

"Poverty Law" -- A Case Study
Prepared for the Ontario Legal Aid Review
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(* Included in Appendix "A" is a list of the persons with whom I consulted on this project. I am very much indebted to them for their insights, guidance and patience.)

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A) Introduction

The poor are obviously not a homogenous group, yet for the purposes of thinking about future directions in legal aid it is important to attend both to differences amongst "the poor", as well as to several broad commonalities of experience in relation to law. I begin the paper by examining several of these commonalities -- experiences of marginalization, dependence and consequent vulnerability, the law as "all over", the multi-dimensional nature of legal problems, the systemic nature of legal problems, and the impediments to seeking legal redress. From this review of "commonalities" with respect to experiences of law one can readily discern several of the pressing legal needs of the poor, particularly in relation to income support programmes and housing.

I then examine some of the many differences amongst "the poor" which arise as a result of one's race, gender, disability, and other social locations which generate discrete and pressing legal needs. I argue that a legal aid scheme ought to be attentive to both the commonalities of experience reviewed at the outset of the paper, as well as to the discrete needs of particular groups. In this context I also consider competing understandings of the concept "poverty law" and ultimately conclude that this term ought not to be used as the basis for coverage under a new legislative regime since there is a substantial risk that many of the most pressing legal needs of particular communities will go unmet. In coming to this conclusion I assess some of the normative justifications underpinning my argument for coverage of those legal needs that frequently arise by virtue of one's low income status, as well as those that arise in relation to one's membership in particular disadvantaged groups.

The next section of the paper provides a brief historical overview of the coverage of these areas of legal needs under the Ontario Legal Aid Plan and reviews in some detail the observations of Mr. Justice Grange in his report on Clinical Funding with respect to appropriate delivery models for meeting the diverse legal needs of low income persons.

The present day clinic system is described in detail, with particular attention given to community governance. I argue that community governance -- the retention of local community boards -- is integral to the identification of the legal needs of communities, as well as to innovation and responsiveness. I then consider several issues which are crucial to the preservation of both the clinic mandate and clinic model: these include ensuring accountability to the community; ensuring accountability to the funder; and ensuring that the place of clinics within the overall governance structure of a legal aid plan does not threaten their survival. These issues are crucial if clinics are to be preserved not only in theory but in practice.

Finally, I examine three somewhat discreet topics: the role of clinics in criminal, family and immigration law; comparators of clinics in other jurisdictions; and student legal aid societies.

B) A "Poverty Law" Mandate

1) Low Income People -- Six Broad Observations

Poor people are obviously not an homogenous group; their life experiences, needs, and interests vary widely, a point to which I will return shortly. Yet there are several observations about the broad category of "the poor" that can usefully be made. First, while the courts have divided on the question of whether "poverty" itself is an analogous ground under section 15 of the Charter, it is clearly the case that persons who belong to enumerated classes under section 15 are over-represented amongst the poor. So, for example, persons with disabilities, the young, the aged, women (particularly women who are single mothers with children under 18), and persons belonging to particular racialized groups are over-represented amongst the poor. This correlation is not simply coincidental. As Supreme Court jurisprudence has recognized, persons belonging to one or more of the enumerated or analogous groups under section 15 have suffered, and suffer, exclusion, discrimination, negative stereotyping, oppression and the disadvantage -- including poverty -- which is their consequence.¹ Moreover, notwithstanding the ambivalence of the judiciary with respect to the question of whether "poverty" (or another low income identifier, such as receipt of social assistance) is an analogous ground under s.15 of the Charter, it is abundantly clear that those who are poor are stigmatized, blamed, stereotyped, excluded, and marginalized.²

The second broad observation to be made is that poor persons are often dependent on others for life's necessities, and are thus in a situation of vulnerability. For some, vulnerability arises because of their dependence upon particular caregivers (in the context of mental health institutions, long term care facilities, or within the home for example) and their lack of resources to afford the option of exit. For others, vulnerability arises because of dependence upon a particular income support program for the basic necessities of life. This vulnerability means that "beneficiaries" are unlikely to challenge decisions or actions taken or behaviours engaged in. And it means that such

¹ The Parkdale Community Legal Services submission to the Review notes the contrast between the negative, stereotypical images of their clients represented in the media and the reality that their "clients are not infrequently heroic in the face of daunting life challenges, invariably appreciative of our assistance and often a source of inspiration".

² Social Assistance Review Committee, Transitions (Ontario: Queen's Printers, 1988) and Sheila Turkington, "A Proposal to Amend the Human Rights Code: Recognizing Povertyism" (1993) 9 Journal of Law and Social Policy 134.

persons are vulnerable to abuses of power (including, of course, powers granted by law). This is not to suggest that abuses of power by care providers or by income support workers are pervasive, but there is no doubt but that they occur frequently. As Douglas Ewart has observed, poor people are subject to hosts "of laws and powers and abuses of power which are unknown to a person of relatively modest means, and which are not understandable when viewed from that vantage point".³

Dependence and vulnerability also connect up with the third observation to be made; the relationship of the poor to law. There are two significant points here. As the realities of dependence and vulnerability might suggest, the "law" frequently occupies the contradictory space of both friend and foe of the poor -- a friend in that it may provide for vital needs (welfare assistance for example) and protection (against self-incrimination for example), but simultaneously a foe, because of its intrusiveness (random home searches, requirements to produce confidential therapeutic records for example) and because of the vulnerabilities it creates. Thus, poor people frequently stand in an ambivalent position with respect to the law. The second point here relates to its intrusiveness into the everyday aspects of every day life.

For me the law is all over. I am caught, you know; there is always some rule that I'm supposed to follow, some rule I don't even know about that they say. It's just different and you can't really understand (Spencer, a public assistance recipient).⁴

As Austin Sarat observes, for poor people, the law is often,

repeatedly encountered in the most ordinary transactions and events of their lives. Law is immediate and powerful because being on welfare means having a significant part of

³ Douglas Ewart, "Hard Caps: Hard Choices: A Systemic Model for Legal Aid, (Background Paper prepared for Centre for Public Law and Public Policy Legal Aid Research Project, Winter 1997) at 2. The pervasiveness of exclusion, discrimination, and vulnerability in the lives of low income persons is captured by many of the submissions received by the Legal Aid Review. For example, the Canadian Mental Health Association submission describes persons with mental illness as "among the most vulnerable in our society" and who are "often unemployed and have difficulty finding and retaining adequate housing". The submission from Justice for Children and Youth describes young people as "a marginalized group with little power or financial resources" who are vulnerable to abuses of power and who frequently lack any sense of entitlement.

⁴ Austin Sarat, "... The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor" (1990) 2 Yale Journal of Law & the Humanities 343 at 343. His working title for an earlier draft of this paper also seemed apt, "Inside the Belly of the Beast".

one's life organized by a regime of legal rules invoked by officials to claim jurisdiction over choices and decisions which those not on welfare would regard as personal and private."⁵

Such decisions may include, for example, how to wear your hair, whether to share accommodation with a person of the opposite sex to make ends meet and/or to provide a sense of security, whether to form a heterosexual relationship, whether to pursue your spouse or the father of your child for support, what employment to seek, what training to secure, and whether to send your children to daycare.⁶ As Stephen Wexler observed years ago, the poor, unlike middle or upper income earners whose lives are characterized by discrete and limited contacts with the law (the automobile accident, the divorce, the will), regularly brush against the law's sharp edges.⁷ Yet notwithstanding the pervasive legal regulation of the lives of the poor, the poor are largely excluded from law's interpretive community⁸; they rarely participate in either the law's making (the legislative process) or its interpretation (the judicial process).⁹

A fourth important observation is that the legal problems presented by the poor are frequently multi-dimensional in nature, both in their legal presentation and in their embeddedness within other social and economic issues. Consider for example a woman who has left an abusive relationship with her three children. At the most general level she needs safety and emotional and material supports. More specifically, she needs information and advice about her legal rights and options with respect to many areas of law: criminal (assault charge, peace bond); family (restraining order, custody, support, exclusive possession); civil (damages for battery); social assistance; housing; criminal injuries compensation. She will likely require legal representation, often in more than one area of law. And all of this she needs from a person or persons with a thorough knowledge of abuse, and of law's potential to both aid and harm a woman in her situation. She will likely need counselling and support throughout, and she will often require medical assistance. These she needs not only to aid in her healing but also because both counsellors and medical practitioners are

⁵ Sarat, supra note 5 at 345.

⁶ See for example the decision of the Social Assistance Review Board, File No. Q-04-24-04 (1996 Marcuccio).

⁷ Stephen Wexler, "Practising Law for Poor People" 79 Yale Law Journal 104.

⁸ Sarat, supra note 4.

⁹ I return to a discussion of this infra in the text.

potential allies in her legal claims. If, for example, she is a sponsored immigrant and seeks to avoid the operation of the \$50 deduction rule she must prove that the breakdown in the sponsorship agreement was by reason of "family violence".¹⁰ Or if she seeks to persuade welfare authorities that she ought to be exempt from the requirement to pursue support from her abusive husband, again the evidence provided by these "experts" will be crucial.¹¹ We could of course extend this example, and develop countless others.

The fifth observation pertains to the systemic nature of many of the legal problems encountered by the poor. This often arises because of the systemic nature of discrimination. A tenant who is denied housing because of his race, his disability, or his receipt of social assistance, for example, has been discriminated against; his human rights have been violated. But his is not a discrete, isolated case. Indeed the very nature of discrimination is such that it is his (assumed) membership in a particular group that leads to the particular denial; hence many others will suffer similar experiences. Problems may also be "systemic" in a further sense, in that significant numbers of persons are similarly affected. So, for example, a great many people will be affected by the definition of "spouse" employed in income support legislation. If this definition is ambiguous and leads to inconsistent interpretations by various persons charged with implementing the legislation, many persons will potentially seek clarification of its meaning by challenging decisions through appeal processes. And if the definition is discriminatory and contrary to the Charter, as a case recently argued before the Social Assistance Review Board contends, the lives of significant numbers of persons -- but women in particular -- will be affected.¹²

¹⁰ R.R.O. 366 as amended by 436/93, s.13(2), (17). Essentially these amendments to the regulations penalize persons (usually women) who are sponsored immigrants, by deducting \$50. from the benefit amount to which they would otherwise be entitled. The \$50. is not deducted if one can prove that the reason for the breakdown in the sponsorship was family violence.

¹¹ The regulations to both the Family Benefits Act (R.R.O.1990, 366, s.8) and the General Welfare Assistance Act (R.R.O. 1990, 537, s.4(3)(b)) require applicants/recipients to make reasonable efforts to obtain compensation or to realize any financial support to which he or she may be entitled. The failure to do so can result in the reduction of benefits or in the denial or termination of assistance.

¹² Falkiner et al. v. Ministry of Community and Social Services and the Attorney General of Ontario, in which the new definition of spouse in the Family Benefits Act and the General Welfare Assistance Act has been constitutionally challenged under both sections 7 and 15, was argued before the Social Assistance Review

The final observation is one which has been well articulated by Ewart, "...poverty imposes a bundle of disadvantages which make that issue [the legal one] and its resolution much more difficult than would be the case for a person of even modest means".¹³ What he has in mind here are the range of factors that make both the identification and resolution of a legal dispute more complex. These factors include, for example, the lack of information about rights and entitlements on the part of poor persons. Poor persons often do not possess this information for a variety of reasons: the rights and entitlements are embedded in statutes and regulations that are impossible even for most lawyers to figure out (general welfare assistance and family benefits for example¹⁴) and little effort is made to communicate this information clearly to potential beneficiaries; even when information is created it may not be accessible (because of illiteracy, disability, or language spoken and read); or it may be unhelpful because it does not begin from the informational needs of the intended recipient.¹⁵

The identification of legal problems is also made more difficult by the internalization of oppression, when persons who are oppressed fail to see themselves as potential bearers of rights or entitlements.¹⁶ Additionally, problems may not be named or voiced because of dependency and fears of retaliation. All of these factors mean that poor people are less likely to name a harm, to

Board beginning April 8, 1997. This case was first argued before the Divisional Court. The majority found that the case ought first to have been heard by the Social Assistance Review Board. Rosenberg J. in dissent found the provisions to contravene s.15 of the Charter.

¹³ Ewart, supra note 3 at 3.

¹⁴ Social Assistance Review Committee, supra note 2.

¹⁵ For a fuller discussion of these ideas see Ian Morrison & Janet Mosher, "Barriers to Access to Justice for Disadvantaged Groups" in Ontario Law Reform Commission Rethinking Civil Justice vol.2 (Ontario: Ontario Law Reform Commission, 1996) 637.

¹⁶ In discussions with lawyers from Justice for Children and Youth they noted that it is common for youths to believe that they do not enjoy rights or entitlements. More particularly, in their submission to the Review they note that at present 16 and 17 year olds are being told by welfare workers that they are not eligible for welfare (when indeed they are in "special circumstances") and are not being permitted to even apply. If they are told about their rights of appeal, they feel powerless to pursue them, and they assume that legal advice is not available. When youths simply accept what is told to them by welfare workers and do not pursue their appeal rights they often end up as homeless, street children.

blame another for it, or to voice a grievance to the alleged perpetrator. In other words, they are less likely to engage in the "naming, blaming, claiming process"; the necessary requisites to the identification of a legal claim.¹⁷

2) Legal Needs of Low Income People

From these broad observations one can readily discern some of the pressing and pervasive legal needs of the poor. Legal needs frequently arise in relation to income support programmes, such as family benefits, general welfare assistance, employment insurance, Canada pensions, and workers' compensation. Issues of eligibility, benefit levels, and terminations -- the resolution of which often turn upon the interpretation of complex statutory and regulatory schemes -- are pervasive. Without legal assistance, statutory rights which exist to provide the absolute necessities of life are often virtually unenforceable. Legal needs also commonly arise in relation to another of our basic human needs; shelter. The Federation of Metro Toronto Tenants Associations notes that one third of tenants in Ontario in 1993 had incomes of less than \$20,000. As such, tenants are frequently members of disadvantaged groups: "women; sole support parents; youth; people with mental and physical disabilities; injured workers; social assistance recipients; new Canadians; refugees; people of colour and non-North American cultures; people who are illiterate or poorly educated; the elderly; and those who move from the streets to shelters and back".¹⁸ As the Federation points out, security of tenure is integral to one's sense of belonging to a community, and to one's ability to work, to pursue education, to provide for one's dependents, and to form close human connections. Yet poverty often makes security of tenure tenuous at best. The threat of loss of accommodation and the inability to purchase other accommodation in the market renders many low income tenants silent about the conditions in which they live. Moreover, poor persons are frequently discriminated against with respect to housing, both on the basis of their low income status and on the basis of their membership in other disadvantaged groups.

While many poor people experience legal needs in relation to income support programmes and housing (as well as other areas, such as consumer law and employment law), particular groups of disadvantaged persons will often share discrete legal needs, many of which arise because of their

¹⁷ William L.F. Felstiner, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." (1980-81), 15 *Law & Society* 631.

