases, although her explanation of the reasons for these negative attitudes is only half of an explanation. A full explanation must address the nature of the country's political economy which led to the value of self-sufficiency, and the growth of corporate influence and laissez-faire economic policies, thereby explaining the mechanisms and processes at work. This begins with a discussion of Karl Marx's general theory of the structure of social life within which law develops.

Marx and Materialism

Marx, with his colleague Frederick Engels, wrote in the mid-1800s that they began their analysis of social life from real premises, which they defined as "real individuals, their activity and the material conditions under which they live."[9] They asserted that, above all else, humans must produce their subsistence, and do so by entering into relations of social production, or into a form or mode of cooperation "no matter under what conditions, in what manner, and to what event."[10] Marx considered that the forms of cooperation that people entered into were

independent of individuals' wills, and took different forms which had been conditioned by history.[11]

Marx and Engels further stated that thought itself – "the production of ideas, of conceptions, of consciousness" – was tied to, and a product of, this material activity of social production. Therefore, they viewed the ideas that were expressed in areas such as politics, law, morality, religion and metaphysics as being mental products that were conditioned by a particular state of the forces of production and corresponding social relations,[12] and as forming a superstructure for economic relations.[13]

Marx and Engels considered that social life was not static, but that social structure was continually evolving in keeping with changes in material production.[14] Marx explained that at a particular stage of development, conflict develops between the productive forces and the relations of production (or the property relations) of a society. This conflict leads, in turn, to a period of social revolution and the rise of a new social structure and related superstructure.[15]

They saw the State as arising in societies characterized by class divisions, and as being "the form in which the individuals of a ruling class assert their common interests," or their "mean average interest."[16] Marx and Engels considered the various forms of struggle that appear (such as struggles between political forms such as democracy, aristocracy and monarchy, or struggles for the right to vote) as actually being struggles between different social classes,[17] and viewed law as being the will of the rulers expressed as the will of the State.[18]

Lawyers Michael Tigar and Madeleine Levy echoed these views in their comments that the system of rules of law forms a legal ideology that states "the aspirations, goals, and values of a social group,"[19] and "the expression of social struggle."[20] They further stated that

> Since the late Athenian age, laws have been crystallizations of power relationships in a given group or society. Laws lock into words, expressed as commands, the rights or duties which a particular group will use its power to protect or enforce, and provide predictable modes of settling disputes which arise within this context. Law is a superstructure erected upon the base of power relationships.[21]

Tigar and Levy continued to say that within societies characterized by class divisions, the state, as "the institution with a public force specially appointed to enforce laws and commands,"[22] serves as the agent of the dominating class. Therefore the ideology of the dominating class becomes the law.[23]

Economist Maurice Dobb added the observation that during any historical period a dominant class would "use its power to extend that particular mode of production – that particular form of relationship between classes – on which its income depends."[24] He stated that these efforts would include exerting influence on the press and on party funds to purchase political influence and to "convert both local and national governments into its mouthpieces."[25]

The Fragility of Law and Legal Change

Even within this view of law, however, Tigar and Levy stated that the relationship between the elements of legal ideology and the self-interest of a particular group is not fixed or invariable. Rather, they argued that several sources may introduce contradictions between the ideology and the self-interest that created it. For example, through time legal ideology becomes subject to interpretation by others in society, and that new interpretation may lead the law away from the strict self-interest of those who originally created it. Also, while legal ideology is created at a specific moment in time, at a later time changing social conditions and social

relations may render the law meaningless, may cause another group to use the established law against its creators, or may cause the dominant group to discard elements of its own law. Finally, other (non-dominant) powerful groups in society may insist on favorable changes that clarify uncertainties or fill gaps in the law.[26] Tigar concluded, therefore, that the law is "twice fragile:" new content may be added to it in the name of justice, and a new legal ideology may begin to develop within it.[27]

Tigar observed that legal change is produced through "conflict between social classes seeking to turn the institutions of social control to their purposes, and to impose and maintain a specific system of social relations."[28] Social change, meanwhile, may involve the use of legal ideology just as it would use any other form of struggle.[29] Tigar also recognized, though, that in the absence of social change there is value in reform initiatives that seek to maximize well-being within the existing social system.[30]

The Capitalist Context

Capitalism serves as the context within which modern social life occurs, and it provides the structure and the framework for social relations and social interaction. Therefore, discussion of social issues, social problems or social policies in modern society is inherently a discussion of capitalism itself, and a critique of the social influences that lead to specific social issues, social problems or social policies is a critique of capitalism itself. That discussion and critique of capitalism may be presented explicitly or it may be implicit in the work. I would assert that an explicit discussion is superior, for it makes clear what the issues are, why they are being discussed, and why they are being discussed as they are.

Marx and Engels discussed the transition from feudalism to capitalism in Europe, observing that feudal towns united to protect themselves against the nobility. The individual burghers – or citizens of towns[31] – slowly became united in the burgher class, or the bourgeoisie, which consisted of those who had industrial or commercial capital, or property. Meanwhile, those without property formed the proletariat,[32] or the working class.[33] The bourgeoisie, as the owners of property, formed the ruling class and controlled the State in its own interests.[34] It logically follows that the law then became an expression of the interests and will of the bourgeoisie as the ruling class.

The description of the rise of capitalism that Marx and Engels gave effectively provides a definition of capitalism. Dobb stated that capitalism is a system in which ownership of the means of production is concentrated in the hands of a relatively small class of individuals (the bourgeoisie), so leaving a larger class (the proletariat) that is propertyless. Labor-power itself becomes a commodity to be bought and sold on the market, and the individuals of the larger propertyless class must enter into a wage contract to sell their labor-power for their livelihood.[35] The owners of the means of production then create surplus value using the labor-power for which they have contracted.[36]

The Philosophy of Possessive Individualism

The rise of capitalism affected social views and attitudes in addition to relations of production. Philosopher C. B. Macpherson explained that the growth of capitalism during the seventeenth century, with the breaking of feudal relations and obligations, was accompanied by the development of a compatible view of social life that he referred to as “possessive

individualism,"[37] and which he and others argued remains current today.[38] The basic assumptions of possessive individualism state that

> (i) What makes a man human is freedom from dependence on the wills of others.
>
> (ii) Freedom from dependence on others means freedom from any relations with others except those relations which the individual enters voluntarily with a view to his own interest.
>
> (iii) The individual is essentially the proprietor of his own person and capacities, for which he owes nothing to society. . . .
>
> (iv) Although the individual cannot alienate the whole of his property in his own person, he may alienate his capacity to labour.
>
> (v) Human society consists of a series of market relations. . . .
>
> (vi) Since freedom from the wills of others is what makes a man human, each individual's freedom can rightfully be limited only by such obligations and rules as are necessary to secure the same freedom for others.
>
> (vii) Political society is a human contrivance for the protection of the individual's property in his person and goods, and (therefore) for the maintenance of orderly relations of exchange between individuals regarded as proprietors of themselves.[39]

This philosophy of possessive individualism, with its emphasis on the independence of the individual, personal ownership of resources, contractual (market) relations and protection of personal property, both complements and reflects the capitalist relations of production described by Marx and Engels and by Dobb. The focus on personal independence, initiative and voluntary relations also implies that those who succeed in life have done so through their own efforts and

so reap the rewards of their success individually, while those who fail have also done so through their own efforts and suffer the consequences individually. The philosophy of possessive individualism would consider both of these outcomes as fair return for the individuals' decisions and actions. As the philosophy of the dominant class, these attitudes also dominate the law.

Following from this chapter's discussion of the materialist theory of law, of capitalism, and of the philosophy of possessive individualism, we would expect that the capitalist social structure promotes strong self-interest, supported by a philosophy of possessive individualism, and (among the successful at least) a general lack of concern for the poor. With the view of access to legal representation by the poor as a form of largesse, we would expect neither government nor private for-profit business to provide adequate legal services for the poor. However, business would be capable of influencing government to implement laws favorable to the business community itself.

End Notes

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16. Marx and Engels, The German Ideology, 80. The comment that Max and Engels made about the state representing the "mean average interest" of the ruling class is important, since it recognizes that classes are not monolithic entities, but consist of individuals acting independently. Because different individuals have different experiences there will be variations of experiences, opinions and attitudes within a class. However, because members of a class do share essential characteristics, there will be general agreement throughout the class even while there is some variation and disagreement. This explains such apparently anomalous behavior as millionaire and billionaire capitalists campaigning to keep the estate tax in what would seem to be activity opposed to their own private interests. As examples, see: David Cay Johnston, "Dozens of Rich Americans Join in Fight to Retain the Estate Tax," The New York Times, 14 February 2001, page A1; William H. Gates Sr. and Chuck Collins, Weatlh and Our Commonwealth; Why Americans Should Tax Accumulated Fortunes (Boston: Beacon Press, 2002).

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Chapter 3: The New Orleans Legal Assistance Corporation, 1970

During the fall of 1970 the New Orleans Legal Assistance Corporation (NOLAC), a highly-regarded affiliate of the federal Legal Services Program (LSP), found itself at the center of unexpected and unwelcome controversy. Some of the activities surrounding NOLAC included investigations by the Internal Revenue Service and the Office of Economic Opportunity, criticism in the national press and threats of loss of funding. Ultimately NOLAC fired two lawyers, and the federal LSP office continued to fund it, but with additional restrictions on its activities.

The Creation of the New Orleans Legal Assistance Corporation

NOLAC's origins lie in early 1964. In January of that year President Lyndon Johnson announced plans for a versatile, multi-pronged attack on the sources of on poverty in the country. This war on poverty was to bring together programs that existed at the federal, state and local levels of government, as well as in the private sector, and was to cure and prevent poverty rather than just relieve the symptoms of poverty.[1] Johnson later stated that he was proposing the war on poverty "because it is right, because it is wise, and because, for the first time in our history, it is possible to conquer poverty."[2] He believed that the existence of poverty in a country of plenty was unacceptable, and that the government had a duty to reduce or eliminate the poverty.[3]

The Social Welfare Planning Council (SWPC), a local agency that was created in 1921 "to plan and coordinate health, welfare and recreation programs in Metropolitan New Orleans,"[4]

began planning for antipoverty programs in the city. Clark Corliss, Executive Director of the SWPC, attended a workshop on poverty and the Economic Opportunities Act in June of that year,[5] and participants at a July 29, 1964, meeting in New Orleans decided to proceed with plans to take advantage of the programs offered in the bill. The group adopted the name New Orleans Committee for Economic Opportunity Program (NOCEOP),[6] and on December 4, 1964, the NOCEOP formally incorporated itself as Total Community Action, Inc. (TCA). This organization would serve as New Orleans's community action agency to manage the city's war on poverty programming.[7]

Congress passed the Economic Opportunity Act, which created the Office of Economic Opportunity (OEO) and the antipoverty programs, on August 20, 1964.[8] The OEO announced on November 12, 1964, that it would create a national legal assistance program,[9] although the government would not pass legislation officially creating the Legal Services Program until November 8, 1966, almost two years later.[10]

In March of 1965 Wilmar G. Hinrichs, President of the Legal Aid Bureau (LAB), wrote to Clark Corliss of the SWPC informing him of the Bureau's intention to revise its charter so that it could become the local legal services affiliate and operate under the TCA and the Economic Opportunity Act.[11] TCA approved of two Legal Aid Bureau proposals, the first in May 1965 and a revised proposal in April 1966.[12]

The OEO in Washington rejected both LAB proposals, and on November 5, 1966, a number of legal and civic leaders in New Orleans met to plan a new legal assistance program.[13] Meeting attendees created a committee consisting of TCA director Winston Lill, Tulane University law professor Jerre Lloyd and Loyola University law professor Dick Buckley.[14] They

created a first draft of a proposal, dated November 28, 1966, for a service called the New Orleans Legal Assistance Program,[15] circulated it to interested parties for comments, and developed a new draft by January 31, 1967.[16] The Board of Directors of Total Community Action discussed and approved the second draft proposal on February 8, 1967, with only minor revisions,[17] and forwarded it to the OEO in Washington for approval.[18] The December 1967 issue of TCA's newsletter announced the creation of NOLAC as the non-profit corporation that would provide legal services to the community.[19]

On February 8, 1968, NOLAC Director Richard A. Buckley sent letters to other organizations announcing that "this law firm has begun operations."[20] By July of 1970 the Coproration had a staff of 54 personnel who were distributed among seven offices throughout the city. In addition to the Director and Assistant Director, the staff included nine attorneys, eight Reginald Heber Smith Fellows, eight "VISTAs" (Volunteers in Service to America lawyers), 13 paraprofessionals, and 12 clerical employees.[21]

NOLAC and the Legal Services Philosophy

In contrast to the low profile of the legal aid organizations which had developed over the previous 80 years,[22] the federal Legal Services Program was oriented toward activism and more prominent law reform activity.[23] E. Clinton Bamberger, Jr., the first Director of the LSP, stated in November of 1965 that

> Lawyers must be activists to leave a contribution to society. The law is more than a control; it is an instrument for social change. The role of [the] OEO program is to provide the means within the democratic process for the law and lawyers to release the

> bonds which imprison people in poverty, to marshal the forces of law to combat the causes and effects of poverty.[24]

He reinforced this position with his later comment that "we are engaged in giving arms, not alms, to the poor."[25]

Earl Johnson, Jr., the first Deputy Director of the Legal Services Program, described law reform as "a bundle of techniques – test cases and legislative advocacy are the most prominent examples – aimed at changing statutes, regulations, rules and practices that are unfavorable to the poor."[26] He explained that law reform had the potential to benefit many poor people who could not be served personally at Legal Services offices. This was because "a single test case or legislative change or modified administrative regulation can benefit thousands of individuals."[27]

The LSP took several novel steps to assist its affiliates undertake law reform. It published a national newspaper, Law in Action, between March 1967 and July 1968 to publicize law reform successes; it published summary accounts of legal memoranda and pleadings in its internal journal Clearinghouse Review as a resource for lawyers; it published Poverty Law Report as a "looseleaf reporter;" and it established the Project Advisory Group, which consisted of agency directors and staff lawyers, to advise the national leadership of the LSP.[28]

The LSP also created the Reginald Heber Smith Fellowship program at the University of Pennsylvania. This provided lawyers with five weeks of specialized training in topics that were not included in most law school curricula at the time, including welfare law, consumer protection, housing code enforcement, and test case litigation. While avoiding the stigma of federal government control, the Fellowship program allowed for recruitment and selection at the national level of highly qualified lawyers who had a broad understanding of their role in the LSP.

In fact, almost one quarter of all lawyers who were employed by Legal Services in 1971 had been recruited through the Fellowship program.[29] The LSP also established a dozen national law reform centers that could initiate lawsuits or legislative proposals, could assist agencies that were short of time with litigation, and could provide training and research material to attorneys in local agencies.[30]

NOLAC Director Richard Buckley, adopting the federal Legal Services Program's activism, reflected Clinton Bamberger's attitude in the comment that "Legal services exist for the redistribution of wealth and power."[31] Auerbach Associates, consultants who conducted NOLAC's 1970 annual review,[32] reported that the agency was "fearless in law reform, caring little about the controversy that results."[33] During the period 1968-1970 NOLAC sued prisons, schools, hospitals, the Orleans Parish Welfare office, the Commissioner of Public Welfare in Baton Rouge, the Agriculture Department, the New Orleans Housing Authority, the chief of police, and the mayor.

Considering a few of the early lawsuits initiated by NOLAC, the Ruffin v. Housing Authority of New Orleans case of 1969 determined that tenants may not be evicted from public housing without due process of law.[34] The French v. Bashful case, also of 1969, decided that university students have the right to counsel at expulsion hearings.[35] The Cook v. Ochsner Foundation Hospital case of 1970 decided that indigent patients had the right to sue hospitals for free care under the Hill-Burton Act,[36] while the later Cook v. Ochsner Foundation Hospital case of 1972 decided that under the Hill-Burton Act hospitals were required to provide a reasonable volume of "free and below cost services" to people who were unable to pay.[37] The Hamilton v. Schiro case of 1970 decided that conditions in Orleans Parish Prison were unconstitutional,[38]

while the Hamilton v. Landrieu case of 1972 ordered that the Prison make numerous and extensive improvements.[39] The case Stokes v. Bonin of 1973 decided that the poor could not be denied food stamps on the basis of their expenses exceeding their income,[40] and the case of LeBanks v. Spears of 1973 decided that the Orleans Parish School Board must provide equal educational opportunities for retarded children.[41] Other early lawsuits saw the state juvenile prison at Scotlandville desegregated; found city and state vagrancy laws to be unconstitutional; and voided contracts in a "vacuum hoax" case involving 1200 families.[42] These cases, as well as others, provided meaningful and permanent improvements in the lives of the poor of New Orleans and of the country.

The Office of Economic Opportunity (OEO), which oversaw all War on Poverty programs, gave NOLAC positive annual evaluations on its performance during each of its first three years. The 1968 evaluation stated that "NOLAC has the potential of becoming one of our best legal services programs,"[43] the 1969 report evaluated NOLAC as "an outstanding program,"[44] and the 1970 evaluation rated NOLAC as "one of the best in the LSP system."[45] OEO also gave NOLAC special praise for the rapport that its attorneys had established with the client community.[46]

OEO's first evaluation of NOLAC in 1968 acknowledged "adversity the program has encountered from the bar,"[47] while Auerbach Associates observed in 1970 that there was "active opposition from the Louisiana State Bar Association which resulted in the State Bar not appointing any of its members to the NOLAC Board of Directors."[48] They also reported that the Louisiana State Bar Association and the County (or Parish) Bar Association were somewhat less hostile than they previously had been, but Auerbach considered that the hostility between the

organized bar and NOLAC would be slow in disappearing.[49] As a general evaluation of the situation, Auerbach Associates commented that "NOLAC operates in an environment which the evaluators characterized as hostile. Southern social mores are certainly disturbed by NOLAC and any other program which seeks to appraise the poor of their legal rights and to intercede for the poor in courts of law."[50]

Controversy and Resolution

The good working relationship that NOLAC had with the LSP in Washington became strained in mid-September of 1970, after NOLAC lawyers Robert Glass and Ernest Jones acted as legal counsel for a group of Black activists who were besieged by, and in a gun battle with, the New Orleans Police Department.[51] Calling themselves the National Committee to Combat Fascism (NCCF) at the time, the activists later admitted to having been members of the Black Panthers,[52] whom FBI director J. Edgar Hoover had referred to as "the greatest threat to the internal security of the country."[53]

In late September of 1970 two government investigators arrived at the NOLAC office. On September 30 and October 1 Mr. Robert Kenney of the OEO appeared "at the request of the Office of General Counsel of OEO and the White House" to investigate three possible violations of OEO guidelines: the representation of members of the political organization Students for a Democratic Society (SDS), representation of the biweekly NOLA Express underground newspaper,[54] and representation of members of the NCCF.[55]

Mr. Newton M. Fisk of the Exempt Division of the IRS also visited NOLAC on September 30, to determine if the organization had engaged in substantial political activities. Such activity would have threatened NOLAC's non-profit tax-exempt status and its funding

through Total Community Action. Fisk supported his concern about political activity by presenting a year-old newspaper clipping in which a judge criticized NOLAC for representing a priest who had been "fomenting trouble." Fisk argued that he needed free access to all client files for his investigation, which he did not get.[56]

On October 5, 1970, Congressional Representative Joe Waggoner, Jr., of northwest Louisiana wrote to OEO Director Donald Rumsfeld asking if Rumsfeld "condoned" NOLAC's assistance to the NCCF.[57] No doubt Waggoner hoped to prod Rumsfeld to censure NOLAC.

Also in early October of 1970 Barry Portman, Acting Director of NOLAC, learned of a handbill, purportedly from the NCCF, that used Ernest Jones's name and office phone number to solicit funds from welfare recipients. The only person known to have seen the handbill locally was Miss Doris Culver, the Director of Orleans Parish Welfare, which had been the target of more NOLAC lawsuits than any other single agency in New Orleans.[58] Culver sent the handbill to Mr. Garland Bonin, the Louisiana Commissioner of Public Welfare in Baton Rouge (which NOLAC had also sued) and a former Democratic State Senator (1962-1965).[59] Portman wrote to both Culver and Bonin asking for a copy of the handbill, as well as for any other information that they might have about it.[60] Bonin replied, saying that Portman would need to contact the City Police for further information.[61]

Bonin sent the handbill to the Secretary of the Department of Health, Education and Welfare in Washington, where it was circulated. Representative John Rarick of St. Francisville, Louisiana, then entered the handbill into the Congressional Record.[62]

A group from Baton Rouge, Louisiana Citizens for Law and Order, also asked District Attorney Jim Garrison to investigate NOLAC over the handbill. Barry Portman thought that NOLAC was being "set-up,"[63] and it very likely was.

