

# Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing

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Conflict over drug-related evictions of tenants from public housing projects is a thin strand in the tangled web of issues facing America's urban poor. It is a microcosm, however, of a larger dynamic that is the setting for this paper: the struggle between individual rights and community responsibility and the implications of that struggle for legal assistance lawyering.<sup>1</sup>

Tenants in public housing desire to live free of violence from illegal activity. They want their children to play outside and visit friends. In short, they want what all Americans want: to feel safe in their own homes and neighborhoods. While management's capacity to rid a residential complex of drug addicts and criminals is not wholly dependent upon evictions, the threat of successful eviction is a necessary part of any program to provide safe, decent housing for residents.<sup>2</sup> Often, the local legal assistance provider impedes progress in this area<sup>3</sup> when it zealously protects the right of any public housing tenant to retain his or her apartment. In deciding to take on a client, the local legal assistance provider rarely considers the needs of the housing tenants as a community.<sup>4</sup>

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1. Throughout this paper I use the term "legal assistance" to refer to the variety of agencies providing free legal representation to the poor. It is limited, however, to legal assistance organizations serving urban areas. The geographical differences between rural areas and urban areas are significant, and I cannot say that my model would be appropriate for rural settings.

2. LANGLEY C. KEYES, *STRATEGIES AND SAINTS: FIGHTING DRUGS IN SUBSIDIZED HOUSING* 222 (1992).

3. See ROGER L. CONNER & ROB TEIR, *NEIGHBORHOOD LEGAL SERVICES AND TENANT-SUPPORTED EVICTIONS: RECONCILING TENANT ADVOCACY AND SAFE COMMUNITIES IN LOW-INCOME HOUSING IN PITTSBURGH* (1994) (available through AARR, Washington, D.C.); see also Testimony to the House of Representatives Committee on the Judiciary, June 15, 1995, by Zelma D. Boggess, Exec. Dir., Charleston Housing Authority, Charleston, West Virginia and Michael Pileggi, Counsel for the Philadelphia Housing Authority.

4. New restrictions on Legal Services Corporation (LSC) funding forbids representation of public housing tenant being evicted for drug offenses. See Pub. L. No. 104-134 1996 HR 3019 § 504(a)(17)(A,B) (1996).

I use the conflict over drug-related evictions to shed light on a larger issue facing legal assistance agencies and their client populations: How should scarce resources be used to meet the legal needs of the poor? I challenge legal assistance agencies to question their assumptions about the primacy of individual rights strategies and to ask themselves “who should be the client for our work?” I suggest that the answer to that question is “the community.”<sup>5</sup>

In Part I, I begin by constructing my own vision of “community representation.” This vision emphasizes the importance of building community within impoverished areas, such as distressed public housing. I show how legal assistance agencies’ traditional focus on individual rights has failed both to build community and to meet the needs of the poor—particularly the black poor—living in inner cities.<sup>6</sup>

In Part II, I consider various aspects of legal assistance work that make adoption of a community representation model both difficult and, at the same time, essential.

In Part III, I focus on the New York City Housing Authority’s (NYCHA) effort to modify the *Escalera* Consent Decree.<sup>7</sup> This decree had defined procedures for tenants facing eviction from public housing for over twenty years. In 1996, NYCHA moved to modify the decree for drug-related evictions. The Legal Aid Society of New York’s decision to oppose this modification<sup>8</sup> exemplifies dramatically the clash between the traditional focus on individual rights and the conflicting concerns of the agency’s constituent community.

I conclude in Part IV by offering a model of service provision that operationalizes my community representation vision for legal assistance lawyering.

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5. Community needs are shared concerns, not just tallies of how many individual neighborhood residents require help with a particular issue. I further define these communities geographically, and claim that the voice of these communities is their institutions. See *infra* Section I.B.

6. Race is relevant since roughly two-thirds of all non-elderly families in public housing are black and nearly one-fifth are Hispanic, See Michael H. Schill, *Distressed Public Housing*, 60 U. CHI. L. REV. 497, 510, 518 (1993); see also Michael R. Tein, *The Devaluation of Nonwhite Community in Remedies for Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463, 1465 (1992); Susan J. Popkin, *Sweeping out Drugs and Crime*, 41 CRIME & DELINQ. 73, 79 (1995).

7. On November 2, 1967, the Escaleras, on behalf of themselves and all similarly situated tenants, sued the NYCHA claiming its termination policies violated their Due Process rights. See *Escalera v. NYCHA*, 425 F.2d 853 (1970). The case was settled by creation of the *Escalera* Consent Decree, which defined eviction procedures for public housing tenants.

8. *Escalera v. NYCHA*, 67 Civ. 4307 (1996). The NYCHA’s motion to modify the *Escalera* Decree to provide for summary eviction procedures for tenants using their apartments for illegal drug-related activity was supported by a representative group of tenant leaders, and opposed by The Legal Aid Society of New York.

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### I. TOWARD A COMMUNITY REPRESENTATION VISION FOR LEGAL ASSISTANCE LAWYERING

#### A. Introduction

Legal assistance organizations are a precious resource to the poor of this country. With no constitutional guarantee to an attorney in civil cases, lawyers for the poor often provide the only access to legal representation for the class of people who cannot afford a private attorney. This resource, however, is severely limited by inadequate funding. It is not possible to be a “full-service ‘Cravath & Swaine’ for the poor”<sup>9</sup> as some legal assistance proponents might desire.<sup>10</sup>

Legal assistance attorneys decide how and on whom to spend these limited resources under the guidance of the general policies promulgated by the agencies’ boards of directors.<sup>11</sup> These decisions are supposedly made in the best interest of the poor being served. In reality, priorities reflect a more complex mixture of agency specialization and attorneys’ skills and beliefs.<sup>12</sup> Although many individuals need representation in the traditional areas offered by legal services, such as landlord/tenant, family law, and benefits termination, the categories are not defined by the clients. Given the underlying philosophical commitment of legal assistance organizations to client involvement,<sup>13</sup> such decision-making processes are of questionable legitimacy.<sup>14</sup> Direct conflicts between legal assistance organizations and their communities (such as those over the representation of individuals facing drug-related evictions from public housing) focus attention on the need to reevaluate the assumptions used in these decision-making processes.

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9. Michael Powell, *Red-Hot Texas Lawyer Hopes to Rescue Poor from New York Liberals*, N.Y. OBSERVER, Jan. 29, 1996, at 1.

10. This problem became evident soon after the creation of the Legal Services Corporation. Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1013 (1970) (arguing that judicially oriented legal services for the poor are incapable of providing justice on a mass scale).

11. Paul E. Furrh, Jr., *The Role of the Board of Directors in Legal Services Programs*, 22 CLEARINGHOUSE REV. 1275, 1275 (1989).

12. See *infra* Section II.A. These decisions may be further influenced by what work is fulfilling to public interest lawyers. See Weisbrod, *infra* note 73.

13. Although the definition of the legal assistance mission is in dispute, the importance of client involvement has been emphasized, if not successfully implemented. See *infra* Section II.B.

14. It is not easy to involve clients in the substance of legal assistance work. Cultural differences are often difficult to bridge. Race is also often a factor. Some have succeeded. Legal Aid lawyer Ray Brescia represents tenant groups. Client organizing and empowerment are major goals of his work. He is gratified at the degree to which his client organizations have taken over the direction of their own representation. Conversation with Ray Brescia, Housing Development Unit of the Community Law Offices of Legal Aid, Nov. 8, 1996.

Legal assistance agencies should allocate their scarce resources by first defining the client population as a community and addressing its needs.<sup>15</sup> My reasons for advocating this "community representation" model are three-fold. First, it is intrinsically important for outside institutions to support emergent signs of community in neighborhoods where such ties are tenuous. Second, the traditional emphasis of legal assistance organizations on individual rights over the needs of the community has not served the best interests of the poor, particularly the minority poor living in distressed public housing. Third, by placing a priority on the needs of the community, legal assistance organizations will maximize the impact of their funding.

### B. *Identifying Community*<sup>16</sup>

The significance of community to American society has reached a kind of apex as evidenced by its prominence in the rhetoric of both Bill Clinton and Bob Dole in the 1996 presidential campaign. Yet those who strive for expanded attention to "community" do not agree on community's exact meaning nor on how it is created or sustained. Robert Booth Fowler has emphasized that although community is a "contested concept," its definition is critical to decisions about social policy.<sup>17</sup>

My own vision of community is consistent with many of the socio-political concepts (often collectively referred to as "communitarianism") explored in Fowler's book.<sup>18</sup> It also borrows from other fields such as community psychology and some branches of sociology. I am interested in the impact of community on the individual, and in what it means for the public housing tenants to experience a sense of community. I believe it is critical that outside organizations and individuals support community development by validating community institutions such as tenant associations and community development corporations. These institutions represent the efforts of individual neighborhood residents to identify and solve their own problems.<sup>19</sup> They are, I contend, the voices of the community.<sup>20</sup>

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15. This process would have ramifications for current service delivery. See Cahn & Cahn, *supra* note 11, at 1012-22 for an interesting analysis of possible service changes.

16. Ideas from this section appear in Raymond Brescia et al., *Who's In Charge, Anyway?: A Proposal For Community-Based Legal Services*, *FORDHAM L. REV.* (forthcoming 1998).

17. ROBERT BOOTH FOWLER, *THE DANCE WITH COMMUNITY* 3 (1991).

18. See also ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985); *The Responsive Communitarian Platform*, in 2 *THE RESPONSIVE COMMUNITY* 4 (Winter, 1991/92).

19. Eric H. Steele suggests that the voice of community can also be heard through participatory processes such as zoning. See Eric H. Steele, *Participation and Rules—The Functions of Zoning*, *AM. BAR. FDT. RES. J.*, 709, 745 (1986).

20. Critics may question my willingness to accept as representative the interests of "self-

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The origins of the word “community” come from the Latin *communis* or fellowship “implying the quality of ‘a community of relations and feelings.’”<sup>21</sup> This “sense of community” or “felt experience of belonging, connection, shared meanings or identity, of being in relation with fellow members”<sup>22</sup> is the “organizing concept for the psychological study of community.”<sup>23</sup> Before American society became as mobile as it is today, this sense of community was synonymous with a geographical location such as a town or neighborhood. Much has been written about the delineation of community in these terms.<sup>24</sup> Today we have other competing conceptions of community that include definition by work group, ethnic identity, or sexual orientation. These competing conceptions do not diminish the importance of geographical definitions, particularly for poor urban neighborhoods. In this paper I focus on geographically defined communities.

Research in the fields of psychology and sociology have linked this “sense of community” to many individual benefits. Mr. Glynn found a significant relationship between a sense of empowerment and community satisfaction.<sup>25</sup> In a study of the relationship between several variables and life satisfaction, Professor Marc Fried found that community satisfaction makes a significant contribution to life satisfaction, “even by comparison with such major variables as marital and work satisfaction” and that this finding is most striking at the lowest status level.<sup>26</sup> Professors Chavis and Newbrough cite “fifty years of research in American social sciences” that shows a relationship between “the strength of a sense of community” and improved mental health, the quality of child rearing and parenting, neighborhood beautification, informal social control, crime prevention and even disease prevention.<sup>27</sup>

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appointed” groups of individuals. I base this on my belief that a sense of community develops around problem-solving, and problem-solving occurs within groups and institutions.

21. Godfrey T. Barrett-Lennard, *Toward a Person-Centered Theory of Community*, 32 J. HUMANISTIC PSYCHOL. 63 (Summer 1994).