¹⁸ Submission of the Federation of Metro Toronto Tenants Associations to the Review.

membership in particular disadvantaged groups.¹⁹ A sense of the range and diversity of legal needs is amply demonstrated by the activities, and submissions to the Review, of many of the community legal clinics in Ontario.²⁰ The submission from the Metro Toronto Chinese & Southeast Asian Legal Clinic notes that "persons of colour and immigrants who live in or near poverty ... have additional legal issues which stem from their minority status in our society. Many of them are victims of racism and discrimination both within and outside of the legal system and therefore need help with human rights matters. Some are victims of police misconduct and require representation in their police complaints".

Attention to the legal needs of communities experiencing discrimination in the context of the criminal justice system is evident in the activities noted by the Metro Toronto Chinese & Southeast Asian Legal Clinic, Aboriginal Legal Services of Toronto, and the African Canadian Legal Clinic in their annual applications for clinic funding. The African Canadian Legal Clinic worked actively within its community to respond to a report on policing. Aboriginal Legal Services of Toronto successfully obtained intervenor status before the Supreme Court of Canada in R. v. Williams. This case involves an Aboriginal man accused of robbing a non-Aboriginal person. At trial, defence counsel made an application to challenge jurors for cause on the basis of bias or prejudice against Aboriginal people. The trial and appeal courts both denied the application. As the clinic describes in its application, this case is important to the community it serves "not only because of the criminal law aspects, but because of the human rights and discrimination issues". The clinic also describes its involvement in an adoption disclosure case, arguing that the Minister ought to exercise a statutory discretion to contact an adoptee to advise him of his aboriginal ancestry. The clinic notes, "this decision is very important for many of ALST's clients and potential clients, since so many Aboriginal peoples were adopted outside the Aboriginal community, and are now seeking Indian status and other links to their cultural heritage".

Aboriginal Legal Services of Toronto, Advocacy Centre for the Elderly and African

¹⁹ Historically, more legal services were provided by Ontario's community legal clinics in the area of landlord and tenant law than in any other area of law. In recent years this has been surpassed by social assistance (family benefits and general welfare assistance).

²⁰ These activities are reported in the annual applications submitted to the Clinic Funding Staff. I reviewed the "significant activities" section of the reports for 1996, and summaries of the whole of the applications of 1995 prepared by a law student, Kumail Karimjee.

Canadian Legal Clinic, in their funding applications, each describe their participation in various coroner's inquests in which they sought recommendations which, if implemented, would protect members of the constituencies they serve. The Advocacy Centre for the Elderly for example, describes its role in representing the Alzheimer's Society in the "Meadowcroft" inquest into the deaths of 8 seniors in care. Its own conclusion that "had the Alzheimer's Society of Ontario not retained ACE to intervene, it is likely that many of the matters of key importance to care home tenants, particularly tenants vulnerable due to the fact that they suffer from a cognitive impairment, would not have been raised", is well warranted. Its expertise on the issues contributed significantly to the inquest. Aboriginal Legal Services of Toronto participated in a coroner's inquest into the deaths of several homeless persons, including an Aboriginal man. Their participation led to several Aboriginal-specific recommendations, which if implemented, would positively impact upon the lives of many urban Aboriginal persons.

Justice for Children and Youth and the Advocacy Centre for the Elderly in their submissions to the Review both note the age-based nature of the law they practice. The Advocacy Centre for the Elderly submission notes that "the aging process brings with it special legal problems that younger people do not face and often do not understand". They note that while some of the problems are the same as those faced by adults of any age, some are unique to the seniors' population as they relate to services used or issues that arise only or primarily at an older age, and others could be experienced by adults at any age but disproportionately impact on seniors.²¹ Accessing legal services makes a significant difference as to where a senior lives, the amount of his or her income available for necessities, the degree of his or her independence, and his or her quality of life.

And of course, some poor people will have legal needs in relation to criminal and family law. But these needs generally do not arise by virtue of their low income status or by virtue of their membership in particular disadvantaged groups. Like middle and upper income earners, poor people sometimes come in conflict with the criminal law. But as the National Council of Welfare reports, most poor people "have never been, and probably never will be, in trouble with the law".²² As discussed more fully later in the paper, this does not mean that there are not criminal or family law

²¹ They also make several observations about seniors which track those at the outset of the paper about the poor; they frequently do not know about their legal rights or are unable to assert them, and problems are almost always multi-dimensional in their legal and social presentation. See the submission to the Review of the Advocacy Centre for the Elderly.

²² National Council of Welfare, Legal Aid and the Poor: a report (Ottawa, 1995) at 9-10.

issues which are of particular concern to disadvantaged groups. As noted above, issues of systemic racism within policing and the criminal justice system and legal resources to challenge them are of fundamental importance to racialized communities. Systemic gender issues in both the criminal and family law systems are also of deep concern to particular communities.²³

3) Poverty Law

As noted, while the poor do experience some of the same legal problems as the non-poor (criminal and family for example), many of the legal needs of the poor arise largely by virtue of their poverty. It is this latter category of legal needs that is frequently referred to as "poverty law". As such, the term "poverty law" is often invoked as a shorthand to capture those areas of the law that arise largely by virtue of one's low income status, the pervasive legal needs described above: housing issues; income maintenance including welfare, family benefits, employment insurance, Canada Pensions, and workers compensation; work related issues including employment standards, occupational health and safety; and consumer and debt problems".²⁴

For many, this meaning of "poverty law" is too limited, and because this is the meaning commonly ascribed, many resist the term.²⁵ As the case studies reviewed above suggest (and one could find many more examples of this) the legal needs of particular communities of disadvantaged persons -- while they may include those usually subsumed under the above description of "poverty law" -- extend well beyond these areas.²⁶ To the extent that we organize legal aid around categories of substantive law -- criminal, family, immigration, poverty for example -- and poverty law is understood to include those substantive law areas most endemic to an undifferentiated category of

²³ While affected communities clearly have an interest in legal resources to challenge these issues, addressing discrimination and the other factors which contribute to disadvantage is of interest to society generally; in other words, legal resources employed to address disadvantage benefit us all.

²⁴ This is the list of substantive law areas provided in a submission to the Review, "Accessing Justice: A Submission by Ontario Community Legal Clinics".

²⁵ This resistance was clearly expressed by several persons with whom I consulted.

²⁶ As Richard Abel notes the category of beneficiaries defined by economic indices has no organic coherence, no necessary unity. Richard Abel, "Law Without Politics: Legal Aid Under Advanced Capitalism" (1985), 32 UCLA Law Review 475.

poor persons, there is a risk that the legal needs most central to the lives of many low income persons will go unmet.

One response to this concern is to press for an even more expansive understanding of "poverty law" to include not only those areas of law which impact pervasively upon "the poor", but also those legal services whose goal is to eradicate economic disadvantage more generally. From this vantage point, what gives the term coherence is economic marginalization; and any legal strategies designed to address the root causes of economic marginalization (including, importantly, discrimination in any realm of activity, not only economic) is "poverty" law.²⁷ So, for example, a legal challenge to a specific instance of discriminatory hiring (because the person discriminated against is put at risk of economic marginalization by the discrimination), as well as legal actions aimed at the eradication of discrimination more broadly (because discrimination puts whole groups of people at risk of economic marginalization) would both be examples of "poverty law" practices.²⁸ Case examples from the work of Justice for Children and Youth help uncover legal strategies in

²⁷ On this conceptualization there seems to be no principled basis for leaving out, for example, criminal or family law as potential areas of "poverty law" practice. I say this for two reasons. First, as is clearly demonstrated by the practices of several clinics, systemic discrimination issues in, for example, the criminal justice system (challenges for cause in jury selection, policing) are a crucially important dimension of fighting discrimination and inequality writ large. Secondly, while family and criminal law (like employment law) affect both the poor and non-poor they do not affect them alike. There are important poverty issues in family and criminal law. This does not, however, necessarily lead one to the conclusion that community based clinics ought to be routinely involved in the provision of family and criminal law services, as I discuss more fully later in the paper.

²⁸ Many activities of clinics may benefit both the poor and non-poor members of particular communities of interests. So, for example, obviously not all persons with disabilities are poor; disability intersects with other aspects of identity -- race, gender, age, etc. -- to produce many different class positions. A successful legal initiative on behalf of a low-income person with a disability may benefit many persons with disabilities both directly and indirectly. So for example, legal actions which flesh out the meaning of the legal duty to accommodate may directly benefit many persons -- low income and other -- in their efforts to secure meaningful employment. The indirect and less tangible benefit is that which comes from challenging negative stereotypes and discriminatory attitudes and practices.

addition to those challenging discrimination which might also be characterized as "poverty law" practices; but they also reveal the limits of this approach.

Staff at Justice for Children and Youth often engage in legal advocacy aimed at getting youths who have been expelled back into the classroom. This legal advocacy has obvious links to the future economic status of youths; without completing a high school education they are far more likely to be under- or unemployed and poor in the future. Since this legal advocacy seeks to address a root cause of potential economic marginalization it too is an example of "poverty law". Justice for Children and Youth staff also undertake legal work on the issues of consent to treatment, are engaged in challenging the corporal punishment provisions of the Criminal Code, and frequently negotiate youths into the care of a child welfare authority in order to protect them from abuse in their homes or on the street. One can mount a plausible argument that the current state of the law with respect to each of these issues is in some manner connected to (and reflective of) the low income status of, and the relative lack of economic power enjoyed by, children and youths and on this basis claim it to be "poverty law". One can make compelling arguments that abuse harms children, including their ability to become gainfully employed in the future, and on this basis, claim it to be "poverty law". But legal actions taken to, for example, protect children and youths are defensible in their own right -- protecting innocent persons from harm, respecting the autonomy of youths -- without having to ground a justification for legal services in current or future low income status. Legal services ought to be provided because these are important legal issues (important because they entail compelling moral values of protecting persons from harm, and respecting autonomy); not because one can establish (weakly or strongly) a causal link to future low income status.

The above discussion suggests the limitations, indeed dangers, of using either of these conceptualizations of "poverty law". At present, the term "poverty law" appears neither in the Legal Aid Act nor in the regulations. Rather, the regulations provide for funding to "enable the clinic to provide legal services or paralegal services, or both, including activities reasonably designed to encourage access to such services or to further such services and services designed solely to promote the legal welfare of the community, on a basis other than fee for service".²⁹ Community is defined to include geographical communities, communities of interest, as well as the general public. It is pursuant to this regulatory scheme that both geographic clinics and "specialty clinics" -- to address the particular needs of identifiable communities of interest or devoted to particular areas of law -- have been funded.³⁰ The Clinic Funding Submission to the Review notes that "[d]epartures from the

²⁹ R.R.O. 1990, 710, Part IV section 5(2).

³⁰ Note that funding of "specialty" clinics appears to have been what Mr. Justice Grange had in mind in his observation that,

core areas of clinic practice are made only when they are linked to pressing needs unique to a particular group of poor clients".³¹ The "core" areas of clinic practice track the first conceptualization of poverty law reviewed above. It is the notion of "pressing needs unique to a particular group of poor clients" -- or the pressing legal needs of communities of interests -- which has resulted in the provision of legal services under the Plan in the diverse areas reviewed above. Thus it is only through this regulation that "poverty law" of any sort is recognized at all, and only through the interpretation given to it by the Clinic Funding Committee that the diverse legal needs of particular disadvantaged groups have been recognized. This leads to an important question to attempt to answer; assuming that "poverty law" is not the appropriate term to use to capture the legal needs of the poor that ought to be covered by the Plan, is the present language in the regulation adequate? One way to answer this would be to examine closely the current clinic system to attempt to ascertain whether, in fact, a conceptualization of poverty law too focused on economic disadvantage, to the detriment of other pressing legal needs, has dominated.³² Not surprisingly, actors within the client system hold competing views on this, and I do not feel well placed to contribute to this particular debate. However, another way to approach this question is to look into the future, rather than the past. That is, rather than to judge whether past clinic funding decision-makers have made the "right" choices, one can attempt to discern the conceptualization, and more specifically the criteria, that ought to guide future decision-makers. Approaching the question in this way, it is helpful to delve more deeply into some of the normative justifications for legal services in response to particular legal needs.

4) Normative Justifications

Time and again in the submissions to the Review, reference is made to the need to respect and protect "basic or fundamental human rights": security of the person (including shelter, food, health, education); autonomy (one's right to make decisions for oneself); freedom from

"wherever there is a community of interest with legal needs but with limited resources, there is a potential home for a community law project." The Honourable S.G.M. Grange, Commissioner, Report of the Commission on Clinical Funding, October 25, 1978.

³¹ "A Balanced Accountability Structure for a Unique Service", Clinic Funding Submission to the Ontario Legal Aid Review, March, 1997.

³² Some persons are of the view that this in fact the case; minutes from the Parkdale 25th Anniversary Conference Workshops, November 15, 1996.

discrimination; equality, including the right to the equal benefit and treatment of the law; liberty; to "belong" -- to families, communities; and to participate, and thus take ownership in, the legal institutions of the state.³³ As Ewart notes, "human rights are not only fundamental, they are constitutional, and their infringement questions the rule of law and the core premises on which our society is based".³⁴

These rights or values are frequently at play in the legal issues that permeate the lives of the disadvantaged. So, for example, as the submission by the Advocacy Resource Centre for Handicapped to the Review notes, "an unjustly committed psychiatric patient's liberty has been removed as completely as that of a falsely accused convict and experiences much greater risk of intrusive procedures such as involuntary medication or electro convulsive therapy".³⁵ Significant security of the person interests are at stake in cases involving access to vital income supports, or housing for example. Even if the courts ultimately conclude that section 7 of the Charter does not confer a right to state assistance, that the interest may not be recognized constitutionally does not undermine its moral force. Constitutional privacy interests are at stake in random home visits in the welfare context. And constitutional equality interests pervade the lives of the disadvantaged; from discrimination in housing (based on receipt of social assistance, family status, race, gender, disability), to challenges to jurors for cause. And in a great many cases, more than one of these values will be at stake. Consider for example a case reported by one of the clinics, and a not uncommon experience. A single mother in receipt of family benefits is alleged to be living with her spouse. The investigation was prompted by a call to the welfare snitch line (and while it is impossible to ascertain who made the call, it is not uncommon for abusive former partners to do so). A welfare worker conducts a perfunctory investigation and concludes she is living with a spouse (the new definition of spouse deems a person to be a spouse if of the opposite sex and sharing accommodation and it is extremely difficult to rebut the presumption in light of the definition of spouse).³⁶ Her benefits are cut off, she is assessed with a huge over-payment and charged criminally

³³ See the submissions to the Review from the Advocacy Centre for the Elderly, Federation of Metro Toronto Tenants Associations, Canadian Mental Health Association and LIFESPIN.

³⁴ Ewart, supra note 3 at 11.