In mid-November of 1970 New Orleans lawyer Ben C. Toledano, Jr., became involved in the dispute. On November 14 he visited Mr. Dick Cheney, special assistant to Donald Rumsfeld, in Washington and requested an investigation of NOLAC. On November 16 he taped a television interview in New Orleans in which he announced an investigation of NOLAC by OEO, and the next day Toledano was back in Washington to see Vice-President Spiro Agnew.[64]

On October 28, 1970, LSP Director Terry Lenzner sent a telegram listing apparent violations of OEO guidelines to John P. Nelson, Jr., Chairman of NOLAC's Board of Directors. These apparent violations included: defending people in criminal proceedings beyond the indictment stage; failure to maintain client eligibility information regularly; and the apparent involvement of a NOLAC lawyer in soliciting funds for the NCCF from welfare recipients. The telegram required that the Board of Directors reply to the charges by November 11 or face suspension or termination of OEO's grant to NOLAC.[65]

Nelson easily dismissed Lenzner's concerns in a ten-page letter.[66] He explained that NOLAC lawyers had provided representation in criminal cases in keeping with guidelines established by former Director Richard Buckley, as described in NOLAC documentation that the LSP and OEO offices had approved., and in apparent conformity with the Economic Opportunity Amendments of 1967. Those amendments allowed criminal representation in extraordinary circumstances. Nelson further commented that LSP-funded lawyers had ceased criminal representation as of October 12, 1970, but that two Reginald Heber Smith Fellows - Jones and

Glass – had requested and were waiting for LSP waivers so that they could continue their representation of NCCF members. He stated that NOLAC lawyers did have income eligibility information for clients, a NOLAC lawyer did not represent the SDS as alleged, and that Ernest Jones did not have any connection to a leaflet soliciting funds for the NCCF, if such a leaflet had ever been distributed.

In closing his letter, Nelson observed that the complaints against NOLAC seemed to be more concerned about who NOLAC represented than about the quality of its work. It was as if the investigators considered NOLAC lawyers to be guilty of the infractions which their clients had been accused of, rather than just providing legal representation to those who needed it. After receiving this letter, Lenzner cleared NOLAC of wrong-doing and concluded that neither the OEO nor the LSP would institute any action to suspend or terminate NOLAC's operations.[67]

Three days later, on November 20, 1970, Rumsfeld fired Lenzner and Lenzner's deputy Frank Jones.[68] OEO officials gave three reasons for the firings: Lenzner's failure to clear with top OEO officials the telegram to NOLAC stating it was not violating OEO guidelines; reluctance by both Lenzner and Jones to advise another office not to use government funds for suits in which the plaintiffs could afford to pay; and permitting the use of federal funds to support the legal battle of the son of a wealthy businessman. Lenzner denied that he had been given orders not to communicate with NOLAC without informing Rumsfeld,[69] and he and Jones stated that they "refused to condemn the three programs without adequate investigation."[70]

The national press had also joined the fray. On November 23 The Washington Post published an article critical of NOLAC. Citing Toledano, it discussed his meeting with Cheney, Toledano's charges against NOLAC (which were contained in Lenzner's initial telegram), and

the NOLAC Board's response. The article gave the false impression that NOLAC continued to represent the NCCF.[71] On November 30 nationally syndicated columnists Rowland Evans and Robert Novak published another article critical of NOLAC, Legal Services, and the War on Poverty in general in The Washington Post. Republican Congressmen John Rarick and John Wold entered the article into the Congressional Record.[72]

Meanwhile, given a choice between remaining at NOLAC or continuing to represent their NCCF clients, lawyers Ernest Jones and Bob Glass elected to continue their representation of the NCCF clients. Following LSP orders, the two lawyers were fired from NOLAC on December 30, 1970.[73]

Wesley Williams from the Austin, Texas, Regional Office of OEO evaluated NOLAC again in January of 1971,[74] and on February 12, 1971, Arthur Reid, Acting Associate Director of the Legal Services Program, requested assurances that NOLAC would operate "in strict compliance with all statutory restrictions, OEO regulations and grant conditions." Only after the NOLAC Board passed a special resolution to that effect, which it both telegrammed and mailed to Reid,[75] did Max Friedersdorf, OEO Associate Director for Congressional Relations, announce on March 23, 1971, that OEO had decided to fund NOLAC for another year. However, the funding came with a series of amendments and special conditions to NOLAC's contract. These included increased oversight; changes to accounting, record keeping and documentation procedures; and specific conditions and limits on criminal representation, among others.[76]

The complaints and controversies concerning NOLAC appear to have come from two general sources. These include the Southern social mores that Auerbach Associates mentioned,

and the change in federal administration from the Johnson Democrats to the Nixon Republicans in 1969.

NOLAC and Southern Social Mores

NOLAC appeared slightly more than a decade since whites of Louisiana and other southern states resorted to "massive resistance"[77] in response to the May 17, 1954, United States Supreme Court decision in the case of Brown v. Board of Education of Topeka[78] which called for the desegregation of public schools. The Corporation also appeared just five or six years since New Orleans itself experienced violent confrontations surrounding school desegregation.

Massive resistance in Louisiana began immediately after the announcement of the Supreme Court decision. The state legislature, which had been in session at the time, approved a resolution that censured the federal Supreme Court,[79] created a Joint Legislative Committee on Segregation for the purpose of maintaining segregation,[80] and began to draft a series of laws to protect the state against school desegregation. Early bills authorized parish superintendents to assign individual students to public schools, mandated that all public schools below college level were to be segregated according to the police power of the state (so avoiding segregation by race alone), and made the policy of segregation by police power an amendment to the state constitution.[81]

The Joint Legislative Committee on Segregation (JLCS) created the Citizens Council movement in 1955, and the movement spread throughout the state.[82] In 1956 the Citizens Council initiated a campaign, coordinated with numerous government officials, to halt desegregation.[83] In an effort to end NAACP activity throughout the state the Citizens Council used the Fuqua law of 1924, originally enacted against the Ku Klux Klan, that required that

associations file membership lists every year with the Secretary of State.[84] NAACP chapters that complied with the demand found that their members were subjected to harassment and resigned,[85] while other chapters simply stopped operating for over five years until the federal Supreme Court ruled that the organization did not need to comply with the 1924 law. In 1957 the JLCS held hearings that determined that the NAACP was a Communist organization and that desegregation activity was part of a communist conspiracy.[86] New laws prohibited advocating desegregation, and teachers and other public servants could be fired for belonging to organizations that did promote desegregation.[87] A 1958 Louisiana law stated that the NAACP needed to certify that no officer of an NAACP affiliate in the country "is a member of any Communist, Communist-front or subversive organization," but the federal Supreme Court ruled the law unconstitutional.[88]

The Citizens Councils also began work in 1956 to disfranchise Blacks. Campaigns that extended over several years challenged voter registrations, purged large numbers of voters from rolls, complicated or ignored attempts to reinstate purged voters, and required near-impossible tests for new voter registrations.[89] This reduced Black voter registration across 21 parishes by approximately 60 percent (while white voter registration increased slightly) between March 17, 1956 and December 31, 1960.[90] The federal Court brought this action to an end as well.[91] The Citizens Council led the fight against school desegregation in New Orleans,[92] threatened and intimidated its opponents,[93] and even arranged "freedom buses" to send Blacks out of Louisiana to other states.[94]

In May of 1960 federal Judge Skelly Wright ordered that Orleans Parish schools begin to desegregate by September 7 of that year,[95] and the Louisiana government responded by entering

into a "legal duel" with Judge Wright. In late 1960 and early 1961 the administration of Governor James (Jimmie) H. Davis, who had campaigned as a segregationist,[96] held five consecutive special sessions during which it introduced and adopted over 100 pieces of legislation in attempts to stop integration. Wright regularly overturned those measures.[97] Business leaders saw the negative effects that the anger and violence displayed by opponents of school integration in 1960 had on commerce and, fearing the negative effects that such actions might have in the future, worked to end segregation in the business community.[98] By 1962 white parents had reluctantly accepted desegregation, and a minimal level of school integration had been achieved. By 1963 the Citizens Councils had lost their influence.[99]

The collapse of the Citizens Councils was followed by the reappearance of the Ku Klux Klan (KKK), which had gone through several cycles of rise and decline since its founding following Reconstruction.[100] Attempts to establish the KKK in Louisiana during the 1950s were failures,[101] but in the 1960s the group served as a refuge for the most extreme segregationists. With the cooperation of many law enforcement officials, the Klan resorted to "arson, harassment, intimidation, and even murder."[102] Once again, the federal government and federal courts stepped in to resolve the situation by prosecuting Klan members and enforcing the Civil Rights Act of 1964.[103]

Governor John McKeithen, who held office from 1964 to 1972, had campaigned as a progressive, a reformer, and a segregationist.[104] Once in office, though, he governed through consensus and with moderation on the race issue, and as a defender of civil rights. He tried to negotiate solutions to problems, so that people "learn to get along with each other."[105] In 1965 McKeithen promoted and engaged in negotiations in Bogalusa following protests against

segregation by the Bogalusa Voters League and subsequent acts of intimidation and violence by the Klan,[106] and he established the statewide biracial Commission on Human Relations, Rights and Responsibilities which worked to resolve racial problems in communities throughout the state.[107] In addition, he urged parish officials to comply with the Voting Rights Act and properly register Blacks.[108] In 1969, however, he made pronouncements opposing school integration, perhaps to gain the support of white voters for his own future political ambitions.[109]

These lingering segregationist attitudes in New Orleans and Louisiana played a role in the controversy surrounding NOLAC. Representative Joe Waggoner, Jr., who questioned OEO Director Donald Rumsfeld about NOLAC's assistance to the NCCF, was a conservative, segregationist Democrat.[110] Waggoner voted against a 1962 House resolution proposing that the states abolish the poll tax in federal elections,[111] as well as against the anti-poverty Economic Opportunity Act of 1964,[112] the Voting Rights Act of 1965,[113] and the Civil Rights Bill of 1968.[114] He had a record of hostility towards NOLAC due to its "aggressive representation of the poor in suits against local interests."[115]

Representative John Rarick of St. Francisville, Louisiana, who entered the fake NCCF handbill into the Congressional Record, was a conservative Democrat and "ardent segregationist."[116] An elected judge in the Twentieth Judicial District from June 28, 1961 to May 15, 1966,[117] he defied federal court orders in 1963 by repeatedly barring the Council of Racial Equality (CORE) from demonstrating in favor of desegregation.[118] He ran for Congressional office with the encouragement of the Ku Klux Klan and the White Citizens' Council, and was on a "first-name basis" with Willis Carto of the racist Liberty Lobby. His entries in the Congressional Record have been characterized as being "anti-Semitic, anti-black, anti-federal

government, anti-United Nations, and anti-welfare."[119] Rarick viewed discrimination as a fundamental aspect of liberty, and while in Congress voted against a $1.5 billion appropriation for school integration, against funding busing for school integration, and against setting targets for minority hiring. He also introduced legislation to repeal the Civil Rights Act and the Voting Rights Act.[120]

Lawyer Ben Toledano, who met with Donald Rumsfeld's assistant Dick Cheney and with Vice-President Spiro Agnew, and who taped a television interview about NOLAC, was a segregationist with political ambitions. He began his political career at the age of 20, working for a succession of Republican presidential candidates beginning in 1952. In 1958 he joined the States' Rights Party of Louisiana,[121] which had broken away from the Democratic Party in 1948 because of the Democratic interest in desegregation, social equality and civil rights.[122] After serving as acting chairman of the States' Rights Party for Orleans Parish and as executive secretary of the Louisiana States' Rights Party in 1959, Toledano registered as a Democrat in 1963 and ran unsuccessfully for a State House seat. By 1969 he had become a Republican and in 1970 ran unsuccessfully for the New Orleans mayoralty. Among his positions he criticized the city's Human Relations Committee, which he claimed favored the Black community over the white community; he opposed the city's anti-discriminatory Public Accommodations Ordinance, claiming that bars were "the poor man's social club;"[123] and he opposed bussing school children and transferring teachers in order to achieve racial balance as "hypocritical social experiments" that he viewed as "unwarranted, unsound, and unjustifiable."[124] He lost that race to liberal Moon Landrieu, who opposed segregation[125] and won nearly 99 percent of the black vote.[126]

Legal Services and the Nixon Administration

When Richard Nixon assumed the presidency in January of 1969 he did not have the optimism and enthusiasm about the war on poverty that Johnson had. In fact, Nixon did not like the Office of Economic Opportunity or the Legal Services Program.[127] During the 1968 election campaign he opposed the OEO, which he characterized as being wasteful and disruptive.[128] Once in office he slowly transferred the anti-poverty programs out of the Office of Economic Opportunity, which was closed in 1974.[129]

For the position of director of the OEO, Nixon chose Donald Rumsfeld, a four-term Republican congressman who represented Illinois's 13th district north of Chicago, which included suburban areas such as Evanston, Skokie and Niles.[130] Rumsfeld had developed a conservative record in Congress, voting against

> the antipoverty bill, aid for college building, medical-school assistance and student loans, area redevelopment for pockets of poverty, the use of surplus food for the needy, foreign-aid appropriations, aid for city and suburban libraries, aid for mass transit, air-pollution control, funds for the arms-control and disarmament agency, the creation of an executive department of urban affairs and the expansion of the House Rules Committee in such a way as to break the bottleneck for progressive legislation.[131]

The United States Chamber of Commerce gave Rumsfeld a 100 per cent rating for his support of business interests. Some described him as being a supporter of civil rights, but fiscally "thrifty."[132] That could help to explain why he could support civil rights measures, but not programs for the poor: giving people rights does not cost money, while programs that provide the poor with goods and services do.

Despite this voting record that consistently opposed providing services to the poor, Nixon worked hard to place Rumsfeld as the director of the national anti-poverty program. He extended five offers before Rumsfeld accepted the position,[133] and also gave Rumsfeld a cabinet level position as an assistant to the President. The administration then faced a constitutional barrier to appointing Rumsfeld, as a sitting Congressman, to a federal post that had received a salary increase during his Congressional term.[134] The constitutional problem was ultimately solved when the administration paid Rumsfeld for his work as White House advisor rather than as OEO director.[135]

Rumsfeld, in turn, hired civil rights lawyer Terry Lenzner as the director of the Legal Services Program. A graduate of Harvard Law School,[136] Lenzner had clerked for civil rights lawyer Lloyd Garrison in New York in 1963, then worked in the Civil Rights Division at the Justice Department.[137] Only six weeks after leaving law school he was sent to Mississippi in 1964 to investigate the deaths of three civil rights workers.[138] In early 1967 he went to New York as a federal prosecutor in organized-crime cases, and two years later he left that job to assist Mr. John Doar, a leading civil rights lawyer with whom he had worked in the Justice Department.[139] Doar had left the Justice Department in 1967, became president of New York City's Board of Education, and from 1968 to 1973 served as the head of the technical assistance arm of the community development project Bedford-Stuyvesant Restoration Corporation.[140]

In the spring of 1969 Lenzner went to the Office of Economic Opportunity as a temporary aide to Donald Rumsfeld, and a month later Rumsfeld appointed Lenzner as LSP Director. During the first several months that they worked together Rumsfeld and Lenzner both expressed support for the Legal Services Program.[141]

Following their November 20, 1970, dismissals, Lenzner and his assistant Jones accused Rumsfeld of bowing to political pressure in firing them.[142] They referred specifically to political pressure from California Governor Ronald Reagan, Florida Governor Claude R. Kirk Jr., Louisiana Governor John McKeithen, and the Mississippi Republican Party, among others, "who are determined to keep us from suing special interests close to them on behalf of the poor."[143] They stated further that the administration served political ends rather than the needs of the poor whenever the two were in conflict.[144] Others supported Lenzner and Jones and pointed to political pressure.[145]

Several journalists outlined the role of political influence in the program. Jack Rosenthal of The New York Times stated that "this conflict between law and politics is built into the program, regardless of who sits in the White House." He observed that legal services lawyers who win law reform cases "inescapably step on some very big toes – those of mayors, governors and members of Congress – prompting howls loud enough to be heard clearly in Washington."[146] Frank Mankiewicz and Tom Braden of The States-Item asserted that Lenzner "thought political complaints could be ignored if the job was done well," while "Rumsfeld knew better."[147] Meanwhile, Evans and Novak argued in The Washington Post that

> If any program as naturally provocative as legal services for the poor is to survive in Richard Nixon's Washington, it must be kept in check by a cool-headed politician, fending off uncompromising idealists. Failing to comprehend that political reality put Terry Lenzner on his collision course with Rumsfeld.[148]

In 1971, Richard Nixon himself stated that "much of the litigation initiated by legal services has placed it in direct conflict with local and State governments," and that the LSP's concern with social issues subjected it to "unusually strong political pressures."[149]

Conclusion

The concept of access to legal representation being a form of largesse (or gift or charity) that can be given to the poor when it is convenient for the powerful but withheld from the poor when it is inconvenient for the powerful explains the actions of the individuals in this case well. Doris Culver and Garland Bonin were willing to perpetuate and spread false claims against NOLAC in an attempt to curb its activities and relieve legal pressure on their offices. Politicians Joe Waggoner, Jr., John Rarick and Ben Toledano, Jr., were intent on maintaining segregation and opposed NOLAC as an organization that was working for the goal of integration. Also, Nixon's Republican administration was more receptive to complaints about the activities of Legal Services Program affiliates than was the Johnson administration. Therefore the Nixon OEO and LSP responded to campaigns such as Culver's and Bonin's use of the fake handbill, and to demands from state politicians, and placed greater restrictions on the LSP affiliates' abilities to act. The rule of law, democracy, justice and fairness became secondary considerations. The politicians involved were more concerned about political and economic circumstances and with maintaining political support, and they were willing to sacrifice the rights of the poor to preserve that support.

End Notes

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2. Lyndon B. Johnson, "Special Message to the Congress Proposing a Nationwide War on the Sources of Poverty," 16 March 1964, accessed from The American Presidency Project internet site at http://www.presidency.ucsb.edu/ws/index.php?pid=26109&st=war+on accessed on 7 February 2006.

3. Carl M. Brauer, "Kennedy, Johnson, and the War on Poverty," The Journal of American History 69, 1 (June 1982): 119.

4. Social Welfare Planning Council, "Organization Membership in SWPC - Mutual Responsibilities," February 1963, Community Services Council of New Orleans Collection, Box 47, Folder 484.

5. "Summary of remarks made by Clark Corliss at Annual Meeting of SWPC on June 25, 1964,"Community Services Council of New Orleans Collection, Box 105, Folder 1089.

6. "Minutes of New Orleans Committee for Economic Opportunity Program, 29 July 1964," Community Services Council of New Orleans Collection, Box 105, Folder 1089.

7. Total Community Action, Inc., A History of the Community Action Movement in New Orleans, 1964-2001, (New Orleans: Total Community Action , Inc., 2001), 29; Lee Stinett, "War on Poverty Takes First Real Steps Here," Times-Picayune, 9 December 1964, Bureau of Government Research Collection, Box 194, Envelope C-1, Louisiana and Special Collections, Earl K. Long Library, University of New Orleans.

8. "The Economic Opportunity Act of 1964, Public Law 88-452," United States Statutes at Large, 78 (Washington D.C.: United States Government Printing Office, 1965), 508-516.

9. Earl Johnson, Jr., Justice and Reform; The Formative Years of the American Legal Services Program (New Brunswick, New Jersey: Transaction Books, 1978), 47.

10. "Economic Opportunity Amendments of 1966, Public Law 89-794," United States Statutes at Large, 80 (Washington D.C.: United States Government Printing Office, 1965), 1451-1477. The text creating the Legal Services Program is on page 1462.

11. Wilmar G. Hinrichs to Mr. Clark H. Corliss, 31 March 1965, Community Services Council of New Orleans Collection, Box 81, Folder 867.

12. Thomas P. Godchaux to Board of Directors of Total Community Action, 20 April 1966, Victor Hugo Schiro Mayoral Collection, City Archives, New Orleans Public Library, Box S66-29, Folder "Total Community Action - 1966."

13. "Law, Poverty Program Near," 5 November 1966, Times-Picayune, Community Services Council of New Orleans Collection, Box 105, Folder 1093; "Poor May Get New Legal Aid," 6 November 1966, Community Services Council of New Orleans Collection, Box 105, Folder 1093; Wilmer G. Hinrichs, Press release "To All Newspapers, Radio and Television Media, and Addresses Attached Hereto," 8 November 1966, Community Services Council of New Orleans Collection, box 95, Folder 988.

14. "Poor May Get New Legal Aid," The Times-Picayune, 6 November 1966, Community Services Council of New Orleans Collection, Box 105, Folder 1093.

15. "First Draft Proposal for a Legal Services to the Poor Program in New Orleans, Louisiana," 28 November 1966, Community Services Council of New Orleans Collection, Box 95, Folder 988.

16. Dick Buckley, C. Jerre Lloyd and Winston C. Lill to Mr. Clark H. Corliss, 31 January 1967, Community Services Council of New Orleans Collection, Box 95, Folder 988.

17. Minutes of the Meeting of the Board of Directors of Total Community Action, Inc., 8 February 1967, Community Services Council of New Orleans Collection, Box 105, Folder 1091.

18. "TCA Board Approves Legal Assistance Program," TCA Facts, Monthly Newsletter of Total Community Action, Inc.," Vol. 3, No. 2, February 1967, p. 1, Community Services Council of New Orleans Collection, Box 105, Folder 1094.

19. "Legal Assistance Group Formed," TCA Facts, Monthly Newsletter of Total Community Action, Inc.," Vol. 3, No. 12, December 1967, p. 2, Community Services Council of New Orleans Collection, Box 105, Folder 1094.

20. Richard A. Buckley to Social Welfare Planning Council, 28 February 1968, Community Services Council of New Orleans Collection, Box 95, Folder 988.

21. Auerbach Associates, Inc. "Evaluation Report: New Orleans Legal Assistance Corporation, New Orleans, Louisiana", prepared for Office of Economic Opportunity, Office of Legal Services, November 12, 1970, 1-2, 2-6, 2-7, 3-3, 3-4, Box 3, Folder 26 of the John P. Nelson, Jr. Papers, Amistad Research Center, Tulane University. Although dated November 12, 1970, the report was actually prepared in August of that year. Note that page numbering for this report indicates chapter and page, so that 1-1 indicates chapter 1, page 1.

