RAP-UPS OF A RETIRED REFORMER

STORIES ABOUT HOW LEGAL SERVICES ADVOCATES TRANSFORMED THE LAWS FOR POOR PEOPLE IN MASSACHUSETTS

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DEDICATIONS

I dedicate this book first and foremost to the members of my immediate family. Sons David and John, son Michael (who died in 1988), and wife Sandy (who died in 2003) tolerated and encouraged my dedication to my work, enabling me to spend more hours on it, at times, than they should have endured. But they never complained or suggested that I should be doing other things with that time. I also thank my sisters, Joan and Susu, and my brother, David. We have been a close-knit group since the beginning, and their companionship and good humor have energized me constantly. And I salute my friend, Carolyn Harder, who has unfailingly supported me in writing this book.

I remember with fondness my mother, Priscilla Rodgers, and my father, Jack Rodgers. Mother started doing volunteer work in Rochester's African-American community well before the advent of the civil rights revolution and continued this work for most of her life. My father, whose politics were quite different from those of his four children, nevertheless was supportive of what we did in our lives, particularly to help people in need. Their tolerance of others and concern for those less fortunate than we were influenced the direction of all four of us.

I dedicate this book also to the many legal services advocates, clients, and allies who collaborated so effectively to make the reforms described in this book possible. As the years went on, it became increasingly difficult because of the deteriorating climate for poor people to achieve major gains, and much of the activity became defensive—to hold on to what had already been accomplished and prevent even worse things from happening. In the face of these great odds, it is particularly impressive and heartening that so many people stayed with it; many have made their careers in legal services or in other advocacy groups.

I am especially grateful to have served as the leader of the Massachusetts Law Reform Institute staff. Many have given their careers to MLRI. Those who left have taken important positions: some became law professors; some judges (including a Justice of the Supreme Judicial Court); some public officials (one has run the federal Medicaid program since 2009, and one is a longtime Massachusetts state legislator); and some are in the private practice of law. I've said many times that the accomplishment I'm most proud of is that I hired them all.

Many of those long-standing advocates are still at MLRI, under the leadership of my successor as Executive Director, Georgia Katsoulomitis.

Pat Baker – Public Benefits
Ruth Bourquin – Public Benefits and Emergency Shelter
Neil Cronin – Health
Annette Duke – Housing
Susan Elsen – Family
Fran Fajana – Racial Equity
Iris Gomez – Immigration

Deborah Harris – Public Benefits
Judith Liben – Housing
Margaret Monsell – Employment
Vicky Pulos – Health

They are the greatest!

If you want to find out more than I've been able to describe in this book about what MLRI has accomplished, particularly in recent years, please go to the program's website: www.mlri.org. There you will find the stories about what's been happening and about the many other activities, such as the publications, websites, and trainings that I have not covered in this book because it is focused on advocacy.

I also commend those other staff members, not advocates, who have been employees of MLRI over the years. They are not mentioned in the text of this book only because they did not directly advocate for the law changes that are the subject of the book. But they contributed greatly to what was a collective effort to engage in statewide advocacy for poor people and to provide support to others who assist poor people.

- Technology Staff: Peter Smick, Sharon Armour, Dina Brownstein, Mary Connelly, Deb Gardner, Anne Felker, Linda Landry, Jolette Westbrook, Bob Ritchie, Ed Toro, and others
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- Training Staff (Regional and State): Jim Rowan, Ken MacIver, Gladys Maged, Jane Saunders, Nina Coil, Vanita Datta, Ellen Hemley, Dina Brownstein, Brad Honoroff, and many others
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- Websites Project: Rochelle Hahn, Caroline Robinson, Gene Koo, and Sandra Quiles
- Finance: Shirley Witchley, Frankie Lieberman, Larry Smith, Jacqueline Humbert, and Denise Matthews-Turner
- Office Managers: Jessie Hill, Millie Peters, and Sharon Armour
- Administrative Assistants: Sylvia deMurias, Gale Halpern, and Lena (Bee) Wilson

I also want to commend the MLRI Board of Trustees. Many members have been on the Board for many years. At one point, I counted five or six past Board presidents who continued to be Board members. They were unfailingly supportive of our work and tolerant of my occasional inclination to cut things close to the line (or even over the line) financially. As a result of their willingness to stay supportive even in hard times, we were able to keep as many of our outstanding staff as was possible.

Finally, I thank the many funders and strong supporters of legal services and of MLRI: the Massachusetts Legal Assistance Corporation, led since its beginning in the early 1980s by Lonnie Powers; the Legal Services Corporation; lawyers and bar associations; and those in the private sector

who have come forward as government funding stagnated or declined. We could not have accomplished all this without their help.

I also give my great thanks to those who helped me produce this book. Gale Halpern prepared and proofread the manuscript that began as some 460 handwritten pages. She produced an electronic version as well as address lists for use by the book's printer in a direct mailing to over 300 people. MLRI staff helped with addresses, and MLRI will be the repository for the printed books that are not mailed out. MLRI will also post the book on MLRI's website (www.mlri.org) and on the Mass. legal services website (www.masslegalservices.org) for all to see.

As this book was going to print, we learned that our longtime colleague at MLRI, Tony Winsor, has passed away. Tony and I worked together at MLRI for nearly thirty-nine years. We were the generalists there, taking on such areas as court reform and language access that did not fall within the specialties of other staff. Tony was dedicated, meticulous in his work, and dogged in pursuit of its success, which he usually achieved. He was also cheery and humorous, a joy to have in the office. I hope that these qualities are adequately portrayed in this book.

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INTRODUCTION

I had the privilege of participating in a legal revolution for poor people by poor people themselves and by their legal services advocates and allies. For forty-two years, from early in 1969 to the end of 2010 when I retired, I was the Executive Director of the Massachusetts Law Reform Institute, a nonprofit legal advocacy group that promoted systemic legal changes and provided support to poor people's groups and other legal advocates for the poor. This book is my catalogue of the major lasting changes in the law and practices of those who regulate the poor which MLRI and its allies succeeded in putting in place. It is based on my own memory of what happened; it is therefore necessarily a limited history of these events. I have not checked or rechecked the original records at MLRI on most of these stories, nor have I rechecked dates and citations. I simply want to get this recalled history down so that others can refer to and remember it. Others should feel free to correct or supplement it. Perhaps someday someone will write a more definitive history of what was accomplished and how it was done.

Given where the law and practices affecting poor people were when legal services came on the scene in the late 1960s, the changes achieved are remarkable. Entire fields of law were restructured and major new programs were created. Most of the changes have been accepted as permanent.

There are two parts of legal services work that I will not relate. The first is the history of the development of legal services programs in Massachusetts. That story is well summarized in an article Ken MacIver, Executive Director of Merrimack Valley Legal Services, and I wrote in 2011 and published in the *Management Information Exchange Bulletin* of Summer 2011, entitled "A Brief History of Legal Services in Massachusetts." The second includes the many kinds of support that MLRI and other legal services programs have provided over the years to help advocates for the poor better represent their clients. This support ranges from books and advocacy manuals to training, and from co-counseling to advice to statewide coalitions to managing statewide websites. Massachusetts has been a leader in all aspects of this support, which has extended to assistance to poor people's organizations, advocates who help the poor from many social services agencies other than legal services programs, and lawyers in private practice who help the poor. The consequence of this available support is that the representational success rate of those helping the poor has been high.

This remarkable record of reform has many parents. In nearly all of the efforts I describe there were many allies. Typically involved were coalitions of legal advocates, poor people's groups, and other advocacy groups. MLRI was fortunate to be able to lead many of these efforts, but they could not have been successful without these collaborations. I will mention some of the advocates and allies who were active in these campaigns, but these listings will be incomplete because my memory is incomplete. Those who read this should feel free to prompt me on what I've not included.

I have divided this book into sections based on legal fields. Each is somewhat chronological. Some areas with which I am less familiar are shortchanged. Consumer law and prisoners' rights are two notable examples. I have to leave these to be filled in by others more familiar with these fields. But before starting these histories I will describe two key background stories: what were the laws and practices legal services and poor people faced when we first started work at MLRI in 1968; and what was the climate for poor people from the 1960s to the present. With this as a prelude, here is my account of this storied work.

Chapter One

THE STATUS OF LAWS AND PRACTICES AFFECTING POOR PEOPLE IN THE LATE 1960S

A. Cash Assistance

Some people like to glorify the "good old days," when, they say, life was simpler and less divisive. Of course, these apologists did not experience what poor people did then or do now. Massachusetts' family cash assistance programs were, until the late 1960s, administered by cities and towns, with few rules and standards for those who received assistance and those who did not, a recipe for arbitrary decision-making.

Fortunately, in 1968 the state established a statewide agency, called until the mid-1990s the Department of Public Welfare (DPW), into which all cash assistance programs were placed. DPW administered the federal Aid to Families with Dependent Children (AFDC) program, but there was no cash assistance program for the elderly or disabled except for Social Security and Social Security Disability Insurance. There was no special program for food assistance, except for a federal surplus commodities program; and the federal Medicare and Medicaid health programs had only recently been established by Congress. Medicaid was just starting at the state level to cover some health expenses of the very poor.

In the wake of the 1970 U.S. Supreme Court decision in *Goldberg v. Kelly*, poor people now had due process rights against arbitrary denials or terminations of essential benefits, and the federal agencies backed these up with required procedures for making fairer decisions and offering administrative "fair hearings" to those who wished to challenge an administrative benefits decision. But compliance with these requirements was not a given in Massachusetts. Agency workers, many of whom had migrated to DPW from municipal welfare agencies, did not shed their belief that only the most "deserving" poor people should receive benefits. This worker "lawlessness" (as legal services advocates called it) continued to deprive many eligible people of the benefits to which they were entitled. Although DPW set up an administrative hearing system, the notices of the right to a hearing were cryptic, many people with grievances did not understand that they could challenge decisions with which they disagreed, and there were few resources available to help someone who wished to appeal. The so-called fair hearing system, for those who managed to pursue an appeal, pitted the poor person against a DPW worker who presented the case and, in effect, represented the agency at the hearing.

Hearing officers were taken from agency employees and in some cases were told what decision to make. As a consequence, few people took advantage of the "due process" available and most who did lost their hearings. A subsequent appeal to court was out of the question for most because there were few lawyers to provide representation for them.

B. Unemployment

Many of the same problems were present in the unemployment insurance (UI) system. Court decisions established due process rights for those seeking or receiving UI and good U.S. Department of Labor regulations and guidance required the states to set up due process procedures for prompt decisions and fair hearings. But in Massachusetts there were long delays in issuing initial decisions on eligibility, placing many claimants in crisis because they had no other source of income. The Massachusetts so-called fair hearing system consisted of two hearings—the first, an informal meeting with an agency worker, and, if this was not successful in resolving the dispute, a second, more formal, hearing before an employee of the agency who had no legal training. Most people did not have the patience or the means to navigate this system successfully. There also were few resources available to provide representation to claimants, many of whom had to face an employer who had representation at the hearing.

C. Housing

Massachusetts had some federally funded and state-funded public and subsidized housing which carried some rights to a modicum of fair treatment of residents, but these programs were mostly administered by local housing authorities whose members were largely elected locally and generally did not look kindly on the residents.

Private landlord-tenant law was still in the old common-law legal regime of the primacy of property rights of the owners. While there was a decent statewide Sanitary Code governing conditions in private housing, and during the late 1960s the Massachusetts Legislature began to establish the right to withhold rent for bad conditions, these rights were not directly enforceable by tenants, nor was violation of these requirements a defense to eviction. So the law was largely like the Wild West. Eviction cases in courts were called "summary process" (they still are, perversely enough), and the time from filing to judgment was a few weeks. Summary process sessions consisted largely of defaults by tenants.

Even when the tenant was present, the tenant said what she could and the court almost invariably issued an order for prompt eviction. Most landlords had legal representation and most tenants did not. All summary process cases were handled in the District Courts, which, as I will relate later, were individual fiefdoms presided over by lawyers who knew a governor and peopled by friends of the judges, legislators, and other public officials. Needless to say, these were eviction mills. There were no Housing Courts or special sessions in District Court presided over by people who were experts in housing conditions and housing law. There were no rental certificate programs, so most poor people had to duke it out with private owners, either as tenants-at-will (where they could be evicted for any reason upon short notice) or as tenants with leases that favored the landlord at every turn.

D. Public Utilities

Gas, electric, telephone, and water services were not legally considered necessities, and were subject to virtually no regulation protecting residential customers. Service could be terminated for any reason (but usually for nonpayment) upon as little as three days' notice with no right to a hearing unless the customer had the resources to hire a lawyer to go to court (which no poor person did). Utility companies refused to enter into payment agreements in order to continue service. They charged security deposits to those with inadequate or poor credit records, some as much as $200-$500. A person whose service was terminated could get service restored only by paying off the entire arrearage and paying a security deposit (usually much more than the initial deposit). There was statutory protection against termination of gas or electric service to elderly households, but those with disabilities, those with illnesses, and those with young children had no special protection. If a landlord defaulted on a utility bill, the tenants' service could be terminated without recourse. And there was no special protection against shut-offs of service to poor people during the winter months.

E. Health Law

Medicaid and Medicare were established by Congress in the mid-1960s. Medicaid was administered by the state DPW, and the procedural shortcomings described in the section on cash assistance applied in the Medicaid program as well. Private health care insurance for those who did not qualify for Medicaid was beyond the financial reach of poor people. Those who were employed were usually in jobs where the employer offered no health plan, unless the employee was a member of a union that had successfully bargained for one.

Although hospitals that had received federal construction funds were on paper obliged to provide free care to poor people, few did. Most poor people who went to private hospitals were directed to the few available public hospitals like Boston City Hospital that were comparatively low funded and overwhelmed by patients, especially in their emergency rooms. Massachusetts, as a result, had what amounted to a two-tier health care system.

The medical research community was just beginning to discover the baleful health consequences of exposure to lead paint and other lead derivatives such as gasoline. There were no laws regulating the use of lead paint, even in residences, and there were no effective damage remedies for those, usually children, who were damaged by lead in their systems. Toxic industries were typically sited near neighborhoods occupied by poor people and people of color. Although advocates for poor people knew of the presence of asthma in many who lived in these communities, the connection between these toxic materials and poor health conditions was not generally recognized or, if it was, it was minimized.

F. Language Access

After World War II, the nation's xenophobia caused severe limitations on the entry of new people to the U.S. But people living in Puerto Rico were U.S.

citizens, so they could freely relocate to the States. Many did, including to Massachusetts. Little was done to provide for their transition to living successfully in the U.S. There was no access to information in Spanish or other non-English languages. There were few interpreters available at state agencies or in the courts; most people had to rely on friends, or even on children, to translate or interpret for them, if they got to the agencies or to court at all. There were no bilingual education or special education programs in the public schools. As immigrants from other countries began to arrive in Massachusetts, these needs became even more acute.

G. Programs for Persons With Disabilities and Youth

Persons with serious mental health and other disabilities had been warehoused in state institutions since the 19th century. The conditions in these institutions were often appalling and many people were held in restraints or in rooms that resembled prison cells. The state had established mental commitment laws and the Mental Health Legal Advisors Committee, a state agency, provided private lawyers in some mental commitment hearings. But persons with disabilities were not recognized then as a protected class, with the legal rights that flow from that recognition.

Young people identified as school truants, runaways, or stubborn children were treated under the juvenile delinquency laws, with no right to legal counsel or the formalities of a due process hearing. The stakeholders involved and the judge typically sat around the table, with the juvenile and/or the parents off to the side, and discussed what would be "best" for the youth. In some cases, detention in a juvenile delinquency institution was the result.

H. Consumer Law

The national consumer movement, sparked by Ralph Nader, was just getting going in the 1960s and produced some major changes at the federal level starting in the 1970s. At the state level, consumer advocates had just begun to press for consumer law changes. There were few consumer protection laws at that time. The Uniform Commercial Code in the early 1950s included some protections for individual purchasers of consumer goods which were groundbreaking at the time, but such sections as forbidding "unconscionable" terms in consumer contracts were largely not taken seriously in the courts at the few times they were raised. Nor was this concept then expanded beyond the sale of goods.

In the late 1960s, Massachusetts passed a "baby" Federal Trade Commission Act, Chapter 93A, proscribing unfair and deceptive practices in a wide range of transactions. But 93A rights were enforceable only by the state Attorney General. There was no private right of action, nor the right to attorney's fees for successful plaintiffs. Yet to come were the expansion of Chapter 93A rights to housing and the establishment of consumer protections in credit, debt collection, and the repossession of consumer goods.

I. Discrimination

Federal and state basic anti-discrimination laws were passed before the late 1960s. Massachusetts set up the Massachusetts Commission Against Discrimination in the 1950s, with an always-inadequate budget and staff and with little interest in addressing patterns of discrimination. Persons with discrimination claims, though, could not go to court until the MCAD had first processed their claim. Since it often took many months, even years, for the MCAD to make a final administrative decision, often even a favorable decision could only award an injunction and modest damages but the discriminatory act could not be reversed. While the agency had on paper the authority to go to court earlier for injunctive relief, it seldom did so. There was also no authority for the MCAD or a court to award attorney's fees to a successful plaintiff who hired a lawyer.

There were also no anti-discrimination protections for many important groups who needed protection, such as women, persons with disabilities, families with children, and persons receiving public assistance. Those attempting to include those groups in the anti-discrimination laws were met with arguments, even by the MCAD itself, that the agency did not have the capacity to take on any more categories of cases.

There was another kind of discrimination practiced with public jobs. Many of the most desirable jobs, such as with the MBTA and other transit agencies, police departments, and fire departments, were governed by the state's civil service system. Entry to those jobs started with a paper-and-pencil test that had not been validated for the skills required for these jobs. Many people of color and those with lower education or literacy levels had a harder time doing well on these tests. People were taken from the list for further screening in the order of their test scores.

To compound this, the agencies doing the hiring would establish a new hiring process and list well before the prior list was exhausted. The result, typically, was that people of color, who tended to score lower on the tests, were never reached on the civil service list before the agency scrapped the list and started over again with a new paper-and-pencil test. Some of these agencies also had other hiring criteria that disproportionately excluded people of color and women, such as physical tests, minimum height and maximum weight requirements, and automatic disqualification for having criminal records.

J. Family Law

Abuse was rarely recognized or treated as a condition that deserved protection or court remedies. One could request a civil protection order in Probate and Family Court, but these orders were only enforceable by going before a usually unsympathetic judge reluctant to grant any sanctions, and an abused woman could seldom get protection through a get-out order if the abuser owned or rented the home. For serious cases of physical abuse, the crimes for such things as assault and battery could be addressed in District

Courts, but typically no effective relief was granted because these cases were considered "family matters."

People on public assistance sometimes had trouble getting divorces. Their hearings were turned into a grilling on their life choices and their dependence on public assistance. One judge even had a practice of denying a divorce until the petitioner showed she had taken herself and her children off public assistance. Another tactic of some judges was to delay a decision until the parties had made a demonstrable effort to reconcile.

Getting and enforcing decent child support orders was often difficult. There were no standards or guidelines for establishing these orders. Where a petitioner was receiving AFDC, some judges would set the order for the AFDC amount regardless of the family's needs or the support obligor's ability to pay, so that all the support would go to the state to reimburse it for the AFDC paid and none would go directly to the family. This typically gave the support obligor little incentive to pay and the supported family little incentive to push for enforcement. Continuing wage assignment and efforts to pursue assets to pay back child support were not authorized by the law. To get a wage attachment at all, one had to apply to the court for an attachment of the wages, which was effective only if the employer received the attachment order after the wages were earned but before they were paid to the employee. Needless to say, the attachment route was seldom tried except for high-income people and not at all for poor people because they did not know about it and could not do it without a lawyer.

These family law barriers put most poor custodial parents (overwhelmingly women) in an impossible predicament. Divorce was sometimes not achievable and financial independence was difficult to secure. Most women had no practical choice but to rely on former or new male providers for their subsistence. Many of these males were abusive, including those who insisted on total control over the mothers and children. Many women became discouraged from marrying the fathers of their children in the first place. This destabilization of families contributed greatly to new generations of damaged children and exploitive, irresponsible men.

K. Administrative Agency Law

State and local administrative agencies ran most of the programs on which poor people depended. Although the state adopted the Model Administrative Procedures Act in the early 1950s, which established an orderly and public process for adopting agency regulations and maintaining the regulations accessible to the public, the state had no central regulations public register, unlike the one adopted by the federal government. Although regulations were collected at the State House, they were sometimes difficult to find and they were nowhere published for public view other than at the State House. Notices of proposed regulations were not made available in a way that most of the public would find out about them. Many agencies adopted emergency regulations in situations where there was not a true emergency and neglected to conduct effective hearings so that people who objected had any chance of persuading the agency to change its mind.

Even worse, some agencies did not really believe in subjecting themselves to binding rules through regulations even though the APA required it. These agencies issued guidelines or internal memos to their staff which those personnel were supposed to follow but which, when they were the basis for a legal claim in court, the agencies claimed were not binding on them. As an example, the unemployment agency had few regulations governing the unemployment insurance program. Instead, starting in the mid-1970s it issued a thick Service Representatives Handbook instructing its employees in great detail about how they should make their decisions. They even imposed these subregulatory rules on the supposedly independent hearing officers who heard appeals from UI determinations. And they refused for many years to make the Handbook available to the public. When they finally relented, they made a hard copy of the Handbook available upon request but refused to make it available in electronic form. This practice continues to the present, although in recent years the agency has been more open to advocates' requests to correct errors or to explain the guidance better.

L. The Courts

Justice in the state's trial courts was spotty and disorganized, relieved only by the occasional efforts of some in the system to mete out even-handed justice. There was really no system and few rules. The Supreme Judicial Court apparently did not see that it was its duty to oversee things except to address the occasional scandal. Particularly in the District and Probate and Family Courts, each local court was its own fiefdom, usually with the presiding judge doing the hiring and running the court administratively. There was no retirement age for judges or for other court personnel. Some judges served long beyond their usefulness or even their ability to comprehend what was going on. During the 1960s when I was present in the courtroom to observe the trial courts, there was one pathetic case of a Probate and Family Court judge who obviously did not understand what was going on, and whose decisions were made and announced by the Clerk.

Judges were appointed by the governor unencumbered by any independent advice or process except sometimes through bargaining with the largely corrupt Governor's Council. There was little or no oversight of the conduct of judges and other court personnel. To initiate disciplinary action, one had to go directly to the Supreme Judicial Court, which under the state's Constitution thought it had no authority to remove a judge. Disbarment as a lawyer was the most severe sanction the SJC could employ, and since one did not need to be a lawyer to be a judge, that might not be successful in having the judge removed. Lawyers and bar associations usually did not want to stick their necks out by even criticizing a particular judge; after all, in the local courts it could be bad for one's practice to be out of favor with the local judge.

Poor litigants fared particularly badly in the courts. In criminal cases, all sorts of pressure was brought to bear on defendants in District Court cases to plead guilty and to waive their right to appeal for a Superior Court jury retrial, by being threatened with a harsher sentence if they did appeal. Bail

was often set punitively high so that those without standing or connections were kept in jail pending their trial or appeal. There was no effective appeal from a bail setting. Some poor people were assessed fines or court costs that they could not pay, and they were jailed until they could work off these debts at the princely amount of $3 a day. Many poor defendants were berated or made fun of by the judge. The Chief Justice of the Boston Municipal Court, who otherwise did not impose long sentences, ran a comedy show (he thought) in his criminal court session by making jokes about the plights and lives of poor defendants before an appreciative audience of hangers-on and lawyers awaiting appointments by the judge to represent poor defendants. This would have been a perfect setting for one of Daumier's satiric cartoon series about similar conditions in the 19th-century French courts, entitled *Les Gens de Justice*.

There was no organized system of waiver or state payment of court costs for poor people in civil cases. Those who could not pay would have to go without a court remedy unless they could get the money from relatives, friends, or abusers, or unless they had a legal services lawyer whose program was willing to pay court costs of its poor clients out of their meager budgets. Summary process cases were run through the speedy court mill, with few defenses to eviction recognized and little time given to move, and the tenants were often saddled with court-ordered back rent and other costs which added greatly to their difficulty in getting new housing. Debt collection cases were run through the District Court Supplementary Process mill, with few defendants having legal representation and many others defaulting because they knew they could get no justice in a system totally skewed toward the interests of creditors.

These are but a few examples of how the law and practices of the courts affecting poor people were largely inhospitable to the poor. The systems trudged on, with few even recognizing that the injustices could be addressed. These barriers made it even more remarkable how many changes legal services, poor people, and their allies were able to make, especially in the early years during the late 1960s and during the 1970s.

Before turning to catalogue these changes and how they came about, I want to describe one more major element that affected our work in a major way: the climate for poor people's rights and interests.

Chapter Two

THE CLIMATE FOR RECOGNIZING THE NEEDS OF POOR PEOPLE

Spurred by Michael Harrington's 1962 book, *The Other America: Poverty in the United States*, and the writings of Frances Fox Piven, Richard Cloward, and others, the condition of poor people was rediscovered during the 1960s. Lyndon Johnson, who grew up dirt poor (as he described it) and never forgot it, pushed through Congress the War on Poverty, and the federal government established and funded many new programs, such as community action, Head Start, housing subsidies, and legal services. Buoyed by the Civil Rights Act of 1964 and the Voting Rights Act of 1965 (which probably no President except Johnson could have pulled off), Medicare and Medicaid, and the civil rights revolution, these were heady times for those who thought it might be possible to eliminate poverty and they eagerly joined in. Coincidentally, poor people's groups, such as welfare rights and tenants groups, were formed and engaged in many campaigns and public actions to promote change. They established and helped build important public support for changes in the laws and practices that discriminated against or ignored the poor, and for major new rights and public programs designed to address these inequities. In time, other groups whose rights had been shortchanged, such as people of color, women, persons with disabilities, seniors, immigrants, and groups representing children, organized and pushed for changes to move toward leveling the playing field for the particular needs of these groups.

The state Legislature at that time was led by two people from Holyoke, David Bartley as Speaker of the House, and Maurice Donohue as President of the Senate. They were particularly attuned to and eager to help reverse the inadequacies of the state's resources for poor people. As will be described hereinafter, they and their staffs and other legislative supporters of change were particularly strong and effective as leaders. The two governors during this period, Republican Francis Sargent and Democrat Michael Dukakis, were also supportive and constructive in bringing about change.

But were the institutions that had to change ready for it? Many of them had seldom before faced lawyers and poor people's groups that pushed hard for major transformations so that agencies would truly serve those whom they were supposed to serve, the poor. Poor people's groups remained largely invisible. As a perverse illustration of this, once, when MLRI assisted the South End Tenants Association in the early 1970s, I had to look up its telephone number. The telephone book had listed it as "South End Tennis Association."

Several other examples illustrate this. Peter Anderson, a benefits lawyer at MLRI during the 1970s and subsequently the Executive Director of Greater Boston Legal Services (GBLS) and a District Court judge, described the mindset of those in the state's Department of Public Welfare as being oblivious to the law and as being most interested in sorting out those whom

they thought "deserved" assistance and those who did not. The Department was totally unprepared for outsiders in legal services to start to represent clients there and to challenge their practices.

The state's unemployment agency, similarly, had never experienced legal challenges to its ways of doing things. Jim Hammerschmith, a benefits lawyer with Western Mass. Legal Services (WMLS), and I brought a class action in the Springfield U.S. District Court (*Hanlon v. Hodgman*) in the early 1980s challenging the failure of the agency to have any effective decision-making or appeals process for unemployment insurance claimants who exercised their right under state law to obtain a waiver of repayment of an unemployment overpayment in certain circumstances. We won a preliminary injunction on the legal claims from the U.S. District Court judge and then negotiated a good set of agency regulations establishing standards for waiver claims, a fair hearing, and a court appeal. These regulations are still in place today. A graduate student at Harvard's Kennedy School wrote a paper about the case and how it was resolved. He interviewed people at the agency and described how nonplussed they were that someone had the audacity to challenge their practices in court. The case took a considerable amount of time to resolve; one reason, the student found, was that some high agency people did not want to give in to what they considered a kind of legal extortion.

Another example shows how out of touch with litigants' interests several Chief Justices of the District and Probate and Family Courts were. Ernest (Tony) Winsor of MLRI was one of the earliest to recognize and try to do something about the rights of people in court and with claims at administrative agencies who could not effectively communicate in English. He started with the District Courts, proposing to Chief Justice Samuel Zoll (who was on other matters sensitive to and cooperative on poor people's rights) that the District Court include on important court notices, in a variety of languages: "This is an important notice which may affect your legal rights. Please have it translated immediately." After Chief Justice Zoll failed to respond in writing or to return follow-up calls, Winsor sent Zoll a letter in Spanish, with the above-quoted legend in English at the top of the first page. Even that ploy failed to interest the District Courts in doing anything about this need at that time. Winsor got much the same reaction from the Probate and Family Court Chief Justice after he sent Judge Alfred Podolski a similar letter. He received a two-sentence reply: "I acknowledge receipt of your letter. I have referred it to the Committee on New Ideas." Needless to say, that was the end of that.

It took years of consciousness-raising before even those institutions open to change began to understand the needs and were amenable to proposals for change or improvement. Welfare rights and tenants groups sprang up and advocated for fair and lawful treatment, especially at local offices of state agencies and at local agencies like housing authorities. Legal advocates helped people document their claims and dramatize the need for responses. Where changes were made, there was a critical need for follow-up so that the agencies actually complied with the changes. Groups of seniors, persons

with disabilities, those assisting victims of domestic violence, and those monitoring the public health and health care systems also engaged in advocacy and compliance efforts, as well as pushing for law changes and new programs to address the needs of those groups. This was the golden age of advocacy, and much was accomplished, as I will relate in this book.

The climate for poor people changed for the worse starting in the late 1970s. Organized groups of self-styled "conservatives" started a drumbeat of demonizing poor people for not succeeding in life as others did. "Welfare" became a surrogate for race in the blame game. Ideological right-wingers waged campaigns to get rid of government programs for the poor. Legal services funding was one of their biggest targets. Press reports of abuses by legal services lawyers, nearly all of which were false, filled the media and the halls of Congress. Supporters of legal services funding had to spend untold amounts of time rebutting these stories and shoring up support in Congress.

In the 1980s, the tone was set in the federal government from the top. As Governor of California, Ronald Reagan had tried to get defunded those legal services programs which were successful in getting courts to throw out illegal steps his government took to gut poor people's programs. After he became President, he continued his own war on the poor by trying to get legal services funding eliminated and by undermining other poor people's programs, such as community action. Reagan also made it respectable for people to be greedy and to have no responsibility to help those in need. This barrage of anti-poor rhetoric and actions also began to undercut the willingness of the public and even some liberals to spend their political capital in standing up for poor people.

The way poverty and unemployment statistics were kept also, in my opinion, greatly contributed to the fading of poor people from public consciousness and from being a major concern of government. Both sets of statistics were designed so that they greatly understated poverty and unemployment. The federal poverty line was based on a study in the 1950s of the expenses of poor people which used food costs as a major element. As time went on, food costs became a much smaller part of a poor person's budget, and other costs, such as housing, health care, and child care, became much more prominent. Studies in later years by economists who realized that this methodology greatly understated poverty showed that, under more realistic methodologies, the percentage of those in poverty would be much higher than the official poverty line. Other studies based on actual living costs concluded that the poverty line should be at least doubled to reach a level that provided a realistic subsistence level of support. But economists could not agree on a substitute methodology, and the right wing, of course, churned out largely disreputable studies purporting to show that the poverty line should be even lower than it was. So when the U.S. government each year announces the official poverty line, you can be sure that the real incidence of poverty is much higher. And the condition of the poor worsens each year. The powers-that-be don't want us to know about this because they do not want to be caught admitting that something needs to be done about it.

The UI figure suffers also from a methodology that seriously undercounts those who are out of work. It counts only those who are actively looking for work. It does not count those who have given up looking for work because their search has been fruitless. It also does not count those who are underemployed—that is, those who work part-time but want to work full-time. As a consequence, if these two other groups were counted, the unemployment rate would be as much as twice the official rate.

So poor people were made to disappear in the public consciousness. This caused a remarkable stagnation in public assistance levels as living costs increased greatly. In the late 1960s and through most of the 1970s, family cash assistance was nearly adequate to meet the federal poverty line. But then the slippage began, and it has continued to this day. The Massachusetts Legislature approved only two increases in family cash assistance, starting in the 1980s, despite a convincing campaign by advocates to raise those levels to something approaching the poverty line, and they have not increased since the late 1980s. Today, the family cash assistance levels are less than 50% of the totally inadequate poverty line.

Things got even worse. Having captured the South by appealing to the electorate's opposition to the civil rights law changes, Republicans were set to hang the "welfare rights" label on Bill Clinton as he ran for President in 1992. They apparently concluded that welfare would be a surrogate for race. Clinton reacted by saying that, if he were elected, he would "end welfare as we know it." Mysteriously, the Republicans dropped their campaign to label Clinton as a welfare supporter. Clinton did what he said he would do. He collaborated behind the scenes with Republican Congressional leaders to pass the Welfare "Deform" (my term for so-called Welfare Reform) Act of 1996. This law abandoned any federal legal responsibility for the program, turning it over to the states to pretty much operate it as they saw fit. It also imposed time limits on the receipt of assistance, a work requirement, and many other punitive behavior control conditions on the program beneficiaries. The states eagerly followed suit, with Massachusetts adding some punitive parts of its own at the insistence of Republican Governor William Weld and anti-poor legislators.

Poor people were also subjected to disparately based treatment when the state thought they stepped out of line. Most welfare overpayments were treated as potentially criminal, and were referred to a state fraud investigative agency staffed mostly by former law enforcement types. By contrast, Medicaid providers who committed fraud had their cases negotiated by a state agency and few were referred for criminal prosecution, even though the state money lost through provider fraud dwarfed the amounts lost by true beneficiary fraud. Poor people went from being regarded as those who needed and deserved help to pariahs with few supporters and allies.

This disappearance of poor people from public and elected officials' radar made it increasingly difficult for poor people's advocates to succeed in getting programs to improve poor people's lives. Increasingly, legal services efforts had to be devoted to defensive measures. Starting in the early 1990s,

Massachusetts legal services programs started a Budget Cut Litigation Project to coordinate efforts to hold off or challenge state budget cuts. Much of that effort was successful, at least in part, but thumbs in the dike were all that was possible. With each economic downturn, the cutbacks became worse. Even our current Democratic Governor, Deval Patrick, has implemented punitive cutbacks in programs for the poor, such as in the shelter system for the homeless. Since 2010, the rise of public consciousness about the gross income inequality in this country and how our economic system is rigged in favor of the most wealthy may give some hope for a reappraisal of what our nation has done to those without power and put some spine into those who should know better but are afraid of public rejection if they support the poor. But things could go in the opposite direction, as those who have so much wealth they don't know what to do with it pursue their incessant greed to make this country into a corporate oligopoly.

Given these baleful trends, it is all the more remarkable that most of the changes brought about by advocates remain in place and that they have been able to largely forestall even worse proposals to punish people for being poor. But the enormous time and energy that it has taken even to tread water has sapped the resources that could have been spent more productively in promoting legal advances for poor people.

Chapter Three

ADMINISTRATIVE AGENCY ADVOCACY

Overwhelmingly, the largest numbers of decisions on poor people's benefits are made at administrative agencies, most of them at the state level.

I have described previously in Chapter One the status of administrative agency "justice" when legal services programs were established in the late 1960s. Given the U.S. Supreme Court decision in *Goldberg v. Kelly* in 1970 and favorable due process regulations by federal agencies that governed federally funded programs, this was an important place for advocates to start efforts to shape up the state agencies.

A. Agency Rule-Making

In its first state legislative session (1969) after MLRI's state support program was funded in 1968, MLRI filed some 60 legislative bills, of which 11 became law. One successful legislative priority was the Administrative Code bill, which required state agencies to provide notice and copies of all regulations to a State Register administered by the Secretary of State. It also established procedures, with participation by the public, for promulgating proposed and final agency regulations, and limitations on the kinds of regulations that could be put into effect on an emergency basis.

The passage of this law in 1969 is a good example of why having the law on the books is not nearly enough. MLRI consistently found that legislative mandates were delayed, inadequately funded and staffed, and even avoided altogether. Making these laws do what they were intended to do often took a vigorous and time-consuming campaign to see that they worked, sometimes taking many years. This was certainly true with the Administrative Code. Several years after it was adopted, it was evident that the Secretary of State, former House Speaker John F. X. Davoren, was doing nothing to set up the Mass. Register of regulations. Tony Winsor and I decided that we should tip off a *Boston Globe* columnist, Carol Surkin, about this. Carol wrote what we called a "killer column," excoriating the Secretary of State for his failure to implement the law. Soon afterward, I got a call from Frank Larkin, a District Court judge in Milford and former Dean of Boston College Law School (whom I knew somewhat because we were on opposing sides of a Supreme Judicial Court case when I was in the Attorney General's office in 1968). Larkin said that the Secretary of State was very concerned about the *Globe* column and wanted to meet with me. The place of the meeting was the Locke-Ober restaurant in Boston, in a first-floor room that was open to men only. There were around 20 other people there besides the Secretary of State, probably all of them from his office (and all of them men, of course). Midway through the meal, Davoren got up to speak. He said he planned to see that the law was implemented and started giving orders to various people there ("Now, Johnny, I want you to," etc.). I left the meeting suitably skeptical, and it took a couple of years for Davoren's office to start to comply. Ultimately it had to be done right by Davoren's successor, Paul Guzzi, but they finally did it. This

system remains in place to this day, now in electronic form, and works as it is supposed to.

B. Agency Hearings

1. Administration & Finance Standard Rules of Adjudicatory Procedure

Legal services advocates worked at across-the-board and individual state and local agency improvements in decision-making affecting poor people. Most of this was on an agency-by-agency basis. We had to get agencies to not only acknowledge their obligations, but also to implement them in a complete and consistent way. In an early effort for broad improvement, the state government (through the Executive Office of Administration and Finance (A&F)) initiated in the late 1970s an effort to standardize state agency fair hearing rules. Tony Winsor of MLRI had a major role in drafting the contents of what became the Standard Rules of Adjudicatory Procedure, promulgated by A&F in 1977. A dual system of hearing rules was established, a more formal set for more complex hearings, such as rate-setting cases, and a set of Informal Rules for less complex hearings on such things as public benefits programs and unemployment insurance (UI). Most poor people's programs fell within the Informal Rules. The first issue to be faced after issuance of the Rules was whether agencies with already-developed rules that were consistent with the Standard Rules should be exempted from those new rules under a waiver permitted by them. Most agencies administering poor people's programs sought and received a waiver. That meant that advocates had to work with each agency separately rather than trying to enforce the rules through A&F. By and large, the Informal Rules were very good, and most agencies that had waivers from them had similar provisions. The Standard Rules continue to this day with no significant change, although they probably need a careful review at this point.

2. Department of Public Welfare (DPW), now called the Department of Transitional Assistance (DTA)

Because of the large number of people whose very subsistence has depended on DPW programs, legal services advocates made many efforts over the years to improve DPW decision-making. In the early 1970s, the DPW Hearings Department was part of the line administration of the agency. Supervisors at the agency occasionally prescribed decisions by hearing officers and some even reversed decisions already made. Legal services advocates decided to address this through legislation. Led by MLRI's Peter Anderson (later the Executive Director of Greater Boston Legal Services and a District Court judge), this effort was successful in its first year of consideration, in the mid-1970s. The new law established the DPW Division of Hearings as an independent division within DPW and prohibited anyone at DPW from interfering with the independence of the hearing officers. This was an important structural precedent for other state agencies, and legal services advocates had several occasions to use this statute whenever DPW or other

agencies began to undermine this independence. DPW also upgraded the quality of its hearing officers, hiring lawyers for some positions and using law students at times. As a result, the quality of hearings and hearing decisions improved greatly.

3. Division of Employment Security (DES), now called the Division of Unemployment Assistance (DUA)

The state's unemployment agency has had many different names over the years. The ones I remember are the Division of Employment Security, the Department of Employment and Training, and the Division of Unemployment Assistance. Each name change was heralded as part of a reorganization that promised more efficient and effective service. But although the names changed, little else did as a result of the reorganizations. The French have a saying for this: "Plus ça change, plus c'est la même chose"—"The more things change, the more they stay the same." I have tried to use the name in existence at the time of each event I describe, but no doubt these are incomplete.

All legal services programs represented UI claimants at hearings. Greater Boston Legal Services had an experienced Employment Law Unit, led by Monica Halas, and for many years MLRI (me, for several years, and now Margaret Monsell) ran a statewide Employment Rights Coalition (ERC). Because of the many problems with decision-making at DES, and because so many legal services and private attorneys had clients who encountered these problems, we spent a lot of time over the years trying to improve things, with much success. In many of the most recent years, Massachusetts had among the highest percentage nationwide of claimants approved for benefits and the highest success rate in hearing decisions. Together, between 55% and 60% of people who applied for benefits received them, again the highest percentage in the nation in most years.

These improvements did not come easily. The biggest barrier in the DES hearing system was that, before 1978, it required two levels of hearings. The first was an informal meeting, and, if the claim was not resolved, there was a hearing before a hearing officer, called a review examiner. As a result, many people who wanted to appeal a denial of UI had to wait many months before they got a final decision on their appeal. In the meantime, they were without UI benefits. MLRI filed a federal court lawsuit challenging this system as a violation of the federal UI statute that requires the state to pay benefits "when due" and a violation of the federal statute (put into place after the *Goldberg v. Kelly* and *California Department of Human Resources Development v. Java* decisions of the U.S. Supreme Court applied due process in both public benefits and UI programs) requiring that someone appealing an adverse decision must be offered a "fair hearing before an impartial tribunal." DES immediately caved, and we negotiated a new state statute that eliminated the informal level and spelled out the due process rights of claimants at the one agency fair hearing. Implementing the new system took time because the agency had no effective plan for training, overseeing, and, if necessary, disciplining its Review Examiners, most of

whom were not lawyers and came from the agency's claims adjuster positions. Gradually, and over many years, the hearing system became better, as shown by the hearings statistics related previously.

A category of cases that DES insisted was outside the hearing system was waivers of collection of UI overpayments. A Massachusetts statute provided that a person not at fault in a UI overpayment who could not afford to reimburse the state could apply to the UI Director for waiver of the recovery. DES had no regulations or even any system for notifying claimants of the existence of this statute and claimed that it had no legal obligation to have one. Jim Hammerschmith of Western Mass. Legal Services (WMLS) and I brought a class action challenge in the early 1980s in the Federal Court in Springfield, *Hanlon v. Hodgman*. I dug up a letter of the New England Office of the U.S. Department of Labor saying that states administering the UI program must provide due process on issues related to UI, as well as for UI decisions themselves. Armed with this and the argument that due process required notice and the right to a hearing in waiver cases, we secured a decision from U.S. District Court Judge Frank Freedman agreeing with our position. DES then negotiated with us over a very good set of regulations covering all aspects of waiver claims, and the case was settled. Those regulations remain in effect, unchanged from the text we negotiated.

Massachusetts, like most states, has a UI administrative appeals body, but it is not subject to the control of DES. It is called the Board of Review, and it consists of three members appointed by the governor. Appeals from fair hearing decisions must go to the Board of Review before a party can take a case to court. When the Standard Rules were issued, the Board, which could hold hearings in appropriate cases, had no hearing rules and tried to get a waiver from the A&F Standard Rules. Legal services advocates opposed the waiver request and A&F required the Board to be subject to the Standard Rules. This became important later, when legal services advocates brought some appeals on important UI issues to the Board that needed a Board hearing. In several instances, Board decisions after these hearings became significant precedents on UI law.

The Board also at times became severely backlogged in processing appeals. The statute provides that the Board must act on a request for an appeal within 21 days of its being filed or else the appeal is deemed to be denied and a party has the right to go to court. The Board at times put appeals on hold, claiming that it had accepted the appeal within the 21 days but delaying acting on them with any promptness, and these held cases contributed greatly to the backlog. Things got so bad that Monica Halas of GBLS and Peter Benjamin of WMLS filed a state court lawsuit in 1992 against the Board (the *Burke* case), claiming that the long delays violated the federal UI law's "when due" clause. The state court judge agreed that the Board had violated the law, and the parties negotiated a settlement under which the Board got additional temporary resources to clear the backlog under a schedule set forth in the settlement.

Another problem with DES's fair hearing system was that DES Directors claimed they had the right to require the Review Examiners to follow legal

positions of the agency on UI issues even though they were not contained in the UI law directly or in agency regulations. Most of these directives were in the agency's Service Representatives Handbook, an extensive compilation of guidance for agency employees, with specific case examples, on all aspects of the UI program. I, two lawyers from Merrimack Valley Legal Services (MVLS)—initially, Ron Eskin and then Jim Breslauer—and two lawyers in private practice who were active members of the statewide Employment Rights Coalition—Vida Berkowitz and Andy Kisseloff—filed a state court class action in the late 1990s challenging various consequences of this policy (the *DiCerbo* case). We were surprised to learn that this issue had never been raised in any court in the nation, so far as we could find. After extensive discovery and refining our claims, we presented the case in 2002 in a Superior Court trial before Judge John Cratsley (who started his legal career at the Cambridge and Somerville Legal Services program). Cratsley agreed with us on most of our claims. He found that the Director's power to require hearing officer conformity to the agency's subregulatory opinions violated due process. He also found in our favor on our claim that Board of Review decisions on legal issues are binding on DES in other cases. The agency had claimed that Board decisions applied only to the individual case, and if the agency disagreed with the Board's decision, it could apply its opinion to other UI claimants in similar situations.

4. Local Housing Authorities

Residents of subsidized housing operated by local housing authorities have certain appeal rights at the local level, and thereafter to the state's housing agency. Some housing authorities claimed that their hearings were not subject to due process rights. This was challenged by Pat Rae of WMLS in the *Madera* case (1994). Western Mass. Housing Court Judge Hank Abrashkin (a legal services lawyer at Legal Services for Cape Cod & Islands and at MLRI before he became a judge) found that due process applies to those hearings and the housing authority appealed. The Supreme Judicial Court agreed with Judge Abrashkin.

5. Department of Social Services (DSS), now called the Department of Children and Families (DCF)

In the early 1980s, the state split off child welfare matters from DPW to a new agency called the Department of Social Services. That raised the immediate question of what procedures would be applied to DSS decisions. Advocates at MLRI and other legal services programs were active in participating in rule-making at DSS on a variety of topics, including the fair hearing regulations. These turned out to be good, largely following the Standard Rules, with two exceptions. First, they provided, over our objection, that a hearing officer could not overturn a decision of a "trained social worker" unless there was a violation of law. Second, they provided for an appeal to the DSS Commissioner, who could overturn a hearing decision. These two exceptions to fair hearing rules were to be used much later by DSS to pretty much corrupt the hearing process, at a time when legal

services advocates stopped concentrating on DSS matters because of changes in their programs' priorities.

In recent years, though, Susan Elsen of MLRI and other family law advocates returned their attention to DSS (now DCF). They found that the Commissioner sometimes interfered with the hearing process and sometimes reversed hearing decisions. They also found long delays, sometimes more than a year, in the scheduling of hearings and in the issuance of hearing decisions. Through requirements they got inserted in the DCF state budget line item and in meetings with DCF people, they have begun to get improvements in what should be basic due process rights of persons affected by these practices.