22. *Id.* at 65.

23. David M. Chavis & J. R. Newbrough, *The Meaning of “Community” in Community Psychology*, 14 J. COMMUNITY PSYCHOL. 4, 335 (1986).

24. *See id.* (arguing that the psychological study of community must include the difference between territorial and non-territorial community); *see also* Thomas M. Meenagan, *Community Delineation: Alternative Methods and Problems*, 56 SOC. & SOC. RES. 345 (1972) (arguing that the definition of community as geographical or not is essential to defining social research); Thomas J. Glynn, *Neighborhood and Sense of Community*, 14 J. OF COMMUNITY PSYCHOL. 341 (1986) (looking at significance of neighborhood to community); Marc Fried, *The Structure and Significance of Community Satisfaction*, 7 POPULATION & ENV'T 61 (1984) (studying the relationship of residential community satisfaction to life satisfaction).

25. Glynn, *supra* note 24, at 350.

26. Fried, *supra* note 24, at 82.

27. Chavis & Newbrough, *supra* note 23, at 336.

The development of a sense of community within a neighborhood is arguably more important for groups of isolated, severely impoverished people. Welfare recipients living in public housing have limited access to alternative communities such as work. Frequent violence in public housing limits the experience of community.<sup>28</sup> The level of violence must be lowered to encourage community development. Tenants who feel safe are more likely to attend community meetings, visit friends, allow children to play outside with other children, and attend school functions. As Robert Bellah emphasizes,

[W]here social trust is limited and morale is blasted, one of the most urgent needs is a recovery of self-respect and a sense of agency that can come only from the participation that enables people to belong and contribute to the larger society.<sup>29</sup>

Participation is facilitated, moreover, through institutions.<sup>30</sup> Researchers Chavis and Newbrough emphasize the importance of institutions in the development of community:

Central to this process is the participation of community members in collective problem-solving. This often is accomplished through the strengthening of mediating structures such as the neighborhood, family, church, voluntary association, schools, and the workplace . . . . The empowerment of people and groups through these structures leads to . . . the "competent community."<sup>31</sup>

I contend that an elected body of tenant leaders is a community-building institution for the public housing community. Legal assistance agencies must support the development of community by validating these institutions.

The development of a sense of community by public housing tenants can lead to other advantages for individual tenants. In fact, a sense of community may be a necessary first step to any meaningful amelioration of the problems facing this beleaguered population.

### C. *Rights and Responsibilities*

If we accept the importance of community argued for above, we still must examine how to consider the needs of this community in relation to the rights of the individuals who comprise it. Most communitarian visions conflict with the liberal tradition in our country of emphasizing individual rights. Communitarians believe this tradition has impoverished individu-

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28. See *infra* Section III.A; see also Stephen Schmitz, *Three Strikes and You're Out: Academic Failure and the Children of Public Housing*, 174 J. EDUC. 41, 42 (1992).

29. BELLAH, *supra* note 18, at xxxii-iii.

30. See, e.g., AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 134-60 (1993) (noting that communities form around institutions such as schools and community policing stations).

31. Chavis & Newbrough, *supra* note 23, at 338.

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als as well as society. Professor Glendon notes that while there is little agreement about what qualifies as a right, many seem to feel that “if rights are good, more rights must be even better, and the more emphatically they are stated, the less likely it is that they will be watered down or taken away.”<sup>32</sup> And, she claims, this “rights talk . . . promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.”<sup>33</sup> Critics of communitarianism, on the other hand, like the ACLU’s Ira Glasser argue that “communitarianism really means majoritarianism. The tendency is to make constitutional rights responsible for the failure to solve social problems.”<sup>34</sup>

One way to explore this issue is to examine the impact of individual rights strategies on the social and economic struggles of African Americans. The Civil Rights movement emphasized individual rights. There is no question that those efforts resulted in important victories for African Americans. Yet, as Professor John Calmore points out:

[The civil rights movement] was essentially demand or protest focused, rather than program focused. While the reforms sought were radical in their call for inclusion of blacks in the American dream, the movement was not protesting so much against the “system” as against being left out of it.<sup>35</sup>

The movement’s emphasis on ending segregation made it difficult to simultaneously support the development of the black “community,” in a sense blurring “the distinction between a compulsory ghetto and a voluntary community.”<sup>36</sup> To move beyond the limitations of the strategies used in the civil rights movement, a focus on “rights” should be replaced by one that improves “group conditions.”<sup>37</sup>

Other observers point to the questionable efficacy of the traditional individual-rights focused strategies employed by legal assistance lawyers for meeting the needs of clients of color:<sup>38</sup>

Despite hard work by legal services advocates, the plight of poor clients is as bad as or worse now than at any time during the 25 years that legal services

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32. MARY ANN GLENDON, RIGHTS TALK 16 (1991).

33. *Id.* at 14.

34. ETZIONI, *supra* note 30, at 49 (quoting an article from Business Week).

35. John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 215 (1982).

36. *Id.* at 223.

37. *Id.* at 236; *see also* Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, *passim* (arguing that ethnic groups are seen only as collections of individuals, maintaining the status of “other” in the dominant majority society).

38. Some maintain that the language of rights remains critical to American blacks. *See* PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146-65 (1991); *see also* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 305 (1987).

programs have been in existence. Although few in legal services will acknowledge it there has long been suspicion among legal services clients and advocates of color that many nonminority members of the legal services community, especially those in legal services leadership, have gained self-esteem by looking down upon their poor clients of color. Other motivations may exist as well in the personal and professional biases of those who control legal services. Their biases are reflected in embedded advocacy strategies that fail to address emerging issues and clients' hunger for empowerment and self-determination.<sup>39</sup>

The adversarial system itself encourages a focus on individual rights by requiring zealous individual representation. In his book, "Lawyers and Justice," David Luban suggests that the system allows behavior that "excuses lawyers from common moral obligations to non-clients."<sup>40</sup> In the process, lawyers focus their professional concern on their client's interests rather than the interests of justice.<sup>41</sup> Luban advocates for "politically motivated" lawyers who responsibly "represent the political aims of [their] entire client constituency, even at the price of wronging individual clients."<sup>42</sup>

Critics of communitarianism fear oppression of individuals by the collective. This is the "dark side"<sup>43</sup> of communitarianism. Communitarians, for their part, do not advocate a complete abandonment of rights. They search for a balance between rights and responsibilities that in today's America requires a de-emphasis of rights.<sup>44</sup> What will keep the moral views of the community from isolating or victimizing a minority? Responsive Communitarians<sup>45</sup> appeal to "higher-order values" that no community has a right to violate.<sup>46</sup> Together with the Bill of Rights, this over-arching guide will keep communities from making repugnant demands.<sup>47</sup> Michael Walzer provides a vision of community that rejects

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39. Paul E. Lee & Mary M. Lee, *Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor*, 27 CLEARINGHOUSE REV. 311, 312 (1993).

40. DAVID LUBAN, *LAWYERS AND JUSTICE* xx (1988).

41. *See id.*

42. *Id.* at xxv. This quote seems to violate rules of professional conduct. *See, e.g.*, ABA MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2(a) and 1.7(a). Luban suggests that the client-centered nature of the bar's ethical codes might be insufficiently "sensitive to the unique features of political law practice." LUBAN, *supra* note 40, at 321.

43. Kevin J. Worthen, *The Role of Local Governments in Striking the Proper Balance Between Individualism and Communitarianism: Lessons for and from Americans*, XX B.Y.U.L. REV. 475, 476 (1993).

44. *See, e.g.*, AMITAI ETZIONI, *RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE* 1 (1995).

45. This is a movement that attempts to take the concern for community beyond theory and into a kind of activism. *See The Responsive Communitarian Platform*, in 2 THE RESPONSIVE COMMUNITY 4 (Winter 1991/92).

46. ETZIONI, *supra* note 30, at 37.

47. *See id.* at 53.



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domination by recognizing differences.<sup>48</sup> This regime of “complex equality,” as he calls it, “establishes a set of relationships such that no citizen’s standing in one sphere can be undercut by his standing in another.” This would seem to require a particular value system, one that recognizes that “the principles of justice are themselves pluralistic in form. . . .”<sup>49</sup>

The question, finally, is an empirical one. Can a tolerant community be maintained that encourages responsibility and moral behavior by emphasizing the collective without crossing the line to oppression of individuals? This question needs to be explored. But in the short run, understanding that there are risks to validating community needs over absolute individual rights should not require a complete rejection of communitarianism. As Amitai Etzioni suggests, “just as we do not avoid swimming because some people drown, we should not hesitate to raise our moral voice.”<sup>50</sup>

Traditional individual rights strategies have failed to meet the complex needs of legal assistance client populations. Agencies should consider alternative strategies. Some legal assistance agencies have recognized the limitations of an exclusive focus on individual representation and have branched out into community work.<sup>51</sup> Many legal assistance agencies, however, resist the adoption of alternatives to individual rights strategies.<sup>52</sup> In the next Part, I explore the structural, historical and philosophical aspects of legal assistance lawyering that help explain this resistance.

## II. LEGAL ASSISTANCE

### A. *Equal Justice or Social Reform: What Is the Mission of Legal Services?*

The rocky road to federal funding for legal assistance through the Legal Services Corporation (LSC) has been well documented.<sup>53</sup> Despite the

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48. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY xii-xv (1983).

49. *Id.* at 5-6.

50. ETZIONI, *supra* note 30, at 53.

51. Gerald Lopez promotes a collaborative method of lawyering, “rebellious lawyering,” which minimizes the subordination of clients by lawyers and elevates client participation. See GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE (1992). *But see* Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 STAN. L. REV. 213, 215 (1993). Southworth suggests that Lopez ignores other ways that lawyers can use their skills to empower communities, “as general counsel and as providers of transactional services to community organizations and small businesses.”

52. See Sol Stern, *The Legal Aid Follies*, CITY J., Autumn 1995, at 22 (suggesting Legal Aid of New York reaffirmed existing strategies when it hired a new Executive Director).

53. See EARL JOHNSON, JR., JUSTICE AND REFORM (1978); JOHN DOOLEY & ALAN W.

constant precarious position of such funding, it played a critical part in the creation of the current legal assistance network in this country. Federal funds originally covered a significant percentage of agency budgets.<sup>54</sup> The policies and actions of the LSC still influence the manner in which services are provided, even if that influence is simply a reaction against LSC recommendations. Most significantly, the federally funded legal assistance network established a culture that continues to embrace an individual rights strategy.

Legal assistance lawyers have struggled with the competing goals of equal access and social reform since their earliest efforts to serve the poor.<sup>55</sup> The first organizations providing legal assistance had social reform notions in mind and provided a mix between these goals.<sup>56</sup> The traditional legal aid offices spawned by members of the local bar association, however, focused heavily on access to equal justice, indifferent to the non-legal problems of their clients.<sup>57</sup> Earl Johnson reveals the thinking of legal aid leaders on this topic:

It is difficult to detect much sympathy for the social and economic deprivation of the poor in the writings of the leaders of legal aid, but their sensibilities as lawyers clearly were shocked by the deprivation of due process caused by poverty. An abiding concern with the integrity of the legal system and threats to its survival pervade the pronouncements of the movement. Each man, rich or poor, deserves his day in court; that is what this country is all about; and besides, if we do not insure that access, the masses will revolt and tear down our system of government. Entirely missing is an evident stake in the outcome of the poor man's day in court and its implications for other social and economic problems.<sup>58</sup>

Social reformers embodied very different goals. They were concerned not only with the outcome of the client's cases but also the larger issues their clients faced. The reformers sought to ameliorate poverty itself. They did not, however, succeed in creating a program in this image. The necessary involvement of the ABA and Congress in the establishment of federal funding for legal services meant rejection of radical lawyering. Again, Mr. Johnson's account is enlightening:

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HOUSEMAN, LEGAL SERVICES HISTORY (1985) (available from the Center for Law & Soc. Policy, Washington, D.C.).