22. Reginald Heber Smith, Justice and the Poor, A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal Their Position Before the Law with Particular Reference to Legal Aid Work in the United States (1919, reprinted New York: Arno Press and the New York Times, 1971); Emery A. Brownell, Legal Aid in the United States, A Study of the Availability of Lawyers' Services for Persons Unable to Pay Fees (Rochester: The Lawyers Co-operative Publishing Company, 1951); Johnson, Justice and Reform, 9.

23. Guidelines for Legal Services Programs, (Washington, D.C.: Community Action Program, Office of Economic Opportunity, 1965), 23. Under the heading "Scope of Legal Services Rendered" the Guidelines states:

> Advocacy of appropriate reforms in statutes, regulations, and administrative practices is a part of the traditional role of the lawyer and should be among the services afforded by the program. This may include judicial challenge to particular practices and regulations, research into conflicting or discriminating applications of laws or administrative rules, and proposals for administrative and legislative changes.

24. Johnson, Justice and Reform, 75.

25. E. Clinton Bamberger, Jr., "The Legal Services Program of the Office of Economic Opportunity," The Notre Dame Lawyer, 41, 6 (1966): 847, 848.

26. Earl Johnson, Jr., Justice and Reform; The Formative Years of the American Legal Services Program (New Brunswick, New Jersey: Transaction Books, 1978), 130-131. Sargent Shriver defined law reform as the use of test cases and legislative activity to make new law ("Law and Reform," The American University Law Review, vol. 17, no. 1, (1967):1). Journalist Jack Rosenthal ("Legal Aid and Politics," The New York Times, 24 November 1970, p. 20) similarly stated that law reform involved "test cases that challenge state and local governments and laws." Professor of Law Lawrence M. Friedman (A History of American Law, second edition (New York: Touchstone Books, 1985), 674-678) explained that the law reform movement originated in the 1870s as a way of demonstrating that lawyers can serve the public interest. He stated that law reform had "small social returns" until the activism of the 1960s, when public interest groups and a general unrest at universities energized lawyers, and the Johnson administration initiated the Legal Services Program. Freidman observed that the relatively small number of lawyers engaged in law reform during the 1960s accomplished a great deal, and too much in the eyes of some. Professor of Law Graham C. Lilly ("Modeling Class Actions: The Representative Suit as an Analytic Tool," Nebraska Law Review v. 81 (2003): 1014) explained that some people trace the origins of the class action lawsuit to the seventeenth-century English Bill of Peace. However, he stated that the first case that legitimized class action lawsuits in the U.S. Supreme Court was Smith v. Swormstedt in1853.

27. Johnson, Justice and Reform, 131.

28. Johnson, Justice and Reform, 176-177.

29. Johnson, Justice and Reform, 178-179.

30. Johnson, Justice and Reform, 180-182. Some of the early principal law reform centers included: a housing law center at the University of California, Berkeley; a consumer law center at Boston University Law School; a juvenile law center at St. Louis University Law School; an employment law center in New York; an education law center at Harvard Law School; a health law center at U.C.L.A. Law School; and an elderly law center at the University of Southern California Law School. Charles K. Rowley, The Right to Justice; The Political Economy of Legal Services in the United States, Brookfield, Vermont: Edward Elgar Publishing Company, 1992, 140, lists the National Support Centers in 1987 as being: National Housing Law and Community Development Project; Center on Social Welfare Policy and Law; National Consumer Law Center; National Health Law Program; National Center for Youth Law; National Senior Citizens Law Center; Center for Law and Education; Migrant Legal Action Program; National Employment Law Project; National Legal Center for the Medically Dependent and Disabled; National Economic Development and Law Center; National Social Science and Law Center; Indian Law Support Center; National Center on Women and Family Law; National Committee for Immigrants' Rights; National Veterans Legal Services Project; and Food Research and Action Center. This structure of the LSP essentially satisfied all of Reginald Heber Smith's original recommendations from 1919, almost 50 years earlier. The affiliated offices provided a range of legal services within a single agency; the Program promoted advocacy and law reform; the twelve national law reform centers served in the role of the recommended "Bureau of Justice;" and the organizations that participated in the program were largely publicly funded (Reginald Heber Smith, Justice and the Poor, A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal Their Position Before the Law with Particular Reference to Legal Aid Work in the United States (1919, reprinted, New York: Arno Press and the New York Times, 1971).

31. "Legal Services Exists for the Redistribution of Wealth & Power," NOLA Express 63, 4-17 September 1970, p. 6.

32. "The Legal Services Corporation: Curtailing Political Interference," The Yale Law Journal 81, 2 (December 1971): 239.

33. Auerbach Associates, Inc. "Evaluation Report," 2-1.

34. Ruffin v. Housing Authority of New Orleans, 301 F. Supp. 251 (1969).

35. French v. Bashful, 303 F. Supp. 1333 (1969).

36. Cook v. Ochsner Foundation Hospital, 319 F. Supp. 603 (1970).

37. Cook v. Ochsner Foundation Hospital, 61 F.R.D. 354 (1972).

38. Hamilton v. Schiro, 338 F. Supp. 1016 (1970).

39. Hamilton v. Landrieu, 351 F. Supp. 549 (1972).

40. Stokes v. Bonin, 366 F. Supp. 485 (1973).

41. LeBanks v. Spears, 60 F.R.D. 135 (1973).

42. Auerbach Associates, Inc. "Evaluation Report," 2-1, 4-4, 4-5; New Orleans Legal Assistance Corporation, 25th Anniversary commemorative booklet [photocopy], 17 October 1992, 8-9.

43. Simon Rosenthal to Ernest N. Morial, December 16, 1968, Box 2, Folder 15, Nelson Papers.

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Chapter 4: The Tulane Environmental Law Clinic, 1998

During the late 1990s, almost three decades after the controversy involving the New Orleans Legal Assistance Corporation, the Tulane Environmental Law Clinic became the focus of a very public dispute. Following inflammatory comments by Louisiana Governor Murphy "Mike" Foster and lobbying efforts from the business community, the Supreme Court of Louisiana issued three revisions to Louisiana Supreme Court Rule XX, which governs the right of law students in Louisiana to represent clients in state courts.[1] The amended rule, which the executive director of the Association of American Law Schools termed "the most restrictive student practice rule in the nation,"[2] was aimed primarily at the Environmental Law Clinic. It placed new, strict limits on the clients whom university law clinics and student lawyers throughout the state could serve, and so had the potential of denying legal representation to significant numbers of the poor in Louisiana.

The Tulane University Law School created the Tulane Environmental Law Clinic (TELC) in 1989. Its purpose is threefold: to give law students practical experience in representing real clients in real cases involving environmental issues; to provide a free legal service in environmental issues to those who could not otherwise afford a lawyer; and to strengthen the abilities of community members to carry on their own struggles concerning environmental issues. The Clinic has a staff of five attorneys and a Legal Advisory Board that provides advice on

Clinic matters (including approval or disapproval of the cases that the Clinic considers taking), and it generally accepts 26 third-year law students into its practice per year. The Law Clinic students and attorneys do not necessarily share the legal goals of their clients, although clients' goals must be lawful, but their role is to determine and follow a strategy to advance those goals. Since its creation the Law Clinic has assisted more than 180 individuals, organizations, and local governments in Louisiana.[3]

The Environmental Law Clinic became involved in the case that led to the controversy after members of the organization Saint James Citizens for Jobs and the Environment (SJCJE) requested TELC's legal assistance in November of 1966.[4] In fact, SJCJE went to the Law Clinic twice requesting assistance. After the first request the Law Clinic decided that the issue was too large for it to handle and suggested that the group get assistance somewhere else. After a fruitless search the SJCJE went to the Law Clinic a second time requesting help, and the TELC accepted.[5] However, the chain of events that led to the controversy began almost a year earlier.

The Origins of the Controversy: Shintech Inc. and Convent, Louisiana

In early January of 1996, business and chemical industry press began to print stories announcing that Shintech Inc., the United States subsidiary of the Japanese company Shin-Etsu Chemical Ltd., planned to build its second U.S. chemical production complex (after its Freeport, Texas plant) somewhere on the Gulf Coast.[6] Shintech applied for air emission permits for a Convent, St. James Parish, Louisiana, site in July 1996,[7] although it would not officially announce its selection of the site until several months later, on October 24, 1996. The company explained that this location was attractive because of "the ready supply of raw materials such as

ethylene and salt, access to deep waterways, ports and rail transportation, and the existing chemical industry infrastructure."[8]

Shin-Etsu was already the world's largest producer of polyvinyl chloride (PVC), and the new plant was to be the world's largest PVC production facility.[9] It was to cover 500 acres of a 2,400 acre site, and was to produce several chemicals, including the annual production of 500,000 metric tons of caustic soda, 500,000 metric tons of vinyl chloride monomer, and 500,000 metric tons of PVC. Construction of the factory was to cost $700 million and employ 2,000 temporary workers, while the operating plant was to have 165 permanent employees and 90 contract positions.[10]

Dr. Timothy P. Ryan, then dean of the College of Business at the University of New Orleans, estimated that the construction of the plant would support 13,133 temporary jobs representing $288 million in income, and would generate $25 million in local and state taxes. He expected that the finished plant would create and support 5,988 new jobs representing an annual income of $107 million, and would generate $10.5 million in annual taxes.[11]

Shintech's announcement was a bright spot in the state's otherwise lackluster economic performance. Between 1983 and 1995 Louisiana had one of the lowest rates of employment growth in the country. The state had fared poorly during the oil bust of the mid-1980s, losing 150,000 jobs and experiencing double-digit unemployment.[12] Workforce and economic conditions placed the state and its workers at a disadvantage in relation to the rest of the country: in 1992 Louisiana ranked 50th among the states for number of high school graduates, 47th for adult illiteracy, 45th for long-term unemployment, and 43rd for tax fairness.[13] The economy picked up in the 1990s with renewed growth in the oil industry, as well as in tourism,

shipbuilding, computer and communications developments, and increased port activity. However, in 1996 the unemployment rate averaged 6.3 percent[14] (when the national unemployment rate was 5.4 percent[15]), and the state ranked 40th for growth of long-term employment.[16] The state's non-farm economy grew by a mere 0.9 percent.[17] The following year, in 1997, employers complained that workers were not properly educated.[18]

Louisiana's population also had a low growth rate of 5.9 percent during the 1990s, compared to a rate of 14.7 percent for the South generally and about 13.2 percent for the country. Part of the state's low population growth was due to a net out-migration of 139,704.[19] Surveys reported that large numbers of Louisiana workers – 38 percent in 1994 and 32 percent in 1996 – said that they would leave the state if they could.[20]

In Convent itself, nearly 47 percent of the residents had not finished high school, and many were desperate for jobs.[21] The 1990 census indicated that 80 percent of the residents who lived within 5 miles of Shintech's selected site were African-American, nearly 43 percent had incomes below the poverty level, and the per capita income of area residents was $7,259.[22]

Governor Foster supported Shintech's plans,[23] as did St. James Parish officials, who had been discussing the plant's location with the company secretly since the previous December. The state Department of Commerce and Industry offered Shintech the "standard state package" of benefits, which was valued at $129.9 million. This included a 10-year industrial property tax exemption, enterprise zone status (providing rebates of sales and use taxes during construction), and a corporate income tax credit for each new job that the company created.[24]

Opposition from Convent Residents

Residents of Convent learned of the proposed new chemical plant at an informal community meeting on July 22, 1996, and this was followed by two public hearings.[25] The residents who opposed the project created the community group St. James Citizens for Jobs and the Environment shortly after.[26] On September 5, 1996, they held a meeting to discuss environmental and health issues that might be associated with the facility.[27] By October 24, when Shintech officially announced that it had chosen Convent as the site for its plant, SJCJE had given St. James Parish Council a list of 78 reasons to prevent Shintech from building in the town, and over 1,100 community members had signed a petition opposing the new plant.[28]

The residents had reason to be concerned. A predominantly African-American community with a population of just over 2,000, Convent is located on the Mississippi River about halfway between New Orleans and Baton Rouge, in an area which is often referred to as "Cancer Alley."[29] In 1997, 138 petrochemical companies were located in this stretch of the Mississippi River,[30] and in 1999 journalist Barbara Koeppel reported that it was "home to seven oil refineries and somewhere between 175 and 350 heavy industrial plants, depending on how you count."[31] These industries emitted 132 million pounds of toxic substances into the environment annually,[32] and waste-processing companies additional toxic waste from other states into the area – 52 million pounds worth in 1995. People living near the factories and waste dumps were plagued with disease, which many attributed to the industrial chemicals and waste. The incidence of asthma, stillbirths, miscarriages, neurological diseases and cancers had ballooned, and residents believed that the waste had also poisoned pets, fish and other wildlife.[33]

St. James Parish, where Convent is located, was already home to eight major chemical plants and a sugar refinery,[34] and in 1996 the chemical plants released more than 17 million pounds of toxins into the environment.[35] While industrial releases exposed U.S. citizens to an average of 10 pounds of toxic chemicals per year nationally, Convent residents had been exposed to 4,517 pounds per year prior to Shintech's proposal.[36] The Shintech plant would have emitted an additional 3 million pounds of air pollutants per year, including 600,000 pounds of toxic chemicals, and would have dumped nearly 8 million gallons of toxic waste water into the Mississippi River every day.[37]

Local residents had not gotten any of the jobs at the plants in the past, and they had seen that chemical plants had not helped develop the community. The incentives that the state government offered Shintech ensured that the community would not receive substantial tax benefits. The residents all knew people who had cancer and who had died of cancer, and they knew of high rates of other diseases. They attributed these afflictions to toxic chemicals,[38] and were concerned about the serious risks that accidental chemical releases posed to the community.[39] They were also aware of the fates of the Louisiana communities of Morrisonville, Sunrise, Reveilletown and Diamond, which had been bought by chemical companies and razed due to industrial chemical pollution.[40]

Legal Representation in St. James Parish

During its representation of the SJCJE, the Tulane Environmental Law Clinic worked with other supportive groups. For example, the Louisiana Environmental Action Network (LEAN) sent a number of reports to the TELC, so giving the Clinic's student lawyers the technical, scientific and historical information that they needed, including information about

deficiencies in Shintech's planning and in its permit applications.[41] LEAN also wrote a status report on Shintech permits[42] and a fact sheet for members of SJCJE,[43] and communicated directly with the Environmental Protection Agency on permitting issues.[44] Also, the New York organization The Center for Constitutional Rights filed a lawsuit against Shintech and Louisiana officials under the Americans with Disabilities Act, arguing that the chemical plant would hurt Convent residents who already suffered from poor health.[45]

The Tulane Environmental Law Clinic itself handled numerous legal actions on behalf of the SJCJE, several of which are listed in Table 6. While not all of the Environmental Law Clinic's actions were successful,[46] it did have some significant successes. Several filings resulted in the EPA delaying decision-making on a crucial air emissions permit;[47] a judge deferring a decision on a coastal zone land use permit;[48] the EPA granting part of the May 22, 1997 petition objecting to permits for PVC and VCM production;[49] the EPA reopening the air permit process in order to consider technical and environmental justice issues;[50] a state district court judge considering an appeal of a waste water permit that the Louisiana Department of Environmental Quality (LDEQ) granted to Shintech;[51] and a state district court judge ruling that a hearing should be held into claims of LDEQ bias.[52]

The EPA's investigation into environmental justice issues, which was mandated by Executive Order 12898 which President Bill Clinton signed on February 11, 1994,[53] was lengthy and slow, as were many of the investigations. The agency interviewed LDEQ employees and complainants in November of 1997 (three months after TELC filed the initial complaint), issued an initial draft report concerning demographic information in Convent on January 30, 1998, and

Table 6: Selected TELC Actions on Behalf of SJCJE

Date	Issue
January 2, 1997	filed a lawsuit against the Louisiana Department of Environmental Quality (LDEQ) for initiating a five-cent per page fee for photocopying public documents, which had previously been free.[54]
May 1997	filed a motion to recuse LDEQ Secretary Dale Givens from proceedings involving Shintech on the grounds that he was biased in favor of the company.[55]
May 22, 1997	filed a petition (incorporating petitions of 3 April and 16 April 1997) with EPA objecting to operating permits LDEQ issued to Shintech under the Clean Air Act.[56]
June 13, 1997	filed a lawsuit asserting that St. James Parish authorities were biased and improperly issued a Coastal Zone Land Use permit to Shintech, and requesting that the federal government revoke the permit.[57]
June 1997	filed a complaint with the EPA claiming that the Shintech plant would violate the 1964 Civil Rights Act and requesting that construction of the plant be stopped on civil rights grounds.[58]
June 30, 1997	petitioned the EPA Environmental Appeals Board to review a Prevention of Significant Deterioration (PSD) air quality permit issued by LDEQ.[59]
July 16, 1997	filed a civil rights complaint with the EPA alleging that the LDEQ's issuing of air and water permits to Shintech discriminated against minorities, and requesting that EPA halt federal funding to the LDEQ.[60]
December 7, 1997	filed a motion with the LDEQ demonstrating pro-industry bias on the part of the Department's top three officials and asking that they recuse themselves from the case.[61]
April 7, 1998	filed a lawsuit to force the LDEQ to release internal documents relating to the Shintech proposal, and to a prior lawsuit involving air permits.[62]
April 13, 1998	filed a lawsuit calling for court hearings into allegations of bias by three LDEQ officials.[63]

after further discussions released a revision of the draft report on demographic information on April 7, 1998. More meetings and discussions followed.[64]

With resolution of the environmental justice issues stalled until at least November of 1998, continuing disagreement over technical issues concerning air permits,[65] and the possibility of further legal action from environmental groups that had "vowed" to prevent construction of

the plant,[66] Shintech announced on September 16, 1998, that it was stopping its efforts to get permits for the Convent site and would work toward building a smaller plant in Iberville Parish.[67] The company acknowledged that opposition from community groups and environmental organizations played a role in its change of plans, but it referred to other factors as well. Shintech representatives commented that it was reacting to a changing market (which was experiencing unstable demand and pricing[68]), its expertise was in PVC production, it already had a working relationship with Dow Chemical for the precursor monomer, and Dow would be better able to deal with controversy since it was a larger company.[69] Shintech's vice president of manufacturing, Erv Schroeder, said that the new proposal was "significantly superior" than the plan for St. James Parish had been.[70]

In fact, in October 1996, industry sources said that Shintech's completion of a plant in Covent was "less than certain" since Shintech was reported to be negotiating with Dow even then, and that Shintech's initial announcement of plans for the Convent plant was part of a "high-stakes poker game" that it was playing with Dow.[71] In 1999 Richard Mason of Shintech said that the lengthy dispute "gave the company time to re-evaluate the economics of building the plant," and that the subsequent slowdown in the PVC industry increased interest in cooperation at both Shintech and Dow.[72] In 2002 the president of Shin-Etsu, Shintech's parent corporation, commented that its situation in Iberville Parish where it was working with Dow was better than the situation in Convent, where Shintech would have had its own integrated plant, would have been.[73]

Opposition to Student Law Clinics and Citizen Representation

Governor Foster, several highly placed civil servants, and business associations expressed, and acted upon, hostility towards the Law Clinic's activities. Foster had been elected to the governorship in the fall of 1995 and took office on January 8, 1996, just days after the first publication of the fact that Shintech was looking for a Gulf Coast site for a new factory. A millionaire businessman, Foster had served two terms in the state senate where he was chairman of the Commerce Committee.[74] Conservative and pro-business, Foster opposed trial lawyers and organized labor, and changed his party affiliation from Democratic to Republican for his gubernatorial campaign.[75] While a senator, Foster promoted legislation to prevent employees from seeking punitive damages as part of worker compensation claims. During his gubernatorial campaign he opposed reinstatement of the state's prevailing wage law (which would have mandated paying workers prevailing wages in areas where government construction projects were underway[76]), and supported the state's right-to-work law (which allows non-union workers in a union shop to benefit from the gains negotiated by unions without joining or paying union dues[77]).[78] Shortly after his election as governor, Foster stated that his administration was "committed to making it easier to do business in Louisiana." His program included tort reform to reduce large court judgments and trial lawyers' fees, and ending unnecessary, nuisance business-oriented regulations.[79]

Foster was a strong supporter of Shintech's plan,[80] and used his influence as Governor to promote it and impede the work of the TELC.[81] At an April 3, 1997, meeting with President Eamon Kelly of Tulane University, Foster "expressed his frustration that sometimes he believes that the clinic acts as an anti-economic development force."[82] On other occasions he said that the

TELC seemed to be driven by the professors' "radical political agenda,"[83] and that it was trying to block the will of the people.[84] He referred to TELC staff as "a bunch of vigilantes out there to make their own law" and as "a law unto themselves" who were stymieing economic growth. Foster threatened to attack Tulane's property tax and sales tax exemptions and the stipends it received for Louisiana students, and asked Tulane supporters to reconsider their contributions to the university. He also accused the Law Clinic of stalling Shintech's plan until it was no longer financially viable, and said that St. James Parish residents should spend their own money rather than Tulane's for legal representation.[85] In making these comments Governor Foster set a partisan, pro-Shintech tone for the rest of state government, and even for a significant portion of the business sector.

