



*Edward Sparer*

## REMEMBERING EDWARD SPARER: AN ENDURING VISION FOR LEGAL SERVICES

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*The new legal aid lawyer's role should be defined by the broadest reaches of advocacy, just as the role of the corporation lawyer and the labor lawyer and the real estate board lawyer. Central to the new legal aid lawyer's role is the task of helping to articulate and promote the hopes, the dreams, and the real possibility for the impoverished to make the social changes that they feel are needed, through whatever lawful methods are available.<sup>2</sup>*

This year marks the twentieth anniversary of the death of Edward V. Sparer. The vast majority of attorneys in our national legal services community have never heard of Sparer, but he was a giant in the early years of a movement called "poverty law" (a phrase which, relative to its original connotations, has little applicability to the work performed by many legal services programs today). Sparer's vision of the transforming potential and power of legal advocacy in society is one which has transcended the passage of time and the shifting winds of cultural change, and which continues to provide, for all of us, an inspired call to action.

Edward Sparer came of age in the late 1940s, became a part of the workers' rights movement while at City College in New York, joined the American Communist Party, dropped out of school, and was hired as a union organizer.<sup>3</sup> Repelled by revelations of Stalinist brutality in the Soviet Union, he left the communist party in 1956, and although lacking a college degree, he enrolled in Brooklyn Law School, where he graduated first in his class in 1959.<sup>4</sup> After working for a time as a labor lawyer, Sparer accepted a position as a teaching assistant at Columbia Law School, which positioned him for an appointment by a law school faculty board charged in 1963 with the creation of a new legal office in New York: the Mobilization for Youth (MFY) Legal Unit.<sup>5</sup> MFY was a well-funded, multi-faceted social services organization, designed by and affiliated with faculty at Columbia's Schools of Social Work and Law, and

it "represented one of the most comprehensive assaults on poverty ever mounted in the United States."<sup>6</sup> Sparer became the first director of MFY's new Legal Unit, where "welfare law theory was finally put into practice," and where Sparer quickly implemented his vision of "the law as a means to empower the poor, a tool capable of forcing structural changes in a system that punished the poor for their poverty."<sup>7</sup> Abandoning the old "Legal Aid" tradition of providing "piecemeal" legal advice to poor individual clients, Sparer channeled MFY's considerable resources into "targeted study and direct litigation designed to change the institutional structure that created and sustained poverty."<sup>8</sup> This aggressive and affirmative use of the "law as an instrument of social change" became the MFY Legal Unit's credo, self-consciously patterned upon the successful civil rights strategies of the NAACP Legal Defense Fund and the American Civil Liberties Union.<sup>9</sup>

Sparer was not alone. It was 1964, and no less a person than the President of the United States — Lyndon B. Johnson — had declared "war" on poverty. A year later, the federal Legal Services Program was created within the Office of Economic Opportunity, providing federal funding for a "new" concept of legal services with an explicit anti-poverty mission, and an avowed commitment to redress inadequacies in the enforcement of legal rights of poor people through "law reform."<sup>10</sup>

It was a time of unbridled optimism in the power of the law and the courts to achieve significant, positive social change, and it is little wonder that the young lawyers and law students of today — children of the 1980s — cannot begin to comprehend it. It was an era when an Attorney General of the United States could say — in public — "We cannot translate our new concern [for the poor] into successful action simply by providing more of the same [traditional legal aid services]... [A] new breed of lawyers is emerging, dedicated to using the law as an instrument of orderly and constructive social change."<sup>11</sup> A year later, still another Attorney

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*Continued from page 9*

General — Robert F. Kennedy — would urge every lawyer in the nation to join in “the unconditional War on Poverty to which President Johnson has summoned all of us.”<sup>12</sup>

The infusion of federal funding greatly expanded the capacities of the existing, traditional legal aid programs, and in addition supported the establishment of hundreds of new neighborhood legal offices, which in turn attracted idealistic young lawyers who “shared Sparer’s vision of combining routine services with strategic litigation.”<sup>13</sup> However, Sparer quickly concluded that the press of individual client demands in neighborhood offices left insufficient time for the strategic advocacy required to address systemic poverty issues, and he revised his delivery model in favor of a two-tiered structure, through which “routine services would be provided by neighborhood lawyers and social workers, and strategic litigation would be generated and supervised by specialists working as partners with the community based offices.”<sup>14</sup> He left MFY in 1965 to implement this model by creating the first of what would later be known as “backup centers,” the Center on Social Welfare Policy and Law (the Center), staffed by lawyers who would, in partnership with local legal services offices, coordinate strategic welfare litigation on a national basis.<sup>15</sup>

