Ideology and the Emergence of Legal Aid in Saskatchewan

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Saskachewan Legal Aid

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I. Introduction

My work at Saskatchewan legal aid (from 1978 to 1982) generated
questions for me about law and social change, and about the origins of
legal aid in the context of the expansion of the welfare state. I examined
the history of legal aid under the N.D.P. in Saskatchewan from 1974-1982
in an earlier work.[1] I concluded that the Saskatchewan N.D.P did not
significantly differ from other provincial parties in its handling of legal
aid during that period, and in that sense that legal aid as it was elaborated
under a social democratic government was not fundamentally altered.

I concluded that the failure of the legal aid program in Saskatchewan
could be attributed to a number of factors: the lack of political will on the
part of the N.D.P., the conception and the mandate of the legal aid plan
which did not support work aimed at achieving substantive justice; the
failure to understand the ideological premises that circumscribed the
perception of the problem and choices about strategy; and the failure to
build alliances beyond the client group.[2] The latter was difficult because
legal aid did not come about as a result of explicit demands by any social
movements; and thus there was no ready base of support. The lack of a
progressive bottom-up movement for legal aid was a key limiting factor
in Saskatchewan and in Canada.

In addition, other factors such as the constitution of the courts and the
legal profession, and the resistance that those institutions posed to legal
aid were also important. In particular, in Saskatchewan, the expansion of
legal aid in the 1970's brought with it not only the first significant
representation of poor people before the courts, but also the first signifi-

1. Jennie Abell, "Legal Aid in Saskatchewan: Rhetoric and Reality, 1974-1982" (1993),
forthcoming in Jim Harding, ed. *Social Policy and Social Justice: The Blakeney Years in
Saskatchewan.*
2. D. Laureen Snider, "Legal Aid, Reform, and the Welfare State" in Stephen Brickey and
Elizabeth Comack, (eds.) *The Social Basis of Law: Critical Readings in the Sociology of Law*
(Toronto: Garamond, 1986) 169.

cant representation of Aboriginal[3] people. Further, it coincided with a marked expansion of the appearance of women lawyers as advocates in the court. Finally, legal aid lawyers were the first lawyers in the province to unionize. Each of these phenomena challenged the legal profession, the courts, and the justice system. Their resistance and hostility also flowed from attitudes towards legal aid clients, attitudes often permeated with racism, classism, English-language bias, and ethnocentrism.[4]

In this paper I focus on the origins and conception of legal aid in Saskatchewan and the impetus for its emergence in the late 1960's. In so doing, I explore the demands of social movements and some of the factors in the expansion of the welfare state, and the influence of the U.S. situation. I review the work of various proponents of legal aid and consider the visions which emerged and the underlying premises of legal aid in Canada and in Saskatchewan. In particular, I examine the articulation of three concepts which were central to political discourse in the 1960's in North America, and to the elaboration of social welfare policies: 'poverty', 'participatory democracy' and civil 'rights'. The meaning of these concepts was set in place by the time legal aid emerged as an issue. Thus, the proponents of legal services for the poor were susceptible to, constrained by and impelled by the already developed ideologies of 'poverty', 'participation', and 'rights'. The parameters of the discourse were shaped by the then current political definitions of those concepts. The ideology or construction of the three issues, I argue, circumscribed both the conceptualization of the appropriate form and content of progressive struggle and the outcome of reform. Thus, even with input from

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3. While I recognize that there are different views on this point, I use the term "Aboriginal peoples" to include First Nations peoples, Metis people and Inuit people. I use this particular term for a number of reasons, but primarily because it has been adopted by a number of 'Aboriginal' organizations (e.g., Aboriginal Women of Saskatchewan) for its importance constitutionally, and for its inclusiveness (as a more encompassing term than "First Nations" which excludes, for example, Metis people). (The Ontario Native Women's Association also chooses the term "Aboriginal" for some of the same reasons in "Breaking Free: A Proposal to Change to Aboriginal Family Violence," (Thunder Bay: December, 1989).) It would be preferable to refer to individual Nations; and in Saskatchewan this would mean: Assiniboine, Cree, Dakota, Dene, Saulteaux and Metis.

4. These attitudes have been well documented across the country in recent years by such inquiries as the Royal Commission on the Donald Marshall, Jr. Prosecution (Halifax: Lieutenant Governor in Council, 1989) and the Aboriginal Justice Inquiry of Manitoba (Justice A. C. Hamilton and Judge C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, Winnipeg: Queen's Printer, 1991) and the reports of the Saskatchewan Indian Justice Review Committee (Judge Patricia Linn *et al*, Report of the Saskatchewan Indian Justice Review Committee, (Saskatoon: January 1992)) and the Saskatchewan Metis Justice Review Committee (Judge Patricia Linn *et al.*, Report of the Saskatchewan Metis Justice Review Committee, (Saskatoon: January 1992)).

community groups and poor people's organizations, the plan was limited. With respect to legal aid, I argue that the ideology of poverty skewed the perception of the problem; and that the ideologies of participatory democracy and of rights limited the solution envisaged.

Some of the factors that are relevant to developing an understanding of the origins of social policies are the functions of the state, the role of class conflict including the increase in working class strength, the centralization of the state, and the interaction between the working class and the apparatuses of the state. However, it is also important to analyze the historical conjuncture in terms of the relations between the state and specific groups such as Aboriginal peoples and women. I would argue also that gains are more or less fragile depending on a number of variables including the extent to which gains become ideologically entrenched or accepted.[5]

Canvassing the literature on the 1960's, there is very little mention of legal services for the poor in any of the demands of the poor people's movements or the student movements.[6] Most of the work on law and the legal needs of the poor was written by lawyers or legal academics. To explore the possibility that legal aid programs were simply an addendum to the expanded role of the welfare state in the 1960's, I examine the factors in that expansion, such as unrest, economic growth, and the influence of the U.S. I then consider whether the demands of social movements encompassed some more generalized concerns (about law and rights, for example) which might have been influential. Finally, I consider what other circumstances in Canada and Saskatchewan might explain the initiative at this specific time. While the vision for legal aid was essentially imported from the U.S., I was interested in what twist Canada and Saskatchewan put on it. I review the work of various proponents of legal aid to see what visions emerged, who advocated the different positions, and how the ideological premises of legal aid may have limited the possibilities for progressive practice.

At the same time as 'poverty' emerged as an issue of social concern, specific understandings of 'freedom' and 'participatory democracy' were gaining currency. Both the mainstream and the new left embraced the rhetoric of participatory democracy, although they differed on the meaning and elaboration of that concept. It is not surprising that the new left said little about legal services for the poor; because the left, for the

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5. See Laureen Snider, *supra*, note 2. So, for example, medicare in Saskatchewan may be less vulnerable to cutbacks than some other social programs there.
6. The main exception to this was the acknowledgement of the importance of criminal representation as a defensive strategy.

most part, had tended to eschew engagement with law and to see rights as unimportant.[7]

In contrast to the left, social movements seem to have been attracted to the discourse of rights. The assertion of 'rights' as a strategy was common to a number of movements: the labour movement, the Black civil rights movement, the women's movement, and the Aboriginal peoples' movement. In the U.S., the U.S. Supreme Court victories starting in 1954 with *Brown* v. *Board of Education*[8] seemed to confirm the strategy of rights struggle as a useful course and also to solidify the confidence in the 'highest court in the land'. These legal victories also fed a perspective that access to lawyers would be a useful goal. At the same time, the strength of social movements was sufficient to elicit reforms. I argue that this focus on rights, then, indirectly encouraged the emergence of legal aid. Meanwhile, as the concepts of poverty, participatory democracy, and rights were being elaborated, then Justice Minister Pierre Trudeau popularized calls for a "just society".[9]

It seems likely that the concern of legal professionals and academics was generated in part in response to the expanding welfarism, the generalized rhetoric about poverty and the just society, the model of the U.S., and inspired by the particular successes of the civil rights movement.[10] It was also motivated by professional self-interest. Lawyers, for the most part, did not frame their concerns in terms of the needs of the poor until there was already a broad level of expressed societal concern about poverty. When they did begin to argue for expanded legal services for the poor, they did so in the terms already elaborated. Thus the conceptualization of legal aid was both prompted by and constrained by the construction of 'poverty', 'participation', and 'rights' in the late 1960's and early 1970's.

This inquiry has current relevance for activists working on issues of poverty and legal services as a new articulation of poverty emerges

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7. Shelley Gavigan, "Law, Gender and Ideology" in Anne Bayefsky, ed. *Legal Theory meets Legal Practice* (Edmonton: Academic, 1988); Laureen Snider, *supra,* note 3.

8. *Brown* v. *Board of Education,* 347 U.S. 483 (1954) [hereinafter *Brown* cited to U.S.S.C.].

9. Trudeau made this a rallying cry of his campaign for the leadership of the Liberal Party in 1968, and his subsequent election campaign.

10. The work of the N.A.A.C.P. (National Association for the Advancement of Colored People) was cited as a useful model for strategy. It was influential as recently as when L.E.A.F. (The Women's Legal Education and Action Fund) was founded in 1985. *Gideon* v. *Wainwright* 372 U.S. 335 (1963) [hereinafter *Gideon* cited to U.S.S.C.] is cited by Graham Parker and Laureen Snider as particularly important; but it did not form the basis of other arguments. See: Graham Parker, "Legal Aid–Canadian Style" in John Harp and John Hofley, eds. *Poverty in Canada.* (Scarborough: 1971, Prentice-Hall); Laureen Snider, *supra,* note 3. In *Gideon,* the U.S.S.C. held that the Fourteenth Amendment incorporated the Sixth Amendment right to counsel. The case established the right to counsel whenever loss of liberty is involved.

identifying the "feminization of poverty" and focusing attention on "child poverty". This new elaboration continues to avoid a recognition of class and more recently denies the pervasiveness of poverty in Canada.[11] Concurrently, at a global level, there is also more acceptance of poverty and a shift from the language of eradicating poverty to the language of living with poverty. Similarly 'participatory democracy', 'participation' and 'rights' have a continuing topicality but a shifting sense of meaning. The struggle over meaning continues to be an important part of political struggle.

II. *The Ideology of the Welfare State*

An analysis of the factors that contribute to an understanding of the origin of social policies including ideology is important to understanding the context and the impetus for the emergence of legal aid. As a starting point, I use the term ideology to describe the package of unquestioned 'common sense' assumptions that passes for truth and serves to perpetuate or prop up the social relations of dominance by disguising them or by justifying them. Ideology is both mystifying and real. Most importantly, it is consensual. Ideology theory examines the process of how unexamined ideas enter our consciousness.[12]

When the ideology that supports domination is accepted or consented to on a wide basis, that dominance appears both universal and legitimate. A 'consensus on values' emerges and this is hegemony. As Antonio Gramsci[13] says, hegemony brings about:

> ... not only a unison of economic and political aims, but also intellectual and moral unity, posing all the questions around which the struggle rages not on a corporate but on a 'universal' plane, and thus creating the hegemony of a fundamental social group over a series of subordinate groups.[14]

Hegemony theory seeks to explore what role ideology and the state reproduction of ideology has played in inhibiting societal transformation.

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11. See, for example, Geoffrey York, "Defending the Definition of Poverty" 16 July 1992 *The Globe and Mail* 1, discussing the work of Christopher Sarlo, *infra*, note 240.
12. For a good example of this, see Mary Jane Mossman's discussion of the idea of "difference" in *Henrietta Muir Edwards* v. *Attorney-General for Canada*, [1930] A.C. 124 (P.C.) [hereinafter *Persons* cited to A.C.]: Mary Jane Mossman, "Feminism and Legal Method: The Difference it Makes" (1986) 3 Australian Journal of Law and Society 30.
13. Antonio Gramsci, *Selections from the Prison Notebooks*, Quintin Hoare, and Geoffrey Smithe, (eds.) (New York: International, 1971).
14. Gramsci, *ibid.*, at 181.

In Mary O'Brien's[15] words: "Ideology is not a product of naked coercion but of social practice in the realm of everyday life and thought."[16] Gramsci saw hegemony as dialectically structured: "... the site of a struggle between 'common sense' or acceptable knowledge, and 'good sense' which has the potential to overthrow common sense."[17] Just as education, which O'Brien focuses on, elaborates hegemony, but in so doing also creates the potential challenge to hegemony; so does law. On the one hand, law enforces, reinforces and perpetuates ideology, and thus legitimizes dominant social relations; and on the other creates, through its promises the contradictions as the sites of struggle.[18] Struggle provides the possibility of transforming or renovating 'common sense' into 'good sense'.[19] Beliefs are not consistently held and this too contributes to soft spots and cracks in the hegemony and resistance at particular moments in history.

The work of social historians and the work of feminists contributes to a more complex understanding of law. Douglas Hay[20] examines criminal law in eighteenth century England and analyses the importance of ideology, how it emerged and how it was encouraged by the ruling class. He describes how what might seem to be the weaknesses and inconsistencies of law were what gave it the elasticity that made it effective.