In August of 1997 Kevin Reilly, the Secretary of the Louisiana Department of Economic Development (LDED) and a wealthy businessman himself,[86] wrote to the president of Tulane University that the Law Clinic's "reckless activities" and "environmental dilettantism" threatened the state's development. Therefore, because of the Law Clinic's activities, the university could be accused of being irresponsible and pursuing elitist social engineering goals. He suggested that the university request that the Louisiana Supreme Court investigate the Clinic, and that the university itself might investigate the TELC.[87] Reilly later admitted that he was trying to "defeat" Shintech opponents, and that he asked LDED staff to investigate the tax-exempt status of the Louisiana Coalition for Tax Justice, and asked his personal lawyers to compile a list of all of the TELC's legal filings. He referred to the Law Clinic staff and students as "an elitist group . . . indulging in an 'amusing' exercise."[88] Governor Foster later approved of Reilly's investigations.[89]

In December of 1997, J. Dale Givens, Secretary of the Louisiana Department of Environmental Quality, scheduled two informal community meetings to hear environmental justice concerns. He gave only 8-to-11 days prior notice of the meetings, and scheduled them for the week of the National Environmental Justice Advisory Committee conference.[90] These arrangements practically ensured that those who were most interested in and knowledgeable about environmental justice issues would be unable to attend the community meetings. (The LDEQ ultimately cancelled the meetings in response to a motion filed by the TELC.[91])

Meanwhile, LDEQ Assistant Secretary Gus Von Bodungen told his staff not to meet with opponents of the Shintech project because their position was "adversarial" to the department's.[92] Jim Friloux, LDEQ ombudsman, referred to lawyers for Shintech opponents as "outside agitators" while he assisted Shintech and its public relations firm in dealing with the environmental justice allegations.[93] Janice Dickerson, environmental justice coordinator for LDEQ, publicly referred to community activists who opposed Shintech's plans as "little Hitlers and little dictators."[94]

In May of 1996 a Parish employee, at Shintech's request, compiled and sent to Shintech lists of parish Coastal Zone Committee, Planning Commission, and St. James Parish Council memberships. The lists included descriptions and characterizations of committee members, including race, gender, employment status, attitudes towards industry, and hobbies.[95] In February of 1997, St. James Parish sent a flier, at its own expense, to 400 parish residents who were a on job waiting list. The flier encouraged the residents to send letters, expressing support for Shintech's air emission permit requests, to the LDEQ.[96]

Three St. James resident groups – the St. James Citizens Coalition, the League for a Better St. James, and the St. James Business Coalition – supported the Shintech development and the jobs that it promised. They falsely characterized the SJCJE as having few African-American members, and stated that most of the SJCJE membership lived several miles from the proposed Shintech site.[97] Shintech paid the legal bills for the St. James Citizens Coalition,[98] including the fees of Annette Jolivette, who served as lawyer for the pro-Shintech groups.[99] Following a December 9, 1996, public hearing, Shintech representatives wrote a memo, which was found in the Parish President's office, congratulating each other on dominating the meeting and "successfully frustrating citizen input."[100]

On September 5, 1997, state NAACP president Ernest Johnson stated that the St. James Parish chapter of the organization endorsed the Shintech proposal but that the state organization had decided not to take a position on it[101] (which was better for Shintech than a rejection of its proposal would have been). Johnson's comment came just hours after the Louisiana Economic Development Council (LEDC) granted $2.5 million to a group led by Johnson to support "minority and disadvantaged businesses." LDED Secretary Kevin Reilly promoted the loan, and the LEDC granted it despite the fact that the loan application was late, incomplete, and opposed by LEDC staff. Also, the LEDC approved an amount that was $500,000 more than Johnson's group had requested.[102] The state NAACP voted to support the St. James Parish chapter's position on September 21 at its convention.[103]

A representative of the Louisiana Chemical Association, which represented 73 companies at the time, stated that they had had a problem with the TELC for a long time, and claimed that the Law Clinic tied the LDEQ "up in knots responding to their briefs."[104] Sam LeBlanc III,

Chairman of the New Orleans and the River Region Chamber of Commerce, referred to the behavior of the TELC student lawyers as "irresponsible."[105]

In May of 1997, at a meeting of the New Orleans Business Council – an organization consisting of 59 chairmen, presidents and CEOs of major businesses based in the New Orleans area – Governor Foster suggested that council members could help the business climate in the city by getting "that bunch at Tulane under control."[106] Several Council members subsequently wrote letters to the Louisiana Supreme Court requesting that the Court stop TELC interference in business interests. A July 8, 1997, letter from Robert H. Gayle, president and chief executive officer of the New Orleans Chamber of Commerce, complained that the legal views of the Law Clinic conflicted with business positions and asked that the Supreme Court investigate the Clinic's positions. A July 16, 1997, letter from Erik F. Johnsen, chairman of the Business Council, requested that the Court enforce the student practice rules and prevent the TELC from fighting, harassing, and interfering with the State's efforts to attract new business. On September 9, 1997, Daniel Juneau, president of the conservative, pro-business lobby group Louisiana Association of Business and Industry (LABI), wrote that the TELC abused the student practice rule and was bad for business.[107] Juneau asked that the Court place additional limits on law clinics, and recommended restricting the types of community organizations that law clinics could represent; requiring that law clinics perform "balanced representation" that would include government, small business and environmental interests; prohibiting law clinics from soliciting clients or using outreach coordinators; requiring that students (rather than clinic staff) be the primary spokespersons in court and before administrative agencies; and requiring screening and approval of cases accepted by law clinics.[108] A November 6, 1997, letter from Joseph W. Cironi,

president of the Chamber of Commerce for southwest Louisiana, complained that the activities of the TELC affected economic growth and development in Southwest Louisiana and requested that the Clinic's activities be restricted.[109] Lawyers who represented business clients who lost lawsuits to the TELC had prominent positions in the New Orleans Business Council as well as in the Chamber of Commerce.[110]

In October of 1997, responding to the letters from the business leaders, the Supreme Court agreed to investigate the law school clinics at Loyola, Southern, and Tulane Universities.[111] The study was to be conducted by the Court's Deputy Judicial Administrators Timothy Averill and Kim Sport.[112] Although the study found that none of the clinics had violated the Law Student Practice Rule,[113] the Court chose to revise the Rule anyway.

The Law Student Practice Rule

The Louisiana Supreme Court created the Law Student Practice Rule in 1971. Originally referred to as Rule XIV-A and titled "The Limited Participation of Law Students in Trial Work," the rule had the dual purpose of providing competent legal services to clients unable to pay for such services, and of encouraging law schools to provide its students with clinical instruction in trial work. Under specified conditions to allow for appropriate supervision and adherence to professional and ethical standards, the rule allowed eligible law students under law school sponsored clinical instruction to "appear in any court or before any administrative tribunal in this State on behalf of the State, any political subdivision thereof, or any indigent person."[114]

In 1988 the Supreme Court revised the rule, then referred to as Rule XX, to allow representation of community organizations. While conditions were still attached to student law practice, the new rule read that "an eligible law student may appear in any court or before any

administrative tribunal in this state on behalf of the state, any political subdivision thereof, or any indigent person or community organization."[115]

Law Student Practice Rule Amendments of June 17, 1998

The revisions of June 17, 1998, narrowed, rather than broadened, the population of clients whom student law clinics could represent. They restricted law clinics to representing the truly indigent, following guidelines used by the federal Legal Services Corporation which used a limit of 125 percent of the poverty limit as determined by the federal Department of Health and Human Services (HHS), listed in Table 7. The clinics could represent a community organization only if the organization proved in writing that it could not afford legal representation, if at least three-quarters of its membership were eligible for legal assistance, if the community organization were not affiliated with a national organization, and if the law clinic did not advise or help residents to organize. Law clinics would not be allowed to "solicit cases or provide legal information to potential clients or outside organizations," and law students would not be allowed to "appear before regular or special sessions of the Legislature."[116] Also, an organization's certification of indigency was to be subject to public inspection.

The announcement of these amendments was followed by public criticism from numerous organizations,[117] members of the press,[118] the deans of the Tulane University and the Loyola University law schools,[119] and Tulane University President Eamon M. Kelly.[120] The major complaints about the rule changes were that the income limit for indigency was set so low that student law clinics would not be able to serve a significant number of poor people who needed legal assistance; that the restrictions on representing community organizations would virtually

Table 7: Client Income Eligibility in Rule XX Amendments of June 17, 1998

Family Size	HHS Poverty Guidelines	LSC and Rule XX Guidelines (125% of HHS)
1	$ 8,050	$ 10,062.50
2	10,850	13,562.50
3	13,650	17,062.50
4	16,450	20,562.50
5	19,250	24,062.50
6	22,050	27,562.50
7	24,850	31,062.50
8	27,650	34,562.50
For each additional family member add	2,800	3,500.00

Source: U.S. Department of Health and Human Services, The 1998 HHS Poverty Guidelines[121]

end the representation of any and all such groups; and that the restrictions on law students communicating with prospective clients violated their constitutional rights.

Law Student Practice Rule Amendments of July 1, 1998

In response to criticism of the June 18 amendments, the state's Supreme Court revised Rule XX once again, on July 1, 1998. The newly amended rule required that only 51 percent of community organization members, rather than 75 percent, be indigent for student law clinics to serve them, and required that written certification of an organization's inability to pay for lawyers' services be made to the Supreme Court rather than be made public. It also suspended the prohibitions on student law clinics soliciting cases, providing legal information to potential clients or organizations, or helping individuals organize into groups that the clinic may then represent.[122]

These amendments, too, were met with considerable opposition.[123] Critics complained that the revisions: contravened the constitutional right to distribute information about free legal services, and the established right of public interest lawyers to provide information about their availability to provide representation in cases that do not generate fees;[124] infringed on academic freedom;[125] were draconian;[126] resembled the reporting requirements of the Fuqua Act which was used by the White Citizens Council in 1956 to require the release of NAACP membership lists;[127] indicated that the Supreme Court justices were "out of touch" with the poor and working poor;[128] imposed "the most stringent restrictions on student lawyers of any state in the nation;"[129] interfered with law schools' abilities "to provide a first-rate legal education;" would "deny law students the opportunity to provide access to justice for the working poor and for many poor community organizations in Louisiana;"[130] would place an impossible burden on law clinics in determining the economic level of an organization's membership ;[131] and "seriously curtail the ethical obligations and rights of law students and law faculty in Louisiana."[132]

In November of 1998 Robert Kuehn, director of the Tulane Environmental Law Clinic, said that the Clinic had already turned down several groups that had legitimate environmental complaints, while the university's other law clinics had turned away 148 of 236 applicants for legal representation.[133] In March of 1999 Kuehn commented that the new rules had prevented law clinics at Tulane and Loyola universities from filing any cases in state court for new clients.[134]

Law Student Practice Rule Amendments of March 22, 1999

On March 22, 1999, the Supreme Court of Louisiana announced new revisions to the Law Student Practice Rule once again. The new rules allowed students at law clinics to represent

community groups that were affiliated with national organizations if 51 percent of the group members had incomes below specified levels; increased the income levels of eligible clients to double the federal poverty guidelines (listed in Table 8); repealed the prohibitions against law clinics helping residents organize or representing people whom they helped organize into groups; and stated that lawyers employed by student law clinics could represent clients who had been solicited in non-fee generating cases, while law students still could not. The rule still prohibited law students from appearing before the State Legislature.[135]

Table 8: Client Income Eligibility in Rule XX Amendments of March 22, 1999

Family Size	HHS Poverty Guidelines	Rule XX Guidelines (200% of HHS)
1	$ 8,240	$ 16,480.00
2	11,060	22,120.00
3	13,880	27,760.00
4	16,700	33,400.00
5	19,520	39,040.00
6	22,340	44,680.00
7	25,160	50,320.00
8	27,980	55,960.00
For each additional family member add	2,820	5,640.00

Source: U.S. Department of Health and Human Services, The 1999 HHS Poverty Guidelines[136]

These revisions to the Law Student Practice Rule, too, were criticized. Louisiana Supreme Court Justice Bernette Johnson objected to rules compelling disclosure of membership information, as well as to the prohibition of law students appearing before the Legislature.[137] Representatives of two law clinics said that the rules were still too restrictive.[138] Meanwhile, the presidents of both Tulane University and Loyola University observed that the rules were more

limiting than student-practice rules in other states, suggested that the rules were not in the best interests of the citizens or of the state of Louisiana, and observed that the rules would not provide the same quality of clinical education that students receive in other states' university-based law clinics.[139] A Times-Picayune editorial observed that the new rule was "still an effective straitjacket for the Tulane Environmental Law Clinic" since plaintiffs in environmental cases were usually groups. It argued that the Supreme Court justices needed to find a way to make the rule less hostile to groups.[140]

Complaint Filed Against the Louisiana Supreme Court, April 16, 1999

In addition to public expressions of dissatisfaction against the revisions to Rule XX, a group of environmental, community and civil rights organizations, law professors, university students and a donor to a law clinic – nineteen plaintiffs in total – together took legal action against the Louisiana Supreme Court. Filed on April 16, 1999, in United States District Court, Eastern District Court Louisiana, their complaint argued, in summary, that the amendments

> abridge their freedom of speech, freedom of association, and right to petition the government for redress of grievances in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I, Sections 5, 7, 9, and 22 of the Louisiana State Constitution, and deny plaintiffs the equal protection and due process of the laws in violation of the Fourteenth Amendment to the United States Constitution and Article I, Sections 2 and 3 of the Louisiana State Constitution.[141]

The complaint called for the federal Court to declare the amendments unconstitutional.[142]

The attorney arguing on behalf of the Louisiana Supreme Court stated that non-lawyers, including law students, had no statutory or constitutional right to represent anyone in Louisiana

courts, and that no individual had a constitutional right to representation in civil cases. Therefore, he requested that the lawsuit be thrown out.[143] Ultimately, United States District Judge Eldon Fallon accepted the Louisiana Supreme Court's argument that no fundamental right was involved in the case, and in a decision given on July 27, 1999, dismissed the complaint.[144]

Appeal of United States District Court Ruling Filed, August 17, 1999

Opponents of the Rule XX amendments then initiated legal action in the U.S. Fifth Circuit Court of Appeals in an attempt to overturn Judge Fallon's decision.[145] After hearing arguments on November 7, 2000, the Court of Appeals dismissed the suit in its decision of May 29, 2001, and so upheld the restrictive amendments to the law student practice rule. The decision stated that the Louisiana Supreme Court "need not have ever allowed . . . non-attorneys to participate in the actual practice of law in Louisiana. The ability of students to represent clients as attorneys in legal matters is entirely . . . at the [Louisiana Supreme Court's] complete discretion."[146]

Following the decision of the Fifth Circuit Court of Appeal, plaintiffs took the case to the United States Supreme Court. That court, however, declined to hear the case,[147] so the revisions of March 22, 1999 remain in effect.

Alternate Explanations for Amending Rule XX

Two explanations have been presented for the changes to Rule XX. First, Louisiana Supreme Court Chief Justice Pascal Calogero stated that the revisions represented a clarification that "merely returned the rule to its original intent of allowing law students to provide legal services only to the state's poorest citizens."[148] That, however, is unlikely. In 1993 Kai Midboe, then secretary of Louisiana's Department of Environmental Quality, asked the state's Supreme

Court to review the activities of the Tulane Environmental Law Clinic to determine if it was operating within the Court's rules or if new standards of conduct were required. At that time Calogero himself responded that the oversight and standards of conduct then in place were adequate, and that no new standards were needed.[149]

Many people, including local and national law school representatives,[150] journalists,[151] and community action and rights groups[152] argued that the rule change was due to lobbying by powerful members of the business community who were angered by the TELC's successful representation of Convent residents who opposed the development of Shintech's multi-million dollar plastics plant in their small community. In fact, Mr. Tim Averill, the deputy administrator for the Louisiana Supreme Court, verified this in 1988 when he said that the rule change resulted from complaints that the Court received from the New Orleans and Lake Charles area chambers of commerce, the Louisiana Association of Business and Industry (LABI), and the Business Council of New Orleans.[153]

The year 1998 was an election year in Louisiana, and Pascal Calogero, Chief Justice of the Louisiana Supreme Court, was preparing to run in a judicial election to retain his position. He was well aware that the business community had recently become politically active.[154] In earlier elections LABI and other business interests had raised money to support conservative, pro-business judges, and had contributed to the elections of Jeffrey Victory in 1994 and of Chet Traylor and Jeannette Theriot Knoll in 1996. Traylor and Knoll both defeated liberal incumbents in their elections.[155] Knowledge of this would have been part of the backdrop to Supreme Court work at the time. One journalist referred to the business community as "a key player not on the ballot."[156]

In June of 1998, just days before the Supreme Court presented its first amendments to Rule XX on June 17, a group of about 30 corporate leaders, including the chairmen of the Chamber of Commerce and the New Orleans Business Council, signed a letter of support for Pascal Calogero in his upcoming election campaign. Sent to 600 business leaders, the letter was intended to serve as a "pre-emptive strike" to demonstrate that Calogero had business support and so discourage other business candidates from contesting his seat.[157] The appearance of the letter so close to the announcement of the revisions to Rule XX suggested to some members of the public that a deal had been struck.[158] Calogero denied that the Court's decision involved politics,[159] while Daniel Juneau, president of LABI, said that his organization had supported Calogero's opponent in the election.[160]

On August 20, 1998, following criticisms from the directors of law clinics at Tulane University and Loyola University that the new rules were too restrictive,[161] and requests from the deans of the Tulane and the Loyola law schools that the Supreme Court delay implementation of, and reconsider, the new rules,[162] Supreme Court Justice Harry Lemmon "gave officials with the New Orleans and Lake Charles area chambers of commerce, the Louisiana Association of Business and Industry, and the Business Council of New Orleans 30 days to respond to briefs filed in the case." TELC professor Oliver Houck commented that the court and the business community were "going off together lockstep, and the hell with everybody else." Court deputy administrator Tim Averill said that the court contacted the four business groups because it was their complaints that led to the Rule XX revisions. He added that while the court did not solicit comments from anyone else, it would accept such comments.[163] Of course, without publication

of a notice by the Court the public would have no way of knowing that such a review was underway and that comments were welcome.

In September of 1998, Calogero publicized a 1996 report from the Tulsa, Oklahoma, organization Citizens for Judicial Review. It showed that he had made pro-business decisions 33 percent of the time, as opposed to the 3 percent ranking that LABI had given him.[164]

Robert Kuehn, former director of the TELC, presented information from conversations that others related to him in which Calogero himself admitted the role that politics played in the revisions to the Student Practice Rule and his sympathy for the business community's complaints. Kuehn stated that

> This sympathy was reflected in remarks by the Chief Justice during a private meeting with Loyola and Tulane University officials. During this meeting, the Chief Justice explained that the court did not want litigants with political agendas to "outgun" the other side, so, to even the playing field, the decision was made to restrict the activities of the Clinic. The Chief Justice explained that, while it was not the job of the court to intervene in a fight between two parties, it was appropriate for the court to take steps to restrict the ability of one side to bring a suit.[165]

Recall, however, that the Supreme Court's own investigation found that there was no wrong-doing by the law clinics, and that there were only allegations, but no evidence, of the law clinics having a "political agenda." Also, it is difficult to understand how a law clinic with a few staff lawyers and two dozen third-year law students could "outgun" a transnational corporation such as Shintech's parent company which had total assets in the billions of dollars, and net annual incomes in the hundreds of millions of dollars (see Table 9). Bob Kuehn cited a hearing

Table 9: Shin-Etsu Assets, Sales and Income, 1996-1999

Year	Total Assets	Net Sales	Operating Income	Net Income
1996	$5,714,814,000	$4,638,516,000	$592,153,000	$305,040,000
1997	$7,509,347,000	$5,035,524,000	$661,484,000	$327,532,000
1998	$8,210,455,000	$5,252,083,000	$688,333,000	$318,386,000
1999	$8,768,372,000	$5,312,364,000	$713,413,000	$358,372,000

Sources: Shin-Etsu Chemical Co. Ltd., Annual Reports for 1997, 1998 and 1999.[166]

which one student lawyer won while arguing against eight licensed lawyers who represented Shintech.[167] I suspect that the student lawyer simply presented a better argument.

Conclusion

The controversy involving the Tulane Environmental Law Clinic provides a very clear illustration of, and very strong support for, the concept of access to legal representation by the poor as a form of largesse. The Law Clinic provided effective representation to the St. James Citizens for Jobs and the Environment, whose members opposed the construction of Shintech's planned factory out of concern for the future of their environment, their community, and their health. They were opposed by Shintech (and its parent company Shin-Etsu), the Governor's office and the state Department of Economic Development and Department of Environmental Quality working on Shintech's behalf, several business associations, and the Louisiana Supreme Court which supported the business community.

The Louisiana Supreme Court created the Law Student Practice Rule in 1971 to provide legal services for those unable to pay for such services, and to encourage law schools to provide clinical instruction in trial work to their students. In 1988 the Supreme Court revised the rule to allow representation of community organizations, so expanding the legal services that law

students could provide. However, when legal representation by law students became too effective for the purposes of government and business, government and business used their influence to change the Rule, placing new restrictions on student legal practice and limiting the access of the poor to legal representation, so producing a more business-friendly atmosphere.

We must recognize, however, that each of the entities involved in the controversy took positions in keeping with their own interests, as the theory described. The members of St. James Citizens for Jobs and the Environment opposed the construction of Shintech's planned factory out of concern for the future of their environment, their community, and their health, as mentioned above. Shintech saw a need for increased production, and viewed Convent, with its supply of raw materials such as ethylene and salt, its deep waterways, ports and rail transportation, and its existing chemical industry infrastructure as the ideal location for its plant. Governor Foster, as a multi-millionaire businessman, saw industrial development as bringing jobs and economic development to the state. The officials of the Department of Economic Development and the Department of Environmental Quality (who may have been appointed by him) took their direction from the Governor, and worked to make Shintech's plan reality. The members of the business associations shared the interests and opinions of Shintech and the Governor, and so joined the pro-business action to create a more business-friendly atmosphere. The members of the Louisiana Supreme Court, meanwhile, were vulnerable to electoral politics, and several members had already been elected with the support of the business lobby. Therefore, they acceded to business demands to limit law clinic activities.