54. See DOOLEY & HOUSEMAN, *supra* note 53, at 33-36. Today, the impact of federal dollars can be quite small for larger service providers. Agencies have historically adapted to funding cuts by raising funds from other sources.

55. See Alan W. Houseman, *Community Group Action: Legal Services, Poor People and Community Groups*, 19 CLEARINGHOUSE REV. 392, 394 (1985); see also Geoffrey C. Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L.R. 699, 701 (1969).

56. See JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 34-36 (1982).

57. The American Bar Association created a loosely connected network of legal aid offices in 1920 under the National Association of Legal Aid Organizations. See JOHNSON, *supra* note 53, at 7.

58. JOHNSON, *supra* note 53, at 12-13.

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By the end of 1964, there were two legal assistance movements in the United States. One was almost 89 years old, a child or at least step-child—of the American Bar Association, charitably financed at a level of about \$4 million a year, led by middle-aged establishment lawyers and concerned solely with the goal of equal justice. The other movement was two years old, unaffiliated with the organized bar, financed by the Ford Foundation and the Federal government at about half a million dollars, conceived and led by youthful lawyer-politicians and dedicated to some vaguely conceived goal of social reform.<sup>59</sup>

No mechanism existed to resolve these philosophical differences. The Office of Economic Opportunity's (OEO)<sup>60</sup> Legal Services program set goals for opening as many local offices as possible, but it established no priorities for *how* the program was going to use legal assistance to help reduce poverty.<sup>61</sup>

The existing network of legal aid offices had focused on equal access by providing representation to poor individuals with legal problems. The sheer volume of cases confronting the new legal services agencies led to continued emphasis on individual representation.<sup>62</sup> Priorities were set according to perceived individual needs in areas such as family, landlord/tenant and consumer law. Legal assistance agencies and individual attorneys within the agencies developed expertise in these areas. Lawyers became increasingly specialized. Eventually, a delivery system emerged that facilitated the intake and handling of these routine cases.<sup>63</sup>

The establishment of such a delivery system promotes the notion of expanding equal access to justice. It also, however, inhibits legal services from recognizing and addressing new client needs<sup>64</sup> both on the individual and community levels.<sup>65</sup> First, client populations adjust their demands to what they know the local legal assistance provider can successfully address. They may not bring novel issues to the specialized attorneys. Second, lawyers may miss or even ignore new problems, even if the client describes them, because they do not fit within existing agency priorities and expertise. Finally, and most importantly for the purposes of this Paper, community needs are difficult to glean from the aggregation of individual client input. Even if agencies self-consciously collect information

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59. *Id.* at 40.

60. The Office of Economic Opportunity was a new agency created by President Johnson to carry out the "War on Poverty." Legal Services began as a program of OEO. *See id.*

61. *See id.* at 102.

62. *See* John A. Tull, *Implications of Emerging Substantive Issues for the Delivery System for Legal Services for the Poor*, 24 CLEARINGHOUSE REV. 17, 19 (1990).

63. *See id.* at 18.

64. *See id.* at 18-20.

65. *See id.* at 19-20.

from individual clients, community confirmation of that information requires additional input from community-based, resident-run institutions.

Initially, legal services' programs implemented the social reform component of their mission in two ways. First, the agencies worked with groups that addressed particular issues facing the poor such as welfare rights.<sup>66</sup> Most of these groups had national funding and staff and did not focus on local needs. During the early 1970s, as national support diminished, these groups disintegrated.<sup>67</sup> Second, legal services agencies focused on legal reform as a way to promote social reform.<sup>68</sup> Lawyers, perhaps understandably, chose a form of social change most compatible with lawyers' traditional skills. Again, Earl Johnson writes:

Due process and its underlying notion of fair play, is comfortable home ground for the lawyer. The chances for success and the feeling of immediate personal gratification many derive are greatest when striving towards this goal. . . . It sounds like a legal assignment; it feels like lawyer work; it is reflected in a direct legal change. This may misplace the emphasis. Not that the poor do not want and deserve personal freedom and respect. But they could enjoy perfection of fair procedures and respectful treatment and still be "ill-housed, ill-clad, ill-nourished."<sup>69</sup>

The legal services attorneys succeeded in establishing procedural protections and equitable institutional treatment for the poor.<sup>70</sup> And, those involved in legal reform truly believed such successes would "help end privation."<sup>71</sup> But these efforts, focused as they were on establishing and protecting *individual rights*, failed to affect the condition of poverty.<sup>72</sup>

Given scarce resources, an equal access focus limits the reach of legal assistance offices in two ways. Only a small percentage of individuals in need of help get it. For those lucky few, only a narrow range of issues receive attention. Legal reform strategies also failed to meet client needs by

66. See Houseman, *supra* note 55, at 392.

67. See *id.* at 395.

68. Housing and community development type clinics have emerged in law schools across the country over the past decade. They embody an alternative conception of social reform. Interestingly, economic development was considered early on as a possible priority for the new OEO legal services agencies (as a way of meeting community needs with limited resources) but was rejected because: (1) lawyer's "work" was considered peripheral to economic development and at the best temporary; (2) it would help the middle class blacks and not the real poor; and (3) it required an influx of capital. See JOHNSON, *supra* note 53, at 130.

69. *Id.* at 219.

70. See Alan W. Houseman, *A Short Review of Past Poverty Law Advocacy*, 24 CLEARINGHOUSE REV. 1515 (1990).

71. Hazard, *supra* note 55, at 701.

72. See *id.* *passim*. This failure may have been predictable. Remedying unfairness in law will not necessarily lead to improvement in standard of living because "the 'wrong' of impoverishment . . . has victims but no specific perpetrators." Courts are impotent to remedy such wrongs. *Id.*; see also Robert L. Woodson, *Race and Economic Opportunity*, 42 VAND. L. REV. 1017, 1018 (1989) (decrying focus on old civil rights strategies in the face of crises in unemployment, out-of-wedlock births, black-on-black violence, incarceration rates, and education).

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focusing on lawyer-driven efforts to establish procedural protections.<sup>73</sup> These efforts have not translated into real social change. Seen in light of the requirement that legal services agencies provide “maximum feasible participation” to the client community, these limitations become quite serious.

### *B. Commitment to Client Involvement*

From the beginning, statutory law required legal services programs to afford poor people “maximum feasible participation” in the agencies.<sup>74</sup> In fact, a commitment to client involvement set the reform-minded OEO legal services program apart from the early legal aid offices.<sup>75</sup> John Dooley and Alan Houseman cite five critical elements that differentiated “Legal Services” from what had come before, “the *first* [was] the notion of responsibility to all poor people as a ‘client community.’” The second was to emphasize the client’s right to control decisions about the direction of their cases.<sup>76</sup> The OEO operationalized this mandated client participation by requiring in its guidelines that clients be represented on the policy making boards of each agency.<sup>77</sup>

No single requirement turned out to be as controversial as client representation on the boards. Lawyers did not like lay control of their work.<sup>78</sup> Even for the social reformers, from whom one might have expected support, client participation was “not a central tenet of the neighborhood lawyer ideology. . . . None of the existing programs even had poor people on their governing bodies.”<sup>79</sup> Yet the requirement stuck, and remains in effect today.

The client participation requirement has symbolic importance. In reality, however, representatives of the poor have minimal impact on the

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73. The ability to “select cases that involve more novel legal issues and . . . pursuit of social goals for which the lawyer has strong preferences” may help explain why some lawyers choose to forgo the pecuniary rewards of the private sector. Burton A. Weisbrod, *Nonprofit and Proprietary Sector Behavior: Wage Differentials among Lawyers*, 1 J. LABOR ECON. 246, 260 (1983).

74. Legal Services was added to the Economic Opportunity Act in 1966, P.L. 89-794 §§ 211-1(b) (Nov. 8, 1966) (codified under “Special Programs” at 42 U.S.C. § 2809(a)(3)). It was added to the section entitled “Urban and Rural Community Action Programs,” which required that programs provide for “maximum feasible participation of the residents of the areas and members of the groups served.” 42 U.S.C. § 2781 (a) (4) (1964).

75. See DOOLEY & HOUSEMAN, *supra* note 53, at 8-9.

76. *Id.* at 8. The other three are: to redress historic inadequacies in legal rights of the poor; to be need driven rather than demand driven; and to provide a full range of services.

77. JOHNSON, *supra* note 53, at 108-12. In the later statute creating the Legal Services Corporation, programs were required to have 1/3 of the board consist of eligible clients. 42 U.S.C. § 2996f(c) (1994).

78. DOOLEY & HOUSEMAN, *supra* note 53, at 108-12.

79. *Id.* at 112.

policies of legal assistance agencies.<sup>80</sup> Legal Services and other agencies who share their mission have failed to translate board slots into real client influence.<sup>81</sup> Instead, agencies have been more comfortable with other forms of outreach such as community education programs. These programs are successful at educating clients about their legal rights. But, they do not promote client ownership of the agencies themselves.<sup>82</sup>

Legal assistance agencies must meet their client participation mandate, particularly when race divides professional from client. Poor, majority African-American communities may require specially designed programs to meet their unique needs.<sup>83</sup> Many legal assistance lawyers assume their strategies are "universal and that poverty is color-blind."<sup>84</sup> Continuing discrimination against African Americans should raise questions about this assumption.<sup>85</sup> Legal assistance lawyers must learn from the community residents of majority minority neighborhoods. Only then can they determine what strategies are necessary to meet the needs of their constituent communities.

### C. *Scarce Resources: The Reality of Legal Assistance for the Poor*

The greatest weakness of organized legal aid work . . . which constantly bars its path, and which may ultimately prove its undoing, is its lack of funds. The reason that the existing organizations have not more completely answered the demand of the poor for legal assistance is that they are grossly under-financed.<sup>86</sup>

Federal funding through the LSC, even in the height of its growth period, never came close to meeting the needs of the poor for legal assistance.<sup>87</sup> A poor person has only a one in five chance of having her legal

80. It has been suggested that this representation is no more than tokenism. See Lee & Lee, *supra* note 39, at 316. I failed to locate any systematic evaluations done on the success of client participation. There is strong and consistent anecdotal evidence, however, that boards were and are lawyer-driven and that client representatives have little impact on policy making. See conversations with Catherine Welch of the Legal Services Corporation (LSC), Nov. 15, 1996, and Karen Crosby, former Special Asst. to the President of the LSC, Nov. 5, 1996.

81. "I have been attempting to work with legal services for the past 15 years and, with few exceptions, the attorneys have decided what the community needed. These decisions are made with the best of intentions, but to be heard as a client has been and continues to be a struggle." Ann Bailey, *Legal Services, Poor Clients, and the "War on Drugs,"* 24 CLEARINGHOUSE REV. 504 (1990) (writing in support of representation of all tenants facing eviction).

82. See Crosby, *supra* note 80. Ms. Crosby ran the community education program in New Haven before working at the LSC.

83. See John A. Powell, *Race and Poverty: A New Focus for Legal Services,* 27 CLEARINGHOUSE REV. 299, 306 (1993). Powell argues that poor minorities have a cluster of problems that "cannot be understood or addressed just by focusing on the individual. One must also look at the community and its resources to address these problems." *Id.* at 304.

