Discourage litigation. Persuade your neighbor to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man.

—Abraham Lincoln, from placard distributed to the New York City Legal Aid Society’s offices in 1907

Until the 1960s practicing poverty law meant little more than giving routine legal advice to poor people. A handful of lawyers—most notably the 400 or so employed by Legal Aid societies across the country—had specialized in representing the poor since the late nineteenth century, but no cohesive body of poverty law had been developed by the litigants or the courts. Except in a few academic circles, labor law, family law, administrative law, and constitutional law were not recognized as having unique impacts on poor people. Instead, legal theorists held to the laissez-faire notion that the law was class-blind.¹

Poverty law changed dramatically in the 1960s. Between 1963, when federal grants were first made available to experimental offices in New Haven, Connecticut, and New York City, and 1971, when the federally funded legal services program was in full swing, the number of lawyers for poor people rose by 650 percent to more than 2,500.² In 1959 Legal Aid Society lawyers took only 6 percent of their cases to court while the rest of their clients made do with advice or assistance with out-of-court negotiations; by 1971 federally funded legal services lawyers took 17 percent of their client’s cases to court.³ Until 1965 no course on poverty law had ever been taught at a law school, by 1967 poverty law courses were offered at thirty-six law schools. Despite eighty-nine years of representing the poor, Legal Aid lawyers had never appealed a case to the U.S. Supreme Court, but from 1965 to 1974 the new poverty lawyers appealed 164 cases to the Court on behalf of their clients. Seven percent of all Supreme Court opinions written during those years were decisions in poverty law cases.⁴

From the nineteenth century through the 1960s a succession of organizations—the Legal Aid Society, settlement houses, Mobilization for Youth, and the Center on Social Welfare Policy and Law—used New York City as a base for efforts to address the problems of poverty through litigation and law reform.

The Legal Aid Society exercised a virtual monopoly over the representation of poor people in New York from its creation in 1876 until 1964, when the Mobilization for Youth (MRY) Legal Unit was chartered. Originally called Deutsche-Rechtsschutz-Verein, the society was founded by Edward Salomon, former governor of Wisconsin, to “render legal aid and assistance, gratuitously, to those of German birth, who may appear worthy thereof, but who from poverty are unable to procure it.”⁵ Only after Salomon’s retirement in 1889 was the society’s charter amended to allow it to render free legal assistance to all.⁶

By that time the wave of German immigration had subsided; the newest influx of immigrants to New York was made up of Russian and Eastern European Jews.⁷ According to Arthur Von Briesen, president of the New York Legal Aid Society from 1890 to 1915, the society had a mission to introduce these immigrants to democracy. “Once a poor jobless fellow-being learns that in this country he will have his rights ensured and enforced,” Von Briesen asserted, “be he ever so poor, he will promptly join the ranks of those who are the most ardent supporters of our institutions.”⁸

Von Briesen’s tenure at the society was marked by dogged fund-raising and steady expansion as he worked to achieve this goal. The society had been funded almost exclusively through the contributions of German immigrants and staffed primarily by volunteers when Von Briesen assumed control. Its annual budget was about $3,000.⁹ Von Briesen moved to establish a stable and sizable budget through membership drives and law firm contributions, refusing financial support from New York City itself.¹⁰ In addition, Legal Aid Society clients were required to pay a retaining fee of up to twenty-five cents, if possible, and attorneys were authorized to collect a 10 percent commission on all sums recovered in excess of five dollars.¹¹ In 1904 alone the society collected $5,483, about one-quarter of its budget, in this way. By 1906 the New York Legal Aid Society’s budget had risen to $28,553, by far the largest of any Legal Aid society in the country.¹²

Von Briesen’s tenacity translated into expanded services for New York’s poor. In 1900, for example, the Legal Aid Society expeditiously handled 14,365 cases—almost triple the caseload in 1898—recovering $96,704.45 for its clients at an average overhead of less than a dollar a case. This rise in
activity was attributable, in part, to Von Briesen's innovative decision to
dilute the resources of Legal Aid's main office in the heart of downtown
Manhattan to establish branch offices in New York's most impoverished
neighborhoods.\textsuperscript{13}

One satellite office was the East Side Branch, established in 1899 at the
University Settlement House at 185 Eldridge on the Lower East Side.\textsuperscript{14} At
the time the Lower East Side was the most densely populated neighbor-
hood in the world, housing more than 1,000 people per acre. Most of the
neighborhood's inhabitants lived in dumbbell tenements, five- or six-
story structures built around dark, narrow air shafts with few windows.\textsuperscript{15} Be-
cause of the overcrowding, filth, and crime bred by the tenements, the
death rate on the Lower East Side was double that of any other part of the
city.\textsuperscript{16}

The national origin of Legal Aid's clients at the East Side Branch dur-
ing the first two and a half months of 1899 reflected the neighborhood's
character: sixty-six clients were Russian; thirty-seven, German; twenty-
eight, Austrian; fourteen, Polish; eight, American; six, Rumanian; two,
Irish; one, Scottish; one, Italian; one, Turkish; and one, Hungarian. Less
than a third were U.S. citizens; 115 of the clients were men, and 50 were
women.\textsuperscript{17}

As recent arrivals learning the mores of the United States, many of
these clients required only basic advice regarding contracts, real estate
transactions, or family troubles. According to the attorney in charge of the
office, "Common sense is a greater requisite than the law." A few addi-
tional cases sought "redress for misfortunes common to us all, and with
which the law has little to do."\textsuperscript{18}

The great majority of the cases handled by the East Side Branch, how-
ever, involved unpaid wages, a common denominator of the sweatshop
employment that prevailed on the Lower East Side. A typical wage case,
according to a Legal Aid attorney, arose when

the 'greener' just over from Poland, Russia, or Roumania looks about for a
chance to earn a living. He sees in one of the Yiddish papers an attractive
advertisement to teach beginners machine operating or cigarette and cigar
making. He applies at the shop and is told that he must learn for four weeks
and then he will be employed steadily, with pay. To this end he gives the fee
of from $5 to $15, which generally takes the last cent he owns. . . . At the
end of that time the apprentice is very apt to be discharged at once, or else
told that he is not fit to earn money and must keep working for nothing if he
wishes to stay. Whether the man leaves in disgust or is discharged, the
result is the same: the master has the money and the apprentice is in a
desperate situation. . . . We have complaints of this sort every week, and
there is little that can be done in the majority of them.\textsuperscript{19}

The Legal Aid Society's policy was to settle most of these wage cases;
only six were brought to trial in 1899. Of the six, four were initially settled
to the lawyer's satisfaction, but the client, "through obstinacy or ill-
temper," insisted on taking the case to trial.\textsuperscript{20} According to Legal Aid staff
attorney Samuel Goldberg, "It is undoubtedly true that our clients are
naturally litigious." Staff attorney Arthur C. H. Lester agreed that "the
spirit of compromise does not exist with them."\textsuperscript{21}

Despite their clients' obstinacy, the Legal Aid Society enforced a "gen-
eral policy of reasonable compromise," whatever the client's wishes.\textsuperscript{22}
Placards distributed to each of the Legal Aid Society's offices in 1907 ad-
mオンished lawyers to settle cases if at all possible.\textsuperscript{23} Legal Aid lawyers
reasoned that an early settlement was preferable to waiting for a trial: "The
clients lived from hand to mouth and needed their money without delay.
The local courts were frightfully congested."\textsuperscript{24} Both to maximize their
own time and to speedily obtain at least some recompense for their clients,
Legal Aid lawyers focused on settling cases.