Unfortunately, in their zeal to support Shintech's plan, the governor's office and government departments were willing to ignore environmental regulations. All opponents of the

St. James Citizens for Jobs and the Environment and the Tulane Environmental Law Clinic were willing to ignore, or subvert, the right of citizens to challenge government decisions in court. Those opponents also denied the existence of a "cancer alley" and so denied the validity of the residents' concerns. However, that denial was based on wilful ignorance as numerous studies were ignored and funding for valuable research was cut. The decision to restrict the activities of law clinics was intended to limit citizen participation in, and the effectiveness of citizen opposition to, government and business decision-making.

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Chapter 5: The Louisiana Capital Assistance Center, 2002

In 2002, four years after the Louisiana Supreme Court made its initial revisions to the Law Student Practice Rule, the Court changed another long-standing practice. The Committee on Bar Admissions reversed a policy of almost thirty years and ceased allowing foreign lawyers to sit for the bar exam, be admitted to the bar, and practice law in Louisiana. In reply to a legal challenge the Supreme Court argued that the change was needed in order to ensure that lawyers did not leave the country and strand clients with no legal representation. New Orleans lawyer Louis Koerner presented a more likely rationale for the change when he said that the Supreme Court wanted to hamper the work of the Louisiana Capital Assistance Center.

Clive Stafford-Smith, a "tenacious, no-holds-barred, bridge-burning capital defense lawyer"[1] and native of England, founded the Louisiana Crisis Assistance Center (since renamed the Louisiana Capital Assistance Center or LCAC) in 1993. He originally traveled to the United States to study journalism at the University of North Carolina. He had intended to write about capital punishment, but his research experiences, which included visits to prisons and interviewing inmates, led him to pursue a career in law in order to help death row inmates who had no representation. He attended Columbia University Law School and qualified for the bar in 1984.[2] Stafford-Smith then worked at the Southern Prisoners' Defense Committee (SPDC, now called the Southern Center for Human Rights) in Atlanta, Georgia, under a grant from the Public

Interest Law Foundation at Columbia University. He worked at the SPDC for nine years, after which he moved to New Orleans where he created the LCAC to provide representation for indigent defendants in capital cases.[3]

Stafford-Smith chose to work in Louisiana because of the state's reputation of having the country's highest per capita execution rate at the time.[4] In 1989, journalist David Kaplan referred to Louisiana as "Death Mill, USA" because, since 1976 when the federal Supreme Court reinstated the death penalty, Louisiana executed the highest percentage of its condemned inmates of any state in the nation. The Louisiana figure of 32.7 percent compared to 14 percent in Texas and 8.4 percent in Florida. It did not carry out the greatest absolute number of executions, however, executing 18 prisoners compared to 30 executed by Texas. Louisiana also carried out the death penalty more quickly than other states, with an average of 5 years and 10 months between the times of arrest and execution, compared to 7 years and 10 months in Texas, and 9 years and 10 months in Florida.[5] Following the summer of 1987, though, when Louisiana carried out eight executions in about 11 weeks, the number of death sentences given by juries fell. Only two death sentences had been imposed within the next year and a half.[6]

Over the past 13 years the LCAC has developed into an office with a staff of 11, including eight lawyers, two investigators and an office manager.[7] The LCAC's many successful actions include participation in a lawsuit against the state that resulted in the 1994 creation of the Louisiana Indigent Defense Assistance Board with a $7 million budget for indigent representation. In 1999 the LCAC established the Orleans Parish Preliminary Hearing Project to deal with the earliest stages of cases, and through the Project saw charges dismissed in 100 (or

84%) of 119 cases. The LCAC has assisted public defenders and other lawyers at work in Louisiana and throughout the south, and it has defended foreign nationals.[8]

Stafford-Smith stated that he lost only six of about 300 cases.[9] Even when the innocence of the defendant could not be established, he worked for a change of sentence to get the defendant off death row.[10] He was also instrumental in establishing the charities Reprieve (US), Reprieve (UK) and Reprieve Australia to assist in legal representation for indigent defendants facing the death penalty, and to raise awareness of issues related to the death penalty.[11] He has been recognized internationally for his work and received numerous awards, including the Public Interest Law Foundation at Columbia's Public Interest Achievement Award in 1995,[12] the Order of the British Empire (OBE) in 2000 for humanitarian service,[13] the 2003 Lifetime Achievement Award from Lawyers Awards,[14] the Robert Burns Humanitarian Award in 2004,[15] a 2004 Open Society Institute Soros Justice Fellowship,[16] and the 2005 Gandhi Peace Award.[17]

Stafford-Smith and the LCAC staff did not do this work and achieved these successes alone, however. They had the help of lawyers and student interns from across the country and around the world. The use of foreign lawyers and interns is not uncommon in law offices – in 2001 more than 75 foreign interns came to the United States to work on death penalty cases.[18] Interns conducted legal research, monitored court proceedings, collected and summarized records, did social science research, gathered statistical data, interviewed jurors, and visited clients.[19] Foreign lawyers had all of the rights and privileges to practice law in Louisiana that citizen lawyers had, at least until 2002.[20]

Louisiana and Foreign Lawyer Practice

The United States Supreme Court dealt with the practice of law by foreign lawyers in the 1973 case of In re Griffiths. Dutch citizen Fre Le Poole Griffiths had married a U.S. citizen in 1967, became a resident of Connecticut, studied law, and in 1970 applied for permission to take the Connecticut bar exam. Both the Superior Court for New Haven County and the Supreme Court of Connecticut denied permission for her to take the exam because she was not a citizen of the United States, as Connecticut state law required. Griffiths took the case to the United States Supreme Court, which decided that Connecticut's rule barring resident aliens from admission to the state bar violated the equal protection clause of the Fourteenth Amendment.[21]

Louisiana followed this precedent for the next twenty-nine years. Numerous foreign nationals who were legally in the country on either student visas or work permits initiated court proceedings in which they appealed to the Louisiana Supreme Court and received permission to take the bar exam or to be admitted to the bar.[22] Several decisions in these cases mentioned the Griffiths ruling specifically, and in Application of Respondek of 1983 the Supreme Court of Louisiana defined a resident alien as "an alien who is lawfully residing in the United States."[23]

The public and the legal community learned of the Louisiana Supreme Court's change in policy in February of 2002 when it began rejecting foreign lawyers' applications to take the bar exam. The first application to be rejected was from corporate lawyer Nathalie Royot of Switzerland,[24] and this was followed by the rejections of applications from several other foreign lawyers. These rejections initiated a string of appeals to the Supreme Court of Louisiana, the United States District Court and the United States Court of Appeals.[25]

Many of the decisions in these cases were handed down without explanation, but explanations that were offered were at the same time telling and cryptic. For example, discussion in the case In Re: Bourke, 819 So. 2d 1020 (2002) erroneously referred to the Griffiths decision as referring to "an alien who was entitled to reside in the United States on a permanent basis." In fact, the Griffiths decision did not refer to an alien residing in the United States on a permanent basis, but referred simply to resident aliens, without regard to or discussion of permanency. The judges in the Bourke case recognized that by considering "resident alien" to mean "permanent resident alien" they were changing the definition of "resident alien" that the Court had established in the cases of Application of Respondek, 442 So. 2d 435 (1983) and In Re: Application of Appert, 444 So. 2d 1208 (1984), and which had been in effect for 29 years. They stated that they were overruling the decisions in those cases, 18 and 19 years after the fact.. Chief Justice Calogero dissented, stating that he saw no reason to overrule the prior jurisprudence,

In LeClerc et al v. Webb et al, 270 F. Supp. 2d 779 (2003), in which a number of foreign lawyers appealed the decisions of the Louisiana Supreme Court and the Committee on Bar Admissions, U.S. District Court Judge Jay C. Zainey accepted the position of the Justices of the Louisiana Supreme Court. This included using the term "non-resident alien" interchangeably with "non-immigrant alien," and the term "resident alien" interchangeably with "immigrant alien."

In this case the Louisiana Supreme Court also presented a "rational basis" argument for its change of position, which Zainey also accepted. This rational basis argument had two major points. First, it asserted that

> the Louisiana Supreme Court has a legitimate interest in insuring that litigants in the state's courts are represented not only by competent lawyers but by lawyers who are not subject to having their residency revoked on relatively short notice. Defendants point out not only the potential disruption to the courts' dockets but also the prejudice that clients could suffer if a lawyer is forced to leave the country in the midst of litigation or even a trial.

The second part of the rational basis argument stated that

> defense counsel pointed out the near impossibility of tracking down client files, evidence, etc. should a non-resident alien be forced to leave the United States on unfavorable and sudden terms. Counsel posited that the Louisiana Supreme Court would lack any type of disciplinary recourse against an alien lawyer once deported and outside of any state bar's jurisdiction.[26]

Less than three months later U.S. District Court Judge Eldon Fallon overturned Zainey's decision. In Wallace et al v. Calogero et al, 286 F. Supp. 2d 748 (2003), Fallon argued that in the Griffiths case the United States Supreme Court could have, but did not, restrict its decision to immigrant aliens. Rather, he argued that its use of the term "resident alien" included both immigrant and nonimmigrant aliens lawfully residing in the country.

Fallon also rejected the "rational basis" argument that Zainey had accepted. He stated that disqualifying nonimmigrant residents does not protect clients from "transient" lawyers, since citizens and immigrant aliens who are admitted to the bar are not required to live in Louisiana, and "Lousiana attorneys retire, die, and leave the practice for a myriad of reasons." He observed that "if the Supreme Court were concerned with transience, the Rule would be calculated to

address that problem directly. However, the Rule only excludes a fraction of persons who may have temporary residence in the state." He further argued that the new rule was not the least restrictive method of accomplishing the stated aim, and that technological advances now allow attorneys to provide services to clients and represent clients "from virtually anywhere." Therefore, Fallon decided that preventing nonimmigrant aliens from sitting for the bar exam solely on the basis of their immigration status was arbitrary and unconstitutional discrimination – violating the equal protection clause of the Fourteenth Amendment – and so unenforceable.

Judge Fallon's ruling was not the end of the matter, however. On October 5, 2004, the United States Fifth Circuit Court of Appeals heard arguments about the two contradictory decisions.[27] Lawyer Louis Koerner Jr., whose law firm employed foreign lawyers, represented plaintiffs Karen LeClerc, Guillaume Jarry, Beatrice Boulord and Maureen Affleck. He filed a number of briefs in which he vigorously and ably presented his clients' case and refuted the arguments of the Supreme Court of Louisiana and the Court's Committee on Bar Admissions.[28]

Beyond the arguments presented by Fallon, Koerner asserted that the case involved a number of Constitutional issues, including Fifth and Fourteenth Amendment due process rights and the Supremacy Clause of the U. S. Constitution. He also said that Judge Zainey's ruling included errors in procedure, errors of definition, faulty logic and misrepresentation of prior cases. Koerner argued that there was "no evidence to suggest that temporary resident attorneys are more likely to abandon their clients than permanent residents or citizens, as Webb, et al. have argued;" there was no suggestion or evidence that, in the past, non-immigrant alien lawyers "had abandoned clients without taking proper precautions or ever behaved unethically, much less that unethical behavior was more prevalent than for permanent residents or citizens;" H-1B visa

holders and some J-1 visa holders are sponsored by employers who would be responsible for ensuring that clients are not inconvenienced by the departure of foreign lawyers; and Judge Zainey improperly refused to grant full discovery which would have revealed the true basis for the change in rules regarding the granting of licenses to non-permanent residents.[29]

On July 29, 2005, the Court of Appeals affirmed Judge Zainey's ruling and reversed Judge Fallon's ruling,[30] and on March 27, 2006, the United States Court of Appeals for the Fifth Circuit denied a petition for a rehearing of the case en banc.[31] A Harvard Law Review article observed that, "Ironically, in protecting its citizens against transient lawyers, the Louisiana Supreme Court may have left some of them with no lawyers at all."[32]

Koerner argued that the reason given for the change in rules "was not genuine, but hypothesized or invented as a response to litigation."[33] Alternatively, he suggested that the Supreme Court of Louisiana changed the rule in order to prevent volunteer lawyers from becoming licensed in Louisiana and working on death penalty cases. In fact, three of the lawyers whose applications were rejected had just such plans. Richard Bourke had an H-1B visa that entitled him to work at the Louisiana Capital Assistance Center,[34] Caroline Wallace had an H-1B visa that entitled her to work at the Capital Post-Conviction Project of Louisiana, and Emily Maw was a graduating student who now works at the Innocence Project New Orleans.[35] Koerner specifically mentioned lawyer Clive Stafford-Smith and the Louisiana Crisis Assistance Center (now called the Louisiana Capital Assistance Center), which he said were "devastatingly effective."[36]

The Supreme Court of Louisiana has done little to disprove Koerner's claim that the new interpretation of the bar exam rule was directed at Clive Stafford-Smith and the Louisiana

Capital Assistance Center. Harry "Skip" Philips Jr., the director of character and fitness for the Committee on Bar Admissions, has denied that the ruling was targeted at Stafford-Smith or the community of death penalty lawyers. However, the Committee fought against discovery during the trials, and the Supreme Court's information officer refused to comment about it, saying only that "the court's opinions speak for themselves."[37]

Louisiana and Death Penalty Representation

The United States is one of a diminishing number of countries that continue to use the death penalty, and in this it is becoming increasingly isolated.[38] By the end of 2006, 88 countries had officially abolished capital punishment while a total of 128 countries had actually stopped using the death penalty even if they had not abolished it in law. Twenty-five countries carried out executions in 2006.[39]

Within the United States, 38 states allow the death penalty, although five of those states had not executed anyone between 1976 and mid-2007.[40] From 1608-1972 there had been 14,489 executions in the country,[41] and from 1976 to mid-2007 there were 1,080 executions.[42] Louisiana figures highly in these statistics, ranking tenth among the states during both of these periods. (See Tables 10 and 11.)

As Tables 10 and 11 demonstrate, the South is prominent in death penalty statistics, dominating executions throughout the country's history. Criminal justice professor Burk Foster commented that "The extensive use of the death penalty is a Southern legal tradition. There's a lot of leeway given to local folks and local prosecutors to decide what to do with their criminals."[43] District attorneys have discretion in choosing when to pursue the death penalty and when to plea bargain, and in preparation for a trial have additional discretion in jury selection.[44]

Table 10: Ten States with the Highest Numbers of Executions, 1608-1976

State	Executions
Virginia	1,277
New York	1,130
Pennsylvania	1,040
Georgia	950
North Carolina	784
Texas	755
California	709
Alabama	708
South Carolina	641
Louisiana	632

Source: Death Penalty Information Center, "Executions in the United States, 1608-1976, By State."[45]

Table 11: States with the Ten Highest Numbers of Executions, 1976-2006

State	Executions
Texas	394
Virginia	98
Oklahoma	84
Missouri	66
Florida	64
North Carolina	43
Georgia	39
South Carolina	36
Alabama	36
Louisiana	27
Arkansas	27

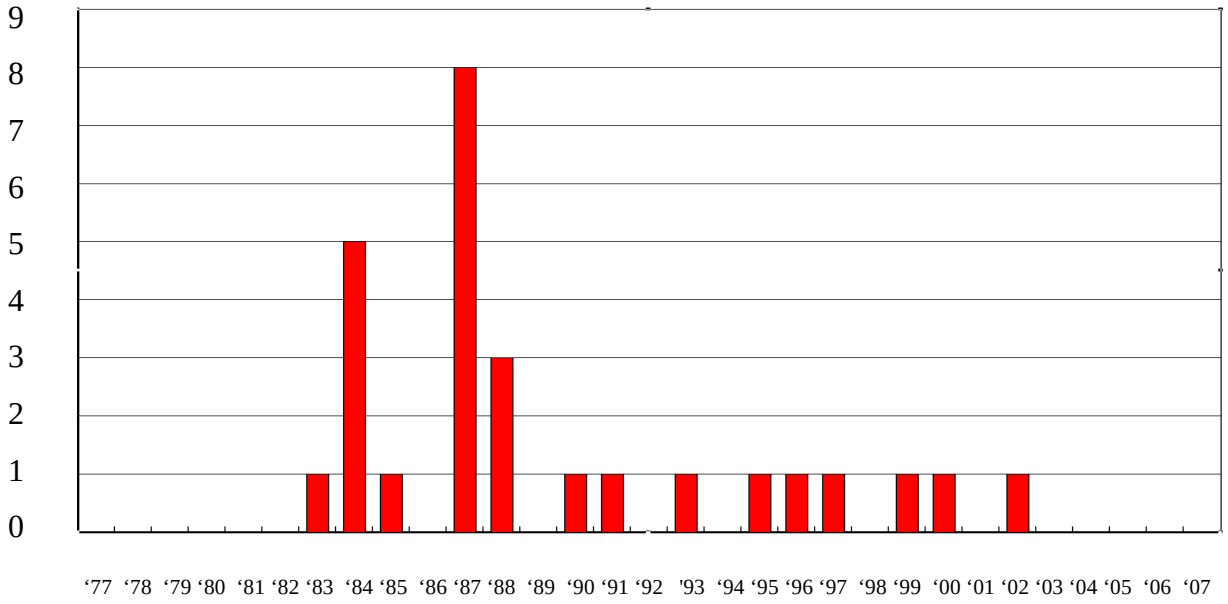
Source: Death Penalty Information Center, "Facts About the Death Penalty," 19 June 2007.[46]

criminals."[47] District attorneys have discretion in choosing when to pursue the death penalty and when to plea bargain, and in preparation for a trial have additional discretion in jury selection.[48] Prosecutors also have discretion in disclosing or withholding evidence.[49] The underfunding and understaffing of public defenders offices deny effective representation to thousands of people who appear in court every year,[50] while federal oversight of state trials and convictions has diminished considerably over the past two decades.[51] In 1985 journalist Jason De Parle described Louisiana's implementation of the death penalty as being random and quirky, and both Orleans Parish District Attorney Harry Connick and New Orleans public defender Dwight Doskey concurred.[52] More recently lawyer Lucy Adams, a former LCAC intern, referred to the country's application of the death penalty as being arbitrary and capricious.[53]

Louisiana's post-1976 record of executions has been mixed. Figure 1 shows that there was a concentration of executions during the mid-to-late 1980s, and a relatively small number of executions since, even though the state had 88 inmates on death row as of June 19, 2007.[54]

As early as 1995 Calcasieu Parish District Attorney Rick Bryant stated that he was "very frustrated and very angry" with the low number of executions, and that "the process has gotten ridiculous, and now it's just a game played by defense attorneys and judges who are against the death penalty."[55] He later commented that "If someone's possibly innocent, obviously we want to hear that," and then he added the incredible statement "But we have none of those in our parish."[56] We might expect him to say next that trials are unnecessary and that accusations or indictments are proof enough of guilt. Following a 2003 Calcasieu Parish case in which a jury convicted a child-murderer of second degree murder rather than first degree murder (so rendering the defendant ineligible for the death penalty), Bryant publicly insulted the judge,

Figure 1: Louisiana Executions, 1977-2007



Source: Death Penalty Information Center, “Execution Database”.[57]

the jury, the city of New Orleans (from where the jurors were chosen), and the victim’s mother who had supported a plea agreement.[58]

East Baton Rouge District Attorney Doug Moreau actually celebrates death penalties; he provides rewards of a free dinner at Ruth’s Chris Steakhouse at public expense to prosecutors who persuade juries to impose the death penalty. Bills for such meals have been as high as $485.[59] More recently, Moreau has argued against the state providing the $55 million that Louisiana public defenders need in order to meet federal and Louisiana state constitutional requirements, and which would bring Louisiana funding to a level comparable to that of other states.[60]

John Sinquefield, First Assistant District Attorney in East Baton Rouge, is an “avid death penalty proponent.”[61] In 2001, the Louisiana Bar Association’s House of Delegates called on the state to halt executions until it could provide attorneys to all death row inmates, [62] defense

attorneys lobbied for a moratorium,[63] and a state Senate committee considered a moratorium on executions pending completion of a study of the disproportionate administration of the death penalty. Sinquefield, however, argued against the moratorium. He stated that he was "talking about monsters in our society who do these things, who are 100 percent guilty."[64] In 2002 Sinquefield stated that his office would push to bring the Washington D.C. snipers John Allen Muhammad and John Lee Malvo to Baton Rouge to stand trial, because Louisiana has an "effective death penalty" that is "generally considered to be more prosecutor-friendly than the rules in Maryland."[65] In 2004, he referred to the death sentence given to serial killer Derrick Todd Lee as "south Louisiana justice."[66] In fact, any sentence that the jury would have given Lee – not only the death penalty – should have been considered south Louisiana justice.

More than just individual district attorneys, the Louisiana District Attorneys Association has opposed any changes in the state's death penalty laws. Prior to March 1, 2005, when the U.S. Supreme Court banned the execution of people for crimes committed while under the age of 18,[67] Executive Director Pete Adams opposed such a ban. He stated that it would take "discretion away from the juries that try violent juveniles."[68] Among other district attorneys, he also opposed giving inmates the "absolute right to get crime scene DNA testing at their own expense," arguing that strict and narrowly drawn guidelines would need to be established in order to avoid requests from lawyers for irrelevant tests on behalf of their clients.[69] Adams has stated that recent death row exonerations proved that the system "corrects its errors," and that "in not a single case has an innocent person been shown to have been executed since 1976."[70] However, numerous recent reports indicate that Adams is probably wrong and that several innocent people most likely have been executed.[71] In fact, Adams's own opposition to the right of inmates to

crime scene DNA testing would work against the system's "error correction" and would increase the likelihood of executing the innocent.

