Conceiving a Lawyer's Legal Duty to the Poor

Ronald H. Silverman

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CONCEIVING A LAWYER’S LEGAL DUTY TO THE POOR

Ronald H. Silverman*

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I. INTRODUCTION

The controversial final report of the New York "Committee To Improve the Availability of Legal Services," dated April 1990, offers a clear response to an important question: Should a lawyer have a legal duty to provide the poor with civil legal services? The Committee, organized at the initiative of Chief Judge Sol Wachtler of the
New York Court of Appeals and chaired by Victor Marrero, Esq. ("Marrero Committee"), has proposed that "all lawyers admitted to practice and registered as attorneys in New York be required to provide a minimum of 40 hours of qualifying pro bono legal services every two years."1

The Marrero Committee Report is also an artfully drafted compromise effort that is the product of deliberations over a rather extended period, with final consideration now postponed by Chief Judge Wachtler until the spring or summer of 1992.2 More importantly, the Committee's mandatory pro bono ("MPB") program has been misunderstood by friends and foes alike. Many lawyers and commentators have mischaracterized the likely individual-level impacts of the proposal and have ignored certain very interesting "institutional" implications. The intense debate over the proposal has all too often suffered from excessive moralizing, from a misguided and unlawyerly taste for obscuring generalizations, and from the relative absence of analytic instruments and useful concepts drawn from disciplines like economics and public finance.

Part II of this article describes the mandatory pro bono proposal


2. By letter dated March 30, 1988, Chief Judge Wachtler charged the Committee "with reviewing information and reporting about the extent of the unmet need for civil legal services, the scope and operation of the existing networks recruiting private lawyers for pro bono assignments, and mechanisms for inducing cooperation and compliance and sanctioning the opposite." Id. at 852. The Committee's initial response was a PRELIMINARY REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK [hereinafter 1989 PRELM. COMM. REP.] transmitted by the Committee's Chair by letter dated June 30, 1989.

Thereafter, the Committee held public hearings on its Preliminary Report in four locations during the fall of 1989: New York City (Oct. 19); Albany (Oct. 26); Buffalo (Nov. 2); and Rochester (Nov. 3). Various submissions by those testifying have been provided by the Committee to the author and are on file with him [hereinafter 1989 CIALS Hrgs.].


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from both more and less conventional perspectives. In addition to relevant history, the Marrero Committee Report is described with reference to its connected components and further described in terms of its plausible effects upon participating lawyers and upon the system that currently delivers civil legal services to the poor. This part also describes this mandatory pro bono program as a kind of tax.

Part III evaluates the need for and the burdens of such a mandatory pro bono program. It also evaluates the fairness of the program and assesses program consequences for a much criticized legal services delivery system. Additionally, this important part addresses certain fundamental efficiency concerns and redistributive puzzles.

Part IV of this article recommends certain changes in the proposal. This part argues for limiting the mandatory pro bono experiment and discusses the need for legislative implementation of the new program. It also explores combining a new mandatory pro bono program with fee-shifting and a special voucher system.

Finally, simple candor requires my confession of a certain reasoned point of view. Though the following extended analysis reveals various problems with the Marrero Committee's proposal, it also leads me to support this mandatory pro bono experiment with some reservations. At the same time, I do not intend this article as an endorsement of all mandatory pro bono programs everywhere. Rather, I offer an unusually detailed review of a particular proposal for use in the distinctive social and professional circumstances of New York State. Even at the risk of excessive length, it has seemed important to avoid the generalized and superficial approaches of much commentary on the subject, while still discussing important issues raised by most mandatory pro bono proposals.

II. DESCRIBING THE PROPOSAL

A. A Generation of Mandatory Pro Bono Proposals

The debate over the mandatory pro bono concept is almost twenty years old. In 1972, F. Raymond Marks and his associates on the research staff of the American Bar Foundation proposed "drafting or socializing a percentage of a lawyer's time" for professional public interest work. After characterizing the practice of law as a form of

public utility behavior, Marks argued for compelling lawyers to provide legal services in the public interest, citing as suggestive precedents the American policy of drafting children for educational purposes and the even longer tradition of a military draft. He was also careful to suggest “a tax on the lawyer’s time” should a professional draft prove unacceptable. At the same time, he conceded that it was unlikely that such “drastic measures” would be undertaken.4

The controversial history of the mandatory pro bono concept may be organized with reference to two discernible, if somewhat continuous, periods. From the mid-seventies to the early eighties, organized bar groups at both national and local levels seriously studied the issue and made a variety of ambitious if abortive proposals. There has also been renewed interest in MPB programs beginning in the late eighties, with serious and detailed proposals for ambitious statewide programs emerging not only in New York but in a number of other states as well.

In 1975, shortly after the 1974 creation of the federal Legal Services Corporation and the “Watergate adventure” with its numerous lawyer participants, the policymaking body of the American Bar Association passed a landmark “Resolution on Public Interest Legal Services.” This Resolution of the A.B.A. House of Delegates unequivocally declared that “it is a basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services.” It also expansively defined “public interest legal services” to include not only “Poverty Law” for clients in criminal or civil “matters of importance” who do not have “the financial resources to compensate counsel”, but “Civil Rights Law”, “Public Rights Law”, “Charitable Organization Representation,” and “Administration of Justice Activity” as well.5

4. Id. at 288-93.
5. For the full Resolution, see Steven B. Rosenfeld, Mandatory Pro Bono: Historical And Constitutional Perspectives, 2 CARDOZO L. REV. 255, 260 n.29 (1980). The 1975 Resolution was designed to give content to existing standards of professional responsibility to the poor that had long since been incorporated into the original Canons of Professional Ethics, adopted by the A.B.A. in 1908, and more expansively reflected in the more modern Code of Professional Responsibility adopted in 1969. Canons 2 and 8 of the 1969 Code were themselves amplified by Ethical Consideration 2-25, which provided, in part, that:

[the basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . . .]
The following year, in 1976, the House of Delegates requested that the A.B.A. Special Committee on Public Interest Practice report on appropriate methods for implementing the 1975 Resolution. In a 1977 report, this Committee underscored “the inherent responsibility of lawyers to participate personally—to become directly involved—in providing [public interest] legal services.” The Special Committee Report also recommended that this “basic responsibility” be quantified to better assure that lawyers “budget public interest lawyering as a distinct part of their regular practice.” This Report, however, contained no quantitative service standards. Rather, in deference to different local conditions, each state and local bar association was to be encouraged to adopt its own specific quantitative guidelines for its own members. The Report further suggested that certain service guidelines might also be incorporated into Canon 2 of a revised Code of Professional Responsibility, and effectively delegated this task to the A.B.A. Commission on Evaluation of Professional Standards chaired by Robert Kutak, a distinguished practitioner (Kutak Commission).6

Interestingly enough, this same Special Committee Report did offer more specific direction on other important issues. While still deferring to the judgments of local bar associations, the Special Committee clearly supported two alternative ways to discharge the public interest duty. Lawyers might do their duty either “collectively . . . as a firm” or by “making financial contributions in lieu of providing time.” Despite a declared preference for the personal contribution of a lawyer’s actual services, the Report offered these noteworthy practical alternatives to an arguably “purist” service ideal.7

In response to the A.B.A. Special Committee’s call for local action, the Association of the Bar of the City of New York appointed its own “Special Committee on the Lawyer’s Pro Bono Obligations” in December of 1978 (ABCNY Committee). The A.B.A.’s Kutak Commission was already considering mandatory pro bono policy as part of an overall revision of the 1969 Code of Professional Responsibility. During the late seventies, therefore, two very important committees, one reflecting a national perspective and one reflecting the

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6. For excerpts from the principal parts of the A.B.A. Special Committee Report, see Implementing the Lawyer’s Public Interest Practice Obligation, 63 A.B.A.J. 678 (1977).
7. Id. at 679-80. The Special Committee was particularly “sensitive to the difficulty that many lawyers, with modest incomes, would face if confronted by an inflexible obligation to provide a substantial amount of public interest legal service.” Id. at 679.
conditions of New York City, turned their attentions to the lawyer's duty to serve the public interest.

The ABCNY Committee was the first to speak. In a 1979 report, titled "Toward a Mandatory Contribution of Public Service Practice by Every Lawyer," the Committee proposed that "the profession move toward acceptance by every practicing lawyer of a mandatory obligation (as opposed to merely an ethical aspiration) to engage, as part of his or her normal practice, in a substantial minimum amount of public service practice."

Specifically, the ABCNY Report recommended a minimum of 30 to 50 hours of annual service at the outset, with the potential for later increase to a 40 to 60 or 50 to 70 hour range. To encourage compliance with this arguably heavy and increasing burden, the Committee's definition of qualifying service was even broader than the scope of the A.B.A.'s 1975 resolution, which had already defined public interest service in rather sweeping categorical terms. At the same time, a majority of the ABCNY Committee demanded nothing less than actual service from lawyers practicing in New York City. While the Committee recognized that some flexibility in implementation was desirable, a majority of its members rejected both a collective or law firm discharge of an individual lawyer's obligation and a cash payment in lieu of service.

This disagreement among Committee members, as well as other differences of opinion, reflected a considerable degree of controversy over an unprecedented proposal for a mandatory pro bono program in New York City. Of a total Committee membership of sixteen, four members attached dissenting opinions to the majority Report, while another concurred in a separate opinion. The President of the Association noted the "[m]any cogent criticisms... levelled at the concept of a mandatory pro bono obligation. It is called, among other things, unfair, impractical, inefficient and unconstitutional." In addition, at least eight different committees of the Association were critical of various aspects of the Report. Finally, after almost a year's delay,
the Executive Committee of the Association rejected enforcement of
the pro bono obligation through a disciplinary rule, in December of
1980.11

In 1980, the Kutak Commission finally made a national-level
recommendation that paralleled the 1979 ABCNY Report but with
considerably less detailed content. That Commission proposed a sim-
ply stated “black letter rule” that was to be enforceable by discip-
\[...