The dire conditions on the Lower East Side also attracted more than a
deo f fledgling settlement houses that were, like the Legal Aid Society,
devoted to reforming the poor by exposing them to middle-class values—a
sort of American chivalry for recent immigrants.

Influenced by the philosophy of Felix Adler, founder of the Ethical
Culture Society, and moved by Jacob Riis's 1890 book *How the Other Half
Lives*, an account of ghetto life on the Lower East Side, settlement house
residents believed that they could reform the conditions that created New
York's ghettos by living and working among the poor.\textsuperscript{25} These aspirations
were inextricably linked to the development and institutionalization of
social work. Not only did the social work profession emerge from the
settlement house movement, but the profession's early focus on social
justice and reform was a direct result of settlement house goals and ideol-
ogy.\textsuperscript{26}

The University Settlement on the Lower East Side—home of the Legal
Aid Society's East Side Branch—was the first settlement house in the
United States, founded in 1886. Its purpose was to bring "men of education
into closer relations with the laboring classes of the city, for mutual in-
struction and benefit," by establishing "settlements" in the tenement-
house districts, where college men interested in the workers may live, and
mingle with their poor neighbors, on terms of perfect equality."\textsuperscript{27}
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The settlement house idea caught on quickly, particularly among young women in cities like Philadelphia, Chicago, and New York, which were inundated with tens of thousands of impoverished immigrants. Settlement houses offered this first generation of college-educated women independence from their families and a respectable, challenging career other than teaching or nursing. At least one of New York’s settlement houses, College Settlement (affiliated with Smith College), was operated exclusively by women. Several others, such as the famous Hull House in Chicago headed by Jane Addams and the Henry Street Settlement House in New York directed by Lillian Wald, were founded by women.

The University Settlement was the only settlement house in New York that provided direct legal services to its clients (through the Legal Aid Society), but as settlement house residents moved into the arena of Progressive politics, law reform became a significant part of their work. Reflecting Progressives’ emphasis on scientific management as an alternative to the cronynism prevalent in city and state governments, settlement houses published reams of sociological data gathered from their clients, then used this data to promote Progressive policies. New York’s Lower East Side was their laboratory. Between 1897 and 1909 the Henry Street Settlement investigated dispossessed tenants, the licensing of midwives, child labor, and working conditions for women. In 1900 the University Settlement conducted an early survey of the criminal courts. The College Settlement mounted a comprehensive survey of unemployment. Settlement residents lobbied to get nurses in the public schools and helped organize the Women’s Trade Union League and the National Association for the Advancement of Colored People. Beginning in 1902 a coalition of settlement leaders led the fight to enact national child labor laws, an effort that culminated in 1912 when Congress passed a bill establishing the Children’s Bureau in the Department of Labor.

Ironically, Legal Aid lawyers—serving the same poor constituency as settlement houses—contributed little to the settlements’ law reform work, which was handled by settlement house leaders in consultation with elite private attorneys. Lillian Wald of the Henry Street Settlement House, for example, relied on the prominent corporate lawyer Louis Marshall of Guggenheim, Untermeyer & Marshall for advice concerning her efforts in support of laws regulating night work for women. Florence Kelley, a fixture at the Henry Street Settlement House, enlisted the able representation of Louis D. Brandeis in 1908 when the issue of regulating women’s work was presented to the U.S. Supreme Court in Muller v. Oregon.

In part, Legal Aid chose to stay on the sidelines in order to maintain an image of professional objectivity. But Legal Aid’s absence from the great law reform debates of the day also reflected the meager political clout wielded by the society. Von Briesen had envisioned Legal Aid as a “stepping stone to success” for young lawyers, much like a physician’s internship, but in reality Legal Aid attracted women and Jews, who were excluded from most law firms. As a result, these lawyers were marginalized even in the area with which they were most familiar—poverty law.

Legal Aid’s apolitical stance did, however, help save it from the financial insecurity of the settlement house movement. Funding for settlement houses came almost exclusively from individuals, and as the movement came of age, many patrons withdrew support because of the residents’ participation in Progressive politics, advocacy of women’s suffrage, support of labor unions, and outspoken pacifism. By the 1920s the type of activist social work pioneered by settlement houses was no longer fundable. Social workers increasingly stressed individual casework and psychology rather than the social context and community of their clients. Settlement houses were forced to change their focus or disband.

In contrast, Legal Aid societies had a pool of well-heeled potential supporters in the legal profession. Bar associations were initially uneasy about Legal Aid societies, as many attorneys viewed Legal Aid as a potential competitor for scarce clients. But the societies tailored their programs to allay this fear. New York’s Legal Aid Society turned away personal injury cases that, because of potential damage awards, might seem attractive to the private bar. As Von Briesen reassured his colleagues, “The attorneys of The Aid Society never take charge of cases which lawyers in actual practice would be ready to undertake.”

It was, however, the great influx of immigrants from southern and eastern Europe between 1905 and 1914 that finally convinced bar leaders that supporting Legal Aid was in their own best interests. As immigration increased, so did the “lawlessness and disorder” of the ghettos and the potential for social unrest unless clients were shown that “their rights could and would be enforced by the mechanisms of the existing capitalist order.” With increased financial support of elite lawyers, the number of Legal Aid societies nationwide jumped from five to forty-one between 1905 and 1920. In 1921, after decades on the sidelines of the poverty debate, the legal profession’s most powerful organization, the American Bar Association, appointed a standing committee on legal aid. Two years later, the National Association of Legal Aid Organizations was formed.
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The architect of the alliance between Legal Aid societies and the organized bar was Reginald Heber Smith, a young partner at the Boston law firm Hale & Dorr and general counsel to Boston’s two-person Legal Aid Society. In 1917 the Carnegie Foundation hired Smith to undertake a nationwide survey of the delivery of legal services to the poor.40 In Justice and the Poor, his 1919 report to the foundation, Smith candidly concluded that “the administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, [and] the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.”41 According to Smith, merely providing Legal Aid lawyers to advise the poor would not solve the problem. He advocated that Legal Aid societies use their expertise to lobby for broad legal reforms.42

Published at a time when the country was struggling to absorb millions of recent arrivals, Smith’s report might easily have led to a broad reexamination of the legal system—the restrictive educational requirements for practicing law and the bar’s monopoly over judicial appointments and courtroom representation, as well as other privileges that attend the profession. Instead, Smith’s conclusion that America’s institutions were fraught with class injustice was diluted—apparently with Smith’s acquiescence—by bar leaders interested in using the survey to strengthen the bar’s exclusive access to legal institutions.