The devotion that district attorneys have to the death penalty corresponds well to lawyer Louis Koerner's observation that there is a lot of anger against death penalty lawyers, and that both prosecutors and the Supreme Court hate them.[72] The foreign lawyers who work on capital cases would be included among those death penalty lawyers. Sinquefield has said that he had noticed British and German people on the periphery of his capital cases, and he didn't like it. He considered that they had no moral authority to be here, based upon actions of their own countries' governments in the distant past.[73] He stated that no alien whatsoever should be a member of the Louisiana Bar, and that "foreign lawyers coming to take death penalty cases should stay home." He asserted that "They're a group of people who, because they don't believe in the death penalty, don't want to follow anybody's rules,"[74] and they really aren't wanted here.[75] Of course, this attitude ignores the fact that lawyers – whether citizens or foreign – merely present arguments in court and that it is the judge and the jury, following federal and state laws, who pass judgment in cases.

Sinquefield characterized Clive Stafford-Smith as spending his time "to the benefit of the most violent hardened criminals, the worst of the worst."[76] He said that he was certain that he could raise some money to buy Stafford-Smith a one-way ticket back to England, and he would be "happy, very happy, to do that."[77] Here Sinquefield is ignoring the fact that all defendants in criminal cases have a constitutional right to effective legal representation, and he is also ignoring the presumption of innocence of the defendant which is a cornerstone of the justice system.[78]

Justice and Electoral Politics

Louisiana is a conservative state where the death penalty is popular. Therefore, reversals of death penalties can make judges look weak and, in a state where judges are elected, could jeopardize their futures on the bench.[79] Elected judges who wish to remain on the bench cannot ignore political pressure, and judges who strive for fairness may be seen as being soft on crime.[80] Crime and the death penalty have been prominent factors in numerous elections throughout the country, and elections have been won and lost due to candidates' positions on the death penalty.[81] Therefore judges sometimes change their rulings in attempts to ensure their re-election.[82] Elected prosecutors and district attorneys share these concerns,[83] for winning a death sentence at trial can give a prosecutor the reputation and the publicity to gain promotion to a judgeship.[84]

In a 1983 study of the Louisiana Supreme Court, political scientist Melinda Gann Hall found that a judge who opposed the death penalty but had not served long enough to qualify for a pension was concerned about re-election. Early in his term he dissented in cases in which the majority of the court affirmed death penalty rulings. However, after finding that his constituents viewed his dissents negatively he stopped dissenting. Conversely, two other long-serving judges who did not feel as negatively toward the death penalty and were not concerned about re-election dissented in more death penalty cases than the first judge and did not change their votes in response to pressure from their constituents.[85] A more recent 1992 study by Hall involving four southern states, including Louisiana, corroborated these findings. She concluded that "elected justices in state supreme courts adopt representational posture" in order to assure their re-election, but she then suggested that the justices may behave strategically in their own self-

interest.[86] In fact, these two alternate explanations amount to the same thing – in controversial cases elected judges tend to assume popular decisions rather than just decisions.

Similarly, in a 2003 study, political scientist James Cauthen found that Louisiana Supreme Court judges voted more conservatively in search-and-seizure cases from their own home districts than in cases from other areas of the state. Cauthen attributed this finding to the fact that constituents may be more aware of cases from their own districts than from other districts.[87] This study supports Hall's finding of judges assuming "representational" (popular) postures or acting in their self-interests.

Conclusion

In the absence of disclosure of official documents of meetings, processes, and opinions of the Louisiana Supreme Court Committee on Bar Admissions, any conclusion to this chapter must remain tentative. However, the Court's own rationale for the policy change – that the rule was changed in order to protect clients from experiencing problems in the event that their non-immigrant foreign lawyer left the country quickly – was weak and was effectively refuted by United States District Judge Eldon Fallon. As he commented, the new rule does not address the stated problem of lawyers leaving the state or the country (since citizen and immigrant lawyers may also leave on short notice) but only refers to a small subset of lawyers, that the rule was not the least restrictive method of achieving its stated aim, and that the issue introduced several constitutional concerns that have been left unresolved.

Lawyer Louis Koerner's explanation for the change in the rule regarding bar admissions – that the rule was changed in order to stop foreign lawyers from representing defendants in Louisiana capital cases – is the more reasonable explanation of the two presented. It is supported

by information on the use of the death penalty in Louisiana, support of the death penalty by prosecutors and district attorneys, the role that the death penalty plays in electoral politics (in a state in which judges and district attorneys are elected) and in promotions, the successes that Clive Stafford-Smith and the LCAC have had in capital cases, and the negative attitudes that prosecutors and district attorneys have expressed toward foreign lawyers.

This theory fits well with the concept of legal representation being a form of largesse that can be granted when it is convenient for the powerful and withdrawn when it is inconvenient for the powerful. The great successes of the LCAC lawyers were threatening the records of the prosecutors and district attorneys and undermining their career prospects. Therefore, from the perspective of the prosecutors and district attorneys it would have been advantageous to cut off a source of support in the form of foreign lawyers, so reducing the number, abilities and effectiveness of defense lawyers in capital cases. This, in turn, would have given the prosecution an added advantage in capital cases and helped elected prosecutors and district attorneys preserve their elected positions. In a place where, and at a time when, there was (and still is) a serious shortage of defense lawyers, the constitutional rights of defendants and the search for justice were secondary concerns.

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Chapter 6: The Advocacy Center, 2004

In July of 2004 the Attorney General's Office of the administration of recently-elected Louisiana Governor Kathleen Blanco expressed concern about, and requested clarification of, possible conflict of interest in the Advocacy Center's dual role as advocate for the elderly and the disabled, and as the organization responsible for the state's ombudsman programs. These programs include the Long Term Care Ombudsman Program, the Ombudsman Legal Assistance Program, and the Community Living Ombudsman Program.[1] This concern threatened the Advocacy Center's status as ombudsman service provider, and therefore also threatened a considerable portion of the Center's funding.

While the Attorney General's Office did not give a specific reason for its request, Advocacy Center staff considered that it most likely resulted from a letter that Mr. Joe Donchess, Executive Director of the Louisiana Nursing Home Association, sent to Mr. Peter Arceneaux, Director of the Governor's Office of Elderly Affairs in 2003.[2] The Center's greatest problems have come from its work relating to nursing homes and the nursing home industry, and that would be the most likely source of a complaint against the Center. Advocacy Center documentation refers to nursing home interests that opposed a settlement agreement between the government and the Advocacy Center, well-placed individuals in state government, and retaliation and "payback" for the Center's work in establishing community-based services.[3]

The Advocacy Center (AC) was created in February of 1984 through the merger of two existing organizations – the Louisiana Center for the Public Interest (LCPI) and the Advocate for the Developmentally Disabled. (ADD). The LCPI, established in 1973, provided representation to the elderly on issues such as Social Security, protective services, and Medicare and Medicaid. It participated in several high-profile lawsuits against a number of prominent agencies to protect the rights of the elderly and the disabled, produced educational videos and publications, contracted with the State to develop an implementation plan for the Louisiana Protection and Advocacy System for the Developmentally Disabled (as required by the Development Disabilities Assistance and Bill of Rights Act of 1976), and staffed the Louisiana Long Term Care Ombudsman Program.[4]

The Advocate for the Developmentally Disabled was established in 1977 as a special unit within the New Orleans Legal Assistance Corporation, but was incorporated as an independent organization in 1979. As part of the Louisiana Protection and Advocacy System for the Developmentally Disabled that the LCPI designed, the ADD provided protection and advocacy services to clients throughout the state, produced educational literature and conducted educational seminars. The 1984 merger of the LCPI and the ADD formed the Advocacy Center for the Elderly and Disabled, now referred to as simply the Advocacy Center (AC).[5]

As the State of Louisiana's officially designated protection and advocacy agency for persons with mental or physical disabilities,[6] the Advocacy Center administers nine federal programs, and operates another five contract programs (listed in Appendix D). The Center provides direct legal representation to clients; visits group homes and hospitals; provides information about resources and makes referrals to appropriate agencies; recommends changes to

external agencies and organizations; educates others concerning the rights of the elderly and the disabled; gives clients the skills and knowledge that they need to act on their own behalf; publishes and provides literature concerning the elderly and the disabled; and makes presentations to community groups.[7] Since the 1977 establishment of the Advocate for the Developmentally Disabled, Center staff have provided services to more than a million Louisiana residents.[8]

The Advocacy Center has been both aggressive and effective in improving life for its clients. It has initiated and won a number of lawsuits against prominent organizations. These include the City Council of New Orleans, New Orleans Public Services, Inc. (NOPSI), the Louisiana Department of Education, Charity Hospital of New Orleans, the Regional Transit Authority (RTA) in New Orleans, Caddo Parish School Board, the Louisiana Department of Health and Hospitals, and Southern University at New Orleans (SUNO).[9] It is also conducting an ongoing campaign to evaluate facilities throughout New Orleans to ensure that they are compatible with the requirements of the Americans with Disabilities Act and are accessible.[10] Some of the significant successes that Advocacy Center lawsuits have gained for their clients include: establishing consultation with nursing home residents in planning transfers between nursing homes; eliminating waiting lists for special education evaluation; gaining access for Medicaid recipients in nursing homes to Medicaid hospitalization benefits (which benefitted half a million people nationally); gaining access for special education students to extended year programs based on individual need rather than on fixed schedules; gaining improved conditions at the Charity Hospital Crisis Intervention Unit, and assurances that people could not be held there for excessive periods of time, and that children would not be held there at all; gaining

interpreter services for the hearing impaired in the criminal justice system; gaining Regional Transit Authority compliance with the Americans with Disabilities Act and the Rehabilitation Act; and gaining assurance that the Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program would be available to children throughout the state.[11]

The Advocacy Center's role in prevention and advocacy also has an investigative component,[12] and the Center has published three exposés of problems at Louisiana institutions. The report Visions of Safety: Dreams versus Reality in Louisiana's Service System for People with Disabilities cited examples of abuse, taken from government investigations and reports, that people with developmental disabilities have suffered within the state's institutions.[13] Life in Louisiana's Group Homes: A Report from the Community Living Ombudsman Program[14] documented "indignities, abuse, and neglect that people with disabilities suffer on a daily basis" in the state's group homes.[15] Mental Health Rehabilitation Services: "Rehabilitation" or a "Get Rich Quick" Scheme? reported on serious deficiencies – including poor quality service, incompetence, fraud, and lack of meaningful enforcement by the state – in the Medicaid-funded Mental Health Rehabilitation Service program.[16] Each of these publications contained recommendations to resolve the problems that they reported.

The Advocacy Center's work has been well respected, and the Center and its staff have won several awards for it. These include an Honorable Mention in the Greater New Orleans Foundation's 1992 "Managing for Excellence" competition, a 1999 advocacy award from the Louisiana Association of the Deaf for services to the deaf community, and a 2003 Career Public Interest Award from the Louisiana State Bar Association to senior staff attorney Ellen Katz.[17]

Nursing Homes, Long Term Care and the State of Louisiana

Nursing homes appeared relatively recently in the United States, in contrast to hospitals, which have a long history in the country. The Assembly of Pennsylvania chartered the first hospital in 1761. By 1873 there were 187 hospitals with 34,453 beds; in 1909 there were 4,357 hospitals with 421,065 beds;[18] and in 1949 the country had 6,572 hospitals with 1,439,030 beds.[19] However, only a small number of these beds were devoted to care of the chronically ill. In early 1950 there were 48,000 beds for those with chronic diseases, and of those beds only 34,000 were considered to be acceptable, while 14,000 were unacceptable.[20]

In contrast, nursing homes that provided long-term care for the general public were slow to develop. During the country's earliest years people depended on themselves and their families for long term care. During the eighteenth century local governments placed the elderly in poor houses with other public wards such as the mentally ill, criminals and alcoholics. During the nineteenth century, benevolent societies and charities began to build old age homes for "respectable" people, and governments began to build hospitals and asylums for the indigent insane. Following the Civil War the government built hospitals and homes for the long term care of disabled soldiers and sailors. The rise of urbanization in the late nineteenth and early twentieth centuries, which saw the country's urban population rise from about 5 percent in 1800 to about 40 percent in the early 1900s, was accompanied by unemployment, overcrowding and tuberculosis. This prompted the government to build sanitariums, generally outside the city, and led to the development of chronic medical care institutions.[21]

A few nursing homes for the aged existed prior to the 1930s. However, the Social Security Act of 1935 provided federal funds to the needy aged, which spurred the growth of

private boarding and nursing homes for the elderly.[22] By the early 1950s the medical community had recognized the need for facilities to care for those with prolonged or chronic illnesses that could last for months or years,[23] and those nursing homes that did exist had long waiting lists.[24] At that time Dr. Hertha Kraus, a specialist in services for the aged, recognized that a growing number of senior citizens was suffering from diminishing abilities and multiple handicaps, and called for "better housing in better neighborhoods within reach of all income groups" to provide improved services to meet the needs of those seniors.[25]

Other federal acts, amendments and programs that encouraged the development of nursing homes included the Hospital Survey and Construction Act of 1946 (commonly referred to as the Hill-Burton Act), 1950 amendments to the Social Security Act, 1954 amendments to the Hill-Burton Act, 1956 amendments to the Social Security Act, 1959 amendments to the Housing Act, the Medical Assistance for the Aged program of 1960, and the 1965 amendments to the Social Security Act which created Medicare and Medicaid.[26] Through Medicare the federal government funded up to 100 days of nursing home care, following hospitalization, for those who were 65 years of age.[27] Through Medicaid the federal and state governments jointly funded nursing home care for those who were over 21 years old and who the states determined needed long-term medical care.[28]

Investors saw government-funded programs to encourage the construction and use of nursing homes as a business and profit opportunity, and during the 1960s and 1970s the country saw a dramatic increase in nursing home facilities, use and costs.[29] In 1976 economist Barry Chiswick classified existing nursing homes into four basic types. Skilled nursing care homes, which provided the highest level of nursing care, housed 77 percent of nursing home residents;

personal care homes that provided a lesser amount of nursing services housed 16 percent of nursing home residents; personal care homes that did not provide nursing services housed 7 percent; and "domiciliary" care homes housed 0.3 percent of residents.[30] Table 12 shows the number, size and use of nursing homes during the 1950s and 1960s, while Table 13 shows the increase in nursing home costs.

Table 12: Nursing Home Supply and Use, 1954, 1963, 1969

Nursing Home Supply and Use	1954	1963	1969
Number of Nursing Homes	9,000	13,100	15,300
Number of Beds	260,000	507,500	879,000
Number of Residents	260,000	470,000	793,000
Nursing Residents (percent of population 65+ years)	2.1%	2.8%	3.9%

Source: Karen Stevenson, "Nursing Home Supply and Utilization in 1954, 1963, and 1969" on the ElderWeb.com internet page.

Table 13: Nursing Home Expenditures, 1950, 1963, 1969

National Nursing Home Expenditures	1950	1963	1969
National spending on nursing homes (millions)	$187	$1,055	$3,567
Expenditures per resident	$700	$1,800	$5,300

Source: Karen Stevenson, "Nursing Home Supply and Utilization in 1954, 1963, and 1969" on the ElderWeb.com internet page.

In 1968, in order to reduce its expenditures on nursing home care, the federal government reduced its coverage under Medicare, and increased standards that nursing homes needed to meet. These two actions alone caused 1,445 homes to close between 1969 and 1971.[31] The Omnibus Budget Reconciliation Acts of 1987 and of 1990 placed new requirements on facilities to ensure good patient care and a respect for patients' rights.[32]

The Louisiana Nursing Home Industry

As in other states, Louisiana saw a rapid rise in the numbers of nursing homes and nursing home patients during the 1960s and 1970s. The number of nursing homes in the state almost doubled between 1963 and 1973, increasing from 115 to 212, and the number of nursing home residents almost quadrupled during the same period, increasing from 4,080 to 16,000.[33] (See Table 14.) There were 324 nursing homes in the state in 2005.[34]

Table 14: Number of Louisiana Nursing Homes, Beds and Patients, 1963-1973

Year	Facilities	Beds	Patients
1963	115	4,559	4,080
1968	186	10,127	9,569
1970	186	12,044	10,814
1971	212	14,600	13,300
1973	212	17,000	16,000

Source: Deborah Jan Fagan, Table II-2 Number of Louisiana Nursing Homes for Selected Years, 1963-1973, in "Appropriateness of Placement in New Orleans Nursing Homes," 1978, p. 14.

Louisiana nursing homes have long received the greatest part of Louisiana's federal Medicaid funds. The state spends more per capita than the national or the southern averages on nursing homes and mental care institutions, and less than average on the less expensive home-based and community-based services.[35] In 1998 Louisiana received over $900 million in Medicaid funds for long term care, and 90 percent of that went to institutional (nursing home) care while only 10 percent went to community-based care.[36] Numerous articles and reports indicate that this pattern continues.[37] Between 1996 and 2005 spending on nursing homes increased by 60 percent and the percentage of Medicaid funds that nursing homes received

increased to 94 percent. This was in spite of the fact that the number of nursing home patients had dropped by 13 percent.[38]

This distribution of funding has helped to give Louisiana nursing homes a profit margin that is almost triple the national average.[39] A 1995 article listed two nursing home owners who had pretax profits of $3.6 million with a profit margin of 24 percent in one case, and pretax profits of $5.3 million with a profit margin of 24.5 percent in the other. Other owners have received salaries or profit shares ranging from $456,722 to $705,000.[40] Yet, the for-profit nursing home industry has consistently argued "hardship" whenever the government has considered reducing Medicaid payments to nursing homes, and has pleaded that the government "not balance the budget on the backs of the elderly."[41] At the same time, Louisiana's Medicaid-supported nursing homes were cited for more deficiencies in care provided or in living conditions than almost any other state's.[42] In 2004 a nursing home owner pleaded guilty to illegally appropriating $2.4 million from his nursing home while denying to nursing home residents such necessities as soap, bandages and a working whirlpool for baths.[43]

Political Influence and Nursing Homes

Political influence has been a major factor in the Louisiana government's treatment of nursing homes, as it has been in other aspects of the states's affairs. The flamboyant Edwin Edwards, first elected as governor on an anti-corruption platform in 1971,[44] played a key role in the recent growth of the industry. Edwards participated in a consulting business during the 1980-1984 period between his second and third gubernatorial terms. Through this business he and his partners acquired certificates of need for new, unneeded hospitals, and then sold the certificates to national hospital chains. This allowed the hospital chains to recoup certain costs from the

federal government. Edwards received almost $2 million out of the $10 million that the partnership received for this work. After he returned to the governor's office in 1984, Edwards overruled the staff of the Department of Health and Hospitals, and exempted the certificate holders from a moratorium that he himself had established, so allowing the clients of his own consulting business to build new hospital facilities. The federal government charged Edwards with racketeering, mail fraud and wire fraud for these activities, but he was ultimately acquitted.[45] Edwards intervened in the granting of a nursing home license again in 1995, during his fourth term as governor, on behalf of friend Senator Armand Brinkhaus.[46]

The for-profit nursing home industry, represented by the Louisiana Nursing Home Association (LNHA), is politically well-connected and powerful, as other industries have been in the state.[47] The LNHA represents over 260 of the state's nursing homes, and has maintained a political action committee that has ranked fifth among individual campaign contributors. With the contributions of individual nursing home owners and operators, in 1995 the industry contributed to as many as two-thirds of the sitting legislators.[48] In 2003 the industry contributed $860,000 to the campaigns of 130 legislators; $615,000 of that went to legislators, and $245,995 went to Governor Blanco's campaign.[49]

Several people, including former DHH secretary David Hood,[50] Advocacy Center program director Charles Tubre,[51] journalists and newspaper editorial staffs[52] have discussed the influence and power of the nursing home lobby. An attorney for the Board of Licensed Practical Nurses explained the home owners' relationship with the Legislature in the comment that "when you're pro-nursing home, you get any damn thing you want."[53] Meanwhile, journalists at The Times-Picayune observed that nursing homes seldom see fines levied or Medicaid

reimbursements cut, and that "laws that would help the elderly but not the nursing home profits, such as those providing alternative care, die quiet deaths in obscure committee meetings."[54]

This power and influence can be seen in a number of recent decisions. A 1999 bill to increase staffing in nursing homes was never scheduled for a hearing in committee.[55] In 2001 the legislature gave nursing homes and certified nursing assistants the same malpractice protection as hospitals and licensed doctors, thereby limiting the size of settlements that nursing homes could be liable for. In 2003 the legislature reduced the types of violations that nursing homes could be sued for, and changed the type of relief that could be awarded in many cases to injunctive (or behavioral) rather than monetary relief.[56] That same year it delayed implementation of a program, which the state had agreed to in a 2001 court settlement, to provide attendants as part of home-care or community-care services.[57] In 2004 the House Health and Welfare Committee rejected a bill that would have moved 500 nursing home and group home patients into home-care programs.[58] In 2005 a House committee restored $47 million that the governor had cut from nursing home funding; the House rejected a bill to restore patients' rights to sue nursing homes for damages;[59] and the legislature passed a law giving existing nursing homes an advantage over other facilities in developing Medicaid-funded assisted living facilities.[60] In 2006 the legislature passed a bill that wrote into law a nursing home funding formula that many have criticized as being wasteful[61] and as reducing the government's flexibility in nursing home funding.[62]