84. *Id.* at 305.

85. The 1996 exposure of Texaco executives' discriminatory discussions is one example.

86. REGINALD HEBER SMITH, *JUSTICE AND THE POOR* Ch. 20, §3 (3d ed. 1924).

87. See LINDA E. PERLE & ALAN W. HOUSEMAN, *THE LEGAL SERVICES CORPORATION:*

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needs met.<sup>88</sup> Private funds have never made up the difference between need and government funding. Funding from all sources still provides only twenty percent of needed assistance.<sup>89</sup> Given these limited resources and huge needs, how should cases be selected? Who should be defining the policies that govern case selection?

Legal assistance attorneys should use the scarce resources available for their work to make the greatest impact on their client population. A community representation model of legal assistance lawyering would allow agencies to uncover real needs and would support new strategies for meeting them.

### III. ESCALERA

#### A. *Setting the Stage I: Rising Crime and Loss of Community in Distressed Public Housing*

Despite longstanding structural problems,<sup>90</sup> most public housing authorities (PHAs) manage a relatively small number of units and “provide safe, attractive, quality homes.”<sup>91</sup> Over half of all of this country’s units, however, are managed by the largest two percent of authorities.<sup>92</sup> These projects, located in the most isolated inner city locations, have the highest density of non-working families and dilapidated buildings. The claim to community in these distressed projects is tenuous. It is here that the onslaught of drug trafficking, particularly crack cocaine, took its largest toll and led to an onslaught of drug-related crime.

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ITS FUNCTIONS AND HISTORY 9-15 (1993) (available from the Center for Law and Social Policy, Washington, D.C.).

88. See Alexander Forger, *Equal Justice in this Century: A Discussion Paper for Access to Justice, 2000 Project 1* (1993) (on file with author). Scott Rosenberg, the Legal Aid attorney in the *Escalera* modification case, see *infra* Section III.D, reports that only five to ten percent of tenants facing evictions from public housing in New York City have representation. Conversation with Scott Rosenberg, Attorney, Civil Appeals and Law Reform Division of Legal Aid Society of N.Y., Nov. 12, 1996.

89. In 1988, the findings indicate that there were “approximately 4.9 million civil legal problems for which low income households had legal assistance and approximately 19 million” for which they did not. CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY. (American Bar Association, 1989).

90. Insufficient funding for maintenance and other problems have contributed to the widespread deterioration of public housing. See Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy*, 143 U. PA. L. REV. 1285, 1291-94 (1995); Schill, *supra* note 6, at 510.

91. Memo from President Clinton to HUD Secretary on ‘One Strike and You’re Out’ Guidelines, March 28, 1996; see also Susan Diesenhouse, *Public Housing: Why the Bad Rap?*, 48 J. HOUSING 293 (1991).

92. See Schill, *supra* note 6, at 501.

Violence from drug-related crime in distressed public housing is epidemic.<sup>93</sup> In 1994 some tenants in Chicago's public housing projects began to show signs of post-traumatic stress syndrome as a result of the constant violence. The Chicago Housing Authority invited the National Organization for Victim Assistance to provide counseling to tenants.<sup>94</sup> The counselors, who had just spent time in Bosnia dealing with refugees and war victims, said the Bosnian experience could not compare to what they found in Chicago.<sup>95</sup>

It was not always so.<sup>96</sup> Most accounts trace the rise of serious crime to the introduction of crack cocaine in the mid-to-late 1980s.<sup>97</sup> A 1971 *Journal of Housing* article on the causes of crime in public housing projects does not mention drugs.<sup>98</sup> The article cites vandalism as management's most serious crime concern. A shift begins in 1985 and "by 1990 the constellation of crime, fear, and violence is dominated by concern for the sale and use of drugs."<sup>99</sup>

In big city housing projects, the drug trafficking business and the resulting violence has become a permanent factor in the lives of residents. Children grow up learning that it is the drug lords and "not the mayor, police or housing authority that rule the housing projects."<sup>100</sup> Families live with random drive-by shootings and eruptions of full-fledged drug wars. Some families come to depend upon the drug money brought in by their children.<sup>101</sup> Others live isolated lives, only leaving the shelter of their apartment when they must, keeping their children inside except when they are at school.<sup>102</sup> Tenants cope by minimizing community interaction. Friends rarely drop in on each other. Parents cannot easily mobilize around school concerns. One researcher has found that public housing

93. The issue of just how much additional violence there is from drug crime was the main question of fact decided by the judge in the Escalera modification case, *infra* Section III.D.

94. Tom Pelton, *Helping Victims; War-Trained Counselors Advise CHA Residents*, CHI. TRIB., May 12, 1994, at Chicagoland 1.

95. "The disaster just keeps going on here." *Id.*

96. See, e.g., Shawn G. Kennedy, *Tenants Press for Easier Eviction of Drug Dealers*, N.Y. TIMES, Aug. 15, 1994, at B1 (reporting that an interviewee remembers a time when tenants were not victimized by drug-related violence).

97. See KEYES, *supra* note 2, at 37-38; Richard Dembo et. al., *Crack Cocaine Dealing by Adolescents in Two Public Housing Projects: A Pilot Study*, 52 HUMAN ORG. 89 (1993); NEW YORK CITY HOUSING AUTHORITY, *THE SECURITY PACT* 7 (1993).

98. See Byron Fielding, *Safety and Security in Multi-Family Housing Complexes*, 28 J. HOUSING 277 (1971).

99. KEYES, *supra* note 2, at 38.

100. ALEX KOILOWITZ, *THERE ARE NO CHILDREN HERE* 34 (1991).

101. See Elijah Anderson, *Neighborhood Effects on Teenage Pregnancy*, in *THE URBAN UNDERCLASS 377* (Christopher Jencks & Paul E. Peterson eds., 1991).

102. See Affidavit of Mark A. R. Kleinman, *Escalera v. NYCHA*, 67 Civ. 4307 (S.D.N.Y. 1996), at ¶ 23.



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tenants survived by “knowing who their friends were and when it was safe to open their doors.”<sup>103</sup>

As HUD and local PHAs have recognized, successful crime fighting strategies require community interaction and organized tenants.<sup>104</sup> A recent study suggests a strong link between a shared sense of community and effective drug elimination strategies. This study compared public housing residents’ attitudes about a particular drug elimination program in two Chicago Housing Authority (CHA) developments.<sup>105</sup> The Horner Complex<sup>106</sup> has a history of neglect and scant resources. It has a high vacancy rate, high crime rate, and an unstable tenant population. Ickes on the other hand has a more stable tenant population, a lower crime rate, and low vacancy. The researchers found that “efforts to establish tenant patrols have thus far been much less successful in Horner than in Ickes, where residents feel a sense of community and know many of their neighbors. Horner residents are simply too frightened of gang retaliation to risk involvement in attempts to control crime in their developments.”<sup>107</sup> Although both sets of tenants believed that the CHA’s program substantially reduced violence in the projects, “Ickes residents were significantly more positive about the program than were Horner residents.”<sup>108</sup> The authors suggest that these differences underscore the challenges facing those who want to improve severely distressed public housing. “Although CHA’s experience with crime prevention offers some hope for developments that still have functioning *communities* and relatively stable tenant populations, it offers little promise for developments that lack this kind of *community base*.”<sup>109</sup> (Emphasis added.)

In the last twelve or thirteen years, due in great part to crack cocaine, public housing tenants have been deprived of the simple ability to become a community. Much of what mainstream America takes for granted about community is not available to the tenants of distressed inner city public housing projects. Expectations for normal neighborhood life are displaced by concerns for basic safety and survival.

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103. Patricia O’Brien, *From Surviving to Thriving: The Complex Experience of Living in Public Housing*, 10 AFFILIA 155 (1995). One interviewee noted, however, that it was not always this way. Neighbors used to watch out for each other. “For nine years, believe it or not, I didn’t even have to lock my door.” *Id.* at 166.

104. See NATIONAL COMMISSION ON SEVERELY DISTRESSED PUBLIC HOUSING, THE FINAL REPORT 9-31, at 5 (Government Printing Office 1992).

105. Popkin, *supra* note 6, at 73. This extensive anti-crime initiative combined sweeping buildings for drugs and weapons with improved security and access to services.

106. Alex Kotlowitz is set in this complex, see KOTLOWITZ, *supra* note 100.

107. Popkin, *supra* note 6, at 95.

108. *Id.* at 94.

109. *Id.* at 95-96.

With a strong community, public housing tenants can begin to turn their own lives around. Yet legal assistance lawyers depress the development of community by opposing tenant groups in favor of defending the rights of individuals involved in drug trafficking. Tenant associations represent the efforts of tenants to solve their own problems. Legal assistance agencies should respect and support those efforts. Without a safe community in which to live and raise one's family the precious individual freedoms protected by legal assistance attorneys are freedoms in principle only.

*B. Setting The Stage II: Legal Assistance and Drug Related Evictions of Tenants from Public Housing*

Virtually all legal assistance providers represent tenants facing eviction. Evictions from public housing, however, attract special attention. In addition to fighting against arbitrary behavior by landlords, legal services attorneys use these cases to define tenant's procedural due process rights. *Escalera* was a landmark case in this area.<sup>110</sup>

In 1988, Congress responded to the crack epidemic by amending the Housing Act of 1937 "to include drug-related criminal activity as grounds for eviction from public housing."<sup>111</sup> A leaseholder could now be held responsible for drug-related activities of family members and guests.<sup>112</sup> HUD Secretary Kemp streamlined the HUD Tenant Grievance Procedure.<sup>113</sup> On June 25, 1990, The Legal Services Corporation joined the attack by passing a non-binding resolution "discourag[ing] representation of persons involved in drug-related activity in drug-related eviction and other housing proceedings involving publicly funded housing. . . [and encouraging work] to assist eligible tenant organizations, resident management organizations and individual clients in anti-drug activities . . ."<sup>114</sup>

Legal services agencies' response has been mixed. Most agencies resisted changing their approach to particular eviction cases based upon the third party interests of other tenants.<sup>115</sup> This often put legal assistance

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110. See Alan W. Houseman, *A Short Review of Past Poverty Law Advocacy*, 24 CLEARINGHOUSE REV. 1515, 1516 (1990).

111. Ginny Kim, Note, *Unconstitutional Conditions: Is the Fourth Amendment for Sale in Public Housing?*, 33 AM. CRIM. L. REV. 165, 169 (1995) (footnotes omitted).

112. See 42 U.S.C.A. § 1437d(1)(5).

113. See KEYES, *supra* note 2, at 177.

114. The LSC reported that only 20 of the 284 basic field offices were involved in efforts to fight drug activity in public housing although many reported representing drug dealers or members of the drug dealer's immediate family to block evictions. See May 1, 1990 memo to the House and Senate Committee on Appropriations from Terrance J. Wear, President, Legal Services Corporation, reprinted in 24 CLEARINGHOUSE REV. 514 (1990).