In his foreword to Justice and the Poor, for example, Elihu Root, Sr.—former Secretary of State, Secretary of War, and U.S. senator from New York—wrote that Smith’s report was addressed to “the multitude of Americans who are interested in the Americanization of the millions of foreigners who have immigrated to this country, and who fail to understand or who misunderstand American institutions.”43 Through the efforts of Root and other bar leaders, Americanization rather than class injustice became the central focus when the American Bar Association considered Smith’s report. The organized bar endorsed this goal by providing financial and administrative support to Legal Aid societies. Instead of tying up the courts with the myriad problems of poor people or putting private attorneys in the uncomfortable position of turning away clients who could not afford assistance, Legal Aid societies would both socialize the poor and efficiently dispose of their cases, extending rough justice to people who otherwise had no hope for justice at all.44

The support of the organized bar, though nominal in some areas of the country, continued to stimulate the growth of the Legal Aid movement:

thirty new Legal Aid organizations were started in the 1920s, and the number of cases handled by Legal Aid societies nearly doubled, rising from 96,034 in 1920 to 171,961 in 1929. But with the onset of the Depression, the interests of many in the legal profession shifted again. Established clients of small firms cut back on the luxury of legal advice. Individuals who might have once hired attorneys instead joined the lines at Legal Aid societies. From 1929 to 1932 the nationwide Legal Aid caseload almost doubled again, from 171,000 to more than 307,000 cases. At the same time, financial support for Legal Aid declined. For example, only 229 of 17,000 lawyers practicing in New York City made contributions to the Legal Aid Society in 1934.45

Small law firms and sole practitioners specializing in representing individuals languished during the Depression. But law firms handling corporate work—the province of lawyers from the most prestigious schools and elite backgrounds—kept busy with bankruptcies and corporate reorganizations and, as one attorney stated, were “very little affected” by the economy.46 The widening gap between individuals of low or moderate income who needed legal assistance and those corporations and wealthy individuals who could actually afford assistance again exposed lawyers and legal institutions to charges of class bias.

This time, no less a personage than Supreme Court Justice Harlan F. Stone led the attack on his profession. In a widely publicized address at the University of Michigan Law School in 1934 Stone asserted that lawyers’ primary allegiance now went to corporations rather than to communities.47 This development had transformed “the learned profession of an earlier day [into] the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations.”48

Law professors rallied around Stone. Fueled by the public antagonism against big business during the Depression years, they published a series of devastating critiques of large law firms and their powerful place in the legal profession. The most influential of these critical theories, “legal realism,” argued that law, far from being a collection of formal, objective rules, was a product of politics and morality.49 Legal realists argued that the orthodoxy that judges decided cases on objective rules was a “wishful” rationalization; they maintained that because a judge’s decision was, in essence, a political response to the facts presented, lawyers could use law as an instrument of social change through their presentation of the facts and selection of litigation tactics.50 According to Karl Llewellyn of Columbia Law
School, legal realism represented "a new and timely voicing of the function of law: to serve society. Society as a whole, not merely the White-collars and the Haves. . . . Let this be written large, for senior partners in law-factories to ponder on: Law does not exist for corporation executives alone."51

Legal realism and its attendant cynicism about the supposed classless nature of the law was particularly popular among liberal lawyers who moved between university law schools and New Deal agencies during the Roosevelt administration.52 The president's willingness to initiate bold new federal programs coincided with lawyers' own ideas that federal intervention was justified, as a legal matter, by the social policy needs of the country. The realists' readiness to use law for social change, combined with the extreme exigencies of the Depression, contributed to the significant reworking and partial federalization of welfare laws in the Social Security Act of 1935.53

Incredibly, the dramatic changes in welfare law and policy did not, by and large, pierce the consciousness of Legal Aid lawyers representing the poor in the 1930s and 1940s. For instance, soon after World War I Legal Aid organizations adopted a standard classification scheme for civil cases to facilitate statistical studies. Yet as late as 1951 these classifications did not include public assistance among the types of cases routinely handled by Legal Aid societies.54

Though legal realists continued to harangue the legal profession for its failure to serve the poor, only those at the political fringes of the profession took the occasion to reassess the existing model for delivery of legal aid. In response to realists' criticism, the leftist National Lawyers Guild in 1938 initiated a small-scale experiment to provide legal services to the poor and to members of the middle class. With the blessings of Llewellyn and Reginald Heber Smith, guilds in Chicago and Philadelphia set up neighborhood offices to provide low-cost legal services. The experiments were a modest success; by 1949 the Philadelphia office was serving 4,200 clients annually and operating at a profit. Yet similar offices were not opened elsewhere, perhaps because of the organized bar's resistance to competition.55

Lawyers for the NAACP Legal Defense and Educational Fund also incorporated the realists' philosophy into their legal strategy for the desegregation of public schools. Realism not only influenced their view of litigation's potential to effect change, it also expanded the scope of their factual arguments against segregation. As envisioned by the Legal Defense Fund lawyers, the constitutional argument for desegregation under the equal protection clause was inseparable from the sociological evidence that separate schools were inevitably unequal—a direct reflection of the realists' argument that all law, even constitutional law, was at bottom social policy.56

These innovations at the margins of the profession had little effect on either the bar associations or the Legal Aid societies. The organized bar's support for poverty law continued to stagnate until 1950, when Great Britain instituted its Legal Aid and Advice Scheme, which mandated that every member of the legal profession be available to provide legal aid to the poor, to be reimbursed by the government.57 A vocal minority of the profession, led by members of the National Lawyers Guild, took up the call for a similar program in the United States. According to the guild's estimates, two-thirds of the American population was unable to afford legal services. It was time for a radical reworking of Legal Aid.58

Terrified lest a plan modeled on the British scheme be adopted in the United States—setting a precedent for restricting the bar's self-regulation—state and local bar associations stepped into the breach to demonstrate the continued viability of American Legal Aid societies. By the end of the 1950s Legal Aid lawyers reported "a breakthrough. Whereas in 1949 . . . 43% of the large cities were without offices, the percentage . . . was reduced to 21% by the end of 1959."59

While shoring up support for privately funded legal aid, the American Bar Association launched a counteroffensive against the guild and others who might support the "socialization" of law. The association's Special Committee to Study Communist Tactics, Strategy, and Objectives concluded that the time had come to "drive such lawyers from the profession" and to exclude those found guilty of "embracing and practicing" communism or Marxism-Leninism.60 Many state bar associations adopted loyalty oaths as a prerequisite to practice. Even Reginald Heber Smith warned in 1951 that "it is a fundamental tenet of Marxist Communism that law is a class weapon used by the rich to oppress the poor through the simple device of making justice too expensive."61 Comprehensive legal services to the poor, the organized bar asserted, was un-American.

Throughout the 1950s the organized bar was largely successful in forestalling federally sponsored legal services for the poor. At the same time, however, a West Coast academician was laboring to develop a legal theory
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that would redefine the rights of poor people and lead to dramatic changes in the practice of poverty law, whether by traditional legal aid organizations or by government lawyers.

Jacobs tenBroek, blinded in a bow and arrow accident at age seven, earned two law degrees from Berkeley's Boalt Hall and one from Harvard before his appointment to the speech and political science faculties at University of California at Berkeley. A founder of the National Federation for the Blind, tenBrook was dedicated to integrating the blind into sighted society. To demonstrate his commitment, he insisted on moving about the Berkeley campus without a guide.62

TenBrook's academic interest—poverty—was also a personal crusade. He began to lay the intellectual foundations of welfare law in the late 1940s, more than a decade before it was recognized as a field of legal practice and scholarship.63

At that time the meaning of the equal protection clause of the Constitution was in flux. In 1944, in Korematsu v. United States—which challenged the restrictions on the movement of Japanese Americans in the United States during World War II—the Supreme Court suggested that the equal protection clause might allow federal courts to scrutinize and strike down state laws that used racial classifications.64 According to Justice Hugo L. Black's opinion, "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect."65 This proposition was confirmed and explained in 1954 in the Supreme Court's decision in Brown v. Board of Education.66 But tenBrook argued in 1949 that poor people, as well as racial groups, should be considered a class requiring special judicial attention and that state laws resulting in unequal treatment of the poor should be struck down by the courts.67 He believed that "the mere state of being without funds [should be] a neutral fact" under the law.68

In 1955 tenBrook detailed a compelling example of the unequal treatment of the poor. Many states had enacted onerous residency requirements that denied welfare benefits to individuals who had not resided in the state for a specified length of time, in some cases several years. As a result, welfare recipients could not move to another state to be with family and friends or to search for a job without forgoing their meager benefits. These laws, tenBrook argued, "operate as an impairment of the [constitutional] right to free movement" of U.S. citizens.69 TenBrook's logic was beyond question, but no court had yet agreed with his interpretation of the law.

