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FOREWORD: PENNSYLVANIA LEGAL SERVICES AT RISK

Louis S. Rulli*

The annual Pennsylvania Review provides a valuable examination of legal trends emerging from Pennsylvania state law and the latest state court decisions. This assessment is important since ordinary citizens rely heavily upon our state law for resolution of their disputes and enforcement of their legal rights.

Specifically, this issue includes articles written by professors, judges, practitioners, and students on issues ranging from judicial ethics and procedure to expert evidence, tort law, and divorce law. Pennsylvania Common Pleas Court Judge Chester T. Harhut addresses the problem Pennsylvania judges face in determining whether they can turn to a third party for assistance in resolving difficult or novel questions of law or procedure. Through empirical data, Judge Harhut demonstrates the gap in the Pennsylvania Code of Judicial Conduct on this issue and proposes a method of resolving the dilemma. Professor Stella L. Smetanka of the University of Pittsburgh School of Law analyzes a related issue and advocates adoption in Pennsylvania of the Uniform Certification of Questions of Law Act. This act would allow a federal court to certify a question of Pennsylvania law to a Pennsylvania state court. Jonathan P. Nase analyzes data on the reasons why Pennsylvania judges leave the bench and discusses the public policy implications of this data. Professor Peter Sevareid of the Temple University School of Law examines Pennsylvania law concerning the ownership of separate spousal property. Specifically, he examines the contradiction between the

* Practice Associate Professor, University of Pennsylvania Law School, and former Executive Director, Community Legal Services, Philadelphia. J.D., B.A., Rutgers University. This article is dedicated to the many talented, selfless individuals in legal services programs who struggle against difficult odds to provide access to justice for the poor in civil cases. They deserve our admiration and support.
way nineteenth- and twentieth-century feminists treat separate property of spouses in the context of divorce.

Pennsylvania Common Pleas Court Judge Mark I. Bernstein analyzes the different ways that the federal courts and Pennsylvania courts treat expert testimony. He argues that the Pennsylvania method is better, and that any attempt to adopt the federal method in Pennsylvania should be resisted. On a related issue, a student note analyzes Commonwealth v. Crews, which established a standard of admissibility for DNA evidence. The Crews court held that an expert can testify to a match between the DNA evidence and the DNA of an individual, but not to the statistical chances of that match. The student argues that this standard contains inherent inconsistencies.

Professor Francis Barry McCarthy of the University of Pittsburgh School of Law explores Pennsylvania law concerning acts of omission from the common law through the Model Penal Code. He then develops a framework that courts can use to analyze the question of duty in such cases. A student note analyzing Renk v. City of Pittsburgh also addresses an aspect of tort law. Interpreting the Political Subdivisions Tort Claims Act, the Renk court required Pittsburgh to indemnify an employee for damages resulting from the employee's intentional tort. However, the language, history, and legislative purpose of the act indicate that Pittsburgh was not required to indemnify this employee.

Several student articles deal with issues relating to Pennsylvania’s criminal laws. One student argues that, in Commonwealth v. Crews, the Pennsylvania Supreme Court departed from an existing line of cases and held that a death penalty defendant was not entitled to a change of venue due to adverse trial publicity. Another argues that, in Commonwealth v. Morris, the Pennsylvania Supreme Court erroneously expanded the circumstances in which police officers may search vehicles without probable cause. A student argues that, in Commonwealth v. Ingram, the Pennsylvania Supreme Court once again unsuccessfully attempted to clarify confusion surrounding Pennsylvania's Implied Consent Law, which suspends the license of any motorist who refuses chemical testing. This student note suggests a more complete resolution of this confusion. Finally, a student comment argues that the rights of privacy and liberty support the existence of a constitutional right to physician-assisted suicide, even though Pennsylvania classifies physician-assisted suicide as a second-degree felony.

The remaining student articles deal with important civil issues governed by state law. One student discusses landlord-tenant disputes in which landlords refuse to rent to unmarried tenants. The article examines various ways

to resolve the conflict between the tenants' right to be free from discrimination and the landlord's right to free exercise of religion. Another student examines the trend toward creating powerful state gambling commissions and argues that the resulting decrease in local governments' ability to regulate gambling produces negative consequences. A third student analyzes Estate of C.W., 8 a case concerning the sterilization of mentally disabled persons. She argues that this decision inadequately protects the fundamental rights of disabled persons to choose to procreate and to be free from intrusions upon their bodily integrity. Finally, a student note analyzes Otis Elevator Co. v. George Washington Hotel Corp., 9 in which the court held that a contract including an automatic renewal provision was already renewed by the time a late termination was issued.