11. For a discussion of the Executive Committee departures from the recommendations of the ABCNY Special Committee, see Joseph L. Torres & Mildred R. Stansky, In Support of a Mandatory Public Service Obligation, 29 Emory L.J. 997, 1000-01 n.17 (1980).

12. For the text of Discussion Draft Rule 6.1 in both the form originally proposed by the Kutak Commission and in the altered form that was eventually incorporated into EC 2-25 of the revised Model Code of Professional Responsibility, see Suzanne Bretz, Why Mandatory Pro Bono Is a Bad Idea, 3 Geo. J. Legal Ethics 623, 623-24 (1990).


14. The Final Marrero Committee Report incorporates an extensive bibliography of books, law journal articles, relevant cases and numerous reports from several jurisdictions on the civil legal needs of the poor. See Final Comm. Rep., supra note 1, at 866-83. For a de-

http://scholarlycommons.law.hofstra.edu/hlr/vol19/iss4/7
A more complete understanding of the Marrero Committee Report also requires that we take into account a second chronological group of mandatory pro bono proposals. Despite the rejection of both the Kutak Commission and ABCNY Committee proposals, more limited and localized MPB experiments began in the early eighties. Court ordered programs in El Paso, Texas and Westchester County, New York have been regarded by some as examples of successful if limited applications of mandatory pro bono. At least eight federal district courts, in one form or another, have provided for mandatory appointment programs for indigent litigants in civil cases. Some local bar associations also claim to have implemented successful mandatory pro bono programs, though most lack effective sanctions against recalcitrant members. Indeed, the Marrero Committee Report cites some of these programs as evidence of eventual acceptance by "drafted" members of the bar.

The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services, 41 U. MIMI L. REV. 973 (1987). For references to failed California initiatives during the same period, see James N. Adler, Raymond C. Fisher, James L. Marable, & Loren R. Rothschild, Pro bono Legal Services: The Objections and Alternatives to Mandatory Programs, 53 CAL. ST. B.J. 24 (Jan./Feb. 1978).

15. For a description of limited mandatory pro bono programs for divorce cases in two New York Counties: Westchester and the Bronx, see William J. Dean, Pro Bono Digest; Two Model Programs, N.Y.L.J., Dec. 21, 1987, at 1. For a more sceptical view of both the Westchester and El Paso experiments, see Esther F. Lardent, Mandatory Pro Bono in Civil Cases: The Wrong Answer To The Right Question, 49 MD. L. REV. 78, 95-97 (1990).

16. As of the late ‘80s, at least the following federal courts have adopted local rules or general orders that provide for the mandatory appointment of free counsel to indigents in civil cases: Eastern and Western Districts of Arkansas, Northern and Central Districts of Illinois, Northern and Southern Districts of Iowa, the District of Connecticut, and the San Antonio division of Texas’ Western District. See Deborah Graham, Mandatory Pro Bono: The Shape of Things to Come?, 73 A.B.A.J. 62 (1987); John R. DeSteiguer, Comment, Mandatory Pro Bono: The Path to Equal Justice, 16 PEPP. L. REV. 355, 361-62 (1989).


17. FINAL COMM. REP., supra note 1, at 776-77 n.24. Commentators, as of late 1987, have identified a number of local bar associations, including the following, that have apparently required member participation in mandatory pro bono programs of various sorts: Orange, Leon and Palm Beach Counties in Florida; Bryan and Athens Counties in Texas; DuPage County in Illinois; and Eau Claire County in Wisconsin. See Bretz, supra note 12, at 629 n.35; Graham, supra note 16, at 52; Jim Miskiewicz, Mandatory Pro Bono Won’t Disappear, NAT'L L.J., Mar. 23, 1987, at 1, 8. See also, Carlos Marin-Rosa & Chuck Stepter, Orange
Recent state-level proposals for mandatory pro bono programs, however, have been largely resisted. Despite the preparation of substantial empirical studies of unmet need for civil legal services among the poor in a number of jurisdictions, only Florida has begun actual implementation of a statewide program for mandatory pro bono in civil cases. Though such survey research typically concludes that only about 15-20% of the civil legal needs of low-income persons is being met, most proposals for state-wide mandatory pro bono programs have either been rejected or continue to be strongly resisted in diverse states like Oregon, Maryland, North Dakota, and Washington.


18. For citations to legal needs studies in Florida, Maryland, Massachusetts, and North Dakota, see Final Comm. Rep., supra note 1, at 774 n.20. For a brief discussion of empirical studies in Maryland, Oregon and Washington State, see DeSteigeur, supra note 16, at 357-58. See also New York Legal Needs Study—Draft Final Report (Oct. 11, 1989); Illinois Legal Needs—Plan For Action (July 1989); Jessica Pearson & Nancy Thoennes, Assessing the Legal Needs of the Poor in Colorado, 20 Clearinghouse Rev. 200 (June 1986).

19. In response to a petition of fifty-eight members of the Florida Bar, the Supreme Court of Florida has recently, unanimously and unequivocally recognized "that lawyers have an obligation, when admitted to The Florida Bar, to provide legal services for the poor when appointed by a court." In re Amendments to Rules Regulating the Fla. Bar—1-3.1(a) and Rules of Jud. Admin.—2.065 (Legal Aid), 573 So. 2d 800, 801 (Fla. 1990). The court, however, clearly did not decide whether to adopt a mandatory pro bono program. Rather, it agreed "in principle that providing legal services for the poor is a community function which will vary from community to community based upon the needs and resources available." Id. at 806. While the court did agree "that the chief judge of each circuit may well play a leading role in developing such a [mandatory pro bono] plan . . . ," it deferred consideration of any concrete program until it received the report and recommendation of a recently established "Florida Bar/Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent in Florida." Id. at 801, 806.

The petition before the Florida Supreme Court is duplicated in Talbot D'Alemberte, The Role of the Courts In Providing Legal Services: A Proposal to Provide Legal Access for the Poor, 17 Fla. St. U. L. Rev. 107, 111 (1989). For a description of the earlier complex Florida experience with mandatory pro bono proposals, see Maher, supra note 14. For a prediction that "Florida will become the first state with a mandatory pro bono rule for all its lawyers," see Florida Supreme Court Declares Pro Bono Obligation, Consortium (Interuniversity Consortium on Poverty Law), Sept., 1991, at 9.

20. "The programs providing civil legal assistance to the poor [in Maryland] are currently able to provide any assistance in only 44,000 cases annually, or in less than twenty percent of the estimated instances of legal need." Advisory Council of the Maryland Legal Services Corporation, Action Plan For Legal Services To Maryland's Poor 27 (1988) (on file with the Hofstra University Law Library). The situation in North Dakota may be even more extreme. Recent survey data indicates "that existing resources meet only approximately 5% of the recognized need of 202,500 civil legal problems of the poor which require the assistance of an attorney each year." Report and Recommendations of the Civil Legal Services Committee of the State Bar Association of North Dakota and the North Dakota Trial Lawyers' Association and the North Dakota Supreme Court, a Workable Plan for Civil Legal Services For the Poor of North Dakota
While the literature offers incomplete and somewhat dated descriptions of the supposedly successful local programs, it is very arguable that a suggestive distinction is emerging between the largely unsuccessful state-level reform efforts and the reported successes of a growing number of more localized and limited programs. Whatever explains this seeming pattern, the distinction may be instructive as the New York State profession considers the very ambitious state-wide proposals of the Marrero Committee.

B. A Categorical Description of the Marrero Committee Report

Much of the continuing debate over mandatory pro bono has been highly generalized and inattentive to the detailed components of particular proposals. Truly informed analysis and debate over the Marrero Committee Report requires easy access to the Report itself and periodic references to its complex and related parts. For this reason, the editors of this law review have decided to publish the Report in its entirety.

Nonetheless, a summary of the Report is still appropriate if not necessary. While the Committee's Report is both well organized and well written, professional and public access to the Report will be improved through a simplified description that is both categorical and comparative in character. The extended Report may be usefully discussed in terms of six simplified and organizing categories, with appropriate comparative references to both the 1979 ABCNY Report and to the various A.B.A. proposals for mandatory pro bono, each briefly discussed in the preceding section of this article.

1. Specifying Program Duties

The Marrero Committee states its paramount goal in very simple terms. It will require most lawyers, registered in New York State, to engage regularly in "professional activities . . . designed in some way to address, directly or indirectly, the legal needs of poor persons." (Rep. at 790.) This stated mandatory service goal is notably narrower

58 (Feb. 19, 1988) (on file with the Hofstra University Law Library).
than either the broad "public interest" goals of the 1975 and 1977 A.B.A mandatory pro bono initiatives, or the even broader "public service" goals of the 1979 ABCNY Report.\footnote{While the 1979 ABCNY Report supports the 1975 A.B.A. Resolution that declared "public interest legal services" to be a "basic professional responsibility of each lawyer," it broadens the scope and changes the emphasis in specifying the kind of mandatory service to be rendered by New York City lawyers. 1979 ABCNY Rep., \textit{supra}, note 8, at 11-12. For the text of the 1975 A.B.A. Resolution and its specification of the scope of "public interest legal service," and for the even broader New York specification of "public service practice," see \textit{id.}, App. A-1 \& A-2, at 26-27.}

The Marrero Committee Report will not allow a lawyer to discharge his or her new legal duty, either as lawyer or citizen, through a wide range of charitable, educational, religious, or professional activities. While commendable, fund raising for the local community chest, service on the board of a local college or organizing a church-sponsored food drive for the homeless will not qualify. Similarly, the Report is not designed to encourage professional work unrelated to the problems of the poor. Neither uncompensated legal work for an arts organization nor involvement in most kinds of environmental litigation will suffice. Much of the uncompensated work lawyers often do to improve the administration of justice through service on bar association and other committees will also not satisfy the proposed new obligation. The goal, more narrowly related to a conclusion about a "crisis of unmet civil legal needs," is to require lawyers to do two basic things: to aid the poor in securing civil justice, and to do it primarily as lawyers. (Rep. at 789-91.)