The nursing home lobby has been speaking to a friendly and receptive audience over the years. In 1995 ten members of the state legislature were affiliated with nursing homes that received Medicaid funds.[63] By 2004 that number had been reduced to three legislators, but included Senator Joe McPherson who chairs the Senate Health and Welfare Committee and is a

member of the Senate Finance committee. Through these committee memberships McPherson is influential in setting policy concerning the funding, operation, and regulation of nursing homes. He has also sponsored several bills that have protected the nursing homes and their incomes. His own nursing home has been "profitable and growing" at the same time that it has been one of the most penalized in the state.[64] In 2005 McPherson's nursing home received $3.3 million in Medicaid payments, which made him the Louisiana legislator who earned the most government money that year.[65]

Joe Donchess, executive director of the LNHA, also wields considerable personal influence, including access to government business. In July of 2001 the DHH allowed him to review and edit a $3.5 million grant application to the Centers for Medicaid and Medicare. Among the edits, he changed responsibility for planning and application of the grant from the Governor's Office of Disability Affairs to DHH. This and other changes caused advocates for home and community-based services to withdraw their support for the application. The totality of these actions prompted David Hood, then secretary of DHH, to comment that his agency had gotten caught in a shooting war between the community advocates and the nursing home industry.[66] In 2003 Donchess was invited to sit on a 30-member advisory committee that would lead the search for a new health secretary.[67]

Donchess began his 25-year career in health care in the Office of General Counsel of the Louisiana Department of Health and Hospitals where he worked on health planning and with regulatory agencies. After almost eight years at DHH he was hired by the LNHA as its executive director.[68] Therefore, Donchess has intimate inside knowledge of the personnel, structure and operation of state government and the DHH that the LNHA would find useful. He explained his

lobbying activities on behalf of the LNHA with the comments that "If 80 percent of your payroll was based on one pool of money, would you make sure you were more interested in that pool of money than anything else? . . . We live and die by the Medicaid program."[69]

Olmstead, Barthelemy and the Louisiana Nursing Home Industry

In 2000 the Advocacy Center challenged the dominance of institutional care for the disabled and mentally ill in Louisiana. In the Olmstead v. L.C. case of 1999 in Georgia the United States Supreme Court decided that under the Americans with Disabilities Act of 1990 (ADA)

> states are required to place persons with mental disabilities in community settings rather than in institutions when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[70]

Following the success of the Olmstead case the Advocacy Center filed the Barthelemy v. Hood suit the following year in order to make in-home care more accessible in Louisiana for persons with disabilities who are, or are at risk of becoming, Medicaid patients.[71] Rather than fight a protracted court case, the Louisiana Department of Health and Hospitals (DHH) settled the case. In October 2001 the government received court approval for a schedule for providing home and community based services, beginning January 1, 2002.[72] The State missed the January 1 date to begin offering personal care services, and so it and the Advocacy Center returned to court to amend its agreement. The new agreement set July 1, 2003 as the date to begin implementation,

and it also established in-home care as an entitlement rather than as part of a waiver program.[73] However, prior to the July 1 starting date the state Legislature directed the Department "to ask the court for permission to modify the existing deal."[74] The judge denied the request, and ordered DHH to comply.[75]

On September 19, 2003, under order of a federal judge, the state Joint Legislative Committee on the Budget finally approved the agreement to provide home-care attendants to those people who qualify. It did, however, make qualification for the personal-care attendant more strict than for admission to a nursing home. Initially, qualified people with a monthly income of $1,656 or less were entitled to nursing home care.[76] By early 2005 those who qualified for nursing home care and had monthly incomes up to $579 were automatically entitled to a personal care attendant for home care, and those who had incomes up to $1,737 could receive waivers for home-care, but may have needed to wait up to two years to be accepted into the program.[77] The agreement received federal approval in December 2003 and was launched in January 2004.[78] In July of 2004 the number of people who were receiving in-home care remained small: 125 of 4,600 applicants. The Advocacy Center returned to court, accusing the State of dragging its feet, and asked the judge for help in enforcing the agreement.[79] Almost a year later, in April of 2005, approximately 4,455 people were receiving home-care services, while 30,000 were in nursing homes.[80]

The LNHA opposed the use of Medicaid funds for community-based care. In May of 2001, after the Olmstead decision required that community-based care be made available, Joe Donchess stated that while he favored community-based treatment, "paying for extra services shouldn't mean cutting mandatory Medicaid programs such as nursing homes."[81] In 2002 he

argued that "boosting money for community-based services could end up short-changing those who need institutional care."[82] In April 2003, when he was informed that the LNHA should expect a 13 percent to 15 percent reduction in reimbursement under Medicaid so that money could be transferred to community-based care, Donchess commented that "when they start coming after the nursing homes' money and try to expand home and community-based services, we are going to fight."[83] The use of such phrases as "nursing homes' money" when referring to Medicaid funds indicates that Donchess himself had a sense of entitlement – a perception that Medicaid money was coming to Louisiana for the nursing homes specifically rather than for services for the disabled and the elderly.

In the spring of 2003 Donchess tried to stop the legislators from creating a personal care attendants program so that nursing homes would not lose money. Louisiana senator and nursing home owner Joe McPherson also tried to eliminate funding for the personal care program.[84] In the August 2003 hearing of the modified settlement agreement, Donchess filed an objection, which the judge denied. Donchess had requested that the previously court-approved program be scaled back because it would "adversely affect nursing homes' revenues as well as the financial solvency of Louisiana's Medicaid program."[85] Donchess continued to work at reducing the effectiveness of the settlement and, under LNHA pressure, the Legislature reduced the personal care program's budget from $35 million to $28 million, and delayed its implementation.

In the fall of 2004 Governor Blanco tacitly acknowledged the role played by political influence in health care policy. At that time she called for the development of a comprehensive state plan on long-term care, but stated specifically that it be "based on best practices and not on protecting any particular interest."[86]

The Investigation of the Advocacy Center

In 2003 Joe Donchess wrote a letter to Mr. Peter Arceneaux, Director of the Governor's Office of Elderly Affairs (GOEA), in which he expressed the LNHA's "growing concern that the Advocacy Center may not be an appropriate contractor to provide ombudsman services for nursing home patients," and referred to the Center's "conflicting interests with nursing homes." The conflicting interests included receiving money from the Developmental Disabilities Council which promotes home care services, initiation of the Barthelemy case, and lawsuits that Advocacy Center lawyers occasionally filed against nursing homes for inappropriate operations. The letter argued that the Personal Care Service Option under Medicaid could "drain funds needed to adequately reimburse nursing homes, hospitals and other mandatory Medicaid programs," would take funds from the nursing home program, and was a service "that may result in a loss of funding for nursing home care." The letter requested that the GOEA review its current arrangements with the Advocacy Center concerning ombudsman services to determine if there was a conflict of interest. The GOEA did not act on the letter, however.[87]

Donchess's letter misrepresented the costs of personal care services, which are approximately half the cost per patient of nursing home services.[88] It also reflected his sense of entitlement (discussed above) by which he viewed Medicaid funds as belonging to the nursing home industry rather than having the purpose of serving the elderly and the disabled.

A year later, on August 3, 2004, Anne Maclaine, Director of Legal Services at the Advocacy Center, met with Isabel Wingerter, Chief of the Consumer Protection Section of the Attorney General's Office, about that offices own concerns. Wingerter had a subsequent telephone conversation with Susan Howard, the Director of Advocacy Services at the AC.

Maclaine followed up these contacts with a written letter.[89] She observed that the state was concerned that the fees that it paid to the Advocacy Center should not be used "to subsidize activities that might result in legal action against the state," and that "the Advocacy Center's receipt of attorneys' fees for its protection and advocacy activities **may** [emphasis in original] be prohibited by the Louisiana Code of Ethics."

Maclaine's letter described the Advocacy Center's programs, and explained that the Center maintained a strict separation between the state-funded ombudsman services and the federally-funded protection and advocacy services. Because of this, the staffs and the funding of the two aspects of the AC programming would not mix. Even confidential information gathered through state-funded programs would not be given to the protection and advocacy staff for use in litigation. She also explained that attorney's fees are awarded in only a small number of cases, and that the fees are returned to the program that supported the fee-generating lawsuit rather than being given to the lawyers who handled the case. While these considerations should have satisfied the Attorney General's Office, Maclaine added that the Advocacy Center would consider additional remedies for any lingering issues.

Fearing that their programs and funding were at stake, the Advocacy Center also appealed to the advocacy community for assistance. They placed a summary of issues, a sample letter, and the addresses of the Governor, the Attorney General, and the Executive Director of the Governor's Office of Elderly Affairs on the Louisiana Citizens for Action Now internet site, and requested that readers send letters of support.[90] The Attorney General's Office accepted the Advocacy Center's structure and mechanism for avoiding conflict of interest, and the Center retained the ombudsman program contracts.[91]

Conclusion

The controversy involving the accusation of conflict of interest lodged against the Advocacy Center, and its fear of loss of funding, supports the concept of legal representation for the poor being a form of largesse to be granted or withheld at the convenience of the powerful. At each step in this process, we can see that the for-profit nursing home owners and their representative association, the LNHA, acted to maximize their own benefits with little regard for the rights of the clients or patients. Some of them built unnecessary facilities with the knowledge that they would be paid well under Medicare and Medicaid; many collected large profits and payments while providing poor service; they fought against the implementation of less expensive home-care and community-care services that may have reduced their fees, and they ensured that they would receive preferential treatment and continued high payments when the new home-care and community-care services were implemented. They tried to overturn court-approved settlements regarding home-care and community-care, and successfully fought against legislation that would have mandated improved staffing levels. They successfully restored nursing home funding that the government had reduced in order to provide home-care and community-care, and they also successfully reduced funding that the government allotted for home-care and nursing-care. They were not as concerned about providing care to their clients as they were about their own personal incomes.

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Chapter 7: Legal Representation and Justice for the Poor

The facts of the four controversies discussed in this dissertation support the view with which our research began – that access to effective legal representation for the poor is a form of largesse that can be granted when it is convenient for the powerful and withdrawn when it is inconvenient for the powerful. In each of the cases we found that business owners and state agents (in the form of politicians, government employees, judges, prosecutors and district attorneys) worked to impede the effectiveness of nonprofit organizations that provided legal services to the poor and to those who could not otherwise afford legal representation. The actions against the legal services offices served the personal interests of the business owners and state agents by protecting private profits, government policies and budgets, and the reputations and jobs of the state agents themselves.

The case against the New Orleans Legal Assistance Corporation in 1970, discussed in Chapter 3, was fueled by a number of organizations and influences. Doris Culver, the Director of Orleans Parish Welfare, and Garland Bonin, the Louisiana Commissioner of Public Welfare, no doubt hoped that their effort to discredit NOLAC would reduce the effects of the Corporation's actions on their own agencies and work. Segregationist Congressman John Rarick aided Culver and Bonin through his activities in Congress, and Congressman Joe Waggoner acted out of concern for "local interests." New Orleans lawyer and aspiring politician Ben Toledano, Jr.,

visited the federal Office of Economic Opportunity and the Vice President with accusations about NOLAC in the hopes of advancing his own political career. The OEO, which placed restrictions on NOLAC's activities, did so as part of its response to business and governments who complained about the costs and commitments that resulted from the activities of Legal Services affiliates on behalf of the poor throughout the country.

The new restrictions placed on student law clinics, discussed in Chapter 4, resulted directly from opposition to the Tulane Environmental Law Clinic's successful representation of the Convent, Louisiana, citizens who opposed the construction of a $700 million chemical plant in their community. Governor Foster, a multi-millionaire businessman who supported the construction of the factory, encouraged New Orleans business leaders (many of whom were lawyers who had lost cases to the Law Clinic in the past) to find a way to control the Clinic. The business leaders, who were looking for a more business-friendly environment, petitioned the Louisiana Supreme Court to investigate and restrict TELC activities. Chief Justice Calogero, who faced reelection and possible defeat to a pro-business challenger supported by business lobbyists, allowed reconsideration of the Student Practice Rule to proceed. The Court complied with the business leaders' requests by imposing restrictions that others in the legal community described as hostile and as a strait-jacket on law clinic representation of the poor.

Chapter 5 presented a credible, although not a definitive, explanation of the change in the Louisiana Supreme Court's Rule XVII, Requirements For Admission To The Bar, to exclude non-immigrant alien lawyers from sitting for the bar exam and practicing law in Louisiana. The chapter argued that the most logical explanation for the rule revision was that the Supreme Court intended to prevent foreign lawyers from coming to Louisiana to represent defendants in capital

cases, and more specifically to prevent them from working with the Louisiana Capital Assistance Center. The chapter noted the LCAC's success in defending capital cases, and getting life sentences if not acquittals for their clients. However, losses and reversals in death penalty cases can make judges, prosecutors and district attorneys look weak and can affect promotions and re-election. Therefore, barring foreign lawyers from admission to the bar, which would slow the work of the LCAC, would work to the benefit of judges, prosecutors and district attorneys who dealt with death penalty cases. A definitive explanation would depend upon the release of documents by the Louisiana Supreme Court's Committee on Bar Admissions. Whatever the definitive explanation, however, the rule change had the effect of reducing legal representation of poor defendants in capital cases.

The Louisiana Nursing Home Association's accusation of conflict of interest against the Advocacy Center, discussed in Chapter 6, led to increased concern following a request from the Louisiana Attorney General's Office. Among its duties, the Advocacy Center worked effectively to improve services for the disabled and the elderly. This included working to have the government fund home care and community care rather than nursing home care exclusively. The Nursing Home Association, which represents owners of for-profit nursing homes, was concerned that these changes would reduce nursing home funding and profitability, and requested that the Governor's Office of Elderly Affairs investigate the Advocacy Center in the hope that the government would cancel the Center's ombudsman contracts. The Advocacy Center would have lost a significant part of its funding and its overall effectiveness through such a cancellation, and oversight of the nursing home owners would have been reduced as they continued appropriating large salaries and profits at the expense of the clients whom they were supposed to be serving.

Interference in Nonprofit Legal Services A National Issue

While the four cases discussed in this dissertation were from New Orleans and Louisiana, the problems experienced by nonprofit legal services for the poor are not limited to that city or state but are national in scope. Legal Services Program affiliates throughout the country had been subjected to political interference,[1] and Ronald Reagan, after assuming the presidency in 1981, tried to eliminate the Legal Services Corporation (successor to the Legal Services Program) altogether. He recommended appropriations of $0 for the Corporation for the fiscal years 1982-1988,[2] and during his second term in office he consistently nominated opponents of the LSC as Board members.[3] Congress provided the LSC with reduced budgets (which led to reductions in staff and services and to the closing of numerous offices throughout the country), and placed new restrictions on Legal Services activities in 1982 and again in 1996.[4] Over the past three decades opponents of university law clinics have attacked them in a number of different ways, trying to restrict their activities, limit their funding, and even have a law clinic terminated.[5]

In effect, the professional activities of the nonprofit legal services that we have discussed here have effectively challenged powerful business and government interests on behalf of the poor, and those business and government interests, in turn, challenged the nonprofit legal services in attempts to restrict the effectiveness of legal representation for the poor. Lawyer David Luban referred to the "statutes, rules and judicial decisions that allow opponents to attack the funding or restrict the activity of their adversaries' advocates" as "silencing doctrines" which transform the justice system in to a system of injustice.[6] That is precisely the type of activity that

we have seen the opponents of legal services for the poor pursue, and which the concept of legal representation for the poor as a form of largesse addresses.

Early Warning Signs

The occurrence of these confrontations should not be a surprise. The conditions that led to them are not new but have existed in this country for over two centuries, and there were several early warnings that such confrontations could arise.

The class divisions that we discussed in Chapter 2 have been a constant characteristic of social life in the United States, and those divisions have become greater throughout the country's history.[7] Historian Roger Shugg, acknowledging that some considered that the United States had a classless society, was prompted to say that "whether we choose to recognize or to ignore the class divisions among us, they do exist and are of crucial importance in explaining how our government and our economy work."[8]

In the 1830s, French traveler and social observer Alexis de Tocqueville discussed the prevalence of individualism in the United States in language that almost mirrors Macpherson's comments in Chapter 2. De Tocqueville stated that individualism disposed community members to withdraw (with family and friends) from society at large. As people gained the ability to provide for themselves they owed nothing to and expected nothing from others. They considered themselves to be standing alone, and imagined "that their whole destiny is in their own hands." De Tocqueville stated that equality placed individuals side by side, but that they were unconnected by common ties, were predisposed not to consider each other, and cared only for themselves. Ultimately, he said, individualism "is absorbed in downright selfishness."[9]

De Tocqueville also provided a description of class relations in his discussion of the manufacturing process in nineteenth century United States. He commented that the master (or factory owner) and the workman were connected to and dependent upon each other, but that the differences between them grew daily. Through the increased division of labor workmen worked at more highly specialized tasks, so developing greater dexterity in their tasks and producing commodities "with greater ease, speed, and economy." However, this limited and repetitive work degraded the worker, who became "more weak, more narrow-minded, and more dependent." As production improved, the wealthy and educated built factories and took advantage of the division of labor and economy of scale to produce inexpensive commodities to satisfy a growing demand. Some, although not all, manufacturers thereby increased their wealth. Summarizing the relationship between the manufacturer and worker, De Tocqueville commented that "The manufacturer asks nothing of the workman but his labor; the workman expects nothing from him but his wages." He observed that, in contrast to Europe's feudal aristocracy, the capitalist manufacturers had no obligation to aid or assist their workers, but impoverished and debased them, and then abandoned them to be supported by public charity. De Tocqueville saw this attitude as being a natural consequence of the capitalist manufacturing process and the corresponding philosophy of individualism that he had already described.[10]

Between October 1787 and March 1788, James Madison, Alexander Hamilton and John Jay, signatories to the Constitution, wrote a series of commentaries about the Constitution and its implications for the government of the new country. This included specific commentary about the legal system and the judiciary. Madison cautioned that different classes of citizens had different interests, and he asserted that a united majority could threaten the rights of a minority,

and that a stronger faction could oppress a weaker faction.[11] James Hamilton argued that judges needed to have permanent tenure in office in order to ensure their independence. He wrote that judges who held temporary commissions or periodic appointments might improperly work to please an executive or legislative authority that makes appointments, or that publicly elected judges might improperly make popular decisions rather than making decisions according to the Constitution or the law. Therefore, he saw the independence of judges with permanent appointments as being essential to protect the Constitution and the rights of citizens.[12]

While de Tocqueville saw class divisions and the philosophy of possessive individualism at work in social life and predicted their outcomes almost two centuries ago, we can now see that the fears of Madison and Hamilton have been realized. In the four cases presented in depth, as well as in other cases mentioned in this dissertation, politically and economically strong groups of business owners and government leaders have worked to oppress politically and economically weaker groups of poor citizens and their lawyers, and elected judges have made decisions that were popular rather than just (in order to protect their positions). In both instances the rights of poorer and weaker citizens have been violated for the benefit of the wealthier and more powerful.

Achieving Legal Representation and Justice for the Poor

Having identified a number of problems in the provision of legal services to the poor, we must now ask how we can solve these problems, make the lives of the common people brighter and fairer, and build a civilization founded on democracy, as Reginald Heber Smith wrote. In 1919 Smith himself presented a series of four recommendations to improve legal services for the poor. He stated that cities should have a single legal aid organization with departments that specialized in different types of legal work;[13] that legal aid offices should engage in law reform,

or "preventive law";[14] that a Bureau of Justice should be established for the scientific study of law, to detect its shortcomings and determine remedies for them;[15] and that legal aid for the poor should be publicly funded in order to meet the entire need.[16] More recently lawyer Deborah M. Weissman proposed the establishment of a national legal services institution that would be publicly funded at an adequate level, stable and without restrictions; a reform of philanthropic institutions to promote issues of justice; and the establishment of a "civil Gideon" which would establish the constitutional right to representation in civil cases just as the case of Gideon v. Wainwright established the constitutional right to representation in criminal cases.[17]

The creation of the Legal Services Program during the Johnson administration essentially fulfilled Smith's recommendations, and the fulfillment of Weissman's recommendations would no doubt assist the poor in ameliorating onerous conditions and improving their positions. As Tigar has commented, they would be worthy accomplishments.[18] However, the cases discussed in this dissertation have demonstrated that legislation and judicial rules can be revised, rewritten, reinterpreted and even ignored, and programs can be reorganized and reoriented, depending on the politics of the time. Therefore such reforms must be considered as partial or short-term remedies for the problem of legal services for the poor.

To develop long-term remedies we must return to our earlier discussion of law which argued that consciousness and ideology, including legal ideology, derive from a society's relations of production. Within capitalist society, business leaders (as a ruling class) and state agents (including government employees, judges, prosecutors and district attorneys) work to deny effective legal representation to the poor, and to ensure that benefits continue to flow to the wealthy and the powerful. The beneficiaries of this process are not necessarily aware of the finer

details of the social mechanisms at work, even as they play their own parts in that process. Rather, they simply assume roles that seem natural and right to them, and which they vigorously protect. This corresponds well to the assessment of the legal situation that Tigar and Levy expressed in their comments that "the system of organization of production for private profit is unable to meet the needs of the people, and the legal ideology of the dominant group is unable to accommodate their demands for freedom and fairness."[19]

Therefore, we are led to conclude that, in order to bring about an effective, long-term transformation of the legal system so that it provides the justice that it promises, we must transform the dominant relations of production. Rather than accepting ownership and control of the means of production by a small number of individuals for their own personal benefit, we must work toward community or public ownership and control of the means of production. This would benefit all members of the community or of the public and would lead to the development of a legal ideology that would serve all members of the community or the public rather than just a privileged few.