While leading judicial opinions reflect favorably upon the wisdom and creativity of our state bench, they also acknowledge the essential role that lawyers play in the administration of justice. Without vigorous advocacy by lawyers on all sides of a legal dispute, the development of our jurisprudence would stall and the rights of citizens would go largely unprotected. In these turbulent times, the vital role of the lawyer is both undervalued and misunderstood. Nowhere is this more apparent than in the provision of civil legal assistance to the poor.

I.

Our system of justice rests squarely upon the Magna Carta's remarkable promise that "to no one will we sell, to no one will we refuse or delay, right or justice."10 The Pennsylvania Constitution adopted this pledge by guaranteeing that "all courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."11 Access to our court system for redress of legal injury is not only a constitutional right,12 but also a cornerstone of our democracy,13 in which lawyers fulfill a historic role.

In the criminal justice system, assistance of counsel is recognized to be of a fundamental character,14 absolutely necessary to assure the fundamental rights of life and liberty.15 For more than thirty years, it has been an “obvi-

9. 27 F.3d 903 (3d Cir. 1994).
10. MAGNA CARTA, cap. 40 (1215). The Pennsylvania Supreme Court has noted that this provision of the Magna Carta has been characterized as “the foundation of the liberty of Englishmen.” Commonwealth ex rel. Duff v. Keenan, 33 A.2d 244, 249 (Pa. 1943).
ous truth" that a fair trial in a criminal proceeding cannot be assured to a person too poor to hire a lawyer unless counsel is provided to him or her.16

Yet, while assistance of counsel is essential to securing fairness in criminal trials, lawyers remain largely unavailable to the poor in even the most important of civil cases.17 As noted by then Attorney General Robert F. Kennedy at a 1964 Law Day address: "[W]e have secured the acquittal of an indigent person—but only to abandon him to eviction notices, wage attachments, repossession of goods and termination of welfare benefits."18

Clearly, lawyers are indispensable to the administration of justice19 in both civil and criminal cases. Equally clearly, it takes a lifetime of learning to master the lawyering art.20 Do we seriously expect untrained, unsophisticated, and often uneducated citizens, too poor to hire a lawyer, to obtain justice on their own?

The early legal aid movement in America was surely a response to this inescapable dilemma. In 1876, the German Society, a New York City association helping newly arriving German immigrants, formed a separate Legal Aid Society to protect German immigrants from deceitful persons who preyed upon the trusting newcomers.21 In September 1902, the Legal Aid Society of Philadelphia got its start with the loan of a free room two evenings each week from the Society for Organizing Charity and a grant of twenty-five dollars for incidental purchases from the Provost of the University of Pennsylvania.22 Six years later, in 1908, the Pittsburgh Legal Aid Society was founded. The Pittsburgh Legal Aid Society and the Legal Aid Society of Philadelphia remained Pennsylvania's only legal aid offices until a third society was founded in Erie in 1936. In these offices and seven smaller ones opened during the 1940s,23 a limited number of low-income Pennsylvanians, living in isolated pockets throughout the state, began obtaining access to legal assistance in civil matters.24

17. Comprehensive national and state studies have concluded that as much as 80% of the civil legal needs of the poor are unmet with current resources. See generally AMERICAN BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE, A SURVEY OF AMERICANS (1994); AMERICAN BAR ASS'N, NATIONAL SURVEY OF THE CIVIL LEGAL NEEDS OF THE POOR (1989); REPORT OF THE PENNSYLVANIA BAR ASS'N TASK FORCE FOR LEGAL SERVICES TO THE NEEDY (1990).
19. SMITH, supra note 13, at 31 (citing In re Thatcher, 190 F. 969, 975 (N.D. Ohio 1911) (Killits, J.), aff'd, 212 F. 801 (6th Cir. 1914)).
20. Id.
21. Id. at 135.
22. Id. at 142 (quoting REPORT OF THE PROCEEDINGS OF THE FIRST CONFERENCE OF LEGAL AID SOCIETIES 7 (1911)).
23. By 1950, modest legal aid offices opened in several additional Pennsylvania locations such as Allentown, Harrisburg, Lancaster, Reading, Scranton, Wilkes-Barre, and Williamsport. EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES 314-15 (1951).
24. The absence of any coordinating force among individual legal aid offices diminished the effectiveness of their services. From almost the beginning, representatives from Pennsylvania played a leading role in advocating centralized coordination to improve the coverage and serv-
Legal aid offices were modest charitable undertakings, lacking public financing that would permit adequate staffing. It soon became apparent that the legal needs of the poor could not be met by the charitable efforts of individual lawyers acting alone and that public funding of organized legal aid societies was essential. On the eve of America's entry into the Second World War, Harrison Tweed, the highly regarded chairperson of the American Bar Association's Standing Committee on Legal Aid, reported:

[I]ndividual practicing lawyers, no matter how well disposed or generous of their time, cannot adequately take care of all the poor in all their legal troubles, particularly in the larger cities . . . . The truth, of course, is that just as it is necessary that there be hospitals and clinics to take care of the poor who have physical ailments, so it is necessary that there be Legal Aid organizations properly financed, staffed and equipped, and the existence and location of which are known to welfare organizations, court officers, the police, and the community in general.

Despite Tweed's strong call for increased support, legal aid societies barely obtained the financial resources to do more than scratch the surface of need. As late as 1964, nine American cities with populations over 100,000 still had no legal aid facilities. Outside of cities, legal aid was virtually non-existent. Even where legal aid societies existed, just as many indigent persons were deprived of legal aid as received it. And even at the most highly regarded legal aid societies, the service was woefully inadequate. For example, while the recommended maximum caseload for a full-time legal aid at-

ices of legal aid. In 1911, representatives of 14 legal aid societies met in Pittsburgh, upon the invitation of Pittsburgh Legal Aid Society President Mark W. Acheson, Jr. There, they agreed upon the need for a national organization. Id. at 147. In 1922, another convention of legal aid organizations was held in Philadelphia. Representatives began the early formation of a national coordinating body which would become the precursor to the present National Legal Aid and Defender Association. Among the nine distinguished representatives chosen to draft a constitution and by-laws were two Pennsylvanians: William Draper Lewis, dean of the University of Pennsylvania School of Law, and George Wharton Pepper, former United States Senator from Pennsylvania. Id. at 149.

25. While most legal aid societies were private, charitable organizations, the Kansas City Bureau was founded in 1910 by the municipal government and paid for with funds from the public treasury. The Bureau's goal was to ensure that no one be denied justice because of an inability to employ counsel. After its first full year of operation, the publicly financed Kansas City Bureau ranked third among the existing 19 legal aid organizations, easily outdistancing private societies in larger cities such as Boston, Cleveland, and Philadelphia. Id. at 92.

26. Id. at 2-3 (quoting 65 ABA Reports 189 (1940)).

27. LAW AND POVERTY, supra note 18, at 47.

28. Id. at 47 n.143.

29. In 1947, Chief Justice Fred M. Vinson, speaking at a convention of the American Bar Association in Cleveland, stated that legal aid “should not exist only in the cities; it should be extended to every part of this country to protect the rights of those who cannot protect themselves.” BROWNELL, supra note 23, at 25.

30. LAW AND POVERTY, supra note 18, at 48. Indeed, in some reports, legal aid offices served only 10% of those who needed help. Id. at 47 n.142.
torney was 1000 cases, legal aid lawyers in Philadelphia maintained caseloads of 2200.31

Although private legal aid societies were a noble attempt to meet the legal needs of the poor, they failed to succeed by most objective standards. Local leadership was sporadic, and community fund drives, which generally financed legal aid, frequently failed to reach campaign goals.32 Most legal aid lawyers worked part-time and were quickly overwhelmed by huge client demand. There were few reported cases, few appellate decisions, and no Supreme Court decisions in which civil legal aid societies were counsel of record. Legal aid programs rarely, if ever, attempted to hold public or private institutions accountable for violating the rights of the poor.33

These major shortcomings in the legal aid experience led bar associations to explore actively new ways to enhance legal representation of the poor. In 1965, a special ad hoc committee of the Philadelphia Bar Association's Public Service Committee conducted an appraisal of existing legal services to Philadelphia's poor and found them wanting. The Committee recommended the creation of Community Legal Services, one of the nation's earliest legal services programs supported by public funds. The new program was described by one of its founders as "a 'lawyers program' from beginning to end, without political direction or bureaucratic interference, establishing a service which incorporates the vital traditions and professional ethics of the Bar . . . ."34

Publicly financed legal services programs quickly followed in Allegheny, Delaware, and Lackawanna counties.35 Newly available federal funds from the Office of Economic Opportunity, together with soon-to-follow state funding, enabled Pennsylvania to establish a comprehensive and coordinated state-wide legal services system serving all sixty-seven Pennsylvania counties, known as Pennsylvania Legal Services.36 With substantial public funding supporting full-time, well-trained lawyers for the poor, access to justice for low-income Pennsylvanians appeared to be within reach.37