Nonetheless, the Committee recognizes the practical difficulties of such a narrowed definition of mandatory service. While a focused low-income goal must be served, the scope of qualifying services can still be drawn rather broadly within such limits so as to offer "diverse opportunities for service to lawyers of every background, temperament and training." Whether or not this is also a form of "political" accommodation, the Committee rather persuasively argues that the "needs of the poor are . . . diverse and the lawyerly skills required to meet them . . . varied." As a result, qualifying services, though related to the civil justice needs of the poor, will include "a very wide variety of professional activities . . . [and] are not limited to adversarial settings or to particular subject matters, such as housing." (Rep. at 791.)

The Committee is so determined to guide affected members of the bar that it devotes approximately ten percent of the total text of
its Report to this subject. It confesses that this aspect of its plan is "particularly sensitive. Questions and controversies are bound to arise as to what would or would not fall within the acceptable range of pro bono activities for purposes of compliance . . . ." While the Committee feels no obligation "to anticipate and resolve every definitional nuance raised by [its] proposal . . . ," it specifies qualifying pro bono services and activities in three categories as follows:

A. Professional services rendered in civil matters, and in those criminal matters for which there is no government obligation to provide funds for legal representation, to persons who are financially unable to compensate counsel.

B. Activities related to improvement of the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons.

C. Professional services to charitable, religious, civic and educational organizations in matters which are designed predominantly to address the needs of poor persons.22

The Report also offers limiting interpretations of each service category. With respect to the first category of direct legal service to clients, for example, the Committee resists the temptation to expand the program beyond a poverty-level clientele.23

The Committee also carefully limits the range of qualifying "Administration of Justice" activities to include only those "uncompensated professional services and activities whose systemic aim or effect is to improve the administration of justice as it relates to the needs of poor persons." This means that a lawyer might serve as an uncompensated arbitrator or mediator, engage in legislative advocacy, serve on a bar association committee or on the board of a legal aid agency. All such service, however, must be intended "to foster the amount or quality of legal representation available to indigent clients." However commendable, membership on a bar association committee working to improve litigation procedures for all, work with Amnesty International, or environmental litigation on behalf of the Sierra Club will very likely not qualify. (Rep. at 793-95.)

23. Id. at 792-93. By comparison, the broader mandatory pro bono proposal in the 1979 ABCNY Rep., supra, note 8, at 6, would allow lawyers to satisfy their obligations by serving non-indigent clients in civil rights cases or with respect to "public interest law matters."
The third and final category of qualifying “Services to Charitable Organizations” (Part C supra), however, “is intended to offer further flexibility and latitude to attorneys.” Lawyers may discharge their MPB obligations by serving organizations that deliver other than legal services to the poor. Such service, however, must be in the form of “legal representation and other forms of lawyering provided to or on behalf of the organization itself. Non-legal functions on behalf of the charity would be eligible only to the extent that the organization provides legal services to the poor . . . .”24 Fund raising for a legal aid organization will suffice, while fund raising for a church-sponsored food drive for the homeless will not.

At one and the same time, therefore, the Marrero Committee seeks to respond to the crisis of unmet low-income needs for civil justice and seeks to broaden the range of service options available to members of the bar. Most lawyers, even those disabled by specialties like patents and securities law, will find ample opportunities to discharge their newly created legal duties to the poor, if it’s the last thing this Committee ever does.

The Committee, of course, understands the risks of compromise, however skillfully crafted. It fully understands that its carefully nuanced effort to describe the scope of the required service is “bound to create gray areas.” Nonetheless, it remains confident that answers to “peripheral” definitional questions will eventually emerge, if only in the course of careful administration of the new mandatory pro bono program. (Rep. at 796.)

The Committee’s carefully balanced descriptive effort also has implications for other aspects of its proposal. While the Committee does not elaborate on the connection between service definitional questions and its hopes for simplified and low-cost program administration (Rep. at 819-22), there can be little doubt about a negative connection. A focused commitment to the civil legal needs of the poor linked to a tolerance for a wide variety of service options will doubtless encourage imaginative lawyers to minimize the burdens of compliance through artful feats of definitional “finessing” if not outright evasion.

24. FINAL COMM. REP., supra, note 1, at 796. This purposely broad charitable services formulation recognizes that certain organizations can have a “substantial indirect impact on [low-income] legal needs and services” by addressing the living needs of the poor more broadly. An organization that develops housing for the poor “may lessen the likelihood that the people aided would find themselves among the multitude of unrepresented tenants in Housing Court.” Id. at 795-96.
The Marrero Committee, however, is more explicitly interested in the relationship between the kind and character of qualifying service and quantitative guidelines for that service. While the Committee considered quantitative service standards ranging between an annual 20 and 50 hours, it ultimately decided to require only “a minimum of forty hours of qualifying pro bono services . . . every two years.”  

This minimal service requirement, the Committee explains, is directly related to its service specifications because “the narrower the definition of qualifying services the more limited should be the required [quantitative] standard.” (Rep. at 784.) Moreover:

This correlation [between service scope and hourly minimum] recognizes that the qualifying services that many lawyers would render in order to comply with the pro bono requirement would comprise only part of the uncompensated professional activities in which lawyers engage, both as concerned citizens and as members of the profession. (Rep. at 784.)

Finally, the Committee notes that the 20 hour annual minimum, however modest at an individual level, will still produce a significant increment to the low-income civil legal services now available in New York State. At the same time, an annual 20 hours “is the minimum individual support necessary to have a meaningful cumulative impact on the need.” (Rep. at 784.)

In short, the Marrero Committee’s recommendations going to both the kind of qualifying service and the quantitative minimum are carefully crafted and logically connected. In fact, the Committee’s systematic approach will make it all the more difficult to alter the program piecemeal since particular changes in the scope or quantity of required service are likely to affect other components of the total proposal.

2. Justifying the Proposal

Quite predictably, the Marrero Committee Report justifies its mandatory pro bono proposal in various ways. (Rep. at 771-79, 822-

25. Id. at 784. The use of a two-year compliance period allows lawyers greater flexibility in allocating their pro bono service year by year. In one year, a lawyer may be prevented from rendering much if any service. This kind of service slack, in one year, may be compensated for by increasing pro bono work in the second year. In addition, the Committee intends for the two year period to coincide with the term for attorney filing of a biennial registration statement in accordance with N.Y. COMP. CODES R. & REGS. tit. 22, § 118.1(g) (1991).
While the Report argues that the proposed service requirement is both "modest" and "unlikely to be considered onerous by many attorneys" (Rep. at 35), many lawyers and critics apparently disagree, including a minority of the Marrero Committee itself. The sharp opposition to the plan that the Committee encountered during hearings throughout the state in the late fall of 1989 is reason enough for making a special effort to justify both core program concepts and certain detailed components of the plan.

Many of the Report's justifying arguments may be organized in two categories, with reference to both a form of demand-side and a form of supply-side analysis. "The Crisis of Unmet Civil Needs," if it exists in fact, is both a function of important levels of unsatisfied demand and a function of inadequate resources. In short, the Committee argues that a scarcity problem of crisis dimensions demands resolution.

On the demand-side of its analysis, the Marrero Committee is quick to emphasize an important distinction. Access to civil legal services may be more important to poor folks than to middle-class citizens:

Typically . . . [low-income] needs for legal services are not in any

26. Three members of the Committee, Sol Neil Corbin, Charles H. Dougherty, and Robert B. Fiske, Jr., dissented from the Committee Report. FINAL COMM. REP., supra, note 1, at 847-51. Two other members, Evan A. Davis and Thomas F. Gleason, filed concurring statements endorsing mandatory pro bono but recommending a "phasing in" of the requirement. Id. at 844-46. While the Committee Report states that the "twenty-two members of the Committee reflect a broad cross section of the New York legal community . . .," id. at 763, not everyone agrees. It is very arguable that smaller-firm practitioners, particularly from suburban and upstate areas, were underrepresented on the Committee. See the statement of A. Thomas Levin, Nassau County Bar Association, 1989 CIALS Hrgs., supra note 2, at 348, for the charge that the Marrero Committee "consists primarily of high powered and high priced attorneys who practice law in mega-firms."

Among the bar associations in the State, virtually all that have formally commented, except for the Association of the Bar of the City of New York, have opposed the proposal for mandatory pro bono. The Marrero Committee Report itself concedes the "fundamental" differences between its recommendation of mandatory pro bono and the promotion of voluntary pro bono by the organized bar. FINAL COMM. REP., supra note 1, at 822, 766-67.

Additional evidence of very widespread opposition from within the legal profession comes from the 1989 CIALS Hrgs., supra note 2. The vast majority of communications that the Committee received were critical of the mandatory pro bono proposal even though many agreed "that a significant gap exists between the needs of the poor in New York State for free civil legal services, and the availability of lawyers to address the need." The Committee heard testimony from 74 persons, most in a representative capacity. It also received approximately 161 letters commenting on its proposals. FINAL COMM. REP., supra, note 1, at 766. Newspaper editorial comment, on the other hand, has been considerably more favorable. Id. at 766 n.5.
sense optional but rather deal with access to essentials of life: shelter, minimum levels of income and entitlements, unemployment compensation, disability allowances, child support, education, matrimonial relief, and health care. (Rep. at 771.)