³⁵ Advocacy Resource Centre for the Handicapped submission to the Review.

³⁶ Ontario regulation 410/95, s.1(3), (4), (5) amending reg. 537 R.R.O. 1990.

with fraud. She has no legal basis for a support claim against her alleged "spouse" because it is absolutely clear that for family law purposes, this person is not a spouse. She has no money, nowhere to turn, and three children to support. If she fails to provide for her children she puts herself in jeopardy of losing custody to a children's aid society. Her security and that of her children is fundamentally compromised. Her liberty is at stake. Her privacy has been violated.

The moral autonomy of persons is respected only when their distinctive legal needs are addressed. Respect is obviously undermined by stereotyping, but is also undermined when we consider "the poor" as a generic category. As the case studies in the preceding section revealed, the legal needs of disadvantaged persons will vary depending upon their race, disability status, age, etc. Acknowledgement of, and respect for, these differences is crucial both to ensure equal respect and to ensure equal access to justice. This point was well-expressed by the submission to the Review by the Ontario Human Rights Commission,

...the values the Code stands for may be equally applicable to the goals of a new legal aid system. These values are, in essence, the recognition of the dignity and worth of every person "so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province". The accessibility of affordable needed legal services would significantly impact upon the full inclusion of disadvantaged groups into our society.³⁷

The conceptualization of "access to justice" offered by Roderick Macdonald makes a related point. As Macdonald has noted, "access to justice" in much of the literature tends to focus upon accessing legal services and the processes of institutionalized dispute resolution. In so doing, the authors of this literature seem to presuppose that accessing a lawyer, or a forum for institutionalized dispute resolution, is synonymous with accessing justice. Macdonald then proceeds to unfold why this conceptualization of access to justice is flawed. As he notes, much of significance in law-making happens in the legislative realm; a realm from which the disadvantaged are as systemically and pervasively excluded as the judicial realm. To be deprived of participation in the law-making function -- in the creation of legal norms -- works a fundamental injustice. Equal access to justice, and equal respect of persons -- in particular of the unique legal needs faced by members of disadvantaged groups -- requires the funding of participation in the creation of legal norms.³⁸

³⁷ Submission of the Ontario Human Rights Commission to the Review.

³⁸ Roderick Macdonald, "Access to Civil Justice and Law Reform" (1990), 10 Windsor Yearbook of Access to Justice 287; "A Study Paper -- Prospects for Civil Justice, (Ontario: Ontario Law Reform Commission, 1995). For a fuller discussion of the concept of

Another significant dimension of accessing justice is a phenomenon discussed earlier in the paper. As noted, frequently those who are the most disadvantaged and oppressed are unlikely to identify the violation of a legal right. Clinics, for example, often do what Lucy White describes as "lawyering in the third dimension"³⁹; that is, they reach back into the chain of naming, blaming and claiming and assist in the promotion of knowledge about rights, and help oppressed persons come to see themselves as rights-bearers, etc.

... legal aid funding is not about compensating lawyers, but about giving substance to rights, or as it has often been put, ensuring access to justice. But the validity and importance of that view of legal aid funding is nowhere more apparent than in the workings of the administrative justice system of which our agencies are a part. The administrative justice system encompasses many agencies which provide or enforce benefits or legal rights or interests that are often of the most vital importance in individual people's lives, and many of these people live in poverty...we also know that, for people living in poverty the availability of rights of the kind enforced by administrative justice agencies frequently cannot be known, or the confidence to pursue such rights cannot be mustered, except through access to help from professional, legal-services consultants... In short, from our perspective we believe there can be no blinking the fact that restricting access to legal aid equates, effectively, to the destruction of rights.⁴⁰

Rights are often unenforceable because of lack of knowledge, and lack of the means to enforce them. But rights also go unenforced because they are disregarded by bureaucracies charged with their implementation. Just as counsel for the criminal defendant can argue that s/he acts to represent not only the interests of an individual accused but to ensure that the police act fairly and lawfully, that Crown prosecutors do not abuse the plea bargaining process, and that the fundamental rights of the accused are respected throughout the criminal justice system, so too, the presence of advocates within the social assistance system, the employment insurance system, etc. helps to ensure that actors within those systems act fairly and lawfully.⁴¹

access to justice in relation to disadvantaged groups see Morrison and Mosher, supra note 15.

³⁹ Lucy White, "To Learn and to Teach: Lessons From Driefontein on Lawyering and Power", [1988] Wisconsin Law Review 699.

⁴⁰ Letter from S.R. Ellis, as Chair of the Workers' Compensation Appeals Tribunal, and President of the Society of Ontario Adjudicators and Regulators, to then Attorney General Marion Boyd, forwarded to the Review.

⁴¹ For the arguments in the criminal context, see Edward

The importance of advocacy services to perform this role is well illustrated by the following two examples. The Divisional Court ruled in Director of Income Maintenance v. Laurin⁴² that nothing in the Family Benefits Act prevents a child from being considered a "dependent" of more than one person, a ruling which thus permits parents who are separated or divorced and who share custody to each claim the child as a dependent. A subsequently released internal Ministry of Community and Social Services directive on joint custody advises workers that the government "does not accept" this ruling. The Ministry will not grant sole support parent benefits to two parents unless ordered to do so by the Social Assistance Review Board.⁴³ Absent advocates within the social assistance bureaucracy to communicate this knowledge to potential beneficiaries and to challenge the wrongful denial of benefits, many persons would be denied benefits to which the court has found them to be entitled, and bureaucracies would be permitted to flagrantly disregard the law (as they are attempting to do in this instance).

A case recently heard by the Social Assistance Review Board (Board File Q0902-40, heard February 25, 1997) dealt with a situation in which a welfare recipient's benefits were terminated for a three month period for his alleged failure to comply with the terms of an "Ontario Works" programme (workfare). The Board concluded that procedures set out in the regulations and in the guidelines pertaining to "Ontario Works" -- which are ostensibly there to protect welfare recipients -- had not been followed. As both of these cases make clear, simply having "rights" on paper matters little if those charged with their enforcement fail to respect them, and indeed, on occasion consciously choose to ignore them.

5) A Legislative Mandate and Foreshadowing a Model

Where then, does this lead us in attempting to answer the question of whether the existing language of the regulation is adequate. One important implication of the above discussion is that, given the central importance of the legal needs described above, the mandate ought to be moved from the regulations into the statute. The advantage of the current language in the regulation is that it is sufficiently broad to permit the recognition of the legal needs of specific communities of

Greenspan, "The Future Role of Defence Counsel" in A.N.Doob and E.L.Greenspan, Perspectives in Criminal Law: Essays in Honour of John LL.J. Edwards (Aurora: Canada Law Book, 1985) 205.

⁴² (1995), 86 O.A.C. 30

⁴³ The MCSS policy is described in the Community Resource Bulletin 3, March 5, 1997.

disadvantaged people. Moreover, it is not dependent upon a static concept of legal need, but rather creates the potential to respond to the evolving legal needs of communities. The danger is that the openness of the language could also be employed in a narrow and restricted way. As in many other areas of legal regulation one is faced with the dilemma of discretion. It may well be appropriate to consider statutory language which more specifically acknowledges both the general legal needs that will arise by virtue of one's low income status, but also those needs more specifically tied to membership in particular communities of disadvantaged groups. One might also want to consider statutory language which captures some of the normative dimensions of this work. The merits of moving to new language, as well as the specifics of that language, is a matter that ought to be fully discussed and debated amongst clinics, the Clinic Funding Committee, and community-based groups.

Let me briefly pull together several implications from the preceding discussion for service delivery models. A model will need to be able to identify in an on-going way the needs of a particular community; it will explicitly reach back into the chain of "naming, blaming and claiming" in ways attentive to the many impediments to these pre-conditions to the assertion of a legal right; it will take seriously vulnerability; it will endeavour to fully understand the lives of those it seeks to assist; it will seek to challenge discrimination; and it will focus on a broad conceptualization of access to justice, including the participation of disadvantaged persons in the shaping of legal norms.

C) A Brief History of "Poverty Law" and the Evolution of Community Legal Clinics

By 1951 members of the bar and the government had come to recognize that the existing system of representation for the "indigent", based as it was upon the charitable inclinations of individual lawyers, was failing to meet existing needs for legal representation. Thus, in 1951, the Ontario government introduced the first statutory legal aid plan, permitting the Law Society to establish a plan to provide legal aid. The plan was essentially one of organized charity, dependent upon the voluntary and charitable contributions of lawyers, with limited funding for disbursements. Subsequent to the 1951 Plan, two rights were asserted: lawyers asserted their right to be paid for their services; and the right of the poor to legal representation was asserted by social activists, lawyers and others. The Legal Aid Act, 1967, introducing the first state-funded legal aid program, arguably respected both rights (at least to some extent). As others have noted, the Plan was modelled upon the fictitious fee paying client of modest means. The "client of modest means" was used as the reference point for the determination of both the legal aid tariff, and the categories of service to be covered. It was assumed that the "client of modest means" would pay for more

"serious" criminal charges entailing a loss of liberty and significant civil cases in the higher courts.⁴⁴ Thus, coverage was extended to indictable criminal offences and civil proceedings before the Supreme, County or District Courts. Other matters were subject to the discretion of the local area directors of legal aid.⁴⁵

The conception of the legal needs of the poor which underpinned the Legal Aid Act was challenged by the emergence of community based legal clinics completely outside of the Plan.⁴⁶ Mr. Justice Osler was appointed in 1973 to review the Plan. He recommended a mixed delivery model, incorporating community based legal clinics funded by the province. In 1976 the first "clinic funding" regulation (Regulation 557, made under the Legal Aid Act R.S.O. 1970, c.239 as amended) was introduced, establishing funding for clinics. The regulation provided for the funding of "independent community based clinical delivery systems". "Clinical delivery systems" were defined as "any method for the delivery of legal or para-legal services to the public other than by way of fee for service, and includes preventive law programmes and educational and training programmes calculated to reduce the cost of delivering legal services", (s.148). In January 1976 the Clinic Funding Committee of the Law Society recommended, and Convocation approved, the funding of 8 clinics, a number which grew rapidly to 31 by 1978/9. As the then Attorney General observed, it was "obvious that these clinical delivery systems are meeting a need which has not traditionally been well served by lawyers", a sentiment subsequently confirmed in a resolution of the Law Society.⁴⁷

⁴⁴ As David Dyzenhaus notes in his paper prepared for the Review, there is no consensus that "liberty" ranks as the most important value to protect. And indeed, as some of the submissions to the Review argue, there are strong arguments to justify representation for a first offence which does not entail the potential loss of liberty; see for example the submissions to the Review from Parkdale Community Legal Services, Elizabeth Fry of Simcoe County, and Metro Toronto Chinese & Southeast Asian Legal Clinic. Lawyers from Justice for Children and Youth made a similar point in my discussions with them.

⁴⁵ Mary Jane Mossman, "Community Legal Clinics in Ontario" (1983), 3 Windsor Yearbook of Access to Justice 375.

⁴⁶ See Larry Taman, "The Legal Services Controversy: An Examination of the Evidence" (National Council of Welfare, 1971); Mossman, supra note 45; Michael Blazer, "The Community Legal Clinic Movement in Ontario" (1991), 7 Journal of Law and Social Policy 49; Michael Cormier, "Legal Aid in Ontario: the Function of Charity", (1990) 6 Journal of Law and Social Policy 102.

⁴⁷ Grange, supra note 30 at 9-10.

In 1978 Mr. Justice Grange conducted a further inquiry into the legal aid plan. His observations I review in some detail below, but for the purposes of this brief historical overview, it is only important to note here his conclusion that the Plan ought to be based upon a mixed delivery system, incorporating community legal clinics. His report led to the creation of a new clinic funding regulation, setting out the mandate of community clinics and a new funding structure. That regulation, now regulation 710, Part IV, provides for the funding to a clinic, defined as, an independent community organization providing legal services or paralegal services or both on a basis other than fee for service...

to enable the clinic to provide legal services or paralegal services, or both, including activities reasonably designed to encourage access to such services or to further such services and services designed solely to promote the legal welfare of a community, on a basis other than fee for service, (s.5(2)).

Since that time the system has grown to a total of 70 clinics, although the goal of complete coverage of the province has never been fulfilled and in parts of the province, there is no access to a community-based clinic.

It is useful to examine in further detail several of the observations about the legal needs of low income people and appropriate service delivery models to meet those needs made by Mr. Justice Grange. His report is not only of historical significance given its impact upon the evolution of the Plan -- and clinics in particular -- but offers many insights which are as relevant today as they were in 1978.

As Mr. Justice Grange noted in his 1978 report on the Plan, "shortly after the inception of the Plan... it became apparent to the discerning and it later became universally accepted that there were in the Plan serious gaps", gaps which the community based clinics attempted to fill. As Mr. Justice Grange made clear in his report, these gaps were not simply voids in substantive areas of law not covered by the Plan (although these did exist) that could be remedied by extending coverage under the *judicare* model. Rather, the Plan was premised upon more fundamental conceptual gaps in its comprehension of the life circumstances, and thus of the legal needs, of the poor. Both areas of coverage and the model for the delivery of legal services reflected this failure to come to grips with the legal needs of the poor; the fictional fee paying client of modest means was an inadequate, indeed inappropriate, referent point for the fashioning of a legal aid plan. More specifically, Mr. Justice Grange identified the following "gaps" in the Plan, (I first set out his text and then provide an elaboration of the idea expressed by his text)⁴⁸:

⁴⁸ Grange, supra note 30 at 1-3 in particular.

- (a) The poor were not always aware of the assistance available under the Plan, or even of their legal rights, and if they were, they were not always willing to seek out that assistance and those rights.

The judicare model (as do most staff models) presupposed(es) clients who have identified a legal problem and who are prepared and able to seek out assistance (no barriers or impediments exist) for the resolution of that problem. This may well be a fair assumption to make where someone has been charged with a criminal offence and perhaps in some circumstances where one has decided to end a marital relationship. But as noted above, it is often the case that poor persons are not in a position to "name, blame or claim". Clinics recognized (and recognize) this, and hence saw (see) community outreach, community legal education and their visible location in communities as crucial to bringing the law to poor persons.

As early as 1972, the Law Society acknowledged the inappropriateness of this assumption in a report from a sub-committee of the Legal Aid Committee.⁴⁹ The authors of the report noted that the "man of modest means" concept assumed on the part of the client the ability to identify legal problems in a timely fashion and to take the initiative. This concept, the authors concluded, had little application to what they described as "preventative law". This notion, they explained, makes contrary assumptions (ie. inability to identify some legal problems and failure to act) thus requiring greater initiative by the profession.

- (b) The coverage under the Plan was for reasons of economy and legal efficiency limited to serious problems. But the problems of the poor, though not serious in the traditional sense, have for them very serious consequences. For example, a tenant's dispute with his landlord might involve very little in terms of dollars, but for him might be a matter of survival.