C. Other Agency Decision-Making

Thousands of decisions on public benefits and other programs that serve poor people are made every year by agencies at the initial determinations level. These are made by agency workers often on the basis of incomplete information. Only a small fraction of the erroneous decisions are appealed. Occasionally, these decisions are delayed beyond the time standards which have been set for them. Although most favorable decisions on applications are retroactive to the date of application (or one week later in the UI program), the beneficiary is deprived of the benefits at a time when she is in crisis.

1. Department of Public Welfare

In the early 1970s, DPW was sometimes unaccountably slow in deciding on eligibility. MLRI led a legal services team to file a federal court action (*Banner v. Smolenski*, 1970) challenging these delays. The lawsuit was settled through a court judgment which set general principles and time standards for decision-making on applications and ordered DPW to clear up the backlog. The consent judgment was not time limited (unlike later consent judgments, which the Attorney General's office insisted should sunset), so it was useful to pull out in future years when DPW slipped again.

Another egregious instance of DPW delay in the late 1970s was in granting emergency food stamp benefits. Federal law required DPW to approve and start to pay out these benefits within seven days after an application was filed if the applicant showed an emergency need for food. DPW was falling down badly on this, so MLRI (through benefits lawyer Charlie Capace) filed a federal court class action and asked for a temporary restraining order requiring DPW to act in a timely way (*Russell v. Bergland*, 1977). At the hearing on this request, before Federal District Court Judge G. Joseph Tauro, Jr., the named plaintiff testified that she had applied for emergency food stamps and DPW had not acted on her application for several weeks. Before and during that time, she said, she and her children were limited to eating corn flakes. As soon as he heard this testimony, Judge Tauro straightened up in his chair and announced: "Judge Tauro sees hunger. Judge Tauro acts." He granted the temporary restraining order, DPW immediately offered its willingness to settle the case, and the parties

negotiated a consent judgment. Fearing that it might have to go back before Judge Tauro, DPW moved expeditiously to comply.

2. Division of Employment Security

The unemployment agency has been required under federal guidelines to make initial determinations on UI claims within certain time frames, expressed as percentages of cases to be decided within particular numbers of days. The statistics DES was required to send to the U.S. Department of Labor showed that DES was seriously out of compliance. So John Gresham of Legal Services for Cape Cod & Islands (LSCCI) and I in the late 1970s brought a federal court class action claiming that these delays violated the federal "when due" clause. In the discovery phase, we learned that the agency engaged in several practices which caused delays in decision-making because it first addressed issues raised by employers. These included cases where the employer claimed that it was not subject to the UI system and cases where the employer said that the claimant was an independent contractor and not an employee, and for that reason not eligible for UI. These and other administrative practices were responsible for a large portion of the delays. At that time, Francis Bellotti had become the Attorney General, and the head of the A.G.'s Administrative Division (which represented many state agencies in major litigation) was Steve Rosenfeld, who started his legal career as the Executive Director of the Boston Lawyers' Committee for Civil Rights Under Law (now Lawyers' Committee for Civil Rights and Economic Justice). He subsequently became Governor Dukakis's Chief Legal Counsel during the 1980s and was the prime mover in the 1990s in founding Health Law Advocates.

Steve suggested to me that we should discuss settlement of the lawsuit. We exchanged documents and met a number of times. For his part, Steve thought that his Division should practice dispute resolution approaches that had recently become popular through Harvard Law School Professor Roger Fisher and others. At each of our meetings, with our permission, several other lawyers and students from the Administrative Division attended. For our side, we also employed some negotiation ploys. John Gresham was a gruff, outspoken lawyer in the early legal services mold. He also was somewhat more intimidating because he had a bushy, full-face beard and because he was legally blind. After leaving LSCCI, John spent many years as a staff attorney at Prisoners Legal Services in New York. John and I played a Mutt and Jeff routine in the negotiations. John huffed and puffed and, by prior agreement between us, I put forward some reasonable settlement proposals. We did settle the case. In those classes of cases such as the ones described above, where an employer claimed that the employee was not within the UI program, DES agreed to implement provisional eligibility decisions within the time limits if the claimant was otherwise eligible; if the employer's position prevailed (which it seldom did, DES agreed), DES would pursue repayment of the benefits paid in the meantime if the claimant was later found ineligible. Given the subsequent adoption of waiver regulations as a result of the *Hanlon* litigation (see page 20), few claimants would have to pay these back. So, the case was settled with the incorporation of the new

administrative practices into the consent judgment (which was time limited, at the insistence of the A.G.). The undue delays were cleared up and, by and large, DES (now the Division of Unemployment Assistance (DUA)) has complied with the federal timeliness guidelines ever since, more closely overseen by the Department of Labor.

Advocates discovered another DES administrative practice that delayed a final eligibility determination. Where there was a preliminary issue in the case (such as a claim that the applicant was an independent contractor), DES would decide only that issue and not the rest of the issues on the claim. The result was that even if the claimant won the first issue, the claimant had to go back to Determinations for an eligibility decision on the merits, causing significant delays. The delay was much worse when the claimant lost the initial issue, appealed for a fair hearing, and won the fair hearing.

Vida Berkowitz, one of our private practitioners who was an active member of our Employment Rights Coalition (and a member and President of MLRI's Board of Trustees before her untimely death in the late 1990s), had a client whose claim was delayed greatly because of DES's practice. Vida and I filed a class action in Superior Court in the early 1990s, claiming violation of the federal "when due" requirement. When we failed to get a Superior Court temporary restraining order for Vida's client, we filed an interlocutory appeal in the state's Appeals Court. We appeared before Justice Frederick Brown in the Appeals Court's single justice session. Brown was a civil rights lawyer and an official at the U.S. Department of Housing and Community Development before being appointed a justice of the state Appeals Court, where he now sits on recall. Justice Brown said he found it hard to believe that DES had this practice, and urged it in the strongest terms to change it. The agency immediately processed the claim of Vida's client (she was found eligible) and issued an Administrative Bulletin requiring that all issues raised by a claim must be decided at the outset. We then discussed with the Attorney General's office how we would give notice to potential class members as part of a settlement of the case. We negotiated a notice of the settlement, with information on how people could file claims within a certain time deadline. DES included this notice in mailings to current and former applicants and we distributed it through our own circles. When the deadline passed, I contacted DES to find out how many people had filed claims. They said that nobody had done so, the first class action settlement I'm aware of where nobody came to dinner. Oh well, we tried, and were successful in getting the practice changed.

D. Administrative Agency Lawlessness

As a result of legal services advocacy and the increasing professionalization of agency workers who made eligibility decisions, agency decision-making became increasingly accurate and fairly arrived at. This was especially true in DPW during the Dukakis Administration in the 1980s, when the Executive Office of Health and Health and Human Services (EOHHS), DTA, and DES were managed by people who truly believed that their mission was to help people in dire need and not primarily to be a

guardian of public spending. But during some periods of time, the key state agencies administering benefits programs were led by people who saw their job as policing the beneficiaries. The workers in the trenches tended to follow the lead of these hard-liners. What followed from this were spates of what legal services advocates called "lawlessness." Some of this was carried out by particular workers, supervisors or local offices.

Sometimes it was possible to meet with these people or their supervisors and get some improvements. Under a DPW regulation, a beneficiary could ask for a hearing on worker misconduct. Some beneficiaries tried this approach, but I am not aware of any instance in which DPW actually found a worker in violation and disciplined the worker.

Litigation or filing appeals in individual case denials also was usually not effective because it was hard to get information showing a pattern, and a successful appeal showing that the worker erred did not necessarily change that worker's or any other worker's practice. Class action pattern and practice litigation, for the same reasons, was especially hard to sustain because of the difficulty of proving the pattern and practice to the satisfaction of a judge if the agency insisted on defending the litigation. And, increasingly, as time went on, legal services programs had fewer resources to justify the time-consuming and uncertain results which that kind of litigation might entail.

1. Department of Public Welfare

This lawlessness was magnified greatly by the widespread practices of what advocates have called "churning" or "bureaucratic disentitlement." Agencies required an applicant or beneficiary to satisfy numerous verification and documentation requirements, many of them unnecessary or unfairly rigid. They also required beneficiaries to attend numerous meetings with workers for such things as eligibility and redetermination interviews. These meetings were typically scheduled for the workers' convenience and not after checking the schedules of the beneficiaries. When someone failed to attend a meeting, they were sent a default notice, and sometimes a denial or termination notice, which typically failed even to describe the detailed reasons for the action and what the family could do to cure. The same practices were followed when someone failed to submit adequate verification documentation. Sometimes the agency lost or misplaced documentation the individual had submitted, and the beneficiary was asked to send it in again. Sometimes agency workers demanded copies of documentation which the family had already sent in to another benefits program administered by the same agency. As a result of all this, DPW statistics (when it chose to release them) usually showed that between 25% and 50% of people whose benefits were denied or terminated ran afoul of these procedural and documentation requirements and not because they were, in fact, ineligible.

This phenomenon was greatly expanded after the federal and state governments passed Welfare "Deform" (as some of us called it) laws in the mid-1990s. These laws not only eliminated family cash assistance as an entitlement program (by, for example, imposing drastic time limits on the

receipt of benefits), but imposed strict work requirements for most people who were still eligible for assistance and imposed numerous behavior control mandates that had no demonstrable connection to the dire need for benefits. Among these new criteria were:

- Children of the families must attend school.
- Children in the families must get childhood immunizations.
- Anyone with an outstanding warrant in a criminal case (such as failure to pay restitution or comply with other terms of probation as part of the disposition of a criminal case) was ineligible for assistance (more about this later).
- Any child born to a parent while the family is on assistance cannot be added to (and cause a one-person increase in) the grant, requiring the already woefully inadequate grants to be spread among costs for the entire family.
- Parents not exempt from the work requirement had to document their efforts to find work, attend work training programs as required by DPW, and accept nearly any job found, on pains of losing their assistance.

These obligations, on top of the many already applied to these families in order to receive assistance, greatly added to the large burden these families faced to qualify for and stay on assistance. The numbers of persons receiving Temporary Aid to Families with Dependent Children (TAFDC), as the new program was cynically named, were reduced by nearly 50% within the space of a year in Massachusetts, and there were larger reductions in most other states. These reductions did not take place because poverty had been greatly reduced. Most of them occurred because people could not cope with the restrictions or got lost in the paperwork. The number of people disqualified for churning increased dramatically so far as we could tell. The state also failed to increase DPW staff enough to cope with the dramatically increased paperwork. A lot of people got lost in the bureaucracy and gave up. Others, mistakenly thinking that they would not be eligible, voluntarily took themselves off assistance or did not try to apply. Goodness knows what happened to the families and their children who could not make their way through the thicket.

Legal services advocates (already thinned out by severe congressional budget cuts to the Legal Services Corporation and the elimination of federal funding to advocacy and support centers like MLRI) and their allies were inundated with clients in crisis who could not get or were terminated from assistance, due in many cases to arbitrary or illegal decisions. They also had to bird-dog DPW regulations and practices under the new laws, but with no federal law to back them up any longer. They coped as best they could, and got some favorable changes (some as a result of litigation). But the fact remained that only a tiny fraction of those affected could get a lawyer or experienced advocate to represent them. Lawlessness rained and many poor families drowned. To illustrate the dire consequences of these changes, the

numbers of people on TAFDC barely rose again during several recessions (including the most recent one) while poverty rates steadily increased.

2. Division of Employment Security

The proactive legal services Employment Rights Coalition (ERC), led by MLRI and GBLS, spent much time trying to straighten out the decision-making of DES. The agency avoided putting most of its policy and legal interpretations into regulations (unlike DPW which at least acknowledged that a law-abiding administrative agency should spell out its standards in regulations). But it had an extensive Service Representatives Handbook instructing claims adjusters (and, for a time, hearing officers) how to make decisions. When DES's interpretations favored claimants, advocates used them even though they did not really have the force of law. When the interpretations did not favor claimants' positions, and advocates believed an interpretation was wrong, they challenged it at hearings and in appeals in individual cases. Advocates also submitted periodic comments to DES on parts of the Handbook, and from time to time engaged in negotiations with the agency when it decided to update or re-examine parts of the Handbook. Typically, these comments and negotiations were carried on by a group of advocates from many legal services programs and some private practitioners, ably led by the crackerjack Greater Boston Legal Services Employment Unit.

Our legal advocates also focused on the auditing of DES hearing officers, called Review Examiners. In the early years, these positions were filled by existing employees of DES, most of them from the claims adjuster ranks, and virtually none of them lawyers. Some of them did their jobs well, but most were pretty ignorant of the law and arbitrary in their decisions. At one point, the ERC identified what members considered the ten worst Review Examiners and offered to put together and participate in a series of trainings for them. DES agreed to do this, and some good training materials were developed and used by DES (and legal services) for subsequent trainings. It is hard to say that the ten worst improved dramatically, but apparently Review Examiners got the word and performances improved. The ERC also met periodically with the Director of DES's Hearings Division to discuss criteria for hiring new Review Examiners and instituting good supervision and quality control measures. The upshot was that the quality of hearings and hearing decisions did improve over the years.

This was also helped much by an appeal which Rick McIntosh of Legal Services of Cape Cod and Islands (LSCCI) took to the Supreme Judicial Court in 1986 in the *McDonald* case. ERC members had long argued that because the vast majority of UI claimants appeared at hearings without representation (by a lawyer or by a non-lawyer, which was permitted there), and most were faced with either a lawyer or a non-lawyer representative of an organization hired by an employer, the Review Examiner had an obligation to make sure that the evidence and documents necessary for a fair decision on the issues presented were placed into the record of the hearing. This was particularly important for preserving the record for appeal because the hearing was the only one conducted and the standard of review for an

appeal provided for no relitigation of or additions to the appeal record except in limited circumstances. Rick won this argument in the *McDonald* case, and thereafter advocates were able to persuade DES to instruct Review Examiners to follow this legal obligation.

ERC members also drafted protocols and sequences for Review Examiners to follow in conducting hearings and in considering the two most frequent issues that arise in UI cases: whether the claimant left the job for misconduct or violation of a known and reasonable employer rule, or whether the claimant voluntarily left the job without good cause for doing so. Jim Breslauer of Neighborhood Legal Services (NLS) led this effort. So far as I know, DES did not formally adopt these protocols for its Review Examiners, but it did use them in trainings and some of the better Review Examiners used them in their conduct of hearings.

The ERC also monitored the performance and important decisions of the Board of Review, the three-person administrative body which was the next step (before getting to court) which a party dissatisfied with a hearing decision had to pursue. ERC members met periodically with the Chairs of the Board, most of whom were lawyers and trying to do a conscientious job. The discussions included a review of Board procedures for handling appeals, standards for accepting or not accepting appeals, and what to do when the Board found a reversible error in a Review Examiner's decision. Advocates also persuaded the Board to give priority, from time to time, to claimant appeals because any delay in a case which the claimant ultimately won would deprive the claimant of essential benefits designed to partially replace the earnings received before the individual became unemployed. The ERC also emphasized to the Board the importance of its decisions on legal issues and the need to examine these issues carefully, even to the point of conducting its own hearing. The ERC's position was that legal decisions by the Board were binding on DES for all similar cases. DES disagreed with this, until the Superior Court decision in the *DiCerbo* case endorsed the ERC's position.

I describe these legal advocates' concentration on administrative agency practices because so many of the essential decisions on poor people's needs are decided by the agencies. Hundreds of thousands of these crucial decisions are made by Massachusetts agencies each year. Most of them are governed by low-level agency and worker practices that don't come to the notice of the public or even of the poor people affected by them. To influence these decision-making systems requires intense and time-consuming slogging in the trenches by advocates who know their stuff and are aggressive in pursuing remedies for unlawful or unfair decisions. The work is not nearly as glamorous or attention-getting as major litigation or legislative advocacy. But its history in Massachusetts shows a remarkable amount of success in individual cases and in parlaying individual client cases to systemic change at every level. This view of the need to examine not only what has happened to an advocate's client but how a practice affects others, and to do something about it, is what has distinguished legal services advocates over the years. Although much needs constantly to be looked at or

improved, and the representational resources are still abysmally low, many poor people have benefitted from these successes and changes. Over time, despite some regression at times, state administrative agency practices have improved greatly.

E. Overpayments and "Fraud"

A continuing issue in public benefits programs is what agencies do when a program beneficiary has been overpaid. The absurdly skewed practices of the federal and state governments focus almost wholly on overpayments and not on underpayments, which most studies conclude are almost as frequent. The diabolical quality control standards first established in the AFDC program in the Nixon Administration and applied later in the Food Stamp program (which now has the ungainly name of Supplemental Nutritional Assistance Program, or SNAP) set error rates based solely on overpayments, ignoring underpayments entirely, and sanctioned states by reducing federal reimbursement if a state did not meet those standards. The result was what designers of these standards probably intended: states steered their decisions toward denials and terminations ("If in doubt, push them out," is what state agencies had every incentive to do).

Federal and state governments, egged on by right-wingers (I do not call these people conservatives because the only things they appear to want to conserve are their own wealth and power and the obscenely expensive military and national security programs that will increasingly be used to help them protect and increase their wealth and power) and elected officials who have bought into the demonization of poor people or don't have the spine to oppose it, have placed great emphasis and resources into combating the "fraud" that beneficiaries supposedly commit in these programs. This, of course, contrasts with how government treats fraud committed by businesses, corporations, and others who have much more power and standing than poor people. One example will illustrate their double standard.

In DPW and DTA public benefits programs, most overpayments are presumptively considered as fraudulent, sometimes even if the overpayment is the fault of an agency worker. Before a legal services federal court lawsuit caused DTA to treat many more of these thousands of cases a year as civil overpayments (see page 33), it referred most overpayment cases to another state agency, which investigates allegations of criminal fraud in these cases, and, if it finds fraud, files a criminal case in court. By contrast, alleged fraud by businesses, professionals, and others in the state's Medicaid program is dealt with by written notice of the claims followed by a request to meet with state agency representatives to discuss the allegation. Not surprisingly, most of these people come with their lawyers (and accountants, sometimes) to negotiate a settlement. As a result, only a few cases of provider fraud are referred to a special unit in the Attorney General's office for criminal investigation and fewer still result in a criminal prosecution in court.

The right wing has had an active campaign to denigrate poor people for more than 30 years. The myth they propagate is that if someone is poor, it's their own fault, and government should not reward this irresponsibility by

paying them benefits. This reminds me of an exchange from a skit by Beyond the Fringe in the early 1960s, called The Great Train Robbery. It involves a news reporter (played by Alan Bennett) interviewing a Scotland Yard Inspector (played by Peter Cook—one of the greatest comics of all time, in my opinion) about a robbery of a train in Great Britain in 1944 during a snowstorm. The dialogue goes something like this:

Reporter: What do you think was the cause of the robbery?

Inspector: We believe this to be the work of thieves.

Reporter: So you think thieves are responsible?

Inspector: Good God, no, I think thieves are thoroughly irresponsible.

Mitt Romney let slip during his Presidential campaign in 2012 what he and other right-wingers really think about the people in this country. He divided people into "givers" (the wealthy and those who are higher income) and the "takers," those who depend in one way or another on government and other support. Of course, the reaction to his comments showed how abysmally ignorant he is about these things. We knew so during his term as Massachusetts Governor, because we saw it firsthand. But probably beliefs like that are widely shared by people in the country, and even most of those who don't share them are too cowardly to speak out against them and educate the public about what really goes on. As a consequence, we have, with one hand, established public benefits and other programs to help those who need them and, with the other hand, disqualify many people who are eligible for these benefits or improperly hound and discourage them from qualifying for them.

And so we have a long history of pursuing supposed fraud in these programs, even where no actual fraud has been committed. Massachusetts legal services advocates have been consistently involved in efforts to mitigate or eliminate the most harsh consequences of these policies and practices.

1. Division of Unemployment Assistance

People who are unemployed are not looked upon with nearly as much disdain as are poor people. In some ways this is curious, because most people who are unemployed are poor (at least temporarily) and they, like poor people, do not contribute toward the public funds that are used to pay their benefits. (UI benefits are paid from a state UI Trust Fund, whose funds consist of assessment payments by most private employers.) Consequently, UI overpayments are seldom treated as criminal fraud. Most overpayments are handled as civil reimbursement matters, with the claimant or former claimant receiving notice of the overpayment, having an opportunity to comment on it before any agency determination, and having the right to appeal for an agency hearing on any adverse decision. Once an overpayment is finally decided, DUA reimburses itself by reducing current UI payments, or initiates collection action in court.

Liability for UI overpayments is mitigated where an individual has qualified for a waiver of repayment of an overpayment under DUA

regulations negotiated by legal services advocates as a result of settlement of the *Hanlon* litigation in the late 1970s.

There are periodic efforts in the Legislature to expand the scope of UI "fraud" and increase civil and criminal penalties for fraud. Legal services advocates, with the help of the state AFL-CIO, have been successful over the years in blocking these efforts, which seem to come from the same kind of people who think those receiving public benefits are cheaters. The case has to be made, over and over again, that proponents of these charges cannot show that fraud is at all extant in the UI program and that there are many adequate civil and criminal remedies under current law to deal with any overpayments and fraud that are found.

2. Department of Public Welfare

a) Overpayment and Fraud Practices

Policing alleged welfare overpayments has been a major part of the state's treatment of program beneficiaries since the early 1970s. First, there was (and still is) no right to waiver of collection of overpayment in these programs, unlike for UI and in the federal Supplemental Security Income (SSI) and Social Security programs. This has two unfair consequences. First, if the overpayment has been caused by an error of the agency, the beneficiary must nevertheless repay the money incorrectly paid. Second, there is no lower limit to the overpayment amount which must be repaid, leading the state to say that legally it must recover every penny of an alleged overpayment. In many other public programs there is a safe harbor amount below which the state will not pursue reimbursement because it is not cost effective to do so.

The state started overpayment and anti-fraud activities in cash assistance programs in the mid-1970s. It established a separate agency, not within DPW, called the Bureau of Welfare Auditing, to investigate welfare fraud. DPW workers were required to refer cases of "possible" fraud (with no standards for what that meant) to the Bureau. The Bureau hired mostly people with law enforcement backgrounds, nearly all of whom were males. By contrast, nearly all program beneficiaries whose cases of alleged overpayments were referred to the Bureau for investigation of possible criminal fraud were mothers with small children. These women were not entitled to a state-paid lawyer to represent them at that stage because a criminal complaint had not been filed in court. Legal services advocates could help, but most people called in for a BWA interview did not know what to expect and did not have time to contact a lawyer or legal services program. You can guess what happened in these mismatches.

BWA investigators presented their calculations of the supposed overpayment and suggested that the mother was guilty of fraud. Frequently, the investigator would describe what would happen if a criminal charge was filed in court, and would say that if the mother agreed she owed the amount calculated by BWA, the investigator would have her sign an agreement to repay. In most cases, the agreement was presented to a prosecutor, a criminal case was filed in court, and the prosecutor would recommend to the

court that the case should be continued without a finding conditioned upon a period of probation during which the person must repay in full. An experienced welfare advocate who provided volunteer assistance to many people in BWA proceedings told me she had examined the overpayment calculations of the BWA investigators in dozens of cases and found that all of them improperly overstated the overpayment amounts, some of them grossly.

As a result of this system, most overpayments were investigated by the "fraud squad," as we called it, and in thousands of cases each year poor mothers were saddled with repayment obligations in amounts which were inflated and which they could not realistically hope to pay. This criminalization of poor mothers became particularly acute when the state adopted in 1995 a new restriction that anyone who had an outstanding default warrant in a criminal case (such as for failing to comply with a repayment imposed as part of the disposition of a criminal case) was ineligible for cash assistance. I describe this imbroglio later (see pages 40-41).

Starting in the early 1980s, we met with the Directors of BWA and asked for clarification about what their policies, practices, and criteria were for how these investigations and interviews were conducted and to get an acknowledgment about how things could be improved. We tried to influence the agency within which BWA was placed, but got little response there. Meanwhile, the Legislature was persuaded by the politically influential BWA investigators to change the name of the agency (to the Bureau of Special Investigations, or BSI), expand its jurisdiction to investigating alleged fraud in other agency benefits programs (such as public and subsidized housing), place the BSI within the Public Safety Secretariat rather than Administration & Finance, and greatly expand its budget. The BSI investigators at one point asked for legislative authority for them to carry guns. Not even a *Boston Phoenix* exposé of the abuses of BSI investigators (with a picture of a facsimile of an investigator with a sneer on his face and a German World War II helmet on his head) seemed to prompt any basic changes in the system. Finally, some years ago, the BSI hot potato was transferred to the State Auditor's office, where it now resides. Eventually, BSI's depredations caught up with it, although not as a result of anything we did. As successive economic downturns took place in the 1980s and 1990s, BSI was on the budget cut chopping block. It was reduced in size to a shadow of itself.

We in legal services tried to think of how we could clip BSI's wings. We decided that one way was to reduce the flow of overpayment referrals by DPW to BSI. In the late 1980s, Ron Eskin of Merrimack Valley Legal Services (MVLS) and I filed a federal court class action (the *Norris* case) against both agencies, claiming that the mass referral practices and unfair BSI investigations violated state law and procedural due process. Fortunately for us, the Attorney General's office and the agencies decided to settle the claims rather than to defend them. We found out later why they may have taken this course. A year after we settled the litigation, a corruption scandal

involving some of the BSI investigators erupted. I think they didn't want the case to go into discovery because we might uncover the scandal.

Ron and I achieved some useful changes in the settlement. DPW agreed to set up a central unit to make decisions on how to handle overpayments (previously referrals to BSI had been made by local offices, causing great disparities among offices in the percentages of overpayment cases referred by DPW). They also agreed that overpayment cases caused by errors committed by DPW workers should not be referred to BSI but should be handled as civil claims by DPW. We negotiated an extensive administrative bulletin spelling out how DPW should handle overpayments, what were the types of cases that DPW should and should not send to BSI, and how DPW should act on cases BSI referred back to DPW (presumably after finding that no fraud occurred) or where a prosecutor or court clerk refused to file or accept a criminal complaint. BSI also agreed in the settlement to refer these cases back to DPW rather than try to impose a repayment agreement between the beneficiary and BSI, as had been its prior practice. We believe that, as a result of these changes, the number of referrals to BSI dropped greatly and that the overpayment practices of both agencies improved, but the situation remained that thousands of beneficiaries each year were treated as presumptive criminals.

b) Computer Matches

It won't surprise you that as soon as the state found ways to match electronic databases from other sources with the agency beneficiaries' databases, they were eager to try them out. The major problem, as with all the computer matches that I know about, is that many of the matches are erroneous because the information matched was wrong. We did not believe that we could stop or even restrain the mania that occurred when the state learned that they could do these matches. So the real question was what did the state do with the match information. In this, the state got off to a disastrous start.

i) 15,844 Welfare Recipients v. King

In the summer of 1979, DPW ran its first match of beneficiary data with data that employers had submitted to DES. When the results appeared to show that large numbers of adults in AFDC families were working or had not previously reported income from employment, Governor Edward King, a Democrat in name only (he later became a Republican) who became Governor in the 1978 election after defeating Michael Dukakis in the Democratic primary, saw his chance to bolster his image as a fighter against fraud and waste in government. He and DPW ordered notices to go out to the 15,844 families for which there was a match ordering them to appear at a scheduled interview to explain the discrepancies. Instead of using DPW workers to interview people, the state used BWA investigators, and so began wholesale terminations of assistance to these families. This was an immediate crisis for thousands of legal services-eligible people.

MLRI and GBLS immediately formed a litigation team, led by Barbara Sard of GBLS and me. We promptly sent out an alert to legal services

programs, welfare rights groups, and other advocacy groups to let us know if they knew any of the 15,844 families affected by this. We included an affidavit form to be completed and signed by the beneficiary and returned to us. Advocates responded magnificently. In the course of a week, we had collected some 60 affidavits. In the meantime, we drafted an extensive complaint, including claims of Fifth Amendment and due process violations and that the state's use of BWA investigators violated state law.

We filed the complaint and affidavits in federal court and asked for an emergency hearing before the judge to whom the case was assigned. We titled the case *15,844 Welfare Recipients v. King* (this was Barbara Sard's idea). Fortunately, we drew Judge W. Arthur Garrity. Garrity had presided over the Boston school desegregation case. For this, he was excoriated by those who opposed desegregation of the Boston schools and the busing of students which was part of the remedy Judge Garrity had ordered. We knew Judge Garrity as an even-tempered, polite, and very astute judge. He proved to be that here. When Governor King announced with great fanfare that the state had discovered 15,844 welfare cheats, it was the major news story for days. The *Boston Herald* blared the announcement in huge headlines on its front page, as it confirmed its constant anti-poor myth that poor people are cheaters. So when we got an immediate hearing before Judge Garrity, the courtroom was packed and the halls outside were crawling with media people. Barbara Sard argued our case for a class temporary restraining order, a remedy seldom given in civil rights-type cases.

After the lawyers' arguments were completed, Judge Garrity said that because of the urgency of the plight of the plaintiffs, he would dictate his decision orally in open court. He explained that there was no doubt that the plaintiffs had shown an emergency need for temporary relief, so his question was whether they had made a strong showing of their likelihood of success on the merits of any of their claims that the interviews and terminations were unlawful. He concluded that the use of BWA investigators to interview people to decide whether they were eligible for benefits violated state law.

The state had set up structures and agencies so as to differentiate who was responsible for deciding on current eligibility and who was responsible for investigating past fraud. In its regulations, it was clear that DPW made decisions on current eligibility and was not authorized to look into past fraud. BWA could investigate only past fraud and could not make any decision about current eligibility. Because the state had employed BWA investigators to interview those called in for their current eligibility, these interviews and any terminations coming from them were illegal. Judge Garrity therefore issued an immediate injunction stopping all BWA interviews and grant terminations and ordered the agencies to start over again by doing this right. The courtroom erupted with cheers at this surprising and favorable ruling by the judge.

After DPW went back to square one, it turned out that a large percentage of the matches were erroneous or did not show that a family was not currently eligible. Because the DES database consisted of information submitted by employers, there were large numbers of errors in the employer

forms and when the information in these was entered into DUA's database. Much of the information on employment was also out of date. Employers sent in their reports on a quarterly basis, and, because it took DES at least a month to enter the data into its own database, the match information was at least four months out of date. We pressed DPW to double-check any match data itself first (to cull out any obvious errors) and to notify the family of the match information to give them an opportunity to object to the information or explain it before DPW made any decisions to terminate benefits. They did, somewhat begrudgingly, retool their procedures along these lines. But since the DPW notices did not usually give any detailed information about what a match revealed, many people did not know to respond and many others did not respond at all, opening themselves to termination of benefits. It would take much more advocacy, and some more litigation, to convince DPW to handle the match information correctly and fairly.

In the *15,844* litigation, we decided to pursue other claims, particularly the alleged violations of Fifth Amendment rights (interviewing people in a criminal fraud investigation in the coercive context of a BWA interview), hoping that we could get a court to establish a precedent that the Fifth Amendment applies in these kinds of situations. We applied for a preliminary injunction before Judge Garrity, but he was not convinced that we were likely to win on these claims, although he continued his prior temporary restraining order.

We then decided to appeal to the First Circuit Court of Appeals. We wrote most of our brief over a weekend at MLRI's offices at 2 Park Square, opposite the southwest corner of Boston Common. On Sunday, we noticed that bleachers, sound systems, and other apparatus were being set up on the playing fields across from us. When dusk approached, large bright lights went on, illuminating the entire area. There were also hundreds of police stationed around on foot and in vehicles who looked as if they were armed. At the same time, there was a deluge of rain that continued for hours. It turned out that the Pope was visiting Boston at that time, and that he would conduct a service from a platform on the Common. So speeches, prayers, and music reverberated loudly around the area as we were finishing up our brief that evening. We tried to find inspiration from what happened on the Common, but that was hard after working on the brief all weekend, day and evening.

It is very hard to persuade an appellate court to overturn a trial court judge's denial of a preliminary injunction, particularly a judge of Judge Garrity's stature, and so we lost the appeal. The Appeals Court did us a favor by not giving any opinion on the legal merits of the claims we had raised in the appeal.

We then negotiated a final order in the case, making Judge Garrity's temporary restraining order permanent but dismissing our other claims without prejudice. Then came the time to file an application for the state to pay us attorney's fees for our prevailing in the case on one of our claims. We asked for around $125,000 (a large sum for those days) and divided our

claim into five phases in the case. We did not claim fees for work on those claims where we received an adverse decision.

Judge Garrity referred our claims to a U.S. Magistrate, who trashed our claims, said that we had won only one minor issue, and awarded us around $20,000. We appealed to Judge Garrity, and he held a two-day hearing at which I presented our claim and an Assistant Attorney General contested every aspect of it, even down to matters that made only a minor difference. Judge Garrity explained at the outset of the hearing that the Magistrate had not presided over the case, and so he hadn't appreciated the major importance of the litigation to the plaintiffs and the commendable work of the plaintiffs' lawyers in the face of great odds. He then accepted our division of the claim into five phases and took argument on each phase. When we had finished a phase, the Judge went out of the courtroom with his clerks to make a decision. When he came back into the courtroom each time, he announced his decision, the amount awarded, and his reasons.

When the hearing ended on the second day, the judge announced that he had awarded the plaintiffs some $100,000 in attorney's fees. It was amazing to me that Judge Garrity so patiently heard us out for almost two days of court time, calmly fending off the endless and contentious opposition arguments made by the Assistant Attorney General, in a claim very important to two struggling legal services programs and to implementing the federal attorney's fees statute in an even-handed way. The defendant did not appeal Judge Garrity's order.

ii) Bank Match Litigation

In 1981, the state received a new computer match toy. It started to match DPW records with records of the same people in Massachusetts banks. It did not look carefully at the matches to eliminate those that did not obviously match (such as those in which the names or Social Security numbers did not match exactly) or send immediate notices to the affected people asking for a response before making a decision about whether the family was ineligible for benefits. Instead, DPW sent out notices of termination, which generally stated that the family had assets that exceeded the eligibility asset limit but without identifying the bank or how much was said to be in the bank account. At issue here were the very low asset limitations for qualifying for assistance programs, $2,000 for food stamps, $1,000 for AFDC, and $250 for General Relief. We began to hear from advocates about people who did not even know they had money in bank accounts in their name, people whose name was on an account but they did not own or control the funds, and people who had money in a bank account for a short period of time before using it (which was allowed under DPW rules).

Carol Wagner of GBLS and I filed a federal court lawsuit and asked for a preliminary injunction stopping any terminations that had resulted from the matches. (The case was *Lessard v. Spirito*.) At the hearing, Judge David Mazzone expressed incredulity that the state had proceeded in this way and suggested that DPW should work with the plaintiffs' lawyers to straighten out the situation. The pressure on DPW was magnified by a wonderful long

article by Alan Lupo in the *Boston Phoenix* relating what had happened with the bank matches and how the state had abused people with the initial wage matches. He described in heart-wrenching detail how some people who received the bank notice, not knowing which bank had the accounts, had traveled from bank to bank hoping to find a windfall which would help them and their children get out of poverty.

DPW and the Attorney General agreed to negotiate settlement of the litigation. DPW adopted our suggestion that it set up a central unit to handle all bank matches, rather than to have each office try to cope with the sometimes complicated legal issues of ownership of a bank account where a trust, joint account, or other arrangement had been set up, raising the question of whether the money was a countable asset or was held long enough to go beyond the grace period (usually 30 days) for holding money in excess of the asset limit.

The central bank match unit exists to this day. DPW also agreed to front-end procedures to verify the accuracy of the bank account information before sending notice and to include the particulars (the bank, the amounts, and the period included) in each notice, giving people a chance to respond before DPW made its final decision.

As the case was concluding, I got some figures from DPW on how many of the people who got the initial termination notices turned out to be ineligible. DPW claimed that 70% were eligible, leaving 30% ineligible. How's that for an error rate! Of course DPW would not get penalized because these were underpayments, not overpayments.

Three more significant things came out of the *Lessard* litigation. First, the named plaintiff's individual claim was settled because DPW quickly agreed that she did not own the bank account matched (it was a trust set up by her parents without her knowledge, in which she was the beneficiary but her parents were trustees). That prompted the Attorney General to move to dismiss the case as moot (Ms. Lessard was the only named plaintiff because of our need to get into court quickly to get the terminations stopped.) We argued that the case was not moot because the named plaintiff wore two hats, one for her individual claim and one as a representative of the class which had not yet been certified. There were few court decisions upholding the continuation of a class action in these circumstances, but Judge Mazzone agreed with our argument.

Second, DPW refused to pay back benefits that people lost between the time of termination and when DPW agreed to restore them. We felt obliged as the plaintiff class counsel to pursue these back benefits. To do so, we pieced together parts of AFDC law and DPW regulations to argue that DPW had a legal obligation to verify the bank match information before moving to terminate benefits. Judge Mazzone was not convinced.

Finally, the *Lessard* case was made into a case study at Harvard Law School in a Trial Practice course taught by, among others, Barbara Sard.

As databases and electronic match capacity developed, DPW had computer matches for nearly everything that moves. It matches federal SSI,

Social Security, Social Security Disability Insurance, and federal veterans' program databases; databases from other states' insurance recoveries; federal and state tax refunds; and even state lottery winners. An issue that arises incessantly, no matter who is in office, is how the state can root out the fraud in public programs that they imagine is out there. This has led some people to suggest intrusive and police-like methods to check on poor people and look into the privacy of their lives to discover questionable activities. Legal services advocates and others who know what really goes on have to explain over and over again how much computer match activity already goes on and how much of state resources are devoted to this effort.

Two recent public flaps illustrate that the public and many public officials continue to indulge in these pet nostrums that there is widespread fraud in these programs. The state's Inspector General reviewed sample case files at the Department of Transitional Assistance (as that agency was cynically renamed in the state's Welfare "Deform" Act of 1995) and in early 2013 reported that in a small percentage of them certain documentation and eligibility verifications were missing from the files. Many of these were from the behavior control requirements the state added in the 1995 law, such as child immunization and school attendance by children in a recipient family. The report also concluded that if all of the families for whom documentation was missing were, in fact, ineligible for assistance, that would have cost the state $25,000,000, a seemingly high figure even at that but a small fraction of the total program expenses.

A similar study was made in 2012 of some of DTA's SNAP (formerly food stamps) program files, and somewhat similar inadequate documentation was found. In each of the reports, the authors made clear that they had not been asked to investigate whether any of these people were ineligible and that, in fact, they identified *no person who was ineligible*. When these reports were released to the press, the *Boston Herald* and others erroneously trumpeted that the reports had found many millions of dollars of fraud and urged the state and the Legislature to do something effective about the situation.

Governor Patrick, who should know better, engaged in immediate damage control by summarily firing a competent Commissioner of DTA and agreeing that the reports had uncovered damning evidence of wrongdoing. It turned out that DTA had responded in writing to drafts of each of the reports by pointing out that much of the missing documentation was not needed, was in other files, or was not required at all. Of course, the state leaders and rank and file took the press reports at their ignorant face value and immediately vowed to do something about it. So, weary legal services advocates needed to trudge up to Beacon Hill once again, as they have had to do every year, to explain that these reports do not prove widespread undetected fraud and that the punitive solutions which some propose are illegal or unworkable. It has been ever thus in the fantasy world of myths about the poor.

iii) More Matches

I offer two more episodes of the misuse of computer match information by the state. In the late 1990s DTA started gaining access to electronic databases of public benefits program beneficiaries maintained by some other states. As if they hadn't learned from their past experience, they issued immediate termination notices to those who they found were in another state's database. Pat Rae and Patti Prunhuber of Western Mass. Legal Services filed a class action in the U.S. District Court in Springfield and went before U.S. District Court Judge Michael Ponsor to ask him to order the terminations stopped. He indicated to DTA that he thought the agency should suspend the program, examine each match carefully, and give each match beneficiary an opportunity to rebut or explain the situation. Upon further analysis, it turned out that much of the information in other states' databases was wrong or out of date. Most of those identified in the matches had lived in another state, had received benefits there, had moved to Massachusetts after going off benefits in the other state, and had been approved as eligible in Massachusetts. DTA found only a handful of people who appeared to be receiving benefits here and simultaneously in another state.

So the parties settled the lawsuit eventually. This is a good example of how the state spends resources on inquiries that are likely to, and do, turn up very few ineligible persons. But in match-o-mania, no effort to root out ineligible people, no matter how much they fail to satisfy any cost-benefit test, is too remote to pursue. If only governments would take the same approach toward well-to-do persons with their tax returns and other large benefits they receive at the expense of the rest of us. But in our rapidly increasing plutocratic country, you can bet that won't happen.

There is one more computer match situation I should describe, this one unbelievably cruel. In the state's Welfare "Deform" Act of 1995, there was inserted an amendment providing that anyone receiving state cash assistance would be ineligible if she had an outstanding default warrant in a criminal case. No other groups of people who receive state benefits or services are subject to this requirement. The state had recently set up an electronic database of default warrants in various courts. Because the information in this database was supplied by local courts, and not in electronic form, it was often inaccurate or stale. DTA started doing computer matches between its database and the warrant management database and, when it found a match, started to review the results centrally. Fortunately, the DTA staff who did this were long-time workers and supervisors there and they contacted people individually to ask for further information. They found that in many cases the match information was wrong and so DTA took no action. But if DTA had pursued summary terminations of benefits, as they initially did with wage and bank account matches, the results would have been disastrous.

We knew from our experience with people being railroaded through criminal welfare fraud cases in the courts in large numbers that many people had agreed to repay a supposed overpayment as a condition of probation. When they did not pay (because most of them could not), the

court issued a default warrant, and that person's information was likely to be placed into the warrant management system. Many of these default warrants had been in effect for many years, because typically courts did nothing to enforce collection unless the person came back into court on another charge. We began to hear of cases where the family had been terminated from assistance, or received notice of termination, and were told that in order to avoid termination or get the benefits restored, the person had to go to the court, get the default lifted, and bring to DTA a certified copy of the court order eliminating the default. This created an obvious representation crisis. The major sources of funding of legal services programs forbid them from representing clients in criminal cases, and in any event they were not trained in criminal law.

So we contacted the Committee for Public Counsel Services, the statewide public defenders, and asked them to make their lawyers available. They did so, and DTA agreed to notify people that a lawyer might be available at CPCS to help. Nevertheless, many families believed they had little choice but to go to court on their own, find out what the default was all about, and ask a judge to lift the default. We did hear of a few people who went to court and were jailed for a few days (without any regard to who would care for their children) before the court would hear their request, but from what we could find out, most people who went to court, even without representation, had their cases handled sympathetically. In most cases, the individual entered into a repayment agreement and the default was removed. In some cases, the judge dismissed the criminal case altogether.

During this entire time, I had continuous conversations with one of DTA's lawyers. Because of all the steps described above, I concluded that we could not justify filing a lawsuit against DTA. And she agreed to send MLRI periodic status reports on what happened to those matched. They showed that most people made it through the crisis created by this mindless law.

F. Access to Justice Commission Work on Administrative Justice Systemic Issues

Although we had many successes in getting administrative agency decision-making improved and thwarting agencies when they went off the deep end, promoting change across many agencies was difficult to impossible. Even if more than one agency engaged in the same illegal practice, we could not include both in the same lawsuit. And it became increasingly more difficult and less justifiable for beleaguered legal services programs to invest the large amount of resources and time in major litigation that was usually fact-based and sometimes faced an uncertain outcome. When the Supreme Judicial Court established the first Access to Justice Commission (AJC) in 2005, the focus was exclusively on justice in the courts and on the effectiveness of legal services programs. Toward the end of that Commission's five-year term, under the leadership of Boston lawyer David Rosenberg, the Commission established a special committee to consider what the Commission could be doing to promote justice at administrative agencies.

Given that Governor Deval Patrick and certain people in his agencies had begun to show some interest in improving the fairness and accuracy of agency decisions in public benefits programs, the Commission contacted a few people in the Executive Office of Health and Human Services to start discussing whether the AJC and EOHHS could work cooperatively to improve administrative justice. The AJC committee identified three priority areas for this work: communications by agencies to their program beneficiaries; language access in agencies; and developing a common electronic public benefits application. In early 2010, after the first Commission sunsetted, the SJC revamped the membership and constituted a new Commission, co-chaired by David Rosenberg and SJC Justice Ralph Gants. I and several legal services lawyers were appointed members, and the Co-Chairs set up six working groups, including an Administrative Justice Working Group with me and then-Revenue Commissioner Navjeet Bal as Co-Chairs. The Working Group established a Steering Committee consisting of two people in state government, several legal services lawyers, and Sue Marsh, Executive Director of Rosie's Place, who was also a Commissioner. In 2013, Sue became Co-Chair of the Working Group with me. The Working Group endorsed the prior Commission's choices as the top three priorities and started efforts to promote systemic change in these areas. What follows is a brief capsule of where those efforts stand.

1. DTA Notices

We met several times with representatives of EOHHS, DTA, and MassHealth and decided to start with improvements to DTA's notices to program beneficiaries, which DTA had already begun to review. A group of legal services lawyers, headed by Young Soo Jo, then a Senior Attorney at Legal Assistance Corp. of Central Mass. (LACCM), reviewed and made suggestions for improvements in one-third of the some 500 individual paragraphs that DTA used to generate electronic notices through its automated system called BEACON. Meanwhile, in 2009 GBLS had filed a class action in federal court against DTA, claiming that DTA had failed to follow the law in numerous ways to accommodate persons with disabilities.

The GBLS lawyers decided that it would make sense to fold the Working Group's discussions with DTA into settlement discussions in the litigation, carried on under the aegis of a U.S. Magistrate Judge in Springfield, Ken Neiman (a legal services lawyer at Western Mass. Legal Services early in his career), and to include the development of full texts and principles for DTA notices there. The GBLS lawyers working on this were Melanie Malherbe, Naomi Meyer, and Lizbeth Ginsburg. In the fall of 2012 they reached agreement to settle the federal court lawsuit. Included in the settlement on notices were principles of readability, some general standards, some texts for the most crucial notices, and an agreement to continue the improvement of DTA notices through the cooperation of GBLS and DTA in a Notice Working Group which has been established within DTA. The settlement was approved by the District Court judge in August of 2013.

This is truly an amazing achievement after all these years of chipping away piecemeal at the problems created by inadequate and confusing agency notices. The new notices and standards can be used as models for other agencies and for the adoption by EOHHS and other state agencies of the principles which should govern agency notices.

2. Language Access

We appointed Ron Marlow, the A&F Assistant Secretary for Access and Opportunity, to the Administrative Justice Working Group Steering Committee. Ron was already at work drafting and brokering guidance which A&F would issue to all agencies on this subject. A&F issued Administrative Bulletin #16, in August of 2010, which contains guidance for how agencies should improve access by people who cannot communicate effectively in English, including a requirement for an agency language access plan, the appointment of a language access coordinator in each agency, and standards for obtaining the resources to do the job well. Agencies submitted their plans early in 2011, and after a review of the plans, A&F issued a revised Bulletin in September of 2012.

In the meantime, a long-needed legal services Language Access Coalition sprang up, coordinated by Volunteer Lawyers Project. The Coalition has established a subcommittee on agency access, under the leadership of Naomi Meyer of GBLS, has met several times with Ron Marlow, has submitted comments to him on the 2012 revision of the Bulletin, and coordinates complaints against agency language access failures.