Feminists have identified and elaborated some of the premises of liberalism (neutrality, choice, consent, freedom of speech, abstraction) and how they are contained in law, and how they go to constitute our social reality and the way we see the world.[21]

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15. Mary O'Brien, "Hegemony and Superstructure: A Feminist Critique of Neo-Marxism" in Jill McCalla Vickers, ed. *Taking Sex into Account: The Policy Consequences of Sexist Research* (Ottawa: Carleton, 1984) 85.
16. O'Brien, *ibid.*, at 88.
17. O'Brien, *ibid.*
18. See generally: Edward P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975); Bob Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (London: Pluto, 1984) on the promises and contradictions contained within 'the rule of law'. See also discussion *infra*, note 141.
19. For a Gramscian analysis of rights strategies, see: Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990), 17:3 *Journal of Law and Society* 309.
20. Douglas Hay, "Property, Authority and Criminal Law" in Douglas Hay *et al.*, eds. *Albion's Fatal Tree* (New York: Pantheon, 1975) 17.
21. See, for example, the work of Christine Boyle, Marie-Andrée Bertrand, Céline Lacerte-Lamontagne and Rebecca Shamai, "A Feminist Review of Criminal Law" (Ottawa: Minister of Supply and Services Canada, 1985); Brettel Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987-1988), 2:2 Canadian Journal of Women and the Law 310.

III. *The Role of the State and the Relationship to Law*

In his pioneering work, James O'Connor has identified two contradictory functions of the capitalist state: accumulation and legitimation.[22] Leo Panitch has identified coercion[23] as a third function. This delineation does not mean that the state necessarily fills each function nor does it predict the manner in which it will do so.[24]

The welfare state has functions of both accumulation (underwriting the social cost of production)[25] and legitimation. The legitimation function is particularly important in perpetuating the notion that the state is the neutral benefactor of all.[26] The apparent neutrality of the state, in turn, reinforces certain ideological assumptions. For example, the notion that the state does not serve class interests, and instead represents a plurality or consensus, helps to ensure that the working class sees the state as representing their interests and sees electoral politics as giving them access to power. Concepts such as 'participatory democracy', constructed in a particular way, further encourage this perspective.[27]

However, the welfare state, at any one time, contains contradictory elements. It can be seen both as a form of legitimation and as a victory of working-class struggle. It must be seen in the context of continual struggle "over the goals and forms of social policies."[28] A second contradiction is that "the growth of the welfare state contributes to new forms of crisis (economic, political and ideological)"[29] within the structure of capitalism.

Functional requirements of capitalism are not necessarily determinative of the role that the state will actually assume. Instead, as Ian Gough argues, an examination of both how the state mediates those functional requirements (of reproducing labour power and of securing social harmony[30]) and what role class conflict and other struggle play in determin-

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22. James O'Connor, *The Fiscal Crisis of the State*, (New York: St. James Press, 1973) at 6.
23. Leo Panitch describes coercion as "the legitimate use of force to maintain or impose social order." Leo Panitch, ed. *The Canadian State: Political Economy and Political Power* (Toronto: Univ. of Toronto, 1977) at 8.
24. Panitch, *ibid.* at 50-51. See also Ian Gough, *The Political Economy of the Welfare State* (London: MacMillan, 1979) at 37.
25. Panitch, *supra*, note 23 at 14.
26. O'Connor, *supra*, note 22.
27. See for example: Martin Loney, "A Political Economy of Citizen Participation" in Panitch, supra, note 23, 446 at 453. See also Sue Findlay "Facing the State: The Politics of the Women's Movement Reconsidered" in Meg Luxton and Heather Jon Maroney, eds. *Feminism and Political Economy: Women's Work, Women's Struggles* (Toronto: Methuen, 1987) 31.
28. Panitch, *supra*, note 23 at 14-15.
29. *Ibid.* at 15.
30. Gough, *supra*, note 24 at 52-53.

ing social policy[31] are necessary. Also, an examination of the form of the state and the form of law is important.[32]

Unrest and struggle may generate a response in a number of ways. Either struggle may wrest specifically demanded concessions from the state or it may generate sufficient unrest at a generalized level that the state moves gratuitously to pacify it. The distinction has strategic implications.[33] As Eric Hobsbawn points out, the failure to formulate specific demands and simply engage in what he calls "blind militancy"[34] may amount to an abdication of any role in the definition and articulation of the required change, thus reducing the potential gains.[35] Yet framing the choice in those dichotomized terms implies a greater control over the specific outcomes of struggle than may be possible, and fails to capture the unevenness of gains.

Reforms are thus contradictory and can represent both gains and barriers to further struggle. As Gough points out, "class conflict is now partially expressed through the political arena in advanced capitalist countries."[36] He attributes this to the establishment of universal suffrage and other major liberal rights, and the effect that these formal rights had on integrating the working class into the capitalist system.[37] He argues that while suffrage and enfranchisement represent gains, they also

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31. *Ibid.* at 38.
32. See: Evgeny Pashukanis, *Law and Marxism* (London: Pluto, 1983); Robert Fine and Sol Picciotto, "On Marxist Critiques of Law" in Ian Grigg-Spall and Paddy Ireland, eds. *The Critical Lawyers' Handbook* (London: Pluto, 1992); Sol Picciotto, "The Theory of the State, Class Struggle and the Rule of Law" in Bob Fine, Richard Kinsey, John Lea, Sol Picciotto and Jock Young, eds., *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (London: Hutchinson, 1979) 164-177.
33. Frances Piven and Richard Cloward cloud the importance of the distinction by arguing that the limits of what can be obtained are beyond the control of the poor. See: Frances Piven & Richard Cloward *Poor People's Movements: Why They Succeed, How They Fail* (New York: Pantheon, 1977).
34. Eric Hobsbawn, "Labour and Human Rights" in *Workers: Worlds of Labor* (New York: Pantheon, 1984) at 295.
35. Hobsbawn, ibid. at 294-296; Frances Piven & Richard Cloward, *Regulating the Poor: the Functions of Public Welfare* (New York: Pantheon, 1971).
36. Gough, *supra*, note 24 at 60.
37. *Ibid.*, at 60-62.

potentially divert the goals and strategies of struggle.[38] However, it is problematic that Gough does not specifically address the situation for women. Nonetheless, these struggles explain in part why the focus of activism subsequently shifted to securing participation or more full participation to explore the newly realized 'access' to the political system.[39]

However, it is necessary to understand other factors beyond class conflict to understand the development of the welfare state. Specifically capitalist relations, patriarchal relations and the state also structure policies. Gough argues that while there may sometimes be what appears to be a congruence of interests on specific policy issues, the basis of the support may be different,[40] and any apparent common ground may break down on issues such as the nature of services, the level of benefits, and the control of the services.[41] Nonetheless, periods of social reform do generate "an ideology of the welfare state, one that is premised on a harmony of interests."[42] The ideology of welfare capitalism is found in the literature of social work.[43] It informs the assessment of 'need', the evaluation of 'effectiveness',and the day to day operation of social programs,[44] such as social work and legal aid.

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38. Similarly, Piven and Cloward argue that the effect for the Black civil rights movement, of gaining the right to vote, was to integrate activists into traditional electoral politics, to delegitimize protest, and to divert attention from possibly more serious economic issues. According to Piven and Cloward, the movement initially had two main objectives; to secure formal political rights (and in particular the vote), and to secure improved economic conditions. In July 1964, the *Civil Rights Act* was passed. In August 1965, a voting rights act was passed. Frances Piven & Richard Cloward *Poor People's Movements: Why They Succeed, How They Fail* (New York: 1977, Pantheon) at 253. For a different view of that struggle, see: Julian Bond, "Where We've Been, Where We're Going: A Vision of Racial Justice in the 1990s" [1990] 25 Harvard Civil Rights-Civil Liberties Law Review 273.

39. The shift to participation as the focus can be understood both as succumbing to the promise of the electoral tradition; but also as a challenge to reshaping those terms. These 'stages' of struggle (the demand for a particular reform, resistance to that reform or the discovery of the inadequacy of that reform, and then the next demand) point out that victories are uneven.

40. Gough, *supra* note 24 at 65.

41. *Ibid.* at 66.

42. *Ibid.* at 66.

43. Elizabeth Wilson, *Women and the Welfare State*, (London: Tavistock, 1977) at 28.

44. Paul Corrigan and Peter Leonard, *Social Work Practice Under Capitalism* (London: MacMillan, 1978).

At the same time, to characterize the state as acting in a monolithic way is problematic both because of the instrumentalism of such an analysis[45] and because such an analysis ignores the agency of state workers. As Martin Loney points out:

> Much government activity must be seen as more random than this, mediated by a number of factors including the well-intentioned activities of those within the state system who see themselves as 'radical'.[46]

It is easy to place too much emphasis on the distortion of ideology; it is more useful to understand the contradictions and to see the premises of ideology as a potential terrain of struggle.

IV. *Law and Ideology*

Law itself is partly coercion and partly legitimation; but to imply that it is necessarily either one or the other, and nothing more, accords too much functionality to the nature of law.[47] Legitimation increases social harmony, integrates dissent, but also provides for reforms which may represent real gains. It operates as ideology; but ideology must be understood dialectically. That is, it is both real and mystifying and it has a material basis. To work effectively, it must be consensual and fluid; or the state would need to rely more on coercion. Therefore, notions of 'justice', 'rights', and 'fairness', for example, are extremely important. While they do serve in part to prop up capitalist relations;[48] partly because of that, they are not only empty promises. As Ian Taylor identifies:

> Legitimation involves the display of policies of justice and of welfare (although it is also crucially related to the state provision of education and of health services). In the process of financing these areas of activity, the state describes itself as a liberal state, as the provider of goods and services, and the fulfiller of needs, that are not directly profitable to private industry.[49]

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45. As Rianne Mahon argues in her examination of Canadian public policy and the federal civil service, such analysis does not attend to the complex ways in which class struggle is expressed through representation within the state. See: Rianne Mahon, "Canadian Public Policy: The Unequal Structure of Representation", in Leo Panitch, *The Canadian State, supra*, note 23, 165-198.

46. Martin Loney, *supra*, note 27 at 452-453.

47. As Abel points out there is a tautological quality in the functionalist paradigm, when social scientists conclude that if an institution fails it must therefore be serving the need for legitimation. See: Richard Abel, "Law Without Politics: Legal Aid Under Advanced Capitalism" (1985), 32 U.C.L.A. Law Review 474.

48. For example, the concept of 'justice' is fundamental to capitalism; because law elaborates the definition of 'legal subject' which is at the heart of the relationship of contract. See: Ian Taylor, *Crime, Capitalism and Community* (Toronto: Butterworths, 1983) at 135.

49. Taylor, *ibid.* at 134.

However, law is more than mere legitimation. Following from that, the definition of justice and rights can be understood also as the product of struggle. At the same time, law also operates coercively, for example, in policing, but there again I would argue unevenly.[50] Taylor argues that these coercive functions are not always visible; and points to the ideological premises that justify penitentiaries as treatment, or welfare as a right which must be litigated. While it is difficult to draw a line between coercion and legitimation, I think it is helpful to separate the direct application of force from ideology where possible. At the same time, where, as in Canada, there is a strong belief in the legitimacy of authority; coercive action may readily be assumed to be necessary and thus have an ideological impact to further reinforce the justification for coercion.[51]

V. *The Backdrop: The Expansion of the Welfare State in Canada*

If the welfare state in Canada is both a "functional response to the needs of capital"[52] and the "fruits of working class struggle, as concessions",[53] important questions must address the provenance of the specific reforms of the 1940's and the 1960's and their relationship to the emergence of legal aid in the 1960's.

Drawing on the work of Leo Panitch, Ian Gough, Alan Moscovitch, and Martin Loney, there are a number of factors to examine which may have contributed to the expansion of the welfare state in Canada in the 1940's: the balance of class forces,[54] political unrest within Canada,[55] the increasing popularity of the C.C.F.,[56] the demand for workers, the growing strength of the labour movement,[57] and the surrounding circumstances internationally and in particular in the United States. It is difficult to determine which factors are decisive: the Canadian context of the

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50. For a discussion of popular consent to policing, see: Michael Brogden, *The Police: Autonomy and Consent* (London: Academic Press, 1982).
51. For example, the imposition of the War Measures Act in 1970, was taken as proof by many Canadians of the imminent danger of an insurrection.
52. Gough, *supra*, note 24 at 56.
53. Gough, *ibid.*
54. Gough, *ibid.*; Allan Moscovitch and Glenn Drover, "Social Expenditures and the Welfare State: The Canadian Experience in Historical Perspective" in Moscovitch and Drover, *The Benevolent State: The Growth of Welfare in Canada* (Toronto: Garamond Press, 1987) 14.
55. Leo Panitch refers to "popular radicalism": Panitch, *supra*, note 23 at 20.
56. Moscovitch and Drover, *supra*, note 54; Panitch, *ibid.*
57. Moscovitch and Drover, *ibid.*; Panitch, *ibid.* at 20.

depression, Canadian unrest, struggles outside the Canadian polity, or the American model for reform.[58]

According to Alan Moscovitch and Glen Drover, the next period of expanded social welfarism began in the late 1950's and early 1960s, when growing unemployment in the mid-1950's put increasing pressure on private welfare organizations, and on both provincial and municipal governments. This led to the Unemployment Assistance Act (1956), which they call "the first modern [Canadian] legislated responsibility for relief"[59] and set the stage for the Canada Assistance Plan.[60]

By 1957, "a national funding programme providing hospital care came into being"[61] and in 1962, the C.C.F. government in Saskatchewan introduced the first health care insurance plan.[62] According to Moscovitch and Drover, the recession from 1957-1963 generated a need to increase expenditures for unemployment assistance and relief. Despite increases, federal social welfare expenditures were still a smaller proportion of the budget in 1961 than in 1951. The largest increases were in provincial expenditures on education and health.[63]

Some of the specific circumstances of the 1960's in Canada which encouraged the expansion of the welfare state were: the growth in federal revenues in the 1960's[64] and the general economic buoyancy,[65] the threat of unrest in Quebec, new social conflicts and expanding social movements (student movement, poor people's movement, Aboriginal peoples movement, Quebec separatist movement, the women's movement, and the rise of English Canadian nationalism in the face of increasing American domination), a concern to "strengthen the integrative mecha-

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58. Moscovitch and Drover, *ibid.* at 27, discuss the influence of the American New Deal on Bennett, who referred to his proposals also as the "new deal". They characterize the Canadian response as involving coercion (use of military against strikers, deportations, bans), cooptation, and obfuscation (federal/provincial wrangles about responsibility). See also: Alvin Finkel, "Origins of the Welfare State in Canada" in Panitch, *supra*, note 24 at 344.