31. Id. at 50.
32. Id. at 47 n.143.
35. Twenty Years of Legal Services in Pennsylvania (brochure prepared by the Law Coordination Center, Harrisburg, Pa., and available from Pennsylvania Legal Services, 118 Locust St., Harrisburg, Pa. 17101-1414).
36. The first board of directors meeting of the new Pennsylvania Legal Services was held on Jan. 22, 1973.
37. To measure access to justice, the Legal Services Corporation in Washington, D.C., developed a national "minimum access" standard of providing at least two legal services lawyers for every 10,000 poor persons. See History of Legal Services: Critical Events and Legal Developments 5, published by and available from the National Legal Aid and Defender Association (NLADA), 1625 K St., N.W., 8th Floor, Washington, D.C. 20006.
II.

However, access to justice was still not available to all. In 1970, Rosa Bell Andrews Washington, a poor woman living in Philadelphia, was engaged in a bitter dispute with her former husband, a local deputy sheriff, over the custody of their son. One day, the Sheriff of Philadelphia County came to Ms. Washington’s door and served her with a seizure writ, initiated by her former husband, requiring that she immediately surrender her son’s bed, lamp, bicycle, toys, and clothes. She received no advance notice, no hearing, and no opportunity to contest the validity of any claim being asserted against her.

As a deputy sheriff, her ex-husband was quite familiar with Pennsylvania’s archaic replevin process which enabled a private individual to use the machinery and power of the state to seize personal property belonging to another without ever having to institute a legal action. He simply completed an ex parte application for a writ of replevin and posted a bond for double the value of the property. With only that minimal action, the Sheriff was obligated to seize all personal property located in Ms. Washington’s home which belonged to her son. As Ms. Washington remarked to a journalist some years later, her ex-husband “had the law come in and just take the stuff.”

Under Pennsylvania law, Ms. Washington forfeited all right to regain possession of the seized goods or even to obtain a hearing on the merits of her right to possession of the property unless she posted within seventy-two hours a counterbond with security for double the value of the property or obtained a lawyer to institute her own legal action. Both courses of action required funds which Ms. Washington did not have.

Ex parte replevin seizures of personal property were commonly utilized by institutional sellers against poor consumers to regain household goods when consumers allegedly fell behind in their installment payments. This Pennsylvania practice was employed continuously from 1705 with little regard for the disastrous impact imposed upon poor families.


41. In addition to Rosa Washington, Philadelphia residents Paul and Ellen Parham were also plaintiffs in the Fuentes litigation. See Fuentes v. Shevin, 407 U.S. 67, 71 (1972). After having purchased a bed, table, and other household goods from Sears, Roebuck & Co., their goods were seized when Sears contended that they had fallen behind in their installment payments. Id. It did not matter that certain goods might have been defective or already paid for in full. Private parties with enough financial muscle to post a bond commanded the state as its agent to seize property that belonged to others.

42. See, e.g., Epps v. Cortese, 326 F. Supp. 127, 129 (E.D. Pa. 1971) (noting that since 1705 writs of replevin have been issued against numerous other Pennsylvania residents).
In 1972, following a legal challenge originating in part in Philadelphia, the United States Supreme Court issued its landmark decision in *Fuentes v. Shevin*. In *Fuentes*, the Court struck down the prejudgment replevin provisions of Pennsylvania law as violative of the Fourteenth Amendment since they deprived citizens of their property without due process of law. In addition, the Court rejected the district court’s finding that bond requirements were sufficient substitutes for pre-seizure hearings or that modest household goods were not items of necessity worthy of due process protection.

For more than 250 years, this practice flourished in Pennsylvania. Throughout that period, Pennsylvania’s courts were open for redress of legal injury. There existed a highly skilled and distinguished private bar. And for many of those years, there even existed one of the nation’s oldest, charitable legal aid societies operating nearby. What was different in 1972 to cause an end to this centuries-old, oppressive Pennsylvania practice?

The answer unquestionably lies in the presence of a new, publicly funded legal services program which represented plaintiffs free of charge and challenged long-standing practices that took unfair advantage of the poor. For the first time, low-income Pennsylvanians began to receive assistance of counsel in civil matters on the same basis routinely enjoyed by wealthier citizens. Lawyers for the poor not only responded to the individual cases that poured into their offices but also attacked the systemic practices that oppressed their clients. They brought to bear the skill, creativity, and determination that sophisticated clients routinely receive from competent counsel, the kind of zealous representation envisioned by the Code of Professional Responsibility.