Such a transformation would not happen quickly or quietly, for as Tigar and Levy demonstrated, the transformation from feudalism to capitalism took place over a period of approximately 800 years. However, small changes that accumulated over time had considerable effect, and the many different social struggles that have occurred during the past two centuries in this country and elsewhere (including the actions of the four legal service agencies discussed here) show that significant numbers of people are interested and committed to improving the lives of the poor and of all citizens. In fact, joint action for the social good, and community ownership and control of the means of production would not be entirely foreign, for the country

has a long history of benevolent societies and cooperatives, and a movement promoting community ownership of resources has developed over the past couple of decades.[20]

Omar Saunders, a Chicago man who was wrongfully accused and convicted of rape and murder, and jailed for 15 years before being exonerated by DNA testing,[21] had the Declaration of Independence in mind when he stated that "if we want to make America a greater place it is going to take people like us to understand what the nation is based on and do what the founding fathers did when they thought that their freedoms were being jeopardized and that their rights were being infringed."[22] That is, in order to create a better society we must take action to create the society that we want. Each of us has a stake, and a role to play, in this struggle. The achievement of a society and a legal ideology that respects our rights and justice itself is dependent upon our own actions.

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Southern Christian Leadership Conference et al. v. Supreme Court of the State of Louisiana, 61 F. Supp. 2d 499 (1999).

Southern Christian Leadership Conference et al. v. Supreme Court of the State of Louisiana, 252 F.3d 781 (2001).

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Stokes v. Bonin, 366 F. Supp. 485 (1973).

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Townsend v. Burke, 334 U.S. 736 (1948).

United States of America v. State of Louisiana, 225 F. Supp. 353 (1963).

United States v. Wade, 388 U.S. 218 (1967).

Wallace et al v. Calogero Jr. et al, 286 F. Supp. 2d 748 (2003).

Webb v. Baird, 6 Ind. 13 (1853).

Writ Application to the United States Supreme Court in In Re: Veronique Marty et al accessed on 2 December 2004 from the Koerner Law Firm internet site http://www.koerner-law.com/Marty_Writ.htm

Appendix A: Documents and Decisions Establishing Legal Rights

Item	Date	Effect
Declaration of Independence	4 July 1776	stated that "all men are created equal," and that "Life, Liberty and the pursuit of Happiness" are inalienable rights[1]
United States Constitution	17 Sept. 1787	presented the establishment of justice as a primary goal of the people and rationale for the Constitution itself.[2]
Fifth Amendment	15 Dec. 1791	provided right to due process of law and protection from self incrimination[3]
Sixth Amendment	15 Dec. 1791	provided the right to "a speedy and public trial, by an impartial jury" and the assistance of defence counsel[4]
Seventh Amendment	15 Dec. 1791	provided the right to trial by jury in civil cases involving disputes valued over twenty dollars[5]
Eighth Amendment	15 Dec. 1791	prohibited the use of "cruel and unusual punishments"[6]
Webb v. Baird (6 Ind. 13)	1853	Indiana Supreme Court recognized an indigent defendant's right to a publicly-paid attorney in a criminal case[7]
Fourteenth Amendment	9 July 1868	gave full citizenship and citizenship rights to those born or naturalized in the United States; gave to "any person" the rights of "due process of law" and "equal protection of the laws" against actions of the states[8]
Powell v. Alabama	7 Nov. 1932	decided that defendants in state capital cases must be given counsel[9]
Johnson v. Zerbst	23 May 1938	reaffirmed an accused's right to counsel in federal criminal trials[10]
Townsend v. Burke	14 June 1948	decided that defendants have a right to counsel at sentencing[11]

Hamilton v. Alabama	13 Nov. 1961	ruled that accused are entitled to counsel at arraignment[12]
Douglas v. California	18 Mar. 1963	ruled that indigent defendants in state criminal cases are entitled to counsel during appeals[13]
Gideon v. Wainwright	18 Mar. 1963	ruled that defendants had a right to publicly-funded counsel in state criminal trials[14]
Miranda v. Arizona	13 June 1966	banned use of statements from suspects not informed of their Fifth Amendment rights[15]
In re Gault	15 May 1967	gave indigent children the right to counsel in juvenile delinquency cases[16]
United States v. Wade	12 June 1967	established that accused are entitled to counsel when appearing in a police line-up[17]
Mempa v. Rhay	13 Nov. 1967	ruled that "counsel be afforded to a felony defendant in a post-trial proceeding for revocation of probation and imposition of deferred sentencing"[18]
McMann v. Richardson	4 May 1970	ruled that "defendants facing felony charges are entitled to the effective assistance of competent counsel" at plea bargaining[19]
Coleman v. Alabama	22 June 1970	ruled that accused are entitled to counsel at preliminary hearing[20]
Twenty-sixth Amendment	1 July 1971	prohibited the federal and state governments from preventing citizens eighteen years or older from voting.[21]
Argersinger v. Hamlin	12 June 1972	gave the right to counsel to defendants in misdemeanor cases that may result in loss of liberty[22]
Brewer v. Williams	23 Mar. 1977	affirmed a suspect's right to assistance of counsel and protection from self-incrimination[23]
Moore v. Illinois	12 Dec. 1977	affirmed the right to counsel at corporeal (physical, in-person) identifications[24]
Strickland v. Washington	14 May 1984	decided that "right to counsel is the right to the effective assistance of counsel"[25]

Sources:

1. "The Declaration of Independence in Congress, July 4, 1776; The unanimous Declaration of the thirteen united States of America," in Alexander Hamilton, James Madison and John Jay, The Federalist Papers, Clinton Rossiter, editor (New York: Signet Classic, 2003), 528.

2. “The Constitution of the United States of America As agreed Upon by the Convention, September 17, 1787,” in Hamilton, Madison and Jay, The Federalist Papers, 542.

3. “Articles in Addition to, and Amendment Of, the Constitution of the United States of America,” in Hamilton, Madison and Jay, The Federalist Papers, 559; “The Constitution of the United States,” from The U.S. Constitution Online internet site.

4. “Articles in Addition to, and Amendment Of, the Constitution of the United States of America,” in Hamilton, Madison and Jay, The Federalist Papers, 559; “The Constitution of the United States,” from The U.S. Constitution Online internet site.

5. “Articles in Addition to, and Amendment Of, the Constitution of the United States of America,” in Hamilton, Madison and Jay, The Federalist Papers, 559; “The Constitution of the United States,” from The U.S. Constitution Online internet site.

6. “Articles in Addition to, and Amendment Of, the Constitution of the United States of America,” in Hamilton, Madison and Jay, The Federalist Papers, 559; “The Constitution of the United States,” from The U.S. Constitution Online internet site.

7. Webb v. Baird, 6 Ind. 13 (1853).

8. “Articles in Addition to, and Amendment Of, the Constitution of the United States of America,” in Hamilton, Madison and Jay, The Federalist Papers, 561-562; “The Constitution of the United States,” from The U.S. Constitution Online internet site.

9. Powell v. Alabama, 287 U.S. 45, (1932).

10. Johnson v. Zerbst, 304 U.S. 458 (1938).

11. Townsend v. Burke, 334 U.S. 736 (1948).

12. Hamilton v. Alabama, 368 U.S. 52 (1961).

13. Douglas v. California, 372 U.S. 353 (1963).

14. Gideon v. Wainwright, 372 U.S. 335 (1963); Anthony Lewis, Gideon’s Trumpet (New York: Random House, 1964), 187-189.

15. Miranda v. Arizona, 384 U.S. 436 (1966).

16. In re Gault, 387 U.S. 1 (1967).

17. United States v. Wade, 388 U.S. 218 (1967).

18. Mempa v. Rhay, 389 U.S. 128 (1967).

19. McMann v. Richardson , 397 U.S. 759 (1970).

20. Coleman v. Alabama, 399 U.S. 1 (1970).

21. “Articles in Addition to, and Amendment Of, the Constitution of the United States of America,” in Hamilton, Madison and Jay, The Federalist Papers, 568; “The Constitution of the United States,” from The U.S. Constitution Online internet site.

22. Argersinger v. Hamlin, 407 U.S. 25 (1972).

23. Brewer v. Williams, 430 U.S. 387 (1977).

24. Moore V. Illinois, 434 U.S. 220 (1977).

25. Strickland v. Washington, 466 U.S. 668 (1984).

Appendix B: Text from Acts of the Legislative Council of 1804

Source: “Acts passed at the first session of the Legislative Council, of the Territory of Orleans,” in the Louisiana Purchase Bicentennial Collection of the Louisiana Digital Collection from http://louisdl.louislibraries.org/collections.html, accessed 5 April 2004.

1804

ACTS

PASSED AT THE FIRST SESSION OF THE

LEGISLATIVE COUNCIL,

OF THE

TERRITORY *of* ORLEANS,

BEGUN AND HELD AT THE PRINCIPAL, IN THE CITY OF NEW-ORLEANS, ON MONDAY THE THIRD DAY OF DECEMBER, IN THE YEAR OF OUR LORD, ONE THOUSAND EIGHT HUNDRED AND FOUR, AND OF THE INDEPENDENCE OF THE UNITED STATES THE TWENTY-NINTH.

or cauſing to be publiſhed, any manner of libel, ſhall on conviction thereof, ſuffer fine or impriſonment, or both, at the diſcretion of the court.

Aſſault and battery.

Sec. 32. *And be it further enacted*, That whoever ſhall be guilty of aſſaulting and beating, wounding ſhort of maiming, or of falſely impriſoning any perſon, ſhall on conviction thereof, ſuffer fine or impriſonment, or both, at the diſcretion of the court.

Trials to be on the principles of the common law.

Sec. 33. *And be it further enacted*, That all the crimes, offences and miſdemeanors herein before named, ſhall be taken, intended and conſtrued, according to and in conformity with the common law of England; and that the forms of indictment, (diveſted however of unneceſſary prolixity) the method of trial; the rules of evidence, and all other proceedings whatſoever in the proſecution of the ſaid crimes, offences and miſdemeanors, changing what ought to be changed, ſhall be except as is by this act otherwiſe provided for, according to the ſaid common law.

Trials may be had by jury or otherwiſe.

Sec. 34. *And be it further enacted*, That the trial of every perſon, for any of the crimes or miſdemeanors aforeſaid, ſhall be by jury, if the party accuſed or the perſon who proſecutes deſires it.

Copy of indictment, and liſt of jury to be given the priſoner.

Sec. 35. *And be it further enacted*, That every perſon who ſhall be accuſed and indicted for any capital crime or any crime puniſhable with impriſonment at hard labor for life, or for ſeven years or upwards, ſhall have a copy of the indictment and liſt of

the jury which are to paſs on his trial, delivered unto him at leaſt two entire days before he or ſhe ſhall be tried for the ſame; and that every perſon accuſed and indicted, ſhall be allowed and admitted to make his full defence by counſel learned in the law; and the court before whom ſuch perſon ſhall be tried, or ſome judge thereof, ſhall immediately upon his requeſt, aſſign to ſuch perſon ſuch counſel as ſuch perſon ſhall deſire, to whom ſuch counſel ſhall have free acceſs at all ſeaſonable hours; and every ſuch perſon or perſons ſo accuſed and indicted, ſhall be admitted in his, her, or their defence, to make any proof he, ſhe or they can produce by any lawful witneſs or witneſſes, and ſhall have the like proceſs to compel his, her, or their witneſſes to appear on his, her or their trial, as is uſually granted to compel witneſſes to appear on the proſecution againſt him, her or them.

Priſoner allowed counſel.

May adduce evidence.

Sec. 36. *And be it further enacted*, That no perſon indicted of any crime ſpecified in the preceding ſection ſhall be allowed to challenge above the number of twelve perſons of the jury, unleſs cauſe be ſhewn for ſuch challenges above the number aforeſaid; and if any perſon on his or her arraignment for any offence, ſhall ſtand mute or will not anſwer to the indictment, the plea of not guilty ſhall be entered for him or her, on the record, and the court ſhall, on either of ſaid caſes, proceed to trial of the perſon ſo challenging or ſtanding mute, as if he or ſhe had pleaded not guilty, and for trial put

May challenge jurors.

Standing mute no bar to trial.

Appendix C: Methodology

This dissertation is based upon qualitative research involving both narrative and exposition. Historians Richard Marius and Melvin E. Page explain that narratives describe events and occurrences, and establish the problem to be resolved.[1] Expositions, meanwhile, explain and analyze events and occurrences through discussions of "cause and effect, or the meaning of an event or an idea," and may refer to "philosophical ideas, causes of events, the significance of decisions, the motives of participants, the working of an organization, the ideology of a political party."[2]

To study the controversies experienced by legal service organizations in New Orleans and test the stated propositions, I used a combination of research methods and resources, including archival records, newspapers, internet searches, interviews, and organizations' internet pages and internal documentation. This combination of multiple sources of information was critical to my research, for it provided information that a single source would not have, and it provided the opportunity to test and corroborate information.

Archival Research

My archival searches included records of several collections in New Orleans. The Community Services Council of New Orleans Collection, in the Louisiana and Special Collections at the Earl K. Long Library, the University of New Orleans contains early records of

the Legal Aid Bureau and of the New Orleans Legal Assistance Corporation. These include a copy of Legal Aid Bureau's articles of incorporation of 1935, a 1954 assessment report by the National Legal Aid Association, and program statements and statistics as well as correspondence from the 1960s. The Collection also includes correspondence concerning NOLAC's creation and operation, and early NOLAC newsletters. The John P. Nelson, Jr. Papers at the Amistad Research Center at Tulane University contains NOLAC meeting minutes, internal memos, newspaper articles, correspondence and reports from 1968 to the early 1970s. This material came from Nelson's activities as one of the founders of NOLAC and a member of its first board of directors. The City Archives and Special Collections of the Louisiana Division of the New Orleans Public Library has vertical files on local political figures including former mayor Moon Landrieu, former congressman John Rarick, and lawyer and politician Ben C. Toledano, Jr.

Newspaper and Journal Research

I conducted searches of several newspapers for information on specific events, organizations or individuals. All editions of the New Orleans newspapers The Times-Picayune and The Louisiana Weekly are available on microfilm at UNO's Earl K. Long Library, as are copies of The New York Times and The Washington Post. The Long Library also has back copies of The Gambit Weekly. The Louisiana Supreme Court library has microfilm copies of The National Law Journal. I retrieved full text articles from major newspapers, including The Times-Picayune, The Advocate (of Baton Rouge) The New York Times and The Washington Post since about 1990 from the Lexis-Nexis Academic database service. Major articles from The Gambit Weekly since January 2000 and from The Louisiana Weekly since May 14, 2001 are available on the internet. The Amistad Research Center at Tulane University has a complete

collection of The Louisiana Weekly issues from its beginnings in 1925. I found articles from other newspapers and some journals through internet searches.

Court Decisions

I found notices of some court cases in literature and on the internet sites of legal services and advocacy organizations, while the Lexis-Nexis Academic: Legal Research database provided the full text of many court decisions and law journal articles. The Louisiana Supreme Court internet site provided further information about court cases and decisions. In one case New Orleans lawyer Louis Koerner placed written submissions to the court on his company's internet site.

Internet Research

I reviewed the web sites of the organizations that I studied, and found that some organizations have very comprehensive web sites that include information about every aspect of their organization and work, and include links to reports and publications. Other organizations, however, have web pages that are very sparse, and include little more than contact information.

I used the search engine www.google.com to conduct internet searches on organizations and individuals, and found little information about some and a wealth of information about others. The age of an organization did not seem to be an indicator of the quantity of information about it that is posted on the internet. Rather, the type of organization and the type of work that it does – and specifically the degree to which the organization is controversial – seemed to be a better indicator of quantity of information. The same is true of individuals. Articles posted on the internet ranged from copies of newspaper articles to in-depth interviews with leading project lawyers and biographies.

Organizations' Documents

Internal organizational documents, as with organizational internet sites, varied considerably in the information that they provided. Some organizations had documents that were rich with information about the organizations and their activities. This documentation ranged from simple reports on the numbers of clients served to detailed program descriptions, research papers, and organizational histories. Other organizations, meanwhile, had no documentation to offer.

Limitations

As might be expected for a study involving controversies, not all desired or desirable information was available. The New Orleans Legal Services Corporation, which was involved in the oldest of the four controversies, does not have an archive of its own historical documents, and documents held by the federal government are not readily available. The Louisiana Supreme Court refused to release key documents relating to their decisions relating to both Rule XX, the Law Student Practice Rule, and the rule regarding the practice of law by foreign lawyers in Louisiana. Similarly, the Louisiana attorney-general's office has not responded to a request for documents concerning the investigation of the Advocacy Center.

Fortunately, local archives have a wealth of documents regarding the early years of the New Orleans Legal Assistance Corporation, and newspapers (which are available on microfilm and through databases), journals, and various internet sites have information about the organizations and controversies. In some cases organizations provided me with copies of their own internal documents.

Business records that are available on the internet were of some help. The Louisiana Secretary of State has made basic corporation data available by posting its Corporation Database online at http://www.sec.state.la.us/crpinq.htm. Also, the IRS Form 990 "Return of Organization Exempt from Income Tax," which is a financial form that non-profit organizations with incomes greater than $25,000 per year must submit, is a public document; the forms for most of the organizations that I studied are posted on the internet and are available through Guidestar, "The National Database of Nonprofit Organizations," at www.guidestar.org. Those program directors who did not give me financial information were clearly not aware that non-profit (501(c)(3)) organizations are required by law to provide certain documentation – including incorporation papers and the IRS Form 990 – to the public upon request.[3]

End Notes

1. Richard E. Marius and Melvin E. Page, A Short Guide to Writing About History, 4th edition (New York: Longman Publishers, 2002), 67, 69.

2. Marius and Page, A Short Guide to Writing About History, 73.

3. Donald A. Griesmann, Nonprofit Organizations - Disclosure of Information: What Must We, What Can We Disclose to the Public, Staff, Board and Clients? (Washington, D.C.: National Legal Aid & Defender Association, 2001) from the NLADA internet page http://www.nlada.org/Civil/Civil_Library accessed 25 May 2004; Eric Mercer, What About Posting 990s and Other IRS Forms Online? (Seattle: Internet Nonprofit Center, 2002) accessed from the Internet Nonprofit Center internet site on 10 July 2004 at http://www.nonprofits.org/npofaq/16/58.html; Internal Revenue Service, FAQs regarding the Exempt Organization Public Disclosure Requirements, from the IRS internet site on 23 August 2004 at http://www.irs.ustreas.gov/charities/article/0,,id=96430,00.html#4.

Appendix D: The Advocacy Center's Programs

Federally Funded Programs	**Purpose**
Client Assisted Program	to assist clients of Louisiana Rehabilitation Services secure rights guaranteed by the Rehabilitation Act
Protection and Advocacy for Assistive Technology	to assist clients obtain evaluations and appropriate assistive technology equipment or related services
Protection and Advocacy for Beneficiaries of Social Security	to assist SSI/SSDI beneficiaries prepare for, obtain, maintain or advance in employment
Protection and Advocacy for Persons with Developmental Disabilities	to assist individuals with developmental disabilities regarding education, legal rights, accessibility, public benefits, housing, legal status, juvenile issues, and parental rights
Protection and Advocacy for Individuals with Mental Illness	to assist clients who are diagnosed with a significant mental illness or emotional impairment
Protection and Advocacy for Individual Rights	to assist clients who have severe disabilities with abuse or neglect, accessibility, assistive technology, housing, habilitation, rights, financial entitlements, legal status and parental rights
Protection and Advocacy for Traumatic Brain Injury	to assist clients who have traumatic brain injury with abuse or neglect, accessibility, assistive technology, housing, habilitation, rights, financial entitlements, legal status and parental rights
Accessible Housing	with the LSU Human Development Center and the Fair Action Housing Center trains people with disabilities, their families and service providers about housing rights
Help America Vote Act	informs and trains people with disabilities and personnel connected to the voting process about voting rights
Contract Programs	**Purpose**
Community Living Ombudsman Program	assists developmentally-disabled residents of privately operated facilities with protection of rights and quality of life
Elderly Legal Services	provides legal assistance to persons 60 years of age and older in three parishes (Orleans,, Plaquemines and St. Tammany) with abuse / neglect, accessibility, age discrimination, assistive technology, financial entitlements, health care, legal status, long term care, and public housing

Long Term Care Ombudsman Program	assists residents of nursing homes, board and care facilities and skilled nursing facilities of hospitals in 22 parishes with protection of rights and quality of life issues
Ombudsman Legal Assistance Program	assists elderly residents and applicants of nursing homes and board and care homes with residents' rights, abuse / neglect, legal status and public benefits
Louisiana Coalition Against Domestic Violence	assists service providers to recognize and respond to assault and abusive situations concerning people with disabilities, and to better serve people with disabilities regarding sexual assault and domestic violence – in conjunction with the Louisiana Coalition Against Domestic Violence and the Louisiana Foundation Against Sexual Assault

Source: Advocacy Center internet page "The Advocacy Center's Programs" accessed at http://www.advocacyla.org/programsnew.html on 9 November 2004.

Vita

Louis Crust has followed an eclectic, interdisciplinary program of study that includes a B.A. in Anthropology, an M.A. in Social Anthropology, a certificate in Cartography and a diploma in Scientific Computer Programming. He put his technical training to good use in government and consulting work prior to beginning his doctoral studies. He has presented papers at conferences in the United States and abroad, and has several publications to his credit. He anticipates more of the same in the future.