

The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws

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Introduction

Today's American legal system affords a significant array of protections to workers. Although most workers in this country do not enjoy a general right to be dismissed only for cause--a right characteristic of many European countries and now of one American state, Montana¹--they benefit from a host of specific prohibitions on arbitrary or inappropriate behavior by employers. Examples include prohibitions on discriminatory behavior (on the basis of race, sex, religion, national origin, age, or disability) and on behavior that interferes with other personal rights of employees.² Employers are also under certain affirmative obligations to employees, including the obligation to provide a safe workplace and the obligation (indirectly, through experience-rated insurance premiums) to fund unemployment benefits for employees who are out of work.³

There is, however, a critical and oft-emphasized distinction between the law "on the books" and the law "in action," as the Legal Realist movement famously taught long ago.⁴ What

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¹ For a succinct overview of the European rules, see Samuel Issacharoff, Contracting for Employment: The Limited Return of the Common Law, 74 Tex. L. Rev. 1783, 1809 (1996). For Montana, see Mont. Code Ann. secs. 39-2-901 to 39-2-915.

² See generally Steven Willborn, Stewart Schwab, and John F. Burton, Employment Law: Cases and Materials Pts. III (personal rights) and V (discrimination).

³ See generally *id.* Pts. VI (unemployment benefits) and VIII (workplace safety).

⁴ See Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12 (1910).

ultimately matters for most purposes is how the law actually operates, not what protections it ostensibly provides. The law “in action” includes not only how judges apply the law as written (the original emphasis of the Realists) but also how well the law is enforced by the parties affected by it.⁵

The distinction between law “on the books” and law “in action” is clearly important in the employment law context, where employees are ordinarily not in a strong position to enforce their rights. The precipitous decline in union membership in recent decades can only have exacerbated the problem.⁶ Unions are obvious agents for enforcing workers’ legal rights; they possess the muscle and the force that individual employees typically lack. With union membership down, the pressing question is what institutions, if any, exist to fill the void and help to protect the legal rights provided “on the books” for American workers.

The goal of the present chapter is to examine some of the distinctive public-interest organizations that exist to provide this protection for employees. The chapter focuses on two broad categories of such organizations: “national issue organizations” (for instance, the NAACP Legal Defense and Education Fund), which focus on one or more broad-based issues and are funded predominantly by donations, and legal services organizations, which serve exclusively low-income individuals and are funded primarily by the government. Although the suggestion of

⁵ Cf. Karl N. Llewellyn, *A Realistic Jurisprudence--The Next Step*, 30 *Colum. L. Rev.* 432, 435 (1930) (“It is to Pound we owe the contrast of law-in-books and law-in-action (the latter limited . . . , in his working out of it, to what *courts* do; though in other places he insists upon *administrative* organs as the present center of legal growth).”).

⁶ For a recent overview of the union decline, see Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker’s Statutory Right to a Judicial Forum*, 49 *Emory L.J.* 135, 136 n.18 (2000). Private-sector union membership is currently less than 10% of the workforce. See *Labor Ends its Long Slide*, *N.Y. Times*, Jan. 22, 2000, at A14. Although private-sector union membership climbed in absolute terms in 1999, see Steven Greenhouse, *Growth in Unions’ Membership in 2000 Was the Best in Two Decades*, *N.Y. Times*, Jan. 20, 2000, at A13, it climbed less quickly than the growth of the workforce, and thus the proportion of private-sector

the previous paragraph is that these sorts of entities have become more important to the enforcement of the employment laws with the decline in union membership, it is important to note that neither sort of institution arose in response to that decline; the NAACP Legal Defense and Education Fund, for instance, was founded by Thurgood Marshall in 1940,⁷ and legal services organizations got their start in the 1960s through the Office of Economic Opportunity as part of the War on Poverty.⁸

Many different mechanisms exist for “enforcing” the employment laws. The mechanisms include, most obviously, providing conventional legal representation to employees whose rights may have been violated, but they also include providing information to workers about what rights the law gives them, facilitating the enforcement of these rights through means other than filing lawsuits, and providing research and support assistance to attorneys providing direct representation to clients. Examples of entities providing these latter sorts of services abound; the Workplace Project of Long Island, for instance, provides information to workers and facilitates enforcement of employment laws through means other than litigation,⁹ and the Migrant Legal Action Program offers research and support assistance to attorneys who provide

workers who belonged to unions fell in 1999, see Labor Ends its Long Slide, N.Y. Times, Jan. 22, 2000, at A14.

⁷ See 1998 Annual Report, NAACP Legal Defense and Education Fund, at 2.

⁸ See Gary Bellow, Legal Aid in the United States, 14 Clearinghouse Rev. 337, 337 (1980).

⁹ See Jennifer Gordon, We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change 30 Harv. C.R.-C.L. L. Rev. 407, 430-33 (1995) (Workplace Project’s organizing activity to foster enforcement of rights); Louise G. Trubek, Reinvigorating Poverty Law Practice: Sites, Skills and Collaborations, 25 Fordham Urban L.J. 801, 806 (1998) (Workplace Project’s community education program). Many legal web sites also offer employment law information to workers. See, e.g., http://www.nwjustice.org/law_center/employment.html (visited 9/21/99) (web site of the Northwest Justice Project, which offers, among other things, a download-able document on “Your Rights and Responsibilities as an Employee”).

direct representation to migrant workers.¹⁰ For reasons of scope, however, this chapter focuses on the more conventional activity of direct legal representation.

Section 1 below lays the groundwork for the examination of the role of public-interest organizations in representing employees by describing why the usual mechanism for protecting legal rights--retention of a private lawyer by the aggrieved party--is of limited effectiveness in the employment context. Section 2 overviews some of the key features of national issue organizations and legal services centers (the organizations on which this chapter focuses), emphasizing in particular the amount and nature of the employment law work they do. Section 3 provides institutional detail on how the two types of organizations are funded. Regression analysis of data from national issue organizations suggests, among other things, that there is a significant correlation between the source of funding and the proportion of revenue spent of legal advocacy (as distinguished from fundraising and administration). Section 4 develops the chapter's primary analytic, as opposed to empirical, point; the claim is that funding sources exert a significant influence on the sort of employment law litigation in which an organization engages. In particular, national issue organizations, funded primarily through donations, do primarily high-level, high-impact work in areas with a significant public profile, such as discrimination; by contrast, legal services centers, supported by the government, work primarily at low levels and in mundane areas, such as unemployment benefits. This distinction between the two types of organizations is not absolute (there are some exceptions), and also there are

¹⁰ See wysiwyg://152/http://buscapique.com/latinuse/buscafile/wash/mlap.htm (visited 7/11/00). Additional examples of such support centers include Legal Services for the Elderly, of New York City, and the National Association of Protection and Advocacy Systems. See <http://www.aoa.dhhs.gov/aoa/dir/118.html> (visited 7/7/00) (description of Legal Services for the Elderly; this organization does not provide services directly to clients, but it offers support and advice to other attorneys representing the elderly); <http://www.protectionandadvocacy.com/napas.htm> (visited 7/14/00) (description of the National Association of Protection and Advocacy Systems, which provides various

other categories of public-interest actors that operate in the employment arena, but still the overall pattern of activity seems to be what the distinction between national issue organizations and legal services centers suggests. And this pattern is an unsurprising consequence of the incentives created by differing funding sources.

A final terminological point is important here. Lawyers commonly distinguish between “employment law” and “labor law,” where the former is the body of (largely substantive) rules protecting workers regardless of union status, while the latter is the body of (largely procedural) rules governing the formation and conduct of unions and their relationships with employers. This chapter follows that terminological distinction; thus its focus on organizations involved in enforcing “the employment laws” means a focus on organizations that work on employment law, not labor law, issues.

1. The limited efficacy of private legal representation in the employment law context

In most of the economy, the primary institution that operates to protect parties’ legal rights is the private bar; an aggrieved party retains (and pays for) a lawyer who works to vindicate the client’s rights. Perhaps not surprisingly, this approach seems to work less well in the employment context than in many other contexts. This is so for several reasons.

First, individual employees will quite often lack the funds to hire a lawyer on an hourly basis, the usual arrangement for large commercial clients. In this respect the problem is parallel to the one that arises in the personal injury context, where individual victims often cannot afford to hire lawyers on an hourly basis while defendant-corporations can.

forms of technical assistance and support to state-level “protection and advocacy” organizations for the disabled).

In the personal injury context the solution is representation of victims on a contingent-fee basis, where the lawyer is compensated by receipt of a share of any winnings garnered by the accident victim. But employees generally do not have as great an opportunity to hire lawyers on a contingent fee basis as do victims of personal injuries. The reason is that employees' damages are ordinarily far lower than those of personal injury victims. It is true that some employment law claims sound in tort (like personal injury claims) and thus can produce verdicts for millions of dollars.¹¹ However, a large number of employment claims--most prominently, discrimination claims brought under federal law--do not fall into this potential-seven-figure-verdict category. Until 1991, employees in such cases were limited to "equitable" relief (reinstatement together with limited amounts of lost wages),¹² and even now monetary relief is capped at amounts ranging from \$50,000 to \$300,000 depending on the size of the offending employer.¹³

A further dimension of the problem of relying exclusively on privately-hired attorneys to bring employment law claims is that the potential damages of the employee will frequently be highly correlated with the employee's earnings. Thus employees who earn low to modest wages--and thus are particularly unable to hire hourly-fee attorneys--will also not be attractive to contingent-fee practitioners.¹⁴

A third reason for the limited efficacy of privately retained counsel in the employment law context is that, while some employment laws do provide for the recovery of attorney fees, that right is limited in important respects and often does not provide private attorneys with

¹¹ For an example, see *Wilson v. Monarch*, 939 F.2d 1138 (5th Cir. 1991) (upholding a \$3.4 million verdict on a tort claim for emotional distress brought by an employee).

¹² See, e.g., Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 *UCLA L. Rev.* 1401, 1427-28 (1998) (describing the pre-1991 regime).

¹³ See 42 U.S.C. sec. 1981A(b)(3).

¹⁴ For further discussion of the problems with, and barriers to, contingent fee representation in the employment context, see Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 *Colum. L. Rev.* 29, 57 (1998).

sufficient compensation to ensure that taking an employment case is worthwhile. To begin, it is primarily antidiscrimination laws, as distinguished from other employment laws, that provide for the recovery of attorney fees at all; other sorts of laws do not contain such provisions.¹⁵ Moreover, even those laws that do authorize the recovery of attorney fees authorize recovery only if the employee is the prevailing party in the case,¹⁶ and, in addition, if a party prevails but only to a limited extent, attorney fees are accordingly limited.¹⁷ A final, and critical, point is that even if fees are recoverable, there is no upward adjustment to account for the risk that the employee's attorney would end up not prevailing.¹⁸ The lack of an upward adjustment means that on an expected basis attorney fee awards under the employment law statutes that permit them are systematically undercompensatory relative to the attorney's performance of work on a regular hourly-fee basis.

