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Indigent Access to Justice in West Virginia

John C. Kilwein

One of the most basic promises that any civilized society makes to its citizens is access to a court system where they can resolve their disputes in a non-violent manner. Whether these systems evolved from the Romano-Germanic code, England's common law, or other non-European conceptions of justice, all court systems make the same fundamental bargain with their citizens: give up your right to prosecute your dispute with another by any means and society will provide a fair and impartial tribunal to resolve those conflicts.

Given its English heritage, the legal system in the United States is adversarial. Those involved in a legal dispute are responsible for researching and presenting a case to the court that is both truthful and favorable to their position. The court will hear two competing, biased versions of the truth and will determine what it believes occurred to give rise to the dispute and apply the law to that version. In this adversarial trial, both sides have the ability to not only present their versions of the truth, but also to challenge their opponent's. These competing narratives are compiled using witness testimony and evidence in a courtroom battle that is conducted within the bounds of a very complicated rule system, the law. One final principle must be added to this very simplistic description of ideal American justice: justice is blind to legally irrelevant litigant characteristics such as race, gender, ethnicity, and class.

Obviously, the ideal of equal justice under the law is a work in progress in the United States. Both history and social science show us that Americans have suffered, and continue to suffer, unequal justice before the law based solely on immutable characteristics such as race, gender, and ethnicity (Tushnet 1987; Eisenstein 1988; and Engel 1987). These same disciplines also make clear that American justice can vary based strictly on a litigant's economic status (Galanter 1975).

At its most basic level, class disadvantage may result from a judge or juror's prejudice against the poor, a prejudice that exists in and out of the courtroom. More pernicious is the disadvantage that poor litigants face in securing legal representation. Success in the American adversarial courtroom is based in large part on understanding the law and using it to one's advantage. Put more simply, success in an American court is based on effective legal representation, i.e., having a lawyer, preferably a good one. Securing effective representation requires money and like many goods and services, those who have more money can often secure better-quality representation.

Some might see the connection between wealth and the ability to secure legal representation as an obvious and legitimate manifestation of our free-market system; after all, the rich can afford to live in nicer homes, drive larger cars, and eat fancier food. Most Americans probably accept that those with more can consume these material goods in greater quantities. But, if asked, many of those same people would probably be uncomfortable with the notion that access to fair justice should vary by wealth. It is fair to say that this discomfort makes sense; access to legal representation is different than access to material goods. Without access to counsel, one of society's most basic bargains, i.e., reject individual violence and bring your disputes to a fair court for resolution, becomes a rigged bargain that makes a mockery of basic American ideals. To lessen this gap between ideals and reality, concerned Americans and their national and state governments have developed a number of legal assistance systems that provide free legal representation to some poor litigants.

This article examines the current status of legal assistance for the poor in West Virginia. It begins by examining how legal assistance for the poor is defined and what systems have been developed to provide these services. Next, the article explores briefly some of the debates that have surrounded the provision of legal assistance for the poor. The article then describes and assesses existing West Virginian legal assistance programs for the poor in the civil and criminal justice systems. The article concludes with a look to the future of legal assistance in West Virginia, especially with regard to its future funding.

Systems for Providing Legal Assistance to the Poor

Given the popularity of television and movie police and courtroom dramas, most Americans are familiar with the script of the so-called Miranda warnings given to a defendant at arrest. Among these Miranda rights are the right to counsel and the right to have that counsel provided to you free of charge if you are unable to pay for it yourself. This right to free legal assistance for indigent criminal defendants was created by the U.S. Supreme Court in 1963 in the landmark case of *Gideon v. Wainwright*, 372 US 335. In *Gideon* and its progeny[1], the Supreme Court interpreted the Constitution's Sixth Amendment right to a fair and speedy trial and the assistance of counsel for defense a right for all Americans, regardless of their economic status. In deciding *Gideon*, the Court surveyed a legal landscape in 1963 where it was possible for an innocent defendant to be convicted of a felony simply because (s)he could not afford legal counsel. In 1963, access to free legal counsel, and the quality of that representation, varied from state to state. In some areas, service was provided solely by private, philanthropic efforts and, in others, through a partnership between these private entities and local government. Prior to 1963, indigent persons dealing with the legal system, in a civil or criminal matter, essentially had three options available to them: pro se representation, pro bono publico representation by a private attorney, and assistance from a legal aid organization.