The "traditional" sense of seriousness alluded to by Mr. Justice Grange -- indictable criminal offences, superior court family law issues -- has been very much informed by the life experiences of those who do not live in poverty. For one with resources, these reflect the kinds of serious legal consequences most easily imagined. Because those of us with resources frequently take for granted our ability to survive from day-to-day, because we are not entrapped in the laws surrounding income supports, and because we may have limited or no knowledge of the lives of particular groups of disadvantaged persons, we simply fail to see those dimensions of law, and of legal needs, that are frequently most pressing in the lives of disadvantaged persons. This is not to suggest that criminal

⁴⁹ The Legal Aid Committee (sub-committee report), Community Legal Services, August 1972.

and family law are not of pressing concern to low income people; like middle and upper income earners, low income people experience criminal and family law problems (although how these legal issues play themselves out will often differ along class and other dimensions). In sum, the original Plan failed to recognize those areas of legal need most relevant to the lives of poor persons.

(c) The problems of the poor too often by their very natures fall outside the traditional skills of the private Bar and have come to be known as poverty Law. They include such matters as Unemployment Insurance, Welfare, Pensions, Immigration, Workmen's Compensation, where not only advice but advocacy is sorely needed and vital.

Mr. Justice Grange's observations here reflect the reality that practice in these -- and other -- areas of law impacting upon the lives of disadvantaged persons requires particular substantive law expertise. Many of these areas of legal practice are governed more by internal policies of particular bureaucracies than by specific statutory or regulatory provisions.⁵⁰ Indeed it is extremely difficult to garner any sense of social assistance law or immigration law for example, without regular involvement with the systems which are responsible for their implementation. As argued more fully below, concentrated expertise in particular areas of law, or with particular populations, is important for several reasons: quality of service to individual clients; efficiencies in the provision of services; the development of sound law reform initiatives (which come from the experience of seeing how the laws and regulations are actually being carried out in practice and how they are impacting on the lives of clients).

(d) The private Bar and its clients know that it is sometimes not sufficient merely to resolve the immediate problem. Often the client's welfare dictates much more. He must know the dangers in order to avoid them in the future and if they cannot be avoided, he may have to combine with others to attack the root of the problem which perhaps can only be done in the councils or legislatures of the land.

Mr. Justice Grange's observations here endorse the need to provide more than direct client representation. Here, like the fee-paying client, poor persons benefit from what some have termed "preventative law"; that is, knowledge and information that enable one to take steps to avoid a legal dispute in the future. His comments also endorse the expansion of legal services in another respect - a role in law reform. Clinics have long played a role in law reform: initiating particular reforms in

⁵⁰ Mark Leach et al. in their paper for the review note that British Columbia's Agg report suggested a general consensus that private bar lawyers had difficulty understanding issues of poverty, race and gender. Leach et al., "Legal Aid Delivery Models", March 6, 1997 at 28.

the legislative process and through test-case litigation; and responding to the reform initiatives of government. As suggested above, the knowledge that clinic workers come to acquire of particular areas of law, of problems of implementation and of the impacts on clients, contributes importantly to the development of systemic, structural and sound legal reforms.

- (e) The coverage provided by a Legal Aid certificate is limited to assistance in respect of a specific legal problem. But often the legal problems of the poor are associated with and cannot be divorced from their social, economic, and personal concerns.

As noted earlier, complicated intersections of various substantive law areas and of law with other dimensions of the social and political context characterize the "real life" problems which many clients present.

D) The Present Day Clinic System

The present day clinic system is make up of 70 clinics. Most of these are geographically based, but several are organized around communities of interest (age, disability, race, etc.) Clinics operate in over 100 communities (when satellites offices are considered), but 14 districts in Ontario are without a community legal clinic, (see appendices "B" and "C" for a list of clinics and of the areas of the province where there is no access to a clinic).⁵¹

As the chart prepared by the Clinic Funding Committee on the following page indicates, clinics in 1996 carried 37,097 files, provided summary advice in 147,636 matters, made approximately 70,000 referrals, conducted 2,055 public information sessions (reaching more than 72,000 people) and presented 792 briefs or submissions. Two cautions, however, apply when reading these, and other, statistics with respect to the clinics. First, as the discussion below canvasses in some detail, these statistics reveal only limited insight into the impact of many clinic activities. So, for example, many clinics choose cases systemically, providing representation on those matters which may well have a positive impact not only upon the individual who is directly represented, but upon many others who are similarly situated. This case will show in the statistics as only "1" case. The second caution to underscore is that as the Clinic Funding Staff have identified, there are many problems in the processes used to gather the information reported by these statistics. For example there is a lack of consistency between matters identified as case files and those identified as summary advice; the swearing of affidavits in one clinic may be counted as summary

⁵¹ This is taken from the Clinic Funding Submission to the Review, supra note 34.

intake and as a case file in others. Clinic Funding Staff have finalized a new scheme for data collection, based upon new (and defined) categories to better match actual clinic practices, and this new system is expected to be in place as of January 1998.⁵²

Clinics are staffed by both community legal workers (who represent 40% of the total advocacy staff within the clinics) and lawyers (60% of the advocacy staff).⁵³ In addition, board

⁵² See Community Legal Clinics Statistics Discussion Paper, 1996 and letter from Clinic Funding Staff to boards and Deans dated November 29, 1996. The letter also encourages boards to collect demographic data which may be useful for planning purposes (e.g. "if a high percentage of your clientele is aged, you will want to ensure that your staff are well trained in appropriate areas of law, and may wish to make changes to your case selection policy), and for outreach purposes (identifying significant demographic groups to target)".

Bogart and Meredith, in their paper for the Review, recommend the gathering of more detailed statistics from the clinics. It is not clear whether their comments in this respect are in relation to past methods employed by the clinics, or to the methods now being phased in.

⁵³ Clinic Funding Submission, supra note 34.

members (boards are discussed in detail later in the paper) contributed 33,000 volunteer hours of service in 1996. While who serves on boards will vary from board to board and from year to year in light of the annual general meetings and elections held each year, persons from many walks of life are represented across the system: caregivers, physicians, teachers, social workers, community workers, accountants, labourers, bakers, lawyers, librarians, mechanics, students, and former clients. In addition, many others volunteer their time: students; members of the bar; and community members, (see Appendix "D" for a list prepared by the Clinic Resource Office of members of the bar who contributed their time to clinics).⁵⁴

In 1995/6 the clinic system cost a total of \$32.5 million, just slightly more than 10% of the total legal aid budget of \$315.6 million. Clinics have always operated under capped budgets, and their funding has been frozen since 1993.⁵⁵

Clinics are not-for-profit corporations, managed by elected boards of directors who are responsible for clinic administration, personnel management (boards are the employers of the staff of each clinic), financial management, the determination of legal services to be provided (both the choice of area and the methods or strategies to be used) and the evaluation of services.⁵⁶ The day-to-day management of each clinic is the responsibility of the executive director (a member of the staff). The Clinic Funding Committee, a sub-committee of the Law Society of Upper Canada, is responsible for the administration of the clinic system and for establishing policies and guidelines to ensure the high quality of legal services within the regulatory mandate and that public funds are properly accounted for. Its powers and functions are set out in s.7 of reg. 710 (R.R.O. 1990) and include the power to establish policy and guidelines in respect of the funding of clinics; to require clinics receiving funds to report to it; and to direct the staff in the planning and development of clinics and the clinic system and in the development of resource and training for the clinics. The Clinic Funding Committee is made up of 5 persons, 3 of whom are appointed by the Law Society of Upper Canada and 2 by the Attorney General. At least one person appointed by each of these constituencies must be a person associated with a clinic. The CFC determines the total amount of money to request annually from the Attorney General for the funding of the clinics. The day-to-day carriage of CFC functions, including decisions in the first instance with respect to funding (an appeal

⁵⁴ One clinic reports in excess of 2,000 volunteer hours from students and other members of the community.

⁵⁵ Clinic Funding Submission, supra note 34.

⁵⁶ These responsibilities are spelled out in the Clinic Funding Operating Manual for clinics and in Clinic certificates.

lies to the CFC), is undertaken by Clinic Funding Staff.⁵⁷

1) Strategies for Delivering Services

In reviewing the clinic funding applications for 1995 and 1996 I was struck by the range of activities, by the creativity and innovation clearly evident, and by the evidence of local responsiveness. The practices of most geographically based clinics are heavily weighted in the areas of social assistance (family benefits, general welfare assistance), workers' compensation, employment insurance, Canada pensions, housing (landlord and tenant, homelessness), and consumer problems -- those areas of law which impact pervasively upon the lives of poor persons. In the context of this work, several clinics have undertaken important initiatives to provide outreach and meaningful service to particular populations. So, for example, some have designed their work in any one or more of these general areas to reach particular new immigrant populations, or abused women. Clinics also, as described more fully below, address these areas of practice not only through individual client representation but through a variety of other strategies. The practices of several clinics, the "specialty" clinics in particular, often address a range of other legal issues of particular significance to their communities.⁵⁸ One also sees over and over the importance of concentrated expertise in particular areas of law, and in the legal needs of particular communities of interest. One sees this in the responses to various law reform initiatives proposed by governments, in the sorts of activities undertaken, in the sharing of information between, for example, a specialized clinic and a geographically based general service clinic, etc. Below, I note a select sampling of activities undertaken under broad categories of legal strategies, to illustrate these points.⁵⁹

⁵⁷ The role of Clinic Funding Staff is developed in more detail infra in the text.

⁵⁸ This is not to suggest that these legal issues are untouched by other clinics; indeed they often are. When non-specialty clinics do address these issues they frequently look to the speciality clinics for assistance. Hence, speciality clinics often play an important educative and supportive role within the clinic system. Specialty clinics may be required by the terms and conditions of their clinic certificates to devote a percentage of their time to assisting general service clinics.

⁵⁹ For each of these categories I have listed examples of activities from the annual funding applications of the clinics and from various submissions made to the Review. These are simply illustrative and in no manner do they exhaust the range of activities engaged in.

i) Casework

Casework is the predominant activity of most clinics. Several of the submissions to the Review underscore the importance of providing direct client services, not only because fundamental human rights are frequently in issue, but also because of the "snowball effect" if legal services are not provided in a timely fashion to address a legal problem. The Advocacy Centre for the Elderly in its submission to the Review notes that "if legal services are not available, the potential costs to the community are high as failure to resolve a problem dealing with basic rights may contribute to other problems, leading to a snowball effect, with additional human and financial costs for resolution or an escalation of dependency of that person on public systems".⁶⁰

Representation is provided not only to individual clients, but also to communities. So, for example, the Canadian Environmental Law Association acted as counsel to the South Riverdale Community Health Centre to intervene in litigation and ultimately in settlement discussions between the government and a company responsible for lead contamination in the community in order to ensure that the community's interests were taken into account. Parkdale Community Legal Services provided representation to two tenants associations on whole building applications under the Rent Control Act resulting in improvements in standards of repair.

There are also many examples of clinics undertaking specific activities to improve the quality of their representation. Halton Hills Community Legal Clinic, for example, developed a pamphlet for doctors to improve the quality of information needed to access social assistance benefits. Another clinic developed a domestic violence intake form to identify, and better respond to the needs of, abused women.

As described more fully below, for most clinics, individual casework is integrally connected to their other activities, including law reform, public legal education and community development.

ii) Public Legal Education

Public Legal Education refers to initiatives undertaken to help educate members of communities to be served about their rights and entitlements. As such, it includes the preparation and distribution of pamphlets, brochures, videos, and other media for the communication of information about law. Other activities include presentations by staff to various communities -- the community served by the clinic, service providers, members of the bar -- about particular issues of

⁶⁰ Submission to the Review of the Advocacy Centre for the Elderly.

relevance to the legal needs of low income people. As described more fully below one clinic, Community Legal Education Ontario, plays an invaluable role in supporting the public legal education activities of the other clinics.

These activities often represent an efficient and effective way of delivering legal services; when directed at those who are potential users of other clinic services they will often assist in the prevention of legal problems or aid in the ability of the clinic to intervene at an earlier stage. They will also assist those who would otherwise not engage in the naming, blaming and claiming process to do so. When directed at other services providers, including members of the bar, they can help improve the quality of service that clinic clientele receive from these other providers. Clinic activities of those sort include:

- community presentations in a variety of locales -- ESL classes, libraries, schools, community agencies, etc. -- on a huge number of different legal issues
- newsletters (particularly in rural areas, these seem to play an important role)
- the production of videos, self-help kits, a housing survival guide
- flyers
- the creation of a manual on elder abuse

iii) Community Development

Here I am employing the term "community development" to refer to the activities designed to develop additional "poverty law" resources within, and for, communities. Often these efforts are directed towards enhancing the ability of potential legal service providers (front line staff at community based agencies, clients themselves), to understand and convey basic legal information or to provide representation in particular matters. Many clinics engage in "train-the-trainer" workshops where other service providers, or members of the constituent community, are trained to provide legal information to others. One specific example of this work was provided to the Legal Aid Review by Persons United for Self-Help in Northwestern Ontario Inc.⁶¹ This is a group of persons with disabilities who work together to address issues that impact directly on their lives, rights and freedoms. They note the importance of both the Advocacy Resource Centre for the Handicapped (ARCH) and local clinics in the work they do. They state, [w]e could not effectively present information on issues without the direct association of ARCH. They provide us with a breakdown of proposed legislation and assist us with aspects that impact consumers. We then can take the information and distribute it

⁶¹ Submission to the Review from Persons United For Self-Help in Northwestern Ontario Inc.

across the region with full descriptions provided in plain language. Persons with disabilities do not have equal access to the justice system without access to legal clinics.

Other examples of this work include:

- the community law school; a two day landlord and tenant lay advocacy workshop and one day Canada Pension Plan workshop designed to enable agency staff to provide advocacy, legal information and representation before particular decision-making bodies where agents are entitled to appear. Three and six month questionnaires showed that participants were actively and successfully using the training session materials with clients, on behalf of clients and sharing it with colleagues.
- other initiatives designed to train front line workers (ESL teachers, settlement workers, cultural interpreters, etc.) in community agencies
- 7 day intensive course on "systemic advocacy"
- the development of joint strategic plans with other community based organizations also serving low income clients
- training for welfare workers on tenant issues

iv) Law Reform, Systemic Advocacy

As noted, the clinic funding regulation specifically provides for the funding of clinics where services are "designed solely to promote the legal welfare of the community". This provision is mindful of the observations made about "the poor" at the outset. Issues are frequently systemic and structural in nature, affecting large numbers within a given community. The regulation appropriately supports legal advocacy aimed at improving the welfare of the community. The law reform work of clinics, particularly in situations where clinics act as a resource to low income communities to facilitate their direct participation in law reform activities, enhances justice. At a more pragmatic level, participation of low income communities will result in better laws. For example, participation of those who have a full grasp of social assistance law, policy and administration can have an invaluable impact on the design of system reforms that reduce the costs of implementation. Law reform work is undertaken in both the legislative and judicial realms of law-making. Many clinics engage in significant test case litigation, choosing their cases systemically; that is, on the basis of their likely systemic impact. Both law reform work and systemic litigation have the potential to reduce the need and demands for individual client representation.