3. Common Benefits Application

There has been a lack of coordination among agencies in benefits programs where a family receives more than one state benefit. The sloppiness in handling documents and verifications of eligibility, even within the same agency, has long caused wrong decisions, confusion, and duplicate requests for documentation, which in turn often lead to denial of the benefits for which these families are eligible. The state agencies running these programs have also shown interest in improving these practices, and now the federal Affordable Care Act requires states to develop a common electronic benefits application by January 1, 2014, at least for health and cash assistance programs. A subcommittee led by Sue Marsh of Rosie's Place and Pat Baker of MLRI, with assistance by Northeastern Law School law students supervised by Professor Lucy Williams (a former MLRI public benefits lawyer), has developed a set of principles for this which the AJC Co-Chairs sent in early 2013 to the EOHHS Assistant Secretary who heads up a state effort to comply with the federal law. The AJC representatives met with EOHHS and MassHealth officials in the summer of 2013 and will follow these developments as the state formulates its plans.

So, the approach of the AJC holds some promise of getting widespread improvements in administrative justice. These efforts take a lot of time and depend on the volunteer efforts of Commissioners and legal services advocates, who are in short supply these days because of program funding

cuts. Despite this, the cooperation of these volunteers, all very experienced with public benefits programs, is very heartening and exciting.

My ultimate solution for all of this would be a Governor's Executive Order pulling these administrative justice principles together and applying them to all agencies. This is a pipe dream, I suppose, but we won't really get this unless, in typical legal services fashion, we push hard for it. We do have the satisfaction of knowing that Massachusetts and California are the only Access to Justice Commissions at all working on administrative agency justice. So maybe we can achieve some systemic changes here that can be adopted elsewhere, as well. Now that's an exciting prospect to be working toward.

Chapter Four

STATE BUDGET ADVOCACY

There have been many legislative advocates who have helped us and our allies work on poor people's issues in the crucial decision-making forum of the State House. Of course all MLRI advocates specializing in anti-poverty legal areas have had legislative advocacy as part of their advocacy responsibilities. Many of these advocates have become very sophisticated at doing this, working closely with MLRI's designated legislative advocates and several other allies. What follows is a chronological list of those who specialized in legislative advocacy generally for MLRI over the years.

- Early on, we were assisted greatly by three persons who had extensive public interest legislative experience. Dolores Mitchell worked for MLRI in our early years, and subsequently became the Chief Secretary for Governor Michael Dukakis and then Executive Director of the state's Group Insurance Commission where she still presides. Ellen Feingold had legislative experience in the civil rights and housing fields, and after working with MLRI in 1969 and 1970 she was a leader in several nonprofit housing organizations. Similarly, Helene Levine had campaign experience working on civil rights and related issues.
- Early in the 1970s, we hired Mike Faden as a beginning lawyer, and he immediately took an interest in legislative drafting. After he relocated to Washington, D.C., in the mid-1970s, he worked for many years as a staff lawyer for the District of Columbia City Council.
- When Mike Faden left, we hired Terry McLarney as a staff attorney specializing in housing. He had previously worked with Meg Connolly at the Brockton community action program, under the supervision of MLRI. Terry quickly became an all-purpose legislative advocate for us. He left in the early 1980s to take a clinical law position at the UMass-Boston College of Public and Community Service, and became a tenured professor there until he retired several years ago.
- When Terry left MLRI, two legislative advocates at GBLS also left, and so the two programs decided to retain an outside lobbying firm run by Judy Meredith. Judy had done community-based lobbying for some years before that and decided to establish her own firm. Judy also literally "wrote the book" about lobbying for nonprofit community groups called *Lobbying on a Shoestring*, which MLRI published. She also wrote follow-up training manuals and conducted many training sessions. After MLRI decided to bring our legislative advocate position back in-house in the late 1980s, Judy continued to do legislative work for community groups and for several years has co-chaired, with Lew Finfer, a statewide activist group called One Massachusetts.
- We hired Dick Cauchi as our staff legislative advocate in the late 1980s. Dick had previously done legislative work for such groups as Common

Cause. He relocated to Denver, Colorado, in the mid-1990s and has been a staff member for the National Conference of State Legislatures.

- After Dick left, we hired Kelly Bates. Kelly was a recent law school graduate and had lobbying experience with several community groups. After several years with MLRI she left to start her own nonprofit lobbying and fundraising group.
- In the late 1990s Margaret Monsell became MLRI's Legislative Director. Margaret had been an Assistant Attorney General during the 1980s and for several years before coming to MLRI she was a staff counsel for the state Senate Ways & Means Committee. Margaret became MLRI's chief employment lawyer in the early 2000s, although she continued to do legislative work in the legal fields in which she specialized.
- After MLRI changed Margaret Monsell's work to being the employment law specialist, we hired Debbie Silva. Deb had worked for several state legislators and had a labor and employment law practice. Deb worked for MLRI until 2010, when MLRI was forced to eliminate three staff positions because of major funding cutbacks, one of them the Legislative Director. Deb is now the staff director at the Equal Rights Coalition, a group of lawyers and others who advocate for more funding for legal services programs. It is housed at the Massachusetts Legal Assistance Corp. (MLAC).
- I also recognize the many contributions Debbie Thomson of MLRI has made to our legislative advocacy efforts. Debbie specialized in elder law issues and was also knowledgeable about senior health programs. She worked two days a week at MLRI and the rest of her time at another lobbying group. She filled in where helpful and also did an outstanding job on senior legislative issues.

During the past twenty years, MLRI and its allies have had to focus greatly increased time and resources on the Governor's and Legislature's consideration of the state's annual budget, where most of the decisions on state funding and policy are now made. Because this work took on an area of advocacy of its own, this chapter is devoted to describing this work.

It wasn't like that in the earlier years of our legislative work. In the late 1960s and early 1970s, the Legislature passed some 1,200 to 1,400 new laws each year, of which only one was the annual state budget. Most policy matters were debated and decided outside of the budget and in open sessions, where they should be considered by all rights. Part of this openness was prompted by the leadership of the two houses of the Legislature, by two legislators from Holyoke. David Bartley was Speaker of the House and Maurice Donahue was President of the Senate. During this time, most of the major law changes and new programs benefiting the poor were adopted. I describe these advances throughout this book, subject area by subject area.

As the years went on, the Legislature passed fewer and fewer new laws, and increasingly included policy matters in the annual budget, either within agency line items or in outside sections. At the same time, the Legislature's

consideration of the major decisions in the budget became more concentrated in a handful of legislative leaders: the Speaker of the House, the Senate President, and the Chairs of the House and Senate Ways and Means Committees. Other legislators, including members of the two Ways and Means Committees, were largely shut out of the decision-making, being relegated to telling the Chairs their budget priorities and hoping for the best. When budgets came out of the Ways and Means Committees to be supposedly debated on the floor, where many amendments had been proposed by the very short deadlines set by the leadership, the amendments were often bundled together, came to the floor with no or only minor changes proposed, and were gaveled through with no debate. The result of all this was that the number of new laws passed by the Legislature dwindled to between 300 and 400 a year, most of them minor (such as naming roads after friends of legislators and approving proposals for home rule amendments by individual cities and towns). The real decisions were largely made in the budget by a handful of legislative leaders.

These trends were also caused by a lessening interest in public policy issues by those who received leadership positions in the Legislature. Speakers of the House and Presidents of the Senate kept their members under control by appointing to leadership positions (which carried significant extra pay) those who were loyal to their leaders. Those legislators who did not cooperate were kept off important committees (the leadership had exclusive assignment authority over all committee memberships) and found themselves assigned to minor or do-nothing committees and their sponsored bills blocked.

Another reason for these trends was the legislators' insistence on using the budgets of certain agencies and the courts for patronage. The courts' budgets were (and still are) divided into local court-by-court line items, with the number of positions identified by number and description. Legislators and their friends approached local judges and other court personnel to suggest candidates for court employment, particularly for positions added in the most recently approved budget. You can imagine what the result has been. Former Greater Boston Legal Services lawyer and Dorchester District Court Judge Jim Dolan did a study some years ago comparing the caseloads and job positions in each local court in the state. He found that in many courts these figures were completely out of line, reflecting, he suggested, the skewed resources built up over the years by legislative control over the courts' budgets. Only in recent years have the courts finally been able to persuade the Legislature to give the Chief Justice for Administration and Management limited authority to transfer employees among courts to start to correct these imbalances.

Of course, the most egregious patronage was uncovered finally in recent years. Around ten years ago, House Speaker Thomas Finneran slipped into the state budget (completely behind closed doors) the transfer of authority over probation officers from the courts to an independent Probation Department headed by his friend, John O'Brien. That opened up a patronage bonanza for certain legislators (most of them supporters of Finneran). After

this was uncovered through an independent investigation by a Boston lawyer, O'Brien and others in the Probation Commissioner's office were indicted in 2011 for corruption and the Legislature was shamed into transferring authority over the Probation Department back to the courts, but not without a contest from Governor Deval Patrick, who thought the Probation Department should be in the Executive Branch.

So, the attention of the Legislature's leadership and many of its members turned to more mundane things than major public policy issues. Another sign of this focus was that three former House Speakers (Charles Flaherty, Thomas Finneran, and Salvatore DiMasi) have been convicted of corruption. This trend toward autocracy in the Legislature also enabled influential leadership to block proposals aimed at benefiting the poor without any democratic consideration of them.

Speaker Finneran was known to have hated the state's rental voucher program, probably because he did not like that the vouchers enabled poor people and people of color to move into neighborhoods that had been beyond their financial reach. During the state budget crises of the late 1980s and early 1990s, he made several attempts to eliminate funding for the program altogether. One of these was blocked by a successful MLRI lawsuit in the early 1990s, but Finneran was successful in greatly reducing funding for rental vouchers and imposing restrictions that made it much harder for the poorest people to use them. Ironically, this animus came from a man who grew up in public housing but never looked behind him when he made it out, or, seemingly, had any sympathy for those left behind.

These trends were also hastened by sixteen years (1992-2008) of Republican governors, two of whom (William Weld and Mitt Romney) seemed to be oblivious of the needs of the poor. So we not only had to contend with the difficulties in getting the attention of the Legislature itself on measures to address the needs of poor people, but we had to deal also with governors' proposals to eliminate or greatly reduce key budget items affecting poor people and to impose eligibility restrictions in programs. This only magnified the difficulties advocates had in representing the interests of the poor in the major forum where decisions were made. Nearly all of our efforts turned to defensive work, a dispiriting task when, at best, we could usually only keep things as they were.

A recent blog reminded me of another incident which showed the Legislature's concentration on its own members' interests and not on the interests of the public, to say nothing of the fate of the poor. After Bill Weld became Governor in 1992, the legislative leadership decided to push through a substantial legislative pay raise. Weld balked, but suggested informally that he might be willing to agree to it if at the same time the Legislature included with the bill a major cut in state income taxes. So, without any notice to anyone else in the Legislature, and certainly without any public notice or debate, the leadership added an amendment to the pay raise bill substantially reducing the state tax on capital gains, got it passed without any debate (the bill retained its title that its subject was the pay raise), and sent it to the Governor, who promptly signed it. Weld often brags that during

his four-year term he got 44 tax reductions approved. What he doesn't brag about is that they cost the state at least a billion dollars of lost revenue. This greatly exacerbated the state's budget crises in subsequent years. And guess who suffered the brunt of these giveaways in tax breaks (some of them thinly disguised breaks to major businesses like Fidelity Investments and Raytheon)? You've guessed it: poor people's programs.

Faced with these unfavorable trends, and the public's loss of interest in poor people's needs, MLRI and its allies organized themselves to engage in budget campaigns. These consisted of the following approaches:

- Establishing budget priorities (many of them priorities of poor people's groups), drafting supporting documentation, assembling allies, and getting legislators' support for them as their own priorities;
- If advocacy on a priority was also taking place in other forums, coordinating this advocacy so that the legislative piece fit into an overall strategy;
- Preparing and sending out alerts to actual and potential allies so that they would weigh in at the Legislature;
- Coordinating presentations at legislative hearings and rallies in support of the priorities, including lobby days at the State House, organized by many groups, where members spent part of a day visiting and leaving literature with their local legislators; and
- Trying to get the attention of and support from the media.

Some of the budget advocacy had to be to reverse administrative cutbacks made by the governor during a budget year. A state law gives the governor the authority to reduce or stop already-approved funding if the governor projects that the budget for an item would be exceeded. In past years when this happened, a governor would notify the Legislature of the projected shortfall and submit a supplementary or deficiency budget to make up the difference. These proposals were usually approved in time to avert a spending cutback. But some Republican governors saw this authority as a way of cutting back poor people's programs. They ordered spending stopped, sometimes early in the budget year, as a means of achieving program cutbacks without the inconvenience of having to get the approval of an overwhelmingly Democratic Legislature. This was particularly cruel in programs whose spending depended on economic conditions which periodically caused state spending to increase because of the increased needs.

When these administrative cutbacks occurred, MLRI and its allies protested loudly and attempted to persuade the Legislature to increase the funding even though the governor had not requested more funding. At other times, we had no choice but to file a lawsuit in state court and ask for an injunction stopping the cutbacks until the Legislature could decide what to do. In many of these cases we succeeded, but not without a lot of energy and efforts which took time away from other priorities. We adopted the practice of persuading the Legislature to insert language in certain budget items that

the governor could not initiate an administrative cutback before giving the Legislature at least 60 days' notice. Some governors took the position that this was unconstitutional interference by the Legislature in Executive Branch matters, and continued to order cutbacks despite the advance notice requirement. We were forced to get injunctions against these cutbacks, as the courts agreed with us that the Legislature had the constitutional authority to order the advance notice. Of course, we had to advocate year after year to get these advance notice requirements into the budget items in the first place. Governors, not surprisingly, did not include the language in their budget proposals, and sometimes key legislators were not automatic supporters. But persistent advocacy has preserved these requirements each year, and sometimes has been used successfully to curb administrative cutbacks in eligibility and to require agencies to follow the law, as MLRI has recently done in the budget of the Department of Children and Families. This advocacy has not been limited to actions by Republican governors. We have had to employ it at times during the administration of Democratic Governor Deval Patrick, too.

MLRI and other legal services programs also had to assemble and coordinate more advocacy resources on budget cuts issues. In the late 1980s, MLRI and the other legal services programs persuaded the Mass. Legal Assistance Corp. to give MLRI a special two-year grant to coordinate budget cut litigation. MLRI hired Tom Mela, an experienced litigator, to provide the coordination in conjunction with other MLRI staff lawyers. Tom started his legal career at MLRI in the early 1970s, focusing mainly on major employment discrimination cases (more about this in the chapter on Employment), then went to the Boston University Legal Aid Program as a staff supervisor and then to the regional Office of Civil Rights of the U.S. Department of Education. Since 2006 he has been a staff attorney at Mass. Advocates for Children.

Tom and other MLRI staff assembled litigation teams from among other legal services programs and the project spawned some ten to twelve class actions in state courts challenging a variety of budget cutbacks. Many of these were successful. This was a highlight of major legal services litigation over these years and a useful training ground for less experienced legal services lawyers. In subsequent times of state budget crises, MLRI followed the same pattern: trying to get state court injunctions halting spending cutbacks and persuading the Legislature to restore or increase the funding needed. Again, many of these cases succeeded in doing that. The MLRI advocates who were centrally involved in this work were Ruth Bourquin, Deborah Harris, Pat Baker, and Judith Liben. They deserve recognition for their inventive and largely successful approaches. I have heard of no other legal services effort in any other state that employed this approach to fend off cutbacks in poor people's programs.

Another continuing state budget activity has been the close monitoring of and participation in the annual development of the state budget. For many years, MLRI and its allies have advocated with state agencies to include legal services priority proposals into their budget recommendations to the

governor; advocated with the governor before he settles on his budget proposal to the Legislature; commented to the Legislature on the governor's proposed budget; made proposals for amendments to the House Ways and Means, Senate Ways and Means, and Conference Committee budgets; and advocated to the governor on the Legislature's final budget.

This process takes place over some eight months. Our advocacy at every stage is rooted in the budget priorities MLRI sets in the fall each year, subject by subject, most of these informed by the budget priorities adopted by community groups with which MLRI and other legal services programs work closely. When a proposed budget is released at each stage, MLRI immediately prepares and circulates an extensive memo to its allies about what has been proposed. As the next steps, groups working in the different subject areas propose amendments to the budgets and circulate alerts to their constituencies, asking them to weigh in with their legislators and with the legislative leadership. During the budget debate, advocates are at the State House supporting their budget amendments and advising their legislative supporters, often into the wee hours. All of this advocacy at the Legislature has to take place within the very short time frames for legislative action on the budget.

It is a testament to MLRI and its allies that these efforts have achieved significant success over the years despite the closed budget-making process in the Legislature. Particular credit should go to MLRI's Deborah Harris, who coordinates the preparation and distribution of the budget memos at breakneck speed; to the other MLRI advocates who similarly turn to examining the proposed budgets as they are released and writing up their analyses for inclusion in the MLRI reports; and to other advocates, such as Elizabeth Toulan of GBLS's Family Economic Initiative, who play major roles in budget advocacy. Granted, much of their work has been defensive, especially in recent years, but major improvements have also been made through the budget process in the many state programs on which poor people depend. I describe some of these successes, subject area by subject area, in other parts of this book.

Chapter Five

CONSUMER LAW

Massachusetts has long had strong consumer protection laws and good resources to enforce them. Many of these were promoted by groups other than legal services, and many were on the scene before legal services programs were established. There was a strong statewide Consumers Council, and groups like MASSPIRG specialized in some of these issues. The Attorney General's office has long had a strong Consumer Protection Division, a consumer hotline to help people with consumer complaints, and a regulatory division that represents consumers in utility rate cases, insurance rate cases, and in anti-trust matters. It has also funded local groups that provide consumer advice.

Massachusetts is also blessed to have had the main office of the National Consumer Law Center in Boston. NCLC was started during the 1960s at Boston College Law School, and in several years became the national back-up center for legal services programs across the country in consumer law, with a branch office close to the national government in the District of Columbia. NCLC has done much important consumer advocacy and support in Massachusetts, and still does. It receives a grant from Mass. Legal Assistance Corp. to do this Massachusetts work, and grants and contracts from and with other Massachusetts sources, which enable it to do some areas of consumer work in the state in more depth. It has also had inspired leadership from its Executive Directors in recent years, first Bob Sable (who subsequently became Executive Director of Greater Boston Legal Services and is now retired, except that he's not fully retired because he takes cases for GBLS as a volunteer) and then Will Ogburn. Both came to Massachusetts in the 1970s after starting their legal services careers at the Legal Aid Society of Cleveland.

Given the existence of all these other resources, consumer law has not been as high a priority for legal services programs over the years as it has been in many other states. But we selectively jumped in on issues that particularly affected poor people. Here are some stories about what we did do.

A. Unfair Practices

In the 1960s, Massachusetts adopted a "baby" Federal Trade Commission statute, Chapter 93A, which prohibited unfair and deceptive acts and practices affecting consumers that were engaged in by businesses. Under the Act, the Attorney General was given the exclusive authority to enforce it and no attorney's fees were authorized against a violator. There was no right under the statute for a consumer to bring a lawsuit directly against a violator.

In its first legislative year after being established as a state support center, MLRI recognized the need for private enforcement of Chapter 93A

and filed a bill drafted by Professor David Rossman of Boston University Law School, a consumer law expert. The bill established a private right of action in court, with triple damages for intentional violations and the payment of attorney's fees to successful plaintiffs where a court found a violation of the law. This was coupled with a requirement that a consumer must send a demand letter before being able to bring a court action. Given the prospect of multiple damages and attorney's fees if the business did not settle the claim at that stage, many consumer complaints were settled without needing to go to court at all. The proposal passed the Legislature during the 1969 session as an amendment to Chapter 93A.

This was a powerful new tool for consumers, and with attorney's fees in prospect we expected the private bar to provide much of the representation needed to make the new law work. In that we were initially disappointed. We sponsored and participated in many training events for private lawyers, and prepared written materials to encourage them to represent clients in claims under the law. It was not until many years later that lawyers in the private sector, particularly younger lawyers, began to understand and use this law. Of course, legal services lawyers began to use the law right away, and had considerable success in settling client claims as a result of sending demand letters.

The Attorney General's office had been helpful all along by adopting very good regulations under Chapter 93A, spelling out in detail what kinds of practices were unfair and deceptive. But the question arose whether violations of housing law were 93A violations when committed against a tenant by a landlord, or even by a public agency that owned or operated housing. In the early 1970s, Jim Dolan, a staff attorney with Greater Boston Legal Services (and later the Chief Counsel of the Mass. Bar Association and a Dorchester District Court judge), got the idea of proposing that the Attorney General specifically define violations of housing law as Chapter 93A violations in the A.G.'s regulations. He made a proposal, and legal services housing advocates and tenants strongly supported it. The A.G. adopted the proposal and tenants had a new set of claims to make against housing owners who engaged in unfair practices.

The private right of action to enforce Chapter 93A benefited legal services programs during the 1990s in an indirect way. A small law firm in Boston (Ellis & Rapacki) brought a class action in state court against numerous sellers of animal vitamins for deceptive advertising of these products. The defendants moved to dismiss the case, claiming that there was no cause of action under state law, and the case reached the Supreme Judicial Court. The court, in a 4-3 decision written by Justice Francis Spina (who started his legal career as a staff attorney at Western Mass. Legal Services), decided that the claim was covered by Chapter 93A. After this decision, most of the defendants decided to negotiate a settlement of the case. The parties agreed on a total damages settlement of around $25,000,000. But since there was no practical way to find out, long after the fact, who had purchased the vitamins, the lawyers and the judge decided to enter into a *cy pres* process.

Cy pres is an old English-French legal term which means "the next best thing." It is used in situations where, if the original requirements of, say, a charitable bequest or trust can no longer be met, a court can approve a like charitable purpose for the use of the funds. Since this term does not exactly fit what happens in litigation like this deceptive advertising case, these funds are now called "class action residuals." The court decided that $19,000,000 should be set aside from the recovery for food and nutrition programs. To its great credit, the Ellis law firm decided in the late 1990s to issue a widely publicized request for proposals from potential grantees. It then received proposals for many times the funds available and made decisions on grants to be awarded to nonprofit organizations. MLRI submitted a proposal for $625,000 over a two-year period for statewide food stamps advocacy, $500,000 to be distributed to local programs, and $125,000 to be retained by MLRI for support to local advocates and for statewide systemic advocacy. The proposal was funded in full.

B. Some Other Consumer Activities

Legal services programs did have a statewide Consumer Coalition during the 1970s, run by Tony Winsor of MLRI. Members did some major litigation, particularly on Chapter 93A issues, and involved themselves in promoting several needed legislative changes. One area that desperately needed updating was the state's exemptions from execution statute, which provides that creditors and courts cannot take certain income and property resources of low-income debtors that are essential for their subsistence. This statute had not been updated for many years, and many of the exempt items were somewhat antiquated (such as farm animals and implements and other vestiges of rural living in a different era) or the dollar amounts had not been revised to reflect more recent economic reality. These exemption amounts were important not only in protecting poor consumers in state court collection cases (called Supplementary Process, where debtors frequently defaulted or did not defend against creditor cases brought against them in the creditor mills that were the District Courts at that time), but they applied in federal Bankruptcy Court, as well. Under the leadership of Tony Winsor, legal services, after several years of advocacy, achieved success in getting the exemptions from execution statute modernized in the late 1970s. This updating had to be done again a few years ago, because the exemption amounts had again become seriously inadequate. This time, NCLC led a successful effort (helmed by Bob Hobbs) to do this in 2010.

Another perennial courts-consumer issue that caused major problems for those who were elderly, ill, or disabled concerned the court proceedings for the appointment of guardians to handle their affairs. Those who were the subjects of guardianship petitions had no right to a lawyer to represent them and often were not fully aware of what was happening. Frequently, relatives or other persons with a financial interest in the protected ward's assets were appointed guardians, and there was little effective oversight of what the guardians did. Under the leadership of Tony Winsor and Wynn Gerhard of Greater Boston Legal Services, a legal services group formed in the early

1980s to work on a proposed legislative solution. They recommended that prospective wards should be helped by a new state agency, called the Guardianship Commission, which would not only get involved in the court cases where necessary, but would recruit and furnish guardians in appropriate cases. The group worked hard on this proposal for many years but were unable to get any traction for it in the Legislature, most likely because legislators could not be persuaded that it was a major need and were reluctant to establish a new state agency to address it.

It was not until 2010 that the shortfalls of the court guardianship cases came to the forefront. The Uniform Law Commission (a national group, with representatives from all states appointed by their governors, of which I was a Massachusetts representative for 15 years) had promulgated in the early 1980s a comprehensive Uniform Probate Code, covering all aspects of probate proceedings in court, including, in Part 5, guardianships. It took Massachusetts an unpardonable number of years to consider passing this, but it finally did it in piecemeal fashion over a ten-year period beginning in 2003. The guardianship part was particularly strong to protect defendants and to require accountability by guardians. Legal services advocates, led by Wynn Gerhard and Dan Bartley of GBLS and Bob Fleischner of the Center for Public Representation, quickly took this on and helped get Part 5 passed in 2010. Bob Fleischner describes this new law as a major and exciting improvement in guardianship cases. It even permits (and, some think, requires) the appointment of legal counsel to represent poor defendants at state expense. So, a class of people and a type of proceeding that have long operated in the shadows, and could have been, over a century and a half ago, parodied by Dickens, have been at last brought into modern times. It is also a milestone in the expansion of the right to a lawyer in civil cases where important rights are at stake, which I will describe in the next chapter on Court Reform.

C. Utility Customer Service Rights and Costs

1. Gas and Electric Company Customer Service Practices

When MLRI opened its doors as a statewide advocacy and support program in 1968, we found that one of the major complaints of poor people concerned the arbitrary practices of gas and electric companies. It was bad enough that they faced heartless treatment by many landlords, but often lack of utility service went hand-in-hand with evictions and homelessness. Mike Feldman and I decided that MLRI should treat this as a priority area to reform. Mike was a young firebrand lawyer whom my predecessor, Al Kramer, had hired before I became Executive Director in March of 1969. He exuded outrage over the unbelievable (even for us) conditions that poor people faced and how the laws were stacked against them. Mike actively participated in criminal law and court reform activities at MLRI for several years before he left to become a staff attorney at Boston Legal Assistance Project (which subsequently became the current Greater Boston Legal Services). Mike and a recent law school graduate we had lately hired, Will Aikman, proceeded to collect stories from utility customers and legal services

advocates in order to identify the major problems that needed fixing. At that time there were some 20 gas and electric companies, big and small, operating in the state, so it seemed to us impractical to try to change things through litigation.

We decided to draft and present to the state Department of Public Utilities (DPU) a comprehensive set of proposed regulations. The Chair of the DPU at that time was Bill Cowin, whom I knew as a law school classmate and whom Mike knew as a fellow resident of Brookline. Mike and Will presented their proposals at a DPU rule-making hearing presided over by the Chairman. On the other side were lawyers representing most of the gas and electric companies in the state. MLRI presented many witnesses and affidavits, from customers and their advocates, showing the many arbitrary and unfair practices the utility companies used and how damaging they were to poor people who frequently had to go without service. The companies' lawyers presented their cases for why the DPU should not issue any regulations at all.

Several months later, the DPU issued draft regulations containing most of our proposals and, after taking comments, promulgated them as final regulations. The companies were not going to take that without a further challenge, so they appealed the regulations to the Supreme Judicial Court. The companies complained that new measures such as the regulations should have been considered by the DPU in an adjudicatory hearing, and not as the subject of rule-making. By that time Mike Feldman had left for Boston Legal Assistance Project, so my then Co-Director, Mel Zarr, wrote our brief and argued our case before the SJC. We had recruited Mel from the NAACP Legal Defense and Education Fund in New York to give us an experienced civil rights litigator. He became my Co-Director, until he left in the mid-1970s to teach law at the University of Maine Law School, where he is still active. We got a favorable decision from the SJC, written by Justice Benjamin Kaplan, a very thoughtful and erudite discussion, elegantly written, of the legal differences between topics which an agency could handle through rule-making and those which must be decided after an adjudicatory hearing (*Cambridge Electric Light Co. v. DPU*, decided in 1973). Kaplan was my favorite professor at law school and was appointed to the SJC by Governor Francis Sargent. He continued as an SJC Justice until he retired at age 70, and then sat for many years on recall as a Justice of the state's Appeals Court.

2. Gas and Electric Company Security Deposits

Utility companies charged security deposits to people with supposedly questionable credit and as the price of restoration of service when terminated. This practice fell especially hard on the poor. We had considered including this subject in the prior rule-making proceeding, but our mention of it did not lead the DPU to consider regulating it at that time.

Several years later, we initiated a rule-making case on this at the DPU, whose Chair at that time was John Verani, a former colleague of mine at the

Attorney General's office when I was there for six months before I joined MLRI. I handled the case for our side, and we submitted extensive testimony and affidavits in support of at least the regulation of security deposits and maybe even their elimination altogether. When an official of Western Mass. Electric Company was testifying, Verani asked him whether the company had in its past history decided not to impose security deposits. The official answered yes, and in response to further questions by Verani testified that as an experiment the company had eliminated security deposits for around 18 months in the mid-1960s. It then compared its bad debt losses between those 18 months and the times before and after, and found that there were no differences. I don't know whether Verani knew about this beforehand, but he probably did. So after the hearing, the DPU issued a new regulation in 1974 prohibiting gas and electric companies from imposing security deposits. This was a first in the nation and, so far as I know, Massachusetts remains the only state that bans utility deposits. The many gas and electric companies appealed to the Supreme Judicial Court. In the meantime, the SJC had issued its strong decision in the *Cambridge Electric Light Co.* case, and I guess the companies thought better of pursuing an appeal and dropped it.

3. Other Protections for Vulnerable People Against Utility Shut-offs

Over the next few years, we succeeded in getting many other protections against shut-offs of gas and electric services for people with particular vulnerabilities. Before we started this work, the Legislature had passed a law prohibiting shut-offs of service to households in which an elderly person lived if the shut-off was for nonpayment. We participated in a DPU rule-making case in which the agency issued a set of regulations spelling out what that right meant and the procedures to be followed when a ban on shut-offs was in effect. We also persuaded the DPU to include in its gas and electric service regulations protections against shut-offs of residential service to a home in which there was a seriously ill person.

Another group of people who were especially vulnerable during a shut-off were parents with very young children. John Busbin, a staff member at Western Mass. Legal Services in Holyoke, called this problem to our attention. We immediately filed a legislative bill in 1978 to provide this protection and got it passed during the same year.

Our clients encountered another problem with respect to what happened to service to tenants in a building where the landlord was responsible for paying the full utility bill but did not make the payment. Typically, gas and electric companies terminated service to the entire building, and put the burden on the tenants to pay the full arrears (which they did not legally owe) or to persuade the landlord to do so. Legal services advocates brought this practice to the attention of the DPU. It issued regulations prohibiting this practice and saying that if the tenants agreed to pay for future service they could band together to become temporary customers and better protect themselves against future shut-offs.

A related problem is what happened when someone applied for service at a new location to which they had moved, but had an unpaid bill at their prior address from the same utility company. Company practice was to deny new service until the customer agreed to pay the prior unpaid bill or agreed to have the unpaid bill added to the bill for service at the new address. This practice was challenged in a DPU adjudicatory hearing by a Boston Legal Assistance Project lawyer in the *Cromwell* case (1974). The DPU decided that bills for service at different addresses were obligations independent of each other and that a company could not deny or condition new service on an agreement by the customer to pay or transfer the old obligation to the new address. The utility company did not appeal this decision, and so this decision became the law at the DPU. Thereafter, some utilities tried to get around this decision by requiring new customers to "waive their *Cromwell* rights" and accept legal responsibility for the old bill at the new address. Of course, a waiver of that kind can in no sense be considered voluntary. We complained to the DPU, and it instructed the companies to stop this practice.

Another vital protection for low-income and vulnerable gas and electric customers was to limit or prohibit termination during the winter months. As federal fuel assistance programs grew up in the early 1970s and private charities were increasingly available to help poor people pay their back bills, the gas and electric companies were persuaded by the DPU and customer service advocates to agree to a moratorium against shut-offs of customers in financial hardship between November 1 and March 31 of each year. This started during 1973 and was expanded in 1974 and 1975. Since many of these families were financially eligible for federally funded fuel assistance payments through local community action programs (CAPs), those programs were able to inform customers of the right to shut-off protection and help them get it if the utility balked. Of course, it was also in the interests of the utility companies to cooperate in applying the shut-off moratorium because community action program advocates could help steer some money to the families to help them pay back bills and for service during the moratorium.

Another important and related right of vulnerable customers was to be able to negotiate repayment agreements so they could pay off back balances more in accordance with their periodic ability to make these payments. The DPU included this right in its gas and electric customer service regulations, and the DPU's Consumer Division (more about that later) enforced this requirement. Gas and electric companies gradually saw that it was not necessarily in their interest to shut off service arbitrarily to its customers, and they accepted the many new laws and regulations in a more cooperative spirit. Looked at together, Massachusetts had, and probably still has, the most consumer-oriented regulation of utility customer services practices in the nation. When all this had been put in place, Dan Manning, the Litigation Director of Greater Boston Legal Services, commented that poor people had close to a legal right to continued service.

4. New England Telephone Company's Residential Customer Practices

In the 1970s, New England Telephone Company provided telephone service to nearly every residential telephone customer in the state. And, in Lily Tomlin's memorable description, they considered themselves "omnipotent." They insisted that telephone service was a privilege and not a right, and engaged in the same kinds of arbitrary practices as did gas and electric companies before their practices were regulated. In the early 1970s, Jeff Kobrick and Gerry Billow of Boston Legal Assistance Project filed a federal court class action against the company, detailing the many arbitrary practices which they said violated due process. Around that time, the U.S. Supreme Court, in the *Craft* case (argued by the National Consumer Law Center and legal services advocates in other states), had decided that constitutional due process protections that applied to private utility customer service practices also applied to poor people if those practices were developed by or endorsed by government. But the Boston lawsuit got bogged down on procedural issues and the plaintiffs' lawyers decided not to pursue it.

I then decided that we should bring these practices to the attention of the DPU and ask it to regulate them. Unlike with the gas and electric companies, there was no explicit statutory authority for the DPU to issue rulings on telephone company customer service practices, so we decided not to ask for rule-making for fear that a court might later find that the DPU had no authority to apply regulations to telephone practices. We fastened on the common carrier statute. Starting in the 19th century, faced with the development of railroads, telegraph and other utility companies, and other providers of public services, Massachusetts (and probably other states, too) passed a statute prohibiting common carriers from engaging in unfair and inequitable practices. So in 1974 we filed a request for an adjudicatory hearing before the DPU, cataloguing the unfair practices in which New England Telephone Company (NET) engaged with its residential service. The Attorney General's Consumer Division joined our side in the case, represented by Lisa Fitzgerald, formerly an attorney at Boston Legal Assistance Project. As with prior rule-making proceedings at the DPU, we lined up witnesses, affidavits, and other documentation showing that these broad practices existed. Through discovery, we obtained NET documents showing that in many respects our claims were valid.

The DPU hearing was presided over by Commissioner Reginald Lindsay, recently appointed to the position by newly elected Governor Michael Dukakis. While in law school in 1968, Lindsay had worked with Boston lawyer Herbert Hershfang on a project for the Voluntary Defenders Committee, the name of our nonprofit before it was changed to MLRI in the early 1970s, to explore whether beneficiaries of cash assistance programs for the poor had a constitutional right to a lawyer to represent them in administrative agency adjudicatory hearings involving the denial or termination of their benefits. They issued their report after I arrived at MLRI in March of 1969, concluding that, at that time, establishing the right to a lawyer at these hearings was a long shot and probably not worthwhile pursuing. This turned out to be prophetic, as someone else, not in legal

services, brought an appeal to the Supreme Judicial Court (the *Aiello* case in 1970), and the SJC summarily rejected the idea. After graduation from law school in 1969, Lindsay joined the Boston law firm of Hill & Barlow, where I practiced between 1962 and 1968. After his service at the DPU, he was appointed a Massachusetts U.S. District Court judge, where he remained until his untimely death several years ago.

During one of the hearings, Lindsay announced that he had been contacted by a Harvard Law School professor who wanted to testify at the hearing. Lindsay asked if anyone had an objection, and no one did. So the next morning, the professor appeared and told his story about being mistreated by NET. During the summer, when school was not in session, he and his family spent most of their time at their summer home, and so they did not usually get their mail on time. When they returned they found their telephone service shut off. When they called NET to find out what they needed to do to get service restored, they were told that they had to pay not only all back bills, but also a large security deposit. He also testified that the NET people he talked to treated him like a deadbeat. Needless to say, NET's lawyer decided not to cross-examine him. The professor was Steven Breyer, who subsequently served on the federal First Circuit Court of Appeals and has been a U.S. Supreme Court Justice for almost twenty years.

After the hearing was concluded, I had an extensive record of the hearing to review and a brief to submit to Commissioner Lindsay. I dug up some 19th-century court decisions, from Massachusetts and other states, which disapproved of unfair practices by common carriers similar to those we had presented at the hearing. I remember taking my notes to a National Legal Aid and Defender Association annual conference in Seattle. I spent time there outlining the brief, and took an overnight flight back to Boston. There were plenty of empty seats, so I set myself up and handwrote the brief (nearly 100 pages) during the flight back.

Several months later, Commissioner Lindsay issued his decision. He catalogued in detail the unlawful practices which the hearing record showed NET had committed and found in our favor on nearly every point. At the next hearing, Lindsay said that he intended to propose final orders in the case prescribing practices which he thought NET ought to adopt, but suggested that the parties might want to negotiate them. We proceeded to meet with NET's lawyers and we came to an agreement on regulations covering the areas where Lindsay found violations, with the exception of a few on which we did not agree. One of those was the regulation of security deposits. I pulled testimony at the hearing from an NET official who said that to terminate or restore service, all NET had to do was to go into a back room and pull a switch. For this task, NET required a large security deposit as the condition of restoration of service. But NET disagreed with our proposal to eliminate the requirement of a security deposit in order to get service restored. NET pointed out that it was far easier for a customer to run up a large telephone bill in a short amount of time than it was for a gas or electric customer to quickly use a large amount of service. So Lindsay was

persuaded not to order that NET stop imposing security deposits, but he did institute some controls over their use.

The final rules were incorporated into the DPU's decision and order in the DPU adjudicatory proceeding (Case No. DPU 18448, 1975), and they have not been changed yet so far as I know. And I would have been notified if anyone had tried to change them. Because the rules were part of an adjudicatory hearing decision, they could not be changed by rule-making. Anyone seeking to change them would have to petition to reopen DPU 18448 and present evidence at an adjudicatory proceeding to show that the case decision should be changed. At the time of the decision in 1975, NET provided telephone service nearly everywhere in the state. When other telephone providers applied for DPU authority to offer service, the Department required as a condition of approval that they follow the procedures in DPU 18448. Of course, with the development of mobile phones and other electronic communication devices, the number of people with landlines has greatly decreased, and so these rules probably apply to fewer and fewer people. Still, they have provided protections to residential telephone users for nearly 40 years, and they confirmed that telephone service was, and is, a right and not a privilege. So far as I know, these rules are the most far-reaching in any state.

There is one amusing coda to this. A month or so after the rules were put into effect, NET called me and some consumer advocates to ask if we would be willing to participate in a video on the new regulations. We agreed. NET prepared this video and required all employees to see it. A couple of my friends who worked for NET told me that they had seen the video and had chuckled when they saw me in it. Do you think that an unregulated utility would do something like that?

5. DPU Consumer Division

When the new gas and electric regulations were implemented, we and the DPU had to decide how they would be enforced. We suggested that the agency establish a Consumer Division to help customers and companies resolve their differences, and the DPU agreed to do that. Under the supervision of a Director, the Division employed many staff to accomplish its mission. Companies were required to notify customers on all notices and bills that if they had a dispute and could not resolve it directly with the company, they could call the Consumer Division. Division staff took calls, called the companies, and in many cases were able to resolve the dispute over the phone and through follow-up written documents. When that was not successful, the Division scheduled a meeting between the parties to negotiate a solution. At our suggestion, they offered to hold these meetings around the state for the greater convenience of the parties. When a settlement could not be reached, the Division offered to hold an adjudicatory hearing.

This was one of the most successful dispute resolution systems I know about. Advocates monitored the performance of Division staff and met periodically with the Director to find out how things were going and make suggestions for improvements. By and large, the Directors were strong in their responsibility to enforce the rules and reach fair results. One person in that position for many years, Claudine Langlois, was particularly effective, having worked for the Lowell community action program before she took the job at the DPU.

Utility company representatives came to realize that unreasonable positions would get little acceptance at the Division, and so they resolved larger and larger numbers of disputes without the need to go to the DPU at all. Legal services programs were pleased that they received far fewer emergency calls from people who had had their service terminated or faced other noncompliance with the rules, so they could turn their efforts to housing and other legal areas that were more intractable for their clients. The Consumer Division also assumed responsibility for telephone service disputes after the DPU adopted the telephone rules. As a help to customers and other advocates, MLRI prepared and periodically updated a Utilities Manual, which described the rules, made suggestions for advocacy approaches, and catalogued important DPU adjudicatory decisions on customer service issues. Charlie Harak of MLRI wrote and updated this Manual, and MLRI published it as part of its publications program.

In short, we advocated ourselves mostly out of a job, which ideally is the way it should be in our advocacy. One of our most important tasks is to persuade institutions that deal with poor people to do their jobs right. Legal services and other advocates can help only a tiny fraction of those who need assistance in most legal areas. This is one area where I think we helped shape institutions to treat people lawfully and fairly without the need for representation.

6. Utility Rate Cases

As part of our utilities work in the 1970s, we began to look at the cost of electric service and the rate structures for the different classes of electricity users. These rates and rate structures were set by the DPU after extensive adjudicatory hearings. Most companies had what were called "promotional rate structures." That is, the more electricity you used, the less the per-unit cost. They also had comparatively high fixed-cost components in their rate structures, which all customers paid for and which fell disproportionately on low users, mostly poor people. And they gave huge cost breaks to commercial and industrial users compared to what residential customers paid. As a consequence, we thought that small residential customers were being charged costs greatly out of proportion to the actual, allocated costs of giving service to them.

The Attorney General's Consumer Division had long participated in these rate cases, representing all ratepayers, and had, by and large, done a good job in doing so. But they had to represent all customers, and so that

sometimes inhibited them from highlighting some of the issues affecting small residential users.

A number of consumer groups also concluded that the rate structures discriminated against the small users, and wanted to get involved in rate cases. These included Mass. Fair Share and MASSPIRG. I agreed to become involved in some of the electric rate cases. We sought more information from the electric companies about how their costs were in fact allocated among different classes of customers and within each rate class, and argued for larger unit rates for those residential customers who used larger amounts of service. We also promoted a "lifeline" rate for the smallest users (usually poor people) as a means of making electric service more accessible to them. On behalf of our position, I presented an economist, Eugene Coyle, who had prepared economic justifications for these proposals. Gradually, the DPU began to adopt some of these principles in its rate case decisions. It's hard to conclude that this was caused mainly by our advocacy, because the Attorney General supported some of our proposals, and some other utility commissions across the country began to order that rate structures should be changed along these lines. But I'd like to think that our suggestions for fair and rational restructuring were persuasive in the DPU's decisions.

I had been doing these cases for MLRI myself at first, but it soon became evident that I needed help. So we hired two lawyers for one year each to work on utility issues under my supervision. Both came from the south. The first, Bobbie Rodkin, was here during the blizzard of 1978, when her car was buried for several months in a snowbank. She decided to return to a warmer climate after that year. The second, Bonnie Davis, was here for one year while her husband was in graduate school, and was not unhappy to return to her home in North Carolina. We then hired Charlie Harak for a permanent position, doing utilities and housing work. Charlie had been a lawyer at MASSPIRG, and he was (and is) a real go-getter. He became MLRI's principal lawyer doing utilities work starting in 1980, while I turned my attention to other priorities. Charlie also did housing work. He left MLRI in the 1990s, and became a staff attorney at the National Consumer Law Center, where he continued to do outstanding work on utilities issues in Massachusetts. He is still at NCLC. Charlie worked on most of the matters which I describe in the remainder of this chapter.

One other period of legal services advocacy affected by utility rates was the state's "deregulation" of electric company rates during the mid-1990s. The wave of deregulation of businesses providing public services and goods, which started in the late 1970s in Congress with deregulation of the airlines and other transportation services (led by Senator Edward Kennedy and Steven Breyer, Special Counsel to the Senate Judiciary Committee at the time, before he became a judge) and led eventually to the repeal of the federal Glass-Steagall Act (which some think was the major cause of the most recent recession), started to reach regulated utilities during the 1990s. Gas service deregulation occurred mostly at the federal level, and so we could do little to influence it. But changing state regulation of private electric companies needed to be accomplished state by state. The electric companies

did their lobbying homework effectively and lined up influential legislators, the Governor (William Weld), and the state regulatory agencies in support of a deregulation bill which they filed. Their proposal deregulated only the generation component of utility costs. The transmission and other components were to be left with the existing electric companies.

NCLC jumped into the fray. Jerry Oppenheim, who had a lot of utility regulatory experience in other states before he moved to Massachusetts, was the key lawyer, and he asked me to work with him. Of course, we thought that this deregulation was a farce, a thinly disguised move by private businesses to turn a regulated public necessity into a free-market goldmine for them. Jerry wrote several analyses throwing real doubt about whether the public would benefit from this. But the wheels were greased for this to pass, and so we turned our attention to proposing changes that would benefit residential users (especially poor people) and mitigate the likely effects of more expensive electricity.

We proposed special discounts for lower-income people; reductions in the basic cost component of electric service that everyone had to pay even before charges based on usage were added, and that typically had been loaded up with costs which should have been spread out more to larger users; and the establishment of a large conservation fund, funded by electric companies, which would be used for energy audits and other steps to help customers eliminate avoidable usage. Jerry drafted and presented these amendments, and, to our surprise, they were accepted almost word for word. I guess the powers-that-be (pun intended) wanted the legislation so badly that they were willing to agree to almost anything we presented on behalf of poor people. And, so far as I know, deregulation has not produced appreciable competition in generation providers, nor has it produced any significant decrease in rates. But you can bet that it has lined the pockets of the bigshots who put this through.

However, a lot of benefits came to poor people from the improvements that we got into the deregulation law. Charlie Harak joined NCLC in the late 1990s and did some tremendously effective advocacy in the implementation of lower costs for poor people. These discounts could be as much as one-third of the parts of the electricity bill (except the generation charge) to which they applied. The question was how poor people were to be identified by the electric companies so that they could get their discounts. It was slow going. At first, the state put the burden on customers to apply to the electric companies for the discount. That did not work well, nor did it make sense for the utilities to turn themselves into eligibility decision-making agencies. Charlie suggested that agencies and the nonprofits that run the federal fuel assistance program could certify to the electric companies that certain of their customers were financially eligible for the programs the fuel assistance agencies administered, and upon receipt of that information, the electric companies would give the discount without further documentation. That, of course, raised questions about customer confidentiality which took additional time to resolve. But finally, after Charlie's persistent advocacy,

those systems were put into place and many more poor customers got the discounts as required.