115. Rule 4.4 of the *Rules of Professional Conduct* provides some support for this view. The comment states: "Responsibility to a client requires a lawyer to subordinate the interests of oth-

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lawyers at odds with tenant groups supporting management's use of evictions to increase safety.<sup>116</sup> If a legal assistance agency does represent an organized tenant group, it may have a conflict of interest with future individual eviction cases. This was true for Greater Boston Legal Services (GBLS), which represented tenants in a 1980 class action suit that forced the Boston Housing Authority into receivership.<sup>117</sup> When the receiver began expeditious evictions of tenants involved in drug activities, GBLS could not defend those individuals faced with eviction.<sup>118</sup>

Many tenant associations want to work with management to address issues of crime and drugs. Legal assistance agencies can play an important role in assisting with such collaborative efforts.<sup>119</sup> Few, however, have chosen that route:

Too often, the attention of legal services advocates is focused on the legal rights of an individual public housing tenant whose housing rights are threatened by charges of illegal weapons possession, drug dealing, or other behavior not permitted under the lease. . . . [F]ew legal services programs have attempted to provide legal and other assistance to public housing tenants' associations in defining and implementing measures to reduce violent crime in the housing project. In the absence of leadership from tenants' associations in addressing these issues . . . [solutions are] now being imposed on public housing residents . . . when it should have been defined and negotiated by the residents themselves.<sup>120</sup>

Those who have worked to reduce drug-related crime in public housing recognize the importance of evictions.<sup>121</sup> "An enforceable, equitable, and efficient eviction policy for cause is a critical element in any

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ers to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons." THOMAS D. MORGAN & RONALD D. ROTUNDA, 1995 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 78 (1995).

116. See ROGER L. CONNER & ROB TEIR, NEIGHBORHOOD LEGAL SERVICES AND TENANT-SUPPORTED EVICTIONS: RECONCILING TENANT ADVOCACY AND SAFE COMMUNITIES IN LOW-INCOME HOUSING IN PITTSBURGH *passim* (1994) (available from The American Alliance for Rights and Responsibilities, Washington, D.C.) (describing one such conflict). Michael Kearse, Chief of the Anti-Narcotics Strike Force of the NYCHA reports that tenants lean out from their windows and cheer when the HA is successful at evicting a tenant involved in drug-related activity. See Conversation with M. Kearse, Nov. 8, 1996.

117. *Perez v. Boston Housing Auth.*, 400 N.E.2d 1231 (1980). Part of their claim was that crime was too high in the projects.

118. See KEYES, *supra* note 2, at 186; LUBAN, *supra* note 40, at 296-97. Luban uses the *Perez* case in creating a composite story. The primary source of information on this is a student paper unavailable to the author.

119. See, e.g., Diana A. Johnston, *Drugs and Public Housing*, 24 CLEARINGHOUSE REV. 448 (1990) (noting that legal assistance attorneys assisted tenants in developing strategies for combating drug-related crime).

120. Jan Stokley & Anthony Daysog, *Neighborhood Organizations Respond to Street Crime*, 28 CLEARINGHOUSE REV. 483 (1994).

121. It must be said that evictions are not a "silver bullet" for the problems facing public housing tenants. Drug treatment on demand, a living minimum wage, adequate funds for job training, increased maintenance of public housing, and high quality daycare are just some of the other kinds of programs that need to be implemented to begin to address these other issues.

drug fighting strategy, and its absence it exacts a heavy price."<sup>122</sup> Legal assistance attorneys, however, have several concerns about desisting from representing tenants in drug-related evictions. These concerns include: providing adequate due process to all, protecting individuals from homelessness, and protecting innocent victims such as grand-mothers unaware of their grandchildren's drug dealing.

Public housing residents have responses to these concerns. First, lawyers should balance concern about procedural rights for individuals with the consequences for the community of unwarranted delays in evicting dangerous tenants.<sup>123</sup> Second, legal assistance lawyers should recognize that expedited evictions free up apartments for families who wait years for public housing rather than concentrating on homelessness of current lease-breaking tenants.<sup>124</sup> And third, regarding innocent family members, it is rare that a grandmother is totally unaware of her grandchild's drug dealing.<sup>125</sup> Stricter rules enforcing leaseholder responsibility might help an intimidated tenant rid her apartment of a dangerous guest or relative.<sup>126</sup> Legal assistance should collect data about eviction cases to determine which involve innocent leaseholders, and restrict their representation to those cases.<sup>127</sup>

In short, public housing residents may be prepared to forego a certain level of procedural protection in exchange for improved living conditions. One tenant representative put the issue in perspective:

There was a time when there were standards for acceptable behavior. You didn't write on the walls, you didn't play in the hallways—not because you'd been told not to, but because it wasn't acceptable, and everyone knew it. There were consequences if it happened. But things have changed. . . . I remember hearing about the clean sweeps [unannounced searches for drugs and weapons] in Chicago and thinking, "please do it here!" The environment has become so controlled by drugs and gangs.<sup>128</sup>

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122. KEYES, *supra* note 2, at 177.

123. *See id.* at 75.

124. In 1991 approximately four million families lived in public housing and one million were on waiting lists. *See* Susan Diesenhouse, *Public Housing: Why The Bad Rap?*, 48 J. HOUSING 293, 294 (1991). In 1992, 240,000 New York families were on the waiting list for 8000 units available, annually creating waits of up to twenty years. *See* Kennedy, *supra* note 96, at 31.

125. *See* Kennedy, *supra* note 96 ("When your kids are walking around in \$100 sneakers and they don't have jobs, something is going on.")

126. Many PHAs have procedures by which tenants can avoid eviction by permanently excluding a guest or family member involved in drug activity. The NYCHA's stipulation process is very successful and has been helpful to tenants were unable to otherwise exclude such a person. *See* Kearsse, *supra* note 116.

127. *See* Kay Y. Young, *Handling a Drug-Related Eviction from Public Housing*, 25 CLEARINGHOUSE REV. 793, 794 (1991) (suggesting a "policy to review each case carefully as it comes up, and make a decision at that time" and that "an office may decide to accept only those cases in which innocent family members will be adversely affected by the eviction").

128. *Rounding Out the Table: Opening an Impoverished Poverty Discourse to Community Voices*, 30 HARV. C.R.-C.L.L. REV. 319 (Summer, 1995)(quoting Geraldine M. David, Chair-

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Nowhere is the conflict between community desires for speedy drug-related evictions and actions by legal assistance lawyers more evident than in New York. Until recently, the New York City Housing Authority (NYCHA) could almost never evict a tenant for drug activity,<sup>129</sup> in large part because of the 1971 *Escalera* Consent Decree.

### C. *Defining Due Process for Public Housing Tenants: The Original Escalera Case*

The original *Escalera* case,<sup>130</sup> tried by legal services attorneys, responded to perceived abuses by the NYCHA<sup>131</sup> and continued a general focus by OEO legal services lawyers on establishing procedural rights for poor people receiving government benefits.

At the time of *Escalera*, the NYCHA had explicit procedures for tenant evictions. A tenant could meet with the manager, hear the grounds of the eviction, and present her side.<sup>132</sup> The tenant could appeal an adverse determination in writing to a reviewing official (if the grounds were breaking the rules), or to the Tenant Review Board (TRB)<sup>133</sup> (in the case of non-desirability). If the appeal failed, the manager served a one month notice to vacate. Beginning in 1962, a tenant facing eviction for non-desirability was afforded an opportunity to appear in person before the TRB if the written appeal failed.<sup>134</sup> At that meeting, the Board had discretion to require more investigation, refer the case to social services, or defer action for a period of observation.<sup>135</sup> At the end of this administrative process, if the tenant felt aggrieved, she could institute a special proceeding in the New York State Supreme Court.<sup>136</sup> In that proceeding,

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person, Whittier Street Tenants Association).

129. See KEYES, *supra* note 2, at 103.

130. *Escalera v. NYCHA*, 425 F.2d 853 (1970).

131. See Harold Weintraub, Aaron Kohn, & Jeanne Hollingsworth, *The Mixed Blessing of Escalera: New Vistas of Due Process for Public Housing Tenants in Termination of Tenancy*, XVII N.Y.L.F. 1, 4 (1971) [hereinafter, *Mixed Blessing*] (describing pressure on PHAs to maintain physical plants combined with what might euphemistically be called "normal human frailties" led to abuses including disfavoring single parent families); see also *Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects*, 77 YALE L.J. 988, 989-91 (1968) [hereinafter, *Public Landlords*] (citing examples of abuse such as denying tenant's right to keep his seeing-eye dog, and using eviction to discourage tenant organizing); KEYES, *supra* note 2, at 12 ("Much of the legal service work undertaken during the 1960s and 1970s by activists on behalf of tenants was an effort to right the balance of power between the housing authority, most often represented by the manager, and the tenant.").

132. See *Mixed Blessing*, *supra* note 131, at 11.

133. The TRB consisted of eight officers of the NYCHA. See *Escalera*, 425 F.2d. 853, 857.

134. The tenant was not, however, generally allowed to see the contents of his folder which was used by the Board to inform their decisions. Nor was a tenant given access to the regulations governing the TRB. No transcripts of the proceedings were made. *Escalera*, 425 F.2d at 858.

135. See *Mixed Blessing*, *supra* note 131, at 12.

136. See *id.* at 13. This proceeding was under article 78 of the New York Civil Practice law

however, the court could consider only whether NYCHA had abused its authority, not the merits of the case.<sup>137</sup>

In fact, the NYCHA provided more formal procedures for public housing tenants facing eviction than almost any other local PHA.<sup>138</sup> The *Escalera* plaintiffs, however, found them insufficient to meet due process requirements. They were demanding a hearing prior to termination for all cases and written notice prior to a hearing of all grounds to be relied on in the decision, notice of the rules governing the TRB at the hearing, inspection of the tenant folder, exclusion of items about which advance notice was not given, confrontation and cross-examination of witnesses, exclusion of hearsay items, the right to compel attendance of witnesses, the keeping of a written record of the hearing, an impartial hearing examiner, a written decision with findings of facts and reasons, and access to prior decisions as precedent.<sup>139</sup>

Initially, the case was dismissed on the grounds that the Authority's termination procedures conformed to due process standards. The Second Circuit reversed and remanded the case for a trial on the merits. In reaching its opinion, the court relied heavily on *Goldberg v. Kelly*,<sup>140</sup> which had been decided by the Supreme Court only a month before. *Escalera* joined *Goldberg* as one of the foundational due process victories won by legal services lawyers during the late 1960s and early 1970s.<sup>141</sup>

Before the new trial, attorneys from both sides agreed to negotiate a consent decree under Judge Walter R. Mansfield's supervision. Ever since, the *Escalera* Decree has defined procedures for all tenants facing eviction from NYCHA projects, except for nonpayment of rent or excess-income.<sup>142</sup> The consent decree requires a full evidentiary hearing and a nine-step eviction process that typically takes two years to complete.<sup>143</sup>

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and Rules, § 7801 *et seq.*

137. See New York State, Civil Practice Law and Rules, Article 78 Proceedings, § 7803.

138. See *Public Landlords*, *supra* note 131, at 993.

139. See *Escalera v. NYCHA*, 924 F. Supp. 1323, 1327 (S.D.N.Y. 1996) (*Escalera II*).

140. 397 U.S. 254 (March 23, 1970) (holding that pre-termination hearing is required to meet due process requirements before welfare benefits could be terminated).

141. "It is indicative of the extent to which *Escalera* broke new ground in due process requirements as to public housing evictions that the only housing case the Second Circuit could find to cite for requiring a trial-type hearing was an inferior state court decision . . . and, by analogy, *Goldberg*." *Mixed Blessing*, *supra* note 131, at 37.