Pro se representation was, and continues to be, the worst of these alternatives, because the litigant acts in his/her own behalf against a professional attorney, creating a very lopsided legal adversarial battle. Luckier litigants were able to secure the services of a private attorney without charge because the attorney was acting for the public good (pro bono publico). An attorney's obligation to provide some legal assistance pro bono stems from his or her professional responsibilities. In exchange for its monopoly over the provision of legal services in the United States, the organized bar has traditionally promised to meet the legal needs

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of all Americans, including those who cannot pay for counsel. In reality, the provision of pro bono representation by private attorneys has never come close to meeting the demand for such services. Legal aid societies have tried to fill this void.

At first, legal aid societies were created to meet the legal needs of specific types of litigants, for example women and children or recent immigrants from Germany. But, gradually, they expanded to serve a broader range of poverty-stricken communities. By 1963, these societies had spread to a substantial portion of the country. As with most social welfare programs, public or private, demand for the legal aid far outstripped the societies' capabilities to provide it.

As private entities, legal aid societies relied almost exclusively on private funds to operate. Support came from local charities, local bar associations, other private donors, and city and county governments. They operated independently of each other and utilized staff attorneys who worked solely for the societies to provide legal assistance to the poor. Because legal aid societies were heavily dependent on local bar associations and business leaders for support, they tended to pursue a relatively tame and non-controversial practice that focused almost exclusively on meeting the individual needs of their clients in cases that would not upset their sponsors. In civil court, this translated into a focus on family law cases (e.g., divorce, child custody and support) and an avoidance of cases that might challenge prominent local businesses or government officials (e.g., landlord-tenant and credit cases). In the criminal court, legal aid societies tended to represent defendants who faced the most serious charges, creating a sort of legal triage.

In addition to avoiding controversial cases, legal aid societies established very restrictive eligibility criteria to assure the bar that those clients who could pay for legal representation would not be served. Finally, it is important to note that the service legal aid societies provided was not an entitlement or a right. The societies were the sole determiners of who did and who did not receive representation. Legal aid societies continue to operate in many parts of the country, although their relative importance declined with the development of government funding for legal assistance in the 1960s.

The 1960s brought about two revolutionary changes to the legal assistance landscape: the aforementioned *Gideon* decision by the U.S. Supreme Court and President Lyndon Johnson's "War on Poverty." *Gideon* and its progeny created a new constitutional right for indigent criminal defendants, regardless of whether their prosecutors were federal or state. Practically speaking, *Gideon* required both levels of government to develop apparatuses to provide for this representation. Two basic delivery models were established by the state and federal governments, a staff model and a judicare model. In the staff model, the government funds the creation of an organization that hires attorneys, often referred to as public defenders, to provide representation to indigent criminal defendants. These focus solely on criminal defense and the defenders earn an annual salary that is not linked to the number of clients served. In the judicare model (the legal equivalent of the Medicare model of patient care), the government pays private attorneys an hourly fee to represent indigent criminal defendants. All fifty states and the federal government meet their *Gideon* obligation to indigent defendants through the use of combined systems, i.e., both public defenders and judicare.

The revolution in civil legal assistance occurred as a result of President Johnson's (D, 1963-1968) declaration of war on poverty in the 1960s. The war was actually a concerted effort by the federal government to use substantial budget surpluses to target some of the root causes of poverty, e.g., poor access to education, job training, employment, health care, safe and affordable housing, and legal assistance. The key program charged with fighting Johnson's domestic war was the Office of Economic Opportunity (OEO) and in 1967 its director, Sargent Shriver, agreed to fund the Legal Services Program, an experimental program designed to increase indigent access to the justice system.

The Legal Services Program was designed to be a conduit of federal money to local, independent providers of free legal services to the poor. The Program established guidelines for the recipient programs and key among these was the expectation that they would undertake a more activist litigation strategy on behalf of their clients than had the legal aid societies that preceded them. In other words, the legal services programs were designed to not only represent individuals, but to also use legal strategies to attack systemic conditions that hurt the poor. For example, suing an unfair landlord in one class action suit with a hundred litigants was encouraged as opposed to undertaking one hundred individual suits on behalf of affected tenants. The Legal Services Program allowed existing legal aid societies to apply for its funding, but with the condition that they adopt a more activist approach. Almost all recipient programs used the staff model. In addition, the Program quickly determined that its funds could not be used to provide criminal representation because the states already had a constitutional responsibility to provide this assistance. Instead, the Legal Services Program used its funding to increase access to civil legal assistance nationwide. What the Legal Services Program did not do was establish a right to civil legal assistance. With a few special exceptions, for example, a hearing to determine whether a parent will lose custody of her/his children, Americans do not have a constitutional or statutory right to counsel in civil cases.