7. Fuel Assistance Program

Starting in the mid-1970s, the federal government established the fuel assistance program for low-income people's heating costs. As a result of the 1973 Arab oil boycott, prices for home heating oil and gas used to heat homes shot up rapidly, leaving many poor people without service because they could not pay their bills. The program was run in Massachusetts mostly by nonprofit local community action programs (CAPs), which had been founded in the 1960s as part of Lyndon Johnson's War on Poverty. The federal funds came through the state's housing agency, and were then distributed to the CAPs. Charlie Harak became involved in working with the CAPs when snafus occurred in the distribution of the funds, among other issues. These occurred mostly during the administration of Governor Edward King from 1978-1982. King had defeated Michael Dukakis in the 1978 Democratic primary and then defeated Republican Francis Hatch (a capable legislator who was helpful to our poor people's issues). King was what I call a Republicrat—a Democrat in name, but with a political philosophy more like a conservative Republican. I have already described in Chapter 3 King's actions in immediately ordering the investigation and benefits termination of 15,844 family cash assistance beneficiaries when his administration got the results of the state's first wage match. King also had an animus against the CAPs and against the fuel assistance program, evidenced by his twice freezing the distribution of fuel assistance funds during the middle of the winter. Each time, Charlie filed federal court lawsuits on the ground that federal law did not permit the governor to do this and that the governor had no independent state law power to impound funds. In the first case, he got an injunction, and the funds became unglued. After he filed the second, the state relented.

Charlie also persuaded the CAPs to help fuel assistance recipients with any customer service issues they might have with their provider of heating. The fuel oil dealers, although unregulated, were particularly helpful, and often cooperated with the CAPs in securing deliveries. Of course, fuel oil dealers were mostly local, anyway, and because there was considerable competition they had good reason to be cooperative.

This was not the case with most of the gas companies and with electric companies when a fuel assistance customer heated with electricity. Charlie did trainings, prepared and updated materials on utility customer rights, and gave advice to CAP personnel. Charlie received a special award from the MASSCAP Directors Association for his long-lasting assistance to the CAPs, which he carried over to his new position at NCLC.

8. Utility Bill-Switching in Multiple-Unit Housing and in Water Service

Periodically, two other utility issues threatened to harm poor people. The first concerned efforts by owners of multiple-unit subsidized housing with centralized utility bills to get authority to have meters installed for each unit

so that tenants would have to pay their usage bills directly. In the 1970s, legal services advocates had persuaded the state Department of Public Health to adopt a provision in the State Sanitary Code (a regulation that governs housing conditions) that, in effect, prohibits these owners from switching payment for utilities to their tenants. To make this kind of switch, the owner would have to install meters at each unit and have the utility company bill each tenant separately for usage in that unit.

We thought that this would be a disaster for tenants if it were allowed. After all, the owner's centralized costs of utility services had been figured into the rents, and if owners were permitted to slough off these costs to tenants, they probably would not have reduced rents commensurately, and the tenants would bear the full brunt of future cost increases and termination of service if they could not afford to pay. Nonetheless, every five or so years, groups of owners would file a legislative bill that would give them this bill-switching authority. And every so often, a group of owners would petition the Department of Public Health to change its regulation. So, whenever this chestnut popped up, Annette Duke of MLRI and other legal services advocates and tenants' representatives would document their opposition. To date, the owners have not succeeded in changing this.

The other, related, issue was another bill-switch scheme. This one reared its head in around 2008 during Mitt Romney's governorship. It proposed that owners of multiple-unit housing be permitted to meter each unit for water usage and switch payment responsibility to the tenants. This was first pitched as a water conservation measure, and some environmental groups initially supported it for that reason. We countered that low-income users and occupants of small apartments were not likely to be profligate users of water unless there were water leaks, which were really the responsibility of the owners. And we pointed out that if the environmental groups wanted to promote effective programs of water conservation, they should focus their efforts on high-income apartments, single-family houses, and such water wasters as golf courses.

We also learned that legislation along these lines was being promoted in many states by a California company that manufactures water meters. The company employed several "experts" who prepared reports supposedly showing how water-conserving remetering would be effective in requiring people to pay for their own usage rather than having the owner bear the cost of the entire bill. We soon saw that these reports were seriously flawed.

In the face of this scary proposal, we convened a group of legal services advocates and tenants' representatives to meet periodically at MLRI to discuss our strategies. Margaret Monsell, Annette Duke, and I participated in these meetings. There was some difference of opinion among members of the group about whether we should concentrate our efforts exclusively on trying to defeat the bill altogether or whether, in addition, we should draft some amendments to it. We decided to do both and make our decision as to how to move forward dependent on our assessment of the bill's likely progress. Margaret reported back to us her assessment that the bill had enough legislative support behind it that it was likely to pass. We also

thought that if it did pass, Governor "Mutt" (this was the name I used for him because I thought he looked somewhat like his dog) would certainly sign it. So we proposed a number of amendments that we thought were fair to tenants and would protect them against arbitrary bill switching—and our amendments were accepted.

These changes apply the new law only to tenants in new construction or with new leases; protect tenants with existing leases and in public housing; and first require landlords to install water conservation appliances and accurate metering devices. We expected that these requirements would limit meter switches. They seem to have done better than we had even predicted. As of 2011, when I last inquired, no one in legal services had heard of a single instance in which it had been done. Who says that we don't know how to engage in sensible regulation instead of accepting the deregulation mantra that still reigns in this country?

In the early 1970s, I attended a national conference on poor people's rights to utility services. The focus was primarily on getting due process rights for poor people, such as adequate notice and an appeal to challenge adverse action by a utility. In the middle of the conference a visibly exasperated community organizer stood up and said the lawyers weren't accomplishing anything for poor people except "the right to a fair freezing." His point was that if poor people could not pay their utility bills, fair procedures could do no better than postpone the loss of service. This was a fair comment at that time. But subsequently, at least in Massachusetts, we were able to take things far beyond fair procedures, as this part of the book documents. Poor people now could not lose their service at all during the winter shut-off moratorium; if their family had at least one person who was elderly, seriously ill, or a child under the age of one; if the customer was willing to enter into a reasonable payment agreement; and if the landlord did not pay the bill. The fuel assistance and other community programs provide funds to help people pay their bills. And advocacy over utility rates reduced the costs of service to low users (as most poor people were) and provided a significant discount in their utility bills. This was a major transformation of a legal field in which the utilities had few limits on what they could do when we started this work.

Chapter Six

CRIMINAL LAW AND COURT REFORM

I have described generally in Chapter One the status of the state's major trial courts in which poorer people appear, particularly the District Courts, the Boston Municipal Court, and the Probate and Family Courts, at the time when we first started our work. With only a few exceptions, where some judges had an appreciation of due process and fair decision-making, these courts were appalling. In most classes of cases that particularly affected poor people, such as eviction, debt collection, and criminal cases, these courts were mills, parading defendants through the dockets like assembly-line widgets. In some courts, such as the Boston Municipal Court criminal case sessions when they were run by BMC Chief Justice Elijah Adlow, they were carnivals, at which the judge belittled defendants through jokes made at their expense and gave them tongue-lashings for their failings. Lawyers awaiting appointments to represent some defendants (who typically only talked to their newfound clients in the hallways and returned to court to plead them guilty or have them admit to the charges and take their medicine from the judge) and various court groupies, who came to be entertained, filled the courtroom each day to enjoy the spectacle. They reminded me of the spectators who filled the Roman Colosseum to watch the lions devour the Christians. When I was in college the student humor magazine published a cartoon showing the crowded Colosseum, with a large scoreboard that read: Lions 25, Christians 0.

The courtroom proceedings were almost totally inhospitable to litigants and to the public. Much of the business took place in whispered conversations with the judge or clerk, and even when decisions were announced they could not be understood. When MLRI sponsored trial practice trainings for legal services advocates in our early years, we usually conducted a mock trial. We always asked Tony Winsor to play the clerk. After each phase of the hearing, Tony would announce the judge's decision with such machine-gun rapidity that probably not even he could understand what he was saying. But we could understand the last sentence, which was: "You have the right of appeal." This was not much of an exaggeration of what took place in many courts. Honoré Daumier, the 19th-century French caricaturist who skewered the courts with his sarcastic cartoons, would have had a field day if he had seen what went on in many Massachusetts courts.

The courts themselves were anything but a system. Each local court ran its own affairs according to the wishes of the presiding judge and typically filled the ranks of their employees with patronage appointments suggested by legislators, other public officials, friends, and even relations. The Chief Justices of the District and Probate and Family Courts were ineffective in some of their efforts or believed they had no authority to do anything about this deplorable state. The Chiefs of the Probate and Family Court took the position that they had no authority to promulgate rules or guidance to their courts by themselves, but had to get the approval of all the other judges, a

certain excuse for inaction. The Supreme Judicial Court seemed uninterested in knowing about what was going on, and when they were told, they usually took no action, even though they had broad powers (under statutes like Chapter 211, Section 3) to oversee the courts. Preparing for a Retrospective on Court Reform which MLRI presented in 2007, I reviewed my court reform files and came across a letter I had sent to SJC Chief Justice G. Joseph Tauro in 1971 describing briefly the deplorable conditions which existed in these trial courts and asking him and the SJC justices to take action. I never received even an acknowledgment of the letter.

I have divided this chapter into two parts: criminal law reform and court reform. They overlap a lot, but it is easier to relate the stories in that way.

A. Criminal Law Reform

You might ask how it was that a civil legal services law reform group like MLRI was involved in criminal law reform early in its existence. There were three reasons for this. First, our federal grants from the Office of Economic Opportunity did not at first limit our activities to civil law, and only did so when the federal Legal Services Corporation was established by Congress in 1974 with its statute limiting its funding to civil cases. Second, MLRI's nonprofit organization, called the Voluntary Defenders Committee, coordinated the furnishing of volunteer lawyers to represent defendants in serious criminal cases from its establishment in 1937 until the state took over responsibility for this work in 1960. During the 1960s, the VDC worked on prison and juvenile law reforms, funded by foundation grants until its state support grant from OEO Legal Services started on July 1, 1968. So the VDC staff and Board members (VDC formally changed its corporate name to MLRI in the early 1970s) were already interested in and committed to law reform in the criminal law field.

The third reason was the appalling criminal case scene we found. When the VDC received its OEO grant, Executive Director Al Kramer immediately hired several young lawyer staff members, and they started a long and careful process of consulting with legal services programs, community action programs, community groups, and others about what were the most important and immediate legal problems that poor people faced. The criminal court mills were high on the list of priorities. So we set to work finding out a lot more about what was going on and discussing what we should do about what we found. Here are the major initiatives we carried out.

1. Petition for Criminal Case Rules in the District Courts

Mike Feldman was one of the lawyers hired by Al Kramer. Mike was a bulldog of an advocate. When he found bad treatment of poor people, he immediately wanted to take action. Mike and some community groups looked into what was going on in some of the Boston-area courts with the largest criminal caseloads and the largest percentages of defendants who were people of color. He and the groups gathered affidavits and other documentation on the practices of four judges: Jerome Troy of the

Dorchester District Court; Elwood McKenney of the Roxbury District Court; Elijah Adlow, Chief Justice of the Boston Municipal Court; and John McLeod of the Chelsea District Court, whom they considered to be the worst. MLRI then embarked on a discussion about what to do with the information we had gathered. Mike and a few MLRI Board members wanted to bring lawsuits against the judges directly in the Supreme Judicial Court. I, my Co-Director, Mel Zarr, staff member Diane Lund, and most of the Board favored going to the SJC with a petition for District Court rules spelling out due process rights of defendants, and that's what we did. Diane Lund did most of the drafting of the petition, the proposed rules, and a law memo in support of the rules, in collaboration with Mel Zarr, Mike Feldman, me, and a few of the Board members. We filed the petition in 1970. We did not have a press conference or issue a press release (upon the direction of our Board), but the press soon found out about it and it was major news.

In the meantime, the newly established Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association had been monitoring the courts and issued a major report on what it had found. The paperback report, *The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston* (1970), had a bright orange cover and was popularly referred to as the Orange Book. They also submitted the report to the SJC. Their report was overseen by Steve Rosenfeld, Steve Bing, and Scott Harshbarger. Rosenfeld subsequently became the Chief of the Attorney General's Administrative Division under Frank Bellotti, Governor Michael Dukakis's Chief of Staff, and then started a private law practice in Boston through which he helped establish Health Law Advocates. Steve Bing later became Executive Director of the Mass. Advocacy Center in Boston (later and now named Mass. Advocates for Children). Scott became Middlesex District Attorney and the state's Attorney General before he lost a race for governor. He now practices with a Boston law firm.

The reactions of some of the District Court judges to the petition and report were hardly rational and did not answer our complaints and suggested solutions. Chief Justice Adlow sent a dismissive letter to the SJC, caustically describing MLRI as the "New England Law Reform Institute" (one common characteristic of right-wing critics of legal services programs is that they never got their facts right) and as "intense partisans in the class struggle." He asserted that the court-watchers and lawyers whose observations formed part of the petition's allegations did not know or understand what goes on in his court and ended his letter expressing his belief that the SJC would treat the complaint with the contempt it deserved.

Judge McKenney had his own, unique way of dealing with MLRI. He had long contended that his court had to deal with criminals who were the scourge of his otherwise law-abiding community, and so he saw it as his duty to do all that he could to keep these criminals off the streets. One could certainly sympathize with what Judge McKenney faced in his court, but we thought that the answer wasn't to violate due process rights and preventively detain supposed bad people accused of a crime. One day Mel Zarr received a call from the Roxbury District Court saying that Judge McKenney had

appointed him to represent an impecunious accused drug dealer in that court. We immediately asked ourselves, "Can he do this?," and scrambled around to find an answer. When Mel satisfied himself that the judge had no authority to order him to represent the defendant without his consent, he wrote Judge McKenney to decline the appointment. Judge McKenney did not pursue it further.

Another episode that illustrated the animus that some District Court judges had against us was when the newly appointed District Court Chief Justice, Franklin Flaschner, invited us in 1971 to make a presentation at a conference of District Court judges. I think he thought that if the judges saw and heard us in person, they might be relieved of their apparent notion that we were ogres. So, Mel Zarr, Tony Winsor, and I made a presentation about our SJC petition and our other efforts to have justice improved in the District Courts. After we had finished, hands shot up from all over the room and we were treated by some judges to a succession of tirades, some with fists shaking, about how we didn't know what we were talking about and were destroying the courts. But maybe that did some good. Judge Flaschner told me later that it was probably the best-attended District Court conference of judges he had run, and that many judges told him afterward how appalled they were about the vituperative comments that were directed at us and were prepared to support the Chief Justice in changing things.

There was one more occurrence that helped focus public attention on the problems in the District and Boston Municipal Courts and build it into a crescendo that the SJC could no longer ignore. The *Boston Globe* put an investigative reporter, Anson (Bud) Smith, onto the story. Smith did extensive digging and conducted numerous interviews. The *Globe* then published his six-part series (all parts starting on the front page), called Disorder in the Courts, and afterward the *Globe* editorialized several times to demand that the courts clean up the mess.

The publicity and public pressure eventually worked. The SJC decided not to handle the petition itself, but to send it to new District Court Chief Justice Franklin Flaschner. We did not think that the SJC covered itself with glory by handing off this "hot potato" to a complete newcomer to the courts. Flaschner had worked in a Boston law firm until he was appointed by Governor Francis Sargent to be a Special Justice in the Newton District Court. When the District Court Chief Justice position became vacant a year or two later, the Governor appointed Flaschner to it. This was a surprise appointment, to say the least, but it indicated, to their credit, that the Governor and his staff wanted to shake things up. I saw the hand of Al Kramer in this. When Richard Nixon became President in 1968, he appointed Massachusetts Governor John Volpe to be Transportation Secretary, and Frank Sargent, the Lieutenant Governor, immediately became Governor. Sargent recruited Al Kramer to join his policy staff. Kramer recruited me to become the Executive Director of MLRI, which I did in March of 1969.

Chief Justice Flaschner promptly turned to considering new District Court rules in criminal cases. He convened a committee of some of the best

District Court judges to work with him on this. At his invitation, I attended several of these meetings. In the final stages, Flaschner invited me to his Newton District Court office after hours, and we worked out the final text of the rules. I came to have great admiration about how strongly he was determined to do the right thing and to do so despite the many arrows that were thrown his way by supporters of the status quo. He issued his District Court Initial Rules of Criminal Procedure in 1971. They addressed nearly all of the recommendations we made in our SJC petition.

Jerry Berg, the District Court Administrator from 1971 to 2003, has written a book about the major transformation of the District Court during that time, called *Rough Justice to Due Process* (Mass. Continuing Legal Education, 2004). In it, he describes the MLRI petition and the Orange Book in some depth. He calls them the "defining moment" of Chief Justice Flaschner's new tenure. They were also the sparks that awakened the consciousness of the public, lawyers, and the courts about what needed to be done, and led over time to major improvements in the courts generally.

2. Bail Reform

One of the biggest areas of abuse in the District Courts was how judges used bail to preventively detain poor defendants who could not make bail and as a lever to force defendants to plead guilty or admit their guilt and waive their right to appeal to the Superior Court for a new trial. We decided to draft a bill containing two major changes in the bail law. Mike Feldman and Diane Lund did the work on this. First, it provided that bail could be imposed only in cases where a judge finds that it is necessary to ensure that a defendant will return for a trial. Second, it provided for a quick appeal from the District Court and Boston Municipal Court to the Superior Court of any bail setting that violated the statute or was unreasonable under the circumstances. Mike Feldman led the charge. He befriended Representative Paul Murphy, a law school classmate of mine (though I didn't know him there) who was the House Assistant Majority Leader, and asked him to sponsor the bill.

Murphy did so and single-handedly got the bill through in one session, and Governor Sargent signed it. Several weeks later I received a call from the office of SJC Chief Justice G. Joseph Tauro summoning me to a meeting at the SJC to discuss the new bail law. Mike Feldman couldn’t make the meeting. Maybe that was just as well, given what happened at the meeting. When I was ushered into the conference room where the meeting was held, some 12 to 15 judges were sitting around a conference table, with the Chief Justice at the other end of the long table from where I was asked to sit. Also present was Chris Armstrong, the Chief Legal Counsel for the Governor. I had known him as a colleague in the Attorney General's office in 1968; he was later appointed a Justice of the state Appeals Court when that court was first established and became its Chief Justice.

The Chief Justice addressed me roughly as follows:

Mr. Rodgers, we have been discussing this new bail law and we strongly object to it. When it passed and came to the Governor, the courts were not

informed about it [turning sourly toward Chris Armstrong]. We think it undermines the authority of the courts to protect the public. We think it should be repealed. "Don't you agree, Mr. Rodgers?"

Well, of course I had no reason to agree, and said I would consult with my colleagues and with the bill's legislative supporters. I was then waved out of the room.

I told Mike Feldman about this, and he immediately talked to Rep. Murphy about it. Rep. Murphy agreed to oppose any effort to repeal or change the law, and none succeeded. As a postscript to all this, Rep. Murphy was later appointed to be a judge in the West Roxbury District Court, and I heard from several sources that, as a judge, he didn't like the bail law and said so several times in open court.

After the new law went into effect, Chief Justice Flaschner issued guidelines for the District Courts, after consulting with me and the Lawyers' Committee.

3. Fines in Criminal Cases

a) Imprisonment for Failure to Pay a Criminal Case Fine

When a criminal case defendant was convicted, he or she was often ordered to pay a fine. If the defendant could not immediately pay the fine in full, the judge could order that person to be jailed until the fine was paid. A state statute said that someone jailed for failure to pay a fine could "work off" the fine at the princely sum of $3 a day. Some judges, such as Dorchester District Court Judge Jerome Troy, used this to punish defendants when a jail term would otherwise not be appropriate.

Mike Feldman decided to challenge this practice. He was referred a case by the Massachusetts Defenders Committee (the public defender, now Committee for Public Counsel Services), and he brought to the Supreme Judicial Court by special writ a case in which Judge Troy had imposed an unpayable large fine (*Ariel v. Commonwealth*, 1969), claiming that the practice violated due process. He did not win on the constitutional claims, but the Court expressed its distaste for the practice and somewhat narrowed the circumstances in which it could be used. Then we went to the Legislature and got the $3 a day work-off repealed.

b) Making Fines Commensurate with the Ability to Pay

A continuing issue with fines in criminal cases in this country is that they are not required to be commensurate with a defendant's ability to pay the fine. In the name of misperceived equity, judges usually assess fines in accordance with the circumstances of the offense. The result is predictable. Those who are poor often cannot afford to pay a fine, or must do so over time, while wealthier people can readily pay a fine without blinking an eye. The potential deterrent effect of fines is therefore skewed.

Mike Feldman learned that in Sweden fines are required to be set in relation to a defendant's ability to pay them, so that fines for poorer people are comparatively low and those assessed to higher-income people are much higher. So he drafted and submitted a bill to the Legislature in the early

1970s providing that a Swedish-type system be established in Massachusetts. Of course, at the hearing on the bill he got the predictable snickers from some and incredulity from others that such a system should even be advanced. Some suggested that it was "socialistic," and therefore un-American, and I suppose that in our plutocracy it is. But there is a basic principle of proportionality to this kind of proposal that I wish were in effect now when it comes to sentencing the bigshot financial predators.

4. Recordation in the Trial Courts

The Superior Court had stenographers to record hearings and trials but the District Courts, Boston Municipal Court, and Probate and Family Courts had no record of what took place in their courts except for the docket sheets and the court papers themselves. We recognized early on that this lack of what we called "recordation" lent itself easily to covering up improper statements and actions by judges and the extreme difficulty of appealing any court decision. So we included a request for recordation in our SJC rules petition and continued to press for it in the courts.

The first to respond, of course, was District Court Chief Justice Franklin Flaschner. He recognized the crucial need for this right away and set about to make it happen. The key was to find the funding to install the tape recorders. Flaschner got no help from the SJC. So he arranged to get federal funding to establish tape recording pilot programs in District Courts whose judges would agree to do it. (You can guess which judges would not agree.) This began in 1974. He also established guidelines for how these systems should be used, such as prohibiting the shutting-off of the recorder at any time when the court was in session, how and for how long the tapes were to be preserved, and making copies available to anyone who paid a modest per-tape charge. These pilots worked well, and Flaschner was eventually able to persuade the SJC to support them and ask for funding to install recorders in all District Courts. Fortunately, federal money continued to be available to finance the purchase of the systems, which then spread to the BMC and to the Probate and Family Courts (but not at first for bench conferences before a judge, which was how the Probate and Family Court judges commonly made decisions). So, after many years of hesitation, these courts finally became courts of record.

5. Prison Reform

As part of MLRI's criminal law reform work, we also looked at the prisons, and for several years were active in advocacy initiatives. Later, prisoner legal representation was assumed by Mass. Correctional Legal Services, now Prisoners Legal Services, which was funded initially by the Legislature and, starting in the 1980s, by the Massachusetts Legal Assistance Corporation. MLRI hired two lawyers to do prison reform work in the early 1970s. Through the help of Mel Zarr, we got several years of funding from the NAACP Legal Defense and Education Fund in New York, allowing us initially to hire Max Stern, a recent law graduate. Max was with MLRI for two years and then started his own law firm, now Stern Shapiro Weissberg and Garin, which celebrated in 2013 the 40th anniversary of its criminal defense, civil

rights, and other work. Gerri Hines transferred her national Reginald Heber Smith Fellowship from Boston Legal Assistance Project to MLRI, and she also did prison reform work for us. She subsequently was at the Roxbury Defenders Committee and in private practice before becoming a Superior Court judge in the early 1990s. Governor Deval Patrick in 2013 appointed her to sit on the Massachusetts Appeals Court.

The climate for prison reform was promising because Governor Francis Sargent had appointed John Boone as Commissioner of Corrections. Boone made many improvements in the prisons before he was hounded out of office by the yahoos, particularly the prison guards. Max and Gerri early identified county jail conditions as a major problem. In 1971 they brought a federal court action challenging the conditions in Boston's Charles Street jail as unconstitutional for pretrial detainees. At the trial, Justice Arthur Garrity announced that as part of his fact-finding he would spend a night at the jail. No one objected, fortunately, and he did so. What he experienced (constant noise and yelling from the inmates) left an indelible mark on him, as he explained in his 1973 decision finding the conditions unconstitutional. What Judge Garrity did is what we commonly asked judges to do in order to see firsthand what really goes on in the courts, the prisons, and the juvenile detention centers. Few judges did this, but Judge Garrity was one of a kind.

The defendants appealed Judge Garrity's decision, up to the U.S. Supreme Court several times, but Max stayed on the case all throughout, even long after he left MLRI. Suffolk County built a new jail nearby, and soon the detainees were moved there. The County then had to decide what to do with the old jail. The jail was built in the early 1800s, and was declared a national historical landmark which under federal law could not be demolished. So the County and City took bids from developers to develop the site while preserving the historic building. The winning bidder rebuilt the jail into a luxury hotel, which he named (with no doubt what he thought was suitable irony) the Liberty Hotel. I went there for dinner once, and the main part of the hotel has retained some of the iron bars and other parts of the old jail and its jail cells. So, people can dine on high-priced food and wine while toasting (or maybe roasting) the poor inmates who used to live there.

6. Juvenile Law Reform

Juvenile laws and detention facilities were also stuck in the days of Dickens and Daumier. Governor Sargent took the amazing step of appointing as Commissioner of Youth Services Dr. Jerome Miller, a professional in the field. Miller lost no time in moving to dismantle the state training schools, county institutions which supposedly housed juveniles convicted of less serious offenses who were sentenced to a training school. These were horrible institutions, with abusive staff and conditions (some of them) as bad as the Charles Street jail. Miller declared that they would be phased out and refused to spend any state money appropriated for them except for the expenses of the phase-outs.

There was a big outcry, particularly from legislators whose relatives and friends were employed by the training schools, but Miller and Governor

Sargent stuck to their position, and within a year the training schools were gone. I attribute some of the credit for this to Al Kramer, who remained on Governor Sargent's policy staff until he was appointed a judge in the Quincy District Court (and generally acknowledged to be the best District Court judge) and who had overseen juvenile law reform research while at MLRI during the 1960s.

Conditions at the juvenile detention facilities were also abject. Boston Legal Assistance Project, to its great credit, brought a federal court action in the mid-1970s challenging conditions at the Roslindale Juvenile Detention Center. The case was eventually resolved by an agreement providing for improvements in the physical conditions and the implementation of new programs designed to ease the way for detainees back into society (they had to be released by no later than their 18th birthday).

MLRI became involved in reform of the juvenile laws. A committee of judges invited us to participate in drafting these proposed changes. The committee was led by Juvenile Court First Justice Francis Poitrast. Poitrast was known as a gruff judge who occasionally read the riot act to some juvenile defendants. But in his law practice, he was a criminal and juvenile law defense attorney, so he had a sense of the due process needed in the Juvenile Courts. He was also a strong believer in the courts' responsibility to work closely with social services providers, but he was insistent that the courts maintain control over how these agencies carried out what a court had ordered, in part because of his skepticism that these agencies would follow through appropriately.

So, Will Aikman and I went to a year-long series of meetings with the judges committee, held at the then-new Marriott Hotel in Newton. We produced two new legislative reform proposals. The first decriminalized the juvenile delinquency offenses for "stubborn children," "runaways," and "school truants." For many years, children had been hauled into court under the juvenile delinquency laws for what were hardly offenses of a criminal law sort. We proposed that these offenses should be done away with altogether and dealt with by civil agencies such as the schools and the Department of Social Services. But the judges believed that going that far would create chaos and might even damage the children who we all agreed needed help. So we drafted a Child in Need of Services (CHINS) bill, abolishing these misdeeds as juvenile delinquency offenses and creating a civil law procedure in the courts for review and provision of services for the children brought into court. The Legislature quickly passed the bill in 1973. There those matters remained until recently. I don't know the exact details, but I understand that recently passed legislation moves these cases largely out of the courts and to the responsibility of other institutions. We'll get to see whether what we proposed 40 years ago works better.

The other big project the committee took on was the modernization of the juvenile delinquency laws. We drafted a comprehensive Juvenile Code, and the judges introduced it into the Legislature. It represented some compromises between conflicting opinions on certain issues. But both the prosecutors and the defense lawyers trashed it, and the bill never went

anywhere. Nor did another group appear to try to bridge the differences. So, the juvenile delinquency laws have not been updated since, so far as I know. This was a lost opportunity, in my opinion, because the subsequent climate for enlightened reform has become worse over the years.

7. Police Misconduct

The late 1960s were times of great unrest in the cities, in the wake of the assassinations of Dr. Martin Luther King and Robert Kennedy. The conduct of urban police, long a major problem for communities of color, became even more acute when police reacted to the many protests against the conditions in which poor people lived and how they were treated by public institutions and elected officials. MLRI became involved on behalf of urban residents in two places, New Bedford and Boston.

Protest marches broke out in New Bedford in the early 1970s and residents of color complained about physical violence and other abuse by the New Bedford police. The lawyers at OnBoard Legal Services in New Bedford were asked by community groups to file a legal action against the police, but the Board of Directors of the program voted to forbid them from doing so. The local residents contacted MLRI, and Mel Zarr, who had recently arrived at MLRI from the NAACP Legal Defense and Education Fund in New York, filed a U.S. District Court case against New Bedford on behalf of several residents of color who had been beaten by the police and on behalf of the local branch of the NAACP. After conditions calmed down, the plaintiffs negotiated a settlement with the police and the City establishing an administrative process for addressing complaints against the police.

Another incident of police misconduct arose in Boston, where police were accused of beating up a blind and wheelchair-using resident who was protesting in the Back Bay section. Mel Zarr filed a federal court lawsuit against the Boston Police Department and the City, and the case was resolved through the police's adoption of an internal complaint procedure—which they never effectively implemented.

B. Other Court Reform Activities

1. Those Who Were Involved

There were many actors who joined in the effort to publicize what was wrong with the courts and urge that changes be made at all levels. Here is a brief description of some of the major players and events. Some I have already described in other parts of this chapter.

a) Court-Watching

Since the basic trial courts were not courts of record, the only way to find out what happened was to be there because you were a litigant or a lawyer representing a client there, or to engage in court-watching. Court-watching started in the late 1960s with local and legal groups and became important components of the MLRI SJC petition and the Lawyers' Committee's Orange Book report. Court-watchers' observations were presented through affidavits and the compilation of some statistics by students and other people who sat

in on certain court sessions. But something more organized and long-lasting was needed. So Tony Winsor of MLRI organized court-watching groups, in his own special way, for the District Courts and the BMC.

First, Tony solicited volunteers, with the help of groups like the Unitarian Universalist Service Committee and the American Friends Service Committee. These were mostly students. He put together an extensive set of training and observation materials, with detailed charts for the steps that were supposed to be carried out by the courts in particular types of criminal cases. These included scorecard sheets that could be completed by the watcher for each case. He put on a two-hour training session for each group and took each group on a dry run (with a debriefing afterward) before they started their formal court-watching in a particular court. He persuaded one or more leaders of each group to compile statistics on what they observed and to write up a draft report, which was to cover at least a two-week period of observation. Tony would then review the report with the leaders and assist them in putting it in final form.

In the early years of court-watching, the reports were used mainly to supplement the petition and the Orange Book, as a continuing confirmation that the conditions found in those documents had not improved. Over time, Tony adopted a practice of sending a report to the judge who had been observed, with suggestions for improvement and an offer to meet with the judge. Some judges asked for and got a meeting.

Occasionally, the court-watchers hit a roadblock. Those who sat in Judge Elwood McKenney's session in the Roxbury District Court were told by court officers that it was the judge's policy not to permit note-taking by spectators in the courtroom. Some other courts took the same position, so in initial visits the court-watchers had to take notes surreptitiously or try their best to recollect what they saw and heard after they left the courtroom. We brought this barrier to the attention of Chief Justice Flaschner. In 1975 he issued written guidance to his courts, pointing out that courtrooms were public places and that courts could not ban note-taking unless it was disruptive to the decorum necessary in the courtroom. It took Judge McKenney and other judges awhile to come around, but eventually they did.

I do not think we can overestimate the favorable effect that court-watchers had on improving practices in those courts. The court-watching efforts were publicized in the media, and the American Judicature Society, a national organization promoting improvements in the courts, wrote a feature article in their journal on the Massachusetts court-watching, with a front-page picture of Tony and his court-watchers. And I'm sure word got around within the courts, and particularly among judges, that people were watching them.

b) Court Reform Groups

Those of us working on court reform formed and contributed to a number of groups with similar agendas. MLRI held frequent meetings of public interest lawyers. Since they were usually on Tuesday mornings, we called it the Tuesday Morning Group. Among those actively participating were Tony

Winsor, Mel Zarr, and I from MLRI; Bob Spangenberg, Executive Director of Boston Legal Assistance Project; Scott Harshbarger from the Lawyers' Committee; representatives of other legal services programs; and representatives of the Massachusetts Defenders Committee and Roxbury Defenders Committee, including Wally Sherwood and Brownlow Speer. The group discussed the issues, set priorities for action and strategies, and carried out reform efforts in a collaborative way.

Another participant for a time was John Robertson, who was working at Harvard and Boston College Law Schools. After John relocated to a Wisconsin law school, he wrote a book, *Rough Justice: Perspectives on the Lower Criminal Courts* (Little Brown and Company, 1974), in which he described in great detail the MLRI petition to the SJC, the Orange Book, and the District Court Initial Rules of Criminal Procedure which came out of those efforts. He dedicated the book to the Tuesday Morning Group.

We also joined together with other advocates for change, such as those from community action programs and religious organizations, and other community representatives. One advocacy group was called the Committee for Better Judges. When the Massachusetts Bar Association announced that it would hold a multi-day conference on court reform in 1973, we made sure that many of us reformers were invited and got a number of places for non-lawyers, as well. The participation of these people helped create a palpable climate for the necessity of reform throughout the conference. Our group selected as its spokesperson an African-American with an Afro hairstyle and a beard. When he first approached the podium to speak on our behalf, you could feel the apprehension of the bar leaders who were there. But he was a mild-mannered and articulate advocate for our positions and his presence as our leader helped create a dynamic for the adoption of a reform agenda. And that was what happened. At the end of the proceedings the conference decided to adopt a report, which was prepared by a group of lawyers headed by James Lynch, then at the Boston law firm of Bingham, Dana & Gould. Lynch subsequently became a Superior Court judge and that court's Chief Justice. Like many other lawyers who did not practice in the basic trial courts, he said he was shocked about what was going on. His draft report adopted nearly all of our reform agenda, and it was enthusiastically approved by those attending the conference.

One of the recommendations that came out of the conference was that a citizens group for court reform should be established, and indeed that soon happened. The Mass. Council for Public Justice was created, with many of the non-lawyers who had attended the conference as its leaders, such as Florence Rubin (more on Florence later) and Julia Kaufmann. Later, Paul Donovan, a lawyer, became its President. Tony and I were asked later to join its Board as resource people. The Mass. Council adopted a reform agenda and advocated for it in the Legislature, in the courts, and in other forums. Its leaders were participants in later court reform efforts during the 1980s, as well.

2. Judicial Selection

Massachusetts, thank goodness, appoints its judges rather than choosing them in elections. They are nominated by the governor and must be confirmed by the Governor's Council, an eight-member elected body which is a relic of colonial times. Before the early 1970s, the governor sometimes had to bargain with the Council over who would get nominated and who would get confirmed. Some people called it a "hock shop." There also was no age limit on how long someone could be a judge. There were many superannuated judges on the bench. One notoriously "out of it" Superior Court judge was in his early 90s and his shocking performance was the butt of lawyers' critical comments. I saw for myself the performance of a Middlesex Probate and Family Court judge when I was in private practice during the late 1960s. The judge sat in his chair with a vacant stare most of the time during the hearings I saw. Occasionally he would swivel his chair around and look out the windows behind him. When arguments were finished in a case, the clerk would rise from his seat, go around to the side of the bench, and whisper to the judge. When that was finished, the clerk would resume his seat and announce the decision. It was obvious to me that the clerk, not the judge, was making the decisions.

Some legislators and others concerned about the quality of judging placed on the 1972 November election ballot a proposal to change the state Constitution to require all judges to retire upon reaching the age of 70. The proposal was approved by the voters by a large margin. But some of the judges who were over 70 brought a federal court action challenging the retroactive application of it to judges who were already in office. I then learned that a group named Legal Counsel for the Elderly in New York City had moved to intervene in the case on the side of the judges. This group was funded by OEO Legal Services to concentrate on systemic legal issues affecting the elderly. So I immediately called its Executive Director to tell him that legal services in Massachusetts had supported the constitutional amendment and considered it an important part of our court reform efforts. He did not respond and we quickly concluded what was a frosty conversation. Sometime later I learned that the organization had withdrawn its motion to intervene and the judges' case was dismissed for failure to state a claim.

So, with the new mandatory retirement age for judges in place, we were suddenly faced, after November of 1972, with the prospect of having some 50 judicial vacancies that needed to be filled. Our reform groups like the Committee for Better Judges immediately pressed Governor Sargent to voluntarily establish a front-end judicial nominating committee. This was a reform model being touted across the country by the American Judicature Society, but it had been adopted by only a few states. Under this proposal, the nominating committee interviews all candidates for each open judicial position and sends to the governor a list of three persons. If the governor wants to review more candidates, he can ask for three more. But he must make his nominations from among those recommended.

Governor Sargent decided to form a nominating committee to assist him in filling the 50 vacancies. This was the first such committee that a

Massachusetts governor had created. It proved so successful that all subsequent governors have done the same thing. Governor Sargent named the group the Ad Hoc Advisory Committee on Judicial Appointments (talk about being tentative!), and to our surprise he named Bob Spangenberg and me to be two of its eleven members. The group was coordinated by William Young, the Governor's Chief Legal Counsel. Young later became a U.S. District Court judge in Eastern Massachusetts, where he still sits.

The Committee immediately set to work adopting its procedures. Some 500 people applied for the positions. Bob and I worked hard and beyond normal hours on this, and it is fair to say that we had a strong influence on the people the judicial selection committee recommended and the Governor eventually nominated. We pressed on two issues. First, we urged the group to nominate younger people, women, and people of color. Prior to that, an informal rule of thumb for governors (and for recommendations by a joint Boston and Massachusetts Bar Associations Judicial Selection Committee which commented on nominations in the last stages before the governor's decision) was that a nominee must have had at least ten years of active trial experience. This meant that most of those approved were white males. We were successful in persuading the judicial selection committee and the Governor to abandon this rule, and many persons with less or different experience became judges as a result of this process. These became some of the state's best judges. The second approach we pursued was to probe candidates about their views about legal and social issues in order to unmask biases (particularly against poor people, people of color, and women) that would interfere with their being fair judges. We identified a number of candidates who apparently had one or more of these biases and we persuaded the committee not to recommend them. So, as a result of this and subsequent efforts, the quality of the judiciary was greatly upgraded.

But the old guard in the Governor's Council hung on for a while. Governor Sargent nominated Paula Gold, a staff attorney in the Fields Corner office of Boston Legal Assistance Project, to be a judge in the Dorchester District Court to fill the position recently filled by Judge Jerome Troy (one of the judges who was highlighted in the MLRI petition and was found in 1973 by the SJC to have engaged in corruption, was disbarred, and resigned shortly thereafter). That was too much of an in-your-face move for Councillor Sonny McDonough, a pal of Judge Troy. After a series of raucous hearings, McDonough managed to get enough votes to turn the nomination down. Paula later was a litigation director at MLRI for several years, was the Consumer Affairs Secretary, and then a DPU Commissioner. She now is General Counsel of an insurance company.

3. Judicial Conduct

Another major reform that we pursued during this period was the establishment of a judicial conduct commission to handle complaints against judges. The Supreme Judicial Court had decided some years before that it has no constitutional power to remove a judge from office. It can disbar a judge if appropriate, but no law requires a judge to be a lawyer.

There also was no regularized procedure to make a complaint against a judge. One could bring a case under the Supreme Judicial Court's supervisory jurisdiction over other courts (such as under Chapter 211, Section 3), but it was unclear if the SJC would seriously consider any claims except in cases of alleged corruption.

The American Judicature Society recommended a judicial conduct commission as a solution, and we pressed for that. We were surprised and pleased when the SJC decided in 1977, under the leadership of Chief Justice Edward Hennessey, to establish a Committee on Judicial Responsibility, consisting of three judges, three lawyers, and three laypersons. I was even more surprised when Chief Justice Hennessey called me to ask if I would be the Chair of the Committee. So, I accepted. Florence Rubin was appointed the Vice-Chair and the rest of the Committee members were convinced of its importance. In 1978, the Legislature established the Judicial Conduct Commission, carrying over the charter of the Committee, and giving it a modest budget. I was the Chair for four years, and much happened during that time. When we started, there was a flood of complaints, many of them grievances that people had harbored for some years. I remember one complainant who, in handwriting, complained about a decision of the Supreme Judicial Court which she said had cheated her and her family out of an inheritance. I looked up the decision and found that it was decided in 1938.

The Commission dismissed many complaints at the outset because they showed only a disagreement with a judge's decision and not any misconduct. One disappointing aspect of this work was how few complaints were filed by lawyers. For many years, lawyers had complained about certain judges' conduct, and they were usually on the mark. But even though the Commission's proceedings were confidential up to the time it issued a formal complaint, there were few complaints initiated by bar associations or lawyers. Fortunately, the Commission was given the power to initiate its own complaints, and it did so on occasion.

There were several well-publicized proceedings, such as those involving Superior Court Chief Justice Robert Bonin and Roxbury District Court Judge Elwood McKenney, both of whom eventually resigned rather than go through a hearing. I recused myself from the McKenney matter for obvious reasons. There were a number of instances where the Commission identified one or more patterns of a judge and negotiated an informal agreement with the judge about correcting the misconduct. Several judges quietly resigned after we uncovered some indications of corruption and turned the matters over to a District Attorney.

There was one major disappointment for legal services, though. A judge in the Middlesex Probate and Family Court would refuse to approve of a divorce decree in favor of someone on AFDC unless that person voluntarily took herself off assistance. This practice was eventually found unlawful by the Appeals Court, but the judge continued to apply conditions to people on AFDC that he did not apply to others. Without my knowledge, Tony Winsor gathered accounts of cases involving these discriminatory practices and

collected several legal services programs to join in a complaint to the Conduct Commission. I recused myself from participating, so I do not know how the Commission investigated the complaint and why it eventually dismissed it. Tony had long complained that the courts were only interested in seriously considering complaints of judicial corruption (he called these "cookie jar" violations) and not patterns by judges of violating people's rights. This decision only confirmed that that attitude may not have changed much.

4. Indigent Court Costs Law

When Tony Winsor arrived at MLRI in October of 1970, I asked him to tackle the problem of poor people's losing access to the courts because they could not pay the court fees and other costs necessary to have a chance to have their cases considered. Tony looked at the laws of other states and found that this need had not been addressed in a comprehensive way elsewhere. The U.S. Supreme Court had decided that, for due process reasons, a state could not deny access to a divorce court because of the inability to pay the filing fee, but soon decided that that principle did not apply to housing cases. So we started from scratch. In his ingenious and thorough way, Tony drafted a bill providing for an affidavit of indigency, with two levels of financial information to cover regular costs (such as filing and publication fees), which could be approved without more of a showing of need), and extra costs (such as the cost of a transcript or witness fee), which had to be approved by a judge upon a showing of need for the expense. After several years of determined advocacy and strong support from House Speaker Charles Flaherty and Senate President William Bulger, the bill was adopted by the Legislature in 1974. So far as I know, it is the best and most comprehensive such measure of any state. The federal courts to this day have no similar statute or rule.

As we well know, adoption of a new system such as this is the easy part. Many courts professed to know nothing about the statute, and that meant that legal services advocates had to spend much unnecessary time to get waivers or state payments for the qualifying costs. There were also sticky questions about who would reimburse the litigant or the lawyer for expenses authorized by approval of the affidavit of indigency. After several unsatisfactory short-term solutions, we finally persuaded the Legislature to adopt a budget line item for these costs, within the overall budget of the Chief Justice for Administration and Management, and since then that office reimburses these expenses.

Also, from time to time, some courts stopped approving affidavits because they claimed that the funds had run out or they believed that they should personally carry out an effort to save money for the courts. One of Tony's inspired parts of the law was that it placed in the hands of the Chief Justice of the Supreme Judicial Court the responsibility for enforcing the statute. So whenever the phase of the moon or who-knows-what led the courts to hold or deny applications, we called Bob Bloom in the SJC's legal office, and he had the Chief Justice issue an advisory memo to the courts to process applications. Bob was at the SJC for many years, and we came to admire his

diligence and responsiveness to our requests for help. No doubt he did the same for others—a truly great public servant.

In the early 2000s we began to hear again from legal services advocates that some courts were summarily denying applications or insisting that a litigant appear before a judge to get an approval, which was in violation of the statute in most cases. So, we gathered more information about what was going on and drafted and submitted to SJC Chief Justice Margaret Marshall proposed guidance and forms for her to approve and distribute to the courts. She did so in 2003, adopting our proposals nearly word-for-word. We distributed the guidance to legal services advocates and suggested that they show it to recalcitrant courts. That worked for a time, but shortly before my retirement at the end of 2010 several Probate and Family Courts engaged in the same illegal practices. Legal services advocates approached Probate and Family Court Chief Justice Paula Carey, who communicated to these courts that they should change their practices. I'm told that they eventually came around.

Looking back, this statute has been a major benefit to poor people, and a major time-saver for legal services programs, which no longer have to pay these fees themselves (as they had to do before the statute was passed) and whose advocates no longer should have to spend their already limited time getting for clients what the courts should give them as a matter of course. When I last looked, the budget item for indigent court costs was around $18,000,000 annually. Given that many costs are not included in the budget item because they are waived (such as filing fees), I estimate that this law confers a financial benefit on poor people of at least $30,000,000 a year. Not bad for what many people might consider a comparatively small reform. And not small at all to those clients and legal services programs who are helped by it.

5. The Right to Representation in Civil Cases

a) Lawyer Representation

We celebrate in 2013 the 50th anniversary of the U.S. Supreme Court's decision in *Gideon v. Wainwright* that defendants in criminal cases in which incarceration is a possible disposition have a constitutional right to a state-paid lawyer if they cannot afford one. The progress in securing the same right in civil cases where important rights are at stake has been slow to develop. The U.S. Supreme Court has made it clear that it doesn't consider that there is an across-the-board right in any category of civil cases except juvenile delinquency. It has therefore fallen to the states to develop this right, if it is developed at all.

In Massachusetts, largely by statute, certain categories of civil court cases carry the right to counsel. These include child welfare, mental health commitments, and, most recently, in guardianships. In the early 1980s, GBLS lawyer Rose Marie Adamo persuaded the Supreme Judicial Court that there is a state constitutional right to counsel in termination of parental rights cases. There have been few court decisions since then expanding this principle to other kinds of civil cases, although there have been several in

recent years on certain kinds of child welfare cases that were not previously covered. But there is no right to a lawyer in evictions, foreclosures, private custody disputes, immigration cases, and other cases where crucial rights are involved.

Some years ago, a national movement started in order to highlight this deficiency and cooperate in advancing solutions in the states. In some states, advocates took the test case approach, trying to persuade their courts to declare an across-the-board right in certain types of cases. Predictably (at least according to my prediction), these efforts have failed. We decided in Massachusetts to take an incremental approach. We already had a right to counsel in certain cases. Around one-third of the budget of the Committee for Public Counsel Services, which provides and pays for legal assistance in civil cases as well as in criminal cases, is devoted to civil cases. CPCS works well, and so that is one logical place to handle any expansions.

