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THE IMPACT OF THE CURRENT ECONOMY ON ACCESS TO JUSTICE

Kathleen A. McKee

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THE IMPACT OF THE CURRENT ECONOMY ON ACCESS TO JUSTICE

Kathleen A. McKee*

*"There will always be poor people in the land. Therefore I command you to be openhanded toward your brothers and toward the poor and needy in your land."*¹

I. INTRODUCTION

The adequacy of access to justice in the American legal system is not a newly emergent issue. Discussion acknowledging this right dates back to colonial times. For example, in 1932, the United States Supreme Court noted in the case of *Powell v. Alabama* that the right to counsel in criminal proceedings can be traced back to colonial times in America.² The Court remarked that the right to be heard must encompass the right to be heard by counsel if it is to be meaningful.³ In the ongoing dialogue on this issue, primacy has been given to the right of criminal defendants to have legal counsel.

The right to counsel in civil cases, when acknowledged, is given considerably narrower scope. For example, in *Lassiter v. Department of Social Services*,⁴ a case in which a state department of social services petitioned to terminate the parental rights of a mother who was incarcerated at the time of the termination proceeding, the Court followed the analysis set forth in *Mathews v. Eldridge*.⁵ In assessing whether the mother was entitled to legal counsel in *Lassiter*, the United States

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1. *Deuteronomy*, 15:11.

2. 287 U.S. 45, 60-62 (1932).

3. *Powell*, 287 U.S. at 68-69:

What, then, does a hearing include? In our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably could not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id.

4. 452 U.S. 18 (1981).

5. 424 U.S. 319, 335-36 (1976).

Supreme Court adopted the criteria enunciated in *Mathews*. These criteria include:

[T]he private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.⁶

Over time, a number of different mechanisms have evolved to respond to the need to provide legal counsel for those who cannot afford an attorney. For criminal defendants, legal counsel may be assigned through court contracted attorneys, court appointed legal counsel, or appointment of a public defender.⁷ For parties involved in civil suits, legal services funded through the federal Legal Services Corporation (LSC) are the primary source of legal assistance.⁸ These mechanisms are supplemented in varying degrees by state and local bar association pro bono initiatives, private attorney pro bono contributions, and representation of indigent clients by law school clinical programs.⁹

Viewed in the most favorable light, in the aggregate, the cumulative impact of these various initiatives is marginal. Availability of services may vary from state to state and is vulnerable to federal and state budget priorities. Viewed with a more critical eye, the current system is woefully inadequate. As Deborah L. Rhode noted:

"Equal justice under law" is one of America's most proudly proclaimed and widely violated principles. It embellishes courthouse entrances, ceremonial occasions, and constitutional decisions. But it comes nowhere close to describing the legal system in practice. Millions of Americans lack any access to justice, let alone equal access. According to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet. Government legal aid and criminal defense budgets are capped at ludicrous levels, which make effective assistance of counsel a statistical impossibility for most low-income litigants. We tolerate a system in

6. *Lassiter*, 452 U.S. at 27:

The case of *Mathews v. Eldridge* propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

Id. (internal citations omitted).

Although the Court acknowledged that a number of other states accorded a right to appointment of counsel in both negligence and neglect and termination of parental rights cases, it did not find the mother's circumstances militated in favor of a right to counsel in this case.

7. See DEBORAH L. RHODE, ACCESS TO JUSTICE 11 (2004) ("In criminal cases, over three-quarters of defendants facing felony charges are poor enough to qualify for court-appointed counsel. Legal assistance for these defendants takes three main forms: competitive contracts, individual case assignments, and public defender programs.").

8. See LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 20 (2009) ("[Fifty-three] percent (or 4,231) of all legal aid attorneys work for LSC-funded organizations.") [hereinafter JUSTICE GAP 2009].

9. See RHODE, *supra* note 7, at 11-14 (critiquing the level of representation provided through these mechanisms).

which money often matters more than merit, and equal protection principles are routinely subverted in practice.¹⁰

Organizations providing legal services to their clients without charge are increasingly challenged to cobble together an annual operating budget from federal, state, and private charitable sources.¹¹ As a consequence, offering competitive salaries, maintaining staffing levels, and avoiding unrealistic caseloads for attorney staff are constant challenges. These challenges have become even more pressing in the current economy.

Over the past year we have been spectators to an economic meltdown. Jobs have disappeared from the economy at an alarming rate.¹² Unemployment rates are rapidly approaching double digits.¹³ The September 2009 report issued by the U.S. Census Bureau confirms that there has been a significant increase in the number of households living at or below the poverty line.¹⁴ The poverty line is a figure constructed by Census Bureau and “uses money income before taxes and does not include capital gains or noncash benefits (such as public housing, Medicaid, and food stamps).”¹⁵

An increasing number of households are turning to government assistance programs for a portion of the household budget. According to a recent news article, because of the economic recession, “one of every six dollars of Americans’ income is now coming in the form of a federal or state check or voucher.”¹⁶

10. *See id.* at 3.