President Richard Nixon (R, 1969-1973) dismantled the Office of Economic Opportunity. Many of its programs were discontinued, some programs, like Head Start, were spun off to other departments, and, in 1974, the Legal Services Program became an independent, federal corporation, the Legal Services Corporation (LSC). The Legal Services Corporation has been successful at expanding access to civil legal assistance nationwide. Today, it funds 179 programs that operate in all fifty states and the U.S. commonwealths and territories.

It would be an understatement to point out that LSC has had its share of controversy (Kilwein 1999). At first, some private attorneys feared that it might put them out of business. However, LSC and its recipients are now strongly supported by the vast majority of the local bar and the American Bar Association. But, the Legal Services Corporation continues to experience political opposition from conservatives and targets of its programs' litigation. Opposing litigants, like state and local government and businesses that deal with the poor, have opposed LSC for an obvious reason: LSC funded lawyers have been effective against them in court. When legal services attorneys sue a corporate farm for failing to provide migrant workers with adequate and safe drinking water and toilet facilities in the fields or force a school district to open its doors to disabled students, they not only

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achieve the program's mission, they alienate powerful political actors. These actors have used their political influence to limit LSC and its programs.

Political conservatives have criticized LSC for being a remaining vestige of what they perceive to be the failed experiment in liberal social engineering ushered in by efforts like the "War on Poverty." These critics have argued that LSC programs short-circuit the democratic process by allowing liberal interest groups to gain policy victories not through the ballot box but by court decree. Conservatives, in and out of Congress, along with some business and government actors, have attempted to eliminate LSC funding throughout its existence. While they have failed in that effort, they have been successful, during President Reagan's (R, 1981-1989) term and again in 1996, in cutting LSC's funding and severely limiting how local programs can litigate on behalf of the clients.

Recurring Debates in Providing Legal Assistance to the Poor

As the preceding, and very brief, introduction to the provision of legal assistance in the United States indicates, there are a number of recurring policy questions that surround legal assistance, which are often debated in a very charged political atmosphere. These debates have been present in West Virginia or have had an effect on the provision of legal assistance in the Mountain State, and for that reason it is worthwhile to review them briefly. One debate will not be considered in this article: whether a society should use the government's taxing and spending power to fund legal assistance for the poor. While some conservative and libertarian interest groups call for the complete elimination of government-funded legal assistance, this article is based on the normative premise that failing to provide legal assistance to indigent citizens would fundamentally delegitimize the American justice system. Finally, the reader should note that some of these debates are more relevant for criminal and others for civil legal assistance.

Service Style: Impact vs. Individual

One of the most basic questions surrounding the provision of civil legal assistance has centered on how to meet the poor's legal needs.[2] For some this might seem to be a strange debate. After all, the adversarial legal system pits two opposing litigants in a courtroom battle. Representing one of these litigants would seem to be a discrete service delivered to an individual client. In fact, some legal cases are pursued with more in mind than justice for an individual client; they are pursued because they may bring about a broader policy change. These so-called impact cases seek to change the law and/or the behavior of societal actors that consistently adversely affect the poor as a group over time.

The pursuit of impact work and other legal strategies (e.g., testimony before legislative and administrative bodies on behalf of statutory and administrative rule changes) to bring about policy change was one of the hallmarks of the move from legal aid to legal services. In addition to serving the individual needs of clients, legal services attorneys were to search for good test cases and class action suits that might bring about policy change.

An example of legal assistance impact work can be found in the West Virginia legal services class-action case of *Sites v. McKenzie*, 423 F. Supp. 1190, brought to the federal district court in 1976. In this case, legal services attorneys represented the plaintiff, Mr. Thomas Sites, and all others who were similarly situated. At the time of the suit, Mr. Sites was seventy-six years old and had been incarcerated for forty-five years in either the West Virginia Penitentiary or Weston State Hospital, a mental health facility. Mr. Sites was convicted of first degree murder and sentenced to life imprisonment in 1931. During his custody, Mr. Sites had been summarily transferred between prison and Weston on four different occasions. As a result of these transfers, Mr. Sites had been denied parole reviews that were accorded to prisoners who were not being treated in the mental health system. The legal services attorneys argued that Mr. Sites, and others like him, had been denied constitutional guarantees to due process by the State through the summary nature of his transfers and the denial of probation reviews. The court ruled in favor of the state.

Prior to 1982, the local legal services programs varied in terms of how much impact work they did. Some programs were very active in impact litigation. For example, the California Rural Legal Assistance program was very prominent in impact litigation on behalf of migrant farm workers nationwide. Others maintained a mix of impact and individual representation. Still others focused almost exclusively on individual representation because local demand was so heavy and/or the local bar and bench opposed a more activist approach. It should be noted that some supporters of legal services point out that the distinction between impact and individual casework can be an artificial one, in that "good" individual cases can bring about policy change. Proponents of an impact approach counter that more concerted policy change can be brought about by a purposive search for those individual cases with the greatest potential to effect policy change.