142. HUD adopted these procedures for all local PHA's in *Circular RHM 7465.9* (Feb. 22, 1971). See Al Hirshen, *HUD Issues New Mandatory Circulars on Public Housing Leases and Grievance Procedures*, 4 CLEARINGHOUSE REV. 582, 583 (1971) (upheld by the Eight Circuit in *Housing Authority of the City of Omaha v. U. S. Housing Authority and National Tenants*, 468 F.2d 1, 5-6 (1972)). HUD has since revised its policies for drug-related evictions. All major PHAs have obtained HUD's approval for use of summary evictions procedures for drug-related evictions. For NYCHA, however, the *Escalera* Consent Decree has continued to govern public housing evictions.

143. See Valerie D. White, *Modifying The Escalera Consent Decree: A Case Study on the*

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In hindsight, this result, like other due process victories, was a double-edged sword.<sup>144</sup> Michael Schill has observed that the courts' extensive due process requirements for both eviction and tenant selection have actually contributed to the concentration of poverty in public housing.

The ability of PHAs to screen out potentially troublesome tenants has been reduced, as has their power to evict those harmful to the community. As a result, the quality of life in some public housing developments has deteriorated, causing those residents who possessed sufficient resources to move away and leave behind an increasingly marginalized population.<sup>145</sup>

As described above, deterioration escalated with the influx of crack cocaine and the rise of drug-related violence. The federal government's response to the monumental rise of drug-related crime led to expedited eviction processes for public housing authorities in other cities.<sup>146</sup> Yet, because of the *Escalera* decree, it remained almost impossible to get a court-ordered eviction in New York City.<sup>147</sup>

In 1988, the New York County District Attorney's office found a possible end run around the *Escalera* decree for drug-related evictions. Using a 100 year-old statute called the Bawdy House Law,<sup>148</sup> district attorneys could use a summary eviction proceeding to evict tenants involved in illegal activity. Originally enacted to combat prostitution and illegal liquor production, the law's language can be construed to include any "illegal trade, business or manufacture."<sup>149</sup> Anyone living near an apart-

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*Application of the Rufo Test*, 23 FORDHAM URBAN L. REV. 390-91 (1996). For an extensive review of the procedures required by the consent decree (including the full text in an appendix) see *Mixed Blessing*, *supra* note 131, at 39-41, 86-90.

144. See J.S. Fuerst & Roy Petty, *Due Process—How Much is Enough?*, 79 PUB. INTEREST 96, passim (1985). The authors also cite Jerry Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772 (1972).

145. See Schill & Wachter, *supra* note 90, at 1298.

146. See White, *supra* note 143, at 395. HUD allows PHAs to use expedited procedures for drug-related evictions as long as "prior to eviction, a tenant [is] given a hearing in court which the Secretary determines provides the basic elements of due process." 42 USCA §1437(d)(k) (1994). The NYCHA's proposed use of the Bawdy House laws received a favorable due process determination from HUD in a letter dated Dec. 3, 1991. Aviles Affidavit in support of Motion to Modify ¶¶35-36, *Escalera v. NYCHA*, 924 F. Supp. 1323 (S.D.N.Y. 1996).

147. See KEYES, *supra* note 2, at 103.

148. New York RPAPL § 715.

149. McKinney's RPAPL § 715 (1). The law reads:

An owner or tenant . . . of any premises within two hundred feet from other demised real property used or occupied in whole or in part as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade, business or manufacture . . . or any duly authorized enforcement agency of the state or of a subdivision thereof . . . may serve personally upon the owner or landlord of the premises so used or occupied . . . a written notice requiring the owner or landlord to make an application for the removal of the person so using or occupying the same. If the owner or landlord . . . does not make such application within five days thereafter; or, having made it, does not in good faith diligently prosecute it, the person . . . giving

ment being used for illegal activity may request that the landlord take action to remove the persons carrying out the activity.<sup>150</sup> If the landlord does not act, the person can then proceed directly. The district attorneys would thus would serve notice to the NYCHA, as landlord, to remove the offending tenants. When the *Escalera* decree made it impossible for the NYCHA to comply with this notice,<sup>151</sup> the district attorneys would proceed with the eviction directly. The proceeding could take only two to three months as compared with the two years for an *Escalera* case.<sup>152</sup>

The Bawdy House Law offered the NYCHA a real tool in its struggle to provide public housing tenants with a safe living environment.<sup>153</sup> But first, the NYCHA had to modify the *Escalera* decree to allow them to bring these cases directly.<sup>154</sup>

#### D. Modification of the Escalera Consent Decree

In August 1993 the NYCHA moved to modify the *Escalera* Decree<sup>155</sup> and set in motion a case that would crystallize the issue of drug-related public housing evictions. The NYCHA wanted to use the Bawdy House Law "to bypass the administrative hearing process imposed by *Escalera* and file summary eviction proceedings against tenants who use their residence for illegal commercial gain."<sup>156</sup> Given the dangers resulting from the drug trade in their projects, the NYCHA felt it was critical to cut the time it took to remove involved tenants.<sup>157</sup> The NYCHA noted that due

the notice may bring a proceeding under this article for such removal as though the petitioner were the owner or landlord of the premises . . . .

150. Twenty-six homeowners and tenants first succeeded in using the Bawdy House Laws to evict other tenants using their apartment for drug related activities in 1986. *See Kellner v. Cappellini*, 516 N.Y.S.2d 827 (1986). The court held that a proceeding under RPAPL § 715 is "based on a violation of law and not a violation of a lease agreement and therefore it is not necessary to first terminate the lease." The court acted to "permanently close this 'crack house'" by evicting all tenants under the Bawdy House law. The action was required as "the only effective solution to save this neighborhood" because of the alarming increase in crack-related crime and the inability of police action to stop the drug-related activity in that premises. *Id.* at 831.

151. *See White, supra* note 143, at 394 n.115.

152. *Escalera v. NYCHA*, 924 F. Supp. 1323, 1330 (S.D.N.Y. 1996).

153. NYCHA did not want to depend upon district attorneys to bring these cases. These evictions are a priority to the HA, but only one effort among many for the district attorneys. *See Kearse, supra* note 116.

154. Judge Preska rejected NYCHA's first claim that the Bawdy House Law could be used without modification of the decree. *See Escalera*, 924 F. Supp. at 1335.

155. Defendant's Motion to Modify the Escalera Decree, *Escalera v. NYCHA*, 67 Civ. 4307 (WRM) (S.D.N.Y. Aug. 2, 1993). The Decree itself allows for modification "in the light of experience, the volume of the case load involved, economic considerations, and the needs of the Authority and its tenants; provided that, any such changes are consistent with, and do not contravene, due process of law." Stipulation of Settlement, Procedures for Termination of Tenancy, ¶ 12.

156. *White, supra* note 143, at 393.

157. Use of the Bawdy House laws gives teeth to the NYCHA stipulation agreements with leaseholders. A leaseholder can avoid eviction through settlement if she agrees to permanently



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process rights of tenants facing such evictions would be maintained because the Bawdy House Law provides for notice, discovery and file access.<sup>158</sup> In addition, courts in Bawdy House eviction proceedings have adopted standards to protect innocent tenants and to apply mitigated sanctions where appropriate.<sup>159</sup>

Representing the “plaintiffs” against this effort was the Legal Aid Society of New York City, the original counsel for the Escaleras. In order to modify a consent decree, the NYCHA would have to show “a substantial, unforeseen change in fact as required.”<sup>160</sup> Legal Aid claimed that the NYCHA had failed to do so, providing expert testimony to show that “despite much exaggeration in the media and elsewhere, the incidence of drug-related crime is not significantly different today than in the 1970s . . . .”<sup>161</sup> Legal Aid claimed that the “rights of innocent family members” would be put at great risk by loss of any aspect of the *Escalera* procedures.<sup>162</sup> Legal Aid did not claim that such a change would create a constitutional violation.<sup>163</sup>

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exclude the individual who actually performed the illegal activities. She must also agree to unannounced visits (between 9:00 am and 7:00 pm) by a special investigation task force of the Anti-Narcotics Unit. If the excluded individual is found inside, eviction is automatic. (Under the administrative process, finding the individual would only start the eviction process.) See Kears, *supra* note 116. Mr. Kears reports that many leaseholders appreciate the help in getting a problem child or grandchild out of the house. Legal Aid, however, finds this stipulation process, with the unannounced visits, “offensive.” See Conversation with Scott Rosenberg, Attorney, Civil Appeals and Law Reform Division of Legal Aid Society of N.Y., Nov. 12, 1996.

158. When HUD issued a determination letter that New York State’s judicial proceedings guaranteed due process, see *supra* note 146, they noted that a pre-termination hearing was being provided and that it need not be an administrative one. See letter from Jack Kemp to Governor Mario M. Cuomo, Dec. 3, 1991.

159. Defendant’s Motion, *supra* note 155, at ¶¶ 275-283. This aspect was of great concern to Legal Aid. Although the courts do apply mitigated sanctions (referral to social services, probation, or permanent exclusion of particular individual) when appropriate, they are not *required* to do so. Through two other consent decrees (*Tyson* and *Randolph*) innocent tenants facing eviction because of activities of family members must have mitigated sanctions made available to them by NYCHA. Legal Aid felt that use of the Bawdy House Laws would violate these other two decrees. See Rosenberg, *supra* note 157. The court chose not to address this issue, saying, “to the extent that the decree is inconsistent with the Bawdy House Law and the Housing Authority remains bound by the *Tyson-Randolph* Decree, the resolution of this controversy must be addressed in a later proceeding.” *Escalera v. NYCHA*, 924 F. Supp. at 1335 n.9.

160. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). This test deals with modifications of decrees in institutional reform cases, replacing a more strict standard used for modifications of other consent decrees. See White, *supra* note 143, at 384.

161. Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion To Modify The *Escalera* Consent Decree, Preliminary Statement at 2.

162. *Id.* at 5-7.

163. See *Escalera*, 924 F. Supp. at 1342. The NYCHA cites requirements to follow rules of evidence (i.e., no use of hearsay) in Bawdy House proceedings and the availability of a jury trial as increased procedural protections for tenants facing eviction. See Kears conversation, *supra* note 116. Legal Aid says that formal trial hearings are intimidating for tenants who are often not represented by lawyers See Rosenberg, *supra* note 157.

Weighing in on the side of the NYCHA was the Interim Council of Presidents (ICOP),<sup>164</sup> made up of the eight district chairpersons of each New York City public housing district.<sup>165</sup> The group serves in an advisory capacity to the NYCHA and “encourage[s] tenant involvement in issues affecting their interests.”<sup>166</sup> The ICOP had pro bono representation in this matter from Frank S. Moseley, a partner at the law firm of Davis Polk and Wardwell. The American Alliance for Rights and Responsibilities (AARR) served as co-counsel.<sup>167</sup> In an Open Letter to their fellow tenants and elected tenant leaders, the ICOP explained:

ICOP got involved in the case because of the need to protect tenants against the ravages of drug trafficking and violence. We also felt that the court should hear from elected tenant leaders before making a decision that so directly affects our lives. Because Legal Aid was on the other side, we got our own lawyers and are asking the court to allow us to directly participate in the case.<sup>168</sup>

Legal Aid fought ICOP’s request to intervene, claiming, among other things, that the NYCHA represented ICOP’s views.<sup>169</sup> Judge Preska allowed ICOP to intervene, setting the stage for Legal Aid Society of New York to directly oppose public housing residents in court.<sup>170</sup>

The sole issue of fact at the *Escalera* hearing was whether drug-related crime had increased since the 1970s. At the end of the three-day hearing, Judge Preska reserved decision. On April 19, 1996, she handed down a fifty-five page opinion granting the NYCHA’s request to modify the *Escalera* Decree.