For all of these reasons, the "ordinary" approach of privately-retained legal counsel is a very incomplete strategy for the enforcement of the employment laws. As Lewis Maltby writes, "The economic hurdles facing an employee who seeks justice in court are staggering."¹⁹ Maltby goes on to note that an estimated ninety-five percent of those who seek help from the private bar with an employment matter do not obtain counsel.²⁰

The point is not that representation by privately-retained counsel is never available; in fact, a number of important employment cases have been litigated by such counsel. (A few

¹⁵ Examples of laws that authorize the recovery of attorney fees under certain circumstances include Title VII of the Civil Rights Act, see 42 U.S.C. sec. 2000e-5(k); the Age Discrimination in Employment Act, see 29 U.S.C. sec. 626(b) (referencing 29 U.S.C. sec. 216(b)); and the Americans with Disabilities Act, see 42 U.S.C. sec. 12205.

¹⁶ See, e.g., 42 U.S.C. sec. 2000e-5(k) (Title VII attorney fee provision); 29 U.S.C. sec. 216(b) (age discrimination fee provision); 42 U.S.C. sec. 12205 (disability discrimination fee provision).

¹⁷ See *Farrar v. Hobby*, 506 U.S. 103 (1992).

¹⁸ See *City of Burlington v. Dague*, 505 U.S. 557 (1992).

¹⁹ Maltby, *supra* note 14, at 56.

²⁰ *Id.* at 58.

examples are noted just below.) Two particular categories of privately-retained legal counsel who work in the employment area bear particular mention. The first is the “private public interest law firm.” Firms in this category are private law firms that are supported by ordinary legal fees but that may represent certain clients for reduced fees based on the client’s level of need.²¹ A second category of privately-retained legal counsel in the employment context is the union organization attorney who works on employment law as well as labor law issues. Examples here include the AFL-CIO General Counsel’s Office and the legal counsel of the American Federation of State, County and Municipal Employees (AFSCME), each of which has been involved in a number of important employment law cases.²² But, despite the importance of these examples of “private” counsel on the employee side, it is undeniable that alternative institutional arrangements, and in particular the public-interest organizations discussed in this chapter, have an important potential role to play in the enforcement of employment laws.

2. Employment law litigation by national issue organizations and legal services centers

The present section describes two leading types of public-interest organizations involved in employment law litigation. The first is national issue organizations; as noted above, these are

²¹ See Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 Harv. C.R.-C.L. L. Rev. 415, 436 (1996) (“Social justice law firms serve diverse social classes by using sliding-scale fee schedules based on income . . .”). An example of such a firm, insofar as employment law is concerned, is Krokidas & Bluestein of Boston, Massachusetts. See Remarks of Paul Holtzman, Esq., at Harvard Law School, April 14, 2000. (Holtzman is a partner and employment law specialist at Krokidas & Bluestein.)

²² See, e.g., Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioners, *Christensen v. Harris County*, No. 98-1167, United States Supreme Court, 1999 WL 1114682 (amicus brief in employment law case involving the Fair Labor Standards Act); Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioners, *Sutton v. United Air Lines*, No. 97-1943, United States Supreme Court, 1998 WL 86514 (amicus brief in employment law case involving the Americans with Disabilities Act); <http://www.afscme.org/about/ofcman08.htm> (visited 7/7/00) (“AFSCME’s lawyers initiate and assist in legal actions taken at both the federal and state levels which address . . . civil rights issues that affect AFSCME members and affiliates.”); <http://www.afscme.org/about/womenrts.htm> (visited 7/7/00) (describing AFSCME’s litigation efforts to achieve pay equity for women).

national entities that focus on a particular set of issues or topics (related at least in part to employment law) and are funded largely or exclusively by sources other than the government.

The second is legal services centers; these provide legal representation to low-income individuals at government expense. The present section describes the two types of organizations and details the employment law work they perform. Section 3 below discusses how these organizations are funded.

a. National issue organizations

Table 1 provides a list (not necessarily exhaustive) of national issue organizations according to the above definition. Note that an organization need not be exclusively devoted to employment law issues to meet the definition; indeed, most of the entities listed divide their time between employment and other issues, including housing, education, and consumer rights. An organization also need not be exclusively devoted to litigation, as opposed to other forms of public advocacy, to meet the definition. As long as litigation--meaning representation of clients in lawsuits, negotiating settlements, filing amicus briefs, and so forth--is an important component of the entity's activity, the entity qualifies as a national issue organization.²³

²³ One example of a national entity that works on employment law issues but does not engage in any litigation is the Pension Rights Center, which is active in public advocacy in the media and in testifying before Congress but provides referrals for individuals seeking legal representation. See <http://www.aoa.dhhs.gov/aoa/dir/210.html> (visited 7/11/00) (listing attorney referral, but not direct representation, as one of PRC's services); http://labor.senate.gov/hearings/septhear/092199wt/09219jmj/leahy921/brown/iwry/krueger/chambers/gebhard/ferguson/body_ferguson.htm (visited 7/13/00) (Senate testimony); [wysiwyg://375/http://www.commondreams.org/pressreleases/july99/072799d.htm](http://www.commondreams.org/pressreleases/july99/072799d.htm) (visited 7/11/00) (example of press release). Another example is the National Employee Rights Institute, which provides information and referrals to workers but does not engage in significant litigation itself. See <http://www.nerinet.org/> (visited 7/12/00) (describing NERI's activities).

**Table 1: National issue organizations
(devoted at least in part to employment law issues)**

American Civil Liberties Union ²⁴
Anti-Defamation League ²⁵
Asian American Legal Defense and Education Fund ²⁶
Asian Law Caucus ²⁷
Bazon Center for Mental Health Law ²⁸
Disability Rights Education and Defense Fund ²⁹
Equal Rights Advocates ³⁰
Guild Law Center for Economic and Social Justice ³¹
Lambda Legal Defense and Education Fund ³²
Lawyers' Committee for Civil Rights Under Law ³³
Mexican-American Legal Defense and Education Fund ³⁴
NAACP Legal Defense and Education Fund ³⁵
National Employment Law Project ³⁶
National Partnership for Women and Families ³⁷
National Senior Citizens Law Center ³⁸
National Women's Law Center ³⁹
NOW Legal Defense and Education Fund ⁴⁰
Puerto Rican Legal Defense and Education Fund ⁴¹

²⁴ See, e.g., <http://www.aclu.org/issues/immigrant/workrights.html> (visited 7/6/00) (employment litigation activities of the American Civil Liberties Union's Immigrant Rights Project); <http://www.aclu.org/issues/gay/aboutgl.html> (visited 7/6/00) (describing employment discrimination suit, *Shahar v. Bowers*, brought by the American Civil Liberties Union against the state of Georgia).

²⁵ See Civil Rights Report, ADL in the Courts: Litigation Docket 1999, at 35-36, 40-43 (describing employment law litigation), available at http://www.adl.org/frames/front_civil_rights.html (visited 7/13/00).

²⁶ See 1998 Annual Report, Asian American Legal Defense and Education Fund, at 5-7 (describing employment law litigation activities).

²⁷ See <http://www.peggybrowningfund.org/alc.html> (visited 7/10/00) (describing the Asian Law Caucus's Employment/Labor Project).

²⁸ See Annual Report, Bazon Center for Mental Health Law, 1998-99, at 5 (describing recent employment discrimination suit brought by the Bazon Center); <http://www.bazon.org/who.html> (general description of the Bazon Center's activities).

²⁹ See, e.g., <http://www.dredf.org/sandiego.html> (visited 9/1/99) (describing employment discrimination suit brought by the Disability Rights Education and Defense Fund and others against the City of San Diego, CA); <http://www.dredf.org/christensen.html> (visited 9/1/99) (describing employment discrimination suit brought by the Disability Rights Education and Defense Fund and others against the Los Angeles Police Department).

³⁰ See <http://www.equalrights.org/legal/amicusbr.htm> (visited 7/10/00) (describing current litigation activity, a substantial portion of which is in the employment law area).

³¹ See <http://sugarlaw.org/projects/plantclosings/plantclosingsproject.htm> (visited 7/11/00) (describing Plant Closings Project and its litigation activity under the Worker Adjustment and Retraining Notification (WARN) Act).

The organizations in Table 1 vary significantly in the proportion of their time devoted to employment law issues, both as a fraction of the organization's overall activity and in absolute terms. In terms of the fraction of an organization's overall activity, the National Employment Law Project is exclusively devoted to employment law issues, while a relatively small proportion of the overall activities of the Bazelon Center appears to involve such issues. Likewise, in absolute terms, the employment law activities of the NAACP Legal Defense and Education

³² See 1998 Annual Report, Lambda Legal Defense and Education Fund, at 8-9, 11 (describing employment law litigation activities).

³³ See, e.g., <http://www.lawyerscomm.org/projects/employ.html> (visited 7/6/00) (describing the Lawyers' Committee's Employment Discrimination Project); <http://www.lawyerscomm.org/accompl.html> (visited 7/6/00) (describing legal victories in employment cases including *Claiborne Hardware Co. v. NAACP* and *Women in City Government United v. New York*).

³⁴ See 1998-99 Annual Report, Mexican-American Legal Defense and Education Fund, at 6-7 (describing employment law litigation activities).

³⁵ See 1998 Annual Report, NAACP Legal Defense and Education Fund, at 10-11 (describing employment law litigation activities).

³⁶ See, e.g., <http://www.nelp.org/about.html> (general description of the organization); <http://www.nelp.org/immigrant.htm> (description of Immigrant Worker Project and its litigation activities); <http://www.nelp.org/contingent.htm> (describing Contingent Worker Project and accompanying litigation activities).

³⁷ See 1997-98 Annual Report, National Partnership for Women and Families, at 5, 7 (describing employment law litigation activities).

³⁸ See <http://www.nslc.org/about.html> (visited 7/7/00) (listing pension rights and age and disability discrimination as focus areas, and stating that "NSCLC has a long tradition of national advocacy through impact litigation"); <http://www.nslc.org/consumers.html> (visited 7/7/00) (describing how to contact the organization's attorneys for potential legal representation).

³⁹ See <http://www.afl.org/mem.nwlc.html> (visited 7/11/00) (general description of organization's role in litigating women's rights in areas including employment); Brief of the Women's Legal Defense Fund et al. in Support of Petitioners, *Walters v. Metropolitan Educ. Enterprises, Inc.*, Nos. 95-259, 95-779, United States Supreme Court, 1996 WL 284703 (amicus brief in employment discrimination case, signed by the National Women's Law Center among others).

⁴⁰ See 1998 Annual Report, NOW Legal Defense and Education Fund, at 2-3 (describing employment law litigation activities).