While the legal services community debated LSC's merits, opponents in Congress sought to limit LSC and its recipients' ability to engage in impact work. Between 1974 and 1995, Congress prohibited LSC and its recipients from representing minors without their parents' consent, and litigating over desegregation, abortion, political issues, and the Selective Service System. The so-called Republican Revolution of 1994 gave the Republicans control of both the House and the Senate. And, in 1996, that power was used to fundamentally reshape the Legal Services system. The 1996 amendments essentially prevented legal services programs from engaging in any impact work. They were forbidden from attempting to influence policy, broadly defined as any output of federal, state or local government; they could no longer independently lobby legislative bodies; and were prevented from utilizing class action suits. Substantively, legal services attorneys were barred from cases dealing with prison conditions, public housing, or systemic aspects of the welfare system. They could represent an individual client who had an individual dispute with a welfare agency. In short, these changes have created an LSC and local programs that look more like the legal aid system that existed prior to 1967. In response to this reality, some former legal services programs and attorneys decided to break their connection to LSC funding and its attendant restrictions. So-called non-LSC programs began to develop across the country, receiving funding from state governments, universities, state bar associations, private philanthropic groups and attorneys' fees awarded in cases they win. These non-LSC programs focus almost exclusively on the impact work that is now off-limits to LSC programs.

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Delivery Models: Judicare vs. Salaried Model

Another debate that has surrounded legal assistance in the United States is how to secure and pay attorneys for representing the poor. This debate has essentially been associated with the criminal legal assistance system, because the OEO Legal Services Program made a decision very early in its existence to fund almost exclusively salaried programs. As was mentioned previously, the choice essentially comes down to paying private attorneys an hourly fee to represent criminal defendants (the judicare model) or establishing an agency that hires attorneys to work exclusively for that agency providing criminal defense (the salaried model).

All U.S. jurisdictions must use some combination of the two models, if for no other reason than conflicts of interest arise when two or more defendants are charged with involvement in the same criminal offense. In such a case, it becomes difficult, if not impossible, for the same public defender office to handle all defendants, and so some are referred to private attorneys. Most U.S. jurisdictions also recognize that very rural and sparsely populated areas of the country do not have the critical mass of cases necessary to support a full-time public defender's office, and therefore rely on judicare. In some states though, this debate has taken on a livelier tone with proponents of each system touting what they perceive to be its advantages and the other system's disadvantages.

Supporters of judicare and salaried systems both claim to provide higher quality of services. While the debate is ongoing, the empirical evidence leans in favor of the salaried model. For example, the Virginia State Crime Commission found that defendants represented by court-appointed lawyers received significantly longer sentences than those represented by public defenders (Masters 2001). A number of factors help explain this outcome. First, the hourly amount offered by states to court-appointed counsel is often so low that it attracts relatively new and inexperienced attorneys who are eager for work or more seasoned attorneys who can do no better. Second, regardless of the quality of the court-appointed lawyer, there are advantages that come with specialization. Salaried public defenders focus on criminal defense and have senior staff to call upon for assistance in difficult cases. Many private court-appointed lawyers, on the other hand, do both civil and criminal work to make ends meet, and may need significantly more time to do the research needed to represent their criminal clients. It should be noted that there are very dedicated private attorneys who provide excellent representation to their indigent clients through the judicare system. Likewise, many public defender offices are poorly funded and understaffed and cannot provide effective representation because public defenders carry crushing caseloads.

Funding Legal Assistance

Governments have significant latitude in determining just how much they will spend for constitutionally mandated criminal defense representation. A common problem in criminal defense work is that some states set the hourly wage for court-appointed counsel at such a low rate that it reduces the pool of potential court-appointed defenders. Table 1 underscores the disparity in compensation rates paid to private attorneys in criminal defense appointments. Maryland's is one of the lowest in the nation, while Virginia's is the highest. Most states impose a per case maximum payment, but almost all states allow the trial judge to waive this ceiling.

Table 1

Hourly Rates of Compensation for Appointed Counsel, WV and Contiguous States, 2002

State	Office/Court Hourly Rate (Non-Violent/Violent)	Case Maximum
Kentucky	$45/$50	$1,800
Maryland	$30/$50	$1,000
Ohio	$50/$60	$2,500 to $8,000
Pennsylvania	$40/$75	n/a
Virginia	$90/$90	$445 to $1,235
West Virginia	$45/$65	$3,000

Source: The Spangenberg Group, 2002. *Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview*, October. Note: Case maximums in Ohio and Virginia vary by the nature of the case.