Particular examples include:

- many clinics are invited by governments of all levels to participate in advisory committees and consultations on new legislation and policy
- the development of peer mediation projects at various high schools; these projects are official alternative measures programs in which the police, the Crown Attorney, the school and the youth work together to resolve conflicts outside of the criminal justice system on both a pre- and post-charge basis
- clinics separately and as part of collectivities working with other clinics and with community based groups prepared law reform briefs/submissions on a range of issues: workers' compensation reform; residential tenancies reform; etc.
- participation in Coroner's inquests; some of this was described earlier
- as a resource to community based groups in their law reform efforts

v) Responding to The Particular Needs of Communities of Interest

As the Multiple Sclerosis Society notes in its submission to the Review, "lawyers at these clinics [the "specialty clinics"] have developed specialized expertise in certain areas which ensures that legal services are accessed in an efficient manner". The concentration of expertise means a reduction in service time and an increase in the quality of outcomes. It also facilitates the role that Speciality clinics play in training clinic staff in other clinics in the system and members of the bar on the legal issues facing members of the respective communities which they serve. Specialty clinics also frequently provide advice and consultation to other advocates in the clinic system who are dealing with specific cases raising legal issues particular to members of particular disadvantaged groups. These sorts of activities are not restricted to the "specialty clinics". Many general service clinics have developed expertise on particular issues and have engaged in extensive outreach to particular communities of disadvantaged persons. So, for example, both Flemingdon and Hastings and Prince Edward County have engaged in significant activities to ensure that deaf persons in their respective communities have access to legal services.

vi) The Inter-Connections

The various services provided by clinics are inter-related in many ways. The submission to the Review of the Advocacy Centre for the Elderly captures this well, [c]lient services alone would not address the systemic issues that lead to the individual client problems. Without public legal education initiatives, more client services would be required. Without law reform activities, more money would be needed to respond to client needs that arise from the impact of legislation and policy which creates

problems for many individuals. Without a comprehensive approach to these legal issues, demand for individual representation would likely increase.⁶²

Casework aids in the identification of the areas of greatest client need and in the identification of issues which are recurrent or systemic and as such prompts the search for more systemic solutions, such as public legal education, law reform, or the pursuit of negotiation with a landlord, an administrator or government actors.

2) Community Boards

Central to the community legal clinic model is the concept of "community"; community as the beneficiary of the legal services and community control as the vehicle for best ensuring that legal strategies undertaken are grounded in an adequate understanding of the legal needs of the relevant community (and not reflections of the interests or expertise of particular staff members, nor of the services that lawyers customarily provide), and of what the promotion of the legal welfare of the community might require. As noted, not only do the legal needs of the poor differ from the non-poor (even when confronted with similar substantive law problems) but the poor are a diverse group with diverse legal needs. Often these needs are only apparent to, and thus identifiable by, those who have had significant exposure to the life experiences of those affected (this exposure may arise through the sharing of similar life experiences or because one has emerged oneself in the realities of the lives of others). So, for example, a group of persons, none of whom have ever lived with a disability nor had deep involvement in the lives of others with disabilities could not begin to identify the pressing legal needs of persons with disabilities. Similarly, persons who have always enjoyed material comfort and have never faced the enormous challenges of rearing children alone, could not begin to fathom the needs and priorities of poor, single mothers. Community-based boards, while never a perfect reflection of their communities, move us towards the accurate identification of the needs of those in their respective communities. Moreover, as members of the relevant community, board members also have something of a vested interest in promoting the 'legal welfare' of their communities. I used 'vested interest' here not at all in a negative sense but to the contrary, in a positive sense; an interest that often motivates the search for creative solutions or strategies for responding to local needs.

At present all but two community legal clinics are governed by boards of directors drawn from the particular community to be served.⁶³ As noted earlier, boards are responsible for the

⁶² Submission of the Advocacy Resource Centre for the Elderly.

⁶³ The two exceptions are the Correctional Law Project based at

general administration of the clinic, for planning, establishing and evaluating services and service priorities, and for the personnel of the clinic. As such, boards are charged with the responsibility to make the difficult triage decisions necessary when demands for service outstrip available resources, as they invariably do.

Community boards are a crucial factor in the delivery of responsive, flexible and innovative legal services. It is, in part, the grounding of board members in the life of the community that enables clinics to maintain an on-going sense of the evolving legal needs of the members of their communities, and changing senses of priorities. The Legal Aid Committee of the Law Society of Upper Canada in its 1972 report astutely noted the difficulties posed in trying to identify the unmet legal needs of persons "characterized by their invisibility and reticence toward the Plan and the profession".⁶⁴ The report goes on to note that these difficulties are frequently compounded by the fact that such need is not so often articulated by those in need, as by those who would purport to service it, or see it serviced in a particular way.⁶⁵ As such, the authors of the report stressed the importance of meaningful public local influence to "ensure timely, accurate identification of outstanding (or changing) local legal needs on a continuing basis" and to ensure a public voice in the determination of servicing priorities.⁶⁶ While the authors of that report envisioned local area committees of legal aid being reconstituted to provide this local, public influence, these same principles have been at the heart of community-based clinics.

Mr. Justice Grange made a further, related point, [i]f there are to be effective services to the poor, the traditional distrust felt by the poor towards lawyers, the legal profession and even towards the law itself, must be reduced. ... to the extent that the poor have now placed their confidence in the clinics, much of the credit must go to the strong role played in their development and operation by the boards of directors. If the movement is to develop and progress with the continuing confidence of the clients, that role must not be eroded. The boards must continue to govern the affairs of the clinics, both as to policy and administration, subject only to accountability for the public funds advanced and for the legal competence of the services rendered.⁶⁷

Queen's University and Legal Assistance of Windsor, both of which are staffed primarily by students.

⁶⁴ The Legal Aid Committee (Subcommittee Report), supra, note 49.

⁶⁵ Ibid at 4.

⁶⁶ Ibid at 5, 82-3.

⁶⁷ Grange, supra note 30 at 21-22.

This observation of Mr. Justice Grange touches upon a fundamental component of the solicitor-client relationship, that of trust. Trust is essential to the full sharing of information which in turn, is a necessary pre-condition to effective advice and representation. In many instances, persons are reluctant to seek out legal assistance because they do not know whether those providing the services (lawyers in particular) are to be trusted. This distrust may stem from experiences in one's country of origin, from one's negative experiences with "the law", or from the class, race and/or cultural differences between lawyers and their clients that often render understanding elusive.⁶⁸ Indeed, many American academics have noted the tendency amongst even those lawyers committed to "poverty law" practices not to have a deep understanding of the lives of their clients, and thus to pursue legal strategies without an adequate understanding of their potential impact.⁶⁹ As Mr. Justice Grange points out, having community-controlled and community-based clinics facilitates relationships of trust, in large measure, because such clinics have the potential to be closely attuned to the lives of those they serve.⁷⁰

Connected to community control is a further principle -- that of independence from the government, and to a large extent, from the Plan itself. Independence from the Plan is a necessary pre-condition of local governance and its tasks of responsiveness and innovation. Independence from government is crucial given the realities that government is frequently the opponent in litigation undertaken, and its laws the subject of law reform initiatives.

3) Clinics' Accountability to Their Communities

⁶⁸ The submission of Community and Legal Aid Services Programme (CLASP) to the review makes this point well, "trust is an essential factor in any solicitor-client relationship... Awareness of a particular group's needs and sensitivity to their conditions is essential to providing accessible justice. Distinct cultural, linguistic or situational collectivities ... require sensitivity and respect in the delivery of legal services".

⁶⁹ Gerald Lopez, "The Work We Know So Little About" (1989) 42 Stanford Law Review 1; Lucy White, "Subordination, Rhetorical Skills and Sunday Shoes" (1990) 38 Buffalo Law Review 1; Anthony Alfieri, "Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative" (1991), 100 Yale Law Journal 2107.

⁷⁰ The submission to the panel by the African Canadian Legal Clinic notes that many blacks in Toronto are unwilling to approach general service clinics.

Given the justifications for community boards, an obvious and crucial question is whether boards are, in practice, responsive to their local communities. My review of funding applications and of submissions to the Review leads me to a conclusion similar to that of Corlett and Associates in their 1993 Operational Review of the Clinic System: there is a great deal of evidence of responsiveness to local community needs and of the use of a variety of strategies utilized by clinics to help ensure that they are indeed responsive.

All boards meet at least annually to review service priorities. As part of the funding process, the year's activities are reviewed and evaluated in relation to the prior year's priorities, and new priorities are set for the up-coming year. In addition to this annual process, service priorities are often reviewed at various stages in light of, for example, important legislative changes relevant to the community, shifts in patterns of in-take, etc.

Information about the needs of the community and priorities within the community come to boards through a variety of avenues: reviews of demand for services (statistics and staff analysis of trends); assessments of legislative or policy changes; consultations with community agencies; knowledge of board members and staff; strategic planning sessions; client questionnaires; market trends; information and requests from other agencies; community growth; special committees; and formal needs assessments of the community (where, for example, a community legal worker might systemically survey the community to develop a fuller sense of existing needs in the community).

ARCH, for example, pursues litigation and law reform strategies intended to advance Charter equality and human rights of persons with disabilities. Over the years, its board has generated case and law reform selection criteria to be used by staff on an on-going basis as issues present themselves at ARCH's door. For the selection of litigation cases these criteria include the potential to create a legal precedent of broad application; whether the issue fits within the priority areas identified by ARCH member groups; whether alternative approaches might be more effective; and the likelihood of success. ARCH is governed by a membership of some 54 disability member organizations. "The membership is periodically surveyed about the legal priorities of the constituencies each represents. Results are distributed and form the basis for discussion at "priorities days" at which the membership meets and makes decisions which direct our work for the coming year".⁷¹

Simcoe Legal Services Clinic in its submission notes that it relies heavily upon "an extremely accessible advice component of their service as the principal means to gauge the demand

⁷¹ Submission of the Advocacy Resource Centre for the Handicapped.

for services within the communities they serve. It is only by providing this level that the clinic is in a position to anticipate the needs and priorities that evolve in the delivery of services." In order to provide this expansive advice coverage the Clinic delivers services by satellite offices throughout the service areas. It also employs "800" number telephone technology. "Those needs which are demonstrated by requests for service/summary advice are valuable indicators as to the legal needs of low income clients. This reactive assessment is complemented by proactive public legal education sessions conducted on an ongoing basis in response to the demand and perceived shifts in need as a result of legislative changes, etc." "In the life of this particular Clinic, there have been ebbs and flows in the demand for services in substantive areas of law. The Clinic, because it is constantly monitoring its data with respect to requests for services, changes in legal institutions, and changes in substantive laws, can more readily predict future needs." ⁷²

The CFC has several policies in place which speak to board composition and board practices. The responsibility of boards with respect to programs and services, as well as planning for and evaluating those program and services, are spelled out in the CFC Operating Manual.⁷³ In addition, the CFC together with the then Ontario Association of Legal Clinics developed Clinic Performance Evaluation Criteria in 1987. So, for example, they include whether the composition of the board reflects a balance of low-income representatives, independent legal skills, financial skills, and experience working in community-based groups; whether the board is independent of other community groups and of its staff; whether the board has in place a system of annual planning and evaluation; the board's ability to understand community needs; whether the board has a systematic process of obtaining sufficient information about clinic activities to allow for the continuous monitoring of those activities; whether the board has documented the need for legal services for low income people in the community served by the Clinic, particularly taking into account circumstances in the local community and other services available to low income people; whether the clinic has a method of gathering information regarding current trends and changing cultural/economic patterns in the community, for use in planning; and several specific measures pertaining to the board's ability to assess priorities.⁷⁴

Several of the criteria relevant to the operation of a particular clinic would be discussed at bi-annual "funding meetings" between representatives of Clinic Funding Staff and the clinic board.

⁷² Simcoe Legal Services Clinic, submission to the Review.

⁷³ See Tab 2 of the Operating Manual.

⁷⁴ See Tab 19 of the Operating Manual.

The criteria were employed as standards to which boards ought to aspire and boards were encouraged to self-apply them. The funding meetings at which these criteria were often discussed were discontinued two years ago because of the budget crisis. While these criteria remain in place, a new "Quality Assurance Program" (discussed infra) incorporating several of these and other criteria, and introducing a new process for "quality assurance", is presently being phased in.

While I have not investigated the performance of all boards in their ability to respond to their communities, as noted above, there is much in the annual activities reports and the submissions to the Review which suggests that most clinics (through their boards and staff) are responsive, vibrant and innovative. Others have noted that not all boards function well. Corlett found, for example, that in some instances clinic services are determined not by reference to client needs but "according to the personal priorities of one or more powerful board members" or "according to what the "ED" tells them".⁷⁵ Others have suggested that a few boards do not enjoy the independence from staff required by the performance criteria. Indeed there is a concern that some clinic practitioners fall into habits of practice about what it is they and their clinics do and are not effectively challenged by their boards of directors. In any of these instances, clearly the board does not reflect its community and accountability of the board to the community is lost. But that some clinics fail to live up to expectations in this respect is not to condemn the model. Rather, it is to suggest that there is room for improvement in the system.

Without going into specifics of how board performance in these circumstances might be improved - since these should in any event be determined through a consultative process between clinics and CFS -- let me conclude with a broad observation. Supports for boards are crucial and CFC (or its future equivalent) must be adequately funded for this purpose. Support includes not only board training but the sharing of best practices, logistical supports with respect to personnel management and other board functions, as well as the specific support necessary to ensure the participation of low-income board members (childcare, travel, food for example).

4) Setting Priorities -- Triage Principles

As noted, one of the critical functions of community boards is to establish service priorities; in effect, to decide who will get service and of what sort. While most of the clinic funding applications and submissions which I have reviewed do not explicitly identify the triage principles (those principles for determining who will get service where there are inadequate resources to serve

⁷⁵ Corlett and Associates, Operational Review of the Community Legal Clinic System (1992).

all who seek assistance) adopted by the board, such principles are frequently implicit in the sorts of decisions made. "Urgency", in each of the three senses articulated by David Luban -- immediacy, gravity of harm, and numbers affected -- seems frequently to be the operative principle, both in deciding the substantive areas of coverage and in deciding the strategy or method of response. Perhaps what most distinguishes the clinics from other service delivery models is that cases, issues or approaches are often chosen with a systemic purpose. That is, they are chosen because of their systemic urgency; service may be directly provided to one individual but indirectly to many others.⁷⁶ Hence, the triage exercise is often not about which individual case to choose over another (although this too does occur) but rather, about identifying those issues which impact more systemically upon the community and attempting to fashion a systemic intervention or challenge.