Moreover, the unmet need for civil legal services has grown so enormously in recent years that "a crisis now exists which jeopardizes both the welfare of poor persons and the legitimacy of the legal system itself." Like the 1979 ABCNY Report, this conclusion of unmet need is grounded on common experience. Unlike that earlier Report, more broadly concerned with the need for "public service" legal work, the Marrero Committee proposal is also apparently grounded on "information, studies, documentation and statistical evidence that put the size and importance of the crisis beyond reasonable doubt."27

The Committee, in fact, relies upon seemingly substantial survey research conducted for the New York State Bar Association and published as a detailed "New York Legal Needs Study." This report and others, including one on the New York City Housing Court, are effectively incorporated by reference into the Marrero Committee Report itself and briefly discussed.28 The New York Legal Needs Study, discussed elsewhere in this article, is cited as indicating that "during the study year the low income households interviewed reported having experienced, on average, 2.37 non-criminal legal problems per household for which they had no legal help." This type of finding, coupled with demographic evidence of "a substantial increase in the number of persons living below the poverty line" leads the Committee to a single inescapable conclusion from the demand-side: "our society has evolved so that the poor need legal help to obtain basic human requirements and to an appalling degree cannot get it." (Rep. at 772-74.)

The Marrero Committee's supply-side analysis may be even more

27. FINAL COMM. REP., supra note 1, at 772. The 1979 ABCNY REP., supra, note 8, at 7-8, does refer to certain "well documented" studies, most with a national frame of reference.

28. THE SPANGENBERG GROUP, NEW YORK LEGAL NEEDS STUDY: DRAFT FINAL REPORT (October 11, 1989) [hereinafter N.Y. LEGAL NEEDS STUDY]; THE COMMITTEE ON LEGAL ASSISTANCE OF THE ASSOCIATION OF THE BAR OF NEW YORK CITY, HOUSING COURT PRO BONO PROJECT, REPORT ON THE PROJECT (November 1988) (both unpublished reports on file with the Hofstra University Law Library). For an example of the Marrero Committee's reliance on these studies, see FINAL COMM. REP., supra, note 1, at 772-74. The Housing Court Report was attachment 2 to the Committee's 1989 PRELIM. COMM. REP., supra, note 2, but was not appended to the 1990 FINAL COMM. REP.
important. Both the Committee’s 1989 Preliminary Report and its 1990 Final Report expressed pessimism over the prospects for increased public funding. (Rep. at 775-76.) In addition, the 1990 Report, unlike the preliminary 1989 version, speaks at great length about the prospects for voluntarism. After an extended analysis (Rep. at 822-33), the Marrero Committee “expressed deep skepticism about the prospects for increasing volunteer legal services on a sustained basis to the optimistic levels the organized Bar hopes to attain.” (Rep. at 823.) In short, the Committee is uncompromising in its negative evaluation. The Committee, barely disguising its impatience, observes that “the ‘voluntarism’ so eloquently extolled and advocated by the organized Bar may well amount to little more than a rallying cry for the status quo.” (Rep. at 828.)

3. Universal Coverage

The Marrero Committee proposes nearly universal coverage for its mandatory pro bono program, in two senses. First, the new program will benefit poor persons throughout the State of New York. Though Chief Judge Wachtler originally expected that the Committee would initially “concentrate on the particularly pressing need for additional pro bono publico representation in New York City,” the New York Legal Needs Study found a considerable unmet need for civil legal services throughout the state.29

The Committee also states that the “pro bono legal services requirement is intended to apply to all attorneys admitted to practice in New York State and who are actively practicing law.” As this statement implies, the Committee is prepared to exempt those attorneys who report on their biennial registration form, filed with the New York State Office of Court Administration, that they are not engaged in active practice in New York State. This exempt category will include not only lawyers who practice outside the state, but retired attorneys, judges and any others who are lawfully exempted from the attorney registration fee under controlling regulations. (Rep. at 785.)

At the same time, the Committee’s Report also clearly rejects the

29. FINAL COMM. REP., supra, note 1, App. A, at 852-53. Despite certain regional variations, “[t]he poor in New York State face nearly three million civil legal problems per year without legal help. Not more than 14% of their overall need for legal assistance is being met. N.Y. LEGAL NEEDS STUDY, supra, note 28, at 196.
idea of exempting certain categories of lawyers because of practice specialties or professional situations. While conceding that some government lawyers may have special resource-related and conflict of interest problems, the new pro bono requirement is to affect not only government attorneys but all lawyers employed by business corporations, legal services agencies, charitable or public interest organizations, and law schools. (Rep. at 785). The Committee forcefully argues that such categorical exclusions would pose unwarranted risks to "the integrity of a pro bono services requirement." Though conceding some legitimate practical concerns, the Committee observes that such "[l]arge exceptions would erode not only the credibility but the effectiveness of the program by substantially reducing the number of participating attorneys." (Rep. at 786.)

The Committee also justifies its proposal for nearly universal service with reference to other parts of the Report. Despite the practical and even legal impediments to service by some government and corporate law department lawyers, the broad and flexible definitions of qualifying service still offer most such lawyers a broad range of compliance options. Most practical barriers to compliance can be overcome, though "special attention may have to be paid to these concerns during the implementation phase of the plan."30

Finally, the Committee does recognize a need for a certain kind of administrative flexibility in a system of near universal coverage:

[For a required pro bono service plan to be reasonable and workable the rule would have to make allowance for special circumstances on a case-by-case, year-to-year basis. Accordingly, as the Committee contemplates it, the program would also excuse from service, though not from reporting, attorneys who claim incapacity by reason of illness or other extraordinary circumstances occurring in any given year. What would constitute acceptable extraordinary circumstances other than illness might include, for instance, unusual financial constraint or personal hardship experience in any given year, or long personal or business absence from the jurisdiction. The individual attorney's biennial registration statement would affirm the

30. FINAL COMM. REP., supra, note 1, at 38, 786-87, 789. The Committee also notes that some public agencies "have begun to relax regulations in order to permit government attorneys to participate more easily in public interest professional activities." Id. at 787.

Further compliance flexibility will also result from a carryover option: "Time contributed in any given period in excess of the minimum standard [40 hrs. in 2 years] would be allowed to be carried forward for four years and to be credited towards fulfilling the pro bono service requirement corresponding to that subsequent period." Id. at 768.
factual basis for excuse from service. (Rep. at 785-86).

4. Compliance Options

The language used at several places in the Marrero Committee Report appears to reveal a Committee preference. Lawyers are to be required “to provide a minimum of 40 hours of qualifying pro bono legal services [author’s emphasis] every two years.” (Rep. at 768.) The Committee appears to expect that lawyers will contribute their professional time or actual professional services:

The lawyer’s pro bono services requirement proposed by the Committee is a personal obligation of every attorney subject to it. Every lawyer, therefore, would have a professional responsibility to comply with the requirement by individually fulfilling the minimum time standard of qualifying work. (Rep. at 797.)

Unlike the rather purist approach of the 1979 ABCNY Report, however, the Marrero Committee also recognizes a practical need for two notable exceptions to a strict service requirement: "Under certain circumstances . . . , we would recognize collective compliance with the requirement by performance of group services and individual compliance by monetary contribution to a qualifying legal services program."31

In fact, these two “exceptions” may be especially important to the total proposed plan for mandatory pro bono. Clearly, they add compliance alternatives and considerable flexibility for a number of lawyers in very diverse professional circumstances. As a result, these exceptions may make a universal pro bono requirement more tolerable to more lawyers.

Of the two “exceptions” to the individual service requirement,

31. Id. at 797. For a discussion of the arguments for and against compliance through either collective satisfaction or a cash alternative, with a refusal to accept either as substitutes for actual service, see 1979 ABCNY REP., supra note 8, at 18-20. The 1981 ABCNY Executive Committee rejection of the 1979 Special Committee proposal for mandatory pro bono, however, argued for a more pragmatic approach to compliance and recommended recognition of both law firm pro bono programs as providing for the collective discharge of an individual’s pro bono duty as well as a financial contribution in lieu of actual service. Pro Bono Legal Service: An Executive Committee Position, supra note 11, at 11-12. For similar endorsements of “utilitarian” compliance alternatives to actual service, see Implementing the Lawyer’s Public Interest Practice Obligation, supra, note 6, at 679-80; Dean S. Spencer, Mandatory Public Service for Attorneys: A Proposal for the Future, 12 SW. U.L. REV. 493, 506 (1981).
the group service option may be the more important and interesting:

In practice, the concept would enable the group to assign one or more of its members to perform qualifying pro bono legal services in an amount sufficient to satisfy the combined time requirement of the entire group. Or, the group could hire one or more additional lawyers solely or partly for this purpose. In determining the total time requirement to be satisfied, the group could aggregate the hours of qualifying services its members actually perform in a given year. If the total corresponds to the amount required from the group, the individual members would be deemed to have discharged their pro bono service obligation for the particular period. (Rep. at 798.)

Since such a legal services group could be a firm, government law office, or an unaffiliated entity, both larger- and smaller-firm practitioners will benefit from the added flexibility in complying with the new requirements.

The monetary contribution option would allow some, but not all, lawyers to contribute a sum of $50, in lieu of each hour of required service, to “an approved legal services organization or other public interest group.” (Rep. at 799.) This cash compliance option, however, will only be available “to attorneys who practice alone or in firms of ten or fewer lawyers.” (Rep. at 800.)

The Report justifies this so-called buy-out option in pragmatic terms, citing program needs for cash as well as human capital. Such a cash option is also an important flexibility device for smaller firm practitioners, including certain specialists, who might find it very impractical to competently provide actual professional service to the poor. (Rep. at 799-801.)