Texas has provided a number of chilling examples of what can occur when compensation rates are set very low. Appointed Texas defense lawyers have slept and/or were visibly intoxicated in the courtroom during capital murder trials.

Civil legal assistance providers also face the difficult problem of convincing governments and private entities to fund what may be morally valuable, but not required by law. In 2003, the key sources of funding for civil legal assistance are the federal government, through LSC, state governments, IOLTA programs, private foundations, and attorneys' fees. A combination of political factors and a slow economy have reduced funding from all of these sources.

Given its highly charged political history, the Legal Services Corporation's budget has experienced both significant gains and cuts over the past 20 years. Overall, even with an 8.7 percent increase in 2001, its budget has failed to keep up with inflation (see Table 2).

Table 2

Annual LSC Appropriations 1980-2001

Grant Year	Annual LSC Appropriation($)	Percentage Change from Prior Year
1980	$300,000,000	11.1%
1981	321,300,000	7.1%
1982	241,000,000	-25.0%
1983	241,000,000	0.0%
1984	275,000,000	14.1%
1985	305,000,000	10.9%
1986	292,363,000	-4.1%
1987	305,500,000	4.5%
1988	305,500,000	0.0%
1989	308,555,000	1.0%
1990	316,525,000	2.6%
1991	328,182,000	3.7%
1992	350,000,000	6.6%
1993	357,000,000	2.0%
1994	400,000,000	12.0%
1995	400,000,000	0.0%
1996	278,000,000	-30.5%
1997	283,000,000	1.8%
1998	283,000,000	0.0%
1999	300,000,000	6.0%
2000	303,000,000	1.0%
2001	329,300,000	8.7%

Source: Legal Services Corporation, 2002. *Annual LSC Appropriations, 1980-2001*. Washington, D.C.: Legal Services Corporation. Available on-line at: http://www.lsc.gov/pressr/pr_aLSCA.htm.

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To fill in the gap left by cuts to LSC's budget, many state governments have stepped in to provide significant independent funding for civil legal assistance. In addition, private philanthropic organizations continue to be an important source of funding for civil legal assistance.

The two main funding efforts made by states are direct appropriations and establishing court fees and fines that generate revenue for legal services programs. Table 3 shows that there is considerable variation among the states in this funding. Among the states contiguous to West Virginia, Ohio is the leader at $5.9 million and West Virginia is at the bottom with $150,000. New Jersey's $12 million combined commitment to civil legal aid is the highest in the nation. Twenty-two states, including West Virginia, have no court fees or fines dedicated to civil legal aid, twenty states appropriate no state funds, and seven (Alabama, Arkansas, Connecticut, Idaho, Mississippi, South Dakota, and Wyoming) provide no funding assistance to civil legal services.

Table 3

Direct and Indirect State Contributions to Civil Legal Aid, WV and Contiguous States, 2002

State	State Appropriations (in millions)	State Imposed Court Fees and FinesTo Civil (in millions)	Total State Contribution Legal Aid (in millions)
Kentucky	$1.5	$1.2	$2.7
Maryland	$0.5	$2.3	$2.8
Ohio	n/a	$5.9	$5.9
Pennsylvania	$2.6	$2.8	$5.4
Virginia	$1.625	$2.55	$4.175
West Virginia	$0.15	n/a	$0.15

Source: American Bar Association, 2001. *Project to Expand Resources for Legal Services* (PERLS). Washington, D.C.: American Association Bar. Available on-line at: http://www.abanet.org/legalservices/sclaid/sclaid_chart.html.

All fifty states have Interest on Lawyers' Trust Accounts (IOLTA) programs, which, nationwide, provided more than $160 million in 2001 for legal assistance to the poor. IOLTA programs mandate that when lawyers hold money in trust for a client for short periods of time, they deposit that money into a statewide account that collects interest, which is then distributed to legal assistance providers statewide. The IOLTA mechanism currently faces a serious legal challenge before the U.S. Supreme Court. The Washington Legal Foundation, a conservative public interest law firm which has long opposed LSC, has challenged the constitutionality of IOLTA accounts as an unconstitutional taking of private property (*Phillips v. Washington Legal Foundation*). If the Court agrees with the Foundation's constitutional logic, it could result in a substantial cut in available funding.

Attorneys' fees are other important sources of funding. Many federal laws provide judges the opportunity to award lawyers' fees to counsel who successfully sue defendants engaged in discriminatory or negative behavior. The logic behind these types of "private attorney general" laws is that the government cannot pursue every possible wrong in civil court. However, it can provide an economic incentive to private attorneys to bring them to court. The 1996 amendments to the LSC Act disallowed any LSC program from accepting these lawyers' fees.