11. *See* Julie Kay, *Deep Cuts Slam Legal Aid*, NAT’L L.J., Oct. 27, 2008, available at <http://www.law.com/jsp/nlj/pubArticleNLJ.jsp?id=1202425517990&streton=1&hbxlogin=1> (last visited Apr. 25, 2010) (“Legal aid programs throughout the country are facing budget cuts of up to [fifty percent] - yet another victim of the faltering economy.”).

12. *See* News Release, Bureau of Labor Statistics, Commissioner’s Statement on the Employment Situation (Sept. 4, 2009). Total nonfarm payroll employment declined by 263,000 in September. From May through September, job losses averaged 307,000 per month, compared with losses averaging 645,000 per month from November 2008 to April. Since the start of the recession in December 2007, payroll employment has fallen by 7.2 million. *Id.*

13. *Id.* at 1. Since the start of the recession in December 2007, the number of unemployed persons has increased by 7.6 million to 15.1 million, and the unemployment rate has doubled to 9.8 percent.

14. *See* U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008 at 13 (Sept. 2009) [hereinafter INCOME, POVERTY, AND HEALTH].

According to the report:

The official poverty rate in 2008 was 13.2 percent, up from 12.5 percent in 2007. This was the first statistically significant annual increase in the poverty rate since 2004, when poverty increased to 12.7 percent from 12.5 percent in 2003. In 2008, 39.8 million people were in poverty, up from 37.3 million in 2007—the second consecutive increase in the number of people in poverty.

Id.

15. *See* U.S. Census Bureau, How the Census Bureau Measures Poverty, <http://www.census.gov/hhes/www/poverty/povdef.html>. (last visited Mar. 27, 2010); Gordon M. Fisher, *The Development of the Orshansky Thresholds and Their Subsequent History as the Official U.S. Poverty Measure*, <http://www.census.gov/hhes/www/poverty/povdef.html>. (last visited Mar. 27, 2010).

16. Dennis Cauchon, *Benefit Spending Soars to New High; Americans Rely on \$2 Trillion Safety Net*, USA TODAY, June 4, 2009, at A1. Cauchon further notes in his article that “[b]enefits, such as Social Security, food stamps, unemployment insurance and health care, accounted for 16.2% of personal income in the first quarter of 2009, the Bureau of Economic Analysis reports. That’s the highest percentage since the government began compiling records in 1929.” *Id.*

Despite these seemingly high numbers, there are still a number of Americans who will not be able to access these programs. Some parties may not be familiar with government benefits and services for which they are eligible to apply. Others will be stymied by the eligibility and applications requirements.¹⁷ Some parties who manage to make their way through the application process may find their benefits at risk because they did not fully understand requirements imposed by the programs to maintain eligibility that departments of social services erroneously applied the eligibility requirements to their household.

In keeping with the Supreme Court's decision in *Goldberg v. Kelly*, a claimant has a right to request a pre-termination hearing in the event of an agency decision that will result in a termination of government assistance.¹⁸ Some departments of social services have extended this right to a hearing when a decision is made to deny an application for benefits as well. However, without legal assistance, claimants oftentimes find themselves at a disadvantage at the "fair hearing." The focus of the hearing is usually whether the eligible worker properly applied the section of the agency's manual cited in its notice to the client of proposed action. If there are other sections of the manual that have a bearing on the agency's decision, the burden is placed upon the claimant to identify those sections and any other relevant legal issues at the hearing. In many instances, this is a burden the claimant is not equipped to meet without legal assistance.

This Article will examine the impediments to access to justice individuals face in the current economic climate due to issues of access to legal assistance. Part II will discuss the framework within which civil legal assistance is provided and the impact that the economic downturn has had on it. Part III will discuss the segment of the population forced to look to government programs for assistance in the wake of reduced employment and unemployment and the obstacles they face in accessing these programs. Part IV will look at the changed reality of the demands of providing pro bono assistance to these clients and the need for comprehensive assistance and its inhibiting effect on access to justice.

II. THE CURRENT SERVICE DELIVERY SYSTEM

Civil legal assistance is currently provided to low income households through

17. Recently, the Civil Litigation Clinic at Regent University School of Law provided assistance to a private attorney who had agreed to assist a claimant pro bono in a Social Security Disability case. He indicated in the telephone consultation that Social Security Administration's instructions for submitting an on-line application projected that the entire process should take under three hours. In fact, it took him close to eleven hours to complete the form for his client. Telephone Interview with Robert Nutt, Esq., solo practitioner, in Virginia Beach, Virginia (Oct. 8, 2009). In a similar vein, Virginia uses a consolidated application for food stamps, TANF, and Medicaid. The application is about twenty-three pages in length. Even if an applicant is only applying for one of these programs, she needs to read every page of the application carefully to make sure that no required information is omitted. Application for Benefits, Department of Social Services, Commonwealth of Virginia, <http://www.vafood.org/files/division/bp.fs.forms.032-03-0824-23.eng.pdf> (last visited Apr. 25, 2010).