The Boston Bar Association, under the leadership of then-President Tony Doniger, established in 2005 a Task Force on the Civil Expansion of the Right to Counsel. Bob Sable, Executive Director of Greater Boston Legal Services, and I were appointed members, and many other legal services advocates served on committees of the Task Force. Boston lawyer Mary Ryan was and is the Chair, and Jayne Tyrrell, Executive Director of the Massachusetts IOLTA Committee, the Vice-Chair. Russell Engler, a New England Law School professor and also one of the nation's leading experts in this field, has also been a key member. The Task Force work was initially divided into committees in the subject areas of Housing, Family Law, Juvenile and Education, and Immigration. These committees made their recommendations for priority needs for counsel and the Task Force issued a report containing these recommendations. The next question was how to implement them. Some of the committees proceeded to try to implement their priorities without the need for further study, such as the Juvenile and Education Committee. The Task Force supported the process and applauded when the Legislature adopted Article Five of the Uniform Probate Code, which, among other major reforms, establishes the right to counsel for defendants in guardianship cases.

The Task Force believed that the state (and certainly the state Legislature, which would eventually be asked to fund some of the expansions) probably would not accept proposals for new types of cases unless it could be shown that having a lawyer makes a significant difference in outcomes for the litigants. It also predicted that it would be difficult to justify an across-the-board right to counsel in particular types of cases on topics implicating basic needs. Rather, Task Force members thought, the right to counsel had to be applied in the context of alternatives for resolving disputes, many of which could be successful without the assignment of counsel. So the Task Force decided to operate some field programs to test these approaches out.

The first category of cases the Task Force chose was eviction defense. It obtained grants from the Boston and Massachusetts Bar Foundations and the Boston Foundation to cover the costs of the pilots. It chose the Quincy District Court (with GBLS providing the representation) and the Northeast

Housing Court (with Neighborhood Legal Services providing the representation). The design and analyses of the pilots were carried out by Professor James Greiner of Harvard Law School. The statistically valid results comparing those litigants offered counsel and those who were not showed that, in Quincy, those who had counsel fared twice as well as those who did not. The results were not dramatically more favorable in the Northeast Housing Court, but they were much better than our limited surveys had shown for other courts.

In 2012 the Task Force obtained funds (to be administered by MLRI) to run representation projects on foreclosures and evictions resulting from foreclosures in the Framingham District Court (MetroWest Legal Services) and the Worcester County Housing Court (Community Legal Aid). The results of these will add to our knowledge about what kinds of cases need representation of counsel and will enable the Task Force to put together proposals for more widely funded programs.

Those of us who are working on this believe that expansion of the right to counsel needs to be integrated into other services provided by courts, and is an important element of the court reform being pursued by the State's Access to Justice Commission. The AJC, established by and whose members are appointed by the SJC, is in its second five-year term of existence. Its focuses include reforms of the courts and reforms in the justice vulnerable people get in administrative agency decisions. Members of the AJC include Jacqui Bowman, Executive Director of GBLS; me; Russell Engler; Sue Marsh of Rosie's Place; and other lawyers and judges who have been involved in these reforms for many years. Two of the judges, Cynthia Cohen of the Appeals Court and Maureen Monks of the Probate and Family Court, are former members of MLRI's Board of Trustees. It is through promising efforts like these that court reform will continue to be carried out.

There are other MLRI alumni who are active in the civil right to counsel movement. Jeanne Charn, former MLRI housing attorney, writes and coordinates conferences on this subject as Director of the Bellow-Sacks Access to Civil Legal Services Project at Harvard Law School. The National Coalition for a Civil Right to Counsel is the major national group coordinating this effort. The Coalition is housed at the Public Justice Center in Maryland, whose Executive Director is Debra Gardner, who was a staff attorney in MLRI's Regional Computer-Assisted Legal Research Project in the early 1990s. The chief staff person for the Coalition is John Pollock, who spent a quarter during law school doing housing work at MLRI for Judith Liben. And Richard Zorza, who worked for me on UI and for Tony Winsor on court matters while at Harvard Law School, has long been a major national force in court reform from his position as head of several national groups and networks.

b) Non-lawyer Representation

Another potentially important piece of the representational gap in civil cases is the use of non-lawyer advocates. These advocates have represented lower-income persons in administrative agency adjudicatory hearings in

Massachusetts for the past forty years. Hearings systems where this has taken place, without objection so far as I know, are public benefits program hearings at the Department of Public Welfare (after 1996 called the Department of Transitional Assistance); the state unemployment agency; and Social Security Administration hearings. Note that adjudicatory hearings are trials, albeit of a more informal nature, where evidence and documents are submitted and the examination and cross-examination of witnesses take place. A record is taken, and that becomes the factual basis for an appeal, where the standard of review is quite narrow on the facts found by the agency hearing officer. So representation at the agency hearing level can be very important for the litigant, especially in cases where an appeal is taken. Yet these lay advocates, usually employed by legal services programs, are well trained, experienced, and have very impressive records of success. So, we ask ourselves, why can't trained non-lawyer advocates represent litigants in similar kinds of cases in the courts?

Tony Winsor and I promoted this suggestion starting at least twenty years ago and encouraged some experiments in the courts. The Western Mass. Housing Court, under the leadership of Judges Hank Abrashkin and Dina Fein, have run a program for volunteer non-lawyers and paid paralegals at Western Mass. Legal Services and the Mass. Justice Project to represent low-income tenants in certain kinds of eviction cases. Judge Abrashkin in 2006 wrote a memo to the American Bar Association's Task Force on Access to Justice, reporting on the success of the program in his court and recommending that the Task Force endorse it in a study it was then conducting. The final report of the Task Force made no mention of this proposal.

Community Action Agency of Somerville ran a non-lawyer assistance program for unrepresented tenants in Somerville District Court eviction cases for many years, starting in the early 1990s, with the cooperation of Judge Mark Coven (another legal services alumnus). According to all parties involved it worked well, but it was phased out when Judge Coven became the Presiding Judge of the Quincy District Court.

Tony and I wrote an article for the *Massachusetts Law Review* issue of June 2010 (vol. 93, no. 1), entitled "Non-lawyer Representation in Court and Agency Hearings of Litigants Who Cannot Obtain Lawyers." It spelled out the history of non-lawyer representation in hearings in much more detail than I have summarized above and recommended that the courts authorize this representation in appropriate cases. But throughout this long period, much of the organized bar and the courts reflexively opposed the suggestion. It became a kind of third rail among most of the legal profession despite the demonstrated success of non-lawyer representation at agency and court hearings over many years.

At last, serious interest in non-lawyers as an important representational resource has picked up here in Massachusetts and in a few other places in the country. The first Massachusetts Access to Justice Commission, chaired by former Supreme Judicial Court Chief Justice Herbert Wilkins, included prominently in its 2005 and 2006 annual reports a recommendation that the

Supreme Judicial Court approve representation in certain court cases by non-lawyers who were trained and supervised to provide that representation. Now the successor Access to Justice Commission has picked up the thread. In the spring of 2013, it organized a Study Committee for this issue. Included on the Study Committee are the usual suspects from legal services: Jacqui Bowman, Executive Director of GBLS; Gordon Shaw, Executive Director of the Mass. Justice Project; Russell Engler of New England Law-Boston; Sue Marsh, Executive Director of Rosie's Place; Cindy Cohen, Appeals Court Justice and former MLRI Board member; and me. The effort is staffed by the AJC's part-time staff director, Gerry Singsen, who himself has been involved in some national efforts in this field. We'll see if the third rail gets shut down.

6. Attorney's Fees

The so-called "American Rule" regarding payment of attorney's fees and litigation expenses by each party to a lawsuit is that (unlike in English law and most other legal systems), regardless of who wins or loses, the parties pay their own lawyers, unless certain narrow circumstances exist, such as the creation of a common fund for the plaintiffs. Of course, this practice favored those who could obtain and pay for their own lawyers. Starting in the 1970s, a series of fee-shifting statutes were passed at the federal and state levels directing courts to award attorney's fees to a "prevailing" plaintiff in certain civil rights, consumer, housing, and similar areas where it is in the public interest to encourage injured persons to seek remedies in the courts. The award of attorney's fees, it was found, encouraged more lawyers to undertake representation of clients in these important cases.

In 1976, Congress adopted the Civil Rights Attorney's Fees Awards Act, applying to attorney's fee claims under federal civil rights statutes and federal constitutional claims. Other congressional laws establishing similar rights were subsequently added. As I will relate below, Massachusetts passed many similar statutes.

A number of major legal services court actions were against state agencies, and nearly all of these involved at least one colorable claim under a federal civil rights act or the federal Constitution. When we first began to discuss attorney's fees claims with the Government Bureau of the Attorney General, we were told that Attorney General Bellotti objected to attorney's fees awards to legal services and similar paid staff programs because he considered that they were "double dipping" (I assume he thought this because the plaintiffs' attorneys were already paid by their programs and were trying to get paid a lot more for the same work through an attorney's fees claim). Well, federal courts soon made it clear that paid staff programs could recover fees and defined the circumstances under which work costs on various claims (even on those not decided) were recoverable. They also decided that the proper hourly rates to be awarded were those that prevailed in private law practice, not those based on the much lower actual costs of the program for the lawyers involved in the case. This was good news for us because in considering some early claims for fees, a couple of federal judges

in Massachusetts decided to award only actual costs of the program. We had a claim that illustrated the absurdity of that position. We employed a summer law student who worked on a case in which we later made a fees claim. He was a work-study student, so the judge asked me how much MLRI actually paid for the law student. Our hourly cost worked out to $1, so the judge awarded us $1 for each hour of the law student's time that we claimed. That law student was Peter Enrich, who worked for MLRI during the summer after his first year at Harvard Law School. He made *Harvard Law Review* and has subsequently gone on to a career teaching at Northeastern Law School.

The courts also established the "catalyst" theory of awarding attorney's fees. That is, a plaintiff could prevail if the defendant took the action requested in the lawsuit but not as a direct result of a court order. This rule recognized that defendants sometimes are willing to give the relief voluntarily, stemming from the lawsuit, but for various reasons a court order directly prescribing that relief is not made. This was important for facilitating earlier settlement of litigation, particularly because of the very limited resources of legal services and other civil rights programs and lawyers. But the U.S. Supreme Court threw out that basis for recovery in the *Buckhannon* decision in 2001. The Court ignored the clear purpose of the fee-shifting statutes and even legislative history supporting recovery in catalyst situations and made up its own specious reasons for its rejection. This has unfortunately been typical of a majority of the recent U.S. Supreme Court justices in their decisions. It has been chipping away at civil rights statutes and federal court jurisdiction for many years, much of this in decisions that ignore what Congress intended. When it comes to rights of poor people and other "have-nots," these self-styled strict constructionists manufacture their own lawless reasons for the results they want. The *Buckhannon* decision has created much mischief for those of us with attorney's fees claims, as I will relate below.

We also drafted into whatever statute was appropriate for it the right to attorney's fees for a prevailing party who had a civil rights-type or similar claim. These included claims in all aspects of the landlord-tenant laws, consumer protection statutes such as Chapter 93A, the anti-discrimination laws, and other rights laws such as the emergency medical facility interpreter law. As a result, I don't think there are many claims that legal services lawyers use in court that don't have these claims (an exception is in family law cases, but attorney's fees are available under the common law for prevailing in a contempt of court matter).

It took a lot of work to establish the predicates for these claims. With the large number of cases against state agencies, we tried to work out understandings with the Attorney General's Government Bureau. Whenever a new Bureau Chief took office, Dan Manning of GBLS, Pat Rae of WMLS, and I, sometimes accompanied by other legal services lawyers, trooped up to the A.G.'s office to talk about how we in legal services and the Government Bureau should conduct our litigation. We pressed the point that each of us had scarce resources for the jobs that we had to do, and therefore it was in each of our interests to avoid dilatory and unnecessary litigation moves and

to streamline the cases for negotiation and/or court decisions on the issues that really mattered.

We also discussed how we should resolve attorney's fees claims. It was our position that negotiation of these claims should take place only after the merits of a case had been agreed to, and thereafter the parties would attempt to resolve the fees claim so that both parts of the case could be presented to the judge together. Sometimes we would agree to make available to the A.G. the rough number of hours we had spent on the case to date if that information was crucial to the A.G. or its state agency client. This request may have been more legitimate where the agency would have to pay the claim out of its own budget. But starting in the early 1990s, the state created a line item in the budget of the Executive Office of Administration and Finance for attorney's claims and other settlements and court judgments for the payment of money so the agencies could no longer legitimately be influenced by having to pay these from their own budget. We and the A.G.'s office had supported this change.

But the *Buckhannon* decision sometimes drove a wedge into these efforts to settle cases. Interpretations of *Buckhannon*, such as attempting to define what kind of court order qualifies as the basis for fees recovery, have been confusing and even contradictory, making negotiations between the parties sticky and sometimes causing the claim to be put to a court for decision. What was intended to be a straightforward right to fees has sometimes turned into a major piece of litigation by itself.

All this is made even more difficult by the lawyers' ethical dilemmas which can arise between the clients' interest in favorably resolving the underlying claims and the lawyers' program's interests in obtaining attorney's fees for their work. The lawyers' first loyalty is to their clients, but when the other side starts to condition an attorney's fees recovery upon some concessions in the settlement of the merits, it becomes a touchy situation. Some legal services programs have sought to reduce the potential conflict by requiring clients to enter into a fee agreement in which the client is encouraged (but not required) to agree to a settlement that addresses both claims. In most cases, these matters can be resolved. On the other side, our insistence that a fees claim cannot be discussed at all until the merits have been settled and that a proposed court order does not run afoul of *Buckhannon* might be thought to hand an attorney's fees recovery to the plaintiffs on a silver platter.

Another facet of attorney's fees claims is the amount of the hourly rates to be awarded. Although courts say that legal services lawyers should get the same hourly rates as private attorneys, this has not been followed by some judges in practice. Some years ago, I put together a fee scale for lawyers, paralegals, and law students that I had derived from court decisions and other information such as the rates of lawyers in private practice. I encouraged legal services advocates and others with civil rights claims to use this in their cases, and I prepared a form of affidavit that could be used along with the scales for anyone who wanted it. Many lawyers used this, and in some court decisions the scale was cited as evidence of what is a

reasonable hourly rate. At one point, I learned that the Government Bureau had itself adopted this scale for its own use in evaluating claims that it was defending. Even so, it has not been clear that the policies we wanted the Bureau to adopt in their cases with us were ever formally approved. The disparate positions taken by different lawyers in the Government Bureau, and particularly by those in its Western Massachusetts office, make me think that pretty much each lawyer was on his or her own.

The final area of concern about attorney's fees has been the degree of vigor with which various legal services programs have pursued attorney's fees recoveries. Although it's hard to rely on these as a regular source of funding for our financially strapped programs, they are a potentially significant source of one-time funds. The larger legal services programs in the state, and most of the statewide centers, have been consistently aggressive in pursuing fees, but some of the other programs have not. The Access to Justice Commission, in reviewing the status of the legal services delivery system several years ago, recognized this discrepancy and recommended that the programs do something more affirmative about it. The programs have responded by establishing a committee to oversee the pursuit of attorney's fees. The committee includes, among others, AJC Commissioner Joel Feldman, a former summer law student of mine and legal services lawyer whose private law firm is funded mostly through attorney's fees recoveries, and MLRI Executive Director Georgia Katsoulomitis. Steve Schwartz of the Center for Public Representation (CPR), who has had wide experience with attorney's fees claims, has led the effort to produce documents and trainings for the programs. The committee has asked each program to prepare a plan for identifying and making attorney's fees claims in appropriate cases, and will provide support to those who need help. This is an important development for the programs and for fulfilling the underlying purposes of the fee-shifting statutes.

Chapter Seven

DISABILITY LAW

A. Disability Benefits

Early disability law work of legal services programs in Massachusetts focused mainly on disability benefits programs such as Social Security Disability Insurance, Social Security, and state aid to the aging, which was subsumed by the Supplemental Security Income (SSI) program of the federal government in 1973. MLRI got some funding from a few state agencies to establish an SSI Project in the mid-1970s. MLRI provided support to legal services advocates in the local programs, nearly all of which had this field as a priority. We also did systemic work as we could, but that was difficult to do because the advocacy had to be with the federal agencies that ran those programs.

Some of the MLRI staff members who worked in our SSI Project or in other units were Linda Landry, who subsequently joined the Disability Law Center (DLC), where she remains as one of the foremost experts in this field in the nation; Nan Duffly, who worked with us as a paralegal before she went to law school, went into private practice with a Boston law firm, became a Probate and Family Court judge, then an Appeals Court Justice, and is now a Justice of the Supreme Judicial Court; and Barbara Lybarger, who worked as a paralegal, then became a lawyer with MLRI in the public benefits field, and for many years has been an attorney with Mass. Office on Disability. These staff also wrote an SSI Manual and conducted many trainings.

The state eventually decided to put the funding out to bid and selected the Disability Law Center to continue the work. DLC had a history of experience in all disability fields and was well suited to do this work. In the mid-1980s, legal services advocates persuaded the Legislature to fund Mass. Legal Assistance Corp. (MLAC) for a Disability Benefits Project. MLAC made grants to local legal services groups for case handling and for DLC to be the statewide advocacy and support program. This very successful program continues to this day, and saves the state far more money than it spends on it.

B. Disability Rights

1. Advocacy Coordination

Legal services advocates were active from the outset in disability rights work, building up a wide array of laws that protected persons with disabilities from discrimination and accommodated their needs. Programs did some of this work on an individual program basis, but at first there was no coordinated focus. Disability issues arise in nearly all poverty law fields, and so it became important to encourage this work in all local programs in the state. This "missionary" work among the programs was started in the early 1980s.

MLAC was established by the Legislature in the judicial branch in late 1981, funded initially by surcharges on court filing fees (fortunately, by that time, the indigent court costs law was in place, so poor people did not have to help pay, indirectly, for the costs of their legal representation). MLAC opened its doors early in 1982 and solicited grant applications for both local program representation (which by statute had to constitute at least 80% of the funding) and for statewide programs (which could be given up to 20%). MLRI, being at that time the only statewide program that provide support to all local legal services programs, applied for 17½% of all the funding available, pursuant to an agreement reached with the local programs. DLC and the Center for Public Representation (CPR), a Northampton-based legal advocacy program that specialized in mental health issues, also applied for statewide funding. MLAC decided that MLRI should get 17½% of the statewide funding, but that it should subcontract with DLC and CPR for 2% each so that they could do disability law work. This arrangement was in existence for several years until MLAC was persuaded, with MLRI's support, to give the 2% funding to each of them directly.

DLC, CPR, and MLRI formed a Mass. Disability Law Support Project in order to coordinate advocacy and support in the disability rights field. Through a newly formed Coalition for the Legal Rights of Persons with Disabilities, the programs set and carried out advocacy priorities, particularly in the Legislature and at state agencies, and helped the local programs build up significant knowledge and staff capacity on disability issues.

2. Anti-Discrimination Measures

In the late 1970s, advocates built up a powerful array of laws to protect persons with disabilities. The first was an amendment to the Massachusetts Constitution prohibiting discrimination against members of that group, which passed in 1982. Second, they got added to the state's anti-discrimination laws a subsection that banned discrimination and created jurisdiction in the Mass. Commission Against Discrimination to enforce the new law. By that time, MLRI's success in persuading the Legislature to permit complaints to bypass the MCAD and go directly to court was in force. After several years, this category of cases was among the MCAD's largest. Legal services lawyers also raised disability discrimination claims in the defense of eviction cases, with considerable success before Housing Court judges such as Hank Abrashkin of the Western Mass. Housing Court.

3. Institutional Conditions

Many persons with mental illness and what was then called mental retardation were warehoused in unbelievable conditions in institutions around the state. A movement started in the 1970s to discharge those who did not need to be there and to provide them with community placements and services instead. Federal lawsuits were filed against every one of these institutions. Many of these were brought by lawyers in private practice, but legal services programs such as CPR became involved also. CPR sued the state to challenge the abject conditions at Northampton State Hospital, a

mental health institution. After much effort, these lawsuits largely succeeded in having these hospitals emptied out, although further advocacy was necessary over many years to ensure that the substitute community placements were adequate in numbers and services provided. Some work on transitions continues at a few of these institutions, such as the Fernald State School (now the Fernald Center) in Waltham, as the state decides how to provide different placements for the remaining residents, who have the most severe disabilities. All in all, these efforts created tremendous changes for the better for people with developmental disabilities. Particular credit goes to three lawyers at CPR—Steve Schwartz, Bob Fleischner, and Cathy Costanzo, who have been at CPR since the beginning of this work—and to Pat Rae, who joined CPR around 10 years ago after having been the Advocacy Director at Western Mass. Legal Services for many years, and has recently retired.

4. Housing Work

There were several major efforts to address disability discrimination in housing.

Under statutes and Supreme Judicial Court decisions, a group home for persons with disabilities could not be regulated by local zoning laws so long as it had a significant educational component. CPR and other advocates had to intervene occasionally on behalf of proposals of group homes where a city or town balked, and they did so successfully.

Another area of discrimination was in the rental of small apartments, boardinghouses, and other low-cost housing used commonly by persons with disabilities, which became even more of an issue after the closure of the large institutions. It was not clear that the normal eviction laws and protections applied to these units. So MLRI and other disability and housing advocates got the Legislature to adopt the Community Residents Tenancy Act, which made clear that all the landlord-tenant laws applied to these types of housing.

How persons with disabilities fare in eviction cases has been another significant matter. After observing how vulnerable these tenants were in court, Ann Anderson (wife of Peter Anderson, former MLRI staff member), with the support of Western Mass. Housing Court Judge Hank Abrashkin (another MLRI alum), founded and got initial funding for a Tenancy Preservation Project. Under this program, any eviction case against anyone who appears to have a disability is referred first to the Project, where trained workers attempt to arrange an accommodation with the landlord that will avoid an eviction. The Project now has special funding from the Legislature and has spread to most of the rest of the Housing Courts. Its success rate is impressively high. Annette Duke of MLRI has been a member of the Project's Board for many years.

A knotty issue that arose more than ten years ago was whether and to what extent non-elderly persons with disabilities should be given places in elderly public housing. MLRI was put in a somewhat conflicting position on this because we represented both elder and disability groups. Fortunately,

MLRI housing attorney Henry Korman helped the players arrive at a compromise solution whereby at least 13½% of the units in each elderly public housing development must be made available to non-elderly persons with disabilities. The Legislature adopted the compromise. Henry later wrote a comprehensive manual for housing authorities and advocates, which the state Department of Housing and Community Development adopted and circulated.

5. Persons with Cognitive Disabilities

Another group whose disabilities were largely not understood or were ignored was persons with learning disabilities. These are sometimes not even recognized by the people who have them, and are not usually visible to those agencies who deal with them. The Department of Transitional Assistance was particularly oblivious to the needs of this population, and commonly denied or terminated cash assistance instead of making accommodations for them. Ruth Bourquin of MLRI brought a civil rights discrimination complaint against DTA with the regional Office for Civil Rights of the U.S. Department of Health and Human Services. She also filed a state court lawsuit seeking immediate relief for her clients and certification of a class. After the Superior Court brushed off these efforts (such as not even scheduling a hearing), Ruth presented extensive evidence to the regional HHS office. A hearing officer took evidence and issued a decision, finding that DTA had violated federal law. It directed DTA to take certain steps to address the failure to accommodate. But a state budget crisis had cut back DTA's funds and staff to do this, and progress became painfully slow. Having been turned down by the state court, Ruth's only course was to press the HHS Civil Rights Office to enforce its decision. But the key people in that office had left and the situation came to a standstill.

Four years ago, GBLS took up the cause again, but with a much broader federal court class action lawsuit claiming that DTA failed to provide accommodations to persons with disabilities across a wide range of activities. That lawsuit has recently been settled. The trial court judge referred the matter to U.S. Magistrate Judge Ken Neiman of Springfield to engage in settlement discussions. Ken started his legal career as a public benefits specialist at Western Mass. Legal Services and became a Magistrate Judge around 25 years ago. The settlement is a tremendous achievement. I was involved in one part of it because, as Co-Chair of the Administrative Justice Working Group of the state's Access to Justice Commission, I started negotiations with DTA on comprehensive improvements in DTA's notices. These discussions were then folded into the settlement negotiations between GBLS and DTA in the litigation. The parties negotiated a set of standards (and even the texts of certain key notices) for all DTA notices, which include some detailed readability standards, and for continuing discussions between GBLS and DTA through a notice improvement group which DTA had started and agreed to continue. This is an exciting model for other state agencies, and the AJC plans to urge the state to spread it around. Many congratulations are due to GBLS lawyers Melanie Malherbe, Naomi Meyer, and Lizbeth Ginsburg, who achieved this impressive result, and to Young

Soo Jo, formerly a senior attorney at Legal Assistance Corp. of Central Mass., who headed a legal services group that made extensive recommendations to DTA before the negotiations were made part of the federal court lawsuit.

6. Other Disability Rights Advocacy

There are many other achievements of disability rights advocates over the years, I'm sure. Checking the websites of the Center for Public Representation and the Disability Law Center may offer some information on these, particularly those that have taken place in recent years. Not to be overlooked, of course, is Chapter 766, the state's special education law, which I describe in more depth in the Education chapter of this book. And no description of this advocacy would be complete without noting the monumental achievement of GBLS in its federal court lawsuit challenging the lack of access to persons with disabilities in certain MBTA stations and the shortcomings in The Ride, the T's van transportation program. GBLS negotiated a comprehensive agreement under which the T agreed over time to upgrade its station stops and greatly improve access to The Ride. Kudos go to Dan Manning and the other GBLS advocates who produced these results.

Chapter Eight

ANTI-DISCRIMINATION AND RACIAL EQUITY

I have placed these two subjects into one chapter because they are related to each other in some ways and overlap in other ways. But they are also distinct. Anti-discrimination work seeks to create and enforce rights of certain groups (usually called "protected classes") not to be subjected to disparate treatment because they are a member of a protected class and to have remedies to stop and award damages for discrimination which has occurred or is occurring. Racial equity work is broader. It addresses systemic disparate treatment that affects entire communities and groups, some of it created by actions that appear neutral on their face. Its remedies are also community-wide, such as to create reparations or major changes that to some extent make up prospectively for past wrongs. Racial equity advocates also seek to identify current or proposed systemic disparate treatment, whether intended or not, which threatens to disadvantage groups that have historically been excluded or ignored in the formulation of these actions. MLRI has been active in both of these fields.

A. Anti-Discrimination Laws

I describe in other chapters of this book the many ways in which MLRI and legal services advocates have created and enforced anti-discrimination laws, such as in the chapters on Disability Law, Education, Employment, Housing and Community Development, Immigration, Language Access, and Public Benefits. A major reason for this emphasis on anti-discrimination and civil rights laws is the absence of explicit rights of poor people as a class. In the early years of legal services, advocates tried valiantly to persuade the U.S. Supreme Court that poor people should be considered a protected class, but these efforts failed. So legal services advocates sought to use the civil rights laws, in part as a surrogate for the rights of poor people generally. Many times this succeeded, such as when we could demonstrate statistically that a recognized protected class was being disparately treated and that it consisted entirely or mostly of poor people. But we also succeeded in expanding the state's anti-discrimination laws to cover groups that were not recognized by the federal civil rights laws and to make state remedies more effective.

In the early 1970s MLRI proposed and got passed by the Massachusetts Legislature two additional grounds for discrimination which focused entirely or mostly on poor people. The first barred discrimination against persons receiving certain public benefits because they are recipients of this assistance. The second barred discrimination against families with children, which was used, for example, to keep those families out of housing with lead paint so that the owners could evade their obligation to remediate the lead paint. So far as I know, these bases for legal prohibitions are to this day not found in federal law or in the laws of most, if any, other states.

The second area in which MLRI was centrally involved was to beef up the state's anti-discrimination enforcement. The Massachusetts Commission Against Discrimination was established in the late 1940s and was the agency where persons who sought remedies under the state anti-discrimination laws had to go; only after that process could they go to court if they were dissatisfied with the MCAD's decisions or handling of a complaint. The MCAD, though, was greatly underfunded and understaffed (and not by inadvertence) and so its caseloads became unmanageable and seriously backlogged. And although the MCAD could itself go to court—such as to get an injunction—it seldom did so. Furthermore, neither the MCAD nor a party prevailing in court had the authority to get attorney's fees.

To address these problems, I drafted and got sponsors for a bill that would enable a complainant to go to court after 90 days following the filing of a complaint with the Commission, or earlier if the Commission consented, and gave both the Commission and a court in which a complainant had prevailed the power to award reasonable attorney's fees. Several legislators who believed strongly in the changes worked hard on the bill, and it passed in one session, in 1974.

B. Criminal Offender Record Information (CORI) Misuse

Though governments have long had information about criminal records, for many years there was fairly limited access to such information. But there was some access to criminal records beyond government agencies, and this information was used to deny people with records such benefits as employment and housing. Of course, because of the rampant racism from start to finish in the so-called criminal justice system, the use of criminal records as disqualifying discriminated blatantly against people of color, particularly those who were male. As states (including Massachusetts, to its discredit) adopted increasingly draconian drug laws, minimum mandatory sentences, and other "get tough on crime" laws, the percentages of people of color with criminal and juvenile records became ever more skewed. I recall reading about studies that compared whites and nonwhites with the same drug use for how they were treated by the prosecutorial forces, and persons of color had at least twice as many criminal records as whites.

In the early 1970s, Massachusetts tried to address the use of criminal records in a systemic way. Tony Winsor of MLRI was involved in drafting the Criminal Offender Record Information (CORI) law, which limited access to criminal records principally to law enforcement and the courts, and permitted others to get access only in narrow circumstances of compelling need after approval by a new state agency called the Security and Privacy Council, of which Tony was a member for several years. It was accepted state policy that people who had served out the disposition of their criminal cases had already paid for their offenses and should not have to pay again by being excluded from such important necessities as employment and housing. But as the fear of crime became pervasive, the pressures to allow access exceptions increased greatly, and the CORI system became like Swiss cheese. For example, many people were entirely shut out of a hiring process

at the outset, with no checking by the employer to find out whether the record obtained was even for the right person, or was accurate, or could be explained; if it was accurate, the employer didn't examine the relationship between the offense and the job duties before making a hiring decision.

MLRI became involved in doing something about this totally exclusionary system first because of the practices of the state's human services agencies. Most jobs in these sectors were at nonprofit organizations that provide services to beneficiaries under contracts with state agencies. Under the direction of the Executive Office of Health and Human Services, the state issued regulations restricting the employment of persons with criminal records and requiring all human services agencies to adopt the same restrictions for their own hiring and for the hiring by agencies under contract with them. In 2000 MLRI filed a state Superior Court action against EOHHS officials (*Cronin et al. v. O'Leary*), claiming, among other things, that the regulations violated the state Constitution. Deborah Harris was the lead lawyer. The plaintiffs obtained a preliminary decision in 2001 from Superior Court Judge Ralph Gants that the plaintiffs were likely to prevail on their constitutional claims. The parties then negotiated a settlement of the case by reconstituting the CORI procedures and prescribing some fair procedures for evaluating criminal records. EOHHS agreed to revise its regulations accordingly and to direct the human services agencies to change their regulations also. But the description of the weighing of hiring factors where a criminal record is involved seemed to lean toward rejection of the candidates.

In 2000, MLRI established a Race Equity Project and hired Fran Fajana, formerly a staff attorney with Legal Assistance Corp. of Central Mass. in Worcester, to fill the new staff attorney position. Fran immediately set about talking with individuals and communities of color across Massachusetts to find out their opinions about the highest-priority needs for Project work. Not surprisingly, the discriminatory effects of criminal records came out among the top needs. She then set to work deciding what could be done about it.

In the early 2000s, it seemed like an impossible task to bring wholesale reform of the CORI laws and practices. Fran and Tony Winsor formed a legal team to work with community groups on a campaign for reform. The Boston-based Union of Minority Neighborhoods, the Boston Workers Alliance, EPOCA of Worcester, and other allies put together a remarkable campaign which ultimately led to the passage, finally, of a comprehensive CORI reform law in 2010. The campaign had other parts, too, such as the passage of strong ordinances in Boston and Worcester that required all contractors with those cities to follow fair CORI procedures (these were the first of their kind in the U.S., and were followed by similar local ordinances elsewhere); improvement of the state agency which ran the CORI program and regulations; legislative budget amendments directed at the state agency; a successful court case challenging the failure of the state agency to correct misidentification in CORI records; and a governor's Executive Order setting the stage for legislative changes. The community groups held public actions and legislative lobby days, and related compelling public stories about the unfair use of criminal record information. Gradually key state legislators

became convinced to change the system. It was a remarkable process. Throughout it all, Fran and Tony were the legal team, drafting the legislative bill, the city ordinances, and new regulations, and participating with the governor's staff on its initiatives. They received much recognition from the community groups for their central roles in the campaign.

The new laws established the following policies for the use of CORI:

- Employers and other users cannot use CORI as a front-end screening device.
- They can request and use CORI only for job applicants who are being seriously considered for a position.
- When they get the CORI, they must send it to the applicant to give the applicant an opportunity to correct any errors and/or to explain the offense.
- The existence of a criminal record can only be used as one factor in a hiring decision, and must be evaluated for its connection to the duties of the job and weighed with other factors in the hiring decision.
- Employers are forbidden from asking for CORI as part of a job application or at that stage requiring an applicant to sign a form authorizing the employer to get access to CORI.

When MLRI launched its CORI reform work, we set up a special hotline so that people with CORI questions could ask them and get information. During several years the hotline was operated by temporary lawyers MLRI hired, such as Jen Bosco. This "window on the world" of CORI was valuable to us because it surfaced issues with the use of CORI that we had not previously known about and gave our lawyers the opportunity to take some individual cases that we could use as a vehicle to address systemic issues. Eventually, the Legal Advocacy and Resource Center in Boston assumed responsibility for the hotline and continues to operate it statewide under the supervision of Steve Russo. Greater Boston Legal Services also established a new unit to work on CORI and related legal issues, whose principal lawyer has been Pauline Quirion. Of course, criminal records continue to be a large barrier for poor people, especially for people of color. But at least the laws are now in place to provide fair treatment of those with CORI.

C. Other Racial Equity Work

Fran Fajana expanded her work on race equity issues. One focus was disparate treatment of students of color in local school systems, which I describe in the Education chapter. Two other efforts she led are particularly noteworthy. The first was her participation in an effort led by john powell (mainly at a center at Ohio State Law School) to identify, define, and address "structural racialization," the major disparate treatment of a racial group by a policy or practice meant by its sponsors to be neutral but which in fact is racist. Many examples of this occurred years ago. Examples include the unemployment insurance system, which excluded agricultural and domestic workers, who were overwhelmingly people of color; benefits given to veterans

of World War II, when people of color were largely excluded from serving in the armed forces; and 1950s federal housing subsidies, which went almost entirely to whites because of pervasive housing discrimination. With other legal services programs, and with MLRI's training unit, led by Ellen Hemley, we sponsored a number of Massachusetts and New England conferences on this subject and worked with advocates in legal services programs to identify legal work that might prevent similar inequities from happening. Fran and Iris Gomez of MLRI were also early leaders of the Massachusetts legal services Attorneys of Color Coalition, another focal point for discussion of racial equity issues and possible legal work to address it.

The Ohio Center also pioneered Opportunity Mapping, which used GPS technology to identify and map out the ways in which benefits and services were shortchanged in communities of color. Fran led the way on this in Massachusetts, and several legal services advocates used this mapping approach in their presentations at agency and legislative hearings and in court cases. This was a new field to explore for advocates seeking systemic improvements in communities of color, and has many promising uses in promoting change.

Chapter Nine

EDUCATION LAW

Legal services education law work in Massachusetts has been carried on largely by programs other than MLRI. The Center on Law and Education has been a national support center on this subject since the 1960s. In recent years it has centered its Massachusetts work on assisting local school parents and student groups in addressing inequities in public education. In the past, it represented the plaintiffs in the Boston school desegregation case, a monumental achievement, and successfully sued a public school system for expelling a high school student because she was pregnant (the *Underwood* case in federal court, in the early 1970s). The Center continues to be funded by the Mass. Legal Assistance Corp. to carry out its Massachusetts-based work.

Mass. Advocates for Children (MAC, formerly Mass. Advocacy Center) started in the early 1970s, focusing mainly on the Boston school system but also doing work on juvenile law, child health, and child welfare issues. MAC was involved in the passage of two major education reforms: the special education law and the bilingual education law. Chapter 766, the special ed. law, was the model for the federal law on the same subject and has brought a revolution to how children with disabilities are treated in the public schools. The bilingual ed. law was also influential, in its time, in improving the transition of students whose first language was not English, but around 10 years ago the yahoos finally got to it and persuaded the voters to repeal it in a referendum. MAC followed up its special ed. law advocacy with several successful court actions against the Boston school system for its abject failure to implement the law. MAC has also been funded by MLAC, starting in the late 1980s.

There are other programs dedicated in whole or in part to working on youth and education issues, as well as coalition groups addressing the same subjects. The Children's Law Center of Massachusetts is another legal services program focusing its work on the needs of youth, and the Disability Law Center works on special education cases. Both are funded by MLAC.

MAC has run several education law coalitions over the years, through which other legal services programs have done education law work. A major effort in recent years has been addressing harsh public school student discipline practices, such as those fueled by inane slogans such as "zero tolerance." Legal services advocates drafted and pushed for a major rewrite of the school discipline laws to better ensure fair and balanced practices, and succeeded in getting this proposal through the Legislature in 2011. Among the leaders of this effort was Tom Mela of MAC, who was a staff attorney at MLRI during two periods of time (see the chapters on State Budget Advocacy and Employment Law). Another major effort has been to challenge the poor quality of instruction at alternative public schools, into which some school systems dump "difficult" students and then do not give

them the education other students get. Efforts led by Phil Kassel, when he was the Advocacy Director at Southeastern Mass. Legal Services, were successful in improving these schools in Brockton and New Bedford. In highlighting just a few of the issues taken on over the years, I have no doubt shortchanged by omission much of the important education law work done by all of these groups, for which they also deserve credit.

The following part of this chapter describes some significant education law work done by MLRI over the years and notes the MLRI staff members who have worked on education and related children's issues over the years.

- Larry Kotin is described below in the text.
- Diane Lund and Regie Healy worked in part on education issues in the early 1970s. Their work is described later in this chapter.
- Dennis Tourse came to MLRI in the early 1970s from a Boston law firm and worked on education equity issues for several years before returning to private law practice.
- Barbara Clurman started at MLRI in the late 1970s and during her five years there worked mostly on education and children's issues, including child welfare. She left to go into private law practice.
- Janice Campbell was at MLRI for several years in the early 1980s, working on education issues, before she relocated to Maine.
- Edelina Burciaga was an MLAC Racial Justice Fellow with MLRI for two years in the mid-2000s, working on educational equity issues, before she relocated to California to start graduate school in education.
- Fran Fajana's work is described in Chapter Eight and later in this chapter.

In the early 1970s, positions on the Boston School Committee were filled by at-large election, not by district representatives. The consequences of this system were that it was difficult to impossible for a person of color to be elected to the Committee, even though some prominent people tried. The at-large election became popular in places like the South, where whites saw it as a means of preserving their power, and it started to be challenged in court for, in effect, disenfranchising communities of color. Some Boston leaders were considering what to do about the segregationist Boston School Committee and talked to MLRI staff lawyer Larry Kotin about what to do. Larry was hired by Al Kramer in 1968 and spent several years at MLRI until he went into private practice as one of the founders of the Boston law firm of Kotin, Crabtree & Strong. At the request of some Boston leaders of communities of color, in 1970 MLRI filed a federal court action challenging the legality of the at-large election. The litigation survived a motion to dismiss but got bogged down before an uninterested judge. In the meantime, the proponents of change eventually persuaded the voters to approve the election of School Committee members by district.

Another major area of success in educational equity was the application of the anti-discrimination laws to women and students. This included the prohibition of discrimination in education on account of gender through

legislation in 1971 (the first law of its kind in the U.S.) and the first Massachusetts maternity leave law. This work was carried out by MLRI staff members Diane Lund and Regie Healy. Diane was a class ahead of me in law school, and there she displayed her penchant for being unconventional by turning down a place on the *Harvard Law Review*. She started in private practice at a Boston law firm, but soon looked for more meaningful work, and so I hired her in 1970. She left MLRI several years later to teach at Northeastern Law School and then at Harvard Law School, where she was the second tenured woman law professor. A number of years later she joined Regie Healy to form a small law firm in Cambridge. Sadly, she died in 1999. Her husband, Eric Lund, has written a book about Diane, *Song for an Unsung Hero*, in which he describes the many wonderful things she did in her altogether too-short life, including what she accomplished while at MLRI in much greater detail than I have done here. Regie worked at MLRI while a law student. After that, she worked at the Cambridge legal services office and was a Commissioner at the Mass. Commission Against Discrimination before joining with Diane and John Fiske to start Healy, Lund and Fiske. Regie and Diane continued to work together on many public interest projects after they left MLRI.

A priority of Fran Fajana's race equity work has been discriminatory treatment of students of color by public school systems. She was contacted by some Latino parents of children in the public schools of Southbridge, Massachusetts, about unbelievably disparate treatment of Latino schoolchildren. She and MLRI Racial Justice Fellow Edelina Burciaga, a recent law school graduate, started in 2007 working with the parents and their local supporters to form a new group, called ASPIRE, and to identify changes they wanted in the schools there. They were successful with some of the changes and the group linked up with a national group with similar objectives as a means of spreading these efforts to other school systems in Massachusetts. That effort continues.

A final educational issue in which MLRI has been centrally involved is to persuade the state's public higher educational institutions to charge students who are undocumented immigrants living in Massachusetts the much lower in-state tuition paid by residents, instead of the out-of-state tuition. Some perverse minds across the country have promoted these higher charges by claiming that since these students are in the U.S. "illegally," they can't be residents of a state for tuition-charging purposes. I will describe this campaign in more depth in the chapter on Immigration.

Chapter Ten

ELDER LAW

Legal services programs have long represented seniors as a population with special legal needs. This has been carried out largely through grants to local legal services programs with federal funds provided to the state by the U.S. Administration on Aging, within the U.S. Secretariat of Health and Human Services. This funding, small to begin with, has had two additional limitations. First, the funding levels have been stagnant for many years. Second, the agencies giving out the funding have, by and large, wanted it to be used for community education and individual client representation and not for systemic advocacy. Nevertheless, Massachusetts advocates specializing in elder legal issues have found many ways to carry out more widespread advocacy over the years.

A lot of the coordination and systemic work has been done through the statewide legal services Elderly Legal Coalition (ELC). This group was coordinated for many years by Debbie Thomson at MLRI. Debbie started her legal services career in Pennsylvania and then came to Massachusetts with her husband, Jim Breslauer, to take legal services jobs here. Both worked for Merrimack Valley Legal Services. Jim has been and remains the Advocacy Director at Neighborhood Legal Services. Debbie went to the Attorney General's Office to do regulatory rate case work for several years before MLRI hired her in the mid-1980s. She worked full-time until 1996, when (as a result of MLRI's complete loss of funding from the Legal Services Corporation) she reduced her time to two days a week. With her additional time she has done legislative and agency lobbying work on behalf of senior and health organizations. Regrettably, MLRI eliminated its work on elder legal issues in 2011 as a consequence of the deep reduction in our MLAC grant, caused by the dive in IOLTA collections. So we lost a very experienced and capable advocate as a result of the terrible choices we (and other legal services programs) had to make as a result of the IOLTA collections downturn.

The ELC has had as long-standing members many outstanding advocates, such as John Ford of Neighborhood Legal Services, Wynn Gerhard and Dan Bartley of Greater Boston Legal Services, and Deb Filler of Cambridge and Somerville Legal Services, who with Debbie engaged in much systemic work over many years. A major focus of this work was monitoring the development of the annual state budget. Many of the important budget issues that needed attention were perennial ones, because the Executive Branch and some legislators had their knives out for them at almost every turn. These included a requirement that nursing homes hold beds open, and the state continue to fund them, for 30 days after a resident left the unit temporarily for health reasons and was expected to be able to return; and the Personal Needs Allowance the state makes available for those persons in continuing care. The Coalition also monitored elder health programs, such as the state's Prescription Advantage program, which filled in some gaps in

federal prescription drug funding. In addition, advocates were involved in agency regulatory matters affecting the elderly, such as the state's regulatory structure for assisted living units. These efforts were nearly always successful, thanks to the effective and targeted efforts of Coalition members.

Another important focus of advocacy on behalf of seniors was the legal services Medicare Advocacy Project. The Legislature was persuaded to begin funding MLAC for this work in the mid-1980s, on the ground that advocacy on behalf of Medicare applicants and beneficiaries would save the state considerable funds by causing elders funded by Medicaid and other state-funded cash assistance to receive Medicare instead and would lead to federal refunds to the state. Three field legal services programs are funded by MAP to cover the entire state, largely for individual client representation, and Greater Boston Legal Services also has a grant to do systemic work. This monitoring of the workings of the Medicare program in Massachusetts has led to many administrative improvements.

A final long-standing concentration for seniors has been the guardianship system. I described in Chapter Seven: Disability Law how advocacy for improved procedures in court and resources for defendants in guardianship cases led to the passage in 2011 of Article 5 of the Uniform Probate Code. This was a major revamping of court procedures and accountability and created the right to legal counsel for defendants who wish to contest a guardianship and cannot represent themselves. Our elder and disability advocates also wanted the state to establish a new Public Guardianship Commission to address (among other things) the paucity of qualified guardians for lower-income defendants, who more often than not have to face a guardian who is not neutral. Time will tell whether the changes brought by Article 5 will suffice, or whether the system still needs to provide and pay for guardians who are qualified and independent.

Chapter Eleven

EMPLOYMENT LAW

Employment law, particularly the unemployment insurance (UI) system, has been an important component of legal services advocacy in which nearly all local programs have participated and for which MLRI has provided statewide advocacy and support. The Employment Unit at Greater Boston Legal Services, under the longtime leadership of Monica Halas, has had a particularly strong role in case advocacy and in systemic advocacy. Others who were involved in some of the efforts are recognized also in this chapter. I have already described the administrative agency procedural reforms in which we were involved in Chapter Three: Administrative Agency Advocacy. In this chapter I describe legal services advocacy in the discriminatory hiring and UI areas. This leaves out important areas such as wage-and-hours law work, which I have not included only for lack of knowledge.

A. Discriminatory Hiring Tests and Criteria

The civil rights revolution of the 1960s highlighted how unfair and discriminatory hiring criteria would disproportionately exclude people of color. Early on, MLRI brought three federal court class actions challenging the use by public agencies of hiring tests that included criteria not reasonably necessary to the duties of the job and which disparately disadvantaged those who do not do well on paper-and-pencil tests but were otherwise qualified for the job, invariably people of color.