For the first time in Pennsylvania and across the nation, the poor became participants in civil constitutional cases which directly affected their daily lives. While private legal aid societies produced no Supreme Court cases advancing the law of the poor during their tenure from 1876 through 1965, the new, publicly funded legal services programs scored impressive and immediate results. From 1965 until 1972, legal services programs successfully litigated many of the nation’s most important constitutional cases upholding the rights of the poor, including *Goldberg v. Kelly*, *Shapiro v. Thompson*,

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44. *Id.* at 96. The Pennsylvania cases were consolidated with a Florida case, *Fuentes v. Shevin*, before the Supreme Court. In *Fuentes*, Margarita Fuentes purchased a gas stove and service contract on an installment plan. *Id.* at 70. When the stove broke and she was unable to get anyone to come out and fix it, she stopped paying, leaving a balance of $204.05. Without advance notice, Firestone Tire and Rubber Co. had the sheriff seize the stove from her home. *Id.* at 71. As a result, she lost not only the stove, but also the nearly $400 in payments previously made to Firestone. See *Alderman & Kennedy, supra* note 39, at 184.

45. The Pennsylvania plaintiffs in *Fuentes* were represented by Community Legal Services of Philadelphia.

III.

While the Pennsylvania Constitution promises a remedy for every legal injury, it often takes a creative, persistent lawyer to find it. Peggy was the mother of three small children who summoned considerable personal courage to visit a legal services office in North Philadelphia one cold day in January 1975. She had been severely beaten by her husband on the prior evening for not having dinner on the table promptly when he returned home. The children witnessed this beating, as they had many times in the past. The police were called to the home by neighbors who heard the familiar sounds of domestic violence. When the police arrived at the home, they were reluctant to intercede in the apparent family squabble. They spoke to the husband outside, calmed him down, and obtained his promise that he would not hit his wife anymore. Despite a pattern of escalating violence, Peggy refused the policeman's offer to pack a few clothes and leave home for the evening.

Peggy's attempts in the past to obtain greater assistance from the law to curb family violence had proved fruitless. A sympathetic police officer had suggested that she move out for good, but she lacked both money and a place to go. The District Attorney's Office told her that she could file a private criminal complaint or take out a peace bond, but she soon found that those avenues of help were worse than ineffective. They exposed her to escalating danger for involving the law without any enforceable protection upon which she could rely.

47. 394 U.S. 618, 638 (1969) (statutory prohibition of welfare benefits to indigent residents of less than one year duration violates equal protection clause).
48. 407 U.S. 67, 96 (1972) (Florida and Pennsylvania replevin procedures invalid under Fourteenth Amendment since they deprive residents of property without due process of law).
49. 401 U.S. 371, 380-81 (1971) (invalidating Connecticut practice of denial of access to its courts to indigents seeking divorce based solely upon their inability to pay court fees and costs).
50. 425 F.2d 853, 861 (2d Cir. 1970) (procedures followed by public housing authority in termination of tenancy and assessment of rent charges subject to due process protections of Fourteenth Amendment). See Houseman, supra note 33, at 1516 (further discussing constitutional cases upholding rights of poor).
51. Peggy is a fictitious name used to represent the many victims of domestic violence, usually women, who experienced domestic abuse and sought legal help in the early 1970s. Domestic violence victims tell their actual stories very effectively in an award winning self-help video entitled PEACE AT HOME: GETTING A PROTECTION ORDER IN PENNSYLVANIA (Community Legal Services & Women Against Abuse).
52. Police were reluctant to become involved in domestic disturbances, pointing out that they were neither social workers nor marriage counsellors. See, e.g., Deborah Flynn, Note, Domestic Relations—The Protection from Abuse Act, 51 Temp. L.Q. 116, 120 & n.31 (1978) (police reluctant to respond to domestic disturbances because not their duty and they prefer to avoid danger involved in intervening with domestic problems).
53. Id. at 119.
Peggy's story was the tale of hundreds of domestic violence victims turning to legal services offices in Pennsylvania for help in the early 1970s. Domestic violence was neither new nor uncommon, but it was only spoken about in hushed tones behind closed doors. While it affected all economic groups, it impacted most heavily impoverished women who lacked viable options. It was a legal problem largely ignored by the judiciary, the private bar, and even the charitable legal aid societies.

