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50 YEARS AFTER THE “WAR ON POVERTY”: EVALUATING THE JUSTICE GAP IN THE POST-DISASTER CONTEXT

DAVIDA FINGER*

Abstract: The Legal Services Corporation (“LSC”), formed as part of President Lyndon B. Johnson’s War on Poverty, was one of many initiatives aimed at providing low-income individuals with equal access to justice. Today, the increasing number of people living in poverty, coupled with decreased funding for legal services, has resulted in a significant justice gap in the provision of civil legal services. Poor people do not have the kind of access to legal services that was envisioned when the LSC was created. This justice gap is no more apparent than in the post-disaster context. For example, following Hurricanes Katrina and Rita, legal services programs in Louisiana could not handle as much as ninety percent of the legal needs of low-income individuals. To more meaningfully provide legal services post-disaster, we must re-examine the entire system in which post-disaster legal services are provided.

INTRODUCTION

The legal services initiative developed as part of this country’s overarching War on Poverty to provide, amongst a wide array of other programs, civil legal services to all in need and, in doing so, challenge poverty itself. Since the War on Poverty legal services program was implemented, disaster legal services have been specifically mandated as a necessary post-disaster service for indigent people. How effectively have we as a community been able to provide civil access to justice, specifically in the post-disaster context? Examining access to justice in the post-disaster context gives us a lens through which to scrutinize a number of related issues, including the critiques of legal services restrictions, the methods of funding for the U.S. legal services program, and the way in which the legal services program functions as a whole. The aftermath of a disaster, amplifies these foundational shortcomings inherent to the legal services program and its associated funding scheme.

As a law school clinician working in the post-disaster context, I am interested in exploring ways to provide legal services to low-income people following a disaster in a more productive and prospective manner. Many clinicians

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provide legal services in rapid-fire situations in which emergency legal needs must be met. I believe that law school clinics can continue to play an increasing role in providing disaster legal assistance.

My own experience as an attorney with the Katrina Clinic at Loyola Law School in New Orleans following the 2005 Gulf Coast hurricanes has changed the way I think about the provision of legal services. Eight years after Hurricanes Katrina and Rita, our law clinic is still providing legal services to low-income clients who continue to struggle through a variety of post-disaster issues. Natural disasters are an inevitable part of our permanent legal landscape, and they require a continued effort to provide post-disaster legal services.

Part I of this Article provides background information and describes some key issues surrounding the Legal Services Corporation (“LSC”), which was born as a War on Poverty program. Focusing on the Legal Services Program, Part II of this Article then describes how the 2005 hurricanes exacerbated access to legal services in the Greater New Orleans area for low-income people. Part III then describes the laws that have created our current framework of post-disaster legal services. Next, Part IV of the Article reviews the loss of LSC funding in Louisiana in the years following the disasters, despite the significant continuing civil legal needs of the indigent population.

Finally, Part V of this Article discusses recommendations for structuring legal services programs to handle the wide scope of domestic disasters. There are many questions regarding how a new kind of legal services program could be adequately funded, especially given the ever-increasing scale of domestic disasters. I conclude by examining funding alternatives for post-disaster legal services along with policy recommendations for same.¹

I. THE WAR ON POVERTY: CIVIL LEGAL SERVICES

With the passage of the Economic Opportunity Act in August of 1964, Congress established the Office Economic Opportunity (“OEO”) and President Johnson declared an “unconditional war on poverty.”² Johnson’s often repeat-

¹ In the years since the 2005 Gulf Coast storms, there have been numerous natural disasters and declarations of emergency. See Bruce R. Lindsay & Justin Murray, *Disaster Relief Funding and Emergency Supplemental Appropriations*, CONG. RESEARCH SERV. 11 (Apr. 12, 2011), <http://www.fas.org/sgp/crs/misc/R40708.pdf>. A number of other significant disasters followed the 2005 Gulf Coast hurricanes, including the California wildfires of 2007, the Super Tuesday tornadoes in 2008, the Samoan earthquake in 2009, the Arkansas floods in 2010, the Mississippi River floods in 2011, the April 25–28 tornado outbreak in 2011, the Joplin tornado in 2011, and Hurricane Sandy in 2012. See *id.*

² President Lyndon B. Johnson, Annual Message to the Congress on the State of the Union (Jan. 8, 1964), in 91 PUB. PAPERS 112, 114; see Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified at 42 U.S.C. § 2701 (1964)), *repealed by* Pub. L. No. 97-35, 95 Stat. 519 (Aug. 13, 1981); see also *History of Legal Aid*, NAT’L LEGAL AID & DEFENDER ASS’N, <http://www.nlada.org>.

ed quote sums up the massive undertaking of the 1964 War on Poverty: “Our aim is not only to relieve the symptoms of poverty, but to cure it and, above all, prevent it.”³ As a part of achieving this goal, the federal government began providing financial support for domestic civil legal services for the indigent in 1966.⁴

By 1970, the basic structure of what became the new legal services program was established.⁵ Proponents hoped that this stable legal services framework would be a vehicle by which to move people out of poverty.⁶ President Nixon eventually signed the Legal Services Corporation Act into law. The Act established and funded a separate non-profit corporation to provide “equal access to the system of justice” for individuals who face economic barriers that prevent them from obtaining legal counsel in civil matters.⁷

Federally funded legal services have been administered through the LSC, an independent federal agency, since 1974.⁸ Typically, LSC programs serve people who are at or below 125% of the federal poverty standards.⁹ The LSC provides grants to local legal aid programs.¹⁰ In 2012, 135 local programs with about 900 offices received funding.¹¹ Although local programs have much discretion in determining which types of cases to handle, they often aid with family law, housing law, employment law, benefits law, and consumer law.¹²

Considerable ink has been spilled on the evaluation of LSC programs. Now, fifty years after the War on Poverty, we have at our disposal extensive scholarly writing and empirical studies analyzing the impact and shortcomings of domestic civil legal services with regard to: (1) restrictions that limited rep-

org/About/About_HistoryCivil (last visited Feb. 21, 2014) (discussing history of legal aid in the United States).