Providing Legal Assistance to the Poor in West Virginia - Civil Legal Assistance

West Virginia has a proud legal services history, and at one time was home to four excellent LSC-funded programs. West Virginia's Legal Services programs have consistently compared favorably with programs nationwide. The Legal Aid Society of Charleston was founded in 1952 and eventually became an LSC program. Three other LSC programs were created in the 1970s during the high point of Legal Services funding: North Central Legal Aid based in Morgantown, the Appalachian Research and Defense Fund based in Charleston, and the West Virginia Legal Services Plan, which provided service to the northern part of the state.

On January 1, 2002 LAS of Charleston, the Appalachian Research and Defense Fund, and the Legal Services Plan were merged to create one statewide LSC grantee, Legal Aid of West Virginia (LAWV). It was designed by the former agencies' board members to be a truly statewide organization, although it is based in Charleston. It maintains eleven offices throughout the state (Beckley, Charleston, Clarksburg, Huntington, Lewisburg, Logan, Martinsburg, Parkersburg, Princeton, Westover, and Wheeling). As of December 2002, it had a staff of 103, including thirty-nine attorneys, twenty-two paralegals, eight behavioral health advocates, twelve long-term care regional ombudsmen, nineteen clerical and support staff and three statewide managers.

In 2002, LAWV's total budget was $6.226 million. It received funding from LSC (49%), IOLTA (7%), TANF (15%), Violence Against Women Act (federal) (9%), Ombudsman Program (7%), Behavioral Health Advocates (6%), fundraising (2.4%), and United Way and other local sources (7%). The program faces significant funding cuts in 2003. First, LSC, as mandated by law, cut LAWV's funding by over $411,000 because according to the 2000 Census, West Virginia's poverty population fell since the last census. Second, due to the poor economic environment, the IOLTA fund will yield roughly $300,000 less for civil legal aid in 2003.

Legal Aid of West Virginia's program priorities are fairly standard for most LSC-funded programs. First, it has an important partnership with the West Virginia Coalition Against Domestic Violence and its thirteen regional domestic violence programs to provide legal assistance to victims of domestic violence. These efforts are partially funded with federal money included in the *Violence Against Women Act*, as well as some state funding.

Legal Aid of West Virginia has worked with the thirteen regional domestic violence programs to provide legal assistance to victims who need it, either by a LAWV attorney or private counsel. In addition, LAWV provides legal training to the regional domestic violence programs' staff to enable them to assist their clients with their legal problems. These problems can include the need for a protective order, access to new housing, access to benefits, divorce and custody assistance, and other legal complications that surround domestic violence.

Since 1991, LAWV and its predecessors have maintained the Long-term Care Regional Ombudsman Program. The Ombudsman Program's twelve staff members spend most of their time investigating complaints made by residents of the state's long-term care facilities. Specifically, the program investigated cases of patient dumping, physical and financial abuse of patients, and neglect. In 2001, the staff closed 1,320 complaints and made 854 unannounced monitoring

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visits. The Behavioral Health Advocacy Program provides similar assistance to mental health patients who are in the state's two mental health facilities (Bateman and Sharpe Hospitals) and in the community.

In addition to these targeted at-risk groups, LAWV provides assistance to poor West Virginians. According to LSC regulations, LAWV clients' income must be at or below 125% of the federal poverty guidelines. For example, a family of three cannot make more than $18,288 annually to qualify for LAWV services. Legal Aid of West Virginia represents clients who are facing housing problems such as foreclosure, eviction, or substandard living conditions. Legal Aid of West Virginia represents people who have been denied social security, Medicare, Medicaid, unemployment compensation, disability assistance, and other government benefits. In addition, LAWV deals with their clients' access to education and vocational training. Finally, LAWV represents individuals involved in consumer debt conflicts. In 2001, LAWV assisted over 10,000 clients. In addition to this work, LAWV operated the Pro Bono Project in collaboration with the West Virginia Bar Association. Statewide, over 1,200 private attorneys have signed up to provide at least ten hours per year in pro bono assistance. In 2001, the Project served 2,425 clients.

Mountain State Justice was formed in 1996 by former LSC attorneys in West Virginia in the wake of the 1996 LSC Amendments discussed previously. It was started with seed money from the West Virginia Bar Foundation's IOLTA fund and other private sources. Today, it supplements these sources with lawyers' fees awards. Mountain State Justice is a non-LSC program designed to pursue impact litigation. Recently, the program has focused a significant amount of its attention on consumer debt issues, environmental degradation, including valley-fills, and mine safety.