In 1975, legal services attorneys and women's advocates worked to develop a much-needed legislative remedy. After consulting with colleagues in New York, they drafted a proposed Pennsylvania statute known as the Protection from Abuse Act. The proposed act was adopted by both houses of the Pennsylvania legislature and signed into law by the governor on October 7, 1976. It provided for immediate, emergency measures to obtain temporary civil protection orders that directed abusers to refrain from further abuse and authorized their eviction from the home. It required that hearings be held within ten days and authorized final protection orders to last for up to one year. It was a major step forward in combatting an old and deadly problem. With the help of legal services lawyers, Pennsylvania became the second state in the nation to develop a civil legislative response to domestic violence.

Following the passage of the new civil statute, legal services lawyers monitored the enforcement of the act through their individual casework. Throughout the 1970s and 1980s, they continued to work closely with women's advocates, courts, and law enforcement agencies to develop needed amendments to the state statute, as well as local court rules, self-help informational materials, and emergency pro se filing procedures.

Today, domestic violence cases are the largest part of the Pennsylvania legal services caseload. In 1994, legal services lawyers handled 17,547 protection from abuse cases. While legal remedies for domestic violence still need improvement, the availability of free legal help from legal services programs, in conjunction with vital services offered by domestic violence organizations, make an enormous contribution to ending the cycle of domestic violence.

54. While most victims of domestic violence are women, men may also be victims and in need of civil protection. Barbara E. Sanson, Comment, Spouse Abuse: A Novel Remedy for a Historic Problem, 84 Dick. L. Rev. 147, 147 n.2 (1979).
57. Legal services advocates assisted in the development of proposed amendments to the Protection from Abuse Act which were ultimately adopted in 1978 and 1988. Id. at 24.
58. See, e.g., Phila. C. P. R. 1901.1-1905.8 (local rules drafted by court appointed rules committee, chaired by author of this foreword in his capacity as program director of legal services program).
violence and allowing victims and their children to live safe and productive lives.

IV.

The remedies secured for poor people in constitutional cases and legislative enactments, exemplified by Fuentes v. Shevin and the Protection from Abuse Act, tell only a small part of the legal services experience. In 1994, more than 117,000 low-income citizens received free legal assistance from Pennsylvania Legal Services. Assistance encompassed a broad range of civil legal problems, such as child custody, social security, landlord-tenant, consumer protection, divorce, welfare, and unemployment compensation. Public funding also enabled legal services programs to provide specialized help to the poor in areas such as energy and public utilities, access to health care, prison reform, and housing and economic development. While a small number of legal services cases attract media attention each year, average legal services cases are routine in nature, helping low-income families survive personal legal problems. With legal help, family homes of the poor are saved, disabled and elderly citizens receive the income benefits to which they are entitled, and children escape the violence that jeopardizes their early development. Family self-sufficiency is fostered when temporary household crises are promptly resolved through our legal system, thereby enabling low-income residents to participate in their local communities as independent, productive citizens.

Despite an impressive record of past accomplishment, legal services programs in Pennsylvania stand at a dangerous crossroads. After years of inadequate funding, programs are now under attack for their zealous representation of the poor. They face potential elimination of public funding which in turn threatens their very existence.

V.

Inadequate funding for legal services programs has been a source of growing concern. In 1990, a special Task Force created by the Pennsylvania Bar Association surveyed the unmet needs of the poor of this Commonwealth for civil legal services. Composed of legislators and lawyers, the Task

60. Id.

61. While the majority of legal services cases are resolved through advice, negotiation, or litigation at the trial level, legal services programs do protect the rights of the poor in appellate tribunals when justice requires it. For example, in 1994, the Pennsylvania Supreme Court decided an important child support case brought by a legal services program on behalf of a mother of two minor children. Ball v. Minnick, 648 A.2d 1192, 1194 (Pa. 1994). When the Westmoreland County trial court arbitrarily deviated from statewide support guidelines and awarded $113 less child support per month than what was required by the support guidelines, the legal services program successfully appealed. Id. at 1195. The trial court was reversed on appeal. The additional $113 per month will prove important to the future well-being of the two children, but would never have been obtained without their mother having access to free legal services. Since she earned only minimum wage, she could not afford the cost of private counsel. Id. at 1194.
Force held ten public hearings throughout the state, commissioned a state telephone survey of poor households in Pennsylvania, and conducted mail surveys of judges, bar associations, legal services programs, and legislators. After a comprehensive review spanning more than twelve months, the Task Force concluded:

[T]here is a severe and growing unmet need for legal representation for the poor and near-poor in Pennsylvania. The consequences—to the poor and to society as a whole—of failing to meet this need are enormous . . . . The public, including the legal profession, has a duty to ensure that access to justice is available to everyone, not just to those who can afford it.62