³ Johnson, *supra* note 2.

⁴ Economic Opportunity Act of 1966, Pub. L. No. 89-794, 80 Stat. 1451 (1966).

⁵ Alan W. Houseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, CTR. FOR LAW & SOCIAL POLICY 12 (revised Jan. 2007), <http://www.clasp.org/resources-and-publications/files/0158.pdf> (discussing the history of legal services in the United States); *see also* KRIS SHEPARD, *RATIONING JUSTICE: POVERTY LAWYERS AND POOR PEOPLE IN THE DEEP SOUTH* (2007) (discussing history of legal services in the deep south).

⁶ *See* Houseman & Perle, *supra* note 5, at 12–13.

⁷ Legal Services Corporation Act of 1974, Pub. L. No. 93-355, § 2, 88 Stat. 378 (1974), *amended* by Pub. L. No. 95-222, § 2, 91 Stat. 1619 (1977) (codified at U.S.C. § 2996 (1998)).

⁸ *Id.*

⁹ *Client Income Eligibility Standards Updated for 2013*, LEGAL SERVS. CORP. (Jan. 31, 2013), <http://www.lsc.gov/media/news-items/2013/client-income-eligibility-standards-updated-2013>.

¹⁰ *Disaster Legal Services Training Manual*, FED. EMERGENCY MGMT. AGENCY & AM. BAR ASS’N 29 (2012), http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/fema_manual_2012.authcheckdam.pdf; *Fact Sheet on the Legal Services Corporation*, LEGAL SERVS. CORP., <http://lsc.gov/about/what-is-lsc> (last visited Feb. 15, 2014).

¹¹ *Disaster Legal Services Training Manual*, *supra* note 10.

¹² *Id.*

resentation to individual legal problems;¹³ (2) restrictions imposed on both federal and non-federal funds;¹⁴ (3) calls for restructuring policies so that lawyers' services become more accessible to low and middle income people, including through the unbundling of legal services;¹⁵ and (4) explorations of whether legal services actually provide indigent people with the kind of holistic and client-centered legal services the program was created for.¹⁶

How civil legal assistance programs are funded is also a topic that has been amply covered in other literature.¹⁷ In general, funding for civil legal assistance might come from a variety of sources, including the local, state, and federal levels of government, bar associations, law firms, philanthropic foundations, state Interest on Lawyers' Trust Accounts (IOLTA) funds, and private donors.¹⁸ The LSC allocates federal funds across states according to a formula that links funding to U.S. Census Bureau data on each state's poverty population.¹⁹ Reallocations based on changes in the poverty population occur as new census data is produced.²⁰

Undoubtedly, federal funding for legal services has made a positive impact on poverty issues in this country. Despite this, critique of the legal services program has been buoyed by the fact that there remains widespread underrepresentation of low-income people on civil justice issues.²¹ Attorneys ad-

¹³ See 45 C.F.R. §§ 1608.5, 1608.6, 1610, 1612, 1617.2, 1617.3, 1632.3, 1639.3 (2011); Alan Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 *FORDHAM URB. L.J.* 1213, 1215, 1229–33 (2001); Houseman & Perle, *supra* note 5, at 30, 36–37.

¹⁴ See Houseman, *supra* note 13, at 1224; Houseman & Perle, *supra* note 5, at 39–44.

¹⁵ See Forrest Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 *FAM. L.Q.* 421, 422–23 (1994) (coining the term “unbundling” —a model by which lawyers provide representation on discrete legal tasks as opposed to the full range of services); see also Jessica Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 *GEO. J. ON POVERTY L. & POL'Y* 453, 453–54 (2001) (discussing how “unbundling” legal services encourages legal access for low-income citizens).

¹⁶ See Houseman & Perle, *supra* note 5, at 49. See generally COREY S. SHDAIMAH, *NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE* (2009) (discussing idealistic attorneys navigating the legal system for low-income clients).

¹⁷ See Houseman, *supra* note 13, at 1221–22; REBECCA L. SANDEFUR & AARON C. SMYTH, AM. BAR FOUND., *ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 17* (Oct. 7, 2011), available at http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf; Carmen Solomon-Fears, *Legal Service Corporation: Background and Funding*, CONG. RES. SERVICE 10–15 (Aug. 29, 2013), <http://mspbwatcharchive.files.wordpress.com/2013/10/legal-services-corporation-background-and-funding-aug-29-2013.pdf>.

¹⁸ SANDEFUR & SMYTH, *supra* note 17, at 17; see Solomon-Fears, *supra* note 17, at 16–17.

¹⁹ See SANDEFUR & SMYTH, *supra* note 17, at 17–18.

²⁰ Solomon-Fears, *supra* note 17, at Summary.

²¹ *Documenting the Justice Gap in America*, LEGAL SERVS. CORP. 1–4 (Sept. 2005), http://www.legalaidnc.org/public/learn/publications/Documenting%20the%20Justice%20Gap/DocumentingtheJustice%20Gap_FINAL_Sept_30_05.pdf [hereinafter *Justice Gap I*]; *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 1–2 (Sept. 2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_

dress only a small fraction of the legal needs of indigent people.²² This is known as the justice gap: “[t]he difference between the level of legal assistance available and the level that is necessary to meet the [civil legal] needs of low-income Americans.”²³

The primary data on the LSC and the provision of legal services contemplates whether there is access to justice, who has it, and how large the justice gap actually is.²⁴ When it comes to unrepresented litigants, however, less data exists on measuring self-help services in the courts and whether those services are meaningful enough to enable fair access to the courts.²⁵ That our country is over-lawyered and the civil legal needs of low-income people are underserved, including in court proceedings, is not news. It is also abundantly clear that the War on Poverty, including the creation of civil legal services that came along with it, has not provided a panacea to persistent poverty.

