



“This war, say the historians, was hidden. Hidden, but from whom?”¹

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During this challenging year, “Poetry Twitter” has sustained me. It has given me new poems and new poets to read. You can get a remarkable amount of excellent poetry in spoon-sized bites if you follow the right people on Twitter. It has also given me another angle for thinking about my work in legal services.



I see parallels between poets and legal aid attorneys. Poets are people who have self-selected

into a relatively small, but vigorous and technical profession. There are smaller and larger circles depending on where people live and work, what kind of poetry they write, where they went to school, etc. But the interconnections, love and respect are readily apparent. Like poets, legal aid attorneys have self-selected into the legal profession, which while not necessarily small, is an exclusive club and one that is highly technical. There are circles of community by practice area, geography, and law school. But overall, the legal aid communities across the country are deeply intertwined and evidence real love and respect for colleagues and the work that they do. There are also significant differences.

In early October, Louise Glück was awarded the Nobel Prize in Literature.³ My timeline was flooded with her poems and with admiration and praise for her. However, it wasn’t long until I started seeing push-back and critique. I expected a “yes, but” with the rest being something that justifies or minimizes or victim-blames. Instead, the poet Aria Aber, the author of *Hard Damage*, did something different. She responded to critique of Glück by starting with a “yes, and.” She wrote: “I hear this — my love for her is complicated...”

My love for legal services is complicated.

In 2020, I have personally heard multiple people say that legal services as a whole or a particular legal

services program cannot be racist or sexist. I know from personal experience, as I am sure many of you do, that neither is true. I think (hope) you’d be hard pressed to find someone to say there is no racism or sexism in “big law.” However, a lot of people seem to think that legal services is categorically different. But, lawyers, wherever they work, come through law schools, where we all learn how to “think like a lawyer.”

Thinking Like a Lawyer

Lawyers are trained to navigate a system that implicitly assigns value to people. The law, at its core, decides who is entitled to compensation for harm and how much, which harms are worth recognizing, and who gets punished for what conduct and how much. The law allowed slavery, blocked all but wealthy white men from the vote, enabled the theft of native lands, forbade interracial marriage, permitted (and sometimes required) segregation — and so much more. These are the safer, historic examples. You likely know all too well about the modern-day examples.

We also operate in a system that has layers of explicit hierarchy. Our law schools are ranked. We are ranked within our classes. Firms are ranked. All those rankings go directly to how much attorneys get paid and what firms can charge. It also creates a very small funnel of potential law school professors. Learning to “think like a lawyer” is at least in part, learning to understand and live within (if not accept) these

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hierarchies. There are legal aid programs that have exclusive standards not unlike top tier law firms.

In addition, and not unlike other professional trade associations, our profession works to keep non-lawyers from “engaging in the practice of law.” It is true that rules about the unauthorized practice of law can help protect consumers from being duped by people who don’t know what they are doing. That is no doubt part of the story, but only part. The entire conversation is riddled with a sense that lawyers are smarter — and better — than non-lawyers. I’ve often seen attorneys telegraph that non-legal work is not important and/or irritating. I’ve also seen attorneys signal that non-legal jobs are easy or unskilled — that they could do it better (even when in totally different substantive areas).

What We Don’t Know

For a great many of attorneys what we don’t know is much about our discipline’s history with racism, sexism, homophobia, or ableism. For many of us, most of what we know is that at some point only white men could go to law school or become lawyers, but beyond that the history is sketchy. We also don’t generally know why we should care about the details.

I’ll confess that until this summer I’d maintained most of my high school aversion to history as “boring.” If I thought studying big national/international history was boring, I sure wouldn’t have had any interest in learning more about the history of the legal profession in the United States. I definitely would have said I had the gist of it (know it all lawyer? maybe).

However, in July, I was lucky enough to be able to attend the African American Policy Forum’s Summer School on Critical Race Theory (CRT) and Intersectionality. It was transformative. My take-aways were practical and drawn from the core ideas they were focusing on: 1) every field, every discipline’s origin story is steeped in racism; 2) the changes related to race have been far too superficial so the racism that was there from the start persists, built into the structure of the thing; and 3) without explicitly uncovering, wrestling, and counteracting with the racist foundations of our fields we are perpetuating racism.

This article is an attempt to provide a high-level, quick overview of some of the historical racist and sexist policies and current diversity in the law and legal services. There is ample data in both settings that we are not where we should be. I also highlight some

examples in the chain of legal services development that makes it clear that legal aid’s motives and goals have always been complicated. Finally, I discuss how the culture of the legal services world may be holding it back from seeing and addressing these issues head-on.