TenBrook's magnum opus, a three-part article published in 1965 in the

Stanford Law Review, reformulated his arguments around the idea that welfare laws create dual systems of family law in the United States, one for the indigent and one for everyone else.70 Under the welfare regime, for example, residency laws restricted recipients' movements, and regulations required that women receiving AFDC keep men out of their homes, even if the men were simply boyfriends who had no obligation to support children of a prior relationship. Relying on the Brown opinion and the intimations in Gideon v. Wainwright—which ruled that states must provide trial counsel for indigents in criminal proceedings—tenBrook argued that poverty commanded the special solicitude of the courts.71 He called again for the application of the equal protection clause to strike down laws that used public assistance to impose special standards of behavior on poor people.72

By the close of the 1950s these emerging legal theories were beginning to challenge the fundamental assumptions of the welfare system. Legal Aid societies, however, by and large failed to respond to these changes. Despite the bar's concerted resistance to federal involvement in the provision of legal services, Legal Aid and the private bar seemed unable to meet the legal needs of the poor.
Chapter 3

The Welfare Law Guru

The government's obligation to establish legal recourse for the poor in their dealings with governmental agencies is today merely in the argument stage. It is an obligation, however, which should be assumed, particularly in the war against poverty: partly because the poor themselves need representation, partly because the law is best developed with representation, partly because the war against poverty needs that 'civilian perspective ... of dissent, of critical scrutiny, of advocacy and of impatience' which lawyers for the poor can bring to it.

—Edward V. Sparer, quoting Edgar S. Cahn and Jean C. Cahn, 1964

Edward V. Sparer was concerned with issues of class and of economic redistribution at a time when most progressive lawyers were focused on establishing racial equality. Sparer was a few years older than most of his law school classmates, who had come of age in the 1950s, once the United States was entrenched in the cold war against Eastern Europe and after Brown v. Board of Education had heralded a new age of racial equality. Sparer's adult life had begun in the 1940s, when the promise of socialism hinted at by the New Deal had not yet been abandoned and before the labor movement became yet another special interest group in the Democratic Party's fold. Lawyers of Sparer's ilk were more common a decade or two before—they were active in organizing unions and litigating workers' rights. But by the 1960s litigation addressing economic rights was out of vogue.

Sparer traced his political birth to the summer of 1947 when, at age eighteen and finished with his first year at City College in New York, he traveled south to organize textile workers for third-party presidential candidate Henry A. Wallace, FDR's commerce secretary during the New Deal. According to Sparer, "I returned some months later, shaken to my core, radicalized, as were many others a generation later in the civil rights and antipoverty movements. What so shook me were my encounters with textile workers who were paralyzed with fear; with gaunt twenty-five-year-old mothers in the textile communities who looked as if they were forty years old; with one-time militant labor organizers who—literally—had had their life essence beaten out of them by thugs; with black poverty which surpassed my imagination." Eyes opened, Sparer resolved to devote his life to eliminating "poverty, discrimination, fear and violence and the absence of the freedom of speech."2

The following school year City College was torn by charges that certain faculty members and administrators were anti-Semitic and racist. As vice-president of the student council Sparer could pressure the administration to take action against these individuals. Under his leadership a coalition of liberals, socialists, communists, apolitical students, and a few faculty members planned a course of action.3

First, several hundred students participated in a sit-down strike led by Sparer and two other students. "For nine hours," the New York Times reported, "the group sat, sang, talked, adopted resolutions and joined a guitar player in songfests."4 When the City College administration ignored the demonstrators, the students called a full-blown general student strike. According to Sparer, it was "the first such strike on a major American campus since the 1930s."5

The results were mixed at best. On the first day of the strike, April 11, 1949, more than half of the 7,230 students of the college stayed away from classes and joined the picket line.6 By the second day, only 40 percent of the students honored the strike. Interest continued to wane on the next day and the next. After five days, the strike was broken. The strike committee acknowledged defeat and students returned to classes.

Embittered by the college administration's utter failure to respond to student demands, Sparer and his fiancée, Tanya Schechter, also a City College student, joined the Communist party and dropped out of school, suspending, for the time being, their uneasiness about the party's stance on free speech.7 A few months later they married and, on the instructions of the party, moved to Schenectady, New York. Their task was to consolidate the party's presence at the General Electric plant in Schenectady by joining the United Electrical Workers Union that represented GE employees.

The Sparers arrived in Schenectady by train with two large suitcases—one filled with clothes and one with party literature. Fearing that they might be followed, they walked separately from the train station. Tanya, small and slender, went first, struggling with two heavy bags. Ed, a heavyset man about six feet tall, followed far behind, his hands free. They had decided that he was the more politically important of the pair and should be free to run or deny his party affiliation if they were caught.8

The Sparers' initial attempts to penetrate the work force were unsuccess-
cessful. But in 1953, after a two-year hiatus while Ed served in the army—first as a teacher and then as a lifeguard in Panama—Ed was hired by GE as a “chippie” on the turbine assembly line. He used an air hammer to gouge metal from rough forms that moved past him on a conveyor. Sparer was frightened of the flying metal at first. After some months of practice, however, he grew proud of his skill with the hammer and was not pleased when GE transferred him to the washroom cleaning crew to curtail his organizing activities.9

Throughout their time in Schenectady the Sapers were haunted by the specter of Senator Joseph McCarthy and the Un-American Activities Committee of the U.S. House of Representatives. The national mood of anticommunism could not be shrugged off. “Few of us in those days spoke freely, even inside our own homes, without covering our telephones with blankets and checking for other signs of electronic invasion,” Ed Sparer later wrote. “It was not unknown for Communist factory workers, when their affiliation was discovered, to be thrown bodily out of the factory window.”10 To avoid disruption of the party’s activities if they were discovered and arrested, the Sapers were in touch with only three other couples in the party.11 In Ed Sparer’s mind, however, the risks and isolation were more than outweighed by the solidarity he felt with fellow Communists. “The Party was my community,” he wrote, “and it determined where I lived and what I did.”12

The Sapers’ apprenticeship in the party ended abruptly in March 1956 when Ed Sparer picked up a copy of the New York Times and read the text of Nikita Khrushchev’s speech to the 10th Congress of the Communist Party of the Soviet Union, which detailed Stalin’s slaughter of tens of thousands of capitalists and Communists alike in the late 1930s and early 1940s.13 The Sapers were devastated. “When my doubts about the Communist Party first started,” Ed Sparer recalled, “they were followed by a rush of more doubts—till finally, in but a month’s time, years of fond belief were no more.”14

Ed and Tanya Sparer resigned from the party and returned to New York City. For years Ed’s friends and family had told him that he should be a lawyer, given his interest in politics and his skill at public speaking. In the fall of 1956 Ed Sparer enrolled in Brooklyn Law School, the only one in the city that would accept him without an undergraduate degree.15