II. POST-DISASTER CIVIL LEGAL NEEDS: CASE STUDY— GREATER NEW ORLEANS

Following domestic disasters, we have learned that the burdens on poor people and the resulting justice gap become even more pronounced.²⁶ If providing legal services to the indigent is still part of our country’s War on Poverty, we must better learn how to wage this battle in the post-disaster context. In disaster literature, “social vulnerability” refers to “various attributes and conditions such as poverty, race and ethnicity, gender, age, health and physical ability, and housing conditions” that “place human populations at risk of adverse consequences from a disaster.”²⁷ Indeed, “[f]laws in domestic policy are exacerbated by social, economic, and political inequalities. In this way, the social experience of disaster is a function of already existing injustices.”²⁸

2009.pdf [hereinafter *Justice Gap II*]. At least eighty percent of the legal needs of poor people in this country go unmet. See *Justice Gap I*, *supra* at 4; *Justice Gap II*, *supra* at 1.

²² *Justice Gap I*, *supra* note 21, at 2; *Justice Gap II*, *supra* note 21, at 1.

²³ *Justice Gap II*, *supra* note 21, at 1, 6–7 (finding that for every client served by an LSC-funded program, another is turned down for lack of funding).

²⁴ *Id.* at 1–2, 5–7.

²⁵ Laura Abel & David Udell, *The Justice Index: Measuring Access to the Courts*, MGMT. INFO. EXCHANGE J. 48 (2012), <http://ncforaj.files.wordpress.com/2012/09/abel-udell-mie-justice-index-article-2012.pdf>.

²⁶ Davida Finger et al., *Engaging the Legal Academy in Disaster Response*, 10 SEATTLE J. SOC. JUST. 211, 212 (2011).

²⁷ Shirly Laska et al., *Gender and Disasters: Theoretical Considerations*, in *KATRINA AND THE WOMEN OF NEW ORLEANS* 11 (Beth Willinger, ed., 2008), available at <http://tulane.edu/nccrow/upload/NCCROWreport08.pdf>; see Finger et al., *supra* note 26, at 212, 223; Robert Verchick, *Disaster Justice: The Geography of Human Capability*, 23 DUKE ENVTL. L. & POL’Y F. 23, 24 (2012).

²⁸ Davida Finger & Rachel E. Luft, *No Shelter: Disaster Politics in Louisiana and the Struggle for Human Rights*, in *HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM* 291, 292 (Shareen Hertel & Kathryn Libal eds., 2011); see Laska et al., *supra* note 27, at 11–12.

Social vulnerability has become a major concern among disaster researchers²⁹ and has been, especially in recent years, widely discussed in disaster literature.³⁰ Thus, the post-disaster experience of poor people and the search for post-disaster access to justice must be located in this framework in order to have a meaningful discussion about access to justice. The theory of social vulnerability is a critical part of post-disaster analysis in that it allows us to interpret the impact of disasters as “social and political events that are linked to who we are, how we live, and how we structure and maintain our society.”³¹ As we consider how the post-disaster provision of legal services can be improved for our country’s economically vulnerable population, an understanding of social vulnerability should be a prominent concern.³²

Before Hurricane Katrina, census data of the Greater New Orleans area showed that it was one of the nation’s most impoverished cities, located in one of the country’s most impoverished states.³³ The predominantly African American population of New Orleans (over two-thirds of the city’s residents) along with a higher-than-average female population were both demographic factors that contributed to the population’s high degree of social vulnerability.³⁴

Hurricanes Katrina and Rita created overwhelming burdens on civil legal services agencies and the lawyers who were providing civil legal services to the indigent. Legal services programs throughout Louisiana were unable to handle between sixty-six and eighty percent of calls for assistance.³⁵ The number of people who actually needed assistance is likely far greater than documented because many people with serious legal needs did not or could not call legal services intake lines or visit legal services offices or outreach clinics.³⁶

Due to previously existing legal problems, it is likely that even more of the legal needs of indigent people went unmet following the hurricanes. Even without taking into account the post-disaster context, which adds multiple layers of long-term, complex legal problems, the American Bar Association

²⁹ Verchick, *supra* note 27, at 25.

³⁰ Laska et al., *supra* note 27, at 11; Verchick, *supra* note 27, at 24–25.

³¹ See Laska et al., *supra* note 27, at 11.

³² See Verchick, *supra* note 27, at 24.

³³ See *Areas with Concentrated Poverty: 1999*, U.S. CENSUS BUREAU 3–4, 6 (July 2005), <http://www.census.gov/prod/2005pubs/censr-16.pdf>; *Poverty: 1999*, U.S. CENSUS BUREAU 7 (May 2003), <https://www.census.gov/prod/2003pubs/c2kbr-19.pdf>.