59. Moscovitch and Drover, *ibid.* For a detailed discussion of the implementation of contributory unemployment insurance schemes, see Carl Cuneo, "State Mediation of Class Contradictions in Canadian Unemployment Insurance, 1930-1935" (1980) 3 *Studies in Political Economy* 37.

60. *Ibid.* at 29. Moscovitch and Drover cite James Struthers, "Shadows from the Thirties: The Federal Government and Unemployment Assistance, 1941-1956" in Jacqueline S. Ismail, ed. *The Canadian Welfare State: Evolution and Transition* (Edmonton: University of Alberta Press, 1987).

61. *Ibid.* 29-30.

62. Edwin A. Tollefson, *Bitter Medicine: The Saskatchewan Medicare Feud* (Saskatoon: Modern Press, 1963).

63. Moscovitch and Drover, *supra*, note 54 at 30.

64. Loney, *supra*, note 27.

65. See, for example: Moscovitch and Drover, *supra*, note 54 at 30, who cite the improvement in the economic position of the United States as encouraging expansion.

nisms" of the state,[66] an increasingly strong labour movement,[67] and demands from those movements and organizations, combined with a growing awareness of poverty in a period of relative affluence. A minority Liberal government was elected on a reform platform. The response to these pressures was a "wide range of federal programmes aimed at equalizing opportunities, rather than substantially reducing inequality."[68] The result was a more developed welfare state.[69]

While the U.S. situation cannot be translated directly into the Canadian experience, it clearly was significant and influential in several ways: the cross-fertilization of social movements in Canada,[70] the spectre of unrest which may have prompted the Canadian government into diversionary action, the example posed by the American initiatives under Kennedy and Johnson, and the developed ideology of concepts we then had to contend with or reshape ('poverty', 'citizen participation', 'rights').[71] An analysis of specifically Canadian political traditions, protest movements,[72] the roots of agrarian socialism,[73] and the emergence of the C.C.F. and the N.D.P. (particularly in Saskatchewan), also assists.[74]

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66. Loney, *supra*, note 27 at 451.

67. There was increased public sector unionism in the 1960s. Leo Panitch and Donald Schwartz, "The Economic Crisis and the Transformation of Industrial Relations in Canada" (December 1983) *Canadian Association of University Teachers Bulletin* 21. This seems likely to have contributed to demands. Also the labour movement was now unified (1956) and formally allied with the C.C.F. (1961) in the N.D.P. See Moscovitch and Drover, *supra*, note 54.

68. Moscovitch and Drover, *supra*, note 54 at 30.

69. *Ibid.* at 36. By the mid-1970s, social consumption expenditures had grown to more than fifty percent of total Canadian state expenditures.

70. For example, Myrna Kostash describes the influence of the 'black power' movement on the Canadian student movement. See Myrna Kostash, *Long Way from Home: The Story of the Sixties Generation in Canada* (Toronto: James Lorimer, 1980).

71. Stuart Hall refers to this as the "inherited ideological terrain." See Stuart Hall, "Reformism and the Legislation of Consent" in Bob Fine, Richard Kinsey, John Lea and Jock Young, eds., *Permissiveness and Control: the Fate of the Sixties Legislation* (London: MacMillan, 1980).

72. Two examples were the On to Ottawa Trek and the Abortion Caravan.

73. It would be necessary to analyze the usefulness of this term as a descriptor, for example. See John Conway "Populism in the United States, Russia, and Canada: Explaining the Roots of Canada's Third Parties", in J. Paul Grayson, ed. *Class, State, Ideology and Change* (Toronto: Holt, Rinehart and Winston, 1980) at 305-321.

74. While such an analysis is not within the scope of this paper, I think an examination of the emergence of medicare would provide a basis for understanding the expansion of social welfare in Saskatchewan. In many instances, the role of the federal government was crucial in the initial impetus (federal funding, push from federal Minister of Justice). However, the question of why Saskatchewan took the concept of legal aid in the direction it did is probably much more rooted in circumstances specific to Saskatchewan (balance of powers, political traditions) and the influence those had on the politicians, the planners, and ultimately the workers, board members, and clients.

A substantial number of social welfare programs were put into place in the period from 1963-1968: the Canada Assistance Plan (a federal-provincial cost-sharing agreement to provide social assistance on the basis of "need") (1965), the Canada Pension Plan and the Quebec Pension Plan (1965), health insurance (to provide funding for doctors' fees and hospitalization)(1964), the National Housing Act (to provide funds for public housing) (1964), expanded Youth Allowance (to include children between 16 and 18) (1964).[75]

Moscovitch and Drover enumerate a range of programs (health, education, unemployment insurance, workers' compensation, the Canada Assistance Plan, old age pensions, and family allowances) which they say fill both a legitimation ('social wages') and an accumulation function (to socialize some of the costs of labour). They emphasize economic conditions as precipitating increased demand for the programs and an almost automatic expansion in the face of that demand; while minimizing the significance of the social relations of class and gender and the history of struggle.

Within the context of the expanding welfare state, the Canadian government took a number of steps including the establishment of the Economic Council of Canada (1964), a throne speech promising reforms to deal with poverty and regional disparity (April 1965) which presaged federal government efforts to deal with poverty,[76] a national conference on poverty (December 1965),[77] the establishment of the Company of Young Canadians (C.Y.C.) (1966),[78] the Fifth Annual Report of the Economic Council of Canada (1968)[79] which focused on poverty as a political issue, and the appointment of the Special Senate Committee on Poverty under Senator David Croll formed (1968).[80] By April 1971, four staff members, Ian Adams, William Cameron, Brian Hill, and Peter Penz had resigned from the Senate Committee; because they said it was clear that there would not be "any attempt to discuss the actual production of

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75. Moscovitch and Drover, *supra*, note 54 at 30-31.

76. A special planning secretariat was established to coordinate efforts; but abandoned 2 years later.

77. The discussion papers centred on vocational rehabilitation and retraining; although there were papers on "Characteristics of Low Income Families" and "One Attack on Poverty–Family Planning". For a record of that conference, see: Irwin Cotler and Herbert Marx, eds. *The Law and the Poor in Canada*. (Montreal: Black Rose, 1977).

78. The rationale as Kostash describes it was so that the "energies and talents of youth can be enlisted in projects for economic and social development in Canada and abroad". See Kostash, *supra*, note 70 at 20.

79. Economic Council of Canada, *Fifth Annual Review: The Challenge of Growth and Change* (Ottawa: The Queen's Printer, 1968) [hereinafter E.C.C. Report].

80. In November 1968, the Senate constituted the Special Senate Committee on Poverty. See: Special Senate Committee on Poverty, *Poverty in Canada* (Ottawa: Queen's Printer, 1971).

poverty in Canada."[81] W. Edward Mann, writing in 1970, suggests that medicare was an illustration of the "widening concept of welfare increasingly accepted by most Western democracies"[82], and that anti-poverty programs were part of this expanded welfarism. Also, he argued that the shift or uncertainty in party loyalties brought on by the crisis posed by inflation pushed the Liberals to adopt anti-poverty programs and the rhetoric of concern for the underprivileged so as to prevent supporters turning to the N.D.P.[83]

Accepting the liberal notion of the polity, he attributes the expansion to popular sentiment as expressed in electoral politics and consensus, not unrest. He seems to suggest that the widening concept of welfare arrives on the scene gratuitously with the collapse of the extended family and urbanisation and the lack of other ways to look after the needy. In other words, he assumes the benevolence of the state in elaborating the reasons for the expansion.

Left analysis of the expansion of the welfare state has cast doubt on assumptions about its benevolence, and shifts in the political climate have starkly highlighted its fragility. What is striking is how little the left work on the state, apart from the contributions of feminists, considers the impact on women.[84] The feminist work enriches an examination of the emergence and development of legal aid.

Feminist critiques have examined shifts in the state generally, the reasons for particular expansions or contractions, the differential impact of those expansions and contractions on women and men, and the role of the public and the private in that.[85]

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81. They prepared their own alternative report. See: Ian Adams, William Cameron, Brian Hill, Peter Penz, *The Real Poverty Report* (Edmonton: Hurtig, 1971) at v.
82. W. Edward Mann, ed., *Poverty and Social Policy in Canada* (Vancouver, Toronto, Montreal: Copp Clark, 1970) at viii.
83. *Ibid.* at ix.
84. See for example: Elizabeth Wilson, *Women and the Welfare State* (London: Tavistock, 1977); Jane Lewis, (ed.), *Labour and Love: Women's Experience of Home and Family 1850-1940* (Oxford: Basil Blackwell, 1986); Linda Gordon, *Heroes of their own Lives: The Politics and History of Family Violence* (New York: Viking, 1988). More recently there has been considerable work on the concept of poverty and how the theme of 'feminization of poverty' obscures issues.
85. Pat Armstrong and Hugh Armstrong, "Women, Family and Economy" in Nancy Mandell and Ann Duffy, eds. *Reconstructing the Canadian Family: Feminist Perspectives* (Toronto: Butterworths, 1988) at 146-147:

> Through legislation in areas such as the minimum wage, birth control and property rights, through social programs in fields such as unemployment insurance, family allowance, health and education, and through employment strategies which serve to expand or contract state sector employment (Armstrong 1984, chapter 6), the state plays a crucial role in the distribution of work, control and financial responsibilities between families and private enterprise, as well as between women and men.

In particular, socialist feminist work examines reproduction as well as production. The literature describes the establishment of capitalism, the new dominance of wage labour, and the characterization of that wage labourer as male, by the end of the nineteenth century.[86] At the same time, a new concept of motherhood (reinforcing notions about care and service) was emerging.[87] Thus, a new construction of both men (masculinity) and women (femininity) was appearing, not just coincidentally. Both the family and the labour market were part of shaping this, as were the state and law.[88]

State legislation reinforced shifts in the structure of the Canadian family. Women's status was fragile both within the family and within the labour market. In the family, women were increasingly dependent on men and then directly dependent on the state,[89] although not uniformly so. Gender was only one of the determinants of the structuring of this dependence. In the labour market, domestic and familial roles and responsibilities and attitudes towards women shaped their participation. There was also an interplay between the conditions of labour force participation and attitudes about women both in the workplace and in the home. Shifting options effected each other.[90] State regulations and employers' policies discouraged or prevented women from continuing their paid work after marriage.[91]

For the most part, state intervention has taken the form of insisting on or preserving family relations (for example, paternity, child support, income maintenance, reproduction), sometimes in response to women's demands. However, feminist demands have also sought state intervention to interfere with or dissolve family relations and some aspects of the privacy of the family (for example, easier availability of divorce, matrimonial property reform, custody, policing of child abuse and wife battering). The assertion of these demands at an individual level often required access to legal representation.

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86. See for example Armstrong and Armstrong, *ibid.*
87. Katherine Arnup, Andrée Lévesque and Ruth Roach Pierson, eds. *Delivering Motherhood: Maternal Ideologies and Practices in the 19th and 20th Centuries* (London: Routledge, 1990); Jane Lewis, *Labour and Love: Women's Experience of Home and Family 1850-1940* (Oxford: Basil Blackwell, 1986).
88. Arnup, Levesque and Pierson, *ibid.*
89. Jane Ursel, "The State and the Maintenance of Patriarchy: A Case Study of Family, Labour and Welfare Legislation in canada" in James Dickinson and Bob Russell, eds. *Family, Economy and State: the Process under Capitalism* (London: Croom Helm, 1986). See also Shari Barron, "Is there a Man in the House?" (March/April 1986) 9:4 *Perception* 12, as to the number of women who were cut off welfare for having a 'man in the house'.
90. Armstrong and Armstrong, *supra*, note 85 at 165-167.
91. Armstrong and Armstrong, *ibid.* at 157.

At the same time, as both the practice of legal aid workers and feminist challenges at law have shown, the family is not perpetually or evenly scrutinized. Instead, intervention varies with the issue, with gender, and with class[92] and race.[93] For example, there have been shifts over time in the way the issue of child abuse and custody are characterized, and the media has played an important role in shaping that discussion.[94]

The practice of legal aid workers, during the 1970's and the 1980's, illuminated some of these issues. For example, custody disputes do not only arise following marriage breakdown, and the protagonists are not

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92. Mary McIntosh, "Introduction to an Issue: Family Secrets as Public Drama" in 28 (January 1988) Feminist Review 6; Linda Gordon. "The Politics of Child Sexual Abuse: Notes from American History" (January 1988) 28 Feminist Review 56.