The first case was against the MBTA, and it was brought to our attention by Roxbury lawyer Charles Lewis. He had been consulted by an applicant and test-taker for the position of T bus driver who had scored comparatively low on the civil service test. The test resembled a school aptitude exam and on its face contained little material that appeared to relate to the skills needed to be a bus driver. The T made a list of candidates ranked in order of their test scores, and this applicant had lost an opportunity for a position altogether when the T cut off the existing list around halfway through and initiated a new test. Because the T stopped drawing candidates from the list, those reached for possible hiring were overwhelmingly white. I filed a class action, with the help of Joel Selig, a young lawyer who had recently joined MLRI's staff, and moved on a preliminary basis to stop the hiring process. We drew Arthur Garrity as the judge. By the time of the court hearing on a preliminary injunction request, the T had hired from around the top third of the list. Garrity concluded that those already called in from the list would be harmed if the list were thrown out, and so, weighing the balance of harms, he decided not to issue an injunction ordering the reconstitution of the hiring process. But he went on to decide that we were likely to prevail on our argument that the test violated the federal civil rights law. This decision (*Arrington v. MBTA*) in 1970 was one of the first of its kind in the U.S.

After the court decision, the T saw the handwriting on the wall and agreed to change its practices. Instead of taking applicants from the list in

order of scores on the test, it decided to choose them by lottery and to exhaust a list before giving a new exam. The court decision also created interest in other urban transportation authorities and the federal transit agency, the Urban Mass Transit Authority (UMTA), in the validity of similar tests that were commonly used. UMTA agreed to fund a project to develop a test and other criteria that were validated for the particular position. I served on a national advisory committee for the project, and ultimately a validated test was developed and put in use.

We next turned our attention to two federal court class actions challenging the state civil service tests and other criteria for certifying to cities and towns qualifying candidates for police and firefighter positions. While I oversaw these two cases, they were handled for MLRI by two younger lawyers, Tom Mela and Joel Selig. Tom was at MLRI for several years in the early 1970s, and when he left for the Boston Law School Legal Aid Program he took the cases with him. They were subsequently transferred to the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association, which represented the plaintiffs through the many years of litigation. Tom subsequently joined the Office of Civil Rights of the U.S. Department of Education, served MLRI again in the early 1990s in our Budget Cut Litigation Project, and since 2006 has been a staff lawyer at Mass. Advocates for Children. Joel also was at MLRI for two years until he relocated to Washington, D.C., to join the Justice Department's Civil Rights Division, where he litigated major civil rights cases across the country before becoming a Professor of Law at the University of Wyoming School of Law, from which he recently retired.

In the police case (*Castro v. Beecher*, 1972), Tom went before Judge Charles Wyzanski. During oral argument on a request for an injunction, the judge looked up and said: "Counsel, this case is going to the U.S. Supreme Court." Well, along the way the defendants made several attempts to bring the case to the U.S. Supreme Court, but the Court never accepted an appeal. The case was tried and Judge Wyzanski found that the test was discriminatory. At our request, he ordered the affected police departments to take remedial actions that were unheard of then but later became more common. The departments were ordered to create two pools of applicants, one white and the other African-American, and to hire in turn from each list (1-for-1 hiring) until the number of African-Americans on the police force equaled their percentages of the population of each municipality. Some of the cities appealed and in other ways tried to get out of their court order, but it was upheld in the First Circuit Court of Appeals and the remedy went forward.

We found the same situation with firefighters and brought a separate federal court action (*NAACP v. Beecher*, 1974), with the same results and the same kinds of unsuccessful appeals by some of the cities. There is an ironic footnote to these two cases. The Beecher who was a defendant in both cases was Nancy Beecher, a Concord resident who was the Chair of the Civil Service Commission. Many years after the courts' decisions, Nancy was appointed to the Board of Directors of the Massachusetts Legal Assistance

Corporation when it was established in 1982. We laughed when we talked about the cases, because her sentiments were privately on our side.

B. Unemployment Insurance (UI)

We established a legal services Employment Rights Coalition (ERC) in the early 1980s, run by me for many years and then by my employment law successor at MLRI, Margaret Monsell. Nearly all legal services programs handled at least UI cases in the employment law field, and there were many experienced advocates across the state and in private law practice. We identified systemic UI eligibility issues and helped each other out when appeals occurred.

One major case was caused by a legislative amendment to the UI law, long sought by employer interests, to add another misconduct ground for disqualification from UI benefits. The long-standing misconduct ground was for "deliberate misconduct in willful disregard of the employing unit's interest." In the late 1980s, there was added a second ground—violation of an employer rule. When that became effective, the question was what state of mind of the employee was necessary to constitute a rule violation. Peter Benjamin of Western Mass. Legal Services in Springfield had a client, Annie Still, whose UI disqualification for a rule violation raised this question. Still was fired for an outburst against a nursing home patient who constantly called her racist names. Peter appealed the disqualification and the Supreme Judicial Court took the case. I drafted an amicus brief, and Monica Halas of GBLS and a Boston labor law firm signed on. The Supreme Judicial Court decision was a complete win for Ms. Still. The Court said that her outbursts were spontaneous reactions to extreme provocation and could in no sense be found to be deliberate. It also said that the deliberateness that is necessary for a finding of a rule violation was pretty much the same as under the long-standing deliberate misconduct ground. So the steam was taken out of the employer-sponsored amendment.

Another long-standing disagreement we had with the UI agency was whether someone who could work only part-time after becoming unemployed could qualify for UI benefits. The agency at first said that a part-timer was not eligible and later added, when it had to back down some, that the reason for having to work part-time after having become unemployed had to exist before the person lost her job. Legal services advocates had several cases challenging the agency's position. The first was an appeal brought to the Board of Review by Catherine Kay of Western Mass. Legal Services on behalf of a woman who could work only part-time because of a physical disability that arose after she had become unemployed. Several of us filed an amicus brief with the Board in support of Catherine's appeal, and the Board concluded that someone who had to limit their work because of a disability that arose after she became unemployed could nevertheless be eligible for UI. The agency adopted rules accepting this result. That left other reasons for part-time work, such as the lack of child care, which the agency continued to treat as disqualifying. Monica Halas appealed a child care reason case to a District Court and won, but the agency refused to follow the decision. So far

as I know, this practice has not been straightened out, although GBLS has tried for many years to solve it by legislation.

The achievements of members of the ERC on UI issues were many and impressive. Here are some of them.

- Continuous, largely successful, advocacy to ward off cutbacks in UI and other punitive measures by employer interests. Every time unemployment was high, because of downturns in the economy, Associated Industries of Massachusetts would trot out its perennial line that the state's UI program was far too generous and should be cut back so that the UI Trust Fund (the fund from which UI benefits were paid) could be reduced and employer contributions to it lowered. We had as an ally in the efforts a strong state AFL-CIO, particularly since Monica Halas during some of this period was on the Board of their State Council. Employer interests and some legislators also tried nearly every year to increase penalties for so-called UI claimant fraud, and every year we had to drag out the same studies and statistics to show that those claims were false and that additional penalties were unnecessary.
- In the mid-1980s, GBLS persuaded the Legislature to increase the claimant dependency allowance, a major benefit to claimants with children.
- The ERC, led by GBLS advocates, worked long and hard to make the employment and training allowance for claimants meaningful, in the face of agency indifference to it.
- GBLS succeeded in getting the Legislature to change the UI eligibility formulas to allow claimants with lower-paid jobs and shorter hours to qualify for UI.
- Most of the state agency's guidance to its workers is contained in a thick Service Representatives Handbook, which was historically not available to the public. When we got access to it, we discovered that some of the guidelines and case examples were incorrect, in our opinion. So over the years, ERC members would periodically comment and meet with the agency. As a result, the agency did make many changes.
- When supplementary UI programs were established by Congress after the 2008 recession started, a question arose whether certain unemployed people could qualify under Massachusetts law. Monica Halas of GBLS led the effort to change the law so that some 3,000 additional people were eligible.

The upshot of all this ERC attention to how the UI program is administered in practice helped the Massachusetts UI program, unlike in most other states, come close to what Congress intended when it established this wage-replacement program in the 1930s. Massachusetts has been consistently ranked at or near the top among the states in the percentage of people who apply for benefits actually receiving them (pretty consistently in the 55-60% range). We also have the highest percentage of claimants win their UI fair hearings (this also has exceeded 50%). Of course, there are still

improvements to be made, and the results could still be better. But this consistent advocacy over the years can be considered a major success, in my opinion.

Chapter Twelve

FAMILY LAW

Family law has long been one of the most important legal needs for which legal services programs have provided representation. Legal services in the late 1960s came onto a scene in which some poor people had difficulty in even getting uncontested divorces. Meg Connolly (who started as a lawyer with the Brockton community action program and eventually became the Executive Director of Volunteer Lawyers Project in Boston) tells the story of a judge in the Brockton Probate and Family Court who refused to grant a divorce to a poor woman because he said he didn't want to be responsible for creating two poor families out of one. Lawyers told Meg that she shouldn't bother taking a divorce before this judge, but of course she did and the judge backed down. Some other judges refused to grant a divorce to women receiving family cash assistance until they took themselves off assistance, a practice that was later declared by the state Appeals Court as beyond the authority of a judge. So, early legal services family law practitioners had to establish a presence in the courts and initiate some aggressive representation that the courts were not used to.

MLRI has had family law advocates since the beginning of its law reform program. I was one of those advocates throughout, until my retirement at the end of 2010. I covered this field for two major reasons. First, I had had some family law experience while in private practice during the 1960s, and because no one else at MLRI had this kind of experience I thought it important that I work in this field. Second, family law work was somewhat looked down upon by legal services advocates at that time, quite possibly because most of these lawyers were male. Some thought that because domestic relations advocacy was mostly to divide the already meager assets and responsibilities from one poor family among two poorer family groups, it was somewhat less worthwhile work than the more glamorous work of big case litigation and expanding resources for poor people by obtaining more benefits, housing, and employment for them.

I thought that these opinions were misguided, and so I started a Massachusetts legal services Family Law Task Force in the late 1970s which, except for a period of less activity in the early 1980s after the Reagan-inspired major reductions in Legal Services Corporation funding, has continued as an active force to this day.

Of course it was unrealistic to think that I alone could ever adequately cover this field for MLRI. So we expanded our family law staff. In the late 1980s, we created a full-time family lawyer position and hired Jacqui Bowman to fill it. Jacqui had started her legal services career in Tennessee, and for five years prior to joining MLRI she was a family law lawyer at Greater Boston Legal Services. She was MLRI's principal family law lawyer for around seven years, coordinating the Family Law Task Force, leading systemic family law efforts of legal services, and playing a major role in the

establishment and expansion of the Battered Women's Legal Assistance Project, which the Legislature funded through the Mass. Legal Assistance Corp. Jacqui returned to GBLS in the mid-1990s to take the position of Associate Director, and in 2011 she was appointed Executive Director of GBLS, succeeding Bob Sable.

After Jacqui left, the following family law lawyers succeeded her.

- Marilyn Lee-Tom had been a family law lawyer at GBLS before she came to MLRI to fill the family law position. She continued for several years before she left to take some leadership roles at nonprofit organizations. For the past three years she has been the Executive Director of the Community Day Center in Waltham.

  Marilyn was succeeded by two lawyers, one full-time and one part-time, as we expanded our family law capacity.

- Susan Elsen had been a staff attorney at Neighborhood Legal Services in Lynn, a staff attorney at South Middlesex Legal Services, and in a Boston law firm before she started at MLRI in 2001. She remains at MLRI.

- Jeff Wolf was the longtime Chief Counsel at Community Legal Services and Counseling Center (CLSACC) in Cambridge before he joined MLRI in the late 1990s. He remained at MLRI until the fall of 2011, when MLRI was forced to eliminate his position because of severe funding cutbacks. He continues to be involved in legal services family law matters as a volunteer at CLSACC and in drafting new court documents and forms for child support as part of a project of Massachusetts Justice Project.

I have divided this chapter into an initial section in which I describe how the legal services family law resources and cooperation developed over the years and successive sections on major topic areas in which these advocates were involved. This is by no means a complete chronicle of all the active family law advocacy which has taken place over many years.

A. Legal Services Family Law Resources and Collaboration

As with most legal services advocacy, family law was established in the early days and funded mostly by grants to the programs from the federal Office of Economic Opportunity and then by the Legal Services Corporation starting in 1974. But in the early 1980s, the Reagan Administration, which opposed any federal funding for legal services, persuaded Congress to cut the Legal Services Corporation funding by 25%. Programs had to immediately cut back their staffs, and in Massachusetts, regrettably, family law staff bore the most severe reductions. This left the family law resources so thin that not much systemic work could be done. But gradually Congress built back the funding. Then, in the late 1980s, legal services advocates and the Mass. Legal Assistance Corporation persuaded the state Legislature to establish the Battered Women's Legal Assistance Project, first with pilots in four local programs, and eventually statewide, to an eventual level of $2,500,000 in funding. This success was greatly aided by legal services collaboration in recommending that state funding be shared between the governor's office and the providers of services to victims of domestic violence.

Jacqui Bowman, then at MLRI, deserves much credit for this cooperation. Legal services programs also had established good relationships with local domestic violence shelters and other local providers, which was important for local and statewide advocacy.

B. Abuse Prevention

Domestic violence became the top priority for legal services family law advocacy because it was so pervasive in the lives of legal services clients and because of the incentive of funding from MLAC. Major changes in attitude toward domestic violence were prompted by the passage in 1978 of the state's Abuse Prevention Act, Chapter 209A. This law was drafted by a small group of lawyers and shelter advocates. Advocates then mounted an impressive campaign and, with the help of some insistent legislators, it passed in one session. It is no exaggeration to say that the strong movement on behalf of victims and the passage of this new law caused a major transformation in how victims were treated. But first the courts had to be brought on board. Fortunately, the District Court Chief Justice, Samuel Zoll, moved promptly to send out good guidelines on the new law to all judges and other key District Court personnel. These were drafted by Judy Cowin, who was then a staff attorney in the Chief Justice's office and later became a Justice of the Supreme Judicial Court. Since most 209A complaints were brought in District Courts, this was a good start for ensuring that the statute would be carried out. In later years, advocates worked with the Administrative Office of the Trial Court on that Court's adoption of some detailed and very good Standards instructing all the courts on how they should handle 209A cases.

Legal services case and legislative advocacy helped toward ensuring that the law would be administered as intended.

- **Subsequent Amendments to 209A**. Legal services advocates have further been involved in securing favorable amendments to 209A and in fighting off regressive proposals to change that law. Family law lawyers at Greater Boston Legal Services helped draft many of the changes that were adopted in the early 1990s. GBLS and other legal services advocates were also active subsequently in successfully opposing weakening 209A amendments.
- ***Custody of Vaughn***. As this trail-blazing case was making its way to the Supreme Judicial Court, several legal services lawyers collaborated on amicus briefs at both the Appeals Court and the Supreme Judicial Court levels. This effort was led by Jacqui Bowman and Barbara Mitchell of GBLS, who filed an amicus brief on behalf of MLRI and GBLS. In 1996, the SJC issued a broad decision (422 Mass. 590) prescribing the standards and procedures that courts must follow on custody and visitation issues where there are allegations of domestic violence.
- **Constitutionality of Custodial Presumption Law**. For four years in the mid-1990s, the prime legal services family law legislative priority was to establish presumptions and other procedures for court decisions on

custody and visitation where there is a history or threat of domestic violence. Opponents of this legislation succeeded in persuading the state Senate to request an advisory opinion of the Supreme Judicial Court on the constitutionality of the bill. Legal services advocates responded by collaborating on a comprehensive brief to the SJC, written by Barbara Mitchell and Pauline Quirion of GBLS and collaborated on by Marilyn Lee-Tom and me. In *Opinion of the Justices* (427 Mass. 1201 (1998)), the SJC upheld the constitutionality of the bill.

- **Custodial Presumption Law**. As a consequence of the SJC advisory opinion, the opposition to the bill collapsed and in 1998 the custodial presumption bill became law. The group that worked most prominently on this law included legal services programs, Jane Doe, Inc., the Women's Bar Association, the Domestic Violence Council, and advocates at the Boston law firm of Mintz, Levin.
- **Permanent Orders under c. 208, § 18**. In *Champagne v. Champagne* (429 Mass. 324 (1999)), Pauline Quirion of GBLS secured an SJC decision holding that a Probate and Family Court judge has the power to issue a permanent restraining order under c. 208 (the divorce law), § 18. MLRI participated in an amicus brief in support of Pauline's client.
- **District Court 209A Procedures**. Starting in 1998, legal services advocates began documenting various practices of District Courts in shedding responsibility for 209A cases by requiring or suggesting that the parties go to Probate and Family Court, in violation of statutes and 209A Standards. The Family Law Task Force collaborated on a letter to District Court Chief Justice Zoll, and a delegation of the Task Force met with the Chief Justice, his legal staff, and Judge Sidney Hanlon, Chair of the District Court 209A Committee. As a result of the letter and the meeting, in the fall of 1999 Chief Justice Zoll issued a strong 209A Procedures Memo, adopting nearly all of the recommendations made by the Task Force.
- **Permanent Restraining Orders under c. 209A**. Some language by the SJC in the *Champagne* case left some doubt about whether courts have the authority to issue permanent restraining orders upon the expiration of a so-called one-year order under c. 209A. The law firm of Foley Hoag and Eliot represented a client who had been denied a long-term order because the District Court judge believed that he did not have the authority to issue one. They appealed this case to the Supreme Judicial Court, and in *Crenshaw v. Macklin* (430 Mass. 633 (2000)), the Supreme Judicial Court clarified that such a power to issue a permanent order exists under the statute. Pauline Quirion of GBLS wrote an amicus brief in support of the appeal, joined in by MLRI and other legal organizations.
- **Clarification of Blood Relationship for Purposes of Bringing 209A Petition**. Pauline Quirion of GBLS represented a paternal grandmother who was legal guardian of a child whose parents had not married, and unsuccessfully sought a 209A order against the child's mother. In *Turner v. Lewis* (434 Mass. 331 (2001)), the Supreme Judicial Court agreed with

Pauline's argument that the grandmother was a person entitled to bring a 209A petition because she was related by blood to the child.

- **Successful Use of Anti-SLAPP Statute in Domestic Abuse Cases**. A domestic violence victim who had obtained a one-year restraining order under c. 209A after a contested hearing was almost immediately sued in District Court by the batterer for abuse of process and other damages as a result of her bringing the 209A action. When the District Court judge refused to immediately dismiss the case under the anti-SLAPP (Strategic Lawsuits Against Public Participation) statute and on other grounds, the victim, represented by the Boston law firm of Taylor, Ganson & Perrin, sought relief in the Supreme Judicial Court, through a petition under c. 211, § 3. The Single Justice of the SJC stayed the District Court damage action and referred the appeal to the full Court. In the SJC, MLRI joined with private attorney Wendy Murphy in an amicus brief in support of the appellant on behalf of Jane Doe, Inc., MLRI, and other organizations, as did Pauline Quirion of GBLS for the Women's Bar Association. In *Walton v. Fabre* (436 Mass. 517 (2002)), the Supreme Judicial Court held that the District Court judge should have dismissed the abuse of process action under the anti-SLAPP statute, and that an appeal of any court's failure to dismiss such a retaliatory action can be made to the Appeals Court under the normal appeals procedures.
- **Combating Mutual Restraining Orders**. In two Appeals Court decisions, legal services advocates were successful in overturning restraining orders against their victim-client, obtained by the batterer at a different time or in a different court, as being mutual restraining orders which require, under the statute, a detailed level of factual findings and support. In 2002, Anne Margolis of WMLS was successful in getting the Appeals Court, in an unreported Rule 1:28 decision, to reverse the grant of a restraining order against her client in these circumstances. In *Uttaro v. Uttaro* (54 Mass. App. Ct. 871 (2002)), Pat Levesh of GBLS succeeded in getting a good opinion from the Appeals Court applying the mutual restraining order statute to a situation in which her client had been subjected to a restraining order at a different time, by a different judge, although for reasons relating to the domestic violence dispute with the batterer.

C. Child Support

- **Initial Massachusetts Wage Assignment Statute**. In the early 1970s, one of MLRI's legislative priorities was to secure a statute that required employers of child support obligors to deduct child support payments from paychecks and to send those directly to the supported family. At that time, it was impossible for a family to secure an assignment of wages except through individual attachments at the time that each paycheck was due the obligor, a practical impossibility for poor families. The statute

passed in 1972, one of the first of its kind in the nation. I was the principal advocate for that change**.**

- **Failure of State to Turn Over Child Support Payments upon Termination of AFDC**. In the mid-1980s, Southeastern Mass. Legal Assistance Corp. (SEMLAC) and MLRI collaborated on the *Acosta* class action lawsuit against the state's Welfare Department. The suit claimed that DPW had violated federal and state law by its failure to account for and turn over to the custodial parent child support payments made to the state during or after the time that the supported family received AFDC benefits. A settlement of the case was negotiated, whereby the DPW was required to establish certain procedures, accountings, and reports on the timeliness of its identification of and turning over of these child support payments (called, suitably enough, *Acosta* payments) to the supported families. MLRI also secured an informal ruling from DPW that any such *Acosta* payment was not countable for later AFDC eligibility purposes. I was the lead lawyer for the plaintiffs.
- **Child Support Guidelines**. Legal services advocates were centrally involved in the development of the state's Child Support Guidelines in the late 1980s. Jon Laramore of South Middlesex Legal Services (SMLS) wrote a paper entitled *Economic Child Abuse*, detailing the state's failure to pursue child support collections from recalcitrant obligors. Jon and Nicki Famiglietti of GBLS were members of a special commission that drafted the initial Massachusetts Child Support Guidelines. Marilyn Ray Smith, a lawyer in private practice and later for many years the director of the state's child support enforcement program, was a key member of the commission. At each point when the Child Support Guidelines were up for review (every four years), legal services advocates furnished comments to the Chief Justice for Administration and Management and fended off weakening proposals made by other groups.

  A typical Guidelines review took place in 2001. Fearing that a major effort by fathers' rights groups to dilute the Child Support Guidelines might succeed, the Family Law Task Force organized testimony at regional hearings held by the CJAM, and many advocates filed written testimony on the Guidelines, as well. This effort was headed up by Peter Coulombe of GBLS, and many Task Force advocates participated in this process, being in most cases the only voices for custodial parents. As a result of this advocacy, the CJAM issued revised Guidelines in January of 2002, over the opposition of the two major bar associations (with whose position the Task Force disagreed), who wanted her to delay her consideration until there was further study. Several of the Task Force suggestions were adopted, although the dollar amounts for some of the lower-middle ranges in the Guidelines were lowered, which adversely affected some legal services clients. Overall, though, this advocacy whenever the Guidelines came up for review was an important factor in preventing further backsliding in the Guidelines.

- **Interstate Child Support**. In my capacity as a Massachusetts Uniform Law Commissioner, I was the Chair of the Uniform Laws Committee that revised and updated the Uniform Reciprocal Enforcement of Support Act, renaming it the Uniform Interstate Family Support Act. After this new law was completed in 1992, Congress mandated that all states adopt this Act, and Massachusetts did so in Chapter 209D. I describe this further in Chapter Nineteen.
- **Child Support Obligation Continues Even Though Father Later Found Not to Be the Biological Parent**. Pauline Quirion of GBLS represented a mother and her young child, whose presumed father had made child support payments for most of the child's life, and had maintained a consistent relationship with the child. Earlier, the alleged father had declined to pursue blood tests. More recently, the father took the child, while she was visiting him, for a blood test, which showed that he was not likely the father of the child. He then petitioned in court under Rule 60(b) to vacate the child support order. In *Paternity of Cheryl* (434 Mass. 23 (2001)), the Supreme Judicial Court decided that the father could not get the child support order vacated because his longtime significant relationship with the child overcame his newly found evidence of non-paternity. Furthermore, the father could not successfully vacate judgment under Rule 60(b)(5) because he was too late and he had some inkling previously that he might not be the father but did not pursue it.

D. Child Welfare

- **Child Welfare Cases and Services**. In 1978, GBLS brought a class action in federal court (the *Lynch* case, subsequently renamed the *McDonald* case) challenging a number of failures of the state's Department of Public Welfare, and later the Department of Social Services, in child welfare cases. As a result of this litigation and agreements reached, the state was required to reduce the average caseload of each social worker, establish certain time frames for investigation and decisions on allegations of abuse and neglect, and otherwise improve its procedures for processing child welfare cases. Dan Manning and Jacqui Bowman at GBLS, among others, worked on this case.
- **Early DSS Regulations**. DSS was established in the early 1980s, when the state's child welfare responsibilities were split off from the Department of Public Welfare. A group of legal services lawyers met with DSS staff and legal counsel when DSS was drafting its initial set of comprehensive regulations. DSS accepted many of the proposals of the legal services group, including establishing a fair hearing system, giving precedence to relatives in child welfare placements, and adopting other policy provisions that were helpful to parents and children. At that time, the top people at DSS believed that their agency's decisions should be balanced and that DSS policies and procedures should be placed in regulations. Later leadership at DSS watered down these requirements, saying that DSS should "let its social workers be social workers."

- **State Legislation on Child Welfare Case Procedures**. As a result of the federal Adoption Assistance and Child Welfare Act of 1980 and its amendment in 1996, legal services advocates were involved in the development of state legislation to implement that law and other standards for handling child welfare cases. Jacqui Bowman and I worked on these pieces of legislation. Although legal services advocates were not successful in getting many of their major recommendations accepted, they were successful in modifying a number of provisions and in preventing damaging proposals from making it into the final legislation.
- Another early representational need was for persons against whom abuse or neglect reports were filed at DSS. Before a case reached court (where by statute parents had the right to legal counsel at state expense if they could not afford their own lawyer), parents had no right to representation and few had legal counsel, without which they might agree to conditions that undermined their right to custody of their children. So legal services advocates drafted and circulated a know-your-rights pamphlet and sought legal help on a voluntary basis from lawyers in private practice and in legal services to start to fill this gap.
- Starting in the late 1980s, legal services priorities turned to other matters, such as the representation of victims of domestic violence, and little child welfare work was done except by Barbara Mitchell, head of the GBLS Family Law Unit (and later Executive Director of Community Legal Services and Counseling Center), and others at GBLS. In the mid-2000s, the Family Law Task Force decided to monitor DSS once more, under the leadership of Susan Elsen of MLRI. They were shocked at what they found: most resources had been taken away from reunification programs and put into investigations; there was a huge backlog of undecided fair hearings and long delays in scheduling hearings; and there were instances in which the DSS Commissioner interfered with or reversed decisions of the supposedly independent hearing officers. Working with sympathetic legislators, Susan secured amendments to the DSS budget to require the agency to start to remedy these deficiencies.

E. Guardians Ad Litem

For many years, the Probate and Family Courts appointed GALs to investigate and report to the courts on issues in cases. Many of these GALs were not trained in or sensitive to domestic violence, and there were no regularized standards for how they should do their work. People had complained for many years about the deficiencies of many of the GALs, yet no one had initiated any proposals to improve the system. Susan Elsen decided to take this on. She and others presented reports demonstrating the inadequacies of the GAL system and persuaded the Probate and Family Court Chief Justice, Sean Dunphy, to initiate standards. Susan had a major role in drafting the standards and, after they were adopted, led a number of

mandatory training conferences for those who wished to have appointments as GALs. This was a very significant achievement after many years of neglect.

Chapter Thirteen

HEALTH LAW

Health law has long been an important priority of Massachusetts legal services programs, although not involving nearly as many individual client cases as the big four case areas of housing, family, public benefits, and elderly. Much of the work has been systemic, and MLRI has been centrally involved as the legal arm for health reform groups.

MLRI has had several health law specialists.

- Mike Faden, whom MLRI hired out of law school in 1970 and who worked on some health and public benefits issues as well as serving as MLRI's legislative advocate for several years before he relocated to Washington, D.C., and worked for many years in the legal counsel's office of the D.C. City Council.
- Laura Rosenthal, whom we hired in the late 1980s and who concentrated mostly on Medicaid and health issues affecting the elderly and persons with disabilities for several years before she relocated to California.
- Neil Cronin, a public benefits paralegal at the Brockton and Western Mass. legal services programs in the late 1970s and early 1980s before he came to MLRI (where he remains), concentrating on health policy issues.
- Cindy Mann, who came to MLRI via Rhode Island Legal Services and the Massachusetts Budget and Policy Center to work mainly on health and taxation issues before relocating to D.C. in the early 1990s with her husband, MLRI staff attorney Steve Savner (see the Public Benefits chapter for more information on Steve's work), first to work at the Center on Budget Policy and Priorities and the Kaiser Family Foundation on health policy issues, and then (and now) to the federal Secretariat of Health and Human Services, where since 2009 she has been the Director of the Center for Medicaid and CHIP Services.
- Vicky Pulos, who started her career as a legal services staff attorney at New Hampshire Legal Assistance, then worked in D.C. for three years on policy issues for Families USA, and joined MLRI as a health law lawyer in the late 1990s.

Here is a description of the major systemic health law areas on which these MLRI staff worked.

A. Lead Paint

In the late 1960s, medical researchers started to uncover the serious effects on children of the ingestion of lead paint. One of the leading researchers in these efforts was Boston physician Dr. Herbert Needleman, who not only documented these serious health effects but joined together with others to advocate for a state program to treat them and for a strong lead paint prohibition law. Cities and towns in Massachusetts had a large stock of older wooden houses, whose exterior and interior surfaces were

often covered with lead paint. Much of this housing included the more affordable rental units that were occupied by poor families with children.

Needleman and others formed a group, the Committee to End Lead Paint Poisoning, which asked MLRI to help them draft a bill and get it through the Legislature. Mike Faden of MLRI did the legal work and provided much of the lobbying advice. In 1972, the Legislature passed the new law, which was then (and may still be now) the strongest protective and remedial lead paint law in the U.S. It not only established a new division in the state Department of Public Health, to set standards for, carry out inspections of, and make grants for lead paint remediation, but it abolished the use of lead paint in residential housing and disallowed an owner from renting to a family with children without achieving the elimination or satisfactory remediation of existing lead paint. These obligations also could be enforced privately because the rights of renters were tied into other rights of tenants in the landlord-tenant laws which were being changed by the Legislature to become much more effective. The requirements were also incorporated into state regulations (the State Sanitary Code, which sets standards for residential housing) so that state and local code enforcement officials could perform inspections and directly bring court actions if necessary. A corps of private attorneys who were experts in lead paint laws sprang up and played an important part in seeing that the new law was obeyed. As a result, the incidence of child lead paint poisoning declined dramatically.

B. Child Health Programs

Along with the AFDC family cash assistance program, initiated by the federal government in the late 1930s and administered by the states under federal regulation until it was "deformed" by Congress in 1996, the feds gave to the states EPSDT (Early and Periodic Screening, Diagnosis, and Treatment) grants to investigate and treat child health problems. States were supposed to conduct comprehensive child health assessments, issue reports on each child, and recommend and carry out health treatment plans. Massachusetts lagged in carrying out all of these requirements, as did most other states. MLRI brought a federal court lawsuit in the late 1970s (the *Vega* case) to require the state to comply. MLRI staff attorney Peter Anderson handled the initial lawsuit and negotiated a consent judgment requiring the state to carry out specific steps and procedures to make the program work as it should have.

The case yielded an interesting twist. DPW took the position that no DPW employee could talk to the plaintiffs' attorneys. We challenged this directive before U.S. District Court Judge Joseph Tauro, claiming that the directive violated, among other things, the free speech rights of the DPW employees. Judge Tauro agreed with us.

In the early 1980s, it became clear to us that the state was out of compliance with the consent judgment in major ways, so MLRI staff attorney Mary Gallagher brought a petition in federal court to have the DPW officials held in contempt. There ensued a series of hearings before a U.S. Magistrate, who decided, by and large, that the state's reasons were not contemptuous

in a legal sense. The plaintiffs appealed these findings to the U.S. District Court judge, and thereafter the parties negotiated an amended judgment to put more specificity into what the state had to do. Even then, the state's compliance was well short of what we wanted. But we developed an understandable contempt fatigue (because the contempt trial was so protracted and violations, being fact specific, were not easy to document) and decided not to pursue the litigation. Other advocacy groups, such as Mass. Advocacy Center (now Mass. Advocates for Children), took on this issue administratively and were able to persuade the state to make such improvements as to institute a medical passport that would record a child's medical history and be carried by the family to each future medical appointment (this was before the time that electronic health records were developed).

C. 1988 State Health Reform Law

Under the leadership of Governor Michael Dukakis, the Executive Branch proposed and the Legislature approved in 1988 the first state effort to expand health care coverage to those who could not afford to pay for it. It contained a number of gap-filling programs, and was not nearly as ambitious as the 2006 Massachusetts health coverage expansion. But it was impressive for its time. MLRI advised community organizations on the content and lobbying of the bill.

However, starting in 1990, Massachusetts got four Republican governors who led the state for a total of 16 years. The first, William Weld, set about immediately at the start of his term early in 1991 to dismantle all parts of the new law. Unfortunately, he succeeded with all of the components except one: a basic health program, funded through surcharges on employers' unemployment insurance payments, for all persons receiving UI. Legal services advocates (notably GBLS and MLRI), Health Care for All, and the state AFL-CIO succeeded in blocking proposals to repeal or gut it, so that it continued to work well and to benefit UI recipients to this day. It is still, I believe, the only state health program of its kind in the country.

But our vigilance of the UI health program had to be constant. There were periodic attempts by the state agencies to cut back on benefits and to impose co-pays or co-insurance charges on people receiving the benefits, and employer interests almost annually sought to repeal it or to switch the costs to the state budget. Benefits are paid from a Medical Security Trust Fund replenished by employer surcharge assessments, and employers tried at times to get some of the Trust Fund monies used so as to reduce their contributions for regular UI benefits; occasionally (usually in the dead of the night through the closely held state budget process) funds were diverted by the Legislature from the Trust Fund to other uses. But the program survived virtually intact for all these years, a testament to the perseverance of its supporters.

D. State Health Benefits for Immigrants

One of the reprehensible features of Congress's Welfare "Deform" Act of 1996 was the elimination of Medicaid coverage for immigrants, even those who were legally in this country. This left us in the states with a crisis and the immediate need to consider health care coverage from state funds. The advocates for this were led by MLRI's Pat Baker. Pat had earlier organized and led a statewide Food Stamp Improvement Coalition, and its members joined with immigrant rights groups to persuade the state to apply most state health care programs to immigrants. But as the state suffered a series of economic downturns (and consequent state budget shortfalls), this program was constantly among the first on the chopping block. There ensued periodic budget advocacy battles, as well as some litigation in a largely successful effort to keep most of the programs intact most of the time. But some of the temporary cutbacks in this program roller coaster caused many immigrants to lose health coverage and to fall back on hospital emergency room treatment when earlier treatment would have saved them much suffering and the state much money.

One major part of health coverage that the Legislature eliminated for immigrants was adult dental care. Health Law Advocates challenged this disparate treatment as a violation of the state Constitution and won a favorable decision in the Massachusetts Supreme Judicial Court in 2012. Vicky Pulos of MLRI submitted an amicus brief in that Court in support of the immigrants' position.

E. 2006 State Health Reform Law

The stars came together at last in Massachusetts for passage of a more comprehensive state law providing for health services for the many people without coverage. The key to this was that all the major stakeholders (medical facilities, physicians, health insurers, business, health law advocates, health coverage recipients, and elected officials) decided to negotiate a new law that would probably require each interest to compromise some of its positions. With that agreed principle, the negotiations worked. MLRI (through Neil Cronin and Vicky Pulos) represented the interests of the uncovered populations and were participants in the entire process. The new law passed in 2006, and gradually after that the new pieces were put in place and the state's uncovered population dwindled down to just a couple of percentage points. Vicky Pulos wrote an article for the *Clearinghouse Review*, a national legal services monthly publication, describing the development of the new Massachusetts law and pointing out the features of the law that might be helpful to advocates trying for the same thing in other states. The Massachusetts law became a model for the development of the federal Affordable Care Act of 2010.

I can't resist commenting about how one feature of the Massachusetts law became an issue in the 2012 Presidential campaign. Although representatives of Governor Mitt Romney participated in the discussions among the stakeholders developing the law, the only major feature that they suggested (and then insisted on) was the so-called individual mandate; that is, all persons must be a part of the state coverage plan or have their own

acceptable coverage, and if they do not they will be penalized through the state income tax system. This was a proposal from the playbook of the right wing, was developed by the Heritage Foundation, and was pushed hard by them for adoption by their sympathizers in the states. We had our doubts about the workability of this at first, because we feared that the state would not develop and follow standards for exemptions from the penalties where a family or individual could not afford to pay the premiums for a component offered. But we finally agreed not to object to it. So when the individual mandate was discussed and accepted in the Affordable Care Act, we were appalled (and even amused) that it was fiercely attacked by libertarian interests as, somehow, a great loss of individual freedom. We saw Romney bob and weave on this during his campaign for the 2012 Republican Presidential nomination before he finally settled on a position that he opposed the individual mandate as part of federal law but did not object to it as part of a state law. What else could he say in the right-wing land of Alice?

Since the passage of the 2006 state law, Neil and Vicky have spent much time looking out for the interests of poor people in the administration of it. Their activities have included successfully beating back proposals for co-pays and other charges to be assessed, assuring that the standards used for implementation of the individual mandate were not unfairly applied, and dealing with the lapses in coverage that occur when someone is switched from one component to another. They have also more recently been centrally involved in the state's compliance with the Affordable Care Act.

Chapter Fourteen

HOUSING AND COMMUNITY DEVELOPMENT

Housing is among the highest-priority legal needs of poor people. The dire need for safe and affordable housing is made much more critical because of the high cost of every type of housing (except in the cases of those fortunate enough to obtain public housing or housing whose rents are subsidized—whose supply is woefully short of the need) and the chronic and disgraceful shortfall of affordable housing units. Every legal services program has housing as a major area of activity because it is so important to stabilizing the lives of poor people.

Housing

MLRI early established housing as a major priority, especially in representing residents groups. For a time in the 1970s, MLRI did community development work, particularly in Boston's Southwest Corridor after the state abandoned a superhighway which was planned for that site. Here are the MLRI advocates who worked on these issues over the years, in order of their appearance.

- Alex Kovel was hired by Al Kramer in 1968 and worked mainly on housing issues. He had a flair for drafting, and was the main drafter of Chapter 40B, the anti-snob zoning law, which was passed by the Legislature in one session in 1969. I describe this in greater detail later in this chapter. Alex left MLRI in 1970 to work on environmental issues.
- Jeanne Charn did public housing advocacy at MLRI during the early 1970s, working in particular with the Massachusetts Union of Public Housing Tenants (Mass. Union). She left MLRI to help found the Harvard-supported Legal Services Center in Jamaica Plain with her late husband, the legendary Gary Bellow, and has held positions at the Center and at Harvard Law School ever since.
- Dan Pearlman was also at MLRI in the early 1970s, doing public and subsidized housing work, until he left in the mid-1970s to become a staff attorney at the National Housing Law Project, the national legal services back-up center in Berkeley, California (and then in Oakland), where he worked until his retirement several years ago.
- Dick Allen started his legal services career as a housing attorney at the Quincy Community Action Program in the early 1970s and joined MLRI soon thereafter. He left in the early 1980s to join Greater Boston Legal Services, then became Chief of the Charitable Division of the Massachusetts Attorney General's office for most of the 1980s and left there to join a Boston law firm, where he specializes in representing nonprofit organizations.
- Howard Cohen started in legal services as a housing attorney at the South Middlesex Opportunity Council in Framingham and joined MLRI thereafter, working mostly on subsidized housing issues. He left MLRI in

the late 1970s to join the Beacon Companies in Boston, developers and owners of subsidized housing, where he remains as a principal.

- Terry McLarney was another MLRI-supervised housing lawyer at a community action program, in Brockton, before coming to MLRI in the early 1970s to do housing work and to become MLRI's legislative director. He left MLRI in the mid-1980s to become a professor in the UMass-Boston community service program, where he continued until his recent retirement.
- Frank Smizik joined MLRI in the early 1980s after being a housing staff attorney at Neighborhood Legal Services in Pittsburgh. He left MLRI in the early 1990s to go into private law practice and was soon elected to the Massachusetts House of Representatives from Brookline, where he continues to serve.
- Charlie Harak was hired by MLRI in the late 1970s to do utilities work, which I have described previously in Chapter Five: Consumer Law. He was previously a staff member at MASSPIRG. Charlie also increasingly did housing work at MLRI. He left in the early 1990s and became a staff attorney at the National Consumer Law Center, where he is a national expert on utility law and has continued his important work in Massachusetts in that field.
- Hank Abrashkin came to MLRI in the early 1980s after being a staff attorney at Legal Services for Cape Cod & Islands. He continued at MLRI until he was appointed a judge of the Western Mass. Housing Court. He was there as Presiding Judge until the mid-2000s, when he resigned to become Executive Director of the Springfield Housing Authority.
- Annette Duke joined MLRI in the mid-1980s as a staff attorney doing housing work and directing MLRI's publications work. She continues at MLRI.
- Judith Liben became a housing attorney at MLRI in the late 1980s after working at Merrimack Valley Legal Services and being Chief Counsel at Cambridge and Somerville Legal Services. She continues at MLRI.
- Henry Korman started his career in legal services as a public benefits paralegal at Western Mass. Legal Services in Springfield. During the late 1970s he and I worked together to try to curb the abusive practices of the Bureau of Welfare Auditing (later named the Bureau of Special Investigations), which was independent of the Department of Public Welfare but spent most of its time hounding welfare mothers accused of fraud. Most had committed no fraud at all but had an overpayment caused by the agency itself. Henry and I collaborated at one point in trying to convince the Bureau to discipline an investigator named Sanborn, which we comically called "Chasin' Sanborn." Subsequently, while at law school, he wrote a long paper about the state's welfare fraud activities, recommending a complete overhaul of the system. After law school, he became a staff attorney at Western Mass. Legal Services. We hired Henry to do housing work. He focused some of his time on housing

for persons with disabilities. Henry left MLRI in the late 1990s but stayed in the housing field with organizations such as Community Builders.

- Amy Copperman was at MLRI as a housing attorney from her law school graduation in the early 2000s until she was laid off in 2010 as part of two rounds of layoffs which MLRI was forced to make as a result of the loss of more than one-third of its funding starting in 2008.

Community Development

- Elbert Bishop worked at MLRI for several years during the 1970s on community development issues before he relocated to Washington, D.C.
- Marcus Weiss succeeded Elbert on community development issues until he left MLRI in the early 1980s, when, because of funding cutbacks, MLRI ended its community development work in Boston.

No description of MLRI's housing resources would be complete without describing the housing lawyers who worked at community action programs in the early 1970s under MLRI's supervision. These arrangements came about because of the astute work of Paul Newman in the regional office of OEO Legal Services. At that time there were areas of Massachusetts that had no viable legal services program available. So Paul convinced OEO and the Executive Directors of some of the community action programs to make grants available to MLRI so that housing lawyers could be stationed in their program service territories. In addition to Dick Allen, Howard Cohen, and Terry McLarney, whose subsequent work at MLRI I have described above, these lawyers included: Meg Connolly in Brockton, who subsequently joined the Regional Office of the new Legal Services Corporation and for many years was the Executive Director of Volunteer Lawyers Project, from which position she retired in 2009; Maxa Berid, who worked in Lowell before establishing her own law practice there and who in the early years of the Mass. Legal Assistance Corporation was on its Board of Directors; Richard Forester in Fall River, before he relocated to Oregon and later became Executive Director of a legal services program there.

I can't resist the temptation to relate a vignette about the community action program in Brockton, Self-Help. I visited Meg Connolly there shortly after the housing lawyer program was first set up in that office. The program was located on several floors of a former warehouse building. On the floor where Meg had her "office," employees were crowded together in small cubicles with around 4-foot-high walls. Meg did not have enough room there to comfortably have anyone else in her office, and client confidentiality in that setting was difficult to observe. Meg suggested that I meet the Executive Director of the agency. We went to an upper floor and entered a huge room with only a desk for the Executive Director's secretary. We were then ushered into another huge and largely empty room with a very large desk with virtually nothing on it. The Executive Director introduced himself. He had a narrow face with a greying goatee. My immediate thought was that he looked like Leon Trotsky. But he hardly behaved like a man of the people. The conversation was brief.

I now turn to describe some of the major systemic housing and community development areas on which MLRI, along with other legal services advocates and their allies, worked over the years.

A. Private Housing

When we started, private housing rights were skewed almost entirely toward owners. Tenants had few rights and the courts, by and large, were eviction mills. The first major barrier was that the obligations of owners to keep their properties up to code were legally independent of the obligations of the tenants to pay rent. Boston Legal Assistance Project lawyers (mainly Joe Murphy) challenged that in the late 1960s, citing a groundbreaking District of Columbia Appeals Court decision in the *Javins* case that the common-law principle of independent covenants was changed because of the conditions regulating owner obligations that had been adopted. In the *Hemingway* decision (1973), our Supreme Judicial Court agreed with the D.C. court.

We got most of the changes in landlord-tenant law through bills passed by the state Legislature. Our strategy was to do this incrementally. The law was confusing enough as it was, but we decided not to offer a comprehensive rewrite because we feared that it would be a greater target for landlords to oppose it and water it down. Our strategy was reinforced by the nature of the potential opposition from landlords. The only owner organization with a real presence at the State House was the Greater Boston Real Estate Board. Terry McLarney, who did most of the lobbying on these bills, befriended the Real Estate Board's lobbyist, the connection eased, no doubt, by their shared Irish heritage. As Terry has related, he told the lobbyist that the bills we supported were aimed at slumlords, and of course his client did not have slumlords as members so they shouldn't worry about the bills. Terry also reached an understanding with the lobbyist that it was OK if Terry got these bills moved along while the lobbyist was on vacation.

What follows are the major improvements in the laws favoring tenants that were adopted in the state Legislature during this period in the early to mid-1970s.

- Incorporating the *Hemingway* decision on dependent covenants and making conditions violations a defense to eviction in certain circumstances.
- Establishing the right of tenants to abatement of rents (past and prospective) for conditions violations and that these violations can be a defense to an eviction.
- Prohibiting landlords from evicting tenants in retaliation for their reporting code violations.
- Establishing a self-help right to repair when a landlord fails to do so after notice, with the costs to be deducted from the rent.
- Prohibiting an eviction when the tenant's failure to pay rent is caused by delay in the tenant's receipt of public assistance.

- Regulating security deposits by requiring them to be placed by landlords into separate bank accounts, with interest.
- Including in each of these statutes the right of a tenant to file counterclaims in an eviction case (previously a tenant had to file an independent action in another court).
- Giving the District Courts equity powers in housing cases so they could issue injunctive relief, which they previously could not do.
- Providing with each of the rights, and more generally, that if a tenant prevailed in court, the tenant could recover reasonable attorney's fees from another party.

So, the upshot was that we created statutory landlord-tenant laws that were much more favorable to tenants (some owner interests claimed they were now totally skewed toward tenants—a good sign) than if we had decided to go the comprehensive rewrite route.

In subsequent years MLRI and legal services advocates continued to improve the landlord-tenant laws and procedures. Here are some of these efforts.

- A revised rent receivership law was adopted in 1993, authorizing a receiver of rental property placed in receivership because of uncorrected bad conditions to borrow funds to perform repairs, to keep the tenants in the units and to authorize a receiver to transfer the property to a nonprofit group that will own or manage the property.
- The community residents tenancy law, described in the chapter on Disability Law.
- Defeat of a perennial campaign by landlord interests in recent years to require tenants who claim unlawful conditions to escrow their rent payments, even before they get their hearing.