Diversity in the Profession

In 1912, the American Bar Association (ABA) would only allow white male members. Membership was extended to white women by 1918.⁴ While non-whites were prohibited from being members of the ABA, the first ABA committee on legal aid was formed (1920) as was a committee focused on legal education.⁵ Twenty-three years after the committee on legal aid was created, the ABA adopted a resolution saying that membership was not limited to whites, but no Black lawyer became a member until 1950 — 30 years after the creation of the ABA committee on legal aid.⁶

The exclusionary policies fell decades ago, but the wins for formerly excluded groups have been slow and have still not reached parity. Women hovered at 3% of all lawyers from 1950 to 1970, eventually growing to reaching 37% in 2020.⁷ The data doesn’t specify, but it seems very likely that the vast majority of the women cited there are white because the data on non-white lawyers shows significant underrepresentation. While the percentage of women lawyers has been rising steadily (if slowly), African-American lawyers have stalled for a decade at 5% (despite the U.S. population is 13.4% African American).⁸ “Similarly, 5% of all lawyers are Hispanic — up from 4% a decade earlier — although the U.S. population is 18.5% Hispanic. And 2% of all lawyers are Asian — up slightly from 1.6% 10 years earlier — while the U.S. population is 5.9% Asian.”⁹

As of 2019, Legal Services Corporation (LSC) data shows that 76% of program staff were women — an over representation of the overall population, but very close to the LSC client population (71.7%).¹⁰ LSC programs overall had staff diversity that was more representative of the population — 57% of all LSC staff were white, non-Hispanic, 20% Hispanic; 14% African American, non-Hispanic; 5% Asian or Pacific Islander; and 1% Native American.¹¹ While Hispanics make up nearly the same percentage of legal aid clients as they do the general population, Black, non-Hispanic clients made up 29.1% of LSC clients — close to double the percentage of African-Americans on staff.¹² In contrast, White, non-Hispanic staff made up a significantly larger proportion of staff than it did of the client base.¹³

My own quick look through data from LSC for

2017, shows that for the programs submitting the data, 76.67% of executive directors were Caucasian; 57.50% were male.¹⁴ When you layer race and gender the results are even starker. Three groups of women have less than 5% of their ranks in legal services in leadership positions — African American (4.9%), Asian or Pacific Islander (1.39%), and Hispanic (2.41%). While there is some additional diversity in legal aid than in the law overall, the data we can see about legal aid is not the data that would exist if the field really was not still racist and sexist.

The Purposes and Limitations of Legal Aid

Many legal aid histories cite the New York Legal Aid Society as the first legal services program in the country.¹⁵ But there were at least two predecessor programs, whose stories help inform our understanding of legal aid in the United States.

First, the Working Women's Protective Union (WWPU), formed in New York City in 1863.¹⁶ In the early years female lay lawyers¹⁷ provided legal services to seamstresses on employment issues.¹⁸ The focus moved to male employment issues and the legal work of these women was largely erased from history. The WWPU was formed in at least in part "as an attempt to quell working women's own protests regarding their low pay and poor employment conditions."¹⁹ While they did not officially exclude non-white women from services, they did not provide services for domestics — just seamstresses (who were generally white women).²⁰

The Freedmen's Bureau's (formed in 1865) had its agents giving legal assistance to newly liberated slaves — acting as their "advocate in the local judicial system."²¹ But the advocacy had limitations: "... however much Blacks attempted to control their labor, agents forced them to make and then abide by contracts with decidedly pro-planter terms."²² In fact, "the labor question" was said to be "the concern lying 'at the foundation of all the efforts of the government to promote the well-being of the freedmen....'"²³

The New York Legal Aid Society was formed in 1876 to provide free legal assistance to Germans in New York City. By 1890 they had expanded those eligible for services to all races, but had screening policies ("appear worthy") that meant that people who had legal claims could not get representation because of who they had claims against.²⁴

"The rule was put in force because of the numerous complaints lodged against our Society by members of the public, because of its activity in attempting to enforce the claims of servants

who leave their employer abruptly, and without notice, so as to create the greatest amount of annoyance possible. Our Society has endeavored to enforce this rule very strictly, notwithstanding the fact that as a matter of law, where the hiring is for an indefinite period, the client would be entitled to compensation for the time actually worked."²⁵

Jumping ahead to what might be considered the modern era of legal services, in 1967, in a case that had involved a challenge to the formation of Community Legal Services as a nonprofit, we can see some of the complexity of motive and goals that we saw in the earlier cases. Judge Alexander took pains to detail the wide range of legal issues facing people in poverty.²⁶ He also issued a clear call for working *with* people in poverty rather than "doing things *to* them."²⁷ But there was also language that pathologized poverty²⁸ and argued that one of the most important outcomes of legal aid would be to make poor "ghetto dwellers" have more respect for the police.²⁹

Finally, a great many legal aid programs are currently operating under LSC restrictions about the type of work that can be performed that have a clear racial tone. The list of prohibited activities for LSC-funded organizations³⁰ is clear that the goal was to keep legal aid attorneys from participating meaningfully in systemic change efforts. It is also clear from the list that there is a racial component (either actual direct impact or perceived impact). Prohibited activities include work related to the census, class actions, demonstrations, desegregation of public schools, evictions from public housing involving illegal drugs, lobbying, organizing, welfare reform. The parallels with the New York Legal Aid Society's worthiness standards, are striking.