⁴¹ See <http://guthrie.hunter.cuny.edu/centro/archives/aids/prldef.html> (visited 7/10/00) (noting that the Puerto Rican Legal Defense and Education Fund has brought lawsuits across the country in a range of areas including equal employment rights, and listing project areas including Employment Rights).

Fund, with two dozen staff attorneys,⁴² are presumably substantially greater than those of the Equal Rights Advocates, with four staff attorneys.⁴³ (If, however, employment law involvement is relatively rare or quite sporadic, then I do not include the organization in Table 1.⁴⁴)

Omitted from Table 1 are organizations that do not have staffs of their own lawyers but rather provide coordinating services to their attorney membership, which engages in employment law litigation. These organizations are not providing direct client representation as I conceive of it. The most prominent example of such an organization in the employment area is the National Employment Lawyers Association, which coordinates amicus-brief-writing activities by its members but does not employ the attorneys who write the briefs.⁴⁵

As discussed in section 4 below, in addition to the organizations listed in Table 1 there are entities that look similar to these organizations but operate on a more regional or local level; examples (all listed in Table 6) include the Asian Pacific American Legal Center of Southern California, the Center for Law in the Public Interest, the Employment Law Center of the Legal Aid Society of San Francisco, the Legal Action Center of New York City, the Northwest Women's Law Center, Public Advocates, Inc., and the Public Justice Center.

⁴² See 1998 Annual Report, NAACP Legal Defense and Education Fund, at 2.

⁴³ See <http://www.equalrights.org/about/director.htm> (visited 7/12/00).

⁴⁴ For instance, Table 1 does not include People for the American Way; PFAW has been involved in employment law litigation on a few occasions, but such litigation does not appear to be a regular staple of its activity. See <http://www.pfaw.org/courts/priorcases.shtml> (visited 7/7/00) (describing PFAW's involvement in the Supreme Court litigation in *Oncale v. Sundowner and Piscataway School District v. Taxman*); <http://www.pfaw.org/courts/docket.shtml> (visited 7/7/00) (current docket of cases in which PFAW is involved, none of which are employment cases). Similarly, the National Center for Lesbian Rights focuses on a range of discrimination and civil rights issues but does not appear to work on employment law matters and thus is not listed in Table 1. See <http://www.nclrights.org/cases.html> (visited 7/10/00) (current docket of cases in which NCLR is involved, none of which are employment cases). The same is true of Trial Lawyers for Public Justice. See <http://www.tlpj.org/tlpjf/caseup.htm> (visited 7/11/00) (summary of current cases, none of which are employment cases).

b. Legal services centers

A second leading type of public-interest organization involved in the enforcement of the employment laws is legal services centers. As noted in the introduction, legal services centers arose in the 1960s as part of the federal government's War on Poverty. Since 1974 they have been administered through the Legal Services Corporation, an arm of the federal government that makes grants of funds to local centers around the country.⁴⁶ The legal services centers provide legal representation free of charge across a range of areas to low-income clients who cannot afford ordinary private lawyers.⁴⁷ The eligibility cutoff is at or below 125% of the federal poverty guidelines, with the decision to go below 125% left to the local center.⁴⁸

As examples of the income cutoff levels, Alaska Legal Services sets the cutoff for a family of three at \$21,700, while Gulfcoast Legal Services of Florida sets it at \$17,063.⁴⁹ As a result of the cutoffs, legal services centers cover only a distinct subset of the population of individuals who may be unable to retain a private lawyer for representation on an employment law matter. As Justice Denise Johnson of the Vermont Supreme Court has noted, "It is not just the poor who cannot afford justice in today's society. Courts across the country have experienced an explosion in pro se litigation" (where the client is not represented by an attorney),

⁴⁵ See <http://www.nela.org/> (visited 7/12/00) (general description of the organization); The Employee Advocate, Spring 2000, at 6, 10 (describing amicus brief activity of NELA attorneys).

⁴⁶ See http://www.lsc.gov/welcome/wel_who.htm (visited 7/14/00) (general description of the Legal Services Corporation).

⁴⁷ See, e.g., <http://firms.findlaw.com/LASP/> (visited 9/21/99) (Legal Services Program for Pasadena and San Gabriel-Pomona Valley) (describing organization's activities).

⁴⁸ See Congressional Research Service Report for Congress, Legal Services Corporation: Basic Facts and Current Status 2 (Oct. 23, 1996).

⁴⁹ See <http://www.ptialaska.net/~aklegal/> (visited 9/21/99) (Alaska Legal Services Corporation); <http://www.gulfcoastlegal.org/guidelines.htm> (visited 9/21/99) (Gulfcoast Legal Services).

“and many people representing themselves are of modest income levels and would not be eligible for publicly funded legal services.”⁵⁰

Legal services centers vary in the amount and nature of employment law work they do. On the one hand, help in getting clients unemployment benefits that have been denied to them is a service that almost all legal services centers seem to provide.⁵¹ On the other hand, wage claims and discrimination claims are handled by some centers, but coverage of these areas is far from universal. For wage claims, the centers most likely to handle them seem to be those that focus on serving migrant workers and seasonal farmworkers.⁵² Discrimination claims are handled by such centers as Gulfcoast Legal Services, Inc. (which, in a fairly unusual practice, explicitly lists discrimination as one of its “priorities”), Atlanta Legal Aid, Client Centered Legal Services of Southwest Virginia, Legal Services of Northern Virginia, and the Knoxville Legal Aid Society.⁵³ Other centers, by contrast, seem to focus exclusively or almost exclusively on unemployment benefit claims in their work in the employment area. At Legal Services of Eastern Missouri, for example, “[e]mployment cases usually involve the loss or denial of unemployment benefits.”⁵⁴ And at the Legal Services Agency of Western Carolina, while unemployment benefits claims are

⁵⁰ Denise R. Johnson, *The Legal Needs of the Poor as a Starting Point for Systematic Reform*, 117 *Yale L. & Pol’y Rev.* 479, 480-81 (1998).

⁵¹ See, e.g., http://www.greenwood.ned/~lsawc/case_acceptance.htm (visited 9/22/99) (Legal Services Agency of Western Carolina) (unemployment benefits claims are “routinely accepted for representation”); <http://philalegal.org/info.htm> (visited 9/22/99) (Philadelphia Legal Assistance) (listing unemployment benefits claims as a service area).

⁵² See, e.g., <http://www.mnlegalservices.org/about/mls.shtml> (visited 7/11/00) (listing wage matters handled by Migrant Legal Services, a unit of Southern Minnesota Regional Legal Services); <http://www.mlan.net/fwls/flsenglish.htm> (visited 7/11/00) (similar for Farmworker Legal Services, a division of Legal Services of Southeastern Michigan).

⁵³ See <http://www.gulfcoastlegal.org/priorities.htm> (visited 9/21/99) (Gulfcoast Legal Services); <http://www.law.emory.edu/PI/ALAS/97cases.html> (visited 9/21/99) (Atlanta Legal Aid); <http://iceman.naxs.com/ccls.info.htm> (visited 9/21/99) (Client Centered Services of Southwest Virginia); <http://members.aol.com/lsnvmain/programs.htm> (visited 9/21/99) (Legal Services of Northern Virginia); <http://kornet.org/klas/problems.htm> (visited 9/21/99) (Knoxville Legal Aid Society).

⁵⁴ See <http://www.lsem.org/services.htm> (visited 9/21/99).

“routinely *accepted* for representation,” other “employment problems” are “routinely *rejected* for representation.”⁵⁵ Some centers explicitly provide that discrimination claims are not handled.⁵⁶

Sometimes only new resources allow a center to branch out and handle additional types of employment law claims. For instance, the New Orleans Legal Assistance Corporation reports in its 1998 Annual Report of handling wage and discrimination claims for the first time in twenty years due to the assistance of a Skadden Fellow (a recent elite law school graduate whose salary is paid by the law firm of Skadden, Arps, Slate, Meagher & Flom).⁵⁷

The Legal Services Corporation compiles aggregate statistics on the types of cases handled by legal services centers. Nationwide, income maintenance claims, which include claims for unemployment benefits as well as other types of public benefits,⁵⁸ comprise about a sixth of the overall caseload of legal services centers.⁵⁹ Other employment cases are a few percent of the overall caseload.⁶⁰

A few of the local legal services centers provide detailed quantitative breakdowns of their activities by subject matter. Atlanta Legal Aid, for example, reports an annual caseload for 1997 of 11,552 total cases, of which 241 involved unemployment benefits, 74 involved discrimination claims, and 185 involved other employment claims.⁶¹ The Maryland Legal Aid Bureau reports an annual caseload for 1998 of 33,048 total cases, of which 2,256 (7%) involved income

⁵⁵ See http://www.greenwood.ned/~lsawc/case_acceptance.htm (visited 9/22/99).

⁵⁶ Palmetto Legal Services of South Carolina is an example. See <http://www.netside.com/~legalpal/priority.htm> (visited 9/29/99).

⁵⁷ See <http://www.nolac.org/humanresources.htm> (visited 9/21/99).

⁵⁸ See <http://www.gulfcoastlegal.org/priorities.htm> (visited 9/21/99) (Gulfcoast Legal Services) (listing unemployment benefits in income maintenance category, not employment category); <http://209.212.129.85/priorities.html> (visited 9/22/99) (Three Rivers Legal Services, Inc.) (also listing unemployment benefits in income maintenance category).

⁵⁹ See, e.g., 1997 Annual Report, Legal Services Corporation, at 5 (income maintenance cases were 14.0% of cases closed in 1997).

⁶⁰ See *id.* (employment cases were 2.4% of cases closed in 1997).

⁶¹ See <http://www.law.emory.edu/PI/ALAS/97cases.html> (visited 9/21/99).

maintenance and 743 (2%) involved employment matters other than unemployment benefits claims.⁶² The Legal Aid Society of Nebraska reports a 1997 annual caseload of 4,762 cases, of which 286 involved income maintenance and 19 involved employment matters other than unemployment benefits claims.⁶³ Many other centers, however, do not even have an “employment” category apart from the income maintenance category.⁶⁴

3. Funding of national issue organizations and legal services centers

The previous section described national issue organizations and legal services centers and provided some information about their involvement in employment law representation. This section at how these organizations are funded. Among other things, the discussion of national issue organizations offers a regression analysis of the relationship between funding sources and the use of funds. The discussion of legal services centers provides national and local figures on the sources of funding for these organizations.

a. National issue organizations

While legal services centers get a substantial amount of funding from the government, national issue organizations typically get little or no government funding. Neither the NAACP Legal Defense and Education Fund nor the Lambda Legal Defense and Education Fund, for example, appears to have gotten any government support in 1998, according to their annual reports for that year; the NOW Legal Defense and Education Fund received a government grant

⁶² See <http://www.mdlab.org/Statistics.html> (visited 9/21/99).

⁶³ See <http://www.las.omaha.org/1997Rep.htm> (visited 9/21/99).