In the foreclosure crisis of recent years, legal services programs have been leading the way in trying to protect low-income homeowners from foreclosure and to protect innocent renters in properties under foreclosure from being evicted. The National Consumer Law Center has been a national and state leader in helping homeowners under threat of foreclosure and in changing the laws and practices which unfairly greased the way for foreclosures by lenders. Legal services programs in Massachusetts challenged some foreclosures because the plaintiff lacked documentation that it was the legal owner, and secured several court decisions that the plaintiffs could not go forward with the foreclosures until they secured that documentation. Of course, many could not do so because, with all the assignments and bundling of mortgage paper into different financial instruments as part of bank abuses, it was not easily possible for them to sort this out. Legal services also challenged the "robo-signing" of ownership claims-authorizing papers that grew into a national scandal.

Even with all these successful challenges, the magnitude of the problem was so great that it was not possible to rescue many of the foreclosed properties, especially since several rounds of federal programs designed to

help homeowners fell flat on their face (some believe that, given the tepid actions of the federal government, this was not accidental). More recently, Mass. Attorney General Martha Coakley secured millions of dollars from a national settlement of state claims against some of the banks, and she distributed several million dollars to Mass. Legal Assistance Corp. which, through NCLC, gave two-year grants to local legal services programs to provide legal representation to the owners of foreclosed homes.

The other important part of the foreclosure crisis was to protect tenants in properties being foreclosed by the banks or their assignees. In most cases the banks decided to evict the tenants because they believed (mistakenly, it turned out) that a vacant foreclosed property could be more profitably sold. MLRI early identified this population as needing special attention. The foreclosure figures began to show that significant percentages (some 25-50%) of foreclosed properties were occupied by tenants.

Judith Liben of MLRI jumped into the fray. She testified at a hearing of a Congressional committee headed by Mass. U.S. Representative Barney Frank on the need to protect innocent tenants. News about this and like issues spread across the country and Congress was persuaded to pass a new law to protect these tenants. State law changes were also needed, and because of MLRI's and others' advocacy (such as the GBLS staff, particularly Nadine Cohen, who were focusing on predatory lending practices), those changes were adopted. The same groups have proposed legislative changes in the one-sided Massachusetts foreclosure laws, which do not require court approval of a foreclosure except in limited circumstances. So, once again, what NCLC, MLRI, and other legal services programs have done here have been models for the entire country.

B. Public and Subsidized Housing

MLRI, from its beginnings, has had an important focus on public and subsidized housing. Massachusetts is still one of the few states that committed its own funds to build public housing, in addition to the state's federally funded public housing. In the early years, our efforts were focused on persuading the state and federal governments to finance the construction of new housing and to manage all of the units in the interests of and with the participation of the residents. But, shamefully, the federal government bailed out of funding construction of new housing in the 1980s (another baleful result of the Reagan presidency) and, although the state continued to fund new construction during the 1980s, it cut back or eliminated those programs in the 1990s under 16 years of Republican governors. As a result, much of the legal work since then has been to preserve existing units as much as possible.

1. Representing Residents

In the early 1970s, public housing residents came together to form the Massachusetts Union of Public Housing Tenants (Mass. Union). This group encouraged the formation of and provided assistance to local public housing groups and engaged in statewide advocacy. MLRI provided advice and

representation to the Mass. Union from the beginning of its existence and continues to do so still. One of Mass. Union's first priorities was to secure state regulations governing public housing. New regulations on leases and grievance procedures and on tenant participation were the major successes in the early 1970s. The Mass. Union and MLRI also succeeded in having a legislative cap placed on the percentage of income that could be paid to housing authorities for rent and utilities. This followed a similar cap for rents in federally funded public housing, adopted by Congress at the instigation of Massachusetts U.S. Senator Edward Brooke, thereby giving the law its popular name: the "Brooke Amendment." The state cap was referred to as the "Baby Brooke Amendment." Both continue to this day. Out of this work on public housing rent caps came the beginning of a long-standing relationship between the Mass. Union, MLRI, and Senator Brooke, which has continued in recent years as well. He has supported various public housing initiatives over the years and has appeared at functions with public housing residents. Quite a performance for a Republican. They certainly don't make them that way these days.

I also recognize and commend the Board members and staff of the Mass. Union with whom MLRI has had particularly close connections. The Mass. Union has appointed many of its members to the MLRI Board of Trustees. Thelma Rogers was the President of the MLRI Board for many years. Peggy Santos, active with the Mass. Union and with other community organizations over a long period of time, was also a longtime MLRI Board member before becoming a member of the Board of Directors of the Mass. Legal Assistance Corp. for some time. Bill King, President of the Fall River Residents Council, was also a member of MLRI's Board for several years. Mass. Union Board members such as the longtime Legislative Committee Chair, Susan Bonner, were effective advocates in the Legislature. And the Mass. Union has greatly benefited from having Jack Cooper as its long-serving Executive Director. Jack has helped keep the profile of the Mass. Union high and credible, has participated in many of its advocacy efforts, and has raised the funds necessary to keep the Mass. Union's programs going.

Annette Duke has had a particular flair for assisting residents groups. She has been the principal lawyer for the Mass. Union in recent years, but she has done similar work for other residents groups, as well. In the 1990s, for example, the Mass. Union joined together with leaders of public housing residents groups in other cities to form a national group to work principally on federal issues. The group met over several years with officials from the federal Department of Housing and Urban Development (HUD) and persuaded HUD to provide additional financial support to residents groups so they could more effectively negotiate with housing authorities over improvements in their housing. They also filed comments on proposed HUD regulations. Annette and Mass. Union leaders started a national residents' newsletter, called *Housing Matters*, with articles written by residents from all over the country. MLRI edited, printed, and distributed *Housing Matters*, sending it to many groups around the country. Unfortunately, the national

effort lapsed when some of the key national leaders became unavailable to carry on the work.

In recent years, MLRI and Annette have provided major support to Boston public housing residents in the formation of an umbrella group and to start building a Boston Resident Training Institute. The purpose of the BRTI is to train resident leaders who can participate in Boston Housing Authority decisions affecting the residents. The Boston Foundation has made annual grants to the Mass. Union, which have been used to hire staff and cover expenses of this effort. In turn, MLRI has assigned one of its AmeriCorps volunteers to work in part as staff on the residents work. In 2011, these groups, with GBLS and the BHA, initiated a new pilot called the Public Service Corps, to train residents to serve as organizers for other local residents organizations. The groups hope that this approach can be spread to other communities in Massachusetts.

2. Boston Housing Authority Receivership

The BHA was in such shambles in the late 1970s that Greater Boston Legal Services, which represented the city-wide tenants organization, petitioned the Boston Housing Court to place the BHA in receivership. A receiver was appointed under the oversight of Boston Housing Court Judge Paul Garrity (who started his legal career as a supervisor at Boston College Legal Assistance Bureau).

The residents council was concerned that the BHA and its receiver were not taking effective steps to deal with disruptive tenants, and so they asked Judge Garrity to adopt streamlined eviction procedures to accomplish this. GBLS represented the residents in this request, and Judge Garrity adopted truncated time frames and short-cut procedures for this, all inconsistent with the state's eviction laws. The first eviction case to come before Judge Garrity under these procedures was one in which Jamaica Plain attorney Art Johnson provided representation to the tenant. The tenant was evicted and Art appealed the case to the Supreme Judicial Court. In what was the only instance I can recall where legal services lawyers took opposing sides in a major court case, Art asked MLRI to consider filing an amicus brief in support of his client's position that the "quickie eviction" procedures (as we called them) were unlawful. MLRI consulted with members of the statewide legal services Housing Coalition and there was unanimous agreement that the programs should prepare and file a brief. Dick Allen of MLRI led the group that wrote the brief. The Supreme Judicial Court adopted our position that the usual eviction laws applied and that a receivership did not justify modifying those laws (*Spence v. Reeder* (1981)).

3. Section 8 Availability

When the federal government bailed out of funding new construction of affordable housing, it created and gradually expanded a rental assistance program called Section 8 for privately owned housing. This program enabled eligible low-income families to get vouchers for affordable rent payments through local housing authorities and then paid federal subsidies to the owners of private rental units to make up the difference between the rent

paid by the tenant and the fair market rent. Issues arose in Massachusetts about the geographic scope of the vouchers. We and our clients claimed that a voucher holder could use a voucher issued by one housing authority anywhere in the state (which would obviously make the vouchers much more usable), but some housing authorities took the position that they could be used only in the issuing community. MLRI brought a federal court action challenging this interpretation and won a favorable decision by U.S. District Court Judge William Young (yes, he is the same William Young who was the governor's Legal Counsel during the first front-end judicial nominating committee process which I described in the chapter on Court Reform) (the *Williams* case). After this ruling, Section 8 vouchers were portable throughout the entire state. Judith Liben of MLRI represented the voucher holders.

A second issue that arose in the administration of Section 8 vouchers was that the need greatly exceeded the supply of available private housing units. Except for some regional programs that covered only around 25% of the vouchers, each local housing authority was given a federal allocation of vouchers and established its own waiting list. We had urged HUD and the state agency, the Department of Housing and Community Development (DHCD) to establish centralized (or at least regional) lists for the rest of the vouchers, but they declined to move forward with this commonsense and easily established system.

We and housing advocates learned that the Fall River Housing Authority had restricted those on its waiting lists to those who waited in line for a one-time opening for the submission of applications. It allowed no applications to be filed in any other way or at any other time. So MLRI, led by Annette Duke, retained the services of a video camera operator and went to Fall River to find out what happened when the doors opened for applications at 7:00 one morning. They found long lines of people who had been waiting all night and filmed both the event and people's comments about it. They then produced the video, called *The End of the Line*, and you can see it for yourself on MLRI's website, www.mlri.org. We immediately circulated and showed the video to DHCD and the media. The state relented and issued guidelines that permitted applications to be filed at any time before a stated deadline, in person or by other means, and required persons to be selected from the list by lottery. But the state has yet to figure out a way to allow a centralized application system and selection process so that applicants can avoid having to submit a separate application to each local housing authority in each place where they may want to live.

Another Section 8 issue arose in eight suburban towns around Brockton that wanted to apply a local residency preference to Section 8. In other words, they wanted to select first the applicants who already lived in their towns. Demographic information showed that the populations of the eight towns were overwhelmingly white, but the population of nearby Brockton was more than 30% persons of color. So MLRI filed a federal court action against the eight towns, saying that this use of a residency preference disparately affected people of color and violated the towns' federal duty to

affirmatively further fair housing. Judith Liben and Amy Copperman represented the plaintiffs, and secured a groundbreaking favorable decision from U.S. District Court Judge Nancy Gertner.

The defendants appealed to the First Circuit Court of Appeals. We and others in the housing and civil rights fields feared a reversal by the First Circuit, so, in return for our agreement to waive our claim for attorney's fees, the defendants agreed to withdraw their appeal. We were truly unhappy to waive the fees claim, but that was one of those cases (rare, I hope) when it was better to protect the favorable decision for the plaintiffs. Afterward, the state agency, DHCD, applied the decision statewide by issuing guidelines for housing authorities, which were drafted by former MLRI housing lawyer Henry Korman. Henry also drafted a guidebook on this subject, which DHCD also distributed to housing authorities. Massachusetts, I believe, was the first state to adopt nondiscriminatory rules on the uses of residency preferences and may still be the only state with this kind of system in place.

4. Preserving Public Housing

The backlash against government-funded affordable housing, started in the Reagan Administration and spreading to Massachusetts because of state budget crunches, soon morphed to threats of eliminating existing housing. MLRI and the Mass. Union were centrally involved in many successful efforts to save public housing, and GBLS and other allies worked, largely successfully, in preserving subsidized housing with time-limited use restrictions that started coming to an end in the early 1990s.

The first initiative to protect against the loss of state-funded public housing units took place in 1984. The public housing statute had several loopholes that appeared to allow housing authorities to eliminate public housing units even though they remained viable, and did not require one-for-one replacement. MLRI and the Mass. Union drafted and secured passage of amendments that largely filled those gaps. This legislation has become crucial in more recent years, as some cities and towns have initiated efforts to demolish public housing.

Two such efforts were launched in the early 2000s, by the cities of Lowell and Fall River. MLRI and the Mass. Union decided it was crucial for us to intervene and try to stop or divert these efforts. Both were started by those cities' filing home rule legislative bills countermanding state law and enabling them to proceed with their plans. We tried to get the bills defeated, but legislators are typically reluctant to oppose home rule petitions when local officials want something special like this, and so the bills became law.

Lowell – The City wanted to demolish 240 units of family public housing built in townhouse style and still viable but in need of repairs which the City had neglected to pursue (deliberately, we thought) for many years. The residents were nearly all people of color, and many Spanish-speaking. The general area in which the development was located was underdeveloped and was the site of a City plan to redevelop it mostly for commercial purposes. Added to the mix was that parts of the land in the area were owned by private interests that were influential with the City. The primary actor here

was the City's major newspaper, the *Lowell Sun*, which owned a large parcel there and was a strident supporter of the demolition of the public housing.

Judith Liben and Amy Copperman of MLRI brought suit against the City of Lowell and its housing agencies and officials, and tried to convince a Superior Court judge to order the demolition stopped. This failed because, the judge concluded, the existence of the new home rule law made it unlikely that the plaintiffs would win on the merits of their claim. So we turned our attention to helping the residents who were displaced to find equivalent housing elsewhere. There then ensued a long period of advocacy with Lowell and the state agency, DHCD, about the process for helping residents find alternate housing and compensating them for their expenses of relocation. The rights to relocation assistance and compensation were present in other state laws, and were not precluded by the special law. DHCD made available some state funds to address both aspects of the needs of the residents. We entered into long negotiations over the expense reimbursements, and finally secured an agreement that each resident would be paid $4,000, plus a greater amount if they could show greater expenses. Because we had little confidence that Lowell would handle these payments correctly, we monitored this closely and intervened when we thought things were not going right.

Another, and more difficult, issue was whether Lowell had complied with its obligation to help the residents find equivalent housing elsewhere. The City administered the first round of this through Housing Authority staff, and we soon began to hear complaints about people not being helped at all or being helped inadequately. Many residents relocated to a section of the city that contained deteriorating housing. So, we initiated negotiations again with the City and DHCD, taking the position that they should locate all the residents and start the process again. Initially, we got no favorable response. At this point, we got volunteer help from the Boston law firm of Foley, Hoag and Eliot to represent the plaintiffs at a trial if that was necessary. Foley also organized the information we had requested through discovery, which uncovered a sorry pattern of inattention and incompetence by the City. As we prepared to go to trial, the dam broke and both the City and DHCD agreed to our requests. DHCD made available funds to hire an independent person to help residents not satisfied with their new housing, MLRI helped select the new person, and Sandra Quiles, a technology staff member at MLRI who spoke Spanish, did the legwork of seeking out and interviewing the residents so they could decide whether they were satisfied with their new housing or wanted a better place to live. MLRI then worked with and oversaw the new relocation counseling process. As a consequence of this, more than 100 of the families were helped to move to better housing.

The last chapter was our insistence that the plaintiffs recover attorney's fees for their success on the relocation claims. A judgment for attorney's fees was negotiated when the state agreed to pay most of the amount. A final follow-up to this disgraceful but ultimately uplifting episode was to document what happened and, particularly, to show how much it really cost Lowell and the state to demolish this viable public housing. This MLRI did in an informal report, which we gave to DHCD and had available if needed in

the future. Our thought was that if a municipality understands how much it is likely to cost it in doing the relocation in accordance with the law, it will be much less likely to be gung ho about destroying public housing. With the exception of Fall River (described below), which had initiated its demolition proposal before the Lowell case was resolved, this has fortunately proved to be the case, as there have been no more demolition proposals made to the Legislature so far as I know.

Fall River – This City initiated its home rule petition, shortly after the Lowell petition was approved, to demolish around 100 units of townhouse family public housing units that had been built in an isolated part of the city but which the City was eyeing for commercial development. As in Lowell, Fall River had refused to make repairs for many years, and had recently refused state funds offered to it to make these repairs. We tried to persuade the Legislature not to adopt the petition, but it passed it nevertheless. MLRI then filed a federal court action to stop the demolition and/or to provide one-for-one replacement of those units elsewhere. We drew a judge who proved to be unsympathetic to the plaintiffs' needs. At one point, we asked him to order at least that repairs be made, but that was rejected. We then asked DHCD to use its oversight authority over public housing authorities to force Fall River to make repairs, but DHCD waffled. Finally, some repairs were made of a kind to address emergency conditions. So, concluding that we were not likely to succeed in preventing demolition, we turned to trying to secure alternate housing for the displaced residents. There were long negotiations over this, in which the City proposed housing that was not really new because it already independently had plans to build it, and other housing that would take many years to materialize. Finally, we reached an agreement with the City for relocating residents, which will be implemented over several years.

A final preservation effort in which MLRI and its allies have been involved for many years concerns the state's rental assistance program. Initiated in the 1980s, it remains one of only a few such state programs in the country. It has been structured similarly to the Section 8 program. But its funding has been subject to some relentless opposition at times and to legislative inattention at others. So it has become a perennial budget battle to keep it alive and to preserve or to increase its funding level. I have described this in some detail in Chapter Four: State Budget Advocacy. Even in these dire times for publicly funded programs, the state rental assistance program is still alive but only at a fraction of the funding that is needed.

5. Preserving Subsidized Housing

Much of the subsidized affordable housing has been built and owned by private parties. In return for government funding and other benefits, they have agreed to restrictions on the sale of the housing without preserving the subsidized units. In the early years, the time periods of those restrictions were limited, such as 20 or 30 years. When those periods expired, the owner could deal with the housing free of the restrictions and, unless something was done, the subsidized units would be lost. In subsequent years, when the legality of longer restrictions was cleared away by passage of a new state law,

most of the restrictions have been perpetual, or at least for much longer periods of time than before.

The end of the restrictions in Massachusetts subsidized housing began to arrive in the 1990s, and these "expiring use restrictions," as they have been called, created crises for the residents and for public agencies that wanted the affordable units to continue. Advocates for the residents found all sorts of ways to cause the restrictions to continue. Some owners have been willing to continue the restrictions in return for new rental assistance payments. Others have been willing to sell the housing to another owner, such as a nonprofit, which is willing to continue the subsidized units. Many of the affordable units in expiring use properties in Massachusetts were continued in this way. But if an owner decided not to cooperate, there was little protection for the residents. At times, Congress and the state adopted measures to put more pressure on owners to agree to the preservation of the affordable units, and these helped in many more cases. But not until 2009 did Massachusetts have a law that more comprehensively addressed this need. Thanks to the continuing work of advocates at GBLS and other housing lawyers, such a law was finally adopted.

MLRI was involved in a preservation case, representing the residents of some housing in Cambridge, through Charlie Harak. Charlie brought a lawsuit against an owner who started harassing the residents in the hope that they would move out. Charlie helped the residents negotiate a resolution through which they became owners of the housing. Other legal services advocates were active across the state in achieving similar preservation outcomes.

C. Other Housing Advocacy

1. Promoting the Acceptance of New Affordable Housing

Historically, there have been many barriers to new affordable housing, but the biggest obstacle has been the practice of cities and towns (especially in communities just outside of the cities) to enact zoning barriers. Some of these laws prohibited the construction of multiple-unit housing at all, and others created minimum lot sizes for housing, such as one or two acres, so as to make it infeasible to build affordable housing. In the late 1960s, the Legislature funded a report on this subject, and in 1968 the report was issued. It documented the exclusionary practices, gave statistics on the appalling lack of affordable housing (even public housing) in many suburban communities just outside the cities, and on the racial disparities among residents of these communities.

In the 1969 session, the Legislature decided to take this on. It had created a new Joint Committee on Urban Affairs, chaired by State Senator Joseph Moakley (subsequently a member of Congress for many years) and with membership of urban and suburban members who favored taking some action. In those years, there were liberal Republicans, long since an extinct species, and two of them on the Urban Affairs Committee, Marty Linsky of Brookline and Bruce Zeiser of Wellesley, were strong proponents of

legislative action. House Speaker David Bartley made this one of his top priorities, and he assigned one of his staff members, John Eller, to work with the Committee on it.

The Committee asked MLRI to help with the drafting of the new law. Alex Kovel was the principal drafter, and I worked with Alex and the Committee throughout the entire process. The big question was what to propose, for there was no precedent for this kind of state law. So Alex and I made it up. The first major change needed was to clear away all of the local approvals needed for a zoning change and provide that final local approval for a low- and moderate-income housing proposal must be given by one local board, the zoning appeals board, with all other local agencies to submit their opinions to the board at one hearing. The second essential change was to permit local zoning boards to override local zoning if the conditions of the statute are otherwise satisfied, and to allow the developer to appeal a denial (or an approval with unreasonable conditions) to a newly established Housing Appeals Committee, within the Department of Community Affairs, which could reverse the decision of the zoning board. Third, we had to develop standards for a local decision, the principal one of which was that if a housing proposal was consistent with local needs (both needs for affordable housing in the region and planning factors), it could not be denied unless the conditions imposed by the local decision made the housing development uneconomical.

The proponents then proceeded to try to convince the Legislature to pass the Committee's bill. MLRI made the proposal a major legislative priority, and we retained three experienced community activists to lobby it through. These were Dolores Mitchell (who subsequently became the Chief of Staff for Governor Michael Dukakis and has been the longtime Executive Director of the state's Group Insurance Commission), Ellen Feingold (who was a principal in several housing and service organizations for many years), and Helene Levine. They formed a group called the Committee for Better Communities, which was the name through which the advocacy was carried out, and accumulated many supporters for the bill.

The bill passed in the 1969 session, but not without some close calls. Some urban legislators supported the bill because they were still smarting over a legislatively approved Racial Imbalance Law passed in 1965, which excluded restrictive suburbs from its coverage of cities. The margins of some of the votes were by one or two votes. But the bill finally did pass and was signed by Governor Frank Sargent (another Liberal Republican). I then worked with the Department of Community Affairs on their regulations under the new law and on the organization of the Housing Appeals Committee and its regulations. The new law was challenged by the Town of Hanover, but in 1973 the Supreme Judicial Court upheld the law (citing an article I had written about its adoption in the 1971 *Boston College Annual Survey of Law)*. The Housing Appeals Committee was strong on upholding the law, and for many years it has been headed by Werner Lohe, who was previously a staff member in the regional office of the Legal Services Corporation.

I'm not sure that even Massachusetts would have adopted Chapter 774 (the session law number, or "Chapter 40B," as it is now popularly called) in any other year, and it remains the only state law of its kind in the U.S. With permits issued under the law, at least 60,000 new housing units have been built. In recent years, a large percentage of new affordable housing units (some 75% to 85%) in the state have been built through Chapter 40B permits. Every year after its passage, there were many legislative bills to repeal or gut the statute. We and our allies took the position that we would oppose these bills and not engage in any negotiation over possible changes in it, for fear that, even if a bill with agreed amendments went to the floor, the chances were good that the Legislature would at least water the law down considerably. Proponents of Chapter 40B have maintained that position to date, and when a group of opponents got enough signatures to get a repeal referendum on the ballot for the 2010 election, supporters organized opposition effectively and the voters turned down the referendum by a 60% to 40% margin.

But there was one problem with the law that looked as if it might need a legislative solution. The statute requires local approval only of affordable housing subsidized by the federal or state government. In those days, there was no local funding for that kind of housing, because most cities and towns opposed affordable housing and it was before the start of the federal funding streams that go to cities and towns for their decisions on their use. In the late 1980s, under pressure from opponents who cited some possible overreaching and bullying by some developers, the Legislature created a commission to study the issues and to recommend curative legislation if needed. Fortunately, the commission was headed by Rep. Augie Grace (a Democrat from a suburb, Burlington). Grace and his commission came up with some inventive solutions to dealing with this and other issues without the need to amend Chapter 40B. They suggested that the state agency, DHCD, develop a program of review and technical assistance to plans when local funding is the only source for the subsidized units, and call this assistance a state subsidy under the statute. DHCD accepted this and created the Local Initiative Program for housing funded locally. As state and federal subsidies dried up, local and private funding became the only resource available for a large number of affordable housing proposals. The LIP program continues to this day, and it has not been successfully challenged.

On December 10, 1999, on the 30th anniversary of the approval of Chapter 40B, Western New England College of Law in Springfield held a day-long conference, organized by law professor Sam Stonefield (a former staff attorney at Western Mass. Legal Services in Springfield), to review what had happened under Chapter 40B and under somewhat similar approaches established in Connecticut, Rhode Island, and New Jersey. The keynote speaker was Professor Florence Roisman, of the Indiana University School of Law, and before that at the Washington office of the National Housing Law Project. Florence has been a longtime intellectual leader in the fair housing and civil rights field and a strong critic of decisions of the U.S. Supreme

Court and other federal courts cutting back on the rights created by those laws. At the luncheon that day, the School of Law recognized those who were instrumental in the passage of Chapter 40B in 1969, including Alex Kovel and myself of MLRI. In 2001, the *Western New England Law Review* published the papers prepared for that conference in Volume 22, Issue 2, and in Volume 23, Issue 1.

I note one other example of MLRI's involvement in helping in the creation and implementation of new affordable housing programs. In the early 1980s, condominium developments became popular, helped by comprehensive laws passed at the time (in which MLRI's Frank Smizik was able to get some protections for owners and renters). In some cases, these developments need state funding to make them financially viable. The state decided to make funding specially available if a developer would agree to make at least 25% of the units available to lower-income first-time homebuyers. I saw this as an opportunity to get some of these units for lower-income renters, so I proposed, and DHCD approved, a requirement that the condo developers sell at least 10% of the units to local housing authorities, which would use them for lower-income family rentals. Several years after this program started, I was told by DHCD that 500 family rental units were created statewide as part of this Homeowners Opportunity Program (called HOP). But at the end of the 1980s the HOP funding was terminated as part of general cutbacks of the state's housing programs in the budget crisis of that time.

2. Housing Courts

Before 1971, all eviction cases and many other housing cases in the state were handled by the District Courts. There were 72 of them, many of them small and presided over by part-time judges who were able to carry on their law practices during the rest of their time (or sometimes even when they were at court). Most judges had little or no knowledge of housing conditions or even of housing law, nor did these courts have any specialist staff to work on housing matters. The result, predictably, was that most courts rubber-stamped landlord requests for eviction and other relief.

One way to improve the fairness of decisions in housing cases was to create specialized Housing Courts with judges and other staff trained to handle these cases. Reformers started in Boston, and in 1971 the Legislature created the Boston Housing Court, with housing specialists to help resolve cases and with judges with housing experience appointed to those positions. Paul Garrity, previously a clinical law professor at Boston College Law School, was the first judge in Boston Housing Court. Other local officials and advocates wanted Housing Courts in their regions, and so over a number of years new Housing Courts were established and expanded to cover most of the rest of the state.

MLRI and local legal services programs were prominent in leading these efforts, as local support was the key in advancing these proposals. And so, over the years, lawyers with legal services experience were appointed judges in these courts: Herman Smith, a staff attorney in the Regional Office of the Legal Services Corporation, to the Boston Housing Court; Pat King, an

attorney at Greater Boston Legal Services, to the Boston Housing Court; David Kerman, Executive Director of Neighborhood Legal Services in Lynn, to the Northeast Housing Court; Hank Abrashkin, staff attorney at Legal Services for Cape Cod & Islands and at MLRI, to the Western Mass. Housing Court; Rob Fields, staff attorney at Neighborhood Legal Services and the Clerk at the Western Mass. Housing Court, to the Western Mass. Housing Court; and Dina Fein, a legal services attorney in Connecticut before she moved to Massachusetts, to the Western Mass. Housing Court. Also, Fairlee Dalton, a staff attorney at Neighborhood Legal Services, was appointed the Clerk of the Northeast Housing Court. I and several others worked behind the scenes to promote some of these appointments.

As a result, the Housing Courts have been a much fairer forum for poor people than were the District Courts. More recently, the state's Access to Justice Commission appointed a committee, headed by Springfield lawyer Joel Feldman (who worked for me at MLRI while a law student and was at Western Mass. Legal Services before forming his own law firm) and MLRI Executive Director Georgia Katsoulomitis, which reported widespread support, including from landlord representatives, for expansion of Housing Courts to the rest of the state. The AJC has voted to support the expansion.

3. Homelessness

Representing the homeless has been a major priority of legal services programs and MLRI for many years. It is an important staple of every local program, and some programs, such as GBLS, have devoted many resources to it. Things have been less worse for the homeless at times because of these resources and the establishment of better temporary housing and social services programs, but cutbacks in government programs and the miserable economy have again swelled the ranks of the homeless, particularly parents with children. Because most of MLRI's long-standing efforts have taken place with public benefits programs, I describe this in more depth in Chapter 17: Public Benefits.

4. Trying to Establish a Right to Housing

Although the Universal Declaration of Human Rights and the constitutions of such nations as South Africa establish a right to housing, no such principle has gained traction in this country. There were two efforts to do this in Massachusetts. One failed, and the second, although it succeeded in part, has not been translated directly into any effective right to housing.

A group of advocates drafted a Massachusetts constitutional right to housing proposal in the early 1980s. Frank Smizik of MLRI provided legal advice. The group, staffed by several people who were temporarily located at MLRI, then recruited volunteers to get signatures. There was opposition to the proposal from influential sources. The *Boston Globe* editorialized against it, saying, among other things, that the language of the proposal was "inelegant." Unfortunately, the group was unable to secure enough signatures, and so the campaign failed, never to be revived since then.

The second effort was a lawsuit engineered by Barbara Sard of GBLS and Judith Liben of MLRI, claiming that a state welfare statute saying that since one of the purposes of the state's family cash assistance program was to enable families to raise their children in their own homes, this established a kind of right to housing. *Mass. Coalition for the Homeless v. Johnston* (Phil Johnston, the defendant, who was the state Secretary of Human Services, was a strong supporter of our position and a good friend of MLRI for many years) was decided in 1987 by the Mass. Supreme Judicial Court in an opinion written by Justice Herbert Wilkins. Although the Court agreed with our interpretation, it observed that a court had no authority because of the constitutionally based separation of powers of the three major branches of government to order the Legislature to appropriate sufficient funds to carry out the statute.

There was one more inventive proposal to establish a more broad-based right of poor people to assistance from the state, although it focused mainly on the right to financial support. The leaders of the Coalition for Basic Human Needs, whom MLRI represented for many years on statewide issues, suggested to us that the Universal Declaration of Human Rights established the right to benefits, housing, employment, and other essentials for basic living and asked us to bring a lawsuit based on these rights. We privately rolled our eyes and explained that a lawsuit like that would surely lose and that we and they should concentrate on other issues that had more promise of success. But the CBHN members were well ahead of their time. In recent years some courts, including the U.S. Supreme Court, have cited the Universal Declaration and other international standards as something our courts can and should take into account in interpreting our own Constitution and other laws. This does not mean that these international rights, by themselves, create the same rights here, but this new interpretive doctrine shows some promise that our laws will edge toward applying the same standards in the U.S.

D. Community Development Activities

From the beginnings of legal services programs, one of the areas of legal representation encouraged by our funders was to participate in helping low-income communities develop their resources. A national support center, the National Economic Development and Law Center, was set up in Oakland, California, to provide training and support in this field. Massachusetts legal services programs have not done much of this work, but MLRI has been involved in several activities which can be characterized as community development.

The first opportunity was created by the state's cancellation of urban superhighways that were planned for sections of Cambridge and Boston in the early 1970s. The most prominent of these was the Southwest Corridor, from Boston through Jamaica Plain, which had been mostly cleared for a highway by the time that the Frank Sargent Administration, to its great credit, pulled the plug on these roadways in 1971. The Administration was persuaded to do this because of an impressive campaign by urban and

transportation experts that pointed out the destructive consequences of these highways, which demolished largely low-income communities so that wealthier citizens could more easily get into and out of the cities of Boston and Cambridge.

Community groups asked MLRI to bring a lawsuit against the construction of Route 93 into Boston from the north. The new road was planned to go a stone's throw from the Mystic public housing development and rows of older three-deckers in Somerville, and would destroy several streets of three-deckers, as well. Mel Zarr handled the case for MLRI. We took the position that the recently passed federal Environmental Protection Act applied retroactively to projects like this, and that the proposal needed a more thorough environmental impact report before it could go forward.

We went before U.S. District Court Judge Frank Murray to ask for an injunction to stop the construction. By the time the request was heard by the judge, the contractors were working day and night on the demolition. The judge decided the project was too far along to justify stopping it, and also suggested that the EPA was not retroactive so would not apply to this project. (Several years later the U.S. Supreme Court decided that the EPA was retroactive for cases like this.) After consulting with our clients, they and we decided not to pursue the case. So the road was built and, contrary to predictions, it did not reduce traffic in and around Boston. When I drive down Route 93 to go into Boston or to the Orange Line at Sullivan Square, I sometimes wonder if the traffic in and around Boston would have been lighter if the road had not been built.

After the cancellation of the Southwest Corridor highway, a Southwest Corridor Coalition was formed to participate in the state's plan to redirect the Orange Line through the Corridor and to plan the transit stations and adjacent development on the Corridor, which presented a big opportunity for low-income neighborhoods to reshape their infrastructure. The Coalition asked MLRI to provide legal help, and we hired Elbert Bishop, a recent law school and urban planning graduate, to do the work. Elbert did so for several years until he relocated to Washington, D.C.; Marc Weiss then continued the work until the early 1980s, when we had to drop that position because of a large cut in our federal funding.

The legal work consisted of analyzing the ways in which state and federal laws affected the construction and land use proposals and helping to shape proposals by the Coalition for employment of local residents on Corridor projects funded by the government. We worked closely on these issues with community leaders such as Mel King and Chuck Turner and with the planners hired by the Coalition. So, the Orange Line was relocated, the transit stations were located at the best spots, and development plans were prepared for the areas surrounding each station. Local resident hiring plans were put into effect which made many jobs available to local residents, who were largely people of color.

Another community development opportunity came our way when the city and state proposed to demolish residential neighborhoods close to Boston's

Copley Square so that developers could construct luxury hotels and stores in the new Copley Place project. MLRI was asked to intervene to see if anything could be done legally about this. Frank Smizik filed a federal court lawsuit to stop the demolition, claiming that the project violated federal housing and civil rights laws. He obtained a First Circuit Court of Appeals decision saying that we had viable claims. The City then engaged in negotiations with community leaders and agreed to fund a low-income housing community at an adjacent site called Tent City (where protesters of the demolition had camped). The case was settled and the Villa Victoria, a low-income housing community, was built.

A similar situation arose in Holyoke. The City had for years engaged in overly zealous housing and building code enforcement in low-income neighborhoods downtown, causing the demolition of many of these units. In Holyoke, as in many mill towns, the housing location was stratified by income, so that the mill workers and poor people lived downtown near the mills, the middle-income people lived outside of downtown up the hills to the west, and the mill owners and executives had their large homes on top of the hills. The City was not too bashful about hinting that they wanted to clear out the poor people (particularly Latinos) from downtown so it could attract commercial development and higher-cost housing there.

Rick Glassman of Western Mass. Legal Services in Holyoke represented several Latino groups in Holyoke that wanted to challenge the City. Rick consulted with Frank Smizik and they decided to launch a federal court lawsuit claiming that, because Holyoke was using federal money in its demolition activities, it violated federal civil rights laws. There then ensued over many years a series of discovery requests, depositions, and motions. MLRI retained the volunteer legal services of Jim Marcellino, an experienced Boston trial lawyer, to be the lead lawyer for the plaintiffs. The federal Department of Housing and Urban Development was a defendant in the case because of its failure to enforce federal law, and during the Reagan and (George H.W.) Bush administrations (1981-1993) showed no interest in resolving the case. When Bill Clinton became President in 1992, things changed. The parties negotiated a settlement placing curbs on the City's more egregious code enforcement activities and funding new low-income housing in Holyoke with additional federal money.

The last area of development activity has involved a federal requirement called Section 3, a part of the federal housing law that requires all developers of federally funded construction projects to provide employment opportunities for low-income people, particularly those who live near the construction. This is a potentially powerful handle for securing more jobs for poor people and for people of color, but HUD has shown little interest over the years in giving it real meaning. Legal services advocates in certain places have achieved some results through aggressive and persistent advocacy, particularly in cooperation with community groups. MLRI and other legal services programs have cooperated from time to time in learning more about Section 3's potential and trying to identify likely opportunities. These efforts were led for several years by Amy Copperman of MLRI and are currently

handled by Annette Duke, who has tied this to MLRI's assistance to public housing residents groups.

Chapter Fifteen

IMMIGRATION LAW

Legal services immigration law capacity in Massachusetts was comparatively late in developing in a widespread way. For many years, Greater Boston Legal Services, Community Legal Services and Counseling Center, some of the law school programs, lawyers in small immigration groups, and lawyers in private practice provided most of the representation statewide. Most immigrants in need of immigration law help lived in and around Boston. There were large populations of Latinos around the state, but many (such as those relocating from Puerto Rico) were already citizens.

Meanwhile, there was much legal activity nationally, and what was achieved against all odds was one of the brightest chapters of legal services' and other advocates' successes ever. The immigration laws themselves were broken, and there was little chance that Congress could be persuaded to recast them or that the national administrations of Reagan and Bush I would approve favorable changes. So, the lawyers set out to open up avenues for people who had come to the U.S. without lawful entry to stay here under temporary status and to be in a position to succeed in their claims for asylum. These lawyers faced implacable opposition from the federal government because the upshot of these claims was that immigrants had a justified fear of returning to their home countries and the dictatorships there whose activities were supported (sometimes publicly and oftentimes secretly—as in training people who killed their opponents) by the U.S. government.

The lawyers, through litigation and sometimes through congressional budget riders—one of which's major supporters was Massachusetts U.S. Representative Joseph Moakley—built up legally recognized grounds for asylum and Temporary Protected Status, which enabled people who had fled to the U.S. from such countries as Nicaragua, El Salvador, Guatemala, Honduras, and Haiti, and were awaiting action on their claims for asylum, to have work authorization. Meanwhile, refugees from so-called "communist" countries, such as Cuba, were automatically given asylum here. Cuban refugees came here in large numbers; many settled in Florida, and most joined right-wing groups and supported right-wing candidates for elective office. Of course, that meant even more that asylum was supported for those with right-wing political tendencies and opposed for those who might not be on that end of the political spectrum. Right-wing groups also opposed any paths to legalization by demonizing these proposals as "amnesty." They did not mention that they supported amnesty for people from Cuba, and also for high-income people who had not paid their taxes. Ah, the wonders of hypocrisy!

Starting in the late 1980s, undocumented immigrants settled across Massachusetts, and so there was an increasing need for lawyers in outlying areas of the state. With the help of those already in the field, the local legal

services programs started to build up their own immigration law capacities, which were not only needed for immigration law representation but also for representation on other legal issues which were affected by immigration law or immigration status. In the late 1980s, MLRI decided to create a new immigration lawyer position, and we were very fortunate to be able to hire Iris Gomez. Iris had spent a number of years practicing immigration law at Greater Boston Legal Services and had taught a course on immigration law at Boston University School of Law. Iris started work at MLRI in 1991 and she is still there. She is not only an astute and versatile advocate, but in her spare time she is a published author of a book of poetry and a novel.

Iris started and administered a statewide Immigration Coalition of lawyers from all sectors, which distributed written materials, met periodically to discuss major issues, and collaborated in advocacy efforts. Over the years, other lawyers and law students at MLRI participated in immigration advocacy. In the early 2000s, MLRI created another immigration lawyer position, which was filled by Virginia Benzan until MLRI was forced to eliminate the position in 2011 because of funding cutbacks.

Iris also played an important role for immigration advocacy nationally. She was a longtime Board member of the National Immigration Law Center in Los Angeles, one of the national advocacy centers, its Board President for several years, and its Temporary Executive Director for a period during which the Center was seeking a permanent Executive Director, all from her base in Boston. The Center hired as its new Executive Director in the early 2000s Marielena Hincapie, who worked at MLRI with Iris as a law student. Marielena continues to lead the Center in its very effective national legal work.

It is not feasible for me even to summarize all the major immigration law work that MLRI and other Massachusetts immigration advocates have done over the years, but here is a sample of it.

- In the early 1990s, the federal government established some restrictive work authorization policies that affected particular groups of immigrants. One group was Salvadoran and other youths under the age of 14 who wished to work during the summer or part-time during the school year. A second group was recently arrived immigrants from Haiti or other countries who were met with overly restrictive identification documentation requirements when they sought work authorization. Working with other advocacy groups, MLRI got legal clearance and negotiated new policies to ease the way for work authorization.
- In 2005, MLRI was a major player in two successful federal court lawsuits. In *Succar v. Ashcroft*, the First Circuit Court of Appeals declared invalid a federal regulation that denied permanent residence to certain spouses and close relatives of U.S. citizens. The appeal was handled by a lawyer in private practice. MLRI did research and helped draft the briefs in this and two other cases that raised the same issue. MLRI then joined with the American Immigration Law Foundation in an amicus brief in the First Circuit in the *Succar* case.

- Also in 2005, in the *Ngwanyia v. Gonzalez* case, MLRI was co-counsel in a nationwide class action in the U.S. District Court in Minnesota challenging the long delays by the feds on claims for asylum and on Temporary Protected Status claims by those awaiting decisions on their asylum claims. More than 160,000 immigrants nationwide were affected. In 2005 the plaintiffs won summary judgment in the U.S. District Court, and the feds appealed to the 8th Circuit Court of Appeals. The case was then settled and the appeal was dismissed. The settlement benefited some 31,000 green card holders whose claims were in the pipeline and established multiple-year employment authorizations rather than the one-year authorization that had been a major cause of the backlog.
- MLRI and the MIRA (Masachusetts Immigrant and Refugee Advocacy) Coalition identified during the early 2000s a priority to change the practices on access by low-income, high-achieving immigrant youth to affordable higher education in Massachusetts. Strangely, youths who were undocumented were charged the much higher fees at state higher educational institutions that were charged to nonresidents of the state, presumably because of the Alice-in-Wonderland logic that, since they were undocumented, they didn't really reside here. This was a common practice across the country. MLRI and MIRA approached the state government and some of the higher education institutions to try to change this policy, which was not required by statute. They got some concessions, such as access to certain scholarships, but the state government refused to accept MLRI's analysis that the practice was illegal. We then drafted a bill for the state Legislature. At first, the Legislature passed the bill, but it was vetoed by the governor. The next year, after long debate in the House of Representatives, it was defeated several times by narrow margins. The opposition was led by some Democrats who claimed that, since the immigrants were "illegal," they should not be awarded these benefits. Other spineless Democrats refused to stand up against this demagoguery.
- Another long-standing problem for immigrants who were Massachusetts residents and who were lawfully present in the U.S. was that the Massachusetts Registry of Motor Vehicles typically denied them operator's licenses. In 2006, MLRI, the American Civil Liberties Union of Massachusetts, and the Boston law firm of Nutter, McClennen & Fish filed a class action lawsuit against the RMV. The RMV agreed to change this practice, but the lawsuit was held open for possible slippage which might occur.
- Another important focus of MLRI's advocacy has been the practice of the federal agency in detaining immigrants awaiting deportation or, in some cases, awaiting a hearing on their claim that they should not be deported. MLRI and its allies obtained three U.S. District Court rulings striking down unlawful retroactive detention of permanent residents without bond hearings. The First Circuit Court of Appeals upheld these rulings, and the

federal Board of Immigration Appeals decided to apply that ruling nationwide.

- Another systemic asylum issue affected immigrants who legitimately fear to return to their home countries because they will face domestic violence. For many years, the feds had refused to recognize this as an acceptable ground for asylum. But immigration advocates across the country pressed this point in asylum proceedings. Among those advocates was Nancy Kelly, who, with John Wilshire-Carrera, has been the longtime leader of the Greater Boston Legal Services Immigration Unit. Nancy secured a favorable decision on this from the Board of Immigration Appeals, and gradually this ground for asylum became accepted.
- If all these abuses of immigrants were not enough, in 2007 federal immigration law enforcement officers, without any warning, swooped down on the Michael Bianco leather factory in New Bedford and arrested some 350 workers, claiming that they were working illegally and should be detained pending deportation. Most of the workers were mothers of children, some single parents. The workers were immediately sent to detention centers—some in New England, and some in Texas because the agency claimed there was not enough detention space in New England. These arrests created a severe crisis among immigrants in New Bedford and terrorized immigrants there and beyond, as they were no doubt intended to do. Lawyers, social services workers, and others immediately came to the aid of the workers and their families. Greater Boston Legal Services sent several of its experienced lawyers to the scene (even though New Bedford was not within its service territory). MLRI and others obtained emergency funds from financial angels to retain additional staff for the efforts. The lawyers filed a federal court action challenging the arrests and detentions, but the courts refused to intervene. The lawyers provided individual case representation to those who requested it; some were released and others were able to defend against their deportations. The magnitude of the need swamped the resources available. Nevertheless, the work of these lawyers, much of it under emergency circumstances, was exemplary. Eventually the owner of the factory was prosecuted criminally, but nothing was done to compensate the real victims of the raid, or even to recognize what a despicable action it was.
- Following the January 2010 earthquake in Haiti, the federal government gave Temporary Protected Status to those who had fled to the U.S., including several thousands to Massachusetts (which has the third largest Haitian population among the states in the U.S.). Applications for the new status had to be filed before several short deadlines. MLRI led the way in getting the word out widely, preparing materials on how the new status could be obtained, and giving legal advice to those who needed it.
- A more recent federal problem has been with the unduly long "clock" system that the government uses to determine when immigrants with pending asylum applications become eligible to obtain work authorizations. At the end of 2011, MLRI joined the American

Immigration Council's Legal Action Center, the Northwest Immigrants Rights Project, and a Seattle law firm in filing a nationwide class action lawsuit in the U.S. District Court in Seattle, challenging this policy.

These are but a few of the examples of systemic advocacy successes by dedicated lawyers on behalf of a despised population, in the great tradition among American lawyers of standing up for the underdogs in the face of major barriers. That they have been able to achieve this much is remarkable.

Chapter Sixteen

LANGUAGE ACCESS

In the wake of the U.S. Supreme Court decisions that due process requires the right to a fair hearing and other due process before government benefits to vulnerable people can be denied or terminated, I would have thought it a no-brainer that the courts would apply these principles to persons similarly affected who do not understand or cannot participate in a government program because they cannot communicate in English. But courts have rejected these claims. There were two attempts in the early 1970s to establish this protection by court decision in Massachusetts programs—one, a challenge to the unemployment insurance program brought by Boston Legal Assistance Project—but the Supreme Judicial Court brushed them off. Advocates subsequently tried to go to other forums to establish the rights of non-English speakers to interpreters, translations, and the like in public benefits programs, in the courts, and in other places involving essential services. In this chapter I describe the long and eventually successful advocacy to put these rights in place.