³⁴ Laska et al., *supra* note 27, at 12; see *Gender: 2000*, U.S. CENSUS BUREAU 6 (Sept. 2001), <https://www.census.gov/prod/2001pubs/c2kbr01-9.pdf>; *The Black Population: 2000*, U.S. CENSUS BUREAU 7 (Aug. 2001), <https://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

³⁵ *An Indicator of Louisiana’s Gap in Access to Justice*, study coordinated by the LEGAL SERVS. CORP., available with LA. BAR ASS’N ACCESS TO JUSTICE DEP’T (on file with author). The four Louisiana legal services programs that participated in the study were the Acadiana Legal Services Corporation, Capital Area Legal Services Corporation, Legal Services of North Louisiana, Inc., and Southeast Louisiana Legal Services, Inc. *Id.*

³⁶ *Id.*

(ABA) has posited that on average, there are 1.1 legal problems per low-income household.³⁷ Using this number, together with census data on poverty for 2008, low-income people just a few years after the hurricanes were actually seeking help from legal services programs for less than ten percent of the legal problems they likely actually faced.³⁸ By this analysis, at least ninety percent of poor people's legal problems were not addressed with the assistance of an attorney.³⁹

Moreover, record-keeping on the post-hurricane provision of disaster legal services might not be fully accurate given the displacement of attorneys and legal services staff, the overwhelming nature of disaster legal services requests, and the general disorientation following the disasters.⁴⁰ The Equal Justice Works Katrina Legal Initiative documented and quantified some ways in which "the legal needs in Gulf Coast communities grew dramatically after the hurricanes, increasing burden on legal aid organizations that were experiencing their own impacts of the storms."⁴¹ For example, although the number of open cases initially dropped when the hurricanes struck in 2005, those numbers subsequently increased significantly and then remained at higher levels through 2008 when many of the post-disaster studies were completed.⁴²

Legal matters directly relating to the hurricanes, such as those connected to housing and homelessness, insurance claims, federal and state disaster program benefits, and contractor fraud with rebuilding, were among the most common types of issues.⁴³ Other legal problems connected to the hurricanes such as family law, domestic violence, and drafting documents, including for successions and wills, were also quite pressing for an extended period of time.⁴⁴

As for the post-disaster need for legal services in the Greater New Orleans area specifically, Southeast Louisiana Legal Services ("SLLS") serves the ten parishes in Southeastern Louisiana including the Greater New Orleans ar-

³⁷ *Justice Gap I*, *supra* note 21, at 13.

³⁸ *An Indicator of Louisiana's Gap in Access to Justice*, *supra* note 35.

³⁹ *Id.*

⁴⁰ Beth Abramson, *Report and Analysis of the Provision of Disaster Civil Legal Services in Louisiana Following Hurricanes Katrina and Rita*, LA. BAR ASS'N ACCESS TO JUSTICE DEP'T (Aug. 2007) (on file with author).

⁴¹ SARA DEBUS & SERI IRAZOLA, *DELIVERING LEGAL AID AFTER KATRINA: THE EQUAL JUSTICE WORKS KATRINA LEGAL INITIATIVE*, at iv, vii (2009), available at http://www.urban.org/uploaded/pdf/411946_legal_aid_katrina.pdf.

⁴² *Id.* at vii.

⁴³ *Id.* at iv; Finger et al., *supra* note 26, at 216–21.

⁴⁴ DEBUS & IRAZOLA, *supra* note 41, at vii; Finger et al., *supra* note 26, at 221; *Louisiana's Legal Services Network*, LA. ST. B. ASS'N 2, <http://files.lsba.org/documents/ATJ/educationalbrochure.pdf> (noting that family cases represent 49% of the cases handled statewide).

ea.⁴⁵ SLLS handled the significant uptick in post-disaster hurricane work for the area most impacted by both Hurricanes Katrina and Rita.⁴⁶ The SLLS attorneys' post-disaster work concentrated on housing and consumer issues across Southeast Louisiana, which were amongst the most pressing and prevalent matters at the time.⁴⁷ Indeed, now many years following the hurricanes, there continues to be widespread need for legal services on disaster connected issues—those impacted by disasters have legal needs that continue for years.⁴⁸

How are post-disaster legal services provided? Can the ways in which disaster legal services are provided move this country toward closing the justice gap?

III. POST-DISASTER PROVISION OF LEGAL SERVICES

Until the mid-twentieth century, Congress provided funds for domestic disaster recovery on a case-by-case basis.⁴⁹ In response to the threats of nuclear war and natural disasters, federal lawmakers passed the Civil Defense Act of 1950⁵⁰ and the Federal Disaster Relief Act of 1950,⁵¹ which together laid the groundwork for federal-to-state assistance for domestic disaster management.

This framework, along with the Disaster Relief Acts of 1966⁵² and 1974⁵³ and President Carter's 1979 establishment of the Federal Emergency Management Agency (FEMA) shaped the details of domestic disaster response and recovery.⁵⁴ Currently, the Robert T. Stafford Relief and Emergency Assistance Act of 1988 ("Stafford Act") governs the role of the federal government in providing disaster relief.⁵⁵ FEMA coordinates all assistance provided directly

⁴⁵ See *About SLLS*, SOUTHEAST LOUISIANA LEGAL SERVICES, <http://slls.org/about/> (last visited Apr. 6, 2014).

⁴⁶ See SE LA. LEGAL SERVS., *Pre-Katrina Civil Legal Needs in Southeast Louisiana—Draft* (Aug. 2005) (unpublished report), available at <http://sites.lawhelp.org/documents/3024212005%20SLLS%20Civil%20Legal%20Needs.htm>.

⁴⁷ See Abramson, *supra* note 40.

⁴⁸ Finger et al., *supra* note 26, at 223; Davida Finger, *FEMA's Post-disaster Grant Recoupment: Hurricane Survivors Still Struggling Seven Years Later*, SHRIVER CENTER (July 10, 2012), <http://povertylaw.org/communication/advocacy-stories/finger/>; *FY 2014: Budget Request Fiscal Year 2014*, LEGAL SERVS. CORP. 18, http://www.lsc.gov/sites/default/files/LSC/lscgov4/LSC_FY2014_Budget_Request_FINAL_6-10-2013.pdf (last visited Apr. 21, 2014) [hereinafter *FY 2014*].