93. For example, coercive attempts to eradicate the Aboriginal family were made. Such attempts have often been by compulsory state education (e.g. Aboriginal people, Mennonite people in Saskatchewan, Hutterite people in Alberta and Saskatchewan); but sometimes by much more drastic and brutal means such as the forced removal of children from their parents. See for example: Associate Chief Judge Murray Sinclair, Provincial Court of Manitoba:

> In the 1880s the Federal Government enacted amendments to the Indian Act in which Indian children were legally required to attend schools as established or directed by the Minister of Indian Affairs. This was some time before compulsory education existed for the rest of Canada. The only schools established by the Minister at that time were residential schools patterned on the Industrial school model then popular in the United States for Indian children and juvenile delinquents. Indian children were taken from their parents (and from their influence), the Minister was appointed their legal guardian and they were educated in schools run sometimes by the Department but generally by missionary societies (thereby coincidentally facilitating the Christianization of the Indians–another ethnocidal belief I might add–that aboriginal people needed to be saved from their paganistic existence through Christianity).

Associate Chief Judge Murray Sinclair, Provincial Court of Manitoba, Presentation to the Western Workshop of the Western Judicial Education Centre (14 May 1990). See also Basil Johnston, *Indian School Days* (Toronto: University of Toronto Press, 1988; Carol Laprairie, "Native Women and Crime in Canada: A Theoretical Model" in Ellen Adelberg and Claudia Currie, eds. *Too Few to Count: Canadian Women in Conflict with the Law* (Vancouver: Press Gang, 1987). For a moving account of similar atrocities against Indian families in the United States, see Dane Coolidge, "'Kid Catching' on the Navajo Reservation: 1930" in Steven Unger, ed. *The Destruction of American Indian Families* (New York: Association on American Indian Affairs, 1977) 18.

94. Compare, for example, the discussion and media treatment of the murder of two young shoeshine boys in Toronto, the Inquiry into Mount Cashel, and the treatment of cases of child abuse within the family. In the latter, the kind of cases that tend to be openly aired are those involving cruelty and neglect, characterized as something different than sexuality. For an analysis of the Toronto case, see Yvonne Ng, "Ideology, Media and Moral Panics: An Analysis of the Jaques Murder" (M.A. Thesis, University of Toronto, 1981). There was comparatively light coverage of the recent 'exposure' of the coverup of institutional child abuse in the North. See Dave White, "Bureaucrats Concealed Sexual Abuse", 4 July 1990, *Yukon News*; and Chuck Tobin, "Former Child Care Worker Jailed Five Years for Assaults", 3 July 1990 *Whitehorse Star*. Thirteen boys were assaulted, some repeatedly, at a native students' residence in Whitehorse. Officials in the Department of Indian Affairs knew about the abuse and did nothing.

always parents.[95] Instead, as the situation facing Aboriginal people indicates, custody may be more often a dispute between the State and one or both parents, or another relative.[96] The public appropriation of the private family lives of Aboriginal women is in sharp contrast to feminist analysis which focuses on the invisibility of the private sphere. The state is not moving uniformly in the direction of privatization or informalism.[97] It also is moving towards increased intervention. This mirrors contradictory moves by the state to privatize on economic[98] and philosophic grounds in the marketplace and the family, and yet expand the criminal sphere as the increases in the law and order budgets in the 1970's and 1980's indicate.[99] Each of these shifts had implications for legal aid. These examples also render problematic uncontradictory fully negative assessments of either privacy or of state intervention.

VI. *Poverty*

In the 1960's, three concepts had considerable influence, both in terms of their centrality to the elaboration of social welfare policies and their topicality as political issues: 'poverty', 'participatory democracy' and civil 'rights'. The ideology or conceptualization of the three issues, I would argue, circumscribed both the conceptualization of progressive struggle and the outcome of reform. With respect to legal aid, I would argue that the ideology of poverty skewed the perception of the problem

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95. Another example of the way law's boundaries hive off an area as though the issues are containable is the distinction set up between custody within family law and custody within child welfare legislation. The central issue is the same, the custody of children, but the protagonists are different, and the issues are constructed as different.

96. See for example: Patricia Monture, "A Vicious Circle: Child Welfare and the First Nations (1989) 3:1 Canadian Journal of Women and the Law 1. See also Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Minister of Supply and Services, 1978); Richard Thatcher, "Stop Stealing Our Children", October 1982, Canadian Dimension 3.

97. Elizabeth Pickett, "Women, Law and Family Mediation: A Feminist View of Formal and Informal Justice in Family Law" (LL.M. Thesis, York University, 1989); Anne Bottomley, "What is Happening to Family Law? A Feminist Critique of Conciliation" in Julia Brophy and Carol Smart, eds. *Women in Law: Explorations in Law, Family and Sexuality* (London: Routledge, Kegan & Paul, 1985) 184.

98. See Judy Fudge, for example: "The Public/Private Distinction: The Possibilities of and Limits to the Use of the Charter Litigation to Further Feminist Struggles", (1987) 25:3 Osgoode Hall Law Journal 485. Economic grounds are not sufficiently explanatory, since some *decisions to privatize viable economic enterprises are clearly not rational economic planning* except to benefit individual members of the capitalist class.

99. Provincial per capita expenditures on policing vary dramatically across the country, and have been increasing. See for example, Ian Taylor, *Crime, Capitalism and Community* (Toronto: Butterworths, 1983).

in a narrow direction; and that the ideology of participatory democracy and of rights limited the solution envisaged.

In the U.S., to defuse the unrest generated by the growing civil rights movement in the 1950's and 1960's, the U.S. government focused on economic and social programs, not rights or racism.[100] The Vietnam war also generated resistance and unrest; and student movements and poor people's movements also were drawn into activism.[101] Economic issues however were an important political issue as the March on Washington for Jobs and Freedom[102] demonstrated. In the face of that march, new programs were created to address poverty. The War on Poverty[103] was announced shortly thereafter.

However, to declare war on poverty without addressing the class nature of society requires a particular definition of poverty,[104] a definition which emphasizes individual psychological and cultural factors rather than structural and relational ones. This definition, the ideology of poverty, becomes crucial to the articulation of solutions to poverty which focus on poor people and victim blaming rather than on societal transformation. At the same time, the ideology of 'poverty' also has material dimensions: the structuring of dependency and in particular the structuring of women's dependency on men,[105] the definition of a poverty line and the consequent availability or unavailability of income support programs, the construction of a dichotomy between the 'deserving' and 'undeserving' poor,[106] and the ways those are constituted at law.

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100. This was true of Presidents Roosevelt, Kennedy and Johnson.

101. Wini Breines, *Community and Organization in the New Left: 1962-1968* (New York: Praeger, 1982); Madeleine Adamson and Seth Borgos, *This Mighty Dream: Social Protest Movements in the United States* (Boston: Routledge & Kegan Paul, 1984).

102. The march on Washington took place in August 1963.

103. President Lyndon Johnson declared an "unconditional war on poverty" in his State of the Union Message, 1964. See: Michael Harrington, *The New American Poverty* (New York: Holt, Rinehart & Winston, 1984).

104. See: Ralph Miliband, "Politics and Poverty" in Dorothy Wedderburn, ed. *Poverty, Inequality and Class Structure* (Cambridge: Cambridge University Press, 1974) 183.

105. For example, the man-in-the-house rule, which has been the subject of Charter challenges in several provinces, clearly has the effect of the state insisting on women's dependency on any man however tenuous her connection with him. See discussion infra, note 99. Poor women in Saskatchewan were also compelled to seek legal assistance to pursue claims under the *Children of Unmarried Parents Act*, R.S.S. (1978) cap. C-8 and the *Deserted Wives' and Children's Act*, R.S.S. (1978) cap. D-26, as a precondition to securing benefits from the Department of Social Services.

106. This dichotomy between the 'deserving' and 'undeserving' poor has gendered scripts and is often constructed along racial lines. See Patricia Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Boston: Unwin Hyman, 1990).

John Kenneth Galbraith[107] in 1958 suggested the focus of political attention in the U.S. had shifted from rights to socio-economic issues. However, the ideology of poverty at the time meant that poverty was characterized as individual pathology.[108] Since poverty was identified as an issue before demands were made for legal aid; therefore, the particular conceptualization of poverty was important; because of the influence that conception may have had on the conceptualization of the legal assistance needs of poor people. The conceptualization of 'law', 'rights' and 'justice' also was important as a prelude to 'law and order', and also influenced the potential of legal aid.

By the late 1960's, the study of poverty in Canada was, as Mann said "an 'in' thing, socially respectable and even of interest to govern- ments."[109] The Throne speech in 1965 had called for the elimination of poverty. The Economic Council of Canada had recognized it as an urgent problem. Cy Gonick in 1969 described it as the "new moral outrage."[110]

Both the rhetoric of the War on Poverty and the concept of the 'culture of poverty' were at the root of how people in these debates talked about the powerlessness of the poor in both the U.S. and Canada. While a link between poverty and powerlessness was acknowledged, the reasoning implicated the poor rather than the powerful, by suggesting that all the poor needed was a sense of power and some encouragement to participate in the political process. The focus was on the effects of poverty, the condition of oppression, and particularly the sociological and psycho- logical characteristics of the poor[111], rather than the structural causes of poverty. The emphasis was on altering the poor and on blaming the victim,[112] rather than on restructuring the conditions which constructed poverty.

Oscar Lewis[113] and Galbraith[114] in different ways were both particu- larly influential on the dominant mainstream approach to poverty in the U.S. and in Canada. According to Galbraith, poverty was increasingly less prevalent; and where it did occur, it was occasioned by such features of the individual or the family as: inadequate education, disability or

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107. John Kenneth Galbraith, *The Affluent Society*, (Boston: Houghton Mifflin, 1958) at 97. See also: John Kenneth Galbraith, *The Affluent Society*, 2nd edition revised (London: H. Hamilton, 1969).
108. Elizabeth Wilson, *supra*, note 84.
109. W. Edward Mann, *supra*, note 82 at vii.
110. Cy Gonick, "Poverty and Capitalism" in Mann, ed., *ibid.* at 66.
111. See for example, Warren Haggstrom, "The Power of the Poor" in Mann, ed., *ibid.* at 383.
112. For a critique of this, see: William Ryan, *Blaming the Victim* (New York: Random House, 1971).
113. Oscar Lewis, "The Culture of Poverty" in Mann, ed. *supra*, note 82 at 26.
114. Galbraith, *supra*, note 107.

health problem, intransigence or unwillingness to relocate for work, or too large a family. Because the conditions were seen as rooted in the characteristics of the family, poverty was seen as self-perpetuating; and the challenge became to break what was often called the 'cycle of poverty'.[115]

Lewis, in his oft-cited but misrepresented work,[116] enumerates some of the characteristics of the poor as: "the disengagement, the nonintegration, of the poor with respect to the major institutions of society,"[117] "the low level of organization",[118] and "a strong feeling of fatalism, helplessness, dependence and inferiority."[119] These values, norms and behaviour are taken to be what inhibit people from escaping poverty. This conceptualization supports individualistic and functional explanations for why society is stratified.[120]

The Economic Council of Canada echoed this language from the U.S. and imported it into Canada. They referred to the "characteristics of the 'hard-core' poor"[121] and the "accumulated defeat, alienation and despair which often so tragically are inherited by the next and succeeding generations."[122] Their report described the poor as "collectively inarticulate, many of them lack the education and the organization to make themselves heard."[123] The council argued in favour of encouraging

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115. This perspective rationalizes removing children from their parents to extricate them from the conditions of poverty and thus break the cycle. In Canada, this excuse was and is most often used to remove aboriginal children from their parents and their culture, a mask for cultural genocide. (It is acceptable for the parents to live in conditions of poverty; but not for the children to do so.)

116. While Lewis' work was the original source of the term 'culture of poverty', the theory of the culture of poverty was a misappropriation of his work. For a critique, see Jack Roach and Orville Gurrslin, "An Evaluation of the Concept 'Culture of Poverty'" in Mann, ed., *supra*, note 82 at 35.

117. See Oscar Lewis, *supra*, note 113 at 30. While Lewis was referring to a particular situation, these characteristics have been taken over to generally apply to the poor.

118. *Ibid.* at 31.

119. *Ibid.* at 31.

120. John Hofley, "Problems and Perspectives in the Study of Poverty" in John Harp and John Hofley, eds. *Poverty in Canada.* (Scarborough: Prentice-Hall, 1971) at 102. More recently, resonances of this 'cultural' explanation of poverty appear in the neo-conservative scholarship of the 1980's and 1990's. See, for example Thomas Sowell, *Civil Rights: Rhetoric or Reality* (New York: W. Morrow, 1984).

121. Economic Council of Canada (E.C.C.), *Fifth Annual Review: The Challenge of Growth and Change* (Ottawa: Queen's Printer, 1968) 103-140.

122. *Ibid.* at 105.

123. *Ibid.*

citizen involvement and public participation, both in planning and "participation as a goal in itself."[124]

The Economic Council Report (1968) described the "large number of people who have not benefited from our so-called affluent society"[125] and focused on the "large and urgent problem"[126] of poverty. They cited the U.S War on Poverty[127] as having brought about improvements, and evaluative techniques Canada could borrow.[128] In particular, they identified legal services as: "highly successful in defending the poor before the courts, bringing suits on behalf of poor clients, and providing educational programs to acquaint the poor with their rights."[129] They described poverty as more than low income, a characterization which recurred in the arguments by the proponents of legal services for poor people.[130]

VII. *Participatory Democracy*

At the same time as the 'culture of poverty' emerged as an issue of social concern, concepts of 'freedom' and 'participatory democracy' were gaining currency. C. Wright Mills[131] suggests that the renewed interest in democracy and freedom was possibly an outgrowth of the intense ideological propaganda of the cold war. Thus, as the 'conventional wisdom' on poverty led to calls for participation and democracy to eliminate poverty, the arguments of the new left complemented this. That is, both the left and liberals coincided in their calls for 'participation', but understood the concept quite differently.