⁶⁴ See, e.g., <http://www.mlan.net/lacm/Whattemplate.html> (visited 9/22/99) (listing of types of cases handled by Legal Aid of Central Michigan); <http://homepage.rconnect.com/smrlswi/index/htm> (visited 9/22/99) (listing of types of cases handled by Southern Minnesota Regional Legal Services).

for \$394,682, approximately 10% of its total revenue.⁶⁵ Some national issue organizations, such as the ACLU, categorically refuse to accept any government funding on principle;⁶⁶ presumably these organizations fear that such funding would comprise their ability to bring aggressive, broad-based challenges, particularly when those challenges involve the government in any way. (The history of legal services funding, discussed in section 4 below, provides a good deal of support for these concerns about the consequences of accepting government funding.)

The primary sources of funding for national issue organizations are generally individual contributions and foundation grants; other sources include attorneys' fees and donation of private attorneys' time.⁶⁷ Often contributions by the government or by corporations are grouped with foundation grants in the reporting of financial information,⁶⁸ so the category of foundation support discussed below includes those additional sources of funding. As noted above, however, government funding appears limited, and the same is generally true of corporate contributions, to the extent one can tell from the information that is publicly reported.⁶⁹

⁶⁵ See 1998 Annual Report, NAACP Legal Defense and Education Fund, at 25-27 (listing institutional donors at length, and describing how to make individual contributions, but making no mention of government funding); 1998 Annual Report, Lambda Legal Defense and Education Fund, at 31 (dividing donors into "foundations" and "individuals," while making no mention of government funding); 1998 Annual Report, NOW Legal Defense and Education Fund, at 17 (listing government grant of \$394,682).

⁶⁶ See <http://www.aclu.org/library/pbp1.html> (visited 7/6/00) ("The ACLU does not receive any government funding").

⁶⁷ See, e.g., 1998 Annual Report, NAACP Legal Defense and Education Fund, at 24 (listing attorneys' fees and costs as the source of \$1,116,878 in revenue, just under 10% of the total intake); 1998 Annual Report, Lambda Legal Defense and Education Fund, at 31 (listing donated legal services as the source of \$961,962 in revenue, approximately 20% of the total intake).

⁶⁸ See, e.g., 1996 Annual Report, NOW Legal Defense and Education Fund, at 17 (grouping contributions from foundations and government in a single category); 1998 Annual Report, NOW Legal Defense and Education Fund, at 17 (grouping contributions from foundations and corporations in a single category); 1998 Annual Report, NAACP Legal Defense and Education Fund, at 25-26 (listing "institutional donors," which include both foundations and corporations).

⁶⁹ For instance, the NOW Legal Defense and Education Fund currently groups contributions from foundations and corporations in a single category, but until 1996 it separated them out. In 1996 corporate contributions were \$61,350, compared to \$1,281,298 from foundations and government. See 1996 Annual Report, NOW Legal Defense and Education Fund, at 17.

Across the two major categories of funding for national issue organizations--individual contributions and contributions from foundations, government, and corporations—the organizations vary considerably in the proportion of funding that comes from each source. For example, in 1998 the Mexican American Legal Defense and Education Fund got 33% of its funding from individual contributors, and 47% from foundations, government, and corporations, while the Lambda Legal Defense and Education Fund got 70% of its funding from individual contributors and only 8% from foundations, government, and corporations. (It should be noted that such differences could result from variations in how organizations categorize different contributions. Unfortunately, none of the national issue organizations' annual reports provide a great deal of detail about how they compute the various figures. On the other hand, the fact that the organizations' financial reports are audited presumably suggests at least some commonality of practice across them. Still, this caveat should be borne in mind in interpreting the empirical results described below.)

The variation across national issue organizations in the sources of funding raises the question whether different patterns of funding correlate with different patterns of expenditures. Some national issue organizations provide detailed breakdowns in their annual reports of funding sources and expenditures, and this data allows one to test the relationship between funding and expenditure patterns.

Table 2 below presents summary statistics for four national issue organizations that provide detailed funding and expenditure information in their annual reports. The organizations are the NOW Legal Defense and Education Fund, the Lambda Legal Defense and Education Fund, the Mexican American Legal Defense and Education Fund, and the National Partnership for Women and Families. For each of these organizations, I have information for several years;

thus the total number of observations in the data set is 22. (Organization and year dummies are included in all regressions reported below.) One of the four organizations, the Mexican American Legal Defense and Education Fund, does not separately break down expenditures on fundraising and expenditures on administration, so for the separate expenditure variables for fundraising and administration, in the last two rows of Table 2, I have only 15 observations.

Table 2: Summary statistics for select national issue organizations

Variable	Observations	Mean	Std. Dev.	Min. Value	Max. Value
Proportion of Revenue from Individual Contributions	22	.52	.19	.19	.93
Proportion of Revenue from Foundations/Government/Corporations	22	.31	.19	.01	.57
Proportion of Revenue from Other Sources	22	.17	.17	.01	.61
Proportion of Expenditures on Legal Work	22	.81	.07	.68	.92
Proportion of Expenditures on Fundraising and Administration	22	.19	.07	.08	.32
Proportion of Expenditures on Fundraising	15	.13	.04	.07	.22
Proportion of Expenditures on Administration	15	.10	.03	.07	.17

Column 1 of Table 3 below reports the results of an ordinary-least-squares (OLS) regression of the proportion of expenditures on legal work on the following explanatory variables: the proportion of revenue from individual contributions; the proportion of revenue from foundations, government, and corporations; and organization and year dummy variables.

The proportion of expenditures on legal work is significantly negatively related to the proportion of revenue from individual contributions and significantly positively related to the proportion of revenue from foundations, government, and corporations. Thus, organizations that receive more of their funding from individuals spend less of their revenue on legal work than organizations that receive more of their funding from foundations, government, and corporations. Since the proportion of expenditures on fundraising and administration is just one minus the proportion of expenditures on legal work, these same results imply that organizations that receive more of their funding from individuals spend more of their revenue on fundraising and administration than organizations that receive more of their funding from foundations, government, and corporations.

Table 3: OLS Regression Results

Explanatory Variable	Dependent Variable: Proportion of Expenditures on Legal Work (N=22)	Dependent Variable: Proportion of Expenditures on Fundraising (N=15)	Dependent Variable: Proportion of Expenditures on Administration (N=15)
Proportion of Revenue from Individual Contributions	-.212 (.059)	-.000 (.058)	.233 (.045)
Proportion of Revenue from Foundations/ Corporations/ Government	.116 (.054)	-.535 (.124)	.323 (.098)
Dummy Variable for NOW LDEF	-.062 (.014)	.014 (.011)	.037 (.009)
Dummy Variable for Lambda LDEF	.034 (.023)	-.195 (.041)	.125 (.033)
Dummy Variable for Mexican American LDEF	.008 (.020)	(dropped)	(dropped)
Dummy Variable for 1997	.020 (.014)	-.041 (.013)	.013 (.010)
Dummy Variable for 1996	.011 (.015)	-.040 (.010)	.018 (.008)
Dummy Variable for 1995	.003 (.014)	-.059 (.016)	.033 (.013)
Dummy Variable for 1994	.051 (.015)	-.082 (.015)	.026 (.012)
Dummy Variable for 1993	.025 (.023)	(dropped)	(dropped)
Dummy Variable for 1992	.006 (.023)	(dropped)	(dropped)
Dummy Variable for 1991	.044 (.029)	-.091 (.019)	.027 (.015)

Notes: The omitted organization dummy variable is for the National Partnership for Women and Families. The omitted year dummy variable is for 1998.

The results just described raise the question whether the effect of individual contributions versus funding from foundations, government and corporations is due to higher fundraising costs

associated with individual contributions. Columns 2 and 3 of Table 3 suggest that, indeed, as between fundraising expenditures and administrative expenditures, the key difference between organizations that receive more of their funding from individuals and organizations that receive more of their funding from foundations, government, and corporations is in their fundraising expenditures, not in their administrative expenditures. The coefficient on the proportion of revenue from individual contributors is not significantly different from zero in the regression of the proportion of expenditures on fundraising on the explanatory variables specified above, while the coefficient on the proportion of revenue from foundations, government, and corporations is negative and significant. (See column 2 of Table 3.) By contrast, in the regression of the proportion of expenditures on administration on the same explanatory variables, both the coefficient on the proportion of revenue from individual contributors *and* the coefficient on the proportion of revenue from foundations, government, and corporations are positive and significant. (See column 3 of Table 3.)

Note that the inclusion of organization dummies in the regressions reported in Table 3 means that the results are not being driven by the fact that, for example, a particular national issue organization may happen to have both a low proportion of expenditures on legal work and a high proportion of revenue from individuals due to some factor not included in the regression. If this is what is going on, then the organization dummy should pick up the underlying fixed effect. In fact, one of the entity dummies does turn out to be significant; the NOW Legal Defense and Education Fund has a lower proportion of expenditures on legal work, and a higher proportion of expenditures on administration, holding constant the proportion of revenue from various sources, than the other organizations (see row 3 of Table 3).

The basic conclusion of the regression analysis is that national issue organizations that receive more of their funding from individuals, and less from foundations, grants and corporations, spend less of their revenue on legal work and more of it on fundraising. An interesting normative dimension of the link between the source of funds and the cost of fundraising is that some types of national issue organizations may have greater access to the (cheaper) foundation funds than others. A striking feature of the data compiled here is that (as already suggested by the contrast drawn above between the Mexican American Legal Defense and Education Fund and the Lambda Legal Defense and Education Fund) Lambda gets far less of its funding from foundations, government, and corporations than any of the other national issue organizations included in the sample. Foundations may be more likely to contribute to more “conventional” civil rights organizations than to organizations such as Lambda.⁷⁰

b. Legal services organizations

The most obvious contrast between national issue organizations and legal services centers in terms of funding is that the former get little to no government funding, while the latter get a substantial (although decreasing) fraction of their funding from government sources. The following analysis presents more detailed information on the funding of legal services centers and how it differs from the funding of national issue organizations.

Table 4 shows the dollar amounts of funding for legal services centers from a range of sources for the years 1980 to 1998. The second column of the table gives the amount of funding

⁷⁰ In a similar vein, Felix Lopez notes the difficulty of attracting foundation support for representation in employment law matters of ex-offenders, people in recovery, and people with AIDS. See Felix Lopez, Lawyers Matter, Policy Matters: How One Small Not-for-Profit Combats Discrimination Against Ex-Offenders, People in Recovery, and People with AIDS, 17 Yale L. & Pol’y Rev. 443, 453 (1998).

from the Legal Services Corporation;⁷¹ the third column gives the amount of funding from other federal government sources (for instance, social services grants);⁷² the fourth column gives the amount of funding from state and local government sources; the fifth column gives the amount of funding from IOLTA, or Interest on Lawyers Trust Accounts;⁷³ and the sixth column gives the amount of funding from other sources. The nature of these “other sources,” to the extent it can be discerned from publicly available information, is discussed later in this subsection.