⁴⁹ Anna Marie Baca, *History of Disaster Legislation*, FEMA ON CALL DISASTER RESERVE WORKFORCE NEWS, Sept. 2008, <https://www.fema.gov/pdf/dae/200809.pdf>.

⁵⁰ Federal Civil Defense Act of 1950, Pub. L. No. 81-920, 64 Stat. 1245 (1951).

⁵¹ Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109 (1950).

⁵² Disaster Relief Act of 1966, Pub. L. No. 89-769, 80 Stat. 1316 (1966).

⁵³ Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (1974).

⁵⁴ See Exec. Order No. 12148, 44 Fed. Reg. 43239 (July 20, 1979).

⁵⁵ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, § 101, 102 Stat. 4689 (1988) (codified at 42 U.S.C. § 5121). In 1979, President Carter issued an Executive Order establishing the Federal Emergency Management Agency (FEMA). 44 Fed. Reg. 43239 (July 20, 1979) (codified at 42 U.S.C. § 5121). In 2002, following the September 11th World Trade Center

by the federal government in response to declared disasters and emergencies, including post-disaster legal services, as part of the federal disaster relief scheme.⁵⁶ More specifically,

Whenever the President determines that low-income individuals are unable to secure legal services adequate to meet their needs as a consequence of a major disaster, consistent with the goals of the programs authorized by this Chapter, the President shall assure that such programs are conducted with the advice and assistance of appropriate Federal agencies and State and local bar associations.⁵⁷

This is a broad mandate that has been realized by giving FEMA discretion on whether and how to provide legal services. In general, “[l]egal services, including legal advice, counseling, and representation in non fee-generating cases . . . may be provided to low-income individuals who require them as a result of a major disaster.”⁵⁸ Non-fee-generating cases are defined as those cases that would not attract a private lawyer.⁵⁹ The regulations also state that legal services “may be provided by “volunteer lawyers,” “Federal lawyers,” or “private lawyers who may be paid by the Federal Emergency Management Agency”⁶⁰

Under the Stafford Act, FEMA is authorized to provide legal assistance for only a narrow range of issues directly connected to the disaster, such as insurance claims and preparing powers of attorney.⁶¹ Moreover, “participating attorneys” may not represent individuals in fee-generating cases, are limited to representing “low-income” individuals, and may only seek benefits provided under the Act and claims arising out of a major national disaster.⁶²

attacks, which drove the U.S. reorganization on disaster preparedness and homeland security, FEMA joined twenty-two other federal agencies, programs and offices to constitute the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; *About the Agency*, FEMA, <http://www.fema.gov/about-agency> (last visited Feb. 22, 2014).

⁵⁶ See *About the Agency*, *supra* note 55. The Post Katrina Emergency Management Reform Act of 2006 overhauled disaster preparedness mechanisms at the federal level. See *Federal Emergency Management Policy Changes After Hurricane Katrina: A Summary of Statutory Provisions*, CONG. RES. SERV. REPORT FOR CONGRESS 40–44 (Nov. 15, 2006), <http://www.training.fema.gov/emiweb/edu/docs/Federal%20EM%20Policy%20Changes%20After%20Katrina.pdf>.

⁵⁷ 42 U.S.C. § 5182 (2012).

⁵⁸ See 44 C.F.R. § 206.164(a) (2014).

⁵⁹ See *id.* § 206.164(b).

⁶⁰ *Id.* § 206.164(c).

⁶¹ *Id.* § 206.164(a); *Disaster Legal Services Fact Sheet*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/public-assistance-local-state-tribal-and-non-profit/recovery-directorate/disaster-legal-services> (last updated Oct. 3, 2013, 10:05 AM).

⁶² See 44 CFR § 206.164(a); Memorandum of Agreement Between the Federal Emergency Management Agency and the American Bar Association Regarding Disaster Legal Services, at 1, 2 (Nov. 8, 2007), available at http://www.americanbar.org/content/dam/aba/migrated/disaster/docs/fema_aba_agreement_11_07.authcheckdam.pdf [hereinafter Memorandum of Agreement].

FEMA has worked to fulfill its duty to provide the Disaster Legal Services Program primarily through the use of volunteer lawyers who are not engaged to provide services until after the disaster has struck. Under a Memorandum of Understanding between FEMA and the American Bar Association's Young Lawyer's Division ("YLD"), FEMA can request the YLD "to provide legal services to low income disaster victims in the aftermath of a 'major disaster'"⁶³ The YLD is charged with delivering legal services by collaborating with other qualified organizations including law firms, not-for-profit legal service providers, Legal Services Corporations, state and local bar associations, and pro bono organizations.⁶⁴

The YLD's ability to provide legal services is not quite as limited as it once was. Prior to 2005, participating attorneys were not allowed to "initiate or counsel disaster victims to initiate litigation against FEMA or state or local governments."⁶⁵ In 2007, however, the new agreement between FEMA and the ABA removed the litigation prohibition.⁶⁶ Given the significant shortcomings in how post-disaster assistance was provided by FEMA following Hurricanes Katrina and Rita, along with FEMA's continuing effort to recoup post-disaster grants, the prohibition was another burden on disaster victims.⁶⁷ In the years immediately following the hurricanes, there was a sharp increase in legal questions related to the extent and duration of assistance provided by FEMA.⁶⁸ Indeed, disaster victims' inability to receive proper assistance from FEMA following the 2005 hurricanes was a major theme in Gulf Coast recovery.⁶⁹

Although it has benefitted from partnerships with the YLD and the ABA, FEMA has an independent duty to fulfill its mandate to provide disaster legal services. Following the 9/11 disaster in the aftermath of the terrorist attacks in New York, Professor Martha Davis raised the crucial question regarding FEMA's partnership with the YLD and the ABA, asking, "whether such a purely volunteer-driven program meets the Stafford Act's requirement that the Presi-

⁶³ See Memorandum of Agreement, *supra* note 62, at 1.