As Westhues says, the basic ideology of popular democracy and of resistance to bureaucratic institutions was not limited to Canada, but was shared by most of the countries in the industrialized western world.[132] The civil rights movement in the early 1960's "served to organize dissident students in a way unprecedented in American history"[133] and this move

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124. Marc Morency, "Animation Sociale: The Experience of the B.A.E.Q. (Bureau d'Aménagement de l'Est du Québec)" in John Harp and John Hofley, eds. *Poverty in Canada* (Scarborough: Prentice-Hall, 1971) at 303.
125. E.C.C. Review, *supra*, note 121 at 4.
126. *Ibid.*, at 5.
127. *Ibid.* at pp. 124-128, 130-140.
128. *Ibid.* at 105.
129. *Ibid.* at 126.
130. See discussion *infra*.
131. C. Wright Mills (1949), in C. Wright Mills, "On Knowledge and Power" in Irving Horowitz, ed. *Power, Politics and People: The Collected Essays of C. Wright Mills.* (New York: Oxford University Press, 1963) at 599-613.
132. Kenneth Westhues, "Inter-Generational Conflict in the Sixties" in *Prophecy and Protest: Social Movements in Twentieth-Century Canada* (Toronto: Gage, 1975) at 388.
133. *Ibid.* at 390.

for racial justice extended to Black communities in Canada. Both the mainstream and the new left embraced the rhetoric of participatory democracy. The terrain of struggle became the meaning and elaboration of that concept through theory and practice. For example, the S.D.S. Port Huron Declaration demanded:

> As a social system we seek the establishment of a democracy of individual participation, governed by two central aims: that the individual share in those social decisions determining the quality and direction of his life; that society be organized to encourage independence in men [sic] and provide the media for their common expression.[134]

Loney describes how in the 1960's and 1970's, the Canadian government introduced a variety of programs with the general purpose of promoting citizen participation with particular emphasis on native groups, the poor, and youth.[135] He characterizes these programs as at least partly social control[136] (to integrate dissidents, to perpetuate the illusion of pluralism, to ensure stability), but also as reflecting a commitment to the 'just society' and the influence of American initiatives under Kennedy and Johnson.

Loney goes on to describe the "host of initiatives in the citizen participation field"[137] some of which, he says, had a social change orientation like programs in the United States (e.g. the Company of Young Canadians). He cites the big increase in government funding and the penetration of the voluntary sector; but points out how the invitation to participation was hollow and really only "a further step towards a carefully managed 'democracy'."[138]

Proposals for legal services programs for poor people were shaped in this atmosphere and also encompassed rhetorical commitments to community involvement and client participation.[139]

VIII. Rights

It is not surprising that the new left in the 1960's said little about legal services for the poor; because the left, for the most part, had tended to

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134. Port Huron Statement, cited in Westhues, *ibid.*, at 390, footnote 8.
135. Loney, *supra*, note 27 at 446.
136. See work of Gavigan and Chunn, for a discussion of the problems with the concept of 'social control': Shelley Gavigan and Dorothy Chunn, "Social Control: Analytical Tool or Analytical Quagmire?" [unpublished].
137. Loney, *supra*, note 27 at 456.
138. *Ibid.* at 463.
139. See, for example: Saskatchewan Legal Aid Committee (Roger Carter, Chair), *Final Report of the Saskatchewan Legal Aid Committee* (1973) [hereinafter Sask. Legal Aid 1973].

eschew engagement with law and to see rights as unimportant.[140] Instead, it had taken an abstentionist or oppositionist position to law and denied the possibility of law as a site of struggle. More recently, the work of Edward Thompson and others has challenged the left to complicate their analysis of law, to take law seriously, to see gains as the product of struggle and to acknowledge rights as more than "shams".[141]

In contrast to the left, social movements have been attracted to the discourse of rights, historically. During the 1960's, the assertion of 'rights' as a strategy was common to a number of movements: the labour movement, the civil rights movement, the women's movement, and the Aboriginal peoples' movement.[142] The social movements sometimes characterized rights differently than did liberals. Rights were constructed as positive, as an affirmation of a state duty, rather than as negative, as a protection against state interference.

For example, in the 1950's and the 1960's, the civil rights movement articulated demands in the language of legal rights (and perhaps the demand for access to lawyers emerged as an extension of that).[143] While some critics[144] have argued that it was a poor strategic choice to focus on

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140. Gavigan, *supra*, note 7; Snider, *supra*, note 2.

141. See generally: Thompson, *supra*, note 18; Fine, *supra*, note 18. While recognizing Thompson's contribution and the need to form alliances with liberalism in defense of civil liberties, Bob Fine argues that Marxism must not abandon its critique of the 'rule of law' and the "principal institutions of the liberal bourgeois state–Parliament, jury trial, 'independent judiciary', 'impartial' police, etc.". See Fine, *supra*, note 18 at 180. Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (London: Routledge & Kegan Paul, 1979) refers to challenging the contradictions of law by "taking it at its word" (110) and "trapping it in its own ideology"(110). Forcing the contradictions may either result in legal victories, or minimally begin to dispel the old representations of the ideology. The Canadian work on strategic engagement and the transformative potential of law emerged in the 1980's, much of it dealing with the *Charter*. For more general work, see Stephen Brickey and Elizabeth Comack, "The Role of Law in Social Transformation: Is A Jurisprudence of Insurgency Possible?" (1987), 2 Canadian Journal of Law and Society 97; Stephen Brickey and Elizabeth Comack, eds., *The Social Basis of Law: Critical Readings in the Sociology of Law* (Halifax: Garamond, 1986); Susan Boyd and Amy Bartholomew, "Toward a New Political Economy of Law" in Wallace Clement and Glen Williams, eds. *The New Political Economy*, (Kingston: McGill-Queens University Press, 1989); Tulio Caputo and Neil Sargent, eds. (1991), 3:1 Journal of Human Justice (issue entitled "Law and Social Transformation").

142. See Hobsbawn's discussion of the attraction of 'rights' for the labour movement: Eric Hobsbawn, "Labour and Human Rights" in *Workers: Worlds of Labour* (New York: Pantheon, 1984) (1984b). See also Miliband's reference to the "extremely strong attraction which legality, constitutionalism, electoralism, and representative institutions of the parliamentary type have had for the overwhelming majority of people in the working-class movements of capitalist societies", in the context of discussing the failure of leninist politics. See: Ralph Miliband, *Marxism and Politics* (Oxford: Oxford, 1977) at 172.

143. See Wini Breines, *supra*, note 101 at 10-11.

144. Piven and Cloward, *supra*, note 103.

legal rights rather than socio-economic rights, as Julian Bond[145] points out, the line between the two is not so dichotomized and economic justice was part of the struggle for civil rights.[146]

It seems to me that there are several factors in this attraction to the discourse of rights, and these factors are not necessarily mutually exclusive: a tradition of belief in rights as a way to frame moral claims;[147] the appeal of rights to the oppressed;[148] the hegemony of legalism and the centrality of law within liberalism and the consequent strategic importance accorded rights and the engagement with law; but also the limited strategic possibilities available to an oppressed group.[149] In terms of strategy, engagement with law was premised on a number of possible views: a belief in the promises of 'justice'; the view that law had ideological force and that judicial recognition of rights was a way to solidify a position gained by political struggle;[150] the possibility of newly

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145. Julian Bond, *supra*, note 38.
146. As Bond argues:

> Yesterday's movement has been criticized in the perfect hindsight of today for winning gains for middle-class blacks alone, but middle-class blacks in Montgomery did not ride the city's buses, and college professors in Greensboro did not eat their lunch at the "five & dime." Someone needs to disabuse the modern world of the notion that the beneficiaries of race-centered affirmative action are somehow "profiting" from it, as if the movement's goals were an investment shared by a greedy few–a subtribe of ebony Ivan Boeskys trading up life's ladder. There is no "profit" in receiving right treatment, just as there is no "profit" in being able to register to vote. Receiving rights others already enjoy is no special benefit or badge of privilege; it is the natural order of things in a democratic society.
>
> The growth of the black underclass is a result of continued racism and an economic system dependent on class division. Abundant scholarship notwithstanding, there is no other possible explanation–not family breakdown, not lack of middle-class values, not lack of education and skills, not absence of role models. These are symptoms. Racism is the cause. Its elimination is the cure.
>
> The 1950's-1960's movement was a mass mobilization against racism, and later, against imperialism. Racism's legal standing, at lunch counters and bus stations and ballot boxes, was eradicated rather quickly. In retrospect, we were foolish to believe a society which values material wealth over human life could be cleansed so quickly of this virus. It has proven more deadly than any plague of yesterday or today.

Ibid. at 278-279.
To explore this further, would require a deeper consideration of strategic choices about the engagement with law and an evaluation of that engagement in terms of the struggle of the Black movement. This line of inquiry would be interesting as a point of comparison to the contemporary women's movement struggle.
147. Hobsbawn discusses rights as the "natural language of anyone who sets up a model of morality and justice." See Hobsbawn, supra, note 35 at 309.
148. *Ibid.*
149. Kimberle Williams Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law", 101:7 (1988) Harvard Law Review 1331.
150. For example, see *Brown, supra*, note 8.

created rights as way to change attitudes;[151] or a confrontation to point out a contradiction and bolster a demand.[152]

In the U.S., the Supreme Court victories starting in 1954 with *Brown* seemed to confirm this strategy as a useful course and also to solidify confidence in the 'highest court in the land'. One of the difficulties is that victories may readily get translated into 'legal' ones, as something the courts give rather than something won by struggle, and this may in turn perpetuate the centrality of law. The centrality of law at once promotes and perpetuates the idea that society is democratic and creates expectations that society is democratic; and thus plants seeds of contradiction or potential challenge. Justice and morality become equated with law. However, any evaluation of the effectivity of *Brown* must be situated in a larger context which considers the context of the civil rights movement and the dynamic possibilities.[153]

Hobsbawn argues that the language of rights was and is "unsuited ... to the struggle for the achievement of the economic and social changes to which labour movements were dedicated."[154] However, I see rights as ideologically contestable and contested rather than static. Significantly, the main critique of left theory on rights came initially from activists and minority groups.[155] This critique has now been taken up more broadly by the academic literature. As Amy Bartholomew and Alan Hunt argue, what is needed is a theory of rights that captures this fluidity and focuses on questions of political strategy and efficacy.[156] A consequence of the dismissal of rights by the left was that the liberal construction of rights as negative rather than as positive dominated.

Whatever the subsequent evaluation of the merit of those strategies,[157] many of the social movements of the 1960's (the civil rights movement, the welfare rights movement, the women's movement) shared a concern

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151. For example, Charles Reich, "The New Property" (1964) 73 Yale Law Journal 733, discusses the "new property" and rights attendant to that.

152. This was the limited strategy of engagement of the left. The N.A.A.C.P. was much more actively engaged in building a jurisprudence of equality.

153. See Crenshaw, *supra*, note 149; Alan Hunt and Amy Bartholomew, "What's Wrong With Rights?", (1990), 9:1 Law and Inequality 1.

154. Hobsbawn, *supra*, note 35 at 311.

155. See, for example Patricia Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987), 22 Harvard Civil Rights Civil Liberties Law Review 435; Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987), 22 Harvard Civil Rights Civil Liberties Law Review 323; Richard Delgado, "The Ethereal Scholar: does Critical Legal Studies Have What Minorities Want?" (1987), 22 Harvard Civil Rights Civil Liberties Law Review 301.

156. Bartholomew and Hunt, *supra*, note 153.

157. It is not within the scope of this paper to explore those extensive debates.

with 'rights'; and made their demands in that discourse.[158] The strength
of social movements, their articulation of demands in the language of
rights, and the legal victories they won all inspired and encouraged legal
activism and propelled some lawyers to reflect on what progressive role
they could play.[159] They also fed a perspective that access to lawyers
would be a useful goal. At the same time, the strength of social move-
ments was sufficient to elicit reforms. I would argue, then, that this focus
on rights in the 1960's indirectly encouraged the emergence of legal aid
in Canada, and that the emergence of legal aid and the growth of the
profession in turn deepened the centrality of law and rights. That
tendency has been further deepened in the 1980's in Canada with the
entrenchment of the *Charter*.[160]

IX. *The 'Just Society'*

Meanwhile, as the concepts of poverty, participatory democracy, and
rights were being elaborated, then Justice Minister Pierre Trudeau
popularized calls for a "just society".[161] It was probably supported for
some of the same reasons as the U.S. War on Poverty. Perhaps, here too,
the rhetoric of the cold war created its own dynamic or demand. Legal aid
simply became part of that.