Certainly, a further principle often in play is whether other assistance is available, or whether the person might, with limited assistance, be able to deal with the matter him or herself. As the review of clinic work reviewed earlier reveals, a tremendous amount of clinic work is devoted to the creation of other options; so for example, to the training of other front line workers so that they might provide legal assistance and the production of self-help and community legal information materials. Thus, again triage decisions are often not about which particular individual will get service but about who will get what kind of service -- assisted self-help, full representation, public legal education -- and about the amount of time to devote to generating additional resources as opposed to providing direct client representation.

In these important respects, clinics simply have available many more triage options, than for example, a judicare system. A staff model devoted to individual case representation would obviously face similar triage constraints to judicare, but it would be possible to create a staff model with a range of triage possibilities that more closely approximates that of clients. With a staff model, however, one is left with the important issue of legitimacy; is there a body with the necessary legitimacy to make triage decisions?

5) Are the Clinics A System?

In thinking about the question of whether the clinics are a system it is helpful to delineate different meanings of the word. One might think of a system as something which is centrally controlled and managed; this does not characterize community clinics. Another way of thinking

⁷⁶ For a well-developed normative justification for choosing cases on the basis of numbers affected see David Luban, Lawyers and Justice (Princeton: Princeton University Press, 1985). See also Ewart, supra note 3.

about a "system" is a collection of connected endeavours which are centrally supported, wherein information is shared widely amongst the constituent parts and where those parts often come together to work jointly on particular undertakings. The community clinics do resemble a "system" in this latter sense, although as discussed more fully below, clinics could function more systemically. There are several constituent parts to this "systemness" of the clinics: the Clinic Funding Committee and staff; the Clinic Resource Office; Community Legal Education Ontario; regional and inter-clinic working groups; and a range of collective activities initiated by clinics themselves.

As noted earlier, the Clinic Funding Committee (CFC) is a committee of the Law Society of Upper Canada and is responsible for the community legal clinics, although its day-to-day functions are carried out by Clinic Funding Staff (CFS). The clinic funding staff purchase centrally for all clinics (for the system); they have centrally co-ordinated bringing all clinics on-line so now all are hooked up via e-mail; they provide board trainings; they administer group benefits and group RRSP's for employees of clinics; they provide bookkeeping and financial reporting support; they develop and implement policies that apply system-wide; and they create system wide supports, such as the Clinic Resource Office and the inter-clinic working groups and training sessions described more fully below.

The Clinic Resource Office provides a centralized research and casework support function. It employs 4 full-time staff lawyers, 1 part-time lawyer, 1 database administrator, and 1 support staff. Its centralized research function includes the creation and maintenance of a Social Assistance Review Board Practice Manual and annotated social assistance legislation, regular bulletins reporting on recent legal developments, the creation and up-dating of standardized legal memoranda as well as providing responses to specific research requests from clinics. Clinics also feed information into the CRO about rulings in particular cases (rulings which are not generally easily accessible - for example, decisions of the Social Assistance Review Board, one of the most important tribunals touching on the lives of low income people, are not generally publicly available). The CRO, in its regular newsletter then uses this, and other information, to provide information to all the clinics with respect to recent developments in law (case law, statutes, regulations, policies). In addition casework is supported not only by this research assistance and expertise but also through the CRO's role in regional and local training (including establishing a mentor programme to enable clinic lawyers to contact a private bar "mentor" for assistance ranging from expert advice on an issue to pro bono representation in test case litigation) and in acting as secretary to provincial working groups (these are described below). Increasingly the CRO has also taken on a significant role in co-ordinating and supporting complex test-case litigation.⁷⁷

⁷⁷ Clinic Resources Office resources and priorities discussion

Responses to a priorities questionnaire prepared by the CRO and circulated to the clinics indicate that clinic practitioners are highly supportive of the work done by the CRO. This was also confirmed by many of the annual funding applications which I reviewed. There seems to be a consensus that, as predicted by Corlett and Associates, the CRO has greatly enhanced the quality of work of clinics, as well as improved efficiencies. As Corlett and Associates report, the CRO has been universally hailed.⁷⁸ But, as they caution, it is under-resourced to take on the role of coordinating inter-clinic initiatives, such as test cases, or law reform activities.

While Community Legal Education Ontario is itself a community based clinic, as briefly noted earlier in significant respects its work supports that of other clinics within the system. CLEO's "primary activity is the development, production and distribution of public legal education materials for the clinic client community and the "potential" clinic client community. Materials are aimed at the legal needs of low-income people, though their distribution is not restricted to this community. CLEO distributes materials to a wide variety of service providers and individuals throughout Ontario."⁷⁹ Its community legal education publications are utilized throughout the system, enhancing the work of other clinics in their community legal education and outreach functions. And while particular clinics will also develop their own resource materials (such as self-help kits, informational flyers, etc.) they will also, as just noted, utilize those of CLEO, or approach CLEO to develop particular materials or to work collaboratively on a project. As such, CLEO plays a vitally important role in supporting the public legal education work of other clinics in the system.

To give a fuller sense of the work done by CLEO let me briefly review some of its activities in 1995. It began the process of revising its assaulted women's manual into a series of handbooks; developed a self-help kit for tenants facing eviction; worked with the injured workers community to produce a law reform publication "Critical Times" addressing changes to workers' compensation legislation; distributed a report prepared by Parkdale Community Legal Services, "Uniform Treatment: a community inquiry into policing of disadvantaged people"; and updated its publications in response to government initiatives and legislative amendments related to power of attorney, consent to treatment and substitute decisions, workers' compensation, long-term care homes, and family law.

CLEO notes in its submission to the Review that in recent years, over 600,000 publications

 paper, December, 1996.

⁷⁸ Corlett, supra note 75 at 52.

⁷⁹ Community Legal Education Ontario's submission to the Review.

per year have been ordered by community agencies including nursing homes, hospitals, MPP constituency offices, agencies that serve immigrants, police forces, women's shelters, school guidance departments, community information centres, and literacy organizations.

An example of how CLEO materials are used is CLEO's handbook for assaulted women entitled **Do you know a woman who is being abused?** In addition to being used widely by shelters and social service agencies, it has been ordered by the Ontario Provincial Police for use by their officers. Recently, the Metropolitan Toronto Police Force also ordered 20,000 copies of this handbook, as well as the victim/witness program which ordered 5,000 copies for use by their staff.⁸⁰

Regional association meetings are commonly used as a vehicle for the delivery of training to clinic staff, and regional and inter-clinic working groups organized around particular topics meet more and less regularly (depending upon the region and the topic). Three provincial working groups are funded by the CFC: the Ontario Legal Clinic Committee on Social Assistance⁸¹; the Workers' Compensation Network; and the Legal Clinics Housing Issues Committee⁸². Three or four unfunded groups meet more locally, and provide their minutes system wide. These include the employment insurance working group, the inter-clinic working group on violence against women, and the Ad Hoc Ontario Human Rights Code Reform Group. Each region has its own funded working groups in relation to income maintenance and housing. Each region is also funded to put 1 or more training conferences on each year, and the CRO is the main trainer at these conferences. These regional and other working groups present opportunities for the further development of expertise and the transmittal of information about practices and experiences within different clinics. As a group, clinic workers are able to brainstorm around tough legal issues, to compare notes about the differential implementation of particular laws in different locales in the province (different

⁸⁰ Ibid.

⁸¹ In its application for funding in 1993 this committee described its mandate as follows: to advocate with government on social assistance issues; be a liaison between clinics and other groups on social assistance issues; coordinate clinic activity; foster information sharing and development of practice resources and public legal education material.

⁸² In its proposal for funding this committee describes its mandate to include: coordinate local and regional interest in landlord and tenant law reform; initiate test case litigation; eliminate duplication of resources and efforts; share information with respect to the law and tactics; and engage in consultations with government.

practices of local welfare offices for example) and to develop joint law reform and other systemic initiatives.

There are, no doubt, many more system-wide initiatives which could be undertaken which would further support the work of clinics (some of these are reviewed below). But perhaps more important is the issue of whether the clinics ought to be more of a system in the first sense articulated, more centrally controlled and managed. The central reason not to do this is the assured loss of local responsiveness, and with it, the loss of the innovation and experimentation that is generated by diverse groups of local boards trying to respond to the legal needs of their communities. The danger is, of course, the creation of yet another large bureaucratic structure with at best, tangential connection to local communities.

The Corlett and Associates Operational Review of the clinics argues strongly for the creation of additional infra-structures to support the work of the clinics; supports which can improve client services without threatening the independence of clinics.⁸³ In a number of areas there is simply inadequate communication or informational exchanges amongst clinics and between CFS and the clinics. As Corlett and Associates report, "there are an astonishing number of creative solutions to common problems in the system...we are convinced that somewhere in the system a clinic has found a solution to every possible problem."⁸⁴ They also found that clinic members, and especially board members, were anxious to share information with each other -- to learn best practices -- but that there are few forums for accessing and sharing solutions. While the provincial working groups do present a forum for information sharing, and while they explicitly identify their respective mandates to include limiting duplicative work, and facilitating co-ordination of initiatives, more forums to do this would improve quality and efficiencies. But this too is, of course, dependent upon adequate funding.

6) The Clinics in Sum

Let me then briefly summarize the features that characterize the clinic model, and indeed, the bulk of existing clinics. Legal needs of the poor are understood to be integrally connected to the social, political and economic position which various poor persons occupy. As such, advocacy is geared not only to the resolution of specific legal issues that materialize in the lives of particular

⁸³ Like Corlett and Associates I think it possible to distinguish support and decision making (Corlett, supra note 75 at 38), although I appreciate that there is not always agreement about whether a particular initiative is a gesture of support or of control.

⁸⁴ Corlett, supra note 75 at 31.

individuals but also to those dimensions of the social, political and economic order that contribute to the oppression and disadvantage of poor persons. Importantly, this includes attention to inequality and to discrimination.⁸⁵ Legal needs are not understood as static but as evolving and transforming in light of changes in the legal, social, political and economic order. Communities of persons united by some commonality of interest are seen as the beneficiaries of legal services and as the bodies responsible for the identification and prioritization of the legal needs of a given community. Because much in the life circumstances of poor people make it extremely unlikely that they will simply appear on the 30th floor of an office tower on King Street seeking legal assistance, services are organized to reach into the community to assist in the identification of legal issues, and in the prevention of legal disputes. Clinics use a wide array of strategies in their work: law reform, public legal education, test case litigation, summary advice, community development, etc. and draw upon the expertise of community legal workers, board members, lawyers, clients and countless others, in so doing.

As Attorney General McMurtry observed in 1982,
 ... the clinics are in a position to take the law to those who need it most. It is almost trite to point out that a great many poor people have never been made aware of the right they enjoy under our laws... The clinics, located in, and run by, local communities, can reach out to advise people of their rights. They take the law to the people... In doing all of this, the clinics help convince the poor that they have a stake in this society.⁸⁶

E) Locating Clinics in the Overall Structure

1) Accountability to the Funder

Clinics, as noted earlier, are accountable to their communities to provide responsive, high quality services. But in addition, because clinics are recipients of public funds, they are also accountable to the funder, most directly to the CFC, but ultimately to the public, to ensure that services fall within the clinic mandate, are of high quality, are responsive and are efficiently provided. This dual accountability is clearly set out in the Clinic Funding's Operating Manual: [the board is a] trustee for the legal aid resources made available to that community. The Board is accountable to the community for the services provided by the clinic. The Board receives public funds. Consequently it is accountable to the funder for its stewardship of those funds, including the services provided with them.⁸⁷

⁸⁵ Several persons believe that on this count, there is much room for improvement within the system overall.

⁸⁶ McMurtry 1982 quoted in Mossman, *supra* note 45 at 376.

⁸⁷ Clinic Funding Operating Manual.

While no one disputes this general claim of accountability, as with accountability to the community, questions related to the operationalization of this accountability attract far less consensus. As Sandra Wain points out in her paper for the Review, how one assesses "quality" and "efficiency" for example, turns very much upon the identified goals of the Plan.⁸⁸ The performance measures for a delivery model such as *judicare*, for example, would differ significantly from those adopted for a community legal clinic model. There is a danger that the "real" measure will be taken to be the number of cases handled and the cost per case. Martin Friedland, for example, in his paper for the Review notes that the "Legal Aid Board" (his proposed governing body) will need information about the cost of cases within different delivery models. But this sort of comparison is only appropriate if the goals across the models are similar. As reviewed extensively earlier, much of clinic work is virtually unquantifiable; efforts are frequently expended where a single case might have the greatest impact. In a cost per case comparison this impact case may appear very costly, yet its effect may have been to enhance the lives and well-being of a great many individuals. Hence the development of performance measures as a vehicle to ensure accountability must be undertaken with adequate attention to particular delivery models and their goals.

It is also important to note the accountability measures that have been in place within the clinic system for some time. As the CFC notes in its submission to the Review, and as set out in detail in the Operating Policies, financial accountability to the CFC is based upon extensive reporting requirements, including regular financial reports, audits, and in the past, funding meetings. With respect to the quality of services, responsiveness to communities, and efficiencies, a host of policies are in place, ranging from those governing conflicts of interest, to minute-taking at board meetings. In addition, boards must report in their annual applications for funding on their activities, and whether they have achieved the goals which they had set in the previous year. As noted earlier, evaluation measures were developed in 1987, and boards are encouraged to self-apply them, and a new quality assurance program is being introduced.

As Wain describes, the new Quality Assurance Program is based upon the evaluation of 5 key work processes: board governance and overall management; understanding of the community; program planning, development and evaluation; communications; and services. Proposed performance standards for each of these areas are under development. Without going into the merits of the particular quality assurance program planned two important points need to be considered. The

⁸⁸ Sandra Wain, "Performance Measures and Quality Review", May 1997.

first is that accountability principles have been in place and continue to evolve within the clinic system. Indeed, it is probably fair to say that greater accountability mechanisms are in place in the clinic system than have ever existed in the judicare side of the Plan. Secondly, it is important not to think of measurement or assessment as the whole of "quality assurance"; rather it is simply one dimension. Like Wain, I would argue that training is a crucial component of quality assurance, and like Corlett and Associates, I would argue that system wide sharing of information -- of the "creative solutions to every problem existing in the clinic system" -- is fundamental to quality assurance. In other words, quality assurance is not simply reactive (measuring performance), but proactive.

2) Governance

Obviously a fundamental issue is whether community clinics ought to continue to exercise the governance functions which they do presently, and if so, how that "jurisdiction" is best preserved in the context of the overall legal aid plan. Posed differently, the question might be whether "community" ought to be retained in clinics, since local governance is essential to any meaningful sense of "community"; take away local governance and one effectively takes away the community.