164. The ICOP moved to intervene as intervenor-plaintiffs and served complaint on the NYCHA. Tenant leaders were unhappy with NYCHA’s efforts to deal with drug related crime but saw the modification effort as a right step. See Conversation with Frank Moseley, Aug. 9, 1996.

165. Affidavit of Frank S. Moseley ¶ 2, (explaining that district chairpersons are elected by the presidents of each development who are, in turn, elected by the residents of each development).

166. *Id.* at ¶ 3.

167. The AARR is a non-profit public-interest group founded in 1988 whose mission is to “restore the spirit of community in the United States. . . . [Its] approach is to identify, promote and defend new approaches which make citizens part of the solution, and strike a balance between extreme rights claims and those who would sacrifice civil liberties as means to an end.” Affidavit of Roger Conner in Support of Motion To Modify and Intervene, at ¶ 2.

168. An Open Letter from The Interim Council of Presidents. A copy was provided to the author by AARR.

169. Plaintiffs Memorandum of Law In Opposition To Motion To Intervene, at 19. Legal Aid understood its client to be “all tenants facing eviction or at risk of facing eviction.” In deciding to oppose the modification, Legal Aid consulted with “advocates and some tenants.” They determined that use of Bawdy House laws would not contribute to overall safety and that loss of procedures were a serious threat to their client. See Rosenberg, *supra* note 157.

170. See *Public Housing Tenants Fight Legal Aid in Court*, Re: Rights & Responsibilities, 1 (December 1995) (available from the American Alliance for Rights & Responsibilities, Washington, D.C.) (claiming it was the first time in the history of Legal Aid.)

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Judge Preska found that drug-related violence has increased enormously.<sup>171</sup> Following the *Rufo* Test,<sup>172</sup> she held that modification of the *Escalera* Decree was warranted since the NYCHA had proved that a significant change in factual conditions existed.<sup>173</sup> Because of this change in fact, the Judge found that continued compliance with the *Escalera* Decree “has become substantially more onerous and is detrimental to the public interest.”<sup>174</sup>

The *Rufo* test for modification of institutional consent decrees has two prongs. After meeting the first prong’s requirement that there be a change in fact (or law)<sup>175</sup>, the NYCHA must also show that the “proposed modification is suitably tailored to the changed circumstance.”<sup>176</sup> “Under this requirement, the proposed modification (1) must not create a constitutional violation, (2) must be tailored to resolve the problems created by the changed circumstances, and (3) should give deference to local government agencies.”<sup>177</sup> Judge Preska found that the NYCHA met all three of these hurdles.

First, Judge Preska’s examination of the Bawdy House Law revealed no denial of constitutionally secured rights since it provides for a trial before a judge with opportunity to cross-examine witnesses.<sup>178</sup> Second, she found that the use of the Bawdy House Law was sufficiently tailored to address the rise in drug-related crime and the need for the Housing Authority to provide safe housing to its tenants.<sup>179</sup> The proposed modification addresses the precise problems that have arisen from this change in fact.<sup>180</sup> Finally, Judge Preska accorded significant weight to the Housing Authority’s preference for use of the Bawdy House Law over adjustments to the *Escalera* Decree.<sup>181</sup>

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171. *Escalera*, 924 F. Supp. at 1332. As regards the Escaleras’ experts, Judge Preska was not convinced by their efforts “to minimize the stark differences between drug trafficking in 1971 and that in 1996.”

172. *See supra* note 160.

173. *See Escalera*, 924 F. Supp. at 1339-40.

174. *Id.* at 1340-41 (e.g., neighbors of drug traffickers who must withstand violent home environments and public housing applicants unable to get units that are occupied by drug-dealers).

175. The NYCHA argued alternatively that there had been a change in law since 1971 pertaining to evictions of drug dealers from public housing citing changes in HUD regulations. Judge Preska, however, found no such change. *See Id.* at 1341-42. Legal Aid saw this finding as a major victory, and one of the reasons that they decided not to appeal. If a change in law had been found it would allow for more sweeping changes to the consent decree. Rosenberg conversation, *supra* note 157.

176. *Id.* at 1342 (quoting *Rufo*, 502 U.S. at 391).

177. White, *supra* note 143, at 407 (footnote omitted).

178. *See Escalera*, 924 F. Supp. at 1343-44.

179. *See Id.* at 1344-45. The judge disagreed with the Escaleras that “tinkering” with the Decree would “sufficiently . . . resolve the problems created by the significant change” of fact.

180. *See id.* at 1344.

181. *See id.* at 1345.

The judge emphasized that the modification would only be used against tenants who use their apartments for illegal activity. All other evictions would still be covered by the *Escalera* administrative procedures.<sup>182</sup> It is “not a tool to evict innocent tenants or to impose vicarious liability on tenants for the conduct of others.”<sup>183</sup> Judge Preska stated that “even the Escaleras recognize that if there is ‘a completely innocent tenant, then there would be no Bawdy House case.’”<sup>184</sup> Legal Aid responded to the opinion by stating simply that their “clients are unhappy that the judge saw fit to take rights away from innocent family members.”<sup>185</sup> However, the organization did not appeal.<sup>186</sup>

This Paper explores a specific issue: legal assistance lawyers’ decisions to represent individual tenants facing drug-related evictions from public housing in opposition to the explicit desires of organized tenant groups. This issue is both a contemporary form of the historic tension between social reform and equal access and evidence of the limitations of legal reform as a tool for social reform. The Legal Aid Society of New York fought modification of the *Escalera* Decree in order to preserve procedural safeguards. But procedural rights do not address the serious effects of drug related crime on the lives of tenants.<sup>187</sup> Just as early Legal Aid attorneys were concerned primarily with equal access to justice (and not to the rest of their clients’ lives), many of today’s legal assistance attorneys remain focused on the protection of individual procedural due process rights. When the poor want to consider trade-offs between procedural protections and improvement of safety for their community,<sup>188</sup> attorneys

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182. County district attorneys control which cases can be brought under Bawdy. Each DA develops a required standard (e.g., amount of drugs that need to have been found on the premises). In Manhattan that standard is quite high. In Kings County, the DA requires a conviction first. In each case, however, there has to be actual evidence of drug-related activity. See Kearsse, *supra* note 116.

183. *Escalera*, 924 F. Supp. at 1343.

184. *Id.* (quoting the Trial transcript at 208).

185. Jan Hoffman, *Process Eased For Evicting Drug Dealers*, N.Y. TIMES, Apr. 20, 1996, at A26 (quoting Judith Goldiner, of Counsel for The Legal Aid Society).

186. Legal Aid considered appealing but felt that they had won a partial victory and did not want to risk losing on that issue. See *supra* note 175.

187. The Legal Aid lawyers, in consultation with other advocates and some tenants, determined that this modification would not promote greater safety in public housing. Fighting the modification was an effort to protect procedural rights for the original class of tenants. See Rosenberg, *supra* note 157. I question the degree to which Legal Aid consulted “clients” on this issue. Rule 1.4(b) of the *Model Rules of Professional Conduct* seems to require that it be the clients themselves who make this kind of determination (“A Lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”) See MORGAN & ROTUNDA, *supra* note 115, at 13.

188. Observers from within the legal assistance ranks have recognized the need for change: Legal services programs will face increased client demands for representation on issues directly resulting from neighborhood deterioration, increased crime and drug activities . . . Legal services advocates can attempt to address these issues directly by allocating resources for litigation and other representation necessary to help end discrimi-

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often fail to listen.<sup>189</sup> I believe the serious conditions facing distressed public housing communities require a reconsideration of this position.

### IV. A COMMUNITY REPRESENTATION MODEL FOR LEGAL ASSISTANCE LAWYERING

#### A. Introduction

Because current legal assistance strategies are having limited success in meeting the needs of client communities and in promoting community development, it makes sense for legal assistance lawyers to reallocate the scarce resource of lawyering for the poor. A community representation vision requires a focus on the needs of the community in setting priorities for legal assistance lawyering.<sup>190</sup> It innovatively strategizes to meet the needs of the poor by pushing lawyers to look outside the box of traditionally defined priorities. At times, this model will place community needs ahead of the individual rights where they conflict. Community representation will also designate fewer resources to support current specializations like family, tenant/landlord, and consumer law.

This model supports the development of community. Neighborhood residents use groups and institutions such as churches, community development organizations, and tenant associations to solve community problems. A community representation model of legal assistance lawyering supports these efforts and helps gain for the poor a sense of control over their own lives. Significant positive change in troubled inner-city neighborhoods and distressed public housing cannot occur without this sense of community.

The LSC has begun to recognize the importance of client- community empowerment. In November 1994, LSC held what it called a "long overdue and historic conference" on client issues.<sup>191</sup> At that conference the

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nation against poor minorities and to help revitalize deteriorated neighborhoods. Or legal services advocates can respond to the problems of a few individual clients when often little can be done for a particular client other than buying time for him or her to leave the neighborhood.

Alan W. Houseman, *Poverty Law Developments and Options for the 1990s*, 24 CLEARINGHOUSE REV. 14 (1990).

189. The Legal Aid Society of New York admits that a majority of tenants might be in favor of the modification of the *Escalera* Consent Decree ("you would have to educate them about the choices before taking a vote"). But Legal Aid's job was to protect due process and to argue the law and not to determine what the community wanted. Rosenberg, *supra* note 157.

190. *But see* Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1126 (1990) (recommending a community focus given scarce resources—i.e., helping multiple individuals instead of just one individual). Tremblay is not concerned about community empowerment.

191. Conference Report on the "Client Issues Conference," Nov. 17-20, 1994, at 1 (available through the Legal Services Corporation, Washington, D.C.).

participants<sup>192</sup> developed a shared definition for two aspects of client empowerment: "client involvement"<sup>193</sup>—the client working with the program—and "client engagement"<sup>194</sup>—the program working with the community. Much of the conference focused on working with the community through community-based institutions. Participants recognized that legal services agencies must change if they are to put these ideas into practice. The challenges noted included: overcoming fears of project directors about regulatory prohibitions, priorities, and the unknown; increasing the level of sensitivity of project directors toward client issues; and getting lawyers to take the risk of empowering clients.<sup>195</sup>

Many legal assistance agencies have begun to implement new strategies for meeting client needs beyond the areas of traditional specialization. Ann Southworth notes that many lawyers who work on urban poverty issues use non-litigation strategies in work with client groups such as tenant management organizations, community groups, and unions.<sup>196</sup> Some agencies have created separate housing related departments that focus on work with groups and organizations.<sup>197</sup> Other programs have special units that work on community economic development. A 1995 article in *Clearinghouse Review* entitled "Building a Community Economic Development Unit" reported that approximately twenty percent of the more than 300 legal services programs have devoted substantial resources to these activities.<sup>198</sup>

I applaud the creation of separate departments within agencies that focus on community economic development and housing. They demonstrate that legal assistance agencies recognize the importance of community-based institutions to their work. My model, however, requires more radical restructuring of legal assistance agencies. My normative argument places a priority on the nurturing and maintenance of community. This

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192. Participants included staff and client representatives. Presenters included John Powell (*see supra* note 83), Edgar Cahn (*see supra* note 10), Ann Bailey (*see supra* note 81) client board members, and directors of various Legal Services programs.

193. "[C]lients meaningfully involved in operations of the program . . . with adequate participation levels on boards, all board committees, task forces, etc. Client board members must receive training and information to assure meaningful participation." Conference Report, *supra* note 191, at 9.