John Turner,[162] speaking in 1970, referred to a crisis of authority and
legitimacy of the legal order. He described his proposals as a manifesto
for law reform; and spoke of a revolution made possible through law as

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158. Other examples were gay and lesbian activists and Aboriginal people, who also made
demands in terms of 'rights'.
159. One of the possible areas for progressive practice that they considered was the represen-
tation of poor people.
160. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.),
c.11. There is now a considerable body of literature dealing with the impact of the *Charter* on
the legalization of politics and the politicization of law and considering the possibility of
progressive engagement with law, and in particular the *Charter*. See, for example Judy Fudge,
"The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter
Litigation to Further Feminist Struggles" (1987), 25:3 Osgoode Hall Law Journal 485; Judy
Fudge, "The Privatization of the Costs of Social Reproduction: Some Recent Charter Cases".
(1989), 3:1 Canadian Journal of Women and the Law 246; Harry Glasbeek and Michael
Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of
Rights and Freedoms" (1984), 2 *Socialist Studies* 84; Michael Mandel, *The Charter of Rights
and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); Andrew Petter,
"Canada's Charter Flight: Soaring Backwards into the Future" (1989), 16 Journal of Law and
Society 15; Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women*,
(Ottawa: Canadian Advisory Council on the Status of Women, 1989).
161. *Supra*, note 9.
162. John Turner was then Minister of Justice and Attorney General of Canada.

a response to the confrontation of the 1960's. He advocated redressing the balance of power of the state to encroach less on individual rights (to property and to privacy); reforms to make criminal law more humanistic and just (bail reform bill, repeal of the vagrancy sections); and the establishment of the Law Reform Commission. Referring to the disgrace of poverty, he called for equality of access and equality of treatment before the law for rich and poor, young and old alike.[163]

The poor were described as bewildered by law and sceptical about, if not hostile to, lawyers.[164] He summed up by emphasizing the need to ensure equal treatment in the courts, and implying that this is met by access to counsel. His concept of legal representation for the poor at that time included services for a wide range of problems (not only criminal law[165] but also including contracts, labour, landlord/tenant, welfare), representation in court, and law reform to alter the imbalance. Government support for legal aid was couched in the terms of the promises surrounding the "just society".[166]

X. *Legal Aid and the Legal Profession*

It seems likely that the concern of legal professionals and academics for legal aid was generated in part in response to the expanding welfarism, generalized rhetoric about poverty and the just society, the model of the U.S., and was inspired by the particular successes of the civil rights movement.[167] It was also motivated by professional self-interest. Lawyers claimed the demand for charity work was increasing and they wanted fees for that work;[168] it would provide a vehicle for education of law

163. John Turner, "Justice for the Poor", speech delivered on 1 December 1969 to the 1969 International Conference of the North American Judges' Association in San Francisco.
164. These descriptions recurred in the arguments of the proponents of legal services for poor people.
165. Subsequently, the focus shifted to criminal law; encouraged by the provision of federal government moneys, after the initial grants in 1971.
166. It is difficult to assess what the 'just society' meant to Canadians generally. What was the ideological impact? At a concrete level, it does not seem to have brought about any particularly strong reverence for notions of 'justice' and 'rights'. It may have served to enhance the legitimacy of the government. For example, in October 1970, despite the lack of evidence, the federal government was able to bring into force the War Measures Act and readily persuade most Canadians that there was an apprehended insurrection in Quebec. Also, the white paper on Indians recommended terminating the special status of treaties in June 1969. For a discussion of the latter, and specifically the lack of consultation, see: Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig, 1969).
167. See discussion *infra*, note 10.
168. The negotiation of government funding or the re-negotiation of the scale of funding available was an issue in Ontario (Parker, supra, note 12), Manitoba (Norman Larsen, "Seven Years with Legal Aid (1972-79): A Personal View of Some Events and Background Literature" in (1981), 2:3 Manitoba Law Journal) 237, and Saskatchewan (Abell, *supra*, note 1).

students[169]; and they were worried about professional autonomy given the spectre of socialised professions that medicare had raised.[170] They were also influenced by electoral politics[171] and by what some saw as the risk of unrest and violence. For example, Ian McDougall concludes his brief on behalf of the Community and Legal Aid Services Programme, to the Senate Committee on Poverty:

> ... [I]n view of recent U.S. experience vis a vis urban disturbances, as well as perhaps the recent events in the city of Montreal imply a demand for expeditions effort at the earliest opportunity. The law affords a means of translating many of the problems facing urban indigents into politically-acceptable solutions via our courts. When the recourse to law is available it does much to decapitate the frustration which leads to inevitable violence which may not be so politically acceptable.[172]

Lawyers did not really start to worry about the needs of the poor until there was a broad level of expressed societal concern about the needs of the poor. In that sense, they were reactive rather than initiators. As such, the proponents of legal services for the poor were susceptible to, constrained by and impelled by the developing ideologies of 'poverty', 'participation', and 'rights'. The parameters of the discourse were shaped by the political definitions of those concepts, and what Jane Jenson has called the "universe of political discourse."[173]

The literature addresses the delivery of legal services to the poor as a 'need' of the poor rather than as a 'demand' by the poor. Arguments tended to focus on the U.S. example of the Office of Economic Oppor-

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169. The deans of Ontario law schools were involved by 1968, according to Roland Penner: Roland Penner, "The Development of Community Legal Services in Canada: An Evaluation of Parkdale Community Legal Services in Toronto, Dalhousie Legal Aid Service in Halifax, and Community Legal Service Inc. in Point St. Charles, Montreal" (Ottawa: Health and Welfare Canada, 1977).

170. Parker, *supra*, note 10.

171. In 1962, the Ontario N.D.P. made a public defender system part of its election platform. The Liberals followed suit a few months later. See *The Toronto Telegram*, 19 February 1963, cited in McDougall and Taman, in Zemans (1972) at 108. A committee of inquiry was established by the Ontario Conservative government in June 1963; and a legal aid plan was introduced in 1966, the first in the country. (Legal aid was not part of the N.D.P. platform in Saskatchewan in the 1971 election.)

172. Ian McDougall, "Brief to the Senate Special Committee on Poverty: Legal Assistance of the Poor and the Principle of Equality under the Law". This concern about violence in the streets was not anomalous. Less than a year later, the majority of Canadians were prepared to accept the notion of an "apprehended insurrection" as justification for the suspension of civil liberties that the *War Measures Act* entailed.

173. Jane Jenson, "Gender and Reproduction: Or, Babies and the State" (1986), 20 Studies in Political Economy 9; Jane Jenson, "Paradigms and Political Discourse: Protective Legislation in France and the United States Before 1914" (1989), 2 Canadian Journal of Political Science 235.

tunity,[174] the legal academic literature, the moves within law schools, the federal rhetoric of the 'just society' in Canada, and federal initiatives related to law (for example, the Bail Reform Act[175] and the creation of the Law Reform Commission).[176]

Legal aid was understood and discussed in the literature for the most part in terms of liberal access to justice, albeit with some room to lobby for more far-reaching legal reforms. The philosophical base of legal aid was essentially imported from the United States. The writings of Jean Cahn and Edgar Cahn, and Stephen Wexler, and the War on Poverty were particularly influential.[177] Cahn and Cahn, writing in 1964[178], applauded both the objectives and the strategies of Johnson's War on Poverty. However, they suggested that a "civilian perspective" should be injected through neighbourhood law centres and the encouragement of client perspectives and participation. They argued that the legal services to be provided should be comprehensive and include traditional legal services for formal rights, legal representation with a view to law reform where the law was either vague or adverse to the interests of the poor as a group, and non-legal services which would pressure for change. They distinguished individual service cases from representative or broad impact cases; although, they said it was necessary to take service cases to determine what were the broad issues. Also, they saw a role for law students. Each of these points were echoed by others.

Wexler went further than Cahn and Cahn to situate narrow legal issues in a more extended context; and to consider what happens before and after the determination of the specific legal issue. Writing in 1970, he saw organizing for social change as the way to help the poor. By 1971, he acknowledged this could not be done at the lawyer's initiative. According to Wexler, the lawyer's role was instead to strengthen existing organizations, for example, by serving clients from those organizations.[179]

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174. The Office of Economic Opportunity was created by President Johnson, as part of the War on Poverty.

175. *The Bail Reform Act*, R.S.C. 1970 (2nd Supp.), c. 2.

176. See Parker, *supra*, note 10; Snider, *supra*, note 2; Larsen, *supra*, note 168.

177. For example, Taman writing in 1971 relies substantially on the work of Cahn and Cahn and Wexler. See Larry Taman, "The Legal Services Controversy: An Examination of the Evidence" (Ottawa: National Council of Welfare, 1971); Edgar Cahn and Jean Cahn, "The War On Poverty: A Civilian Perspective" (1964), 73 Yale Law Journal 1317; Stephen Wexler, "Practising Law for Poor People" (1970), 79 Yale Law Journal 1049. The National Conference on Law and Poverty in 1971 invited Cahn, Cahn and Wexler as discussants. For a record of that conference, see Cotler and Marx, *supra*, note 77.

178. Cahn and Cahn, *ibid.*

179. Wexler, *supra*, note 177 and Stephen Wexler, "How Not to Practise Law for Poor People" (1972), 1 Quaere 15.

The proponents of legal aid tended to discuss access to justice as a 'right' and a 'need'. Indeed, they fell in to medical metaphors like 'preventative' law, and suggested that legal representation was as fundamental a need as health care. However, while I think legal services can be useful to poor people, I see them also as related to legitimation. That conclusion prompts a further question about whether and in what ways law can be a site of struggle.

Most of the proponents of government-funded legal services for poor people couched their arguments in terms of equality before the law.[180] They appealed to the somewhat contradictory popular wisdom that 'everyone should have their day in court'; that there should not be 'one law for the rich, and another for the poor'. They resurrected the Magna Carta[181] and invoked Anatole France[182] to justify their case. They generally saw access to legal services as a precursor to, if not equivalent to, access to justice, and a step to achieving equity in society. A few discussed how to build a jurisprudence of equality and identified the need to go beyond individual cases to challenge systemic and structural injustice. Most saw a place for law reform and conventional political lobbying as the remedy for any gaps between the law and justice for the poor. They recognized some manifestations of bias. For example, with respect to criminal law, they would have agreed that bail provisions needed to be reformed, that vagrancy laws should be abolished, and that fines operated inequitably. Some recognized the need not only to reconstruct the terms of the law; but to create new rights[183] to effect social equality (to go beyond formal equality to substantive equality). They drew heavily on the 'culture of poverty' approach in their descriptions of the poor (e.g. "cycle of helplessness"[184], "defeatism"[185], "disenfranchise-

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180. See for example, Taman, *supra,* note 177 at 47: "As long as those without funds are thereby denied the services of lawyers, that ideal of equality before the law becomes a shallow, even cynical, myth."

181. "Nulli vendemus, nulle negabimus aut differemus, rectum aut justiciam." Translation: To none will we deny, to none will we sell or delay justice or right. (Magna Carta, article 40)

182. Anatole France's phrase describing "the majestic equality of the French law, which forbids both rich and poor from sleeping under the bridges of the Seine" was frequently invoked to describe the inequality of the law. However, as Jock Young points out, this description glosses over several important aspects of the substantive inequalities of the law: the fact that the rich are treated more leniently for the same offenses, the lack of proportionality between social harm and penalties, the inaccurate implication that most crime is the result of poverty and the substantive elements of legal categorization. See: Jock Young, "Left idealism, Reformism and Beyond: From New Criminology to Marxism" in Bob Fine, Richard Kinsey, John Lea, Sol Picciotto and Jock Young, eds., *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (London: Hutchinson, 1979).

183. Charles Reich, *supra,* note 151.

184. Cahn and Cahn, *supra,* note 177.

185. *Ibid.*

ment"[186] and "dependency"[187]); and this influenced them to see participation and education as the solution.[188] This strategy was premised on the pluralist concept of the polity as neutral and subject to pressure.

They cited studies which indicated that the poor did not know lawyers, that the poor did not trust lawyers; that the poor saw law as their enemy not their friend; that the poor did not characterize their problems as legal; and that the poor were powerless and unorganized. They sought to remedy this by encouraging participation with a view to increasing the 'political competence' of the poor. (That is, the only hurdle between the poor and access to policy-making was taken to be their sense of powerlessness.)[189]

Legal services were extolled as an "adjunct" to other programs "directed towards the elimination of poverty."[190] The legal system was seen as representing a consensus of ideas and values.[191] For most, it was access that was central; but for a few the question was how to make legal institutions an "effective vehicle of social change."[192] The proponents of legal aid did make a contribution in pointing out the legal issues in the conditions of poverty; although, they usually restricted these to the areas that became known as poverty law (e.g. welfare, landlord/tenant, con-

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186. Ken Norman and Connie Hunt, "A Study in Injustice" (1972), 1 Quaere 11.
187. *Ibid.*
188. Sources in clinical law casebooks in the early 1970's included materials on the culture of poverty, the psychology of poverty and even the psychopathology of poverty.
189. See, for example, Taman, *supra*, note 177 at 6-7.
190. See Taman, ibid., at 1, writing in language very reminiscent of Cahn and Cahn.
191. Taman, *ibid.*, at 2.
192. For example, the Saskatoon clinic, in its brief to the Saskatchewan Legal Aid Committee, described its role as "a vehicle to assist poor people in changing some of the ground rules of a society which has done little to destroy the cycle of poverty." See: Brief of the Saskatoon Legal Assistance Clinic to Sask. Legal Aid (1973). Similarly, Ken Norman and Connie Hunt argued that lawyers had a role:

> But you ask what role can lawyers play in remedying the plight of the poor? So long as you define poverty strictly in economic terms, the answer becomes no role at all. But if you identify poverty by its other symptoms which are disenfranchisement and dependency, there is a role ...
>
> The model developed by the Cahns and labelled by them the neighbourhood law firm was developed to provide the opportunity, the orientation and the training to stimulate self-reliance and leadership among the ranks of the poor.