Both the proposals for group service and the cash option, however, are themselves subject to an important exception. For several reasons, neophytes, admitted to practice for less than two years, will be disqualified from both compliance options whatever their professional or practice situation. Rendering actual legal services to the poor may be a usefully formative experience for such neophytes, whose “energies and idealism” may yield special professional contributions to the poor. Moreover, such neophytes need protection from demanding, unsympathetic, and manipulative seniors. (Rep. at 798-99, 801.)

The Committee, therefore, offers different compliance options to three different categories of lawyers as follows:
This short menu of compliance options is extremely important for a number of reasons. It recognizes a mixed program need for "capital" of both the human and cash kind, while taking into appropriate account different practice situations and making the burdens of universal "service" more tolerable. The Committee also rejects the misguided moralizing of certain critics of both the group service and cash substitutes for actual service.32

5. Administration and Enforcement

Both critics and supporters of the Marrero Committee proposal have raised various questions about the administration of a mandatory pro bono requirement, including the key matter of monitoring and enforcing compliance by over 90,000 New York State lawyers. The Committee candidly acknowledges that its treatment of administrative and enforcement matters is "necessarily sketchy." (Rep. at 821.) Nonetheless, it does provide a certain useful framework for later detailed elaboration. First, the program will use the existing mecha-

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32. After an extended justification of both the group service and the monetary contribution options FINAL COMM. REP., supra note 1, at 797-804, the Committee concludes by sharply responding to a certain kind of critical moralizing over the two controversial compliance options: "We fail to understand the moral calculus under which to do nothing in a crisis, even in utter disregard of professional ethical norms which bid some action, is tolerable but to make a monetary contribution to those engaged in easing the problem would be offensive." Id. at 804.
nism for the biennial registration of lawyers in New York State with all members of the Bar reporting compliance with the new pro bono requirement when they are required to file a registration statement with the New York State Office of Court Administration. (Rep. at 785.)

This compliance arrangement, of course, implies what the Committee declares quite explicitly: "the primary inducement to widespread compliance among attorneys will be an individual acceptance of the requirement as a civic and professional responsibility, depending largely upon attorneys' individual integrity and commitment to professional responsibility." (Rep. at 820.)

While the Committee predicts that most attorneys will discharge their new legal duty in good faith, it also recognizes the need for an administrative presence. It proposes that the Chief Judge of the Court of Appeals and the Administrator of the New York State Court System share administrative responsibility for the new mandatory pro bono program with the Appellate Division of each Supreme Court Department. This familiar New York State pattern will be especially important in assuring "equality of standards and application" of those standards across the state. This familiar and relatively simple mechanism, moreover, is also responsive to the frequently voiced concerns that mandatory pro bono, in any form, poses serious "risks of bureaucratic nightmares, massive [administrative] costs and governmental intrusion . . . ." (Rep. at 821.)

Though the Committee offers few management details, it does note the existing agencies that can be relied upon to train participating lawyers, collect and distribute cash contributions, oversee the reimbursement of expenses, and generally assure the delivery of pro bono services to the poor generated by the new mandatory pro bono program. Because of the number of established legal services and public interest organizations in the State, it should not be necessary to establish extensive new delivery mechanisms. The Report also suggests, as a starting point, "the appointment of an oversight or implementation committee to formulate more of the administrative particulars, to identify those parts of the program that can be carried out first, and to refine details . . . ." (Rep. at 820-21.)

Of course, the Committee concedes the need for early resolution of certain issues raised by government lawyers, and to determine client eligibility standards. In addition, various administrative,
definitional and financial issues must eventually be resolved as well. Nonetheless, the Committee also argues that "implementation details" will be more easily settled once the program's "philosophical obstacles are resolved and a decision is made to proceed with the idea in principle." Whatever administrative details remain to be refined, the Committee remains firmly convinced that "the benefits expected from . . . [its pro bono] plan . . . would outweigh its administrative and other costs . . . ." (Rep. at 821-22.)

6. Initial Program Implementation

The Marrero Committee Report, however incomplete its specification of administrative detail, argues at length for initial program implementation by judicial regulation. Most importantly, it concludes that such judicial action is already authorized by various New York State constitutional and statutory provisions. Further enabling legislation, therefore, will be unnecessary. (Rep. at 814-19.)

While the Committee claims to have considered implementation through either an amendment to the Code of Professional Responsibility or by legislation, it quickly dismisses both alternatives as "cumbersome." It then proposes implementation of its plan for mandatory pro bono through "a four-fold regulatory program promulgated by the judiciary . . . ." (Rep. at 815.)

Perhaps because "the scope and interrelation of the relevant constitutional and statutory provisions are not completely settled," the Report incorporates a detailed argument in support of judicial implementation. Both in the main text of the Report and in Appendix C (Rep. at 857, 861.), the Committee marshalls extended technical arguments to support the speedy and efficient adoption of its mandatory pro bono plan solely by judicial rule. Obviously, the Committee's treatment of this implementation issue identifies it as an especially important component of the total reform effort.

33. Id. at 821-22. In addition to considering exemptions for various professional categories, there will be a need to dispose of individual applications for hardship exceptions, to designate organizations that qualify to receive cash contributions made in lieu of actual service, and to provide information about available training programs and opportunities to serve the poor through various existing agencies. At least one inconsistency in the Final Report itself will also require attention. The text of the Report, id. at 800, defines a small firm as one "of ten or fewer lawyers," while Appendix B defines a small firm as one "with fewer than ten . . . attorneys." Id. at 855 (emphasis added).
7. Characterizing the Total Report

The preceding effort at a simplified description of the Marrero Committee proposal, in terms of a modest number of organizing categories, ultimately leads to certain important generalizations. First, the proposal is obviously complex. The preceding categorical summary, while fairly reflecting the proposal's core elements, hardly does justice to the rich substance and considered detail of this carefully crafted report with its numerous parts and subparts.

The total report also has an "organic" quality. Its numerous components are often connected and interacting portions of an integrated whole, with obvious complementary and qualifying parts crafted, rather than cobbled together, into an impressive systematic brief for a controversial mandatory pro bono initiative.

A careful identification of the civil legal needs of the poor, for example, leads to a focused set of program goals. Whatever similarities exist between the mandatory pro bono proposal of the Marrero Committee and the 1979 Report of the ABCNY, or the 1977 Report of a Special A.B.A. Committee, there is one quite fundamental difference. Those earlier proposals would have required uncompensated service with respect to a far wider range of "public interest" or "public service" issues. The Marrero Report has a far more confined focus on the civil legal needs of the poor. In turn, this considerably narrower program focus leads to a lower hourly requirement. Given this modest forty-hour biennial "service" requirement, there is more reason to resist exemptions for certain professional categories like government attorneys, even though there may be respectable arguments for special treatment.

Unfortunately, both the complexity and organic characteristics of the proposed program for mandatory pro bono also have certain unhappy consequences. However necessary extended argument may be, the Marrero Committee Report is plainly too long and too complex to be readily accessible to the profession, let alone to the public at large. The temptation is too great, even for experienced lawyer consumers of reform proposals, to slide over a number of carefully balanced and nuanced arguments. Rather than careful and informed deliberation over this particular proposal, we are all too tempted to merely examine a few general questions in the abstract. It may be actively mis-

34. 1979 ABCNY REP., supra note 8, App. A-2, at 27.
leading for us to simply ask: "Should we require lawyers to provide the poor with free civil legal services?" The more useful threshold question is rather more specific: "Do we favor the particular Marrero Committee proposal for mandatory pro bono, taking into careful account both its carefully balanced and interacting components, and the special challenges posed by New York State and City contexts?"

Finally, there is another price to be paid for the Report's organic qualities. Because the proposal's components are so often logically and functionally related, there is a special risk in piecemeal amendments. A change in one portion of the proposal may have consequences for other parts. For example, if the scope of qualifying service were to be broadened to include civil rights cases, as well as environmental and other important public interest type issues, this would force a rethinking of the relatively modest quantitative minimums. In short, there is good reason for the Marrero Committee to resist amendments to the proposal. Changing such a carefully integrated whole is a difficult and complicated task that will produce still more delay in addressing problems that some characterize in extreme crisis terms. It is small wonder that the Committee prefers to avoid legislative implementation.

C. "Positive" Descriptions of the Marrero Proposal

However useful a conventional description of the Marrero Committee's proposal for mandatory pro bono may be, a form of "positive" analysis may be even more important. Positive analysis, for the purposes of this article, is simply a descriptive effort in terms of plausible program effects or consequences. It is an analytic method that initially seeks to separate "what is" from "what ought to be," and that offers relevant predictions about a particular mandatory pro bono program. These predictions will eventually contribute to efforts to evaluate the new program.

35. Despite the heavy criticism of the Marrero Committee's 1989 PRELIM. COMM. REP., supra note 2, the FINAL COMM. REP., supra note 1, made no substantive changes whatsoever in the proposed program, but merely responded more explicitly and at greater length to various opposition arguments.

36. Milton Friedman, The Methodology of Positive Economics, in ESSAYS IN POSITIVE ECONOMICS 3, 4 (1953), succinctly describes positive economics:

Positive economics is in principle independent of any particular ethical position or normative judgments. As Keynes says, it deals with "what is," not with "what ought to be." Its task is to provide a system of generalizations that can be used to make correct predictions about the consequences of any change in circumstances.
My effort at a kind of positive analysis will have a number of noteworthy characteristics. First, it will be an ambitious form of analysis insofar as it aims to identify more comprehensively a range of plausible consequences likely to be generated by the mandatory pro bono proposal of the Marrero Committee. This analysis, therefore, will be concerned not only with the short term effects of mandatory pro bono on individual New York practitioners, but with longer term and aggregate effects on the current system that delivers civil legal services to the poor.37

Second, the positive analysis in this article is not only driven by professional data to the extent that such data are available, but it is also dependent upon certain key presuppositions about human behavior. Lawyers, and legal institutions, presumably strive to make rational choices. This postulate is an important foundation for the theory of mandatory pro bono that I develop in this article through a series of logically structured conditional propositions, i.e., "If A, then B."38

Third, my effort at positive analysis will be controversial in some quarters precisely because it has a clear predictive quality. A useful positive effort to describe the proposal of the Marrero Committee must try to predict its effects, whether those predicted program consequences are intended or unintended.39 Of course, one prediction

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37. The master advises: "In devising and choosing between social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating." Ronald H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1, 44 (1960).