⁷¹ Actually this figure is approximate, since the dollar amount in the second column of Table 4 is the congressional appropriation to the Legal Services Corporation; most, but not all, of this amount ultimately flows to legal services centers in the form of grants.

⁷² See, e.g., <http://www.lsnj.org/glance.htm> (visited 9/22/99) (Legal Services of New Jersey) (listing federal funding from a Social Services Block Grant, Department of Human Services and Community Affairs, as well as from the Legal Services Corporation).

⁷³ “Under these programs, certain client funds held by an attorney in connection with his practice of law are deposited in bank accounts. The interest income generated by the funds is paid to foundations that finance legal services for low-income individuals.” *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 160 (1998).

Table 4: Funding for Legal Services Centers 1980-1998: Dollar Figures

year	LSC	Other federal	State and local	IOLTA	Other	Total
1980	300,000,000	27,167,000	3,557,000	0	6,938,000	337,662,000
1981	321,300,000	26,478,927	6,258,655	0	15,405,921	369,443,503
1982	241,000,000	27,500,000	6,500,000	0	16,000,000	291,000,000
1983	241,000,000	25,490,293	9,522,332	1,500,000	15,443,426	292,956,051
1984	275,000,000	23,166,872	16,082,836	1,273,842	23,168,566	338,692,116
1985	305,000,000	24,718,960	20,067,745	2,656,146	34,007,507	386,450,358
1986	292,363,000	25,399,966	23,730,987	15,029,328	26,834,413	383,357,694
1987	305,500,000	25,412,407	30,913,128	28,664,710	36,026,378	426,516,623
1988	305,500,000	27,678,482	33,755,106	29,951,205	37,834,710	434,719,503
1989	308,555,000	28,132,139	42,968,230	35,994,959	42,007,908	457,658,236
1990	361,525,000	28,473,066	50,180,646	55,005,222	50,201,397	545,385,331
1991	328,182,000	29,512,709	52,023,260	73,918,224	44,936,714	528,572,907
1992	350,000,000	31,434,331	58,737,676	87,948,080	60,517,386	588,637,473
1993	357,000,000	32,182,415	70,041,391	75,879,344	67,737,581	602,840,731
1994	400,000,000	34,605,425	75,139,727	64,882,679	68,216,677	642,844,508
1995	400,000,000	40,000,658	75,497,133	60,194,149	77,821,214	653,513,154
1996	278,000,000	28,740,312	68,191,385	53,312,540	58,799,129	487,043,366
1997	283,000,000	27,814,679	79,884,074	57,452,515	63,609,910	511,761,178
1998	283,000,000	35,996,269	87,720,710	63,457,108	75,594,473	545,768,560

Source: Legal Services Corporation web site, <http://www.lsc.gov/sfb99app.html> and <http://www.lsc.gov/sfb99nlf.html> (both visited 9/12/99).

Table 5 translates the information from Table 4 into percentage figures. Table 5 makes clear that the percentage of funding for legal services centers that comes from a government source of one type or another is very large--just under 75% in 1998, and 98% in 1980. The composition of the government support has changed somewhat over time, however; the role of state and local governments has grown, while the role of the federal government has shrunk (from 97% of total funds in 1980 to 58% of total funds in 1998).

Table 5: Funding for Legal Services Centers 1980-1998: Percentage Figures

year	LSC	Other federal	State and local	IOLTA	Other
1980	88.85	8.05	1.05	0.00	2.05
1981	86.97	7.17	1.69	0.00	4.17
1982	82.82	9.45	2.23	0.00	5.50
1983	82.26	8.70	3.25	0.51	5.27
1984	81.19	6.84	4.75	0.38	6.84
1985	78.92	6.40	5.19	0.69	8.80
1986	76.26	6.63	6.19	3.92	7.00
1987	71.63	5.96	7.25	6.72	8.45
1988	70.28	6.37	7.76	6.89	8.70
1989	67.42	6.15	9.39	7.87	9.18
1990	66.29	5.22	9.20	10.09	9.20
1991	62.09	5.58	9.84	13.98	8.50
1992	59.46	5.34	9.98	14.94	10.28
1993	59.22	5.34	11.62	12.59	11.24
1994	62.22	5.38	11.69	10.09	10.61
1995	61.21	6.12	11.55	9.21	11.91
1996	57.08	5.90	14.00	10.95	12.07
1997	55.30	5.44	15.61	11.23	12.43
1998	51.85	6.60	16.07	11.63	13.85

In terms of nongovernmental funding, the Legal Services Corporation data reported in Tables 4 and 5 distinguishes between IOLTA funds and funds from other private sources. In fact, IOLTA funds may bear important similarities to government funds in terms of the pressures and restrictions (detailed more fully in section 4 below) that accompany the funding. In 1996, for instance, Congress forbade entities that receive Legal Services Corporation funds to bring class action lawsuits or to engage in “legislative advocacy” (lobbying activity);⁷⁴ some state laws impose similar restrictions on the use of IOLTA funds.⁷⁵ Also of interest for present purposes, at least one state, Washington, prohibits the use of IOLTA funds for bringing employment

⁷⁴ See, e.g., David S. Udell, Implications of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor, 25 Fordham Urban L.J. 895, 895 n.1 (1998) (summarizing new restrictions on entities receiving Legal Services Corporation funds).

⁷⁵ See id. at 908 n.42 (summarizing state laws in Texas, Maryland, and Washington).

discrimination suits.⁷⁶ (It should also be noted that the legal status of IOLTA funds remains up in the air after a recent Supreme Court decision involving a federal constitutional challenge to the collection of such funds.⁷⁷)

The remaining funding category for legal services centers reflected in the Legal Services Corporation data is funding from “other” sources.⁷⁸ The 1997 Annual Report of the Corporation shows a breakdown of this category between private grants (\$20,747,857) and sources other than private grants (\$42,852,053).⁷⁹ Information from local legal services centers provides some further detail about the sources of this set of funds. Often the funds come from state bar foundations who wish to support the provision of legal services to low-income people.⁸⁰ Other foundations, as well as private individuals, may contribute as well, although in these instances the fraction of support provided by such actors, as compared to government sources, is far smaller than in the case of national issue organizations.⁸¹ United Way campaigns are also another frequent source of funding.⁸²

⁷⁶ See *id.*

⁷⁷ See Judith Resnick & Emily Bazelon, *Legal Services: Then and Now*, 17 *Yale L. & Pol’y Rev.* 291 (1998) (discussing *Phillips v. Washington Legal Foundation*).

⁷⁸ Officially the Legal Services Corporation calls this category “private and other.” See <http://www.lsc.gov/sfb99nlf.html> (visited 9/21/99).

⁷⁹ See 1997 Annual Report, Legal Services Corporation, at 7.

⁸⁰ See, e.g., <http://www.nolac.org/humanresources.html> (visited 9/21/99) (New Orleans Legal Assistance Corporation) (reporting \$160,250 in funding from the Louisiana Bar Foundation and \$20,746 in funding from “other foundations”); <http://www.gulfcoastlegal.org/> (visited 9/21/99) (Gulfcoast Legal Services) (listing funding sources including the Florida Bar Foundation); http://www.greenwood.net/~lsawc/about_us.htm (visited 9/22/99) (Legal Services Agency of Western Carolina) (listing funding sources including the South Carolina Bar Foundation).

⁸¹ See, e.g., <http://www.nwls.org/funding.htm> (visited 9/21/99) (Northwestern Legal Services) (listing, as its sole source of private monetary support, a single foundation, but going on to note that this foundation donated \$300); <http://www.ptla.org/funding.htm> (visited 9/22/99) (Pine Tree Legal Assistance) (listing the Gene R. Cohen Charitable Foundation, the Stephen and Tabitha King Foundation, and individual donors as contributors, but noting that 85% of funding comes from governmental sources and IOLTA).

⁸² See, e.g., <http://www.lsnj.org/glance.html> (visited 9/22/99) (Legal Services of New Jersey) (listing funds received from United Way campaigns); <http://www.nwls.org/funding.htm> (visited 9/21/99) (Northwestern Legal Services) (similar); <http://www.svlas.org/> (visited 9/21/99) (Southwest Virginia Legal Aid Society) (similar).

It should be noted in conclusion that, since the imposition of the new Congressional restrictions on Legal Services Corporation funds in 1996, entities that receive funds from the Corporation are prohibited from collecting attorneys' fees from opposing parties.⁸³ Thus, while some employment laws provide for the recovery of attorneys' fees from employers under certain circumstances (as described more fully in section 1 above), entities that receive funds from the Legal Services Corporation are no longer eligible for this source of private funding. By contrast, as noted above, recovery of attorneys' fees can be a meaningful source of funding for national issue organizations.⁸⁴

4. The relationship between funding sources and the nature of legal work

The previous two sections described, respectively, the employment law activities of national issue organizations and legal services centers and some institutional detail about how these entities are funded. This section puts the two pieces together and looks at the relationship between funding sources and the nature of employment law representation provided by each type of entity.

The basic thesis to be advanced is that the different funding patterns of national issue organizations and legal services centers produce systematic differences in the nature of the employment law work they perform. In particular, national issue organizations, which depend for support largely on private donations from individuals and foundations, tend to focus on high-profile, publicly-charged issues such as discrimination and tend to work on a few important or influential cases rather than a large number of more day-to-day claims; legal services centers, which depend for support largely on government sources, focus heavily on less controversial

⁸³ See Udell, *supra* note 74, at 895 n.1.

topics such as unemployment benefits and tend to work on many routine cases rather than a few attention-getting ones. The distinction is not hard and fast (and some counterexamples are discussed below), but it does capture a general difference between the two types of entities. Moreover, the distinction is an unsurprising consequence of the sorts of incentives created by the distinctive patterns of funding for the two types of entities.

a. The relationship between funding and the subject matter of legal work

i. Subject matter of work by national issue organizations and legal services centers

The descriptions in section 2 above suggest important differences in the subject matter of the legal work on which national issue organizations and legal services centers focus. National issue organizations are disproportionately devoted to issues involving discrimination; thirteen of the eighteen organizations listed in Table 1 are exclusively or virtually exclusively devoted to discrimination issues (as their titles suggest), and an additional two organizations, the Lawyers' Committee for Civil Rights Under Law and the National Partnership for Women and Families, give heavy emphasis to such issues. Furthermore, the American Civil Liberties Union devotes a substantial amount of attention to discrimination issues; it also focuses heavily on other similarly high-profile civil liberties issues. The only national issue organizations that do not devote most of their energies to discrimination or other high-profile civil liberties issues are the Guild Law Center for Economic and Social Justice, which focuses on plant closings, and the National Employment Law Project, which works on a range of employment law topics including

⁸⁴ See, e.g. 1998 Annual Report, NAACP Legal Defense and Education Fund, at 24 (reporting \$1,116,878 in recovered fees and costs).

unemployment, benefits, wrongful discharge and discrimination.⁸⁵ It also bears noting that the Guild Law Center, while national, is tiny, with only three lawyers on its staff.⁸⁶

By contrast, legal services centers focus most heavily within the employment area on unemployment benefits claims, as noted in section 2 above. In this connection, it is interesting to note that the National Employment Law Project, the only national issue organization to devote attention to the unemployment area, also used to be funded by the Legal Services Corporation.⁸⁷

ii. *The role of funding*

The subject matter differences between national issue organizations and legal service centers seem unsurprising in light of their different funding sources. If an entity wishes to raise significant amounts of money from foundations and particularly private individuals, the entity is likely to have far more success if the entity's issues are high-profile and publicly visible. As Karen Paget notes, appeals to private individuals in particular need to be "as sharply ideological and urgent as possible."⁸⁸ A plea for funds to help fight discrimination in the workplace seems likely to attract far more foundation, and particularly far more individual, support than a plea for funds to ensure the integrity of the unemployment benefits system.