Norman and Hunt, *supra*, note 186 at 14.

sumer transactions, unemployment, debtor/creditor, bankruptcy, worker's compensation, unpaid wages).[193]

Some identified the need to work collectively with poor people[194] and even to take direction from them about their needs and about political strategies.[195] When they talked about organizing, however, they often meant creating legal relationships. There were some stray remarks about trade union and civil rights movements.[196] However, there was not much understanding either about why organizing was important (because of liberal ideas about the neutrality and benevolence of the state and the neutrality and justice of the courts and pluralist assumptions about how you bring about change), or how it could be done.[197] Nor was there much commitment to doing it.[198] While not necessarily modelled on traditional legal practice, the range of views put forward to argue in favour of legal aid were almost entirely situated within the liberal/social democratic stream.[199] At the same time, the left for the most part abandoned the terrain to the liberals. Those that argued for lobbying for law reform and organizing went the furthest. However, strategies for organizing with the poor and taking direction from them did not become significantly elaborated until the early 1970's, with the increase in clinics and the direct experience of workers.[200]

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193. Sometimes this delineation of the different legal issues confronting the poor was also based on misconceptions. For example, in a long list of the kinds of legal problems that supposedly did not confront middle class clients, Ken Norman and Connie Hunt argued that, in contrast to poor people:

> Their husbands [of middle class women] aren't assaulting them, absconding with their children, threatening to break down their doors, failing to make maintenance payments ...

Norman and Hunt, *ibid.*
194. See generally Cotler and Marx, *supra*, note 177.
195. Wexler, *supra*, note 179, wherein he describes "how not to practice law for poor people" drawing on his work trying to organize welfare recipients in Vancouver with the help of a large Opportunities for Youth (O.F.Y.) grant and fifteen students.
196. Taman, *supra*, note 177 at 70-72.
197. While Wexler, for example, emphasized the centrality of organizing with poor people's movements, more often words such as "advocacy" and "lobbying" were used.
198. For example, at the 1971 conference on Law and Poverty, only a few poor people had been invited to the predominantly male lawyer and academic gathering. The poor people there demanded that a panel to discuss their concerns be added; it had not even been planned to give them that minimal participation. See Cotler and Marx, *supra*, note 177.
199. This comprehended arguments about the range of services to be provided, and the method which should be used to deliver legal services.
200. As people worked within the previous vision; they saw the limits of it. Some briefs to the Saskatchewan Legal Aid Committee 1973, and some workers and board members did go further, to what I would characterize as a 'left reformist' position.

Considering legal aid, there was some overlap in the interests of lawyers, legal academics and eventually anti-poverty groups (to provide legal representation to poor people). However when interests diverged as to the content of that representation (for example, over areas and extent of services), the latter did not hold the power to elaborate their choice of programs and policies.

XI. *Legal Aid in Saskatchewan*

In the context of the development of legal aid in Canada, the Carter Committee proposals for the Saskatchewan legal aid plan could be characterized as a bold initiative. They were bold because they represented a decisive break with other legal aid plans. They seemed to wrest control away from the legal profession and substitute community control[201] and established legal services offices or clinics which emphasized participation by clients and boards. Also, although the Ontario legal services reformers set the tone for the conception of law primarily as a defensive strategy, this approach was rejected in Saskatchewan. Further, professional self-interest did not dominate in the same way or as fully in Saskatchewan as elsewhere.

Saskatchewan had the lowest per capita personal income of any non-maritime province; the highest proportion of Aboriginal people in the country; and the highest proportion of rural people in the country (more than half the population). The situation was particularly glaring for Aboriginal people in the north where they made up the majority of the population of the province and the average income was $500 per year.[202] Aboriginal people also made up more than half the population in jails in the province overall and more than 90 percent of the inmates in the women's jail.

The Saskatoon clinic, the first in the province, was set up in November 1969 by legal academics and members of the private bar and modelled on

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201. Community or lay control is often held up as a particular legacy of the C.C.F./N.D.P. However, while as recently as 1984, former Premier Blakeney was pointing to legal aid as an example of the successful devolution of power to the community, his characterisation did not match the reality.

> [O]ur legal aid program was run by local community boards on which sat native people. Since natives are major consumers of the service, it was important that they perceive it as "friendly" to their interests. This aspect of local control has disappeared under the new Conservative government, and natives now perceive legal aid like any other bureaucracy.

Allan Blakeney, "Decentralization: A Qualified Defence", ed. John Richards and Don Kerr in *Canada, What's Left*, (Edmonton: New West, 1986) at 149-150.
202. Norman and Hunt, *supra*, note 186.

Cahn and Cahn's ideas about neighbourhood law firms.[203] In June 1971, the N.D.P. was elected provincially. Legal aid had not been a major issue in the party's platform. However, a number of factors influenced the N.D.P. to consider a provincial legal aid plan: a legal aid system had been established in the Northwest Territories (1971); the federal government was pushing the provinces to develop their ideas and approaches to legal aid and offering federal cost-sharing; and the Saskatchewan Law Society wanted to negotiate increases to the fee schedule for legal aid.

From the N.D.P.'s point of view, the arguments in favour of legal aid were persuasive. Legal aid was consistent with social democratic principles. It followed up on the arguments for medicare and yet seemed unlikely to generate the same opposition from the profession. In fact, perhaps in reaction to medicare, the profession chose to support legal aid but to argue for a form it would control. At the same time, federal cost-sharing made a legal aid program much more attractive to the provincial government. They would get credit for the program even though much of the cost would be borne federally. Finally, the program was almost inevitable because of the level of national support, and the Saskatchewan N.D.P. would do better to take the initiative and be identified as a leader in the field.

In May 1972, the N.D.P. established the Saskatchewan Legal Aid Committee, with a broad mandate to review the needs for legal aid, compare the systems in place in other jurisdictions and make recommendations. Although the impetus may have come from legal academics and lawyers, many other groups came forward with briefs when solicited.[204] There was a clear distinction between the recommendations of those organizations representing poor people and those representing lawyers. The former argued for community control and drew parallels to the success of community health clinics (then ten years old) in the province.[205] The lawyers argued for professional autonomy and control. A number of rationales for legal aid were cited such as the premise that

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203. *Ibid.* See also: Don Purich, "Legal Aid: The Criminal Method" (1974), 3 Quaere 6.

204. For example, Aboriginal peoples' organizations, poor people's organizations, farm groups, church groups, and police organizations presented briefs. See: Appendix IV, Sask. Legal Aid 1973.

205. This reference to the success of the community health clinics does not appear in the final report; but it did arise in a number of the briefs. The fight over medicare was undoubtedly in people's minds. Other factors were that it was cheaper to provide services through clinics (though this does not account for the recommendation about boards) and it would ensure services to rural and northern areas (where almost no lawyers practised).

equality before the law depended on access to lawyers,[206] legitimation,[207] crime prevention,[208] social change,[209] and efficiency in the justice system.[210] Many argued that community offices should be run by boards of representatives to encourage client participation.[211]

In May 1974, the *Community Legal Service (Saskatchewan) Act*[212] was passed, creating a provincial Legal Aid Commission with appointed members and employees, and providing for the certification of individual legal aid societies as local boards of the clinics established. The model chosen was a combination of clinics and judicare; that is there was a possibility of the farm-out of some cases to the private bar but the bulk of the work would be handled by salaried lawyers and community legal service workers within the clinics. A broad range of services was possible under the mandate.

As the years went by, it became clear that there was only a fragile commitment to legal aid on the part of the N.D.P. When it came to lay control, for example, the N.D.P. government cut back the number of lay people who would be given control provincially; and stalled on funding for the establishment of a board in the north of the province, the most needy community.[213]

The contentious policy issues as they emerged were local control (the distinction between community control and mere involvement or participation),[214] underfunding, the scope of services, the type of work that was

206. Law Society of Saskatchewan brief to Sask. Legal Aid 1973.
207. The R.C.M.P. saw it as a "key area in winning over the poor to belief in the rule of law"; and John Howard said the "appearance of fairness in the criminal process is crucial to the general societal acceptability of our criminal justice system". See R.C.M.P. brief and John Howard brief to Sask. Legal Aid 1973.
208. John Howard Society brief to Sask. Legal Aid 1973.
209. According to the National Farmers Union (N.F.U.), legal aid was needed to "fight the forces contributing to rural poverty." See N.F.U. brief to Sask. Legal Aid 1973.
210. The R.C.M.P. suggested it would do so by easing demands on the police. See R.C.M.P. brief to Sask. Legal Aid 1973.
211. Again, the model of the community health clinics was influential. See, for example, the briefs of the National Farmers Union and Valley Legal Assistance Clinic to Sask. Legal Aid 1973.
212. *The Community Legal Service (Saskatchewan) Act*, 1974, R.S.S. 1978, C-20.
213. The N.D.P. had acknowledged the special needs of the North by the creation of the Department of Northern Saskatchewan (D.N.S.) with its rhetoric of "local determination". For a critique of the failure to establish a community board for the Northern Legal Services Office, see Tim Quigley and Janice Gingell, "Brief Presented to His Honor R.H. McClelland Concerning the Saskatchewan Community Legal Services System," November 2, 1978.
214. The Saskatchewan Legal Aid Committee Report had recommended that the Saskatchewan Legal Services Commission include one representative from each of the local advisory boards. This could have provided for community control and not simply community involvement. However, the 1974 Act provided for only three representatives from the area boards on a Commission of nine. This was a crucial deviation.

identified as useful,[215] workplace organization and unionization,[216] the mechanism for delivering services, gender politics, and the relationship to Aboriginal people.[217]

While the arguments about these issues had their roots in the arguments and assumptions of the proponents of legal aid, there were also clearly new voices and new arguments. The assessment of needs and strategies was dynamic not static. Workers, board members and clients, rather than legal academics, were central to those developments. Thus, the program's mandate and the N.D.P.'s commitment were tested by people who tried to make the legal aid plan live up to its potential for, for example, social change and community control. Practice and activism highlighted the difficulties with the theoretical models of legal aid and the underpinnings or assumptions of those models. This amounted to a challenge to liberals and to the N.D.P., but also a challenge to the abstentionist position of the left.

XII.   *The Limits of Legal Aid and the Limits of Engagement with Law*

The assumptions and arguments of the proponents of legal aid shaped the philosophy of legal aid, influenced the choices about the structure of legal aid, and affected the subsequent history of the program. Specifically, the understanding of 'poverty' limited the understanding of the needs of the poor and consequently the nature of services provided. Also, the limited understanding of the causes or structuring of poverty meant that there was less acknowledgement of both the pervasiveness of poverty and the responsibility for it, thus justifying the lack of political will on the part of the N.D.P. and their underfunding of legal aid.

The understanding of 'participation' influenced both the structuring of legal aid (the voice given to community boards, and the composition of those boards and the overall commission) and the subsequent resistance to the autonomous choices of individual legal aid boards.

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215. For example, service work displaced representative work (broad impact cases and cases to build a jurisprudence), law reform and organizing. Criminal legal services increasingly dominated the type of legal work done.

216. When workers tried to structure the work-place relations in an alternative way (as a collective in Prince Albert, or without a Director in La Ronge), the commission put pressure on the clinic to conform to traditional hierarchial law office structures. Given the opportunity, the Commission opposed union organizing. Where it could not oppose the certification, the Commission reacted by penalizing the clinic through deliberate underfunding or by refusing to employ selected workers in particular positions.

217. For a fuller discussion of these issues within Saskatchewan legal aid, see Jennie Abell, *supra*, note 1.

The construction of 'rights' as negative, that is to stave off state interference, rather than as positive, as an affirmation of a state-owed duty, supported the predisposition of the legal profession to priorize criminal legal services. That predisposition, in turn, supported the growing tendency of the provincial N.D.P. government to priorize criminal legal services. For example, Roy Romanow argued that the defence of a man accused of assault was more important than rendering legal services to a woman who had lost her children:

> So we asked him [Romanow] if, for example, there was a guy in a bar room brawl and a woman who had lost her children, who do we help? And he said we should help the guy in the bar room brawl. "It must be cold comfort," he told us, "but it's a loss of liberty. We're worried here about loss of liberty."[218]

That is, while it was readily acknowledged that people needed lawyers when the state interfered with them,[219] it was not readily acknowledged that they needed lawyers when the state neglected to assist them. This choice was also confirmed by economic factors.

Examining the arguments about criminal legal services and civil legal services elucidates the function of legal aid, the distribution of power and the liberal basis of assumptions about legal aid. Several things become obvious. First, as criminal law is identified as the more 'coercive' aspect of the state, criminal law defense work is more important to legitimation.[220] Secondly, women may not be same threat to social stability as the poor generally might be. That is, if unrest plays a role in the definition of policy, given the different impact of prison riots, Aboriginal people's movements, anti-poverty movements, and welfare rights' organizations (predominantly made up of women), it seems likely that the first areas of

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218. Andy Iwanchuk, the President of C.U.P.E. Local 1949 (representing Saskatchewan legal aid workers) was quoted in Gary Robins, "The Rise and Fall of Legal Aid" November 1978 *Briarpatch* 22 at 24.