Sparer applied himself to his law studies with a certain desperation. He knew that his career choices would always be limited by his Communist background, but he hoped that if he excelled he would at least be able to get a job. By dint of hard work, sometimes to the detriment of his personal life—which now included three young children—Sparer graduated first in his law school class, won the moot court competition, and served as editor-in-chief of the Brooklyn Law Review.16

But Sparer’s past was not so easily eclipsed. When the Brooklyn Law School dean invited the star student to serve as his research assistant, Sparer wrote him an anguished letter of apology: “The crux of the situation is this—for several years, terminating only a couple of months prior to my law school application, I held membership in the Communist Party. . . . I plain don’t know what to say except forgive me please if I have hurt or embarrassed this school in any way.”17

The dean took Sparer’s admission seriously and quietly asked Sparer to step aside as the law school graduation speaker, an honor reserved for the top student, in favor of someone who would project a better image of the school.18

As graduation approached, Sparer began looking for jobs with labor unions, and he applied for a position as an associate attorney with the International Ladies Garment Workers’ Union (ilgwu), a progressive, socialist-led union that had pioneered union-sponsored cooperative housing, health programs, and worker education.19

The general counsel of the ilgwu, Morris Glushien, interviewed Sparer on April 7, 1959. Two weeks later, Glushien called Professor Sol Klein at Brooklyn Law School for a reference. “He told me that Sparer is extremely hard working,” Glushien recorded in his notes of the conversation. “He writes well. His oral performance in Moot Court was exceedingly good. . . . He gets along well with people, was liked by his fellow students, and is a sincere person.”20 Glushien offered Sparer the job and Sparer accepted, joining the ilgwu’s four-person legal team in their cramped quarters at 1700 Broadway in New York.21

Sparer passed the New York State bar examination that summer. But in 1959, despite a mild reprimand from the U.S. Supreme Court, the local bar associations that controlled membership in the legal profession were still intent on policing their ranks for Communist sympathizers. Before he could finally gain admission to the bar Sparer had to be approved by the New York state Committee on Character and Fitness, a group of bar leaders who were certain to ask whether Sparer had ever been a member of the Communist party. If Sparer admitted his affiliation, his application would likely be denied because he lacked “good character.” And if he refused to answer it was virtually certain that he would be rejected, because bar
associations were adamant that, whatever the First Amendment implications, they had the right to inquire into applicants' political backgrounds.

Sparer asked for Glushien’s help and Glushien arranged a meeting between Sparer and the venerable president of the ILGWU, David Dubinsky, a Socialist with impeccable anticommunist credentials. Thirty years before, he had assumed leadership in the ILGWU by driving out the Communists who were in control of the union, and he was a founding member of the staunchly anticommunist Labor party.22

Dubinsky, convinced of Sparer’s sincere rejection of Communism, agreed to write a letter on Sparer’s behalf to the Committee on Character and Fitness—a letter that carried a great deal of weight. Sparer then went before the committee and, though he admitted his Communist past, was approved as a member of the bar.23

Sparer’s caseload at the ILGWU included everything from defending a striking worker arrested for picketing the home of a scab to calculating workers’ disability benefits to advising union locals on their rights to organize. He not only conducted a number of trials and hearings, but also wrote how-to articles on arbitration and labor law for union members.24 After three years at the ILGWU, however, Sparer grew restless and began looking for a new position.

Sparer had always been interested in teaching, but he feared that his applications would be rejected because his alma mater did not have a strong academic reputation. So in 1962 Sparer took a job that he hoped would lead directly to a teaching position. Monrad Paulsen, a professor at Columbia Law School, was embarking on a study of New York’s juvenile courts and their treatment of lower-class youth. He hired Sparer as his assistant.25

For the next year Sparer observed court proceedings, interviewed judges, clerks and juvenile offenders, and drafted recommendations for juvenile court reform. He finished the report but Paulsen refused to release it, perhaps because of political pressure. Sparer was furious and disappointed but unable to change Paulsen’s mind.26

Smoothing from having worked for a year with nothing to show for it, Sparer decided to put off teaching until his children were older and he began casting about for his next job. The same year, 1963, Paulsen was appointed to the faculty board responsible for overseeing the creation of a new legal office, the Mobilization for Youth (MfY) Legal Unit. Designed by social workers, MfY represented one of the most comprehensive assaults on poverty ever mounted in the United States. With Paulsen’s support, Sparer was hired as the new Legal Unit’s director, and through the unit welfare law theory was finally put into practice.27

MFY was conceived on May 13, 1957, at a meeting of the Board of Directors of the Henry Street Settlement House. Henry Street Settlement, founded in 1893 as the first independent public nursing service in the nation, was still grappling with the social problems of the Lower East Side community six decades later. While many settlement houses had long ago closed or shifted their focus to psychological casework, the Henry Street Settlement clung to its original mandate of social reform.28

The board meeting began with presentations by social workers involved in a delinquency prevention project. When they finished, a prosperous businessman attending the meeting, Jacob M. Kaplan, asked hypothetically, “What would it take, how much would it cost,” to really deal with delinquency?29 By the end of the meeting, the board members agreed that to attack the mammoth problem of juvenile delinquency, they must saturate the Lower East Side with traditional social services—recreation, camping, home visits, day care, and the like. Kaplan offered a grant from his own Kaplan Foundation to pay for the planning of the project.30

The ambitious “action” plan developed by the Henry Street staff over the next few months called for a budget of $6 million over six years.31 The plan’s components, however, did not reflect any rethinking of turn-of-the-century settlement house theories of social assimilation. Saturating the community was exactly what settlement houses had been doing for decades, but on a less-expensive scale.

No one was interested in funding such a project. The National Institute for Mental Health (NIMH) suggested that the settlement enlist social science professionals to develop a more innovative research design. Still hoping to get the project off the drawing board, the Henry Street Board turned to two experts on delinquency affiliated with the Columbia School of Social Work: Lloyd Ohlin and Richard Cloward.

Ohlin was director of the Columbia School of Social Work, and Cloward was an assistant professor. Together they were writing a book, Delinquency and Opportunity, which spelled out their “opportunity theory.”32 In contrast with the prevailing academic view that delinquency could be remedied through psychiatric casework, Cloward and Ohlin argued that the social organization of ghetto communities created delinquency. Young people on the Lower East Side sought status in gangs or through drugs, they asserted, because they had no opportunities for legitimate behavior. Opportunity theory held that juvenile delinquency could be effectively at-
tacked by providing young people with “genuine opportunities to behave differently,” giving them “a stake in conformity.”

Ohlin and Cloward accepted the Mobilization for Youth project. Based on their research design—a 67-page “Proposal for Prevention and Control of Delinquency by Expanding Opportunities”—in May 1962 President Kennedy awarded MFY a $2.1 million grant from the President’s Committee on Juvenile Delinquency. An additional $1 million was garnered from NIMH, the Ford Foundation, New York City, and the Columbia School of Social Work. MFY opened its doors in September 1962.

Within a few months the Lower East Side was indeed saturated with MFY’s staff of more than 350 family aides, gang workers, vocational guidance counselors, community organizers, recreation leaders, teachers, and clergymen. But Cloward and Ohlin’s plan involved more than mere saturation; they were intent on altering the social structure of the community. According to Charles Grosser, deputy director of MFY, the staff spent 80 to 90 percent of its time “organizing the unaffiliated—the lower fifth of the economic ladder . . . who will overturn the status quo.”