Earlier in the paper I touched on this issue in several different contexts: the observations about "the poor" at the outset; the consideration of Mr. Justice Grange's observations about the work of clinics; the discussion of the diverse legal needs of disadvantaged persons; and the discussion of the responsiveness of community boards to local needs. These discussions, observations and arguments all point to the conclusion that community boards are essential to the appropriate identification of legal needs of discreet communities. The dedication, interest and care for one's community that board members have brought to the table over the years, combined with that of staff, have led to the creation of innovative, creative, responsive and high quality legal services. It is community boards that are frequently well placed to understand and address the specific barriers to access encountered by discreet groups of disadvantaged people; to understand why particular members of the community do not knock on the clinic door (even though it may be in an accessible and visible location in the community). As Mr. Justice Grange argued, community based boards can go a long way in fostering trust in the target community. And as the Clinic Funding Submission to the Review notes, "a significant source of individual client and community satisfaction with clinic services is the understanding that clinics are run by Boards that are seen to be independent of government and in touch with local needs."⁸⁹

Thus, it is community boards that are able to fulfil many of the principles that Martin Friedland

⁸⁹ Clinic Funding Submission, supra note 34 at 6.

appropriately argues ought to guide our thinking about governance: accountability; high quality; independence from government; innovation and experimentation; and efficiency.

The more difficult question is how to best preserve local community governance; to preserve board "autonomy with respect to policy and administration, subject only to accountability for the public funds advanced and for the legal competence of the services rendered".⁹⁰ Obviously, de facto local governance, or community control, is dependent upon the overall governance structure of the Plan and the budget structure. Here, let me first briefly consider the reform proposals suggested in this respect by Zemans and Monahan in From Crisis to Reform: A New Legal Aid Plan for Ontario. They propose a provincial legal aid board of 14 which would include 2 representatives from the clinic system. The board's responsibilities would include: determining service priorities in response to the legal needs of low-income Ontarians; the development of long and short-term policies to achieve those priorities; and determining strategic goals and performance objectives. There would exist also a regional structure, based upon the same regional divisions as for the Ontario Court of Justice. Each regional office would have responsibility for the planning and management of legal aid services within its designated region; each region's plan would have to be approved by the provincial Board. Zemans and Monahan suggest that regional offices would identify and respond to the unique legal needs of a particular region. This would be accomplished through advisory committees "broadly representative of constituencies and interests of the region" attached to each region. Community based clinics would continue as "independent" entities. They argue that the integration of clinics at the regional level should not come at expense of clinic independence and they propose to protect clinic independence by transposing the current CFC structure onto the regional level. Clinics and regional committees would sign formal operation agreements equivalent to the current structure.

It is not at all clear to me that this structure would preserve clinic independence; in fact, there is much to suggest that it would fundamentally undermine clinic independence. In light of the responsibility given to regional committees to develop plans reflecting the legal needs of those in its region and in light of the provincial board's responsibility with respect to the determination of policy and performance objectives, it seems entirely plausible that there will remain little, if any, scope for the meaningful exercise of decision-making by local community boards. And certainly their present autonomy with respect to policy and administration would be fundamentally undermined. These multi-layers of decision-making (and I might add, the decision-making authority of each, and their interplay is not immediately apparent to me) risk increased bureaucratization and a radical "de-

⁹⁰ Grange, supra note 30.

democratization" of the present clinic system.

Is there then, any reason to prefer the regionalization recommended by Zemans and Monahan over the local governance presently exercised by clinics. I think not. Legal needs are only tangentially, if at all, connected to regions of the province. Rather, as my earlier discussion has attempted to show, they are integrally connected to one's membership in particular groups; one's association with particular communities of interest. The present clinic system recognizes this; the mandate of several "specialty" clinics includes those throughout the province who share that community of interest. There is no reason at all to think that a regional advisory committee might reflect these various communities of interest. Even the geographically based clinics, and the communities of interest they represent, do not in any manner map onto the regional structure of courts. The membership of a few "community representatives" on a provincial governing body or advisory group is no substitute whatsoever for the local governance and community involvement that now exists. (Which is not to say that there should be no community representatives on such boards, or groups.)

Martin Friedland, in his paper for the Review, addresses several issues relevant to local governance. While he is certainly right to conclude that "some accountability for activities and use of performance standards and outcome measures cannot be avoided when public money is being used", as noted in the above discussion of quality assurance, accountability structures now exist within the clinic system. His suggestion that "governance of the clinics should be done centrally so that there can be a more uniform assessment of the need for clinics in various areas of the province and an evaluation of their effectiveness"⁹¹ is somewhat ambiguous. If, by this, Professor Friedland simply means that a central body, such as a sub-committee of the "Legal Aid Board", ought to have responsibility for making determinations about the funding of clinics and assessing their performance, this is virtually akin to the role presently played by the CFC and ought to continue in the context of a new Plan. Indeed, the maintenance of a separate body to administer the clinic system will be essential to the vitality, indeed to the survival, of community clinics. The administrative body -- who makes decisions about the funding and de-funding of clinics, who evaluates the performance of the clinics, who works to facilitate system supports, etc. - must have a thorough knowledge of clinics, their mandate, and the conditions necessary to their effective functioning. The necessity of this expertise to the appropriate exercise of the function suggests strongly the need for a separate body, such as a sub-committee of a Legal Aid Board, as proposed by Professor Friedland.

⁹¹ Martin Friedland, "Governance of Legal Aid Schemes", draft May 1997 at 73.

Professor Friedland's suggestion of possibly appointing a member of the proposed legal aid board to the boards of community clinics is problematic. If the purpose is to ensure accountability, or to enhance communication, other methods are better suited to these tasks, without the accompanying risks of this suggestion. The risk entailed here is that the presence of a Legal Aid Board member may impede, rather than enhance, the work of local boards. This may occur because the continual presence of the "funder" may inhibit discussion or may cause services and priorities to be set in accord with his or her preferences and expectations, rather than in accord with the needs of the community needs (the goal which, hopefully, both the local board and Legal Aid Board share).

Professor Friedland also suggests the possibility of the new board involving "the agencies in the province in setting some priorities on how public funds given to clinics can be best used". By way of example, he suggests the possibility of imposing limitations on the percentage of time spent on "non-service related activities".⁹² While it is not clear which agencies of the province Professor Friedland has in mind, a role for any agency or body -- other than the community board -- in setting priorities cuts fundamentally against the principle of respect for community control/local governance. It might also be noted here that many "agencies" do sit on the boards of community clinics at present, and the work of clinics and community based agencies is inter-twined in a great many ways, as the review of clinic activities indicated. In this sense, many agencies of the province do assist in setting clinic priorities.

Let me assume for the moment that what may be contemplated here is the imposition by the Legal Aid Board or some sub-committee thereof of priorities, including for example by directing the percentage of time that clinics will devote to particular strategies or modes of service delivery. This is the route which the Interim Report of the British Columbia Poverty Law Services Review Committee⁹³ takes; it interprets the relevant legislation to mandate the provision of community development and public legal education services and so recommends that community law offices be required to devote 15% of staff time to community development and 5% to public legal education. Direction of priorities from above, including the allocation of time to different modes of delivering service, also fundamentally cuts against the principle of community governance. The only relevant question ought to be whether community boards are responsive to the needs of their communities: sometimes responsive may entail all community development work; at others all case work. And this sort of question is addressed, as discussed earlier, through quality assurance and other accountability structures.

⁹² Ibid at 77.

⁹³ Poverty Law Services Review Committee, Interim Report, July 1996, British Columbia.

The final issue to touch on with respect to governance is that of whether there ought to continue to be a separate budget for the clinics as there is at present. As many others have pointed out, the issue of separate versus a single budget is really very much connected to the historical relationship between the two sides of the Plan, judicare and the clinics. This relationship has in some respects been acrimonious. So, for example, in the early 1970's a report of a sub-committee of the Legal Aid Committee of Law Society condemned neighbourhood law offices. The Law Society opposed the recommendation for the expansion of clinics contained in the report on legal aid of Mr. Justice Osler.⁹⁴ Moreover, the Law Society has resisted a "staff" model of legal services, endorsing instead judicare. And while clinics are obviously to be differentiated from a staff model, they nevertheless often fall under the umbrella of the critique of staff models by proponents of judicare. Many speculate that the clinics have survived because they have not encroached upon protected areas of judicare practice, criminal and family law. The worry then, to use Gathercole's expression, is about "putting the fox in charge of the chickens"⁹⁵; that is, a worry that if proponents of judicare have responsibility for funding allocations, the clinics are put at risk of losing their funding to the judicare component of the Plan. Hence, much turns upon who has the responsibility for making allocative decisions with respect to funding. There is a risk that any lawyer-dominated board (and boards may be dominated by lawyers even when they are relatively small in numbers) will prefer judicare. If we are committed to the maintenance of community clinics and wish to respect their mandate, as I have argued we ought to, then this issue is of grave concern. It may well be that the only way to adequately protect clinics and their mandate is to statutorily protect their funding.

F) Criminal, Family and Immigration Law Services

As noted earlier, like middle and upper income earners, low income people experience criminal and family law problems (although how these legal issues play themselves out will often differ along class and other dimensions). In the historical evolution of the legal aid plan, functions as between judicare and the community clinics were divided, with Judicare providing for criminal charges where loss of livelihood or of liberty was at risk, and for some family law matters, and the clinics providing services in the area of "poverty law". In the main then, clinics have not provided criminal or family law direct client services.

⁹⁴ Gathercole notes that the private bar, particularly outside of Toronto has consistently expressed its opposition to clinics. R.J. Gathercole, "The Future of Legal Aid in Ontario" (1978) 2 Canadian Community Law Journal 58.

⁹⁵ Ibid at 63.

With respect to immigration, clinics were initially the only legal service providers in this area. Certificates later became available and immigration became perhaps the only area of "shared jurisdiction" (although certificates in the past were in limited circumstances issued for some areas of "poverty law" practice).

Clinic statistics show that the vast majority of criminal and family law service is in the nature of summary advice, and it is largely in the area of summary advice that clinics have increasingly provided service in light of the recent cut-backs to the judicare side of the Plan. In 1995 clinics provided summary advice in 8,012 family law cases. This increased to 10,139 in 1996 but still represented only 6.87% of summary advice given by clinics. In 1995 only 127 family law files were opened, and in 1997 this number increased to 196 (going from .635 to .92% of the total files). Moreover these few family law files were concentrated largely in a few clinics: Justice for Children and Youth, Keewaytinok, Willowdale and East Toronto.

With respect to criminal summary advice there was an increase from 2.3 to 2.86% of total summary advice, and most of this advice was provided by clinics primarily serving aboriginal populations: Aboriginal Legal Services, Kenora, Keewaytinok, Manitoulin and also Justice for Children and Youth. Not including statistics from the Correctional Law Project which serves only those incarcerated, clinics opened 160 criminal files in 1995 and 165 in 1996. These files again were concentrated amongst a few clinics: Justice for Children, Keewaytinok, and Kenora.

The statistics show greater clinic involvement in immigration with total files in 1995 of 901, and in 1996 of 822. Here too the work is relatively concentrated; some clinics do no immigration, some a small amount, and a few, a sizable amount.⁹⁶

The Clinic Funding Committee submission to the Review concludes, "service in family, criminal, and general civil are generally provided only where clients have little access to other legal services, primarily in remote areas, such as along the James Bay coast." But in addition clinics have and continue, increasingly, to deal with more systemic criminal and family law issues. So, for example, several clinics have done significant systemic work around policing since it impacts upon the populations they serve: the homeless, youths, blacks, psychiatric survivors. Others have begun to provide victim-witness supports to abused women and in this role, have worked actively to improve the criminal justice system's response to wife abuse (for example, working with local Crowns to provide information about conditions for bail releases). Many clinics, particularly since the recent cut-back in certificates, have begun to provide an increasing number of services in the

⁹⁶ The percentage increase and decrease over this period in each of these areas is included in the Bogart and Meredith paper for the Review.

family law area: at least one clinic has created, together with the local area office and members of the bar, a family law duty counsel clinic; and others have begun to provide informational sessions on family law.⁹⁷

In the 1996 applications for clinic funding a few clinics described compelling circumstances in which they provided representation in family law. In one case, the board agreed that the clinic could represent a grandfather in preserving his custody of his grandchild (this required utilization of reciprocal enforcement of judgements legislation). In another, a young mother of two was brought to the Clinic by a school social worker. He had come into contact with the family because it appeared that the children were not being fed.

When he investigated, he found that the mother, who spoke no English, had been cut off welfare for the past two months, had been without food for some time, and was threatened with eviction. Welfare took the position that she should be pursuing support from her ex-husband. Unfortunately, they had not provided the client with any assistance in doing so, or informed her of her rights. The Clinic immediately launched an application for support and custody, as well as an appeal to the Social Assistance Review Board. A parental support worker at Family Court took over the support application.⁹⁸

⁹⁷ Zemans and Monahan also note that there have been many more requests for summary advice in family law received by the clinics. "Our interviews with clinic staff and boards across the province indicate that many would-be certificate applicants have been "displaced" onto clinics, creating increased caseloads in areas of traditional certificate practice, particularly family law." F.H.Zemans and P.J.Monahan, From Crisis to Reform: A New Legal Aid Plan for Ontario (North York: York University Centre for Public Law and Public Policy) at 37.

Bogart and Meredith in their study for the Review found that many clinics are seeing a significant increase in requests for assistance in family law matters from people who have either been denied a certificate or discouraged from applying. Some clinics have responded by providing summary advice; others by creating self-help kits and pamphlets; and others by conducting workshops with the assistance of the private bar.

The submission of the Simcoe Legal Services Clinic describes in some detail the increased demand for service in family law that it has experienced and the many innovations it has introduced in attempting to respond to this demand: it has written and disseminated self-help guides; it has undertaken legal education evenings dealing with particular family law topics and including "an explanation of the process, an introduction of the self-representation materials prepared by the Clinic, and simulation of what the prospective client may find when dealing with the Court bureaucracy and apparatus".

⁹⁸ See the submission of the East Toronto Community Legal

With respect to family law, clinics routinely deal with clients whose multi-dimensional legal needs include family law needs. The intersections between social assistance and family law (the obligation to seek support, the treatment of joint custody arrangements in assessing eligibility or benefit levels, family breakdown and the withdrawal of sponsorships, the role of the family support worker, etc.) are pervasively in issue in clinic practice. Scarborough Community Legal Services describes in its funding application a serious, multi-faceted case. Their client was seriously assaulted by her husband while pregnant and criminal charges were laid. There were "issues relating to the subsequent stillbirth of our client's baby and physical injuries, an eviction from subsidized housing, a denial of welfare assistance, lack of immigration status and pending deportation, child abduction and child sexual abuse". The clinic provided representation on the issues of the welfare refusal, the eviction from subsidized housing and those pertaining to her immigration status. The clinic interacted with victim assistance, the Crown, the police, the coroner and the client's physician. Referrals were made on the family law issues, and the clinic acted as coordinator between the police and the family law lawyer on the child abduction issues and accompanied the client and the police in efforts to locate the child. As such, while not all of the client's legal issues were dealt with by clinic staff, the clinic played a vital role in providing supportive, coordinated service.⁹⁹

Where then might this lead us in terms of the role of clinics in the areas of criminal and family law?¹⁰⁰ It is important to return to an observation made much earlier in the paper that legal

Clinic to the Review.