18. 397 U.S. 254, 267 (1970). *Goldberg* involved the right of a welfare recipient to a hearing prior to termination of benefits. The Court noted that while the pre-termination hearing could be informal, a pre-termination hearing would serve the function of producing "an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits." *Id.*

local legal aid programs that are funded by grants from the federal LSC. When the Congress created the LSC, a uniform and nationwide system of civil legal aid did not exist. According to the 2005 report:

When LSC was created in 1974, the nation's legal aid system was a patchwork of programs focused primarily on urban areas. Many regions were not served at all: a 1980 LSC study of the funding levels of local programs in relation to the population they served found that over 40 percent of the nation's poor people lived in areas not served by legal services programs and many of the remainder had only token access.¹⁹

On the basis of its 2005 report, the LSC set as its goal a minimum level of access to legal aid in every county in the United States. "Minimum access" was defined as two lawyers, with appropriate support, per 10,000 low-income people.²⁰ This goal did not *contemplate* full funding of minimum access by the federal government. Rather, the LSC grants were intended to provide basic funding that would be supplemented by state, local, and private resources. As a result of this change in program structure, there are now LSC funded legal aid programs serving low-income persons in all fifty states.

Each state has a counterpart to the federal LSC that provides oversight to local legal aid programs and advocates for these programs with the state bar and state legislature on funding issues. Funds are allocated to states on the basis of the national poverty population residing within the state. That funding is distributed in turn to the local legal aid program based on the percentage of the state's poverty population residing within its service area. In recent years, there has been a consolidation of programs, presumptively to affect administrative savings. As a result, some local programs cover a multi-county service area without a proportionate increase in attorney staffing levels to serve larger geographic areas.²¹

Federally-funded legal aid programs must operate in accordance with extensive federal regulations that address not only financial administration but limit case selection. There are some legal areas in which legal aid programs are barred from providing legal representation. These include fee generating cases, criminal proceedings, grassroots organizing, abortion, school desegregation, and violations of the Military Selective Service Act or military desertion.²² Grantees are also prohibited from filing or participation in class actions²³ or representation of illegal

19. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 1 (2005) [hereinafter JUSTICE GAP 2005].

20. *Id.* at 1 n.1.

21. For example, several years ago two adjacent legal aid programs in the Tidewater Virginia area were consolidated. The successor program, Legal Aid Society of Eastern Virginia, which had previously served a four city metropolitan area became responsible for serving an area that extended from Virginia Beach, Virginia to Williamsburg, Virginia, and included several rural counties. These two cities are approximately forty miles apart.

22. See Use of Non-LSC Funds, 45 C.F.R. § 1610.2(a) (2008). See also Timekeeping Requirement, 45 C.F.R. § 1635.3(d) (2008), which requires "any attorney or paralegal who works part-time for the recipient and part-time for organization that engages in restricted activities to certify" that she did not engage in restricted activities on legal aid time and that no legal aid resources were used to undertake restricted activities.

23. See Class Actions, Purpose, 45 C.F.R. § 1617.1.

aliens.²⁴ LSC-funded legal aid programs are also prohibited from seeking attorneys' fees, even if permitted by federal and state statute.²⁵ These prohibitions extend to non-LSC funds. An LSC grantee may not use non-LSC funds "for any purpose prohibited by the LSC Act."²⁶

Screening for eligibility is a two-tier process. First, the applicant must be screened for income and resource eligibility. Section 1611.3(c) of the LSC regulations sets the maximum household income level equal to 125 percent of the Federal Poverty Guidelines. The annual income guidelines that are in effect for 2009²⁷ are as follows:

Size of Household	48 Contiguous States and the District of Columbia	Alaska	Hawaii
1	\$13,538.00	\$16,913.00	\$15,575.00
2	18,213.00	22,763.00	20,950.00
3	22,888.00	28,613.00	26,325.00
4	27,563.00	34,463.00	31,700.00
5	32,238.00	40,313.00	37,075.00
6	36,913.00	46,163.00	42,250.00
7	41,588.00	52,013.00	47,825.00
8	46,263.00	57,863.00	53,200.00
For each additional member of the household in excess of 8, add	\$4,675.00	\$5,850.00	\$5,375.00

The guidelines base eligibility on gross income, not net income. Consequently, expenses such as childcare, consumer debt or unusually high utility bills are not taken into consideration in determining a household's eligibility for services. Moreover, income eligibility is determined on a household basis. Consequently, it is possible that a person who moves in with other family members or a friend will have to demonstrate separate household status, i.e., show that she is responsible for her own household expenses. Otherwise, the host household's income may be imputed to the individual with the net result that the individual is deemed to be ineligible for legal assistance.