The initial proposal for MFY made no mention of a legal unit. But the importance of legal services was apparent as early as December 1961: many of MFY’s clients needed legal advice that their social workers were not equipped to give. At the Ford Foundation’s recommendation, MFY approached the New York-based Vera Foundation, an institute devoted to social justice research, and asked it to develop a proposal for an MFY legal arm.

The tentative outline that MFY gave the Vera Foundation was modest: “In order to provide economically deprived clients with the means to cope with the myriad problems which impinge on their lives, Mobilization for Youth hopes to provide through the Neighborhood Service Center, preventative legal services to its clients. In this connection, we are concerned not with actual legal services to be provided in litigation proceedings but rather to make available advice and information which will enable people to know their rights under the law and to assert those rights where appropriate.” MFY proposed using law students and training “indigenous members of the community” to provide this legal advice; any litigation would be referred to the Legal Aid Society.

Completed in May 1963, the Vera Foundation’s report elaborated on the initial MFY outline, with the additional suggestion that MFY hire one or two staff attorneys to supervise the advice-giving and that litigation be handled by a pool of fifty volunteer lawyers drawn from New York City’s political clubs. “Pool members would be oriented to the social mandate of MFY,” the Vera Foundation wrote. “In this way it is hoped that the pool’s services would be in harmony with MFY’s objectives and philosophy.”

In addition to advice and referral, the Vera Foundation recommended that the legal unit provide legal orientation for nonlawyers and social change through research and lobbying. Guided by these recommendations, MFY established a legal unit with a supervisory committee composed of Columbia Law School faculty. Ed Sparer began working in the autumn of 1963 to develop activities for the unit.

Without waiting for the ink to dry on his contract, Sparer let it be known that his vision of the MFY Legal Unit differed sharply from the Vera Foundation’s proposals. In November 1963 he sent a report to the supervisory committee recommending that the Vera Foundation’s report be abandoned. Sparer argued that instead of piecemeal direct legal services in the Legal Aid tradition, most of the MFY Legal Unit’s resources should be channeled into targeted study and direct litigation designed to change the institutional structure that created and sustained poverty.

The MFY staff members quickly adopted Sparer’s view. In a memorandum dated January 20, 1964, George Brager, MFY’s program director, spelled out their agreement that “the major objective of the Legal Unit is to affect social policy and administrative practices rather than to supply legal help to clients in an unplanful way.” There was, the staff members concluded, no ethical barrier to the sort of strategic litigation that Sparer had proposed: “There is nothing in the perspective of the Legal Unit which presumes that cases will be accepted indiscriminately as a result of the legal aid function. I know of no ethical stance which does not permit an individual lawyer or organization to choose its clients.”

It was more difficult to persuade the Legal Unit’s supervisory committee to abandon the model proposed by the Vera Foundation. After several drafts circulated to his colleagues on staff, Sparer sent a second, eloquent memorandum to the supervisory committee in which he argued for a deliberate “change in perspective” concerning the MFY Legal Unit.

Other “small” legal units, wrote Sparer, had very effectively used litigation for social change: “The NAACP Legal Defense Fund for years operated as a law office of about the same size as our own. Only recently has it begun to expand. Yet because it drew on the right kinds of cases, and related itself to a social movement concerned with the same goals, its effect on national issues has been profound. The ACLU for years has operated with a paid legal staff which has alternated in size between one and two lawyers. Of course,
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it has drawn the same kind of response from volunteer lawyers and the public generally on civil liberties matters that we hope to create on 'poor man's law' matters." The MFY Legal Unit's potential was strengthened, Sparer added, because "we work closely with a unique organization [MFY] which employs more than 200 social workers and 'indigenous' program personnel... in the same community. Through these people, we are able to cull cases of the greatest importance to the community as a whole." 45

Sparer dismissed the Vera Foundation's emphasis on study and research, asserting instead that "our lawyers role within the community and our relationship to clients are the instruments by which the study-research function of the Legal Unit is realized. If such should cease, our sources of information and bases for perception will dry. Our role will become sterile. A single law-trained researcher, with an office at Columbia, could then accomplish as much." 46 Sparer's vivid memory of his fruitless year preparing Paulsen's unpublished juvenile courts report no doubt fueled his opposition to the Vera Foundation's recommendation that poverty lawyers spend their time preparing studies of their clients' problems.

After several months of debate, the supervisory committee was finally convinced by Sparer's view. The aggressive, affirmative use of "law as an instrument of social change," patterned after the methods of the NAACP and the American Civil Liberties Union, became the MFY Legal Unit's credo. Sparer only half echoed the statements of Arthur Von Briesen and Reginald Heber Smith when he wrote in November 1965 that "ultimately, it is hoped that the poor will come to look upon the law as a tool which they can use on their own behalf to vindicate their rights and their interests—in the same way that law is used by other segments of the population." 47 Like his Legal Aid predecessors, Sparer saw law as a means to redress inequality. But in contrast with those who used it as an agent of democratization, Sparer viewed the law as a means to empower the poor, a tool capable of forcing structural changes in a system that punished the poor for their poverty.

As part of his effort to empower clients, Sparer was committed to broadening the range of advocates. Convinced that social workers could play an important role in expanding clients' rights, Sparer set about training MFY staff members and settlement house workers regarding the legal issues facing their clients. 48 According to Sparer, social workers "are in regular contact with thousands of the most desperately impoverished...[who are] not prone to seek out lawyers on their own initiative. Yet they are often

the most exploited, the most seriously disadvantaged and the most in need of legal help and legal education in the community." 49

Even more ambitiously, Sparer envisioned welfare recipients acting as their own advocates in administrative hearings, and he arranged legal clinics at neighborhood centers and settlement houses—including University Settlement, where Legal Aid had operated an office sixty years before—to educate members of the community about their legal problems and options. 50

In its first full year of operation, the Legal Unit's four attorneys handled a range of poverty law matters: 350 housing cases, 60 workers' compensation matters, 50 consumer credit cases, and 200 criminal cases. 51 In addition, Sparer made plans to establish students' right to counsel in school suspensions, to develop a model brief for use in consumer fraud cases in the neighborhood, and to form an action plan attacking problems in the provision of public benefits to clients. The MFY Legal Unit's work was characterized by activism and aggressive advocacy. As one attorney explained, MFY lawyers believed that their client was more important than their professionalism; they would violate court etiquette and the bounds of professional good taste by, for example, interrupting opposing counsel or following a judge into chambers to argue a case if it might mean a better result for their client. 52

The Legal Unit's first year, however, also brought a crisis that pitted Sparer against MFY as a whole, alienated one of the Legal Unit's major funders, and very nearly resulted in the Legal Unit's demise.

MFY received funds from the city of New York. At the same time, the MFY Legal Unit regularly sued the city's welfare department on its poor clients' behalf. As these suits proliferated, the city balked at funding further litigation against itself and demanded an investigation of the Legal Unit's activities. In response—and in hopes of placating the city—MFY's Committee on Direct Operations prepared to undertake a review of the Legal Unit's case handling procedures.

To MFY's surprise, the Legal Unit refused to submit to the review, arguing that supervision and censure by nonlawyers would violate the confidential relationship between MFY lawyers and their clients. Sparer believed that the issue of the Legal Unit's independence was inseparable from the ongoing internal debate concerning the Legal Unit's litigation priorities; "if litigation on any...politically sensitive subject areas is contemplated," he wrote, independence from MFY is "a necessity." 53 According to
Sparer, "There is no significant area of direct lawyer-client work in which we can properly engage without creating potential conflict situations with city agencies... It would not be unreasonable to suggest that the City—which has the controlling voice on MFY's Board—would not permit us to enter into such situations."