West Virginia Senior Legal Aid, Inc. is the former North Central Legal Aid Society. Today, with federal funding, it provides telephone advice to, and maintains a website for, senior West Virginians who have legal concerns, their caretakers, and their advocates in local senior centers. West Virginia Senior Legal Aid does not provide legal representation.

Clearly, the West Virginia Bar Association has figured prominently in the development and funding of civil legal assistance in the Mountain State. During its existence, the Bar Association's IOLTA program has distributed over $8 million to West Virginia legal services programs. It has distributed another $1.6 million to Senior Legal Aid, Mountain State Justice, the Court Appointed Special Advocate program, and the WVU Appalachian Center for Law. The West Virginia Bar Association is partnered with Legal Aid of West Virginia to maintain the Pro Bono Project. The Bar Association also provides all West Virginians, regardless of their financial status, access to free legal advice from volunteer lawyers every Tuesday evening from 6 p.m. to 8 p.m. at (800) 642-3617.

Criminal Legal Assistance

Criminal defense assistance is provided in West Virginia through a mixed system, judicare and salaried public defenders, which vary among the state's thirty-one judicial districts. The statewide provision of both types of indigent defense is funded by a state governmental agency, West Virginia Public Defender Services.

Until 1989, indigent criminal defense was provided by a very meager judicare system, which paid a private attorney $20 per hour for out-of-court work, and $25 per hour in court, with a total per case limit of $1,000 (except for life imprisonment cases). In addition, circuit judges had the power to compel private attorneys to provide representation at these rates. In 1989, the West Virginia Supreme Court of Appeals fundamentally changed this system with its *Jewell v. Maynard* (181 W.Va. 571) decision. The Court decided that it was unconstitutional to require a private attorney to work more than ten percent of his or her work year in forced, court-appointed cases. In addition, the Court raised the hourly rates to $45 per hour for out-of-court and $65 per hour for in-court work and ordered the legislature to either raise the per-case limit to $3,000 or eliminate it altogether. Following this decision, state support for criminal defense assistance to the poor moved from near the bottom of compensation rates to the middle of the pack.

The West Virginia Legislature created Public Defender Services in 1990 and mandated that, in addition to funding judicare representation, it negotiate with local judges and lawyers to establish local public defender corporations with salaried staffs throughout the state. Public Defender Services acts as a conduit between the state and local providers of criminal legal aid. While Public Defenders Services tries to foster local discussions on how best to provide criminal legal aid, ultimately those decisions are left to the circuit bench, who consult with the local bar. In practice, the judges of the circuits have two choices available to them: devise a system to find and pay private attorneys to represent indigent clients or establish an independent public defender corporation with salaried staff for their circuit. It must be stressed that the legislature placed significant power in the circuit bench. The local public defender corporations are independent of Public Defender Services and the other local corporations across the state, with their own local boards of directors, made up of representatives of the local bar, bench and general public. Public Defender Services has imposed statewide client income eligibility guidelines; for example, a defendant with a family of three must make no more than $18,480 annually to qualify for assistance. The judicare systems are also very decentralized. Circuit judges are responsible for determining who qualifies for assigned counsel, making assignments, and determining what the assigned counsel is owed for his or her work. Judges are also empowered to waive the $3,000 per case cap, which many routinely do.

As of December 2002, there were seventeen local public defender corporations operating in eighteen of the state's thirty-one judicial circuits (the 1st - Brooke, Hancock, and Ohio, the 2nd - Marshall, Tyler, and Wetzel, the 5th - Calhoun, Jackson, Roane, and Mason, the 6th/24th - Cabell and Wayne, the 7th - Logan, the 8th - McDowell, the 9th - Mercer, the 10th - Raleigh, the 11th - Greenbrier, the 12th - Fayette, the 13th - Kanawha, the 15th - Harrison, the 18th - Preston, the 23rd - Berkeley, Jefferson, and Morgan, the 25th - Boone and Lincoln, the 28th - Nicholas, and the 30th - Mingo). Public Defender Services would like to see local corporations created in seven additional circuits (the 4th - Wood and Wirt, 16th - Marion, 17th - Monongalia, 20th - Randolph, 22nd - Pendleton, Hardy, and Hampshire, 26th - Lewis and Upshur, and the 29th - Putnam). Public Defender Services has no desire to see local defender corporations

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established in the remaining six judicial circuits due to their low populations.