⁶⁴ See *id.* at 3.

⁶⁵ JOHN C. EIDLEMAN, DISASTER LEGAL SERVICES TRAINING MANUAL 31 (June 9, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/fema_manual_2012.authcheckdam.pdf.

⁶⁶ *Id.* The provision was removed as a result of the *TRLA v. FEMA* settlement. See *id.* FEMA requested that LSC help negotiate a settlement that included a new a contract between FEMA and the ABA/YLD to better ensure coordination of the full complement of available legal resources at the time of a disaster. See *id.*

⁶⁷ Finger, *supra* note 48.

⁶⁸ Abramson, *supra* note 40.

⁶⁹ See, e.g., AD HOC SUBCOMM. OF THE U.S. SENATE ON DISASTER RECOVERY OF THE COMM. ON HOMELAND SEC. AND GOV'T AFFAIRS, FAR FROM HOME: DEFICIENCIES IN FEDERAL DISASTER HOUSING ASSISTANCE AFTER HURRICANES KATRINA AND RITA AND RECOMMENDATIONS FOR IMPROVEMENT (Feb. 2009), available at <http://www.hsgac.senate.gov/imo/media/doc/DisasterHousingInves.pdf?attempt=2>.

dent ‘shall assure that such programs are conducted’ whenever low income individuals cannot otherwise obtain adequate assistance in meeting their post-disaster legal needs.”⁷⁰ Perhaps the Stafford Act, by design, simply cannot provide an adequate response when disaster overwhelms the capacities of state and local governments.

In post-disaster Louisiana, reflection on FEMA’s volunteer-driven model called for better coordination and communication between state legal assistance entities and the three branches of government.⁷¹ For example, the ABA Representative should have had a pre-arranged agreement with the LSC, Louisiana Bar Association, and pro bono organizations to facilitate more efficient and comprehensive services.⁷²

Notably, the LSC did not begin to collaborate formally with either the ABA or FEMA on disaster relief until after Hurricane Katrina.⁷³ Since then, the LSC has increased its capacity to address legal needs after disasters.⁷⁴ In the years since Hurricane Katrina, the LSC has built a stronger network to handle both disaster preparation and response. For example, LSC staff members have trained the YLD’s participating attorneys.⁷⁵ Additionally, FEMA is now tasked with making direct referrals to LSC organizations.⁷⁶ The LSC itself also makes direct disaster assistance and emergency disaster relief grants.⁷⁷ In 2011, in response to tornadoes and flooding, the LSC provided emergency grants.⁷⁸ In addition, legal aid programs continue to provide direct services to those impacted by Hurricane Sandy, which hit in 2012.⁷⁹ The LSC has convened the National Legal Aid Disaster Network to handle phone calls regarding post-disaster issues as needs have arisen.⁸⁰ In 2008, the National Disaster Legal Aid website was launched, sponsored by the LSC, the ABA, the National Legal Aid and Defender Association, and Pro Bono Net.⁸¹

⁷⁰ Martha Davis, *Preparing for the Worst: Re-Envisioning Disaster Legal Relief in the Era of Homeland Security*, 31 *FORDHAM URB. L. J.* 959, 969 (2003) (quoting 42 U.S.C. § 5121 (2003)).

⁷¹ See Abramson, *supra* note 40. Notably, the FEMA ABA/YLD plan was implemented along with the Louisiana State Bar Association Disaster Response and Relief Plan.

⁷² See *id.*

⁷³ EIDLEMAN, *supra* note 65, at 31.

⁷⁴ See *id.* at 31–32.

⁷⁵ See *LSC’s Coordination with National Disaster Response Organizations*, LEGAL SERVS. CORP., <http://lri.lsc.gov/program-administration/disaster/coordination-national-response-orgs> (last visited Jan. 25, 2014).

⁷⁶ See EIDLEMAN, *supra* note 65, at 38.

⁷⁷ See *Disaster Relief Grants*, LEGAL SERVS. CORP., <http://grants.lsc.gov/apply-for-funding/disaster-relief-grants> (last visited Jan. 25, 2014).

⁷⁸ See *FY 2014*, *supra* note 48, at 16; *About, NAT’L DISASTER LEGAL AID*, www.disasterlegallaid.org/about/ (last visited Mar. 9, 2014).

⁷⁹ See *FY 2014*, *supra* note 48, at 16.

⁸⁰ *Id.* at 18.

⁸¹ *Id.*

IV. THE IMPACT OF DECREASED POST-DISASTER LEGAL SERVICES FUNDING

In the last two decades, legal services programs have been reduced in scope while being required to serve greater geographic areas.⁸² Although the total poverty population in the U.S. has increased since 2000, the congressional allocation of funding to the LSC for legal services has not.⁸³ Measured in 2012 dollars adjusted for inflation, the LSC's funding history shows that since 1976, when the program was first funded, it has experienced an overall decrease of approximately \$120 million allocated to its program budget.⁸⁴

In Louisiana, the LSC provides the bulk of the funding, fifty-nine percent, to legal services programs.⁸⁵ Despite ongoing advocacy, the State of Louisiana provides no direct funding to Louisiana legal services programs.⁸⁶ Analysis shows that up to a forty percent decrease in funding to Louisiana's Legal Services Network is to be expected by 2014.⁸⁷

Louisiana has one of the highest LSC client-eligible populations in the country at 25.8% of the population.⁸⁸ The Greater New Orleans rate of poverty in 2011, at twenty-nine percent, has remained statistically the same as it was in 1999.⁸⁹ Despite the scale of the disaster brought on by the 2005 hurricanes, overall LSC funding since 2005, measured in 2012 dollars, dropped by approximately forty million dollars.⁹⁰ This is because the exodus of people from areas affected by the hurricanes created a net loss of the overall poverty population.⁹¹ The funding cuts from LSC, based on the statewide poverty population

⁸² See Houseman, *supra* note 13, at 1220–22. LSC funds 807 offices throughout the United States. 2012 ANNUAL REPORT, LEGAL SERVS. CORP., available at http://lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/2012%20Annual%20Report_FINAL-WEB_10.1.pdf.