194. "[P]rogram staff effectively engaged with client community by working with client organizations, community-based organizations, and other organizations and groups to develop holistic and historical understanding of community culture(s) and needs." *Id.*

195. *See id.* at 8-9. The Conference report does not define what is meant by "risk."

196. Southworth, *supra* note 51, at 231.

197. The Housing Development Unit of the Community Law Offices of Legal Aid is a good example. *See* Brescia, *supra* note 14.

198. Mario Salgado, *Building a Community Economic Development Unit*, 28 CLEARINGHOUSE REV. 981, 982 (1994) ("Many programs . . . have done little CED work, focusing on their traditional role of providing individual legal services in areas such as evictions and public benefits.").

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requires a constant focus on the needs and desire of the community as defined by its institutions and groups.<sup>199</sup> The structure of legal assistance agencies must cast community in this primary role.

### *B. The Model*

Implementation of a community representation model requires three steps. First, geographic areas must be defined capable of creating and maintaining a sense of community. Second, the needs of such communities must be assessed. Finally, community-defined strategies for meeting those needs must be identified and carried out.<sup>200</sup>

#### *1. Neighborhood Focus*

This step involves dividing the client population area into neighborhoods. A neighborhood is an area with some self-recognition.<sup>201</sup> The residents share important institutions such as schools, community policing stations, and political representatives. Neighborhood residents have both reason and opportunity to organize to address common concerns.<sup>202</sup> This joint problem solving reflects community.

Communities will contain different voices within them (e.g., based on race or religion). Such “conflicts of values” can be normatively positive. “It is the clash of norms in the context of a particular dispute that illuminates the larger significance of the dispute and makes it possible to search for a resolution . . . .”<sup>203</sup> Community institutions allow such conflicts to be thrashed out and common concerns to emerge.

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199. When ideas from this Paper were presented at the First Annual Liman Colloquium (Yale Law School, Mar. 5, 1998), many legal services directors voiced disbelief at the notion that a community voice could be determined. Many seemed to feel that the aggregate voices of multiple individual clients were sufficient to determine the needs of the community.

200. I share with Gerald Lopez, *see supra* note 51, at 11-82, the goal of true community empowerment. Lopez’s focus, however, is on the attitudes and approaches of individual lawyers to their work and clients, *see id.* at 28-29. My model focuses on structural changes to facilitate community empowerment. Also, although Lopez stresses collaboration with community groups (i.e., he underscores the failure of regnant lawyers to do that, *see id.* at 24), he does not advocate a strategy of “community as client.” In contrast, my primary goal is the strengthening and/or building of a sense of community as a necessary first step to true empowerment. As noted by Southworth, *see supra* note 51, Lopez ignores the important roles that lawyers can play in aiding community based organization (e.g., as general counsel or as providers of transactional services). Such roles and skills are essential to my model.

201. City residents, when asked, will identify themselves as part of one neighborhood.

202. Robert Ellickson suggests that even a neighborhood focus may be too large for meaningful debate and collective governance. He asserts that block-level institutions are better scaled to serve as “incubators of local social capital.” Ellickson, *New Micro-Institutions for Old Neighborhoods*, 7-8 (Program in Law and Organization, Center for Studies in Law, Economics, and Public Policy, Yale Law School, Working Paper #217).

203. Steele, *supra* note 19, at 744-45.

## 2. *Needs Assessment*

This step is the most critical and difficult. The legal services agency must build a relationship with each neighborhood community. First, the agency must learn who the community is by getting to know its leaders and institutions. Lawyers should search out resources within the community to facilitate this entry process. Churches may offer a good place to begin in many inner-city, African-American communities. Agencies may need to engage the services of organizational or community psychologists to help them.<sup>204</sup> Particular care must be taken to establish and maintain a relationship with the community because it is so essential to the success of all future work.

Out of this initial outreach should come a working group for each neighborhood, composed of a cross-section of community residents and agency staff. Representatives from each working group would also serve on the agency's board of directors. Once a working group has established a level of trust, the group will guide the needs assessment process. This process might involve focus groups, interviews, or town meetings. The working group would then be responsible for using the gathered data to define initial priorities. These priorities would then be reported back to the larger community through meetings and newsletters. Reactions to the priorities would serve as a check on the process.<sup>205</sup>

## 3. *Meeting Needs*

The third step in each identified neighborhood would be to determine how to address the community-identified critical needs. Because I believe institutions best represent community needs and efforts,<sup>206</sup> I assume that organizations are the appropriate clients for this work.

Often, an appropriate client organization will emerge from the needs-assessment step ready to address specific issues. If not, the agency, guided by the working groups, must identify resident-run, community institutions with the capacity and desire to spearhead efforts. A tenant association, for example, might be the likely institution to address neighborhood safety issues. If no institution exists, the agency should work with com-

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204. These professionals can design community-building exercises, advise lawyers about handling interpersonal and group dynamics, and serve as a check on lawyers' resistance or fear of the unknown. There are risks involved in using outside professionals in a process designed to engage a community. It is best if professionals can be found who have significant ties to the community. At the very least, professionals must be matched with important characteristics of the members of the community (i.e., gender, race, ethnicity, age, and religion).

205. Legal services staff will balk at how time consuming such a process would be. I contend that it is time well spent since the result will be community empowerment and change.

206. See *supra* Section I.B.



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munity leaders to develop one.<sup>207</sup> A third option is to work with non-profit organizations which, although not resident controlled, are uniquely capable of addressing a priority need. For example, if affordable housing is a critical need, the agency could work with a non-profit developer.

Working with client organizations on community needs requires multiple skills. Some involve familiar legal areas such as real estate transaction and corporate law. Others such as community organizing and process facilitation may be less familiar. The unique training of lawyers to analyze problems and to think critically will serve as good preparation for the multiple aspects of community work. There will be times, however, when legal assistance agencies will want to invite other professionals such as business people, architects and social service professionals to assist them.

### *C. Implications of the Model for Current Legal Assistance Agencies*

The implications of a move to a community representation model of legal assistance lawyering are extensive. I cannot explore all of them here. Two important areas, however, deserve mention.

#### *1. Agency Structure*

This model suggests a staffing structure built around geographic divisions. A senior lawyer would head a unit focused on a particular neighborhood. The work of each unit would be guided by the community working groups developed during needs assessment. The governing board of the agency would be composed of members of the community working groups and outside attorneys. This structure would be preferable to one built around substantive issues such as housing, community development, or legislative reform. Specialization, as I discussed earlier, may create resistance to recognition of new and changing needs.<sup>208</sup> The neighborhood units will need to retain flexibility. Units should, however, work together to address concerns shared across neighborhoods. A good example of this might be legislative advocacy.

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207. Community development corporations (CDCs) are popular vehicles around which neighborhood residents organize to address common problems. The Housing and Community Development Clinic at Yale assisted the Dwight Community in establishing a CDC. Their work with the CDC continues as that organization addresses specific needs. That partnership's most recent accomplishment was the development of a major neighborhood supermarket.

208. *See supra* Section II.A.

## 2. *Individual Clients*

Adopting a community representation model would mean moving away from the current individually focused structure. A mandatory pro bono system<sup>209</sup> and expanded use of pro se training<sup>210</sup> could be set up to handle individual cases. Until such a system is in place, however, agencies will need to continue individual work such as child custody cases. Because litigation requires extensive resources and provides benefits only to successful parties to the suit, it will be important for legal assistance agencies to develop non-adversarial alternatives for common legal problems.<sup>211</sup> Many more individuals will benefit from the ability to solve their problems without resorting to the court system.

A move to a community representation model will create conflicts of interest. For example, an agency representing a tenant association that has been working with the local housing authority to facilitate drug-related evictions would be precluded from representing the individuals being evicted.<sup>212</sup>

What would such a model have meant for the *Escalera* modification case discussed in Part III? David Luban suggests that before deciding how to act, a lawyer facing this situation should:

canvass the . . . community service groups, housing experts, tenant organizations, and individuals . . . carefully explain the potential drawbacks of allowing the camel of summary eviction to insinuate its nose back into the tent, as well as the problems posed by violence in public housing . . . Then they should act on the advice of those groups and individuals who represent their client population as a whole.<sup>213</sup>

It is likely that such consultation with community leaders would have led Legal Aid to drop its efforts to block the modification. This does not

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209. Luban discusses such a plan. *See supra* note 40, at 277-89.

210. *See, e.g.,* Douglas Martin, *For Poor, Do-It-Yourself Divorce*, N.Y. TIMES, Nov. 20, 1996, at B1. Rosemonde Pierre-Louis, who helped establish the Pro Se Divorce Workshop calls winning one's own divorce a "model of empowerment." Pro se does not work for contested divorces. All of the women interviewed faced abuse from their husbands, but only one was having the divorce contested by the husband.

211. The "Drug Court" system is a good example. It involves judges in supervision of drug rehabilitation for individuals who would otherwise receive punishments immediately. *See* Elaine Song, *Cared Straight*, CONN. L. TRIB., Aug. 26/Sept. 2, 1996, at 1; *see also* Cahn & Cahn, *supra* note 10, at 1016 (claiming a need for "the creation (and legitimization) of new justice-dispensing institutions . . . and the development of forms of group representation as a means of enfranchisement").

212. Ray Brescia reported that such conflicts occurred frequently in his work with tenant groups. *See* Brescia, *supra* note 14.

213. LUBAN, *supra* note 40, at 339. I differ from Luban in that his call for political action, although proposed as a joint effort with the community, still feels imposed upon the community. My model may lead legal assistance lawyers to some very mundane, non-radical work on behalf of a poor community. The radical concept in my model is that the entire legal assistance agency is structured so as to empower the "community as client."

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mean that Legal Aid would have had no role to play. Instead, it means that Legal Aid would have represented the community through the ICOP tenant association. The agency might have offered up front to work with the Housing Authority on the modification to ensure protection of the community's interests.<sup>214</sup> This model would, I believe, lead legal assistance organizations to refrain from taking most cases that involved evictions of drug dealers or their families.<sup>215</sup>

The structural changes needed to adopt a community-representation vision would meet with resistance from current staff. Many of these lawyers will not give up the ideal of providing services to each poor person who needs them.<sup>216</sup> Other lawyers may be reluctant to give up work at which they are highly skilled. For these reasons, the model I propose would no doubt lead to a change in the kinds of people who choose legal assistance careers.

The implications of this for the quality of lawyering for the poor are unknown. But the alternative to change—the status quo—is unacceptable.

Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put her skills to the task of helping poor people organize themselves. This is not the traditional use of a lawyer's skills; in many ways it violates some of the basic tenets of the profession. Nevertheless, a realistic analysis of the structure of poverty, and a fair assessment of the legal needs of the poor and the legal talent available to meet them, lead a lawyer to this role.<sup>217</sup>

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214. Legal Aid claims to have offered to work with the NYCHA on this. The HA refused. See Rosenberg, *supra* note 157. I was unable to confirm this with the HA because of staff turnover. However, Frank Moseley, the attorney for the tenants knew nothing of such an offer. See Moseley, *supra* note 164. If Legal Aid's client had been the tenant association instead of the class of tenants facing eviction, the HA might not have refused.

215. It is possible to imagine an elderly public housing project where many of the tenants have custody of their grandchildren. This community of tenants might be particularly afraid of changes in eviction procedures that allow leaseholders to be evicted based upon the behavior of family members. The role of legal services in that case would be to work with the local PHA to ensure that safeguards are followed so that elderly tenants are protected.

216. The Liman Colloquium, see *supra* note 199, provided evidence of resistance by some current legal services directors.

217. See Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1049 (1970).