Even though an applicant is income eligible, she may still not be eligible for services if she has excess resources. Resources encompass personal property such as a vehicle whose value exceeds a certain dollar amount, monies in a checking or savings account that exceed a certain dollar amount, or a lump sum settlement from

24. See Suspension Procedures, Grounds for Suspension, 45 C.F.R. § 1623.3.

25. See Attorneys' Fees, Prohibition, 45 C.F.R. § 1642.3.

26. See 45 C.F.R. § 1610.3.

27. Legal Services Corporation, 74 Fed. Reg. 5620 (Jan. 30, 2009) (codified at 45 C.F.R. § 1611).

a lawsuit unless held in trust and not accessible to the individual applicant.²⁸ Programs have the discretion to waive the income and resource limits under certain circumstances.²⁹ However, such waivers must be reviewed and approved by the program's director. Further, programs are required to maintain documentation of waivers and their disposition.³⁰ They may be required to submit this information in their annual refunding application to LSC. Also, this information may be reviewed as a part of a routine performance review of the program by LSC or as a part of an audit by the LSC Office of the Inspector General.

Once a program determines that an applicant is income and resource eligible, the screening process moves to the next step. The applicant must fit within the case acceptance parameters of the program. LSC regulations require programs to conduct periodic needs assessments in which they poll former and current clients, agencies, judges, bar associations, private attorneys, and governmental agencies that serve low income households to determine what the current priority areas of service should be.³¹ These areas are most often consumer issues, domestic relations, employment, landlord-tenant relations, and government benefits.

Within these categories, the program may develop and apply additional criteria to ensure that limited resources are applied where they are most critically needed. For example, a client who needs assistance securing an initial order of child support may be declined services if she is able to establish an initial level of child support through the state Child Support Enforcement agency. Similarly, a program may decline to represent a parent who is defending against a custody action, absent domestic abuse by the other party, if the other party does not have an attorney. The underlying rationale would be that it is a level playing field between the parties since neither has an attorney. While a program might accept a case arising under the state consumer protection statute which would result in an award of damages to the plaintiff if she prevails, legal aid programs do not customarily accept fee generating cases. Again, the rationale is that if it is a meritorious case and will generate attorneys' fees, there is probably a member of the private bar who would be willing to accept the case on a contingent fee basis.

These priorities are reflective of the need to allocate limited resources among the clients who would most benefit from representation. In its 2009 update to its 2005 report on access to justice, the LCS noted that there is a significant gap between the level of resources available to the general population as opposed to those available to the low-income population.³² Specifically, the report update found that while the ratio of private lawyers to people in the general population was one lawyer to every 429 people, the ratio of legal aid attorneys to people living in poverty was one lawyer to every 6,415 people in poverty.³³ In practical terms, this means that legal aid programs often have to turn away as many applicants for services as they serve. This is aptly illustrated by LSC's 2009 report update on its

28. See Financial Eligibility, Policies, 45 C.F.R. § 1611.3(d)(1).

29. See 45 C.F.R. § 1611.5(a).

30. See 45 C.F.R. § 1611.5(d).

31. See Priorities in Use of Resources, Establishing Priorities, 45 C.F.R. § 1620.3(a), (b).

32. JUSTICE GAP 2009, *supra* note 8, at 20.

33. *Id.* at 21. The category of legal problems entitled "Miscellaneous" includes services such as drafting wills and estates, advance directives, and powers of attorney. *Id.*

2005 report on the justice gap. Data collected for the report³⁴ indicates that the demand for services within the service priority categories of legal aid programs far exceeds their capacity to serve:

Type of Legal Problem Categories	Unable to Serve Twelve Month Projections	Calendar Year 2008 Cases Closed
Consumer	98,214	108,404
Education	8,874	6,839
Employment	42,264	26,896
Family	391,038	312,046
Juvenile	18,780	15,143
Health	22,230	30,802
Housing (Other than Foreclosure)	113,706	219,592
Foreclosure	21,756	9,920
Income	49,236	98,257
Individual	39,216	13,250
Miscellaneous*	139,062	48,006
TOTAL	944,376	889,155

This report has several serious implications. First, it underscores the fact that “for every client served by an LSC-funded program, at least one eligible person seeking help will be turned down.”³⁵ Second, since not all eligible persons contact a local legal aid program to seek assistance, it indicates that there is an even larger universe of eligible clients whose legal problems are addressed without the assistance of any attorney.³⁶ Included in this latter group are individuals with legal problems who may not understand that they need legal help, individuals with legal problems who may not know that they are eligible for legal aid, and individuals who have tried to reach the local legal aid program but were unsuccessful due to limitations on access to intake.³⁷ Third, it suggests that clients with complex, interrelated legal problems are unlikely to receive comprehensive legal assistance to resolve those problems.

III. PROVIDING LEGAL ASSISTANCE TO THE NEW POOR

The current economic downturn is challenging the current system of delivery of legal services in a number of ways. First, it has increased the number of households whose income has dropped down to or below the poverty level and

34. *Id.* at 11.

35. *Id.* at 12.