The Task Force’s report outlined concrete recommendations for all segments of society—government, the judiciary, bar associations, legal services programs, and pro bono organizations—intended to enhance access to justice for all Pennsylvanians. Among its many recommendations, the Task Force called upon the Pennsylvania General Assembly to increase immediately the appropriation for legal services and to restore it to a level at least equal to the amount appropriated in 1980, adjusted for inflation and for increases in the number of Pennsylvania residents living in poverty.63

Instead of increasing resources for legal services, the General Assembly took the extraordinary step in 1994 of eliminating all $2,500,000 in state funds supporting Pennsylvania’s legal services programs. Legal services programs were thrown into an immediate and dire funding crisis of substantial proportions. By necessity, legal services programs throughout Pennsylvania began reducing staff, closing offices, and decreasing client services.64 Needy families were turned away when they needed help the most.65

Legislative attempts to restore state funding have failed as of this writing.66 Senate Bill 1848, which was introduced on September 21, 1994 by Senator Stewart Greenleaf and co-sponsored by twenty-six senators, died in committee. Similar legislation introduced in the House of Representatives

62. Pennsylva nia Bar Association Task Force for Legal Services to the Needy 40 (Dec. 1990). Most surveys of unmet legal needs conducted by the American Bar Association and state bar associations have similarly concluded that as much as 80% of the legal needs of the poor cannot be met with existing resources. Too many low-income citizens simply do not receive legal help when they need it. This causes them to give up seeking assistance, resulting in tragic consequences to the individual and to society as a whole. The problem has worsened as the national population of people in poverty has increased from 26 million in 1979 to 39.3 million in 1994. Today, there is one lawyer for every 305 Americans, but there is only one legal services lawyer for every 10,567 poor Americans. National Legal Aid & Defender Ass’n & the Project Advisory Group, Legal Services: The Unmet Promise.


64. Telephone Interview with Phyllis E. Guillaume George, Controller, Pennsylvania Legal Services.

65. Pennsylvania Legal Services estimated that more than 12,000 low-income Pennsylvanians would not get the legal help they needed in Fiscal Year 1995 due solely to the loss of state funding. Id.

66. See Epilogue, infra note 82.
met the same fate. These efforts failed despite strong public support voiced by the organized bar, leading newspapers across the Commonwealth, the deans of all seven Pennsylvania law schools, and more than 700 citizens, groups, organizations, and clergy who signed an urgent, full-page advertisement published in a leading Harrisburg newspaper.

On top of the loss of state funding, legal services programs in Pennsylvania face grave danger on the federal level. Sweeping legislative changes resulting from the November 1994 general elections have, for the first time, placed some of the most vocal opponents of legal services programs in key leadership positions in both houses of Congress. These elected officials have wasted no time in calling for the elimination of the federal Legal Services Corporation. Since federal funds represent the largest funding source for most Pennsylvania legal services programs, the elimination of federal funds, or even a significant decrease in conjunction with the loss of state funds, would likely end civil legal aid in Pennsylvania as we now know it.

Pennsylvania Legal Services is at risk.

VI.

More than a quarter century of proven accomplishment has still not secured the future of civil legal services to the poor. Much controversy still stems from the fact that competent, zealous representation requires that legal services lawyers challenge governmental authority when state or federal action threatens the vital interests of the poor. Some legislators candidly ask


68. The Pennsylvania, Philadelphia, and Allegheny County Bar Associations, as well as the Pennsylvania and Philadelphia Trial Lawyers Associations and Pennsylvania Defense Institute have all expressed their support for the restoration of state funding to legal services. See, e.g., Legal Community Joins Forces To Restore Funding, LEGAL INTELLIGENCER, Feb. 14, 1995, at 1.

69. Leading editorials criticized the cut in funding and urged the adoption of supplemental state funding. See, e.g., Just Plain Wrong: Starving Legal Aid to the Poor is Inexcusable, PHILA. INQUIRER, Nov. 16, 1994, at A14; Justice in More than Name, HARRISBURG PATRIOT & EVENING NEWS, Nov. 16, 1994, at A6; Legal Friction: A Myopic Stance in Harrisburg Hampers Aid for the Poor, PITT. POST-GAZETTE, July 2, 1994, at B2; Playing Scrooge: Pennsylvania Needs to Restore Legal Services Funds, LANCASTER INTELLIGENCER J., Nov. 21, 1994, at A12.