⁸⁵ See supra notes 31, 36 (describing the Guild Law Center and the National Employment Law Project). Other national entities that, like these two, focus on the plight of low-income individuals, and that thus might be more likely to be concerned with more mundane legal topics than the rest of the national issue organizations, include the National Center on Poverty Law and the Center for Law and Social Policy, but neither of these entities appears to work on employment law issues. See <http://www.povertylaw.org/> (visited 7/7/00) (National Center on Poverty Law home page, containing link to Case Reports section, which does not reveal any employment law work); <http://www.clasp.org/faq2.htm> (visited 7/10/00) (describing subject areas in which the Center for Law and Social Policy works).

⁸⁶ See <http://www.sugarlaw.org/about/staff.htm> (visited 7/17/00).

⁸⁷ See, e.g., Legal Services Corporation Authorizes Temporary Program Funding, PR Newswire, Dec. 30, 1988 (available on Lexis).

⁸⁸ Karen Paget, *Citizen Organizing: Many Movements, No Majority*, *The American Prospect*, Summer 1990, at 115, 123.

At the same time, government funders may be more hesitant to fund relatively controversial types of legal claims than relatively mundane types, such as claims for unemployment benefits. An illustration here is the fact that, as noted above, the state of Washington has a law prohibiting the use of IOLTA funds (similar in certain respects to government funds) for bringing employment discrimination claims.⁸⁹ Alan Houseman, Director of the Center for Law and Social Policy, offers a similar argument in response to the idea that government funds for legal services should have flowed to entities like the NAACP Legal Defense and Education Fund rather than to the sorts of entities that received them; he says that had entities similar to the NAACP Legal Defense and Education Fund applied for funds, “they would have sought funds for national civil rights and constitutional rights litigation,” and “[f]unding such entities for civil rights and constitutional litigation would have created a political fight.”⁹⁰

A further point related to funding sources and the subject matter of legal work is that the prohibition since 1996 on recovery of attorneys’ fees by any entity receiving any Legal Services Corporation funds, noted above, makes employment discrimination cases even less attractive for such entities.

In short, then, there are important subject matter differences between the work of national issue organizations and that of legal services centers, and these differences seem to mesh up with the differences in funding sources.

⁸⁹ See Udell, *supra* note 74, at 908 n.42.

b. The relationship between funding and the nature or type of legal work

If the differences in subject matter and funding were the only salient differences between national issue organizations and legal services centers, then there might be little cause for interest or concern. For if national issue organizations raised money largely from private donors and worked on high-profile issues, while legal services centers got funded largely by the government and worked on more mundane issues, but both types of legal issues were fully covered, it might not matter that there were differences between national issue organizations and legal services centers. The difficulty, however, is that, as detailed in this subsection, the two types of legal issues are generally not being covered in the same way. Instead, the nature or type of work is quite different across national issue organizations and legal services centers.

i. Nature or type of work by national issue organizations and legal services centers

By and large, national issue organizations and legal services centers pursue cases at very different levels of the judicial system and have very different goals in their legal representation. A brief introductory point is in order at the outset: Although this section will often use the term “impact” to refer to the sort of representation in which national issue organizations engage, it does so without meaning to embrace in an uncritical fashion the oft-drawn distinction between “impact” or “law reform” work, on the one hand, and individual client representation, on the other.⁹¹ Marc Feldman nicely summarizes the distinction:

Service cases, undertaken for individual clients, . . . respond to the immediate problems of specific clients who present themselves at a program’s offices seeking assistance. . . . Impact cases, on the other hand, are viewed as significant

⁹⁰ Alan W. Houseman, Political Lessons: Legal Services for the Poor--A Commentary, 83 Geo. L.J. 1669, 1681 (1995).

⁹¹ See, e.g., Joel F. Handler, Social Movements and the Legal System: A Theory of Law Reform and Social Change 26-27 (1978).

and special. These rare cases seek to advance the interests of a number of . . . persons by ‘reforming’ some widespread practice or abuse.⁹²

However, that distinction is problematic on a number of grounds, perhaps particularly when used normatively (to suggest the superiority of impact work).⁹³ But for my descriptive purposes, it is useful to distinguish in a rough way between work done at elite levels to affect large numbers of individuals and work focused on meeting the individual needs of a particular client.

National issue organizations typically focus their energies on a small number of impact-type cases, often at the appellate level of the judicial system.⁹⁴ Moreover, these organizations often explicitly discourage any impression that they are a resource for representing a large number of everyday claimants; for instance, the web site for the Western Regional Office of the NAACP Legal Defense and Education Fund contains this stern statement:

The [office] handles civil rights impact litigation. It does not offer direct services or legal advice. . . . [It] takes cases that it feels will have a significant impact on a large community of people. Often these are class action cases. This means that [the office] represents a group of people with interests in common against a government agency, organization, company or person.

Attorneys are not available to speak with people in person or on the phone to offer legal advice. [The office] is able to accept requests for assistance only in writing. [The office] is unable to handle most of the cases that people bring to its attention. . . . It usually takes 30-45 days to receive a response.⁹⁵

Other national issue organizations, such as Equal Rights Advocates, do accept phone calls from individuals seeking legal advice, but even there the organization will provide legal representation

⁹² Marc Feldman, Political Lessons: Legal Services for the Poor, 83 *Geo. L.J.* 1529, 1537-38 (1995).

⁹³ See, e.g., Louise G. Trubek, The Worst of Times . . . and the Best of Times: Lawyering for Poor Clients Today, 22 *Fordham Urban L.J.* 1123, 1133 (1995); Lucie E. White, Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 *N.Y.U. Rev. L. & Soc. Change* 535, 542-45 (1987-88).

⁹⁴ See *supra* notes 24-41 (describing litigation activities of national issue organizations).

⁹⁵ See <http://www.ldfla.org/rfa.html> (visited 9/3/99).

(as distinguished from information or referral to another lawyer) only in “compelling, precedent-setting cases.”⁹⁶

By contrast, the primary emphasis for legal services centers is on serving large numbers of clients. The lead-off message of the Legal Services Corporation’s President, Douglas Eakeley, in the Corporation’s 1997 Annual Report, for example, is that the Corporation’s “269 programs served some 2 million clients in 1997, closing 1.5 million cases, an increase over 1996.”⁹⁷ Eakeley goes on to praise the fact that “[m]any programs . . . increased their efficiency by adopting advanced telephone intake systems that facilitated access to their services over a large geographical area.”⁹⁸ As Gary Bellow wrote two decades ago, speaking of legal services, there is “an almost exclusive focus, publicly and administratively, on ‘access’ and how it is to be realized.”⁹⁹ “Graphs and tables” supplant “examples of practices changed and wrongs righted.”¹⁰⁰ While the NAACP Legal Defense and Education Fund brags in its annual report that it “has been involved in more cases before the U.S. Supreme Court than any organization except the U.S. Department of Justice,”¹⁰¹ the claim to fame of the New Orleans Legal Assistance Corporation is that “[i]n 1998, [it] completed work on 6058 cases affecting 19,264 persons in total” with “completed cases averag[ing] about 300 per attorney.”¹⁰² It is hard to imagine a more striking difference in emphasis between the two types of organizations.

The difference is not, of course, categorical or absolute. While it is clear that “there is relatively little impact work compared to service actually being done” by legal services

⁹⁶ See <http://www.equalrights.org/legal/index.htm> (visited 7/10/00).

⁹⁷ 1997 Annual Report, Legal Services Corporation, at 2.

⁹⁸ *Id.*

⁹⁹ Bellow, *supra* note 8, at 340.

¹⁰⁰ *Id.*

¹⁰¹ 1998 Annual Report, NAACP Legal Defense and Education Fund, at 2.

¹⁰² <http://www.nolac.org/humanresources.htm> (visited 9/21/99).

centers,¹⁰³ it is clear that at least a few centers do focus to some degree on impact litigation. More likely than local centers to be involved with such litigation are state-level “support centers,” which work together with the local centers. Although the role of these support centers has been cut back with restrictions on Legal Services Corporation funds,¹⁰⁴ at least some of the centers appear to remain active. For example, the Ohio State Legal Services Association State Support Center provides assistance, including direct representation of clients or co-counsel representation (presumably with the local center), to the eighteen local centers in Ohio and lists as one of its areas of coverage employment law, and in particular unemployment benefits.¹⁰⁵ It may be that this sort of entity is more inclined than the local centers to take on unemployment benefits cases at higher levels of the judicial system.

Also in Ohio is ABLE, whose self-professed focus is “impact work.”¹⁰⁶ True to this characterization, ABLE has brought a number of fairly high-profile discrimination suits in the employment area, including suits against government actors.¹⁰⁷ These are cases similar to those brought by national issue organizations. But does ABLE bring impact suits in more mundane areas such as unemployment benefits? Not in the particular area of unemployment benefits; the cases it mentions in that area are highly fact-specific and narrow, in stark contrast to the

¹⁰³ Gary Bellow & Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman’s Critique of Legal Services Practice*, 83 *Geo. L.J.* 1633, 1645 n.46 (1995).

¹⁰⁴ See Alan W. Houseman, *Civil Legal Assistance for the Twenty-first Century: Achieving Equal Justice for All*, 17 *Yale L. & Pol’y Rev.* 369, 370 (1998).

¹⁰⁵ See <http://www.iwaynet.net/~oslsa/page2.html> (visited 9/21/99).

¹⁰⁶ See <http://home.earthlink.net/~hn80/about.html> (visited 9/22/99).