39. The ultimate goal of a positive science is the development of a "theory" or "hypothesis" that yields valid and meaningful (i.e., not truistic) predictions about phenomena not yet observed. Such a theory is, in general, a complex intermixture of two elements. In part, it is a "language" designed to promote "systematic and organized methods of reasoning." In part, it is a body of substantive hypotheses
about this form of "predictive" description is that some lawyers and commentators will be quick to charge that such analysis is unacceptably speculative.

While such lawyer critics are sometimes unaware of their own heavy reliance on unsystematic forms of positive analysis, they do raise important questions about both the strengths and weaknesses of this very important descriptive approach. Positive analysis, as I shall apply it in this article, at best produces a series of provisional propositions or hypotheses that, of course, will ultimately require testing against real world experience. Because we are concerned with a proposed and unprecedented program for mandatory pro bono, even the best efforts at positive analysis will yield no more than a set of plausible and contingent conclusions.

Even such provisional conclusions, however, may justify an experiment with a mandatory pro bono program. At the very least, even an imperfect effort to predict plausible program consequences offers an alternative to certain, heavily moralizing styles of argument. All too many proponents of mandatory pro bono seem to have overrelied on a powerful, but ultimately unsatisfying, moral rhetoric. Urgent and sincere calls to duty, however elegantly phrased and securely anchored to the Code of Professional Responsibility and to the best of our professional traditions, may be little more than empty and unpersuasive moral incantations. Durable law and institutional reforms must be connected to and inspired by logically and empirically respectable conclusions about a real world of connected human behaviors.

There is yet another important "mediating" function associated with positive analysis of the kind attempted in various parts of this article. Such positive analysis may moderate, if it does not resolve, some of the bitter conflict surrounding the Marrero proposal for mandatory pro bono. The deeply felt conflict over the proposal, especially among lawyers, may be more the result of different predictions about various program effects rather than the result of more fundamental differences over conflicting professional and personal values. If, for example, most New York lawyers will merely be required to contrib-

designed to abstract essential features of complex reality.
Friedman, supra note 36, at 7.

40. The law of the American Constitution reflects important commitments to consequentialist analysis wrapped in constitutional diction. For a classic example, see Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). Critics of mandatory pro bono programs who argue that they involve a form of unconstitutional involuntary servitude are engaged in predicting the effects of such programs, among other concerns.
ute cash rather than actual legal services to the poor, this may influence the ultimate judgments of some lawyers who now strongly object to the proposal as tantamount to "a draft" if not a form of involuntary servitude.

At the same time, it is also possible that a careful positive analysis will reveal more fundamental reasons for the great debate over mandatory pro bono. As a logical matter, one cannot support the proposal without first supporting an expansion of civil legal services for the poor. A more searching form of positive analysis, however, may raise very important questions about the net wisdom of increasing such civil legal services in a modern environment of complex entitlement programs. The Marrero Committee, of course, like virtually all supporters of mandatory pro bono, clearly assumes that an expansion of civil legal assistance for the poor is not only a necessity but a net social good.

Finally, a serious effort at positive analysis may be disquieting of itself. Systematic positive analysis, of course, is resisted by lawyers and others because it is harder to do than the excessively moralistic and case-parsing analysis so commonly encountered in the literature on mandatory pro bono. Such analysis also sometimes produces analytic surprises, or what might be called "counter-intuitive" conclusions.\(^4\) It is entirely possible that the extensive and hotly debated Marrero Committee proposal is not quite what it appears to be, for better or worse.

**D. Describing Consequences for Individual Practitioners**

There is good cause to predict that a substantial majority of New York State's approximately 92,000 registered lawyers will be cash rather than actual service contributors under the Marrero Committee proposal.\(^2\) This prediction, to the degree that it is persuasive, should

\(^4\) The continuing debate over minimum wage policy offers a classic example of the "surprise" potential of positive analysis. While a higher minimum wage level appears to improve the welfare of low-wage employees, precisely the opposite may be the case. Some employers, newly compelled to pay low-wage employees more, may shift the burden of the new minimum wage level by hiring fewer low-wage employees. In effect, this new minimum harms some low-wage workers so that others may benefit. Some would characterize this as a "perverse" redistributive effect even if we cannot be sure of the magnitude of such effects. See Friedman, supra note 36, at 5-6.

have a bearing on the debate over mandatory pro bono since many of the practical and legal objections to the proposal appear to assume that most lawyers will be compelled to actually serve the poor in professional ways. Even those sympathetic to a mandatory pro bono ("MPB") program have noted the difficulties in efficiently using the widely diverse professional skills of a very large number of "draftees."

The prediction that many, if not most, practitioners will comply with cash, not actual service, is grounded upon an interacting number of assumptions and factual conclusions about the behavior of lawyers, specific details of the Marrero proposal, and certain aggregate data and general impressions of the profession. Two propositions are of particular threshold importance. The first notes the exceedingly important menu of compliance options available under the Marrero proposal, including both group service and cash contribution alternatives to actual service. The second assumes that most participating lawyers will choose from that menu in dominantly rational ways so that their benefits will be maximized and their costs minimized. While few lawyers, of course, are consistently successful in actually maximizing their net professional satisfactions, most strive most of the time for just that result.

York State Office of Court Administration reports, for calendar year 1990, a total of 92,300 registered attorneys having a principal place of business in New York State, exclusive of judges and retired attorneys (computer printout, dated 1/7/91, on file with the author).

43. For a brief discussion of the practical difficulties in administering a mandatory pro bono program with numerous lawyer "draftees," see Lardent, supra note 15, at 99-100. The 1989 CIALS Hrgs., supra note 2, contain statements from legal services professionals reflecting ambivalence towards mandatory pro bono because of the practical difficulties in utilizing the services of numerous lawyers who lack experience dealing with low-income clients and their problems. See statement from L.H. Gipson, Monroe County Legal Assistance Corp., 1989 CIALS Hrgs., supra note 2, at 18. See also, Mandatory Pro Bono Might Not Do The Trick, Says Panel, N.Y. St. B. News, June 1991, at 3.

44. For these very important compliance options, see FINAL COMM. REP., supra note 1, at 797-802.

45. My assumption about lawyers as conscious utility maximizers goes further than many economists would go. Economics is less about mental processes and more about behavior observed to be dominantly rational. "The postulates assert simply that people display certain consistent and predictable patterns of response to changes in their environment." ARMEN A. ALCHIAN & WILLIAM R. ALLEN, UNIVERSITY ECONOMICS 24-25 (3d ed. 1972). For a succinct definition of the "rational behavior ... cornerstone concept", see MCKENZIE & TULLOCK, supra note 38, at 15 who state that: "Briefly, rational behavior means that a person knows, within limits, what he wants, is capable of ordering those things which he wants from least preferred to most preferred, and will choose to do those things which will maximize his satisfaction." McKenzie & Tullock also note common confusions over the concept. Id. at 26-28.
The first proposition, about the compliance options available to all lawyers except for neophytes within two years of admission to practice, requires further elaboration. Seasoned practitioners in larger firms of at least ten lawyers may satisfy their MPB obligations either by actually serving the poor directly or indirectly, or by joining a so-called "pro bono service group." Any such group will be permitted to "aggregate" the hours of qualifying service that its members actually perform in a given year. If fifty lawyers from a single law firm, for example, combine in such a service group to perform a year's total of at least 1000 hours of qualifying services, that total will discharge the obligation of every group member.

Even if ten members each perform 100 hours of actual service, and forty members of the 50-lawyer group do nothing for the poor whatsoever, this will suffice. Because the total 1000 service hours actually generated by a few group members may be allocated to all fifty members, this produces an average, per group member, of twenty hours of service for the year. This is just enough to discharge each member's minimum obligation. (Rep. at 797-99.)

This group service option is also a promising vehicle for the delivery of competent civil legal services precisely because it contemplates a delegation of actual service responsibilities. The Marrero Committee Report explains that a group may hire or assign one or more specialist members who will devote considerable, if not full, time to providing legal services to eligible poor clients. (Rep. at 798.) If this happens, members of the group will obviously be called upon to support the efforts of the designated poverty-law specialist through cash contributions sufficient for a living wage and the overhead for the group's poverty law practice. In reality, therefore, the so-called group service option is a form of cash option for larger-firm group members, though a cash option that also promises to increase the number of working specialists in poverty law.

Smaller-firm or solo practitioners have a similar group service option, in theory if not in fact. They, too, may delegate their MPB duties to others by joining a service group for a subscription price. A smaller-firm or solo practitioner, for only one example, may join a very large service group sponsored by a local bar association or affiliated with a local law school. This very large group may hire a number of staff poverty-law specialists, and otherwise incorporate a number of scale economies into its specialized low-income practice. Of course, members of the group will still be free to supplement staff efforts as they choose, adding their own actual service to the total
number of hours available for allocation to group members in discharge of their MPB obligations. Surplus hours, moreover, will presumably be eligible for “carryover” to following years. (Rep. at 856.)