Sparer had an urgent and specific advocacy mission, which was to establish, through a carefully orchestrated agenda of sequential “test-case” litigation, a constitutional “right to survive” for poor people — in essence, a right to a constitutionally guaranteed minimum income.<sup>16</sup> Building on the theoretical work of Charles Reich (author of the influential “New Property” social welfare analysis), and Jacobus tenBroek (who first suggested that the poor, as a class, required special constitutional treatment), Sparer described a tentative “bill of rights” for poor persons (and specifically for welfare recipients), which included guaranteed rights to adequate income, privacy, due process, choice of residence, and freedom from moralistic conditions upon the receipt of benefits.<sup>17</sup> The Center embarked upon its legal campaign as the vanguard of a larger social phenomenon, the “welfare rights” movement, which mobilized thousands of welfare recipients in local grass roots campaigns across the country, and which culminated in the formation of the National Welfare Rights Organization (NWRO); at its inaugural convention in 1967, the NWRO adopted a manifesto calling for the national

welfare system to be governed by four goals: adequate income, dignity, justice, and recipient participation.<sup>18</sup>

Sparer left the Center in 1967 for an academic career that would take him first to Yale and then to the University of Pennsylvania Law School, but he retained a leadership role in the Center’s on-going strategic litigation campaign.<sup>19</sup> His “test-case” approach eventually produced a remarkable string of victories for welfare recipients in the U.S. Supreme Court.<sup>20</sup> Ultimately, the Center and its allies failed to establish any fundamental right to a guaranteed minimum income,<sup>21</sup> but the astonishing overall success rate of the early Legal Services Program in the Supreme Court (and the lower federal courts) transformed those courts into “active participants in the development of national poverty policy,” largely for the benefit of welfare recipients and poor people; it also established the federal judiciary as an effective alternative forum for a disenfranchised community with little influence in the political process, and provided the model by which a generation of legal services lawyers fought the “War on Poverty.”<sup>22</sup>

To be sure, Sparer’s delivery model had significant detractors, even among his contemporaries. Jean and Edgar Cahn, perhaps the most prominent spiritual and intellectual leaders of the legal services movement, criticized Sparer’s policy litigation approach as professionalist and elitist, favoring instead a neighborhood-centered, case by case model in which “the caseload is power.”<sup>23</sup> From another perspective, Stephen Wexler, a staff attorney with NWRO who was very much engaged in Sparer’s strategic litigation campaign, had an epiphany which sharply questioned the ultimate effectiveness of litigation as an anti-poverty strategy, and he argued on behalf of a radically different, community-based paradigm involving organizing, education, skills development, self-help, and strategic training.<sup>24</sup>

Both of these critiques had some force, but each failed to fully appreciate the breadth of Sparer’s vision. Sparer certainly recognized the importance of community empowerment,<sup>25</sup> and in addition he was “one of the few poverty lawyers who understood that a legal campaign was an organizing tool for a social movement, not the other way around.”<sup>26</sup> With respect to individual case work, Sparer believed that while the provision of “routine legal services” to the poor were important, they should not be delivered purely in reaction to the randomness of individual demand; lawyers for the poor, he argued, should function no differently than lawyers for corporations, by proactively and aggressively anticipating their clients’ needs, and advancing both their immediate and long-term agendas.<sup>27</sup>

In this respect, Sparer's model was consistent with a principal feature of the "new" federal legal services program, which was a responsiveness to "informed" legal *need* within the community, rather than to "uninformed" legal *demand*.<sup>28</sup>

Decades passed. Edward Sparer remained on the faculty at the University of Pennsylvania Law School until 1985, when he suffered a heart attack and died at age fifty-five.<sup>29</sup> Along the way, the War on Poverty somehow was transformed into a war on poor people. The "welfare rights" of Lyndon Johnson in the 1960s gave way to the "welfare queens" of Ronald Reagan in the 1980s, which in turn gave way to the "welfare reforms" of Bill Clinton in the 1990s, grandly culminating in an "end to welfare as we know it." Welfare rolls dropped precipitously, but the national poverty rate continues to climb; the poor, it seems, are indeed "always with us."<sup>30</sup>

A second generation of legal services attorneys has fought the same political battles which scarred their predecessors, this time sustaining even more costly and damaging wounds. In 2004, the Legal Services Corporation gratefully observed its thirtieth anniversary, after barely escaping political annihilation with its funding diminished, its grantees greatly reduced in number, its once cohesive national community of advocates scattered, and the substance of its work hindered, since 1996, with intentionally burdensome Congressional restrictions.<sup>31</sup> Just four years before, the out-going president of LSC had finally abandoned any pretense of fidelity to the original anti-poverty mission of the federal legal services program, concluding that "federally funded legal services should focus on individual case representation."<sup>32</sup> Under the new rubric of "access to justice," innovative delivery systems, enhanced by technology, now permit the "unbundling" of piecemeal legal assistance to increased numbers of disconnected individual clients, without reference to the needs of the larger poor community, and the resolution of those random demands for service, either singly or in the aggregate, have no necessary correlation whatsoever to the alleviation of poverty. If Sparer were alive today, he might well conclude that the predominate "vision" of the federal legal services program of the twenty-first century is simply a nationally regulated (albeit more efficient) version of the old legal aid society network of the 1950s.