36. *Id.* Referring to studies recently conducted at the state level, the LSC 2009 Update report notes that “[t]hese studies confirm that *only a small fraction of the legal problems experienced by low-income people (less than one in five) are addressed with the assistance of either a private attorney (pro bono or paid) or a legal aid lawyer.*” *Id.* (emphasis in original).

37. *Id.* at 10.

therefore are potentially eligible for legal aid at a point in time when funding resources for legal aid such as IOLTA are decreasing.³⁸ A recent report by the U.S. Census Bureau indicated that the number of individuals living below 125 percent of the federal poverty level in the United States increased from 49.6 million in 2005 to 53.8 million in 2008.³⁹ This number does not capture those individuals who will fall below the poverty line as a result of job losses in 2009.

As the LSC noted in its 2009 report update: “The current economic crisis, with its attendant problems of high unemployment, home foreclosures and family stress, has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and has pushed many families into poverty for the first time.”⁴⁰ As a result, a number of households have had to turn to the “safety net” income maintenance programs in order to meet food costs, continue medical coverage for household members, and otherwise replace lost income.⁴¹

Many of these individuals will encounter difficulties finding their way into the “safety net” program system. These difficulties can be characterized as way-finding and access, qualifying for and maintaining eligibility. First is the issue of way-finding and access. States are not impervious to economic downturns. They generally do not have the capacity to deficit spend or borrow to cover operating expenditures when the revenues from real estate, personal property, sales taxes, and income taxes decrease. As a recent report issued by the Center on Budget and Policy Priorities noted:

[S]tates have three primary actions they can take during a fiscal crisis: [T]hey can draw down available reserves, they can cut expenditures, or they can raise taxes. States already have begun drawing down reserves; the remaining reserves are not sufficient to allow states to weather a significant downturn or recession. The other alternatives—spending cuts and tax increases—can further slow a state’s economy during a downturn and contribute to the further slowing of the national economy,

38. John Epps, *Legal Aid Crisis*, 36 VA BAR ASS’N J. 4, 4 (2009). A number of legal aid programs supplement their LSC funding with grants from Interest on Lawyer Trust Accounts (IOLTA). The drop in interest rates has had a devastating effect on the level of IOLTA funding available to legal aid programs. Epps notes that IOLTA, “a voluntary program in Virginia, has plummeted along with interest rates. Statewide, these funds—which go to fund civil legal services for the poor—are projected to drop over \$3 million in the next year.”

39. INCOME, POVERTY, AND HEALTH, *supra* note 14. See also Gregory Acs, *Poverty in the United States*, 2008, http://www.urban.org/uploadedPDF/901284_poverty_united_states.pdf (last visited Mar. 27, 2010):

If historical experience is any guide, we can expect poverty to surge in the coming year. When unemployment rates jumped markedly during the mid-1970’s, year-to-year poverty rates rose by 1.1 percentage points. When annual unemployment rates exceeded 9 percent, as they did in 1982 and 1983, poverty rates reached 15 percent. As bad as the numbers for 2008 are—more than one of every eight Americans are poor, an increase of 0.7 percentage points in just a year—poverty’s toll on American families is even worse today. The 2009 statistics unveiled next year could show poverty still climbing and one in seven Americans below the poverty line.

Id. at 1.

40. JUSTICE GAP 2009, *supra* note 8, at 5.

41. See Cauchon, *supra* note 16.

as well.⁴²

In some states, such as Virginia, budget deficits have translated into reductions in the staff of government agencies and closing and consolidating government satellite offices. This means that potential applicants for government services must either apply online for these services or travel farther to make in-person applications. When decisions regarding initial or continued eligibility are contested, hearings are conducted by telephone rather than face-to-face. The default strategy is to rely on technology to bridge the gap. This has proven to be less than satisfactory. Clients are asked to leave messages in voicemail systems. However, oftentimes these voicemail boxes are filled up and unable to accept any more messages. In addition, the computer infrastructure of some state agencies is outdated and unable to respond to the current level of demand. For example, in Virginia, where 100,000 workers are eligible for unemployment, claimants eligible for extended unemployment compensation benefits had their benefits stopped. The culprit was an outdated state computer system. According to state officials, “[T]here’s nothing they can do to speed up the processing of claims because their computer network has, at its core, a 1970’s mainframe machine.”⁴³ The end result of this computer limitation is that it may take up to two months before eligible claimants receive their seven weeks extension of benefits.⁴⁴

The Virginia Employment Commission is representative of other state governmental agencies struggling to serve the public. Departments of social services, the gate keepers for programs such as food stamps, Medicaid and Temporary Assistance for Needy Families (TANF), are challenged to meet the needs of their clients in the face of reduced staffing levels, complex program regulations, and temporary modifications in program eligibility guidelines. For example, in order to qualify for food stamps a household must satisfy a gross income and net income test.⁴⁵ Income limits and permissible deductions from gross income may differ for elderly or disabled households.⁴⁶ If the household’s gross and net income are both within permissible limits, the household will be screened for resource eligibility.