A Few Words for Managers

My sense is that in a majority of programs, those of us who make it into management roles (whatever our race, gender, ability, or sexual orientation) are likely to have mastered the "yes, but" response for anything that isn't "over-the-top" sexism, racism, ableism, or homophobia. The "yes, but" response is turbo charged in the wrong direction when we add to that the idea that we can see the — isms clearly and would respond appropriately.

I recently sat through a training on sexual harassment for legal aid managers. Much of the conversation focused on setting up reporting processes and encouraging people to report. The conversation implicitly

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assumed that we were safe people to report to. In a setting that is unmistakably informed by racism and sexism, where most people participating were white, as a group we *gave ourselves the benefit of the doubt*. We have not earned it.

I will confess that I lodged the “yes, but” response at myself in response to things that I have personally experienced in legal aid. If I was willing to say that to myself, how much easier to say it to someone else? Whether I joined the chorus of “yes, buts” about program demographics, failed to be aware of the range of forms retaliation can take, or acted in ways that assume I have earned the benefit of the doubt, I have been a part of the problem. While I have never *said* there isn’t racism or sexism in legal aid or a particular program, I have *acted* as though it were true. All the evidence I can see suggests that I have a lot of company. We can do better.

- 1 Aria Aber, *Hard Damage*, IV. Ex Nihilo, p. 69
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- 3 After this article was written, but prior to publication, Glück gave her acceptance speech, which generated an entirely different response from “Poetry Twitter.” Glück’s speech included, among other issues, a well-known racist poem. The poets I follow, including Aber, moved from being unsure about Glück’s positions on equity, to being clear that she embraces racist ideals. This provides yet another lesson we can borrow — when racism (or other isms) is clear, it must be named.
- 4 American Bar Association, ABA Timeline, https://www.americanbar.org/about_the_aba/timeline/.
- 5 *Id.*
- 6 *Id.*
- 7 American Bar Association, *ABA Profile of the Legal Profession 2020*, <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>, at 32.
- 8 *Id.*
- 9 *Id.* at 33.
- 10 Legal Services Corporation, *National Profile of LSC Grantee Activity, Grantee Client Demographics*, <https://www.lsc.gov/civil-legal-aid-data/dashboards.html?dashboard=national-clients>
- 11 Legal Services Corporation, *National Profile of LSC Grantee Activity, Grantee Staffing*, <https://www.lsc.gov/civil-legal-aid-data/dashboards.html?dashboard=national-staffing>
- 12 Legal Services Corporation, *National Profile of LSC Grantee Activity, Grantee Client Demographics*, <https://www.lsc.gov/civil-legal-aid-data/dashboards.html?dashboard=national-clients>
- 13 *Id.*
- 14 My calculations are available in a Tableau workbook available at https://public.tableau.com/views/StaffAnalysis_LSC2017/JobTitle-RaceGender?:language=en&:useGuest=true&:display_count=y&:origin=viz_share_link.
- 15 *Securing Equal Justice for All, A Brief History of Civil Legal Assistance in the United States*, Alan Houseman & Linda E. Perle, Revised May 2018, https://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf
- 16 Felice Batlan, *Women and Justice for the Poor: A History of Legal Aid, 1863-1945*, p 17
- 17 *Id.* at 17.
- 18 *Id.* at 16.
- 19 *Id.* at 17.
- 20 *Id.* at 22-23.
- 21 *The Freedmen’s Bureau as a Legal Agent for Black Men and Women in Georgia: 1865-1868*. Sara Rapport, *The Georgia Historical Quarterly*, Vol. 73, No. 1 (Spring 1989), pp. 26-53.
- 22 *Id.* at 31.
- 23 *Id.* at 29.
- 24 *The New York Legal Aid Society (1876-1925)*, Leonard McGee, *The Annals of the American Academy of Political and Social Science* Vol. 124, *Legal Aid Work* (Mar., 1926), pp. 27-32 (6 pages), p. 27.
- 25 *Id.* at 28.
- 26 *Community Legal Services, Inc.*, 1967 Pa. Dist. & Cnty. Dec. LEXIS 183.
- 27 *Id.* at 43.
- 28 *Id.* at 20.
- 29 *Id.* at 50-51.
- 30 *LSC Restrictions and Other Funding Sources*, <https://www.lsc.gov/lsc-restrictions-and-funding-sources>