There can be no dispute that "access to justice" is a vital and noble mission; indeed, it is a fundamental obligation for which a democratic government ought to bear full responsibility. But it was not Edward Sparer's

mission, nor was it the principal mission of the federal legal services program, which was conceived as an institutional anti-poverty tool (like its sister programs such as Medicare, Head Start, and Food Stamps), to be used in the construction of a "Great Society." And that anti-poverty zeal that burned so brightly for Sparer and his contemporaries was never completely extinguished. It was kept alive throughout the long decades, and not just in the old organizational mission statements that strike young lawyers today as quaint and anachronistic echoes of a bygone era, like old newsreel images of welfare recipients demonstrating for their "rights."<sup>33</sup> Less than a decade ago, Congress itself recognized the enduring and inextricable connection between the legal services program and anti-poverty advocacy — and feared it — leading to its shameful attempt to prevent LSC-funded attorneys from challenging the lawfulness of its (simultaneous) effort to dismantle the federal welfare system.<sup>34</sup> But by then the shifting currents of legal, economic, and political reality already had led many anti-poverty strategists away from a litigation-centered reform model, and toward more expansive, multi-faceted approaches involving, for example, serving as "corporate house counsel" to grass-roots community organizations pursuing their own strategies of community-based economic development and neighborhood revitalization,<sup>35</sup> and assisting such organizations to achieve their own agendas of affordable housing development, micro-lending and micro-enterprise business creation, and job training opportunities.<sup>36</sup> These strategies differed markedly from Sparer's relentless test-case litigation approach, but Sparer saw the courts merely as the most effective and promising means, in his era, of pursuing the same ends; he surely would applaud the creative efforts of his successors to engage in "the broadest reaches of advocacy" on behalf of entire poor communities.<sup>37</sup>

Finally, and perhaps surprisingly, the anti-poverty mission survives even today in the legal services community. It lives on, in those programs and advocates who still struggle to balance the problems of individual clients, and the mandate of "access to justice," with the confrontation of the larger causes and effects of poverty in their communities.<sup>38</sup> It lives on in those programs and advocates who prioritize anti-poverty advocacy within an individualized, case-by-case delivery model.<sup>39</sup> And it lives on in those programs and advocates who continue to recognize that strategic litigation "can still accomplish immediate, positive results and have broad impact in changing the practices, policies, or laws that hurt our clients," and that policy advocacy must remain

a viable tool for any organization which claims to address the legal needs of the poor community.<sup>40</sup>

As long as legal services for the poor exist, they will be necessarily directed, at least in part, toward the alleviation of poverty in their client communities; as a federal court found several years ago, without legal services organizations "the poor are unlikely to satisfy their most elemental needs and protect their most basic legal interests."<sup>41</sup> So a second generation of legal services attorneys marches forward in a war on poverty which can never be won, but must always be fought: haltingly and imperfectly, but often creatively; and, occasionally, achieving some remarkable successes. In answering that call to arms, today's generation of advocates would do well to remember the admonition of Stephen Wexler, a contemporary of Edward Sparer, who articulated this ultimate vision of empowerment: "the [legal aid] lawyer will eventually go or be taken away; he does not have to stay, and the government which gave him can take him back just as it does the welfare. He can be another hook on which poor people depend, or he can help the poor build something which rests upon themselves - something which cannot be taken away and which will not leave until all of them can leave."<sup>42</sup>

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<sup>2</sup> Edward Sparer, "The New Legal Aid as an Instrument of Social Change," 1965 *U.Ill.L. Forum* 57, 59-60 (1965) (emphasis in original).

<sup>3</sup> For a compelling biographical account of Sparer's life and his critical role in the early legal services and welfare rights movements, see Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, 22-39 (1993).

<sup>4</sup> *Id.* at 25.

<sup>5</sup> *Id.* at 26-30.

<sup>6</sup> *Id.* at 26.

<sup>7</sup> *Id.* at 27, 30.

<sup>8</sup> *Id.* at 29.