⁸³ See *id.* at 2.

⁸⁴ See *Funding History*, LEGAL SERVS. CORP., <http://lsc.gov/congress/funding/funding-history> (last visited Jan. 25, 2014).

⁸⁵ See *LSC-Funded Programs in Louisiana*, LEGAL SERVS. CORP., <http://lsc.gov/local-programs/state-profile?st=LA> (last visited Jan. 25, 2014).

⁸⁶ *Louisiana's Legal Services Network*, *supra* note 44, at 2. The State has provided Louisiana's Legal Services Network with an annual legislative appropriation of \$500,000, however in 2010 this funding was removed and then restored partially in 2011 to \$150,000, only to be cut again in 2012. *Id.*

⁸⁷ *Id.*

⁸⁸ 2012 FACT BOOK, LEGAL SERVS. CORP., available at <http://lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/Funding%282012FactBook%29.pdf>. Louisiana also showed a net 3.08% loss in its poverty population from 2000 to 2011. *Id.* at 6.

⁸⁹ See Alyson Plyer, *Facts for Features: Katrina Recovery*, DATA CTR. (Aug. 28, 2013), <http://www.datacenterresearch.org/data-resources/katrina/facts-for-recovery/>.

⁹⁰ *Funding History*, *supra* note 84.

⁹¹ Alison Plyer & Elaine Ortiz, *Poverty in Southeast Louisiana Post-Katrina*, GREATER NEW ORLEANS CMTY. DATA CTR. 1 (June 2012), https://gnocdc.s3.amazonaws.com/reports/GNOCDC_PovertyInSoutheastLouisianaPostKatrina.pdf.

census data, diminished resources for civil legal services and widened the post-disaster justice gap.⁹²

Although there is insufficient overall funding, the examples given here raise the question of whether it makes sense to continue assessing funding based on statewide census data, rather than more narrow regional data to more closely analyze poverty population shifts, especially following disasters. There are no special provisions regarding how disaster-impacted areas can be assessed for LSC funding purposes.⁹³ There are no caveats in the current scheme for how LSC funding is allocated and how the overall poverty population is measured for disaster-impacted areas, even when there has been a temporary out-migration during the recovery and rebuilding phases. Although the LSC can provide some stop-gap measures, such as emergency grants, we know that post-disaster legal work stretches for extended periods of time and is not likely to be nearly completed on short-term grant funding cycles.

V. POLICY RECOMMENDATIONS FOR POST-DISASTER LEGAL SERVICES

National organizations call for increased funding to the LSC in order to continue funding legal services programs. For example, the LSC itself has requested an additional sixteen million dollars for 2014 appropriations in recognition of the vast increase in the U.S. poverty population, which is at an all-time high.⁹⁴ The National Center for Access to Justice has highlighted new models to provide alternatives to lawyers such as help desks, pro se clerk's offices, computer kiosks, forms, call centers, and the use of non-lawyer staff.⁹⁵ The National Legal Aid and Defender Association continues to play a key role in advocacy for both federal funding and state funding so sorely needed in Louisiana.⁹⁶

Additionally, the ABA, in line with the "Civil Gideon" movement, calls for the expansion of the right to counsel in civil cases involving basic human

⁹² See Plyer, *supra* note 89.

⁹³ Notably, the Civil Access to Justice Act of 2009, which would have allowed a competitive bidding process for funding, was not enacted. H.R. 3764, 111th Cong. § 11 (2009).

⁹⁴ See *FY 2014*, *supra* note 48, at 1. President Obama has said that making civil legal assistance available to low-income Americans is "central to our notion of equal justice under the law." *The White House and LSC Co-Host Forum on the State of Civil Legal Assistance*, LEGAL SERVS. CORP., <http://www.lsc.gov/media/in-the-spotlight/white-house-and-lsc-co-host-forum> (last visited Apr. 21, 2014) (quoting President Barack Obama, Address at the White House Forum on Civil Legal Assistance (Apr. 17, 2012)).

⁹⁵ *New Models*, NAT'L CTR. FOR ACCESS TO JUSTICE AT CARDOZO LAW SCH., <http://ncforaj.org/new-models-of-support-for-unrepresented-litigants/> (last visited Jan. 25, 2014).

⁹⁶ See NAT'L LEGAL AID & DEFENDER ASS'N, *THE PURSUIT OF EQUAL JUSTICE UNDER THE LAW 14-16* (2011), available at http://www.nlada.org/News/News_Pubs/Pursuit%20of%20Justice%20Under%20Law.

needs.⁹⁷ Answering the calls for additional funding and a commitment to a civil right to counsel would expand the provision of legal services, especially in the post-disaster context. Questions remain, however, with regard to how to provide more holistic and ongoing legal services for the indigent. Can the model of how our country provides legal services be updated, as Professor Martha Davis queried, so that legal services are no longer “a besieged holdover from the War on Poverty, but an important, contemporary aspect of our nation’s response to disaster”⁹⁸

The Sandy Recovery Act of 2013 authorized changes to FEMA’s disaster assistance program.⁹⁹ Under this Act, the Administrator of FEMA is required to develop a national strategy “for reducing future costs, loss of life, and injuries associated with extreme disaster events in vulnerable areas of the United States.”¹⁰⁰ None of these changes, however, necessarily focus on improved models for the delivery of disaster legal services.¹⁰¹