Detailed program regulations differentiate between income and resources.⁴⁷ It is not always easy to discern the line between the two. Thus, even though a household is income-eligible for food stamps, it may be deemed ineligible to receive benefits because it owns a resource whose value exceeds the program resource limits. A household’s liquid and non-liquid assets may not exceed \$2,000 unless the household includes a member who is sixty or older, in which case, the limit is \$3,000 provided the asset is accessible to the household.⁴⁸ For example, if a household member were to receive a lump sum award in a lawsuit and invested it

42. IRIS J. LAV & ELIZABETH MCNICHOL, STATE BUDGET TROUBLES WORSEN (Center on Budget & Policy Priorities, May 18, 2009).

43. Bill Bartel, *Waiting for Jobless Benefits: ‘It’s Ridiculous,’* VA. PILOT, May 29, 2009, at A1, A6.

44. *Id.*

45. See Certification of Eligible Households, Income and Deduction & Determining Household Eligibility and Benefit Levels, 7 C.F.R. §§ 273.9, 273.10.

46. See Household Concept, 7 C.F.R. § 273.1(b)(2).

47. See Resource Eligibility Standards, 7 C.F.R. § 273.8.

48. See 7 C.F.R. § 273.8(c)(1).

in an annuity as a part of a structured settlement to provide for future income, the annuity would most likely be treated as an excess resource and disqualify the applicant for benefits.⁴⁹ However, if a court determined that the individual was disabled and instructed her attorney to arrange that the lump sum be invested in a structured settlement or entrusted in some way and further ordered that withdrawals be made subject to the approval of the court or a trustee, the money would arguably be exempt from the limits because the individual lacked direct, unrestricted access to the funds.⁵⁰

Once eligibility is established, the household will be certified as eligible to receive benefits for a period of up to twelve months.⁵¹ At the end of that period, the household will have to be recertified for benefits.⁵² During the period of certification, the household has an ongoing obligation to report any changes in household composition, income, or resources that would affect eligibility or level of benefits.⁵³ Failure to do so can result in the household's being assessed for an over-issuance of benefits.⁵⁴ Transfer of an asset to a non-household member may also result in program disqualification for a period of up to one year if the state agency determines that the purpose of the transfer was to avoid income or resource limitations.⁵⁵

When a department of social services denies an initial benefit application or terminates existing benefits, the recipient will receive a notice of proposed action. The affected household has a right to challenge the agency's determination through an in-office conference or a fair hearing. If the household opts for a fair hearing, it may receive a packet summarizing the information on which the agency relied in making its decision. Some departments of social services even list the number of the local legal aid program on the notice in the event the household wants legal assistance in preparing for and participating in the hearing. Most program applicants would be hard pressed to advocate on their own behalf, particularly those who have no prior experience with the income maintenance programs.

Adding to the client's challenge to maneuver her way through program application and compliance requirements is the fact that federal law and regulations set the framework for the income maintenance programs. In some instances, the states may be required to submit a state plan to the federal agency that oversees program administration. Any departure from federal program requirements is subject to federal agency approval. In addition to their state plan, states issue program manuals to govern day-to-day program operation. State program manuals may not override federal statutory provisions or regulations. However, most program participants will not know what the federal program requirements are and whether the state policies and procedures conflict with them. At best, they may

49. See 7 C.F.R. § 273.8(e)(8).

50. See 7 C.F.R. § 273.10(f).

51. See 7 C.F.R. § 273.10(f)(4), (8).

52. See Recertification, 7 C.F.R. § 273.14.

53. See Requirements for Charge Reporting Households, 7 C.F.R. § 273.12.

54. See Claims Against Households, 7 C.F.R. § 273.18.

55. See 7 C.F.R. § 273.8(h).

have accessed the program manual if their state has posted it on the internet.⁵⁶ However, access to the program manual is not a substitute for legal assistance when household eligibility turns on a discrete legal issue.

This is best illustrated by two representative cases. In the first case, the client participates in both TANF and the food stamp program. As a single parent receiving welfare benefits, she is required to maintain employment or volunteer thirty-five hours per week. The client finds a job but subsequently leaves it because of “a conflict” with her employer. As a result of her leaving her employment, the local department of social services terminates both her TANF and her food stamps for a period of three months.

What appears to be an open and shut case of failure to satisfy a program work requirement is not. The client may be exempt from this requirement if she can establish one of the following exemptions: (i) lack of adequate childcare for her children; (ii) lack of adequate transportation; or (iii) medical problems resulting in a temporary inability to satisfy the work requirement. For example, when the client contacts a law school clinic and is assigned an advocate to assist her at her fair hearing, she discloses at the initial interview that the “conflict” that caused her to leave her job was in fact a childcare issue. Her seven-year-old twins get home from school an hour before she comes home from work. While friends have been willing to assist her with childcare coverage on a short term basis, they cannot do so indefinitely. Although she has asked her employer for an accommodation in her work hours, the nature of her work, cleaning houses and places of business, does not allow the employer to do so.