The creation of the proposed additional public defender corporations has been prevented by local bar politics, i.e., local attorneys have resisted yielding appointment work to a local public defender corporation. Proponents of these expansions argue that they will bring less expensive, more efficient and effective public defense to the state. In addition to the potential quality concerns raised earlier, salaried public defenders tend to be more cost-effective than their private counterparts. For example, Public Defender Services reported that for the first nine months of FY2001/2002 it reimbursed private lawyers $13.99 million for representation in 21,812 cases ($641.28 per case represented). During the same time period, it gave $11.34 million to public defender corporations to provide representation in 28,339 cases ($400.12 per case represented).

West Virginia Public Defender Services faced a significant funding shortfall in 2002, over $3 million and faces a similar shortfall in 2003. These shortfalls were the result of stabilizing caseloads and increasing case costs. The legislature had anticipated that crime rates would continue to decline as they had in 1999-2000 and cut Public Defender Services budget by ten percent. For now, Public Defender Services is dealing with this fiscal crisis by delaying payments to individual lawyers rather than to the local corporations, to prevent these programs from being forced to lay off staff counsel. Clearly, though, this is a temporary fix to a critical problem. It is unfair to deny lawyers payment for services rendered and continued shortfalls will send a message to the private bar that the state is an untrustworthy debtor and reduce the number and quality of lawyers willing to do court-appointed work.

The Future of Legal Assistance to the Poor in West Virginia

West Virginians should be proud of the yeoman work done by dedicated lawyers across the state to make our justice system fairer. West Virginia has an excellent legal aid infrastructure made up of quality programs that compare favorably to similar programs nationwide. The continuing and pressing problem facing providers of legal assistance to the poor in the Mountain State is limited funding. Unfortunately, as one scans the legal assistance horizon in West Virginia and the country as a whole, dark clouds loom. The federal government is again facing the possibility of dramatic budget deficits, as it cuts taxes, increases defense and security spending, and deals with an economic downturn. The federal surpluses of several years ago have vanished. It is therefore very reasonable to expect some cuts in federal funding for the Legal Services Corporation and other federal programs like TANF and the *Violence Against Women Act* that provide funding for legal services to the poor. Finally, the legal services community waits with bated breath to see what the U.S. Supreme Court will decide in the IOLTA case (*Phillips v. Washington Legal Foundation*).

The fiscal environment for legal assistance is no more hospitable in West Virginia. The State is facing a significant deficit and has asked state agencies to reduce their budgets by up to ten percent. West Virginia Public Defender Services was exempted from that cut, but given the constitutional mandate, the legislature will need to increase its funding just to meet existing shortfalls and future costs. It is possible to realize cost savings in the program by expanding the number of public defender offices, but the legislature would have to break the local impasses that have blocked this move thus far. The state could also save costs by cutting the hourly fee paid to private counsel. However, that action would make it more difficult to ensure that the indigent have equal access to quality representation.

As the civil legal assistance community looks to make up cuts that have already occurred at the national level and those that may yet come, the picture is even starker. At present, West Virginia is at the bottom of contributors to civil legal assistance. Moreover, given the state's fiscal difficulties, it is hard to imagine the legislature coming up with additional funding for civil legal aid in the near future. Recognizing this, some allies of legal services have proposed a non-tax, partial solution to the problem: a surcharge added to civil court filing fees that would go to civil legal assistance providers. The plan has been proposed in past legislative sessions and failed. In addition, even if the U.S. Supreme Court upholds IOLTA programs, the reality is that dropping interest rates have cut into that pool of funding. There is one bright spot for West Virginia's legal services community. In the wake of the most recent LSC cuts, two Charleston attorneys have spearheaded a campaign to raise $1.2 million in donations to make up some of the lost funding.

In the end, though, West Virginia faces an impending crisis in indigent legal assistance. Cuts at the national level will force cash-strapped states like West Virginia to decide whether they can continue to strive to keep one of society's most basic bargains: fair and equal access to the courts. The choices are difficult. On one side the state faces the need to raise taxes and/or fees to provide additional revenue for these services, tantamount to political suicide in today's political environment. On the other, West Virginia faces the prospect of a judicial system where success is determined by a litigant's net worth, rather than justice. The first choice is difficult and requires political courage. The second may be politically expedient, but is morally indefensible.

Notes

[1]The Court incrementally added to the Sixth Amendment's right to counsel over a twenty-year period. Today criminal defendants have a right to government-funded counsel in every important stage of the criminal trial process, including a right to counsel before being formally charged through to some appeals of trial court verdicts.

[2]This debate has been less important in the criminal defense sphere of legal assistance, because criminal defense, by definition, centers around defending an individual who is charged by the state with committing a crime. That is not to say that there is no impact criminal defense work undertaken in the United States. There are privately funded public interest law groups that do provide appellate representation to death-row inmates with the hope of not only saving the lives of their clients, but also limiting or striking down the use of capital punishment more generally.

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