The controversy was ultimately submitted to a state court judge, who upheld the Legal Unit's independence. The city was free to curtail its funding to MFY, but if it chose to provide funds, it could not use its financial influence to exercise control over MFY's lawyers.

Not unpredictably, this confrontation resulted in a cutback of city funding for MFY. But the timing was perfect, at least for the Legal Unit. By declaring its independence from MFY, the Legal Unit largely avoided involvement in a virulent anticomunist attack on its parent organization by city and state politicians. Though the attack was abandoned when it was revealed that only two of the 400 MFY employees had Communist affiliations, it presaged the demise of the weakened, tainted MFY. Meanwhile, the federal government was on the verge of creating its first poverty law program, one that would provide the MFY Legal Unit with a new and perhaps more secure source of financial support.

With the initiation of the War on Poverty in 1964, President Lyndon Johnson had established the Office of Economic Opportunity to administer the neighborhood-based Community Action Program. CAP was designed to provide financial support for community-based anti-poverty efforts by funding existing programs and stimulating new ones. Under one of the most controversial provisions of the new law, each CAP-funded effort was to be "developed, conducted, and administered with maximum feasible participation of residents in the areas and members of the groups served."

A proposed legal component of CAP was initially rejected. But through skillful lobbying, by Edgar Cahn and Jean Camper Cahn in particular—two young, politically connected lawyers who urged that legal services would give voice to a "civilian perspective" on the War on Poverty—federally funded legal services were incorporated into the program in 1965.

Sparer's commitments at MFY precluded his involvement in the day-to-day lobbying to create federal legal services. He did, however, significantly influence the shape of federally funded poverty law centers. In 1964, MFY and the Washington, D.C., Neighborhood Legal Services Project (NLSP) were the only non-Legal Aid poverty law offices in the country. A third poverty law office, opened in New Haven, Connecticut, in 1963, lasted only seven weeks, largely because of the public outcry when it took on a controversial criminal case. Unlike MFY, the New Haven office had failed to establish independence from its parent social service organization. All three of these programs were initially funded by the Ford Foundation, and each espoused a legal services philosophy quite different from the traditional model of providing the poor with no more than "access to justice."

The New Haven experiment had adopted a casework approach and envisioned sociolegal teams that would address the "whole person" by resolving the "social, economic and psychological factors" that resulted in their clients' poverty. In contrast, Sparer was convinced that litigation for social change should be the MFY Legal Unit's highest priority. He concentrated, to the extent possible, on "strategic legal actions that would create new legal rights for the poor" while maintaining "a direct relationship with the community" as a "genuine neighborhood law office."

NLSP began operations in 1964 with a sociolegal approach similar to the one employed in New Haven, but it moved toward a practice that, like MFY's, mixed routine representation with strategic litigation.

But Jean and Edgar Cahn favored a model developed along the lines adopted by the National Lawyers Guild in the 1930s. That model promoted participation of the poor in their own representation through neighborhood offices and traditional lawyer-client relationships. New Haven's sociolegal approach, the Cahns believed, would interpose nonlawyers, like social workers and psychologists, between attorneys and their clients. And the strategic impact litigation of MFY, according to the Cahns, was largely driven by lawyers' personal desire to bring "important" litigation rather than by true responsiveness to clients' needs.

Reversing decades of opposition to federal funding of legal services, the ABA publicly supported the Cahns' proposal. The lesson of the American Medical Association's unsuccessful opposition to Medicare had not been lost on bar association leaders; they recognized the political danger of waging a prolonged, losing battle over federal funding of legal services and opted for a behind-the-scenes role in shaping the program. So long as representation was strictly limited to the poor and was explicitly based on the established bar's ethical standards of representation, bar leaders reasoned that federal funding would do no harm to the profession and would augment the limited, privately funded efforts of the nation's 256 legal aid offices.
Within a few months of the ABA endorsement, the federal legal services program was implemented as a part of CAP, and from January 1, 1966, through January 30, 1967, three hundred legal service organizations received grants totaling $42 million. Despite the theoretical debates over how poverty law should be practiced, the activities of these offices varied greatly. And, because the federal government funded them through block grant programs, they were largely beyond government control. Established programs, like MFY or Legal Aid offices, simply continued providing legal services as they always had. Legal Aid societies, in particular, were not forced to abandon their opposition to law reform to qualify for federal funds. On the other hand, many new legal offices set up by community action agencies were staffed by young lawyers who shared Sparer’s vision of combining routine services with strategic litigation and were eager to bring the next Brown v. Board of Education for poor people.

Though Sparer had contemplated combining day-to-day advocacy with strategic litigation at MFY, he soon realized that neighborhood legal offices were not really equipped to do the kind of strategic work that he envisioned—a fact confirmed by Christopher Edley of the Ford Foundation on a visit to the MFY Legal Unit in early 1965. According to Edley’s report, MFY was inundated with clients, not all of whose problems could be resolved through impact litigation. The press of these cases left little time for developing a comprehensive litigation strategy along the lines of the NAACP’s antisegregation campaign. Edley concluded that the MFY Legal Unit “has only partially filled the role of becoming legal champion of the poor—a role which it criticizes Legal Aid for not filling.” Unless its goals are clarified and narrowed, Edley wrote, “the risk is that through confusion and after a good start MFY’s legal program may accomplish nothing of moment.”

Responding to these practical limitations, Sparer revised his model for delivery of legal services to the poor. He did not, however, refocus the MFY Legal Unit or make a renewed attempt to integrate strategic litigation with day-to-day representation. Instead, Sparer envisioned a two-tiered model in which routine services would be provided by neighborhood lawyers and social workers, and strategic litigation would be generated and supervised by specialists working as partners with the community-based offices. Implementing this idea, Sparer left MFY in late 1965 to set up a “backup center” with major funding from the Stern Family Fund and the Ford Foundation. At the new center, called the Center on Social Welfare Policy and Law, a staff of nine lawyers would coordinate strategic welfare litigation nationwide. Because Sparer’s practice of suing government agencies on his clients’ behalf was so controversial, the Columbia Law School turned down Sparer’s requests to house the program. Instead, the Center was located at the Columbia School of Social Work, reflecting Sparer’s ties to Richard Cloward—who arranged for the space—as well as his commitment to integrate the activities of lawyers and social workers serving the poor.

Sparer passed the directorship of MFY’s Legal Unit to Harold Rothwax, a former Legal Aid criminal defense attorney who fervently agreed with the Cahns’ neighborhood-centered, case-by-case approach to legal services. According to Rothwax, “Law reform cannot substitute for the caseload. The caseload is power.” Sparer’s emphasis on test cases was, Rothwax believed, misplaced: “For one thing the client doesn’t understand [the test case approach] and those who understand don’t care. . . . But even when you win a test case I think it is meaningless to win a principle and then not vindicate it with lawyers. . . . There are countless laws on the books today that are beautiful in their symmetry and their justice and morality and fairness that don’t mean a thing because there are no lawyers to vindicate them.”