¹⁰⁷ See <http://home.earthlink.net/~hn80/report.html> (visited 9/22/99) (describing ABLE cases such as *Brown v. Winkle*, a discrimination suit brought against the Toledo fire department that yielded a consent decree providing relief to minority employees, and *Gonzales v. Felker*, a discrimination suit brought against the Toledo police department that yielded a consent decree providing relief to minority employees).

discrimination cases noted just above.¹⁰⁸ But ABLE does mention a Fair Labor Standards Act case involving overtime that “could have an impact on the rest of the [landscape services] industry in eastern Ohio.”¹⁰⁹ It also mentions a class action under the Fair Labor Standards Act, but this case had to be transferred to a non-legal-services attorney after the imposition of the 1996 restrictions, which prohibited centers receiving Legal Services Corporation funds from representing parties in class actions.¹¹⁰ Thus ABLE appears to do some work (probably less since 1996) of an impact nature in areas of employment law not emphasized by national issue organizations, such as the Fair Labor Standards Act; it does not, however, appear to do any such work in the area of unemployment benefits.

A number of other legal services centers, like ABLE, have traditionally (although perhaps less so since 1996) engaged in impact work, including at least some in the employment area. For instance, Community Legal Services of Philadelphia litigated a major employment discrimination case in the 1970s similar to the cases described by ABLE.¹¹¹ However, it seems clear that impact work is not a staple of most legal services entities. As Gary Bellow and Jeanne Charn write, “Many programs have abandoned any systematically oriented activities, treating the collective problems that plague the populations they serve as beyond their responsibility and

¹⁰⁸ See *id.* (describing unemployment benefits cases involving issues such as the claim that being fired for a single offense violates company disciplinary procedure and the claim that a particular employer’s work policy was too vague).

¹⁰⁹ See *id.* (discussing *Llamas v. Mentor Landscape & Supply Co.*).

¹¹⁰ See *id.* (discussing *Villareal v. Wiers Farms*); Udell, *supra* note 74, at 895 n.1 (noting prohibition on representing parties in class actions). A related phenomenon is the spinning off of part of a legal services center into a new entity to handle the cases barred by the 1996 restrictions. David Udell gives an example of a spin-off entity working on “impact work for migrant farmworkers”; such work may or may not relate to employment law issues. See David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 *Yale L. & Pol’y Rev.* 337, 357 (1998).

¹¹¹ See Catherine C. Carr & Alison E. Hirschel, *The Transformation of Community Legal Services, Inc., of Philadelphia: One Program’s Experience Since the Federal Restrictions*, 17 *Yale L. & Pol’y Rev.* 319, 320 n.3 (1998). Examples from outside the employment law context include Oregon Legal Services, which prior to the imposition of the 1996 restrictions devoted one-third of its time to legal-reform-type

competence.”¹¹² Moreover, the 1996 restrictions on Legal Services Corporation funds increase the degree to which this is true, since, by banning class actions by entities that receive any financial support from the Legal Services Corporation,¹¹³ they cut off a significant avenue through which impact work may get done.

ii. *The role of funding*

Once again, funding sources provide a clear explanation for the difference in the activities of national issue organizations and legal services centers. For national issue organizations, which, as noted, get most of their funds from private donations, it seems quite logical that raising money for high-impact work is easier than raising money to represent a large number of individuals in everyday, run-of-the-mill cases. Recall in this connection the NAACP’s proud reference in its annual report to its dominant role in Supreme Court litigation.

By contrast, the history of legal services centers makes painfully clear the quite different pressures that come with government funding.¹¹⁴ There is some dispute about how much impact work got done in the early days of legal services.¹¹⁵ However, it is clear that at least a substantial fraction of centers, even early on in time, focused on representing a large number of individual

work. See Udell, *supra* note 110, at 346 (giving one-third statistic; mentioning a range of examples of law-reform work not including employment law matters).

¹¹² Bellow & Charn, *supra* note 103, at 1647; see also Feldman, *supra* note 92, at 1535 (“Service work” rather than “impact work” “constitutes the bulk of” legal services centers’ effort); *id.* at 1539 (“Currently, a [legal services] program spends the vast majority of its legal resources on cases in which the horizon of ambition is defined, even at its maximum, by the individual client. The goal of the legal work is . . . service to individual clients.”).

¹¹³ See Udell, *supra* note 74, at 895 n.1.

¹¹⁴ For a succinct summary of the key early developments in the history of legal services, with references to the broader scholarly literature, see Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 Mich. L. Rev. 1994, 2019 n.100 (1999).

¹¹⁵ Compare Feldman, *supra* note 92, at 1562, 1579-81 (contending that impact work never figured importantly in the mission of legal services) with Lawrence J. Fox, *Legal Services and the Organized Bar: A Reminiscence and a Renewed Call for Cooperation*, 17 Yale L. & Pol’y Rev. 305, 305 (1998) (stating

clients rather than on bringing high-impact cases.¹¹⁶ This was probably because the centers adopted the existing model of “legal aid” societies, which had a similar focus.¹¹⁷ Some authors also link the predominant focus on day-to-day, routine representation to legal services’ dependence on the support of the organized bar, which may have been threatened by a more aggressive embrace of impact work by legal services centers.¹¹⁸

But whatever the causes, it is clear that, even fairly early on, relatively little impact work was being done by most centers. Gary Bellow writes that while “early in its history, the [legal services] program articulated a mixture of goals and encouraged both day-to-day legal representation and challenges to existing rules and practices which adversely affected the clients and communities served,” within a short time “it became clear that for all practical purposes this latter role would be assigned to specialized units within programs or to back-up centers specially created to handle large litigation.”¹¹⁹ Consistent with the political pressure hypothesis offered here, these centers quickly became controversial.¹²⁰

Indeed, it is striking how quickly legal services centers in general became controversial.

Houseman succinctly summarizes the history:

[T]he program has been beset with the congressional and executive interference from the outset. It began in 1967 with the effort by Senator Murphy to ban suits against the government, and it continued throughout the history of the program: vetoes by governors over controversial programs; efforts to dismantle the program, first by Howard Phillips in 1973 and then again by President Reagan

that legal services in its infancy gave priority to the impact model) and Houseman, *supra* note 90, at 1669, 1677, 1685 (similar to Fox).

¹¹⁶ See Bellow, *supra* note 8, at 338.

¹¹⁷ See *id.*; Feldman, *supra* note 92, at 1562. Prior to the availability of federal government funding for legal services, the needs of low-income clients were met by private legal aid societies supported by charitable contributions and some municipal funding, as well as by individual lawyers on a voluntary basis. See Bellow, *supra* note 8, at 337.

¹¹⁸ See, e.g., Feldman, *supra* note 92, at 1578. For a contrasting view, see Bellow & Charn, *supra* note 103, at 1644-45.

¹¹⁹ See Bellow, *supra* note 8, at 339.

¹²⁰ See Houseman, *supra* note 90, at 1682 n.64.

and his initial board of appointees in 1981-1984; and congressional restrictions on who can be represented (e.g., aliens), what types of suits can be brought (e.g., abortion access), and what kind of advocacy was permitted”¹²¹

The legal services program found itself in “deep political trouble” shortly after its founding,¹²² and this trouble culminated in the removal of legal services from the “politics” of the Office of Economic Opportunity, the center of the War on Poverty, and its instatement in the separate Legal Services Corporation in the 1970s.¹²³

With the creation of the Corporation came, as Gary Bellow has noted, “an almost exclusive focus, publicly and administratively, on ‘access’ and how it is to be realized.”¹²⁴ “The immediate goal now [wa]s ‘minimum access’--defined as 2 lawyers per 10,000 poor people in the United States”¹²⁵

As Houseman describes, however, the 1970s reform did not ultimately quell controversy over the legal services program. Following the changes he notes, Congress in the mid-1990s ordered a major restructuring of the program. As noted above, substantial restrictions were imposed on all entities receiving Legal Services Corporation Funds.¹²⁶ Prompting the 1996 reforms was the sense “the program was founded for the purpose of handling the routine, day-to-day problems of poor people and that what had evolved was major impact litigation, which had politicized the entire program.”¹²⁷ As the Legal Services Corporation reported in its 1996

Annual Report:

Congress determined that federally funded programs should focus on individual cases, while efforts to address the broader problems of the client community

¹²¹ Id. at 1687 (citing Earl Johnson, *Justice and Reform* 193 (1974), and John A. Dooley & Alan W. Houseman, *Legal Services History* ch. 3 at 12, ch. 4 at 2-5 (1985)).

¹²² See Bellow, *supra* note 8, at 340.

¹²³ See *id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See Udell, *supra* note 74, at 895 n.1 (summarizing restrictions).

¹²⁷ Alexander D. Forger, *The Future of Legal Services*, 25 *Fordham Urban L.J.* 333, 335 (1998).

should be left to entities that do not receive federal funds. Certain kinds of advocacy that have always been recognized as important tools for attorneys to employ on behalf of their clients, such as class actions and most legislative advocacy, would no longer be permitted for legal service attorneys, even if non-federal funds were used for the purpose.¹²⁸

The House Budget Committee was more direct: “Too often, . . . lawyers funded through federal LSC grants have focused on political causes and class action lawsuits rather than helping poor Americans solve their legal problems.”¹²⁹

The pressures against impact-type work imposed by government funding have not gone uncriticized. In Congress, Senator Kennedy decried the effect those pressures were having:

I personally do not think Washington should be deciding what legal issues local attorneys may raise on their client’s behalf; I do not think Washington should be deciding what forums they can raise them in; and I most emphatically do not think we have any business telling a lawyer that the touchstone of whether or not to represent a client should be a measure of how controversial or how popular the issue.¹³⁰

But Senator Kennedy’s lament did not ultimately carry the day, either in 1974, when it was first made, or in the subsequent controversies.

c. Other organizations: Funding and nature of employment law work

The discussion thus far has focused on two types of entities that provide legal representation in the employment law context: national issue organizations and legal services centers. The claim that has been advanced is that the work of these two types of entities produces a pattern of coverage of 1) impact claims for high-profile, publicly charged issues, and 2) day-to-day claims for mundane issues such as unemployment benefits. This pattern leaves

¹²⁸ See <http://www.lsc.gov/anrep.html> (visited 9/21/99) (1996 Annual Report of the Legal Services Corporation).

¹²⁹ H.R. 104-120, quoted in Congressional Research Service Report for Congress, Legal Services Corporation: Basic Facts and Current Status 1 (Oct. 23, 1996).

¹³⁰ 120 Cong. Rec. 1392 (1974) (quoted in Udell, *supra* note 74, at 901).

uncovered the two remaining categories: impact claims in mundane areas and day-to-day claims in high-profile, publicly charged areas.