Solo and smaller-firm (fewer than 10) lawyers, as already noted, also have an important “direct” cash option unavailable to larger-firm lawyers. In addition to actual service or the group service option, such practitioners may contribute cash directly to certain designated legal service and public interest organizations. Such direct cash contributions must equal $50 for every service hour required by the Marrero MPB plan. If a solo practitioner simply wishes to substitute cash for actual service, without joining a service group, a total annual contribution of $1,000, therefore, will be required. Though numerous details remain to be supplied, there seems to be no reason why a smaller-firm practitioner could not mix options, providing in a given year, for example, ten hours of actual service to a poor client and a $500 cash contribution to a local legal services organization. (Rep. at 799-80.)

The key question, given this menu of compliance options, is obvious. Is there good cause to predict a typical preference for the group service or direct cash substitutes for actual service? In a word, yes. Because the compliance alternatives to rendering actual legal services to the poor are “cost minimizing,” many lawyers will prefer them. This is especially likely to be the case for those lawyers who are hostile or indifferent to the welfare of the poor. If, as is likely, the majority of lawyers are relatively insensitive to the needs of the poor, it is predictable that they will be especially cost-conscious.46

46. There is likely to be a considerable range of relevant practitioner attitudes. Some lawyers, for example, are certain to be sympathetic both to the poor and to the idea that legal instruments, including, but not limited to, litigation, ought to be aggressively used to address a wide variety of low-income problems. Other lawyers, while generally concerned about the poor, may resist more “creative” attempts to use litigation, lobbying and other legal tools to effect “social change.” A third group, however, may actually be hostile to “the undeserving poor” and very firmly opposed to any activist use of legal instruments on their behalf. Finally, perhaps the largest number of affected lawyers may simply be described as largely indifferent to the poor and to their legal problems. While there is no reliable survey evidence to support the conclusion, there is abundant anecdotal evidence for the proposition that most lawyers, like most of our middle-class population, are relatively insensitive to the poverty in our midst. Mass professional indifference to the legal problems of the poor is inferable from the historical struggle to increase voluntary pro bono work by lawyers on behalf of the poor, punctuated by frequent exhortations on the subject from organized bar leaders. See Esther Lardent, PRO BONO in the 1990's: The Uncertain Future of Attorney Voluntarism, 5 MGMT. INFO. EXCH. I. 3 (Mar. 1991)(A.B.A./An Exchange of Information for Legal Services; typescript available from the A.B.A.). Reginald Heber Smith long ago ob-
Even those lawyers who are most interested in meeting the legal needs of the poor have good cause to minimize the costs of complying with any new pro bono requirement. While a taste for cost-minimizing doubtless varies from lawyer to lawyer, insensitivity to costs is simply wasteful and unprofessional. The better the lawyer, the more we may expect an efficient approach to the rendering of professional services and the discharging of professional obligations, including any legal duties to the poor.  

Cost-sensitive lawyers are also likely to be concerned with several relevant cost categories. Opportunity costs, transaction costs, information costs, potential tax liabilities, and even intangible forms of "anxiety" costs may all influence practitioner choices between or among compliance options. The effects of the most important cost-related considerations are best illustrated by two suggestive, if oversimplified, examples that have been constructed, among other purposes, to distinguish the case of a larger-firm lawyer from the case of a smaller-firm lawyer.

First, consider the case of a seasoned, larger-firm practitioner, Jones. If Jones decides to discharge her mandatory pro bono obligation through actual service she will very likely forego professional revenue, unless she is underemployed or foregoes increasingly scarce leisure time to do her duty.

Served that "[i]t is common knowledge that the bar as a profession is not considered charitable." For Smith, however, there was a practical explanation for lawyerly indifference to the legal needs of the poor. In any event, he argued that the new legal aid bureaus deserved the bar's financial support because they "are performing for the bar its duty to the poor." REGINALD HEBER SMITH, JUSTICE AND THE POOR 237 (1919).

Lawyers who are very sympathetic to the poor may also be persuaded that the poor will be better served through the professional services of full-time or nearly full-time specialists. To the extent that the group service option delegates responsibility, to either lawyers hired especially to do low-income work or to committed group members especially inclined to provide actual service, it may improve the quality of the civil legal services delivered to the poor as a result of a mandatory pro bono program. The group service option, therefore, may maximize the benefits of a mandatory pro bono program while it also has potential for minimizing costs. The Marrero Committee is itself convinced that in certain specialized areas, like Housing Court and government entitlements practice, pro bono representation rendered individually by occasional volunteers is not a particularly effective way of responding to the unmet need. FINAL COMM. REP., supra note 1, at 799-800.

Economists describe "cost" in terms of foregone choices or opportunities. MCKENZIE & TULLOCK, supra note 38, at 20, observe that "the existence of choices, in and of itself, implies that some alternative must be foregone when one alternative is taken. If A and B represent the relevant opportunities and A is taken, then, at least for that point in time, B must be foregone." For a succinct discussion of the opportunity cost concept, see ROBIN PAUL MALLOY, LAW AND ECONOMICS 17-20 (1990).
Assume that Jones is fully employed with a demanding practice, billing at an average hourly rate of $200. Her decision to service a poor client directly, or to engage in other qualifying service at the MPB 20-hour minimum, will initially cost her, and her firm, a minimum total of $4,000 annually (20 hrs. x $200).

Of course, this opportunity cost will not necessarily deter Jones from choosing to render actual legal service to a poor client. She may casually assume, with little or no investigation, that it will simply be shifted forward to her or her firm’s fee-paying clientele without market consequences. Even if Jones’ fee-paying clients refuse to absorb the cost, so that her total annual billings are reduced by $4,000, she may simply conclude that she has professional and personal preferences for low-income client contact. In this instance, she decides that the benefits to her and a low-income client justify the costs of rendering actual service.

Nonetheless, there is clearly a cheaper way, in dollar and other terms, to discharge her duty under the Marrero Committee proposal. If Jones joins a pro bono service group, as previously described, the dollar and other costs may be considerably reduced. Assuming that Jones joins with 98 other lawyers, perhaps members and associates of her own large firm, this 99-member practice group may then decide to hire a single specialist (the 100th member) who will spend all of his or her time engaged with the civil legal problems of the poor. A single hardworking specialist, billing 1800-2000 hours annually on low-income matters, may discharge the entire minimum collective obligation of the firm-based service group. This is especially likely if a few other members of the same group contribute a modest number of hours to supplement the efforts of this single poverty law specialist. In fact, this kind of firm-based group option may be especially appealing to Jones because it offers very practical avenues for future service-in-kind should her busy practice someday permit her the luxury of a more direct involvement with low-income clients and their problems.

The arithmetic is telling and rich in relevant implications. If 100 fully employed lawyers, with average hourly billing at $175 per hour,
were to each render free actual service to poor clients, the total collective opportunity cost of minimal compliance equals $350,000 (20 hrs. x $175 x 100 lawyers). This amount, of course, represents only the minimum professional revenue foregone. Some large firm partners, particularly in New York City, charge considerably more than $175 per billable hour.\(^{50}\)

Alternatively, consider the situation if these same lawyers choose the group service option provided by the Marrero Report. Ninety-nine lawyers "pitch in" to hire a poverty law specialist at an annual salary of, say, $100,000. Further assume that overhead for this specialist costs an additional $100,000 for a total annual dollar expenditure of $200,000. There is, of course, a considerable savings compared to the direct service scenario previously sketched. The group practice option saves about $150,000 in the aggregate (about 43% of $350,000) because 99 group members now avoid rendering direct service themselves. By delegating MPB responsibility to a single poverty law specialist member, each other group member effectively saves about $1,500.

A rational cost-minimizing practitioner ought to choose the group service option, therefore, even if she supports an expansion of civil legal services for the poor. This choice is all the more compelling if service is likely to be delivered by poverty law specialists. Finally, even if large-firm Jones still wishes to work directly with a low-in-

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50. Among the twenty large New York City law firms cooperating in a recent survey of hourly rates, eighteen listed average hourly partner billing rates of $200 or more, with some such large firm partners apparently billing at more than $400 per hour. Of course, associates in these same firms are billing at considerably lower hourly rates. *Hourly Rates For Partners and Associates*, NAT'L L.J., Nov. 19, 1990, at S11. More recent information about Manhattan's forty highest grossing firms indicates that, despite a recession economy, revenue per lawyer at these firms ranged from a high of $1,110,000 to a low of $260,000, with 21 of the 40 firms reporting revenue per lawyer over $400,000. Assuming lawyers in these firms average 1,800 billable hours annually, this means that each hour of such a lawyer's time diverted to a low-income client will cost about $222 in revenue foregone. See *The Man Law 40*, MANHATTAN LAW., July/Aug. 1991, at 25. While the continuing recession may reduce these figures, there is also evidence that some firms are continuing to raise hourly billing rates. Kenneth Rutman, *Despite the Slump, Many Firms Raised Rates*, NAT'L L.J., Nov. 18, 1991, at S5.

There is also the risk that a lawyer rendering actual free services to a low-income client will spend more than twenty hours servicing that client despite an intention to render no more service than the MPB minimum of 20 annual hours. Finally, large firm lawyers, in particular, have experimented with forms of premium or value billing, generating fees well in excess of the hourly figures reflected above for special cases and legal matters, and departing from systems of hourly billing. See Bradford W. Hildebrandt, *Hourly Billing*, THE AM. LAW., July/Aug. 1991, at 41.
come client or to devote her time to low-income matters, her firm has a considerable incentive to discourage that form of relatively high-cost compliance behavior.

A cost-minimizing Jones, and her supposedly rational firm, should also be tempted by still other cost-related considerations to prefer the group service option that the Marrero Committee has so thoughtfully provided. If she chooses to join the service group, Jones is spared certain likely transaction-type costs. By foregoing actual representation of a poor client, for example, she avoids the need to familiarize herself with a kind of subject matter that is not part of her ordinary practice. While Jones may soon become quite knowledgeable about the food stamp program, or similar problem areas, her specialized experience in securities law in the context of a large-firm corporate practice may do little to prepare her for work, however limited, as a poverty lawyer. She may also be spared the time-consuming burden of dealing with various public agencies and bureaucracies on behalf of her low-income client. At the same time, should Jones ever get the urge to do her duty by rendering actual service to a client in need, the presence of an on-site firm pro bono department may make that choice logistically more practicable.