The delivery of disaster legal services should be part of this new national strategy mandate. In discussing FEMA’s role after the 9/11 terrorist attacks, Professor Martha Davis noted that, “[a]lthough the Stafford Act provides the president and federal government with the means to grant funding and assistance to states for legal services, it has yet to utilize these means toward an effective end.”¹⁰² FEMA must be agile; the agency must be able to implement procedures that make sense for the scale of disaster at hand. Professor Davis asked: (1) what it would cost to provide disaster victims more institutionalized legal services nationally? (2) how would those funds be administered? (3) whether LSC, rather than a new institution, should administer legal aid to disaster victims? (4) would involving Legal Services further pro bono services? and (5) would disaster legal services overwhelm LSC-funded organizations?¹⁰³

More than ten years later, these questions remain as important as ever to explore and attempt to answer. As a preliminary matter, FEMA, with LSC as a partner, must analyze the possible approaches to resolving this problem. A taskforce charged with learning more about disaster legal services, soliciting community input, and making policy recommendations would be a useful

⁹⁷ This movement has aimed to sidestep the Supreme Court’s 1981 decision in *Lassiter v. Department of Social Services*, which limited the right to counsel in civil cases to a situation where, without counsel, the proceeding would otherwise prove fundamentally unfair. See 452 U.S. 18, 33–34 (1981).

⁹⁸ Davis, *supra* note 70, at 965 (footnote omitted).

⁹⁹ See Sandy Recovery Improvement Act of January 29, 2013, Pub. L. No. 113-2, 127 Stat. 4.

¹⁰⁰ *Id.*

¹⁰¹ *See id.*

¹⁰² Melissa Lombreglia, Note, *The Calm After the Storm: Using Mediation to Resolve Parenting Disputes in the Wake of Natural Disasters*, 46 FAM. CT. REV. 395, 403 (2008) (citing Davis, *supra* note 70, at 968).

¹⁰³ *See* Davis, *supra* note 70, at 979–80.

starting point. A range of stakeholders must be involved. Attorneys who have worked through previous disasters to provide disaster legal assistance should be an integral part of this process. To engage critically with new ideas on disaster legal services, it is also important that those who have lived through domestic disasters, the post-disaster bureaucracy, and those who hold community-level leadership positions be firmly engaged as well. In fact, we must achieve greater citizen participation with disaster recovery in general.

Knowing that recent disasters have brought massive problems in our country that have overwhelmed many communities, perhaps it is time to again reconsider the current framework that gives discretionary involvement to the federal government without guarantees of specific assistance at the local and state levels. More comprehensive policies with enforceable guarantees for disaster victims would allow for more humane long-term responses to the types of needs communities face after disasters.¹⁰⁴

For example, international human rights standards could be used as a framework to achieve post-disaster guarantees beyond the narrow range of provisions of the Stafford Act.¹⁰⁵ “A disaster response governed by human rights norms prioritizes and guarantees post-disaster shelter and humane, dignified treatment of displaced persons.”¹⁰⁶ This would create a paradigm shift in terms of national focus, broad support, and unified political will to disaster issues, along with building leadership that is deeply engaged with promoting and ensuring government transparency.

Most importantly, FEMA should consider new methods to fulfill its role in providing disaster legal services. Exploring fresh, creative possibilities requires a long-term outlook on post-disaster legal services and a commitment to meeting the civil legal needs of low-income people. To this end, FEMA should expand its partnerships on federal, state, and community levels. First, the agency should provide funding to LSC so that LSC offices may choose to provide the agency with feedback and comments on disaster policy. Moreover, LSC offices could, with funding, more meaningfully participate in the ongoing training of volunteer attorneys so that when disaster hits, there is a cadre of trained attorneys available. FEMA should provide regular written and webinar updates to all LSC offices regarding post-disaster programs so that as FEMA creates policy and program changes from disaster to disaster, LSC offices around the country remain up to date. FEMA should also fund specific networks of LSC offices to establish disaster assistance departments that would,

¹⁰⁴ See, e.g., Finger & Luft, *supra* note 28, at 297–300; Charles Martel, *Bring It on Home: A Gulf Coast Marshall Plan Based on International Humanitarian Standards*, 32 VT. L. REV. 57 (2007) (proposing a plan based on international standards for disaster relief, specifically, the United Nations Guiding Principles on Internal Displacement).

¹⁰⁵ See Finger & Luft, *supra* note 28, at 297–300; Martel, *supra* note 104, at 102–04.

¹⁰⁶ Finger & Luft, *supra* note 28, at 297.

in turn, develop expertise and advise and guide other LSC offices as needed following disasters.

Moreover, FEMA should establish partnerships with and fund additional non-LSC pro bono legal services organizations that serve low-income people as a means to build capacity beyond LSC organizations. FEMA should prioritize building networks of community organizations that provide legal services organizations with fact-finding tools to assist in the provision of legal aid to low-income people after disasters. FEMA should establish a stronger, permanent, on-the-ground regional presence to better assure that post-disaster information is clear and accurate. Finally, mediation services for individual disaster assistance recipients should be funded as part of the disaster legal services budget.¹⁰⁷ Any of these approaches would enable greater access to legal services for indigent populations in the aftermath of disasters.

CONCLUSION

To address the post-disaster justice gap, we must renew our commitment to the contemporary War on Poverty. Rebuilding any community after a disaster involves a myriad of legal issues, many of which cannot be known in advance. To provide post-disaster legal services to the most vulnerable members of our communities, we must engage in collective strategic planning. Because we cannot predict where the next disaster will hit, the time is now to work collaboratively for a comprehensive post-disaster policy that meaningfully accounts for the provision of civil disaster legal services.

¹⁰⁷ See Lombreglia, *supra* note 102, at 396.