A review of the client’s paperwork also reveals that she may be entitled to an exemption from the work requirement for health reasons. The client was recovering from hernia surgery during the time period in question and had not yet been released by her doctor to return to work. Last, but not least, the client relies on a vehicle more than twelve years old for transportation. When she ceased to be employed she also had to limit the use of that vehicle due to the cost of gas. Public transportation is not readily available for her to travel to and from volunteer sites.

It should be noted that none of these issues would have been explored at the fair hearing had the client not been assisted by a law school clinic. Although the client had three different case workers, not one of them queried her on what she meant by a “conflict” with her employer. Although the client had provided paperwork to the department regarding her surgery, no one inquired whether she had any residual physical limitations after her surgery that would limit her ability to work or volunteer. Not one of her case workers had inquired whether she had after school childcare coverage for her children while she was at work. In sum, the client had reasons why she might be exempt from the work and volunteer requirements that were identified only through the fair hearing process and only with legal assistance at the hearing.

The second case also involves a termination of food stamps benefits for failure to satisfy the work requirement. In this instance, the client is in her forties and

56. See CENTER ON BUDGET AND POLICY PRIORITIES, FOOD STAMPS ON-LINE: A REVIEW OF STATE GOVERNMENT FOOD STAMP WEBSITES (July 28, 2008), available at <http://www.cbpp.org/files/8-25-03fa.pdf> (last visited Mar. 27, 2010).

single. The program regulations classify her as “able bodied.” She lives in the home of a seventy-year-old woman who provides shelter in return for the client’s assisting her with chores around the house, walking her to the store, doing yard work from time to time, and walking her dog. The client also works at one of the local grocery stores bagging groceries. There was a time when she was scheduled to work up to twenty hours per week. More recently, she has only been scheduled to work nine to eleven hours per week. The client would like to do work other than bagging groceries. However, she indicates that she has a “learning disability” that limits her employability. She also suffers from arthritis which makes it difficult to stand for long periods of time. In addition, she has transportation problems since she depends on her work wages to pay for bus fare. When her work hours decline, she does not have enough income to buy food and to pay bus fare to and from work.

When the client’s food stamp benefits are terminated, it is on the grounds that she is an able bodied individual who has failed to comply with the requirement that she work or volunteer at least twenty hours per week. However, paperwork the client brings to the initial interview indicates that she has an I.Q. of ninety to ninety-five and suffers from progressive arthritis. Her medical records indicate an ongoing pattern of absence from work due frequent trips to the emergency room for medical treatment. Moreover, the woman with whom she stays has provided a written statement that the client provides at least twenty hours of service in return for her room. Thus, it is possible that this client should have been exempted from the work-volunteer requirement on several grounds: health problems, lack of transportation, and her provision of in-kind services to her landlady for an estimated twenty hours per week. At the hearing, the client finds out for the first time that the federal economic stimulus package has suspended the able bodied work requirement for a period of fifteen months. She is temporarily eligible to reapply for food stamps.

It should be kept in mind that some households participate in more than one income maintenance program. For households that participate in TANF, food stamps, Medicaid, and subsidized housing, they must establish and maintain eligibility for each program. While the programs may have some overlapping requirements, they also have requirements unique to the individual program. As a 2005 report issued by the Urban Institute observed:

Asset tests vary widely across government social programs . . . [t]he differences arise from decisions by the federal government for some programs and by state governments for other programs. The federal government sets rules for SSI, housing assistance, the Earned Income Tax Credit (EITC), and the Pell Grant program, while states decide on TANF, the State Children’s Health Insurance Program (SCHIP) and Medicaid rules and play a role in selecting policies for food stamps. Usually, the programs ignore a family’s net worth in their home and in a car worth less than a specified figure. For liquid assets, families are ineligible for benefits above a set threshold. For example, a bank account of \$2,000 or more would exclude a household from receiving food stamps, no matter how low the household’s income. Similarly, an elderly couple with \$3,000 or more in liquid

assets would be ineligible for SSI.⁵⁷

How is the new program participant, made eligible only because of recent unemployment, to keep all these requirements straight and comply with them when departments of social services struggle to keep abreast of current program changes? Moreover, once there is a retrenchment in the level of services provided to clients through the social services agencies, will that programmatic knowledge, skill, and staff capacity be replaced?⁵⁸

IV. ENSURING ACCESS TO LEGAL ASSISTANCE IN THE NEW ECONOMIC CLIMATE

It is clear that access to civil legal assistance will be more challenging during the current period of economic recovery. Some legal aid programs will be forced to retrench. That will mean reducing legal staff levels and restricting intake. Some legal aid programs may receive unexpected assistance in the form of the loan of new associates from private law firms for a year. For example, as one reporter for the *Philadelphia Enquirer* noted:

The sharp decline in legal revenue last year forced firms to reengineer not only practice groups, bolstering some and downsizing others, but also their financial models. They let go thousands of associates, and then they told hundreds of young law-school graduates that their start dates would be delayed. Many were offered stipends of \$65,000 for this period provided they signed on with public-interest legal organizations, other nonprofit groups, or government.⁵⁹

While this is certainly a cause for optimism, it is only a down payment on and not a solution to the problem. In light of the reduction in IOLTA funding, some legal aid programs face program budget cuts of up to 50 percent.⁶⁰ Projected shortfalls in 2008 IOLTA revenue ranged from a low of \$2.3 million in Illinois to a high of \$15 million in New Jersey and Massachusetts.⁶¹ In practical terms, the president of Legal Services of New Jersey estimated that “for every million dollars New Jersey loses in money for legal services, it must lay off 20 staffers and serve 900 fewer clients.”⁶² This decrease in IOLTA funds is not offset by the increase in LSC funding for the current fiscal year from \$350.5 last year to \$390 million this

57. HENRY CHEN & ROBERT I. LERMAN, DO ASSET LIMITS IN SOCIAL PROGRAMS AFFECT THE ACCUMULATION OF WEALTH? 2, Opportunity and Ownership Project, The Urban Institute (Aug. 2005).

58. See David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393, 393 (2008):

Having survived deep budget cuts and the partial dismantlement of their legal structure, subsistence benefit programs now face an even more severe threat to their existence: the dismantlement of the agencies that deliver these benefits. Some states are replacing the agencies operating Medicaid and food stamps with private contractors while others are simply dismantling the agencies and leaving low-income people on their own to find free or paid assistance with application procedures. The loss of these agencies will irreversibly limit the scope of assistance for the poor.

Id.

59. Chris Mondics, *Law Grads Headed for Public-Interest Work*, PHILADELPHIA INQUIRER, Aug. 23, 2009, available at <http://www.clsphila.org/NewsItem.asp?id=171> (last visited Mar. 27, 2010).

60. Kay, *supra* note 11, at 17.

61. *Id.*

62. *Id.* at 17.

year. According to a recent *New York Times* article on the funding squeeze: “Meeting the needs of those currently turned away would require a doubling of federal aid, with commensurate increases from states and private groups, Ms. Barnett [President of the LSC] said, along with an increase in the contribution for free services from lawyers in private practice.”⁶³ It is highly unlikely that there will be enough law firms that will bridge the current funding gap by paying their associates to work for legal programs for one or two years. Moreover, in the absence of adequate funding, at the end of that period, how will legal aid offices staff the positions left vacant by associates returning to the private firms.

Clearly, it will take a collaborative effort by private attorneys, state bars, local bar associations, and volunteer attorneys to fill the void left by the current funding crisis. Alternate sources of revenue will need to be considered.⁶⁴ Access to self-help materials will need to be broadened, keeping in mind that in complex cases or domestic abuse cases, self help materials are not an adequate substitute for actual legal assistance. State bars will need to take a second look at whether pro bono service should be simply encouraged or mandated.

V. CONCLUSION

Even before the current economic crisis, there was a documented justice gap in the United States. The current economic downturn has exacerbated that gap. At a point in time when the financial resources to fund free civil legal assistance are decreasing, the poverty population in the United States is significantly increasing. Low-income clients face legal problems of increasing complexity in the form of predatory lending, mortgage foreclosures, and bankruptcy.⁶⁵ Complex program regulations and policies and application forms make it more difficult for these clients to access and maintain eligibility for the safety net programs.

What is needed is not only adequate funding to ensure that low-income

63. John Schwartz, *Cash Squeeze Said To Deny Legal Aid to Poor*, N.Y. TIMES, Sept. 30, 2009, at A22.

64. RHODE, *supra* note 7, at 22, suggesting that:

[S]ubsidies for an expanded system could come from a variety of sources likely to command greater support than general funds. Examples include: a small progressive tax on law-related revenues; a surcharge on court filing fees based on the amount in controversy; increased opportunities for fee awards to prevailing parties; and *pro bono* requirements for lawyers that could be satisfied by a minimum amount of annual service, such as fifty hours, or the financial equivalent. In a nation that spends over \$90 billion every year on private legal fees, a modest 2 percent tax would substantially increase the capacity of civil legal aid programs. So would more significant *pro bono* contributions by close to a million attorneys.

Id.

65. See Brad Heath, *Lawyers Scarce for Poor Facing Foreclosure*, USA TODAY, available at http://www.usatoday.com/news/nation/2009-10-05-foreclosure-lawyer_N.htm (last visited Mar. 27, 2010):

The nation’s foreclosure has swamped lawyers for the poor, leaving thousands of low-income homeowners across the country without legal assistance that could save their homes. Legal offices providing help to the poor are turning away many who have been hit hard by the economy, according to lawyers in cities across the country who were interviewed by *USA Today*.”

Id.

households can access free legal assistance but sufficient funding to ensure retention of the skilled community of legal aid attorneys who are knowledgeable about these issues and sufficient in number to adequately serve their legal needs.