⁹⁹ The People in Transition Inc. submission to the Review notes with respect to abused women, "women should be able to access all of their criminal and civil needs, plus access medical support, childcare and counselling within the same setting." While this may be ideal, it may not always (or often) be possible. As described by the example in the text, the role which the clinic here took on in ensuring that all of the legal needs of their client were met and in providing continuity of service is a viable alternative.

¹⁰⁰ Due to time constraints I am not able to consider immigration law here. As noted in the text, the area of immigration has been something of an anomaly in the evolution of the Plan and I am reluctant to comment on it without the opportunity to delve into the area in more depth. But it is important to observe not only that immigration is a vitally important issue to many communities served by clinics, but also that it intersects in a great many ways with other issues clinics routinely deal with: social assistance; and housing in particular.

needs in relation to criminal and family generally do not arise by virtue of low income status or by virtue of membership in a particular disadvantaged group. This general proposition does not hold true in all instances; as noted above the multi-dimensional needs of many low income people often include family law issues that arise by virtue of low income status; and as noted below, it is possible to imagine communities of interest that might coalesce around particular issues in relation to criminal or family law. I have argued earlier in the paper that legal aid funding ought to be provided to address those legal needs that arise both by virtue of one's low income status and by virtue of one's membership in a particular disadvantaged group (which for ease of reference I describe below as "poverty law" notwithstanding my earlier critique of the term) and have attempted to offer normative justifications for so doing. I have also argued that a community legal clinic model is the best delivery model to identify and respond to such needs. Thus, as I have conceptualized the mandate of clinics, criminal and family law individual representation **generally** do not fit within this mandate. The bulk of individual representation in criminal and family is not respectful of a "poverty law" mandate, but of other mandates; to ensure that those accused criminally or that those facing loss of custody of their children have representation for example. The risk of clinics taking on these other mandates is that these other mandates will drive out the "poverty law" mandate. Just as it is possible to respect the "poverty law" mandate in theory, but not in practice, by incorporating an overall governance structure that undermines community control, so too it is possible to undermine the "poverty law" mandate by allocating to community based clinics (those charged with the responsibility to honour this mandate) responsibility for other competing mandates. So, for example, if clinics were expected to be responsible for providing significant levels of representation in criminal and family law, the "poverty law" mandate would be put at great risk. If clinics were **required** to provide representation in these areas essentially community control and thus responsiveness would be eliminated, and of course, such a requirement would almost certainly destroy the poverty law mandate.¹⁰¹

A further concern is that the representation of accused persons is at odds with other work undertaken by clinics, in particular their work in assisting victims of domestic assaults.¹⁰² Moreover, many worry that should clinics become engaged in criminal defence work this would perpetuate the stereotyping of the poor as criminals and many poor people would be more reticent to

¹⁰¹ Rollie Thompson discusses these issues in his unpublished paper, "So, Do You Think It's Going to Rain? Notes on Community Legal Clinics and The Legal Aid Crisis", November, 1995.

¹⁰² Submission of the Association of Community Legal Clinics of Ontario to the Review.

approach clinics.

As emphasized above, the proposition that the provision of legal services in relation to criminal and family law is not consistent with a "poverty law" mandate is only generally true, and in many instances the provision of legal services in these areas will be consistent with a "poverty law" mandate. As discussed throughout the paper, integral to the community clinic model is "community", communities of interest and geographic communities. As described above, it is clear that for particular communities of interest, systemic issues in relation to criminal and family -- and one can well imagine although I have not detailed these here, in relation to immigration -- are of pressing concern. As such, it is entirely consistent with the "poverty law" mandate of clinics to engage in this systemic work. And one could also readily imagine particular communities of interest in each of these areas who might wish to seek funding to establish a clinic devoted to their legal needs. So, for example, one might identify women survivors of sexual assault as sharing a community of interest with particular and pressing legal needs -- in relation to documentary disclosure amongst other legal needs.

While, as argued above, there are many reasons to be concerned should clinics take on a significant role in direct client representation in criminal and family, they ought not to be precluded from providing this service where it is consistent with their "poverty law" mandate; they simply should not be relied upon to provide extensive coverage in this area. Moreover, it may be the case that in more remote areas of the province it will make sense to have one office with a "multiple" mandate, but such offices need to be structured to ensure that each of the mandates is respected. Or it may also be appropriate in some instances to co-locate a "staff" family law lawyer with a community clinic, so that office space and other resources might be shared. The co-location of criminal law services is strongly opposed by many poverty activists, for as described above, it risks perpetuating the stereotype of the poor as criminals and decreases the sense of the clinic as a "community resource".

The intersections between family and social assistance in particular also suggest the need for some level of co-ordination between various components of the Plan. One could imagine shared training sessions for clinic and staff employees on issues relating to the intersection of these areas of practices. And one can imagine particular clinics and staff offices negotiating procedures for the handling of specific issues.

In sum then, while clinics ought to continue with their systemic work in relation to family and criminal, and while they ought not to be precluded from doing individual case work in these areas, no significant responsibility for coverage in this area should be assigned to clinics. The work which clinics do at present in providing support and continuity of service is crucial and ought to

continue, although parenthetically let me note that here too, is another example of the problem of basing performance measures on case counts. Co-location of clinics and staff lawyers could be experimented with, and if undertaken, ought to be evaluated. Thought might also be given to experimenting further with the multi-service model such as York Community Services, a community based, non-profit organization offering full primary health care, legal services, counselling and community programs within an interdisciplinary environment primarily to residents of the city of York... A community legal clinic in a multi-service community centre offers major advantages to clients, staff and the legal delivery system. Nearly all of the clients served by a community legal clinic present with a number of problems, of which "legal problems" may be only a fragment. For example, legal problems may stem from a critical social problem, which in turn can be reflected in a health problem...clients can get help for most, if not all, of the other problems which stand in their way to healthy growth and independence.

G) Comparative Dimensions

Models which bear resemblance to Ontario's community legal clinics, but which are not perfect reflections of them, exist in British Columbia, Quebec and Australia.¹⁰³ It appears that no jurisdiction has a model comparable to the "specialty" clinics in Ontario.

British Columbia as of 1996 had 14 community law offices and 15 Native Community law offices. These are administered as separate legal aid societies and operate as funded agencies of the Legal Services Society.¹⁰⁴ The community law offices provide services in areas similar to Ontario's geographically based clinics: residential tenancies; social assistance; and employment law. Like clinics, services are delivered by a mix of lawyers and para-legals, and like clinics, they rely not only on direct client service but public legal education and community development.¹⁰⁵ British

¹⁰³ I should note here that I have not undertaken an exhaustive comparative analysis. Moreover, portions of what appear in this section are highly dependent upon secondary materials which unfortunately do not provide information about those dimensions of the models in other jurisdictions which would be most apt for the purposes of developing a comparative analysis with Ontario's community legal clinics.

¹⁰⁴ Nancy Henderson, Issues Concerning Legal Aid and Some B.C. Experiences, (Background Paper prepared for the Public Law and Public Policy Legal Aid Research Project: Winter 1997); Poverty Law Services Review Committee, supra note 93.

¹⁰⁵ Poverty Law Legal Services Review Committee, supra note 93.

Columbia's Legal Services Society Act mandates legal services for qualifying individuals in particular circumstances, including where an individual has a legal problem which threatens his/her family's physical or mental safety or health; his/her ability to feed, clothe and provide shelter for her/himself and his/her dependents; or his/her livelihood. As such, the Act mandates services for many of the legal problems facing low income people. In a recent "Core Services White Paper" the Legal Services Society has also delineated "board mandated" services. And as noted earlier, the Poverty Law Services Review Committee in its interim report recommends that community law offices be required to commit 15% of total advocacy services to community development services and 5 % to public legal education. Nothing in the B.C. legislation, nor in the structure of the community law offices, recognizes the discreet needs of particular disadvantaged groups, other than those of Aboriginal persons.

As Mark Leach et al. point out in their paper for the Review, there are some similarities between local legal aid offices operated by regional corporations in Quebec and Ontario's community clinics. They provide representation in criminal, family and "poverty law", and they engage in legal education and law reform in addition to providing direct client representation. Quebec's legal aid statute includes in the Commission's mandate the responsibility to promote the development of information programs to economically underprivileged person on their legal rights and obligations.¹⁰⁶

Thurtell and Smith note that in 1991, New South Wales had a network of 26 community legal clinics similar to Ontario's'. They also note that from a British perspective, the Ontario Legal Aid Plan is "an attractive mix of provision which could form a recognizable goal. From an outsider's viewpoint, the speciality clinics are a particularly impressive part of the model."¹⁰⁷

Leach et al. also note that the 55 Law Centres in England and Wales provide similar services to those of Ontario's clinics but are more individualistic and grounded in local initiatives.

H) Student Legal Clinics

In the late 40's and early 50's, while on one front there was a struggle over the status of legal aid as a right or privilege, (whether it ought to be a "social" benefit removed at least in part from the market) another struggle was being engaged around legal education. Prior to 1949 lawyers in Ontario were trained through an apprenticeship system. In 1949 the first university based law school

¹⁰⁶ Leach et al., supra note 50 at 4.

¹⁰⁷ Thurtell and Smith, "Desperately Seeking Sustenance" (1993) 9 Journal of Law and Social Policy 258.

opened in a climate of a rather acrimonious division between practitioners and academics; between those who understood that law could only be learned through practice and those who believed that the study of law ought to be separated entirely from practice and studied in universities. Law schools insisted that they were not in the business of teaching their students about the practice of law. Some went the further step and claimed that there was little educative value in having students spend time in the actual practice of law.¹⁰⁸

Fairbairn notes that "in its initial stages of development, student legal aid met with almost universal disfavour". While students involved in student legal aid saw the provision of legal assistance to poor persons as a means to get access to the practical experience that they believed essential and as providing an important community service, their activities were opposed by practitioners who viewed such activities as the unauthorized practice of law, and by their faculties, who regarded the activities to be of negligible educational benefit and an unworthy distraction from the study of law.¹⁰⁹

Now we come to a point of overlap in the history of publicly funded legal aid and the student struggle for "practical" education. In the mid 1960's students entered the debates about publicly funded legal aid hoping that they might participate in the delivery of such a system and thereby secure legitimization of their past and current practices. Students made submissions to the Joint Committee on Legal Aid and in its Report it noted that the "value of this experience for students can not be overstated. ... It is apparent that the participation by law schools and the students-at-law in the legal aid plan should continue."¹¹⁰

The Legal Aid Act of 1966 provided that "there may be established in accordance with the regulations... student legal aid societies". A subcommittee of the Legal Aid Programme Committee was struck in 1968 to consider student participation in the Legal Aid Plan. At the time the only organized student legal aid programme was located at Osgoode Hall Law School, and it appears that Osgoode Hall Law School was the only faculty to recognize the educative potential of student legal aid activity.¹¹¹ The sub-committee concluded that student legal aid programmes might be "designed to service (a) a special educative function, (b) a community need and/or (c) merely as an

¹⁰⁸ This history is briefly reviewed by Lyle S. Fairbairn, "Student Legal Aid The Search for Legitimacy (1974) 12 Osgoode Hall Law Journal 627.

¹⁰⁹ Ibid at 628.

¹¹⁰ Ibid at 628.

¹¹¹ Ibid at 629-30.

extra-curricular activity."¹¹² In 1969 a regulation was introduced that provided for the creation of student legal aid societies. Law schools could at their option apply to the legal aid committee for its approval with respect to the establishment of a student legal aid society. Within less than 2 years all 6 of the province's law schools had applied for and received approval to establish legal aid programmes, although concerns about their legitimacy linger(ed).¹¹³

Currently, student legal aid societies are governed by sections 73-77 of Regulation 710 (R.R.O. 1990) to the Legal Aid Act. These provisions essentially provide that a dean may apply to the Legal Aid Committee for approval for the establishment and operation of a student legal aid society, and it is the dean who has ultimate responsibility for such societies. The Legal Aid Committee designates sums of money to be set aside out of the Legal Aid Fund for the purpose of financially supporting the student legal aid societies.

In addition to the funding of student legal aid societies through the legal aid committee, students are funded by the Clinic Funding Committee for summer positions in four clinics: Parkdale Community Legal Services, Correctional Law Project at Queens; Kensington-Bellwoods Community Legal Services; and Legal Assistance of Windsor.

Student law societies are presently funded at each of the law schools in Ontario, (students are not paid for their work, rather the primary expenditures are for review counsel, and for secretarial and other supports). Faculties vary widely with respect to the extent to which the activities of the clinic are integrated into their curricula. Law faculty based clinics provide services in the areas of summary conviction criminal matters, social assistance, landlord tenant, consumer matters (Small Claims Court), employment standards, human rights complaints, and academic appeals and offences. While most do primarily individual representation, increasingly student clinics have become engaged in community legal education and outreach efforts. Students also volunteer a significant number of hours to other community legal clinics.

As noted both by Bogart and Meredith in their study for the Review, and in submissions to the Review, student legal aid societies have seen a significant increase in the requests for representation in criminal law matters. At least two of these societies, Downtown Legal Services (DLS) at the University of Toronto, and CLASP at Osgoode Hall Law School, report an increase in the number of criminal files and in their seriousness.¹¹⁴ At DLS the number of criminal files has

¹¹² Ibid at 630.

¹¹³ Ibid at 634.

¹¹⁴ See the submissions of Downtown Legal Services and CLASP to the Legal Aid Review.

increased from 30% to 56% of all open files, and the matters in which students are acting are more serious than in the past.¹¹⁵ CLASP also reports an increase in the number of requests for service in family, young offenders and Ontario Court (General Division) litigation. Community Legal Services at the University of Western Ontario reports that while in the past students provided representation for clients in provincial court on family law matters, the introduction of the Unified Family Court has meant that students can no longer appear, and thus persons who were able to get representation in the past are no longer able to do so.

Law students have obviously contributed enormously to the overall goal of enhancing access to justice for low income people. And clinic work has enriched the educational experiences of students. Student legal aid societies ought to continue to be funded under the Plan and efforts should be made to include them more integrally in the broader planning for service delivery within the Legal Aid system. Beyond these general observations there are several pertinent issues which time did not permit me to investigate fully, but which may warrant future attention: the levels of funding (an issue which is connected to the objectives of student legal aid activities, and these objectives continue to be debated, particularly as between educational and service objectives); the allocation of responsibility as between the dean, the student officers of a society and review counsel; and the relationship between the law school and the overall governing body of the legal aid plan.

¹¹⁵ See the paper of Bogart and Meredith for the Review at 17; the submission of Downtown Legal Services to the Review.

Appendix "A"

Persons consulted for this project:

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Several clinic staff at a meeting to form the Association of Community Legal Clinics