70. Under the leadership of Temple University School of Law Dean Robert J. Reinstein, the deans of all seven Pennsylvania law schools signed a letter to the editor calling for the restoration of state funding. The letter appeared in major newspapers across the Commonwealth during the latter part of 1994. See, e.g., Letter to the Editor, PHILA. INQUIRER, Sept. 28, 1994, at A14.


72. See, e.g., Mitchell Loin, Legal Aid May Get Death Sentence, FT. LAUDERDALE SUN-SENTINEL, Dec. 24, 1994, at 3A (Representative Henry Hyde, newly selected Chairman of the House Judiciary Committee, stated that he will try to eliminate Legal Services Corporation).
why they should fund legal services programs if such funds are used to sue government.73

The question was answered more than twenty years ago by President Richard M. Nixon in his message to Congress requesting the establishment of the federal Legal Services Corporation:

Much of the litigation initiated by legal services has placed it in direct conflict with local and state governments. The program is concerned with social issues and is thus subject to unusually strong political pressures . . . . [I]f we are to preserve the strength of the program, we must make it immune from political pressures and make it a permanent part of our system of justice . . . .

The legal problems of the poor are of sufficient scope that we should not restrict the right of their attorneys to bring any type of civil suit.74

Zealous representation owed to clients under the Code of Professional Responsibility simply permits no distinction between rich and poor clients.75

Still other legislators suggest that voluntary charitable efforts should replace publicly funded legal services as a cost-saving measure. These legislators ignore the failed history of private legal aid societies76 and are unwilling to acknowledge the essential public function performed by legal services programs when justice is made available to all. Their vision is dangerously shortsighted since they ignore the increased societal cost of not providing legal assistance when needed77 as well as the substantial amount of private dollars and pro bono hours leveraged by existing legal services programs on behalf of the poor.78

Most importantly, critics do not comprehend the conservative nature of the legal services program which transfers the resolution of volatile disputes from the lawlessness of our streets to the orderliness of our courts. By maintaining access to our courts for a growing underclass, programs do much more than just fulfill an abstract principle of law. They offer low-income citizens an opportunity to rescue hope from despair and thereby remain connected to our legal system and invested in the future of Pennsylvania.

74. William R. Klaus, Legal Services Program: Reply to Vice President Agnew, 58 A.B.A. J. 1178, 1180 (1972).
75. Id. at 1178-79.
76. See supra notes 21-23 and accompanying text for history of private legal aid societies.
77. For example, early intervention in landlord-tenant or mortgage foreclosure cases will often prevent a family from becoming homeless and thereby save substantial future governmental expenditures on intensive and costly shelter services.
78. For example, a review of pro bono projects conducted in Philadelphia concluded that for every dollar the local legal services program invested in private attorney involvement projects, it received $10 of contributions (cash and in-kind) in return toward the delivery of legal services to the poor. Report of the Private Attorney Involvement Committee of the Board of Trustees of Community Legal Services (1992).
Unless we act vigorously to save civil legal services for the poor, we will be declaring to a large segment of our citizenry that their participation in our system of government is neither wanted nor needed. We will be confirming that justice is not a constitutional right, but a commodity to be bought and sold. In future years, we will need to hold one-quarter of all the pages of the annual Pennsylvania Review completely blank as a visual reminder that one-fourth of our citizens are non-participants in our legal system, that our courts are open only to preferred-paying customers, and that "justice for all" has withered to dust in the wind.

It is our system of justice that is at risk.

79. Even if legal services programs survive this latest and most serious challenge, the future of an effective legal aid system depends upon insulating such programs from chronic political attack. Inevitably, the more effective such programs become, the more opposition from political opponents they will engender. Moving from controversy to controversy and funding crisis to funding crisis has drained even the best programs of staff morale and has deprived their clients of much needed services. In the long-run, non-political, dedicated funding sources must be found to stabilize the provision of legal aid to the poor.


82. While the poor pay taxes and thereby share in the cost of our justice system, only those with sufficient disposable income to afford the cost of private counsel have meaningful access to our courts.

Epilogue. Pennsylvania did not restore state funding to legal services programs in fiscal year 1995. The General Assembly, under strong pressure from the Governor, did appropriate two million dollars for fiscal year 1996, but at the same time imposed substantial restrictions on the types of cases that lawyers for the poor were allowed to accept for representation. In Washington, D.C., the House Budget Committee voted to recommend the elimination of all federal funding for legal services over the next two years. While federal appropriations for the coming fiscal year are not yet final, Congress is expected to impose deep funding cuts and further restrictions on all legal services programs.