219. Criminal legal services were the most obvious example of this. However, another example was that when the Department of Social Services moved to apprehend a child, the parents were entitled to legal counsel to be funded by the Department. With the inception of legal aid, that burden was shifted to legal aid clinics, thus relieving the Department of Social Services of a significant financial responsibility. That is, both of these areas also represented economic savings to the provincial government. ·

220. In criticizing the focus on criminal legal services, I do not mean to argue that criminal defence work is unimportant. Clearly, Aboriginal people and poor people'are the ones most abused by the criminal justice system. The conclusion Abel reaches that criminal defence work is particularly problematic for progressive lawyers, because of the limits of the specific legal form, avoids both the immediate problem confronting individual accuseds and the issue of alternative strategies to employ to combat the systemic abuses of criminal justice. See Richard Abel, *supra*, note 47 at 599-600.

service to be cut will be those which are primarily relevant to women.[221] Thirdly, economic factors militate in favour of decisions that priorize criminal legal services, because of the consequent assumption of financial responsibility by the federal government. Finally, the construction of the public/private dichotomy at law tends to priorize 'public' areas of law, such as criminal. However, as feminist work has established, the dichotomy between public and private is replicated even within areas that would seem to be ascribed 'public' importance.[222]

There were clearly implications from this choice for both women and Aboriginal people. For example, a man charged with assault against his wife would be eligible for a defence but the woman would not necessarily be entitled to legal assistance to secure any redress. Further, the emphasis on criminal matters, and in particular serious criminal matters, meant that the attention to quasi-criminal matters (such as violations of hunting and fishing regulations) was minimized. However, the latter charges were often crucial to the rights of Aboriginal peoples and to the maintenance of their livelihoods.

An examination of the specific situation of women and Aboriginal peoples enlarges the understanding of the contentious issues as they emerged within legal aid in Saskatchewan by revealing other factors underlying particular policy choices, the differential impact of those choices about eligibility and areas of services for example, and the contingency of those choices. By taking difference seriously, it is possible to identify the gendered and racial character of the delivery of legal services.

As Mary Jane Mossman[223] highlights in her insightful work on gender and legal aid, there is a need to examine substantively the question of who actually receives legal services under existing legal aid plans and a need

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221. Political strength and alliances influence this choice, and thus the situation varies over time. For example, in Saskatchewan, the alliances between clinics and the women's movement did not fully emerge until the 1980's. The work on the feminization of poverty by feminists prompted a deepening of those alliances. In Ontario, the clinics were at the forefront of this work.

222. Mary Jane Mossman argues that the construction of the public/private is important to understanding the gendered delivery of legal services. See Mary Jane Mossman, "Gender Equality and Legal Aid Services: Directions for Research", 1993 Sydney Law Review (forthcoming). However, as I argued in "Bringing it all Back Home: Feminist Struggle and Wife Battering" (LL.M. Thesis, York University, 1991), while the construction of the public/private is important, to overemphasize the importance of the public/private dichotomy is to risk reifying the dichotomy and ignoring the fact that, for example, violence against women is never given sufficient attention at law, whether in the so-called public or the private sphere. For example, both women who have been battered and women who have been raped face similar problems in terms of the enforcement of criminal law.

223. Mossman, *ibid.*

to explore the factors giving rise to those differences. She identifies several constructions as central to gender inequality within legal aid, including the supposed neutrality of law, the public/private split, and the 'universality' of legal norms.

Legal aid in Saskatchewan, as elsewhere, has been understood or supported generally in terms of access, as an extension of formal law into the substantive arena. This is the liberal democratic model that there already is equality before the law and that what is needed is equality of access. This completely misses an examination of what would be just, the nature and roots of poverty, and the structuring of power. It doesn't call for any attempt to redress the balance even by organizing with poor people's groups, lobbying, or law reform. Geoffrey Hazard called it the difference between "commutative justice", or enforcement of those claims recognized by law, and "distributive justice", which reconsiders and redefines what would be socially just.[224] Equal access may simply obscure the inequitable relations that exist. Less frequently, legal aid was fought for in terms of substantive justice as well as formal justice.

Nonetheless, an analysis which dismisses equal access as a 'smokescreen' may imbue relations with a static quality and ignore the dynamic potential, and specifically other possibilities that the experience of equal access may open up. Even a discussion in terms of aggregate distributive justice rather than individual justice is problematic; because it focuses on the mechanism and content of distribution rather than the organisation of production and the division of labour. This focus is hardly surprising given the origins of legal aid and the understanding of poverty.

As Richard Abel has argued, the focus on access in much of the work on legal aid ignores the politics of legal aid, and in particular the role of the state and the political role of lawyers including the opposition from conservative governments and the organized legal profession in the U.S.[225] I argue that the Canadian situation does not entirely parallel the U.S. one. Instead, the opposition of the legal profession in Canada has been more covert than overt,[226] and the political choices including

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224. Geoffrey Hazard, "Social Justice Through Civil Justice," (1969) University of Chicago Law Review 699.

225. Abel, *supra*, note 47.

226. For more recent examples of attitudes of private lawyers in Saskatchewan, see the federal study: *Saskatchewan Legal Aid Evaluation: Stage I Interim Report and Proposal for a Costing Sub-study* (1987). As that report pointed out at 2-14, "Clearly there is a good consensus of opinion regarding Legal Aid quality in every group except the private bar." The study also collected complaints about too many not guilty pleas and the unionization of legal aid lawyers. Some respondents were also critical of the community boards, describing inconsistencies in service which "were seen as mainly political in nature, at the whim of individuals, and disruptive to the normal orderly process of law." (at 2-16)

self-interest must be carefully interrogated. For example, members of the legal profession often couch their arguments in terms of the centrality of choice of legal counsel, but the clear self-interest (payment for private lawyers) and the less evident slur on the competence and quality of clinical (salaried and sometimes unionized) legal aid lawyers is thereby lost. The legal profession also has maintained considerable control over legal aid programs in Canada, both within the bureaucracy set up to administer legal aid and through the various law societies.

In assessing the results of legal aid programs, the language of success and failure is unsatisfying since neither captures the unevenness of struggle and the engagement with law. The word failure sounds precariously like the traditional cynical prognostications of the left. Instead the 'failures' I describe are contestable rather than absolute, and are the contingent results of struggles rather than the necessary result of a capitalist economic system. Also, there have been limited gains within the possibilities of legal aid.[227]

However, I think that legal aid can be termed a failure in the sense that the program failed to achieve its potential.[228] This failure can be attributed to a number of factors: the conception and the mandate which did not support work aimed at achieving substantive justice; the failure to fully understand and challenge the ideologies that circumscribed the perception of the problem and choices about strategy (the inherited ideological terrain of 'poverty', 'participation', and 'rights', the pervasive trust of authority[229]);[230] the lack of a progressive bottom-up movement for legal aid; the failure to build alliances beyond the client group;[231] the resistance of the legal profession and the justice system; and the effort to marginalize clients and community.

It is difficult to build alliances on behalf of the clients of legal aid, because of the general mistrust and unpopularity of that group. Various attitudes and ideologies perpetuate this chasm. For example, attitudes about poverty and the prevalence of 'blame the victim' ideologies make

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227. See for example, Abel, *supra*, note 47 at 620 and Snider, *supra*, note 2 at 185. Although critical of legal aid overall, both acknowledge some gains in curbing excesses, mitigating hardship, regulating market relations, and altering the balance of power.
228. The potential for legal aid has not been fully explored, and the examination of legal aid programs in the context of the potential of law as a site of struggle needs to be further developed.
229. See for example Snider, *supra*, note 2.
230. It seems to me that many workers inadequately understood the lack of support of the N.D.P. and the need for building a base of support. Also, when they encountered hostility (in the courts, for example), they did not always attribute it to the 'unpopularity' of their clients and their causes. This fed an obsession with 'professionalism'.
231. Snider, *supra*, note 2.

others unsympathetic to claims by clients.[232] It is even more difficult to build alliances on behalf of prisoners, 'criminals'[233] or Aboriginal people, or welfare recipients. The ethos of the legal profession also blocks inspired advocacy on behalf of particular client groups, identifying it as antithetical to good lawyering and calling it biased.[234]

Added to those difficulties, legal aid did not come about as a result of demands by any social movements, and thus there was no base to fall back on. Also, such a movement might have struggled against the ideological construction of poverty, rights and participation, with the possible consequence of a more democratic, more substantial legal aid system. That left the task of organizing primarily to workers within legal aid. Lawyers had a very limited understanding of organizing which did not extend much beyond pluralist pressure politics; and the emphasis of work in the clinics, for both lawyers and community legal service workers, increasingly was on legal work. There was a lack of skills and resources and not much more than a flirtation with organizing and movements.[235]

In one of the few critical pieces on Canadian legal aid, Laureen Snider concludes that legal aid, in North America during the 1970's, has been a failure because it has not achieved any significant substantive justice or structural change, and that "the main beneficiary of the multi-million dollar legal aid initiative has been the legal profession."[236] She attributes the failure to the weak power base, the "extreme weakness of the proletariat and its inability to present a strong ideological and political alternative or to form alliances with other classes or class fractions."[237] However, as she points out, this does not explain other gains of the poor and the working class, since the meaning of reform varies with the context in which it is embedded.[238]

Snider attributes the success of other reforms which she characterizes as successful to three factors: that the reform is ideologically a victory (translated into 'right'), that it is bureaucratized (and therefore important to state workers), and that it has established an outside base of support.

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232. Snider, *ibid.* at 184.
233. For example, a person charged with a crime, is already labelled as a 'criminal', and seen as not meriting a defence.
234. For a contemporary example of this, see my examination of the resistance by the private criminal bar to the creation of a women's division at the University of Ottawa Student Legal Clinic: Jennie Abell, "Women, Violence, and the Criminal Law: 'It's the Fundamentals of Being a Lawyer that are at Stake Here'" (Spring 1992) 17:1 Queen's Law Journal 147.
235. As Abel said, it is "difficult for lawyers to initiate social action". See Abel, *supra*, note 47 at 3.
236. Snider, *supra*, note 2 at 186.
237. Snider, *ibid.*, at 186.
238. *Ibid.*

Legal aid was bureaucratized in Saskatchewan; and workers (including many lawyers) were unionized. This did strengthen resistance to government cuts, for example, which reemphasizes the importance of examining the specific situation in particular provinces. Looking at medicare, I think that both the significance of health care needs and the universality of medicare have been factors in redefining health care as a 'right' and in building alliances.

It seems to me that certain kinds of community legal service work and practice might have challenged the ideologies of poverty, participation and rights. Some kinds of legal work would also have provided a basis for alliances with labour, for example. Areas such as workers' compensation, U.I.C., and even housing might have solidified links. Other areas would have provided a basis for alliances with the women's movement. Still others would have provided a basis for alliances with Aboriginal peoples' organizations. However, possible alliances were not often fully explored and these were the areas of service first marginalized and excluded, for a number of reasons, including the low prestige attached to this legal work and a financial incentive to shift work away from these areas and towards criminal law, which the federal government funded. Nonetheless, there were some law reform gains that might have presented an opportunity for organizing such as human rights legislation and tenancy legislation. Also, better links with progressive groups might have been possible on some of the broad impact issues that individual clinics did take on (such as the apprehension of Aboriginal children, Aboriginal hunting rights, prisoners' rights, police brutality, and racism in the judiciary). These issues did challenge the structuring of poverty and racism, and consequently met considerable resistance. The sense of the importance of these issues deepened as legal aid was elaborated by workers and activists. A continuing difficulty was the reluctance of the left to engage with law.

In more recent years, alliances were built with the women's movement around the interests of women prisoners, and between welfare groups and labour in the face of massive cuts by the Conservative government.

How could workers and clients in legal aid have organized around these issues to build alliances? Because of the attractiveness of the language, rights might have been a good mobilizing strategy. The question which remains for me is how critical practice can challenge the ideologies of poverty, participation and rights and transform the content and terms of rights. Some further consideration is necessary of the kind of engagement with the law that would be useful, both to advance the struggle of the poor, of Aboriginal people and of women and to build alliances.

The question of alliances is very relevant in the context of the current Canadian and global situation of massive cuts to social welfare and justice programs, the appropriation of the language of 'democracy' by the right,[239] the denial of the extent of poverty,[240] and the individualization and decontextualization of rights.

In Saskatchewan, when the Conservatives took office (1981), the community legal aid boards were disbanded, the scope of services was reduced, deterrent fees were instituted and workers were laid off. The Minister responsible appealed to the right; and attacked legal aid as serving the needs of drug dealers and prostitutes.[241] An alliance of welfare recipients and lawyers was formed to fight the cuts and the imposition of deterrent fees.[242] While the immediate goal of both groups was the protection of the legal aid system, their long-range goals were different. With a newly-elected N.D.P. government (1991), the important work at this point is to forge links with a broader base in Saskatchewan to reframe understandings of poverty, rights, and popular participation, and to begin to reconceptualize the goals of legal aid. That work must be informed by an exploration of the strategic possibilities of law as a site of struggle and an examination of the specific situation of various groups (including women and Aboriginal peoples) and the substantive impact of law and legal aid upon them, historically and presently.

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239. See for example, Eduardo Galeano's critique of the U.S. government's invocation of "democracy" as an alibi with respect to Panama, Nicaragua and Cuba: Eduardo Galeano, "A Child Lost in the Storm," (June 1990) *Canadian Dimension* 23.

240. See for example Christopher Sarlo, *Poverty in Canada* (Vancouver: The Fraser Institute, 1992).

241. "Hookers, Dealers should Pay Own Defence Bills: Schmidt", 25 July 1987 *The Saskatoon Star-Phoenix* A6.

242. That alliance demonstrates where the prime support for legal aid comes from: the poor, progressive and liberal lawyers, and academics (a number of whom are former legal aid lawyers). For a discussion of the imposition of what the Conservative government referred to as user fees, see Dave Yanko, "Legal Aid Fees Benefit Lawyers, Critic Claims" 30 July 1987 *The Saskatoon Star-Phoenix* A3.