Do other public-interest organizations fill the void left by national issue organizations and legal services centers? That is the question addressed by this subsection. The analysis first looks at an important set of organizations that are similar to national issue organizations but operate at the regional or local level. It next looks at the network of government-funded disability discrimination (“protection and advocacy”) centers, which do case-by-case work in a variety of areas including employment discrimination, and thus represent an important exception to the general dichotomy drawn in this chapter.

i. “Regional issue organizations”

Table 6 contains a list of organizations that would meet the definition of national issue organizations if they were national. (In addition to the entities listed in Table 6, one might wonder about “legal services spin-offs”--entities spun-off from legal services centers in the wake of the 1996 restrictions that made impact work less feasible for such centers.¹³¹) Like the entities listed in Table 1, the entities in Table 6 focus on a particular set of issues or topics related at least in part to employment law, and they are (or appear to be) funded largely or exclusively by sources other than the government. (Sometimes publicly available information did not disclose sources of funding, but in no case was there any indication of a significant role for government funding. For two organizations, the Asian Pacific American Legal Center of Southern California

¹³¹ See generally Carr & Hirschel, *supra* note 111 (detailed case study of one such spun-off entity). Some spun-off entities may be doing impact work in the employment area. However, it is interesting to note that Community Legal Services of Philadelphia, which did impact work in the employment area when it was funded by the Legal Services Corporation, is now, since being spun off, focusing its attention away from litigation, although it does continue to litigate in the areas of consumer and housing rights. See *id.* at 330-31.

and The Public Justice Center, there was neither an indication of government funding nor any reason to suspect government funding. For the Employment Law Center of the Legal Aid Society of San Francisco, there was no indication of government funding, but the organization might receive such funding because it is part of a legal aid organization. At the same time, the Center clearly receives substantial foundation funding.¹³²⁾

**Table 6: “Regional issue organizations”
(devoted at least in part to employment law issues)**

Asian Pacific American Legal Center of Southern California ¹³³
Center for Law in the Public Interest (Southern California) ¹³⁴
Employment Law Center of the Legal Aid Society of San Francisco ¹³⁵
Legal Action Center (New York City) ¹³⁶
Northwest Women’s Law Center (Seattle) ¹³⁷
Public Advocates (San Francisco) ¹³⁸
The Public Justice Center (Maryland) ¹³⁹

¹³² See Foundation Center, Grants List 1/98-4/98 (reporting \$107,000 grant from the Rosenberg Foundation to the Employment Law Center in 1998) (available in FGI database on Westlaw).

¹³³ See <http://www.safenetwork.net/rd/sn000348.htm> (visited 7/10/00) (listing employment as one of several areas of activity).

¹³⁴ See <http://www.afj.org/mem/clpi.html> (visited 7/12/00) (listing employment discrimination as one of several areas of activity); Emily Barker, Doing Good, Doing Well, *American Lawyer*, June 1997, at 53 (describing funding sources for the Center as being various grants, including from the Ford Foundation).

¹³⁵ See, e.g., Victoria Slind-Flor, Workers Have Right to Privacy, *National L.J.*, Feb. 16, 1998, at A8 (describing a case brought by the Employment Law Center that produced a ground-breaking ruling recognizing the right of employees to genetic and medical privacy).

¹³⁶ See Lopez, *supra* note 70, at 446 (describing focus on employment discrimination); *id.* at 453 (describing funding sources as including sales of books and videos and recovery of legal fees).

¹³⁷ See http://www.nwwlc.org/issues_employmentdiscrimination.shtml (visited 7/10/00) (“Employment Discrimination: Impact Litigation” description for the Northwest Women’s Law Center); 1998 Annual Report, Northwest Women’s Law Center, at 21-22 (describing employment law litigation activities); *id.* at 24 (listing sources of funding as special events, individual contributions, grants, seminars, and other).

¹³⁸ See Public Interest Organizations, *Cal. Reg. L. Rep.*, Spring/Summer 1995, at 5 (describing employment as an area of concentration for Public Advocates); Rinat Fried, The LSC Investigates Its Offspring, *Recorder* (San Francisco), Apr. 2, 1998, at 9 (referring to Public Advocates as an “independent nonprofit,” in contrast to the Legal Aid Society of Alameda County, a legal services center); Barker, *supra* note 134 (referencing Ford Foundation funding for Public Advocates).

¹³⁹ See <http://www.publicjustice.org/reports.html> (visited 7/11/00) (link to “Cases and Projects List,” which summarizes employment law cases such as *Talavera v. Hill & Sanders Ford* (a discrimination suit) and *Heath v. Perdue Farms*, *Fox v. Tyson Foods, Inc.*, and *Trotter v. Perdue Farms, Inc.* (all suits involving wage and hour issues, presumably under the Fair Labor Standards Act)).

Like the national issue organizations listed in Table 1, the organizations listed in Table 6 generally focus on issues involving discrimination and other high-profile civil liberties matters, as is apparent from the descriptions given just above.¹⁴⁰ The closest thing to an exception to this pattern is The Public Justice Center, which seems to do substantial work in the wage and hour area.¹⁴¹ But even that organization (like the National Employment Law Project, the primary outlier among the national issue organizations in Table 1), also works on employment discrimination issues.

Also like the organizations in Table 1, the organizations in Table 6 are involved across-the-board in impact litigation. For instance, the Asian Pacific American Legal Center of Southern California has “spearheaded several lawsuits which have had a strong impact in the legal community,” and the Northwest Women’s Law Center “brings public impact cases throughout the Northwest.”¹⁴² Some of these organizations may also do some individual representation; for instance, The Public Justice Center seems to engage in some such activity.¹⁴³

¹⁴⁰ See *supra* notes 133-39.

¹⁴¹ See *supra* note 139.

¹⁴² See <http://www.safenetwork.net/rd/sn000348.htm> (visited 7/10/00) (Asian Pacific American Legal Center of Southern California); <http://www.nwwlc.org/main/content/lawcenter/> (visited 7/17/00) (Northwest Women’s Law Center); see also Barker, *supra* note 134 (describing a significant employment discrimination suit brought by the Center for Law in the Public Interest against the Los Angeles fire department); Lopez, *supra* note 70, at 448-49 (describing impact work including cases against the post office and the local transit authority); Public Interest Organizations, Cal. Reg. L. Rep., Spring/Summer 1995, at 5 (describing class action activity of Public Advocates); <http://www.publicjustice.org/reports.html> (visited 7/11/00) (link to “Cases and Projects List,” which summarizes Trotter v. Perdue Farms, Inc., a nationwide class action wage and hour lawsuit).

¹⁴³ See <http://www.publicjustice.org/reports.html> (visited 7/11/00) (link to “Cases and Projects List,” which summarizes Talavera v. Hill & Sanders Ford, which appears to be a fairly fact-specific discrimination case).

But other organizations on Table 6 appear to be limited to impact work in their representation activities.¹⁴⁴

ii. *Day-to-day representation in discrimination cases: The case of disability*

The “regional issue organizations” just discussed fit neatly into the dichotomies drawn in this chapter between national issue organizations and legal services centers, since the regional organizations are so similar to the national issue organizations. Less easy to fit comfortably within the dichotomies are the state centers across the country serving the needs of disabled individuals, including disabled employees.¹⁴⁵ These centers are funded by the government (at least to a significant degree) and focus at least in significant part on day-to-day representation of individual clients¹⁴⁶--so in those respects they are like legal services centers--but their primary focus in the employment area is, not surprisingly, discrimination¹⁴⁷--so in that respect they are like national (and regional) issue organizations.

The example of disability centers, while important and interesting, does not disrupt in a fundamental way the more general idea that for many types of discrimination claims, legal representation on day-to-day matters seems likely to be seriously inadequate. Lynn Kelly notes

¹⁴⁴ See, e.g., <http://www.nwwlc.org/main/content/lawcenter> (visited 7/17/00) (Northwest Women’s Law Center) (describing services as a combination of “impact litigation” and “self help” for individuals through information packets and a telephone hotline (but not legal representation)).

¹⁴⁵ See generally 2000 Annual Report, National Association for Protection and Advocacy Systems, at 1-3 (overviewing activities of state centers).

¹⁴⁶ See <http://www.protectionandadvocacy.com/brochur1.htm> (visited 7/14/00) (describing various government programs including PADD, PAIMI, and PAIR); 2000 Annual Report, National Association for Protection and Advocacy Systems, at 5 (listing large number of clients represented by state centers).

¹⁴⁷ See, e.g., <http://www.pai-ca.org/pubs/500801.html> (visited 7/14/00) (Protection & Advocacy, Inc., of California) (listing employment discrimination as a service area, and not listing any other employment problems); <http://www.dlc-ma.org/programs.html> (visited 9/2/99) (Disability Law Center of Massachusetts) (similar).

that “there is almost no representation of law wage workers with discrimination claims.”¹⁴⁸ At the same time, the disability example similarly does not alter the suggestion above that legal representation for impact work in mundane areas of employment law is highly inadequate and incomplete.

Conclusion

It bears emphasis that this chapter has not attempted to provide anything approximating a comprehensive normative assessment of how a range of legal institutions should, in an ideal world, function to enforce the employment laws. Projects of that sort have been undertaken in other contexts; for instance, Susan Sturm has offered a comprehensive set of recommendations for improving the enforcement of laws in another context involving vulnerable beneficiaries--the prisoners’ rights context--and Houseman has recently undertaken a similar project for legal advocacy for low-income individuals.¹⁴⁹ The more limited scope of the present inquiry has been to highlight two central types of public-interest organizations involved in the enforcement of the employment laws and discuss some of their features and functions.

¹⁴⁸ Lynn M. Kelly, *Lawyering for Poor Communities on the Cusp of the Next Century*, 25 *Fordham Urban L.J.* 721, 725 (1998).

¹⁴⁹ See Susan Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 *U. Mich. J. of L. Reform* 1; Houseman, *supra* note 104, at 390-433. Sturm surveys existing institutions, as this chapter has done (although without her comprehensive scope), but she also has a much more ambitious and normative aim. She writes:

Lawyers and policy makers have yet to capitalize on the potential for creative collaboration among various organizational players to achieve an effective legal services delivery system. This Article identifies the distinctive niche that each organizational player could occupy, and concludes this some proposals to encourage creative collaboration and a greater appreciation of the need to integrate litigation and non-litigation strategies for correctional reform.

Sturm, *supra*, at 6-7. Similarly, Houseman offers a comprehensive model of how legal services should be delivered to those unable to afford private attorneys. See Houseman, *supra* note 104, at 390-433.

Future work could look more broadly at additional types of institutions, including pro bono models, law school clinical programs, social justice law firms, and client nonprofits.¹⁵⁰ Any such broader inquiry would also have to face the fundamental question of whether more aggressive litigation of employment law claims will in the end help employees--a question whose answer depends on the degree to which the courts are likely to be the friend of workers.

¹⁵⁰ See generally Trubek, *supra* note 21, at 417-18 (identifying the inquiry into these institutions with “external analysis” challenges to the canonical legal services model); see also Fox, *supra* note 115, at 315 (describing the Litigation Assistance Partnership Project, an American Bar Association initiative that matches legal services centers needing help on major cases with private law firms seeking pro bono work); Trubek, *supra* note 9, at 805 (noting that some large law firms have set up pro bono offices).