<sup>9</sup> *Id.* at 30. See Mobilization for Youth Legal Unit Report, Nov. 1965, at 3 ("Ultimately, it is hoped that the poor will come to look upon the law as a tool which they can

use on their own behalf to vindicate their rights and their interests.")

<sup>10</sup> Alan Houseman, "Civil Legal Assistance for the 21st Century: Achieving Equal Justice for All," 17 *Yale L. & Policy Rev.* 369, 374 (1998).

<sup>11</sup> Nicholas de B. Katzenbach, Address to the 1964 Conference on the Extension of Legal Services to the Poor, quoted in Houseman, *supra* n.10, at 374 n.10.

<sup>12</sup> "Robert Kennedy Bids the Bar Join Fight Against Social Ills," *New York Times*, May 2, 1964, p.22, col. 4.

<sup>13</sup> Davis, *supra* n.3, at 34.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 35.

<sup>16</sup> His model, of course, was the graduated litigation strategy pursued by the NAACP Legal Defense Fund which culminated in a Supreme Court decision holding racial segregation in public education to be unconstitutional; Sparer and his disciples sought to use the same equal protection theories to "bring the next *Brown v. Board of Education* for poor people." *Id.* at 34.

<sup>17</sup> Edward Sparer, "The Role of the Welfare Client's Lawyer," 12 *UCLA L. Rev.*, 366, 367 (1965).

<sup>18</sup> Davis, *supra* n.3, at 45. The Center, under Sparer's leadership, became the de facto counsel for the NWRO. *Id.* at 73.

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., *King v. Smith*, 392 U.S. 309 (1968); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Rosado v. Wyman*, 397 U.S. 1207 (1970); *U.S. v. Moreno*, 413 U.S. 528 (1973).

<sup>21</sup> See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court").

<sup>22</sup> See Susan Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision-Making*, 273-284 (1990).

<sup>23</sup> Davis, *supra* n.3, at 36.

<sup>24</sup> Stephen Wexler, "Practicing Law for Poor People," 79 *Yale L.J.* 1049, 1056-57 (1970). In effect, Wexler was advocating an approach for which the term would not be coined for another two decades: empowerment.

<sup>25</sup> See *supra* at n.9.

<sup>26</sup> Davis, *supra* n.3, at 73 (citing Gary Bellow).

<sup>27</sup> Sparer, *supra* n.2, at 60; Davis, *supra* n.3, at 35.

<sup>28</sup> Houseman, *supra* n.10, at 374.

<sup>29</sup> Davis, *supra* n.3, at 141.

<sup>30</sup> *Deuteronomy* 15:11.

<sup>31</sup> See John McKay, "Federally Funded Legal Services: A New Vision of Equal Justice Under Law," 68 *Tenn L. Rev.* 101 (2000).

© REMEMBERING ED SPARER  
*Continued from page 12*

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- 32 *Id.* at 111.
- 33 For example, the mission statement of Legal Services of Northern California, Inc., is “to provide quality legal services to empower the poor to identify and defeat the causes of poverty within their community.”
- 34 Ironically, the congressional restriction upon “welfare reform” advocacy was itself unlawful. See *Valezquez v. Legal Services Corporation*, 521 U.S. 533 (2001).
- 35 See, e.g., Brian Glick & Matthew Rossman, “Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience,” 23 *N.Y.U. Rev. L. & Soc. Change* 105 (1997).
- 36 See, e.g., William Kennedy, et al., “Cultural Changes and Community Economic Development Initiatives in Legal Services: What Happened in Two Programs,” 33 *Clearinghouse Rev.* 440 (Nov.–Dec. 1999).
- 37 Sparer, *supra* n.2, at 60. Indeed, Sparer’s vision remains a personal inspiration for some of his contemporaries now pursuing very different strategies. For example, Brian Glick, who helped achieve some of the remarkable long term accomplishments of the Brooklyn Legal Services Corporation, see *supra* n.25, succeeded Sparer as director of the Center on Social Welfare Policy and the Law in 1967.
- 38 See Edward Hoort, “Equal Access to Justice v. Alleviation of Poverty: A New Version of an Old Debate,” *MIE Journal* 38 (Fall 1999).
- 39 For example, in recent years a number of programs have devoted increased efforts toward individual advocacy around Earned Income Tax Credit (EITC) eligibility.
- 40 Raun Rasmussen, “Affirmative Litigation Under the Legal Services Corporation Restrictions,” 34 *Clearinghouse Rev.* 428 (Nov.–Dec. 2000).
- 41 *Legal Aid Society of Hawaii, et al. v. Legal Services Corporation*, 961 F. Supp. 1402, 1420 (D.Hawaii 1997).
- 42 Wexler, *supra* n.24, at 1053.