Sparer agreed that routine legal services available at the community level were important. But he also believed that lawyers for the poor, like lawyers for corporations, were called on to do more than simply respond to their clients’ routine requests. “Businessmen, individually and in their corporate capacities, use lawyers in a multitude of ways to advance their immediate and long-range interests,” he observed. “Lawyers are prime tacticians and strategists for advancing economic goals of corporations. Lawyers are lobbyists and propagandists. Lawyers are negotiators and advocates in the truest and broadest sense of the term, and not merely when suit has been brought against the corporation. . . . The new legal aid lawyer’s role should be defined by the broadest reaches of advocacy, just as is the role of the corporation lawyer and the labor lawyer and the real estate board lawyer. Central to the new legal aid lawyer’s role is the task of helping to articulate and promote the hopes, the dreams, and the real possibility for the impoverished to make the social changes that they feel are needed through whatever lawful methods are available.”

At the Center on Social Welfare Policy and Law Sparer focused on developing a welfare litigation agenda for the burgeoning poverty law movement—a strategy to bring the confusing half-federal, half-state system created by the Social Security Act of 1935 under the thumb of federal
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law. If Sparer’s litigation campaign was successful, states could still administer welfare programs, but they would have to do so in a manner consistent with the federal Constitution and federal law. Relying heavily on Jacobus tenBroek’s writings of the past decade, Sparer concluded that the requirements of federal statutory and constitutional law were broad indeed.

In an article published in the *UCLA Law Review* in 1965, Sparer drew on the work of influential social welfare analyst Elizabeth Wickenden, Yale Law School professor Charles Reich, and tenBroek to set out a tentative bill of rights for welfare recipients that might be established through strategic litigation: “[1] the right to privacy and protection from illegal search; [2] the right to freedom of movement and choice of residence; [3] the right to choose one’s own standards of morality; and [4] the right to freedom to refuse work relief without suffering penal or other improper consequences.”

The following year, Sparer identified specific issues that were ripe for litigation, including residency laws, “man-in-the-house” rules, midnight raids, work-relief practices, the inadequacy of the money grant, the absence of due process protections, and the lack of uniformity in welfare laws among states. The Center’s staff, wrote Sparer, was prepared to extend its “maximum aid—including brief writing, research, consultation on appropriate strategy, etc.” to attorneys engaged in litigating these issues.

These lists were drawn from a memorandum on the constitutional rights of assistance recipients prepared by Wickenden in 1963 and from Sparer’s personal experiences as a poverty lawyer. For example, Sparer’s clients on welfare had been subjected to midnight welfare raids in which city investigators entered the recipient’s home without a warrant. The presence of a man in the apartment would result in suspension of the client’s welfare benefits on the assumption that the man was, or should be, contributing to the client’s support. In fact, Tanya Sparer, who briefly considered becoming a welfare caseworker, had participated in a training session in which she was instructed to visit clients’ apartments and search for telltale razor blades in the bathroom, whiskers in the sink, or ashes in the ashtrays.

Sparer had also handled cases involving state residency laws, which denied welfare to needy individuals until they had resided in a given state for a certain period of time—in New York, the period was one year. In one case, Sparer represented a young woman, Minnie Nixon, who had moved away from her family in North Carolina to look for work in New York, where her two sisters already resided. According to Sparer’s brief in the case, soon after Nixon arrived and began work as a domestic, complications from an unexpected pregnancy required that she stop work. When she applied for public assistance, the caseworker denied her application, asserting that she did not meet the residency requirement, that her continued presence in New York was “socially invalid,” and that she should return to her estranged family in rural North Carolina. In arguing Nixon’s appeal of the decision, Sparer framed the issue as a constitutional quandary: “whether the power to deny public assistance on the ground of ‘social invalidity’ is consistent with the equal protection . . . clause” of the Constitution.

The overriding goal of Sparer’s strategy was to create a constitutional “right to live”—in essence, a right to welfare or a guaranteed minimum income. As a legal matter, the notion of a right to live—later adopted for very different purposes by the anti-abortion movement—was radical. One of its earliest and most complete explications was in a 1955 book by A. Delafield Smith, former attorney with the Social Security Board. The significance of the New Deal and the Social Security Act had been misunderstood, Smith wrote, and lawyers and courts were at fault because they had failed to apply “basic constitutional guarantees in the field of social welfare.” Smith argued that the government has a responsibility to respond to its citizens’ basic needs and that, once those basic needs are identified, services should be made available to individuals without regard to whether they can pay for them. According to Smith, “If that most fundamental of our constitutional guarantees, that test of all justice, the equal protection of the laws, were ever actually applied to social programs, the whole field of public welfare would soon be revolutionized.”

Smith’s views did not find a champion until Sparer and, even then, Sparer stood virtually alone in his enthusiasm. According to Herbert Wechsler, professor at Columbia Law School, the right to live concept was “not valid as an interpretation of the Constitution.” Anthony Amsterdam, a law professor at Stanford University, simply stated that the principle was “of not much practical use.”

Sparer responded to these criticisms with analogies similar to those used by Smith. “We guarantee income to farmers for not producing crops,” he told the *New York Times*. “We guarantee subsidies to railroads and to oil companies. It seems to me only reasonable that we should guarantee the subsidy of life to those who are starving and to those without shelter or medicine—reasonable not only on humanitarian grounds, but because
there is a 14th Amendment, which guarantees equal protection of the laws. 86

As Spurer and his colleagues formulated their litigation strategy, they felt that the equal protection clause offered their best chance to expand benefits available to recipients and to establish a federal guaranteed minimum income. The equal protection clause was the basis of most litigation involving race discrimination, so judges were accustomed to seeing it used as a vehicle for social change. Though the due process clause expressly referred to the government’s obligation to protect “life” in addition to “liberty, or property,” its controversial history ruled out arguments that the due process clause created a right to welfare.

Prior to 1937 the U.S. Supreme Court had regularly used the due process clause to invalidate state and federal laws that imposed limits on employers’ use of labor. The most famous of these cases was *Lochner v. New York*, in which the Supreme Court struck down a New York state law that prohibited employment of bakery workers for more than ten hours a day or sixty hours a week. 87 The Court’s straightforward rationale was that such a statute restricts liberty—in *Lochner*, the liberty of an employer to freely contract with an employee to work more than ten hours a day. This view of the due process clause—that it barred regulatory statutes affecting “life, liberty, or property”—was known as “substantive due process.”

In 1937, however, buckling under pressure from President Roosevelt, who wanted assurances that his New Deal legislation would not be struck down, the Supreme Court abandoned the view that the due process clause could be used to invalidate entire statutes. Substantive due process was discredited as judicial overreaching, and the due process clause took on a purely procedural meaning: the state could not restrict life, liberty, or property without providing adequate opportunity to challenge the restriction. After 1937 courts could use the due process clause to require the government to improve hearing procedures; they could not use it to strike down statutes wholesale. The one controversial exception occurs when, as in *Roe v. Wade*, a majority of the Supreme Court justices agree that the statute violates a fundamental right, like privacy or procreation. Of necessity, then, activist lawyers turned to the equal protection clause as their primary vehicle for attacking discriminatory laws.

The fact was, however, that constitutional provisions and their philosophical bases were not so important to Spurer and his colleagues as the goal of creating an adequate minimum standard of welfare under the Constitution. The equal protection or due process clauses were merely the expedient vehicles for presenting the stories of welfare recipients to the courts in hopes that the courts would be compelled to reassess the constitutional protections of the Bill of Rights and use them to ease the economic plight of the poor.

By 1966 Spurer’s litigation strategy was disseminated nationwide in publications read by poverty lawyers, and a national network of legal services lawyers was ready to bring cases to establish the constitutional rights of welfare recipients. At the same time, Spurer had not ignored one of the most important lessons of the civil rights movement: a successful litigation strategy must be linked to a social movement.