The leader in these efforts during the first three decades was Tony Winsor of MLRI. In the 1970s, Tony established and led the Babel Coalition (named after the biblical Tower of Babel and the confusion of languages). He first tried to interest the courts in establishing interpreter services programs. He started with the Chief Justices of the District Courts and the Probate and Family Courts, where the need was most acute. He wrote District Court Chief Justice Samuel Zoll, describing what we knew about the need and asking him to join with MLRI and others in advocating for state funding for interpreters. He got no response at all, even after leaving several telephone messages at his office. This was unusual because Zoll was amenable to legal services suggestions in many other areas, as I have related in other places in this book. Then Tony had Alba Moreno, his administrative assistant, translate his letter into Spanish, type in bold type at the top in English: "This is an important notice affecting your rights. Have it translated immediately," and sent the letter to Zoll again. He still got no response. He sent the same initial letter to Chief Justice Alfred Podolski of the Probate and Family Courts. After a couple of weeks, he got the following letter back:

Dear Mr. Winsor:

I have received your letter of [date]. I have referred it to our Committee on New Ideas.

Sincerely yours

Needless to say, we did not hear from that court again.

Also, in the late 1970s Tony and the Babel Coalition asked state government to require that certain important notices (Tony called them "or else" notices) be translated into other languages commonly spoken by a significant number of the beneficiaries of agency programs. The Executive Office of Administration and Finance, with whom they dealt on this, fiddled

and diddled around (in the words of Boston Celtics announcer Johnny Most) and finally said it would be too expensive and complicated to do translations. They offered to place warning language on these notices in some eight to ten other languages (resembling UNICEF greeting cards):

> *Warning: This is an important notice that may affect your rights. Please get it translated immediately.*

Some agencies tried to do this, although haltingly, but the effort stopped when Ed King was elected governor in 1978, not to be resumed until much later.

We next returned to the courts. Tony and the Babel Coalition drafted a statute providing for interpreter services in the courts. The state was hardly ready to spring for the cost of statewide coverage, so the bill provided that the program would go into effect as a pilot only in the Essex County courts at the outset. Then, ingeniously, the bill authorized the Chief Justice for Administration and Management to order the expansion of the system to other courts without the need for further legislative approval, when the courts were ready to take this on. We then worked with the Legislature to beef up the Office of Interpreter Services within the CJAM's office, and to begin to increase the funds for the Office and for paying the interpreters. The Office came to be led by Gay Gentes, who is still the Director, and it gradually built up training of and standards for interpreters. The Legislature provided separate budget line items for interpreters who were employees of the Trial Court and for interpreters under contract. Slowly, the increase in funds permitted the services to expand to cover most of the state.

The most supportive and effective advocate for these efforts was CJAM Barbara Dortch-Okara. She pressed hard for more funds and for a more effective Office of Interpreter Services. Then, shortly before she left office in 2003, she acted under the statute and ordered that interpreter services must be available in all the courts. So, presto change-o, we had an instant statewide entitlement, without the need to go back to the Legislature for approval. The CJAM's office issued detailed standards for how interpreter services were to be carried out. Of course, the resources available remained below the need, and some courts did not fully carry out this mandate. But no one to my knowledge has challenged the Dortch-Okara order. Since then other groups of advocates, including legal services, have documented shortcomings and met with Gay Gentes periodically. One such group, focusing on the language needs of victims of domestic violence, was led by Jeff Wolf of MLRI. A second group is part of the statewide legal services Language Access Coalition, which I describe below.

The next domain for expanding the right to an interpreter was at emergency medical facilities. The need there was obvious, and the absence of interpretation could in some cases be life-threatening. Some hospitals, such as the Boston Medical Center, had built up impressive programs, but most hospitals and other emergency care facilities had not. Tony Winsor organized a group to work on a new law. They drafted a bill obligating emergency facilities to have adequate interpreter services available, which included the

right of a person who did not receive services to go to court to enforce the mandate and recover damages, and, if successful, to recover attorney's fees. The bill was passed in the late 1990s after two sessions of advocacy. The question then became how it would be enforced. Tony and his Coalition members approached the state agencies responsible for overseeing the hospitals and other emergency facilities to ask them to take steps to find out what was happening and to act if any hospital was lagging. The agencies said that they did not have the staff and the money to do this.

So MLRI decided that we would do this ourselves. With new foundation grants we hired new staff (principally Ray Andam) to communicate with the hospitals about their plans and programs and to offer technical assistance if any requested it. We designed a questionnaire to be answered by the hospitals, visited them to discuss their programs and to observe whether they had posted the appropriate notices of people's right to an interpreter, and prepared written reports documenting what we found and making recommendations for improvement. Some hospitals refused to cooperate (not major ones, thank goodness), and we forwarded their names to the state agencies. We also sent our reports to the state agencies. We had to end this effort after finishing the reports because our special funding ran out. We then prepared and sent to the agencies our final report on what we had done and found. We did not receive follow-up information on what happened after that, but we believe that this effort had its intended effect and that interpreter services programs serving the purpose exist at all these facilities.

There was periodic advocacy at various state agencies to push them to establish interpreter and translation services. Employment advocates at Greater Boston Legal Services had long goaded the Division of Unemployment Assistance to establish interpreters for fair hearings on unemployment insurance claims, and the agency started to do this. But progress lagged, so GBLS got the Legislature to amend the UI statute to require interpreters and other efforts, and not to discriminate against people because they could not communicate in English. DUA then expanded its interpreter services to pretty effectively cover fair hearings.

GBLS advocates also took action against the inadequacies of the translation and interpreter services at the Department of Public Welfare (in 1995 transformed magically into the "Department of Transitional Assistance"—the name change says it all!). GBLS filed an administrative complaint with the Regional Civil Rights Office of the U.S. Department of Health and Human Services, asking for directives under the federal civil rights laws that DTA must establish effective language access in its agency. The parties negotiated a series of steps DTA should take to upgrade its services. But because of funding limitations and lack of enthusiasm by DTA, that effort did not fully succeed.

State agency language access has been the focus of two efforts in recent years. First, the Access to Justice Commission's Administrative Justice Working Group (of which I am Co-Chair with Sue Marsh of Rosie's Place) established some priorities for work in cooperation with state government, one of which was language access at state agencies. The Office of Access and

Opportunity of the Executive Office of Administration and Finance, headed by Ron Marlow, had started work on language access guidelines for state agencies. As a result, in August of 2010, A&F issued Administrative Bulletin #16, in which, among other things, all state agencies were required to submit language access plans under standards in the Bulletin. These plans ultimately were sent in by the end of February of 2011, after which they were reviewed by A&F. In the meantime, legal services programs had established a Language Access Coalition, administered by Volunteer Lawyers Project, which had started to identify priorities and meet frequently. The Coalition has subcommittees for language access in the courts and for language access at state agencies. The Coalition subcommittee has met with Ron Marlow and submitted comments to him in the summer of 2012 on the need to strengthen the requirements set forth in the Bulletin. Although Marlow did not adopt many of those comments, A&F did issue a revised Bulletin in the fall of 2012 and has asked the agencies to submit updated plans and to explain what they have done in response to the initial Bulletin. Meanwhile, Coalition members are assisting clients with language access issues at agencies and documenting the status of compliance by agencies that are of particular importance to poor people.

More recently, the Access to Justice Commission has established a Language Access Study Committee, with a view to recommending what the AJC's roles should be on language access in the justice agencies, the courts, and administrative agencies. The Committee met once over the summer of 2013 and hopes to have some recommendations during the fall of 2013.

To sum up, when all is said and done there has been a lot of progress in language access in this state, although it has been slow and painstaking at times, and access still does not command the priority it deserves.

Chapter Seventeen

PUBLIC BENEFITS

MLRI has long had a strong emphasis on public benefits programs, which include state family and disability cash assistance, food stamps, emergency assistance, emergency shelter, and child care. When we started, cash assistance much more nearly equated with the federal poverty line (although that, too, became more inadequate because its methodology has not been changed to recognize the major changes in the mix of expenses incurred by poor people). But as the incessant demonization of the poor by right-wingers sank in, it became difficult to impossible to gain any increases in the grant levels even as poor people's expenses greatly increased. This caused our advocates and our allies to concentrate more on other benefits programs, such as food stamps, which held out more promise of helping people meet their subsistence needs. In this chapter I will describe MLRI's benefits advocacy over the years by major category, realizing that this is necessarily an incomplete picture.

MLRI has been blessed with outstanding benefits advocates for many years. Here are the principal ones, in order of their initial employment by us.

- Mike Faden. As described in the chapter on Housing, Mike also worked on some benefits issues and was our legislative advocate until he relocated to D.C.
- Toby Sherwood started at MLRI in 1970 after she graduated from law school, and worked mostly on public benefits issues before she relocated to Washington, D.C.
- Peter Anderson started at MLRI around 1974 after a period as a staff attorney at Boston Legal Assistance Project. He left MLRI in the early 1980s to return to GBLS (formerly BLAP) and soon became its Executive Director. In the late 1980s he was appointed a District Court judge, where he served until his retirement several years ago.
- Charlie Capace came to MLRI in the mid-1970s from Northern Worcester County Legal Aid in Fitchburg, and left in the early 1980s to go into private law practice.
- Mary Gallagher started at MLRI in the late 1970s and left in the mid-1980s to go into computer programming.
- Lucy Williams came to us in the early 1980s after several years as a staff attorney at the Legal Aid Foundation of Chicago. She left in the late 1980s to become a law professor at Northeastern Law School, where she continues to teach.
- Pat Baker was a paralegal at Western Mass. Legal Services in Northampton before she arrived at MLRI in 1983. She's still there.
- Steve Savner was the Advocacy Director at Southeastern Mass. Legal Assistance before starting at MLRI in the early 1980s. He and his wife,

Cindy Mann, relocated to D.C. in the early 1990s. He has worked there at the Center for Law and Social Policy and then at the Center for Community Change.

- Cindy Mann's career is described in Chapter Thirteen: Health Law.
- Deborah Harris was a staff attorney at Community Legal Services in Philadelphia before starting at MLRI in 1990. She remains at MLRI.
- Denise Williams was a paralegal at Rhode Island Legal Services before joining MLRI's benefits unit in the early 1990s. She stayed for two years before leaving.
- Mimi Powers was a lawyer at the Legal Services Center in Jamaica Plain before coming to MLRI in the early 1990s. She left after two years.
- Tish Lee came to MLRI in the mid-1990s from a Boston law firm and stayed three years before relocating to Ann Arbor, Michigan, where she was a staff attorney at the area legal services program there.
- Ruth Bourquin was in private law practice doing labor and employment work, an Assistant Attorney General, and a staff member at the state Senate Ways and Means Committee before starting at MLRI in 1998. She remains there.

A. Representing Welfare Rights Groups

The late 1960s and the early 1970s were the high point of welfare rights organizing and advocacy. It appeared then that it might be possible to increase grants to a sustainable level. Even President Richard Nixon joined in. His advisor, Daniel Patrick Moynihan, drafted a minimum adequate income proposal and Nixon submitted it to Congress. But it was trashed by right-wingers as blasphemy and by welfare rights groups as inadequate, so it went nowhere. This kind of proposal was never made again by someone in a federal leadership position.

MLRI assisted a succession of welfare rights groups in Massachusetts, starting with the Mass. Welfare Rights Organization in the early 1970s: the Coalition for Basic Human Needs from the late 1970s through the late 1980s; and Survivors Inc. on occasion since then. I will describe some of the major efforts of MLRI in support of these groups. But first I will catalogue two major lawsuits we filed in the early 1970s.

Welfare rights groups helped people learn the assistance program rules, but it was difficult to locate people who needed this help at the time they needed it. So they created a presence at local welfare offices, sometimes outside the offices and sometimes inside. They set up tables with literature and offered to advise people about their rights and about what to do if they were denied assistance. Members at some locations were told to leave, and when they did not, they were arrested. Some were charged with criminal trespass and some were arrested under an ancient criminal law statute (Chapter 273, Section 53), which, among other things, made "disturbers of the peace" subject to criminal prosecution.

MLRI, through Mel Zarr, represented the groups and those arrested by filing three-judge court actions in U.S. District Court. In those days (but no longer), if you claimed that the U.S. Constitution had been violated, you could request a panel of three judges (usually all District Court judges, but sometimes with a Circuit Court judge) to decide the claim. If you were dissatisfied with the decision at that level, you could appeal directly to the U.S. Supreme Court, which was required to accept and decide the appeal. This structure had been established to accommodate the need for speedy action and direct access to the U.S. Supreme Court to enable people claiming civil rights violations to avoid undue delay in obtaining decisions. Mel was familiar with this process from his prior work at the NAACP Legal Defense and Education Fund.

MLRI filed separate three-judge court actions challenging the arrests under each of the criminal statutes, claiming that the arrests and prosecutions violated the First Amendment rights of those arrested and those others who wanted to establish their presence in welfare offices. We got decisions from each of the three-judge courts narrowing the circumstances in which persons could be arrested in that context, but the courts refused to invalidate the arrests altogether. We filed direct appeals to the U.S. Supreme Court, which summarily upheld the decisions. Thereafter, the Department of Public Welfare, with the help of the Attorney General's office, negotiated a procedure under which people could set up tables in local welfare offices in an unobtrusive way and give advice to people who requested it.

B. Grant Increase Campaigns

Welfare rights groups were very active in a number of ways to try to get increases in state benefits. In the early 1980s, the Coalition for Basic Human Needs put together an Up to Poverty campaign, which included public education on the inadequacy of grants. The campaign included a minimum adequate income bill in the Legislature. One legislator responded. House Ways and Means Committee Chair Joe DeNucci (a former professional boxer who later was the State Auditor for many years) put out a proposal to raise family cash assistance grants gradually over a number of years. After much discussion, CBHN rejected the proposal because its members wanted much larger increases sooner. The effort then collapsed, and the stronger CBHN proposal never got serious consideration.

The CBHN activism did produce two specialized benefits that were approved by the Legislature in the 1980s and still exist (although they have been under fire in recent years). The first was a $150 clothing allowance per child, to be given in September of each year in order to enable schoolchildren in these families to purchase clothing for the start of school. The second was a special $40-a-month rental allowance for those, mainly in private unsubsidized housing, whose housing costs exceeded their income.

There were several other pieces of legal services litigation that can be characterized as keeping benefits in place when other state actions threatened them. In the early 1980s, the Legislature failed to adopt a budget

by the end of the prior fiscal year, and, as the stalemate continued into July, the state announced that welfare checks would not be issued because of the supposed lack of funds. Believing that the state statutes required the payment of benefits in those circumstances, we filed a lawsuit in U.S. District Court (*CBHN v. King* (1982)) and sought an immediate order in the First Circuit Court of Appeals. The First Circuit agreed with our position, in an opinion by Judge Steven Breyer (subsequently, and still, a U.S. Supreme Court Justice), and ordered the state to issue the checks. The Legislature then passed the budget and DPW issued the checks. We then pursued a claim for attorney's fees, and the state opposed it because it said that our case was moot and we had obtained no operative relief because the budget crisis was solved right after the First Circuit's opinion was issued. Justice Breyer wrote another opinion in our favor, holding that we had secured a favorable decision on our claim, and it didn't matter that the state issued the checks after the Legislature addressed the budget crisis. Lucy Williams and Tony Winsor of MLRI represented CBHN in the case.

Two other legal services litigation cases were successful in protecting public benefits eligibility when another benefit was terminated. The first, handled by Greater Boston Legal Services, involved Medicaid. When the state terminated AFDC of a person who was also on Medicaid, it automatically terminated the Medicaid without independently determining whether the family continued to be eligible for Medicaid, which many were. In *Mass. Association of Older Americans v. Sharp* (1983), the U.S. District Court decided that this was unlawful and that the state must promptly evaluate the family for Medicaid eligibility.

The second case was similar, but it involved food stamps. In *Dever v. Spirito* (1983), the U.S. District Court held that the state must follow the same procedures for food stamp eligibility. Steve Savner handled the case for MLRI. The named plaintiff, Jeanne Dever, was a longtime leader in welfare rights groups and for many years a member of the Board of Directors of Greater Boston Legal Services. Despite her poor health, she stayed involved for many years before her death in 2012. When DPW implemented the decision, its literature said that workers needed to "Dever" these cases. I told Jeanne that she was the only person I knew whose name was used as a verb.

C. Workfare; Employment and Training Programs

Starting in the 1970s, a new requirement for cash assistance recipients swept across the country, called Workfare. Under it, families and individuals who receive cash assistance and are certified as able to work must work a certain number of hours each week in an approved job without any increase in their benefits and under risk of termination if they do not do so. The wages earned were deducted from the grant check, although not always on a dollar-for-dollar basis. This program became particularly controversial because some states asked nonprofits, particularly those receiving state funds, to take workfare placements. We were lucky to escape Workfare in Massachusetts, at least until Welfare "Deform" was passed in the mid-1990s.

In the first Dukakis regime (1975-1978), the Governor and his Welfare Commissioner decided to institute workfare for General Relief program beneficiaries, who were largely males with disabilities. The Welfare Department hired workers and lined up workfare placements in order to start the program. We filed a lawsuit in Superior Court and drew Judge Paul Garrity, who had just been appointed a judge there after being a Boston Housing Court judge. Charlie Capace and Peter Anderson asked Garrity to enjoin the program, and he immediately did (*Nault v. Sharp*). What followed was a succession of serendipitous events that killed the program. The agency apparently couldn't decide whether or not to appeal Judge Garrity's decision, but then laid off the newly hired workers because it didn't want to spend money on them short-term. By the time the dust cleared, the funds that had been set aside were no longer available, and so the program never started. We got the feeling that there were some in the Dukakis Administration who were not unhappy that the program got canned.

During the administration of Governor Edward King from 1978 to 1982, his Welfare Commissioner, a hard-line transplant from Wisconsin, made several efforts to gin up a workfare program, even for AFDC parents, but we were able to block these proposals in the Legislature. Another benefit of Judge Garrity's decision in the *Nault* case was that DPW apparently thought it could not implement a workfare program on its own, but had to get legislative approval.

Welfare rights groups and MLRI strongly favored state employment and training programs that affirmatively helped people get and keep decent jobs without the punitive approach favored by others. In the 1980s we had our opportunity to persuade the state to adopt our approach. Michael Dukakis was again elected governor in 1982, and both his Secretary of Health and Human Services, Manuel Carballo, and his Welfare Commissioner, Jerry Stevens, accepted our approach. So Lucy Williams, with help from community group representatives, drafted and presented to Stevens a full-blown proposal for standards and funds to help people on AFDC transition, at their own pace, to employment. Stevens established the program we suggested and persuaded the Legislature to give him some new funds to implement it. The program operated for the rest of the 1980s, and its results were encouraging and much more impressive than forced work programs used elsewhere.

But the state budget tanked with the economy at the end of the 1980s, and in 1991, with William Weld taking the governor's office, we started a stretch of 16 years of Republican governors. We had to scramble to hold onto what employment and training services we had, and the contests were played out in the annual budget, as I have described in Chapter Four: State Budget Advocacy. So the hardliners were back in the Welfare Department and the Stevens program was scrapped.

Our work on this in the 1980s was also done by Steve Savner who, after he and Cindy Mann left for D.C., became a national expert on employment and training programs at the Center for Law and Social Policy. After arriving

at MLRI in the early 1990s, Deborah Harris took the lead on employment and training issues.

With the passage of Welfare "Deform" by Congress and by the state in the mid-1990s, the forced work requirement became embedded in the statutes, leaving us to fight for more adequate budgets in the training and education field and to try to mitigate the harsh penalties for supposed noncompliance.

D. Emergency Assistance and Emergency Shelter

Even in the early 1970s, the cash assistance grants were so inadequate that families in crisis usually had no place to turn for such unexpected expenses as back rent, security deposits, back utility bills, unexpected uncovered medical bills, and the like. In any kind of humane society, one would think that government would have catchall funds available to cover these emergencies. Doing so not only prevents hardship and suffering, but in many cases it allows a family to get past the crisis and avoid obligations that may be even more expensive (both for them and for the state). We even suggested periodically that the state ought to establish flexible funds that its workers could commit from time to time, on their own initiative, to meet emergencies. But this sensible solution lost out. State officials with business-school and pigeonhole minds refused to establish those kinds of programs, claiming either that the state didn't have enough money to fund them or that they would get out of control because those soft-hearted social workers would waste the money. So, we had to engage in never-ending battles to save the various emergency assistance programs the state had over the years.

The first battles were in the early 1970s, when the state put nonsensical restrictions on the use of funds in its Emergency Assistance Program. Peter Anderson brought suit in federal court (*Ingerson v. Sharp* (1976)), challenging the restrictions under federal AFDC law. (Yes, back then we actually had federal law to work with, which was the basis for many of our challenges to the state's restrictive policies, but that all went out the window when the Clinton Welfare "Deform" law was passed by Congress in 1996.) We got a favorable decision from U.S. District Court Judge Walter Skinner, but there ensued a series of appeals and waffling by the Welfare Department that only got straightened out when we returned to Judge Skinner for further relief.

These tussles continue to bedevil us nearly annually. They get played out in the annual state budget battles. Through devices such as requiring the state to give at least 60 days' notice to the Legislature before it can initiate a cutback in EA and other essential programs, we managed to fend off most of the proposed administrative cutbacks over the years. This advocacy is described in somewhat more depth in Chapter Four: State Budget Advocacy.

These contests also were played out with benefits and services to homeless people. Initially, payments to avert homelessness were made as part of the EA program, and some continue to exist there. But as the woeful inadequacies of the cash assistance grants and cyclical economic downturns

occurred and got worse each time, many more families became homeless. The state had for many years provided emergency shelter space for these families, but periodically there were not nearly enough places, and so the state put up homeless families in hotels and motels, most of which were dreadful places—particularly for children—even for a comparatively short period of time. The state continued its EA pattern by imposing all sorts of restrictions on access to shelters and Mickey Mouse rules that, when violated, resulted in the summary eviction of the families to the streets.

With the major recession that started in 2008, the number of homeless families mushroomed: recently more than 3,500 families have been in homeless shelters and several thousand more have had time-limited rental assistance that they were given when they first became homeless. Instead of recognizing that the homelessness crisis is hardly the fault of the families and that the state should take care of them to prevent even more damage to them, the same budget-control mentality, even in the Deval Patrick Administration, has prevailed. The state made several legislative proposals to severely cut back on, or even to eliminate, the emergency shelter program, but fortunately the Legislature rejected them.

MLRI and other allies persuaded the Legislature to establish in July of 2011 a short-term rental assistance program called HomeBASE, through which homeless families are placed in apartments instead of in shelters. But the need was so great that the program had to close its doors to new applicants only a few months into fiscal year 2012, leaving the rest of the families with no place to turn. Another successful push was made for supplementary appropriations, still not meeting the need. But for FY 2013, the Patrick Administration got the Legislature to give it the authority to greatly restrict access to emergency shelter, and they ran with it. The disapproval rate for applicants rose from around 40% to 75% starting in the summer of 2012.

This is an incomplete survey of all of the things that have gone wrong with the various emergency assistance and housing programs. MLRI's advocacy (with the collaboration of the Mass. Coalition for the Homeless) has helped soften some of the more draconian decisions, but many families and children remain on the streets and in unpardonable shelter situations that no decent society should tolerate, much less create. Through all of this frustrating scene, Ruth Bourquin of MLRI has been the strong leader of the advocates for adequate shelter, bringing lawsuits, preparing analyses and reports about what is happening to these families, particularly their children, and trying to get the Legislature to do the right things. That they do not do so is testament to how callous we have become as a society to the severe pain and damage suffered by these families.

E. Food Stamps

The food stamp program (in 2008 renamed the Supplemental Nutrition Assistance Program, or SNAP, but I will call it food stamps) was established by Congress in the mid-1970s in the wake of reports documenting widespread hunger in America. In its early years, people received stamps,

which they could use at food stores. More recently, these benefits have been made available by electronic benefits transfer (EBT) cards. Over time, the food stamp program rules have mostly been less restrictive than AFDC rules, to fulfill the program's obvious purpose of getting food to hungry people, especially children, quickly and without delaying rules. I have described in Chapter Three: Administrative Agency Advocacy MLRI's success in getting the state to issue emergency food stamps promptly in the 1970s, and earlier in this chapter, our successful litigation to require the state to evaluate eligibility for food stamps when a family's AFDC is terminated.

MLRI and legal services advocates did not otherwise engage in much systemic advocacy on food stamp issues until the early 2000s. Led by MLRI's intrepid Pat Baker, we established a statewide Food Stamp Improvement Coalition and began to look at what we could do to improve the state's dismal food stamp participation rate. Since then, our advocates have convinced the state to adopt new policies and practices which have moved Massachusetts from among the lowest performing states to among the top-performing states. Pat Baker has been a national expert on these changes. She has written papers describing them and how we got them adopted, and has appeared at numerous conferences on food stamps, particularly those sponsored by the Food Research and Action Center in D.C., with which she has collaborated closely for many years.

Here is a summary of some of the changes Pat and her allies have brought about in the Massachusetts food stamp program.

- Getting a U.S Department of Agriculture-approved pilot to provide food stamp benefits automatically to participants in the Supplemental Security Income program, resulting in benefits to more than 60,000 SSI beneficiaries. The pilot has turned into a permanent policy.
- Negotiating a special fuel assistance benefit for food stamp recipients, increasing the value of the food stamp shelter deduction and thus the value of the monthly food stamp benefits.
- Getting USDA approval of a waiver to allow a standard medical deduction for elder and disabled households.
- Getting a USDA waiver of the requirement of an in-person interview for recertification of food stamp benefits, the first in the country.
- Protecting food stamp benefits from a reduction in the utility allowance during the winter of 2010-2011, preserving some $1,100,000 in food stamp benefits for six months.
- Getting a state policy change to allow low-income community college students in career and technical education programs to qualify for food stamp benefits independently of their parents when they live at home.

As a result of these changes, the number of households in Massachusetts participating in food stamps rose from 226,000 in January of 2005 to 454,000 in July of 2011. We also constantly point out that increases in food stamp participation have a significantly favorable impact on our economy. Studies have shown that every $1 in increased food stamp benefits generates

$1.84 in increased economic activity. This success story is a great example of a leader in legal services (Pat Baker) early identifying an opportunity for a major increase in benefits to poor people, figuring out how to expand participation (most of these steps were done for the first time here in Massachusetts), and leading a coalition to carry them out.

F. Child Care

As the family cash assistance benefits stalled and costs increased, it became crucial for working parents with children to obtain child care. There have been federal proposals to establish a universal child care benefit, as most developed countries have done. But that would be too sensible and (horrors!) would be pretty expensive. So we have left it to the states to struggle to meet the need. Although Massachusetts has had funded child care programs to address the needs of particular priority populations (such as those on family cash assistance who are transitioning to work), the resources have met but a modest fraction of the needs and the wait lists have always been long. For the past twenty years, Deborah Harris of MLRI has monitored the budget for child care and advocated for changes in program rules to eliminate unnecessary restrictions and make the system work better. Our involvement in child care issues started in 1993, when the Department of Public Welfare (which then ran some child care programs) denied child care for some 2,000 parents enrolled in education and training programs operated by the Department. MLRI challenged the denial in state court, and the case went to the Mass. Supreme Judicial Court, which upheld our position (*Healy v. Commissioner of Department of Public Welfare* (1992)). Deborah Harris and Steve Savner represented the plaintiffs in this case.

G. Asset Development

The state's cash assistance programs have been littered with eligibility restrictions designed to make it very difficult for families to transition off assistance into jobs that hold some promise of long-term improvement. These restrictions include very low asset limitations ($2,000 for AFDC and $250 for EAEDC); denial of eligibility to a family that owns a car with an equity value that exceeds $5,000; allowing the counting of education and training toward the work requirement for only one year; applying a lump sum receipt rule that disqualifies a family from assistance if it retains a lump sum payment which puts them over the asset limit for more than thirty days even if they use the funds for immediate expense obligations; and limitations on how much back child support a family can keep rather than having to turn it over to the state. All of these rules were adopted by the state at a time when they were required or encouraged by the federal government. But with the passage of federal Welfare "Deform" in 1996, the federal law disappeared and the state was free to adopt new rules. However, it has steadfastly refused to do so.

In 2008, the state Legislature established an Asset Development Commission, chaired by Senator Jamie Eldridge (formerly a staff attorney at Merrimack Valley Legal Services). The Commission held hearings at which

MLRI and others presented their proposals for change. It adopted all of these proposals and in 2009 filed a legislative bill encompassing the proposals. It has not moved in the Legislature. The main MLRI advocates for these changes were Deborah Harris and Ruth Bourquin.

H. AFDC to Families Whose Children Are Temporarily Absent from the Home

I include this subject in this book because it generated a lot of major litigation by legal services programs during the 1980s and because I was the lead MLRI advocate working on these cases. The issue grew out of actions taken by the Department of Social Services to place children temporarily outside the family home, often with the consent of the parent, when there was a family crisis or when the parent or other caretaker had a report filed with DSS that there was alleged abuse or neglect of a child. But there were other instances where a child in an AFDC family would leave the home on a temporary basis, such as a parent's voluntary placement of a child with a relative or friend while she addresses a crisis such as an eviction or a medical emergency and a child's temporary placement or detention from a juvenile delinquency or Child in Need of Services court case. In some other cases, not all of the children were placed out of the home.

When this happened, DPW would move immediately to terminate AFDC (or reduce it if not all of the children were temporarily absent). When the parent lost her cash assistance, of course, that only made it much more difficult to have the child returned and made more sure that the child's absence would turn out to be permanent. We entered into negotiations with DPW to convince it to continue AFDC at least until the parent's situation had been clarified, but it refused to do so.

Erin Kemple of Western Mass. Legal Services had a client whose child was temporarily in the custody of DSS and who had immediately lost her AFDC, and she appealed the denial to the Supreme Judicial Court. I and other legal services lawyers with similar cases submitted an amicus brief in support of Erin's client's position. The SJC reversed the termination, in a sensitive opinion by Justice Ruth Abrams, who concluded that the strong state policies supporting family unification and reunification overcame the "by the books" eligibility position of DPW (*Johnson v. Commissioner of Public Welfare* (1993)). In the meantime, some four to six class actions had been filed against DPW on behalf of other groups with different circumstances. I was co-counsel on most of them. I then coordinated the favorable settlement of these cases with DPW, and DPW changed its regulations to conform to the principle of the *Johnson* decision. I also negotiated attorney's fees claims on behalf of all of the plaintiffs' counsel. In the *Johnson* case, the Attorney General's office balked at paying attorney's fees to Western Mass. Legal Services, so they had to return to the SJC. I filed an amicus brief in support of the claim. The SJC agreed that the state should pay attorney's fees to WMLS for its successful work on the case.

Chapter Eighteen

TAXATION

It may seem odd that I would devote a chapter of a a book on legal services advocacy to the field of taxation since, to my knowledge, few legal services advocates across the country have been active on tax policy issues. Yet tax policy, particularly its role in raising revenues, is at the heart of the responsibility of states to address poor people's basic needs. During the past thirty years we have been going backwards fast in this area. Almost everybody else has left the field to the anti-taxers, who have in their religious-like campaigns against taxes equated them with the devil. As a result, there has been no effective counterforce among elected officials, even among Democrats. Those running for public office fear that they will not likely succeed if they are perceived as being in favor of any tax, regardless of whether the tax money is devoted to a cause most of the public supports.

Even in Massachusetts, one tiny organization, Citizens for Limited Taxation, which appears to have only one staff member, persuaded the voters to approve of Proposition 2½ (the statute that limits annual property tax increases to 2½%) in 1980. This measure put a serious damper on enlightened and caring municipal government, and CLT's grousing every time new taxes are proposed usually causes legislators to cower. As a result of all this, the anti-taxers are driving our society into the ground, and they do not seem to care about these consequences or about the people who are harmed.

There are exceptions to this otherwise abandoned field. In recent years, a campaign led by such activists as Judy Meredith and Lew Finfer, assisted by the budget analyses of the Mass. Center on Budget and Policy and others, has organized with a cohesive tax program and has started to make some headway with the Governor and some legislators. But so far the largely spineless Democratic legislative leadership has not been up to the task. And on the national level, fact-based advocacy on tax policy by Robert McIntyre's Citizens for Tax Justice has blown holes in the anti-taxers' mindless pronouncements. Much more of this is needed.

MLRI has engaged in tax policy issues from time to time. The Massachusetts Constitution forbids a graduated income tax, except to the extent that the courts have approved exemption levels and graduated deductions that eliminate or ease tax burdens for very low-income people. There were four campaigns in the 1960s and 1970s for a constitutional amendment to allow a graduated income tax. In the first three, the proponents, with only a shoestring budget, tried to convince the public but were massively outgunned by expensive media campaigns bankrolled largely by business interests. After the third loss, the Legislature decided to pass a law forbidding corporations from spending money on ballot measures that do not affect corporate interests. One obvious underpinning of this was that

changes in the state's income taxes do not affect the interests of corporations.

The grad tax amendment got on the ballot again for the 1980 election. Before this, business interests brought suit against the state to invalidate the ban on business spending on the ground that it violated their First Amendment rights. The statute was upheld in the Supreme Judicial Court but was appealed to the U.S. Supreme Court. We decided to file an amicus brief there in support of the state's position. In doing so, we represented United Peoples, a poor people's group based in Framingham. Warren Brookes was a columnist and editorial writer for the *Boston Herald*. When he heard about our brief, he called United Peoples and talked to a recently arrived VISTA volunteer who, of course, knew nothing about the brief. Brookes did not seek to talk to anyone else at United Peoples so far as I know, since he had what he wanted. His article appeared in the next morning's *Herald*, with a huge front-page headline, a feature article covering most of the rest of the page, and an editorial at the bottom of the page. The gist of this bombast was that this federally funded legal services program had illegally participated in the U.S. Supreme Court case (there was nothing to that charge) and that the group we represented knew nothing about the brief. Yellow journalism was back. We, of course, ignored the *Herald's* fulminations.

The Regional Office of the Legal Services Corporation called us to inquire about this, and when we explained what had happened, they said that what we had done was appropriate. The real bad news, though, is that the U.S. Supreme Court in *First Agricultural National Bank v. Dukakis*, by a 5 to 4 decision, invalidated the state statute as a violation of corporations' First Amendment rights. The fourth try at a grad tax amendment went down to defeat in a flood of corporate money and no one has tried to put forward this amendment since.

In the late 1980s, the economy tanked and state tax revenues plummeted, as happens cyclically. MLRI and others participated actively in addressing what the state budget solutions should be (other than cutting poor people's programs). Cindy Mann had recently joined MLRI after spending a year at the Mass. Budget and Policy Center, so she knew a lot about tax policy. She and we decided to get involved in the debate. Cindy prepared and we circulated widely a booklet entitled "The Other Side of the Coin." In it, she compared the costs of proposals to cut poor people's programs in certain ways to the equivalent revenue to be gained by closing tax loopholes and assessing modest tax increases on businesses and on the more wealthy people. The point of the pamphlet was that the Legislature had viable choices to make about whether to cut back on vital benefits and social services programs or whether to assess more taxes on those who could afford to pay them.

At the same time, the Massachusetts economy was transitioning from one largely involving the sale of goods to one in which the provision of services would predominate, but the sales tax was levied on goods and not on services. So we and other tax policy experts proposed that the state apply

the 5% sales tax to, among others, architectural, engineering, and legal services. While this proposal was pending, the Boston and Massachusetts Bar Associations completely panicked and stridently opposed the tax on legal services. That moved me to write letters to the presidents of the two bar associations, explaining that the same budget proposal that contained the tax on legal services had a 5% increase in the rent that public housing residents must pay, and that poor people should not have to be the only people to be (in effect) taxed to help address the state's budget crisis. I never heard from them, and when I saw them later they looked at me somewhat sheepishly and didn't want to talk about it.

The Legislature did approve the sales tax on services and it was scheduled to go into effect in 1991. But in November of 1990 Bill Weld was elected governor. Weld was not only a lawyer but a doctrinal anti-taxer. Lawyers and other providers of services got him to file a repeal. They then put on a full-court press in the Legislature and it caved. The sales taxes on services were repealed before they went into effect. There has been no serious effort since then to renew that kind of proposal.

Bill Weld has bragged that during his four-year term he got through the Legislature some 44 tax cuts. Some of them were thinly disguised handouts to large businesses that did not need them, like Fidelity and Raytheon and some insurance companies, which threatened to move jobs elsewhere unless they received a tax concession bribe. The Legislature seemed only too willing to comply, so much so that they failed to write into the tax breaks any standards for job creation that were enforceable. The businesses said "Thank you very much" and proceeded to do what they planned to do anyway, which in part was to move jobs out of state.

Throughout all these giveaways to those who did not need them, the massively Democratically controlled Legislature was largely supine. The blogger Hester Prynne reminded us recently of a middle-of-the-night deal the legislative leaders struck with Weld early in his term. At that time (since changed), the pay of legislators was set in the budget, so every time they thought they deserved a pay raise (legislative pay has hardly been generous over the years), they had to get by the yakking by the anti-taxers and the possible opposition of the governor. The leaders prepared a pay raise bill for passage by the Legislature, and Governor Weld told them privately that he would veto it. They then asked him what they could add to the bill to cause him to change his mind, and he said a reduction in the income tax capital gains rate would do just fine. So the legislative leaders, without informing anyone else in the Legislature, engineered the addition of the tax cut to the bill and whipped it through both houses of the Legislature without ever changing the bill's title or revealing the tax cut. Weld immediately signed the bill into law and it was only later that anyone found out what was in it besides the pay raise.

Weld was not only a doctrinaire anti-taxer, but, as a libertarian, he had bought into the fiction that poor people are responsible for their poverty. He was brought up in a patrician Long Island family, went to the best private

schools, and did not operate in any circles, so far as I know, that would enable him to see how poor people live.

Our allies fighting Weld-proposed budget cuts to poor people's benefits and services periodically had demonstrations in front of the State House. I characteristically called him "Governor Weld-To-Do." At one of the demonstrations Neil Cronin put on a costume of a chicken and pointed to a sign saying he was impersonating Governor Weld-To-Do. I think a picture of Neil made several news media.

Weld's state administration was, with the possible exception of Mitt Romney's, the most virulently anti-poor group that we experienced. His Welfare Commissioners seemed to have taken their opinions from reading about Simon Legree. Our clients had to face all sorts of cutbacks, most of them either vicious or ignorant. Fortunately, we were able to block most of them or water them down. But there were few affirmative advances for poor people during that period.

The last subject I mention is the Earned Income Tax Credit. This program was first adopted by Congress during the Clinton Administration and a smaller version was passed in Massachusetts afterward. It provided for a reduction in income tax payments of poor people in low-wage jobs, graduated downward until the income qualifying ceiling was reached. It also provided for government payments if a working person owed no taxes or if the EITC payment exceeded the taxes owed. Some have described the EITC as the most significant anti-poverty program since food stamps. Of course, it only benefits people who work, so the incessantly demonized poor people who can't work or can't find a job do not benefit. Margaret Monsell, MLRI's employment law specialist, has worked on the state's EITC for some years. She has monitored its benefit level, opposing cuts and proposing increases. She has prepared literature, with others, publicizing the benefit and participating in meetings and clinics in an effort to increase the surprisingly low participation rates. Some local legal services programs have also publicized the program and have operated tax clinics for poor people.

We should certainly wish that more people (and more influential people) would join the cause and press for greater revenue so that poor people's programs would not always be at risk. But this will require a lot more fortitude than most of our elected leaders have shown to date. There will have to be major changes in how elections are run, at least at the federal level, before this advocacy has any chance of major success. But there is no excuse for the abject disinterest shown by most Democrats in this state. To change this, community groups need to persuade more activists to run for office, as has been happening here for some years, and reach the numbers that would give them enough leverage to change things. In the meantime, advocates in legal services and elsewhere must toil away to make the best of things, knowing that they have prevented, and will prevent, even worse things that might happen to the poor and occasionally will win a significant advance forward.

Chapter Nineteen

UNIFORM LAW COMMISSION WORK

The Uniform Law Commission was established in 1892. It is a private, nonprofit organization, but its members are from the states and are usually appointed by governors. The Commission drafts and promulgates for consideration by the states uniform and model laws largely on private law subjects. Its Executive Committee selects the subjects for new laws and oversees the process. Consideration of a new law or amendments to an existing proposed law starts with the formation of a drafting committee, whose members come from the ranks of its members. Often, the Commission will select a Reporter, generally a law professor, who will prepare background materials and drafts. Drafting committees meet as needed, usually in weekend sessions.

The Commission meets annually in the summer in an eight-day session to debate drafts that are ready for its consideration. The full Commission acts like a legislative body during these sessions, following Robert's Rules. Voice votes are taken on most matters, but stand-up votes are taken if the vote is in doubt or if several members ask for them. In rare cases, where even a stand-up vote is in doubt, or if a certain member requests it, a vote is taken state-by-state, which means that the members from each state must caucus, count their votes, and announce one vote from their state. I mention this detail only because in my first year I made several motions that precipitated votes by the states.

Early in 1975, Bob Haydock (a lawyer from Bingham, Dana and Gould in Boston) and Bob Keeton (then a professor at Harvard Law School and later a U.S. District Court judge in Massachusetts) asked me if I would be willing to fill a vacancy for a five-year term in the three-member Massachusetts delegation. I said that I would, so in the early spring of that year Governor Michael Dukakis appointed me to that position.

The first annual meeting of the Commission in which I would participate was in early August in Quebec City at the Chateau Frontenac hotel. It did not help our comfort that the temperatures ranged to around 100º during the entire eight days and that air conditioning did not work at the hotel except in the bar.

The Commission was considering at that session a gigantic proposed law called the Uniform Land Transactions Act. This was the brainchild of some law professors and the Commission leaders, who hoped to produce for real property law the same kind of comprehensive law that the Commission had produced for commercial law, the Uniform Commercial Code, in 1952, and which had been adopted by every state. But the draft lacked some basic protections for owners under foreclosures and otherwise showed a lack of concern for consumers that was found even in the Uniform Commercial Code.

The National Housing Law Project in Berkeley was working on foreclosure protections, and one of its staff attorneys, David Madway, agreed to come to Quebec City to help me on proposal amendments that we sought. That launched me into making a series of amendments to the proposed law on the floor of the meeting, such as to prohibit nonjudicial foreclosures (that is, not to allow some foreclosures to go forward without judicial approval) and to improve consumer notices. These amendments were opposed by the Drafting Committee and by the leadership of the Commission, and so we had at least three votes by states on them. I won all of these, but by narrow margins. I also got the meeting to accept other amendments, but without needing votes by states. One was an amendment to the entire Act that required that all consumer notices be written in languages other than English (in some eight different languages) for those who could not adequately communicate in English.

The Act, as amended, was approved finally that summer by the Commission, endorsed by the American Bar Association (the next step), and sent to the states for their consideration. The Act must have fallen of its own weight, because to my knowledge it has never been adopted as a whole by any state, although certain articles from it may have been passed in some states. As a footnote to this, the Act did not contain anything about landlord-tenant law because the Commission had adopted, a few years earlier, a Uniform Residential Landlord and Tenant Act, which was pretty balanced. Legal services advocates in other states found the Landlord and Tenant Act very helpful in working on changing the law in their states. But we had already gone far beyond this in Massachusetts, as I have described in Chapter Fourteen: Housing and Community Development.

I served as a Massachusetts Commissioner from 1975 to 1981, when I was not reappointed by Governor Edward King. I think King was unhappy about all the challenges MLRI had made to what he wanted to achieve, including my participation as co-counsel for the plaintiffs in the 1979 wage match case, *15,844 Welfare Recipients v. King*. But another opportunity arose for me, so I agreed to appointments to five-year terms by Michael Dukakis in 1985 and 1990. However, my further appointment by Governor Bill Weld was more than he could tolerate, so my service on the Commission came to an end in 1995. During my tenure, I considered it my job to watch out for the interests of poor people and consumers in the proposals being considered by the Commission. Not being a consumer law specialist myself, I relied a lot on the experts at the National Consumer Law Center.

The major uniform law in which I was centrally involved at the Commission dealt with interstate establishment and enforcement of child support. The Commission had some years previously promulgated the Uniform Reciprocal Enforcement of Support Act (URESA), which all states had adopted. But the Act was outmoded for a variety of reasons, and placed the burden on the supported family (usually a low-income single parent) to pursue their rights across state lines. Jurisdictional parts of URESA also tended to favor the support obligor. In the meantime, the federal government had established a federal child support enforcement program, with funds

made available to state agencies created to do this work. The agencies' primary function was to collect child support to reimburse the states for welfare payments made to the supported family to tide them over while collection efforts were pursued. Some people, especially a national parents group based in Ohio, wanted the federal government to take over interstate child support and enforce it through the federal income tax system. But the states opposed this, and members of Congress who wanted enforcement to be improved did not seem to want the federal government to have this responsibility.

So, the Commission decided to take on a complete overhaul of URESA. They asked me to chair the Drafting Committee. With my advice, it appointed as members of the Committee several commissioners with family law practices. We were encouraged to put together an Advisory Committee for major proposals such as this, and at my suggestion the Commission appointed as advisors Marilyn Ray Smith, who then headed the Massachusetts child support enforcement program, and Paula Roberts of the Center on Law and Social Policy in D.C. The Commission selected Professor Jack Sampson from the University of Texas Law School as the Reporter. It took us three years to work this all through, but we finally recommended, and the Commission adopted, the Uniform Interstate Family Support Act, a wholesale modernization of the field. Congress mandated that all states adopt the Act, and they did so. I believe this was the first time (and may still be the only time) that Congress required states to adopt a uniform law. So within the space of a few years we had a uniformly adopted law in all the states. I understand that it has been a great success.

CONCLUSION

Public institutions and powerful interests continue to be largely unsympathetic to the needs of the poor. Advocates have to spend ever-increasing amounts of time combating ignorant and even malevolent attacks on the poor, passivity on the part of many public officials who should know better, and backsliding by the public and private institutions that are supposed to serve the poor. Much of this has been caused by relentless and well-funded campaigns to hamstring and defund programs that are designed to help. Ultimately, I think the best way to fight these efforts is to open them up to public awareness. As U.S. Supreme Court Justice Louis Brandeis wrote in one of his First Amendment opinions: "Sunlight is the best disinfectant."

But things were much worse when MLRI and other legal services programs were started in the late 1960s. In the 1970s, after MLRI and our allies succeeded in changing many laws and agency practices that adversely affected the poor, public and foundation grants were awarded to those very agencies to help them implement the changes. We, too, asked for funds but were turned down. At one point I said that maybe we should change our name to Massachusetts Law Enforcement Institute so that we could get more credit for what we had done.

This is much the position we are in now. Thanks to our effective work over the years, many laws and programs are in place to protect and support the poor. So we should see ourselves as law enforcers and as uninvited guests at the garden parties. Doing this kind of systemic work is what so many legal services advocates have excelled at these many years. Many of the rights and laws exist to do this effectively. If because of the political climate we find little room for achieving affirmative improvements, we can see to it that people get the rights and benefits that we have helped put into place. Many legal services advocates have made it their careers to do just that. This is a legacy of which we can truly be proud.

Dona nobis pacem

About the Author

Allan Rodgers is a graduate of Princeton University and Harvard Law School. During most of the 1960's he was an associate at the Boston law firm of Hill & Barlow and an Assistant Attorney General of the Commonwealth of Massachusetts. In March of 1969, he became the Executive Director of the Massachusetts Law Reform Institute in Boston. He retired from that position at the end of 2010.

He has continued to agitate for a better world as a member of the Massachusetts Supreme Judicial Court's Access to Justice Commission, the Boston Bar Association Project on the Civil Expansion of the Right to Counsel, the Winchester Housing Partnership Board, and the Episcopal City Mission's Public Policy Advisory Committee. He also writes occasional satires on public issues.