A sensitive or insecure Jones may also suffer from professional anxiety, at least initially, as a result of working on unfamiliar professional ground as a poverty lawyer. If she is especially protective of her professional reputation and averse to others questioning her professional competence, avoiding actual service may reduce the risk of real, if intangible, “anxiety” costs. To be sure, this anxiety may pass as quickly as initial learning burdens do, but it is nonetheless a conceivable “cost” that may encourage Jones to prefer the group service option to direct service to poor clients.

Another source of professional anxiety may also be related to the need for “spillover service,” well in excess of the annual 20-hour minimum annual standard for mandatory pro bono. Even the most skilled and experienced lawyers may have trouble predicting and controlling the total time needed for a particularly demanding case. While

For a relevant discussion of the transaction cost concept, including informational costs, see Burton A. Weisbrod, Conceptual Perspective on the Public Interest: An Economic Analysts, in PUBLIC INTEREST LAW; AN ECONOMIC AND INSTITUTIONAL ANALYSIS 4, 11-12 (Burton A. Weisbrod et al. eds., 1978).

“Not all costs in choice situations are completely obvious, and one of the skills of the economist is that of uncovering any hidden costs . . . . Implicit costs are ‘hidden,’ unobvious costs.” MCKENZIE & TULLOCK, supra note 38, at 55.
Jones will have a carryover privilege for service rendered in excess of 20 annual hours, she may still worry about the risk of unpredictable demands upon her time. Finally, there is the possibility that there will be a certain cultural, class or racial distance between Jones and her low-income client. This may impair communication and compromise a relationship of trust between lawyer and client in time-consuming ways.

For a number of cost-minimizing reasons, therefore, large-firm Jones will be tempted to join her firm service group rather than actually represent a poor client. If a rational Jones still prefers to provide actual service, and she might, it can only be because she expects that the benefits associated with her actual service will be substantial enough to justify the costs. Even if Jones chooses actual client service, however, she is still likely to be among a minority of lawyers who not only care about the welfare of the poor but who are ready to pay the price of actually servicing those in need of civil legal assistance. The very mixed success of voluntary pro bono programs, and some of the sharp opposition to mandatory pro bono proposals, suggest that many more lawyers are likely to be indifferent, if not hostile, to the needs of the poor.

This kind of analysis, emphasizing a typical lawyerly preference for least-cost compliance, also has additional explanatory potential. For one example, it explains why forced actual service for neophytes, within two years of initial bar admission, may be tolerable in cost and benefit terms. At this tender practice stage, the opportunity costs of compulsory client service or acceptable “administration of justice” activities are at a minimum. Youngsters, or neophytes, whose billable time may be worth considerably less than the time of seasoned practitioners, are the ideal “draftees” for cost-related reasons, especially because their forced duty tours will be limited to two years.

53. Clearly, there is rational room for this kind of cost-benefit conclusion where Jones finds great personal, professional and even moral satisfactions in actual client contact. Jones, and her law firm, may also welcome an important reputational or public relations benefit from the “right” newsworthy case on behalf of a worthy low-income client. Such benefits may account in part for a certain kind of voluntary pro bono commitment, and explains the continuing interest of some senior law firm partners in legal services programs, even at a high price for their personal and professional involvement.

The Marrero proposal also provides a third option that occupies a cost-minimizing middle ground between actual service to a client and merely passive membership in a service group. Jones, for example, may avoid direct client contact by doing fundraising for a legal services agency, or by doing legal work for a local soup kitchen or homeless shelter. Final Comm. Rep., supra note 1, at 795-97.

54. For the relative disparity in hourly billing rates between associates and partners in
Such neophytes, and their firms, may also benefit from special early opportunities for professional growth. A large-firm associate may do gratifying and challenging professional work for a low-income client far more quickly than for his firm’s regular clientele. Similarly, neophytes may play useful roles on bar association committees and even on the boards of charitable organizations devoted to improving civil legal services for the poor. It is also clear that the Marrero Committee was wise to bar such neophytes from service group eligibility. To reduce opportunity-costs, many larger law firms might be tempted to designate very junior associates as the poverty law specialists for the firm mandatory pro bono service group.\(^5\)

The same kind of cost-benefit factors help to explain why many well-intentioned lawyers, as they age and mature in professional terms, are less likely to devote their actual time to the legal problems of the poor. Even if Jones remains passionately interested in the civil legal problems of the poor, her direct involvement will be increasingly costly if fee-paying clients are willing to pay an increasing premium for her growing experience and maturing skills.

At the same time, some very seasoned lawyers do devote considerable time and energy to the legal problems of the poor. A number of Marrero Committee members, for example, offer ready evidence that the public-spirited senior still survives. This apparent aberration may also be explained in cost-benefit terms. As a large-firm lawyer matures to the senior partner level, it is likely that her hourly billing rates will reach a certain plateau. At the very least, the annual rate of increase in any experience premium, paid by fee-paying clients, is likely to decline for many larger-firm partners past a certain age.

Even where this does not happen, it is still rational to choose high-cost behavior where considerable benefits are generated, net of costs. A large-firm senior partner, deeply interested in the problems of the poor and his reputation for public service, may serve very conscientiously and creatively on various committees and boards related to the legal needs of the poor. While the cost of Gray Beard’s service is high, the personal gratifications and other benefits of such service may also be great. Even if a dedicated senior is unconcerned with the

\(^5\) Final Comm. Rep., supra note 1, at 798-99. Of course, neophytes, like all other lawyers, may still choose to work with charitable organizations or to engage in “administration of justice” activities through bar committee work germane to the civil legal needs of the poor. Id. at 793-95.
public relations benefits for himself and his firm, and foregoes considerable hourly billings while serving "the cause" in an admirably principled way, his (and his firm's) likely wealth and impressive professional earning capacity may rather easily absorb the dollar costs of such public service.56

This form of cost-benefit analysis also has explanatory and predictive power with reference to a second very important category of practitioner: solo and smaller-firm lawyers who practice in firms with fewer than ten lawyers. By one estimate, such smaller-firm practitioners account for between sixty and seventy percent of the registered lawyers in New York State.57

56. I do not intend to question the motives of distinguished large-firm practitioners, and Marrero Committee members, like Robert B. Fiske, Jr., Alexander D. Forger, Victor Marrero, Cyrus Vance, and others. In fact, a cost-benefit approach only deepens my respect for their continuing devotion to public service. At the same time, such analysis also explains, at least in part, why more large-firm senior lawyers do not emulate their admirable examples.

57. The New York State Office of Court Administration does not collect data on the distribution of lawyer registrants by firm size. See supra note 42; Telephone Interview with Ms. Renee Elias, Sr. Management Analyst, N.Y. Office of Court Administration, Jan. 7, 1991. To compensate for this lack of data, one member of the Marrero Committee relied upon limited statistical data provided by BARBARA A. CURRAN ET AL., SUPPLEMENT TO THE LAWYER STATISTICAL REPORT; THE U.S. LEGAL PROFESSION IN 1985 105-07 (1986). Using this data, Sol N. Corbin, Esq. concluded, in a footnote to his separate dissenting statement, that a total of 52,130 lawyers in "private practice," in New York State in 1985, were distributed as follows: 47.5% practiced alone; 20.9% practiced in firms composed of 2-10 lawyers; and 31.6% practiced in firms comprising more than 10 lawyers. See FINAL COMM. REP., supra note 1, at 849 n.6. For a more recent, though very imperfect, estimate, I consulted the Martindale-Hubbell Library on LEXIS. While the Martindale-Hubbell Directory is a voluntary listing and may not include some registered New York attorneys, it is very likely to include most active practitioners. Information retrieved electronically was used to prepare the following table reflecting the distribution of lawyers by firm size and location, as of May 1, 1991. It has also been possible to estimate the approximate number of solo and smaller firm practitioners listed in the Martindale-Hubbell Directory by subtracting the estimated number of larger-firm attorneys (firms with at least 10 lawyers) from the most recently reported total of 92,300 registered lawyers in New York State. Supra note 42. I have assumed that the Directory is most likely to be accurate with reference to its listing of larger-firm lawyers. It has only been practical to estimate percentages at two extremes.

For example, I estimate, at the low end, that there are 18,999 larger-firm lawyers in N.Y. State. This low-end estimate reflected my unrealistic assumption that all firms listing, say, 50-99 lawyers contained the minimum 50 lawyers. See table infra. This low-end estimate of larger-firm lawyers then allowed me to make a high-end estimate of solo and smaller-firm lawyers through simple subtraction (total number of registrants minus estimated number of larger-firm lawyers). I have similarly made a low-end estimate of solo and smaller-firm lawyers. The following figures, however, are only approximations. It is particularly difficult to account for lawyers employed by business corporations, non-profit organizations and government agencies. It is also unclear how accurately the Martindale-Hubbell Directory reflects very recent professional staff reductions among a number of the very largest firms.

With the foregoing qualifications, I estimate, at the high end, that there are currently
These solo and smaller-firm lawyers, like their larger firm colleagues, may choose a pro bono group affiliation, effectively subscribing to a share of service group expenses so that a specializing few may discharge the MPB duties of many. Unlike larger-firm attorneys, however, these lawyers will also have a second alternative to rendering actual service to poor clients. If they choose, they may contribute money directly to "an approved legal services organization or other

about 73,301 solo and small-firm attorneys in New York State, or about 79.4% of the current registered total of 92,300. I also estimate, at the low end, that there are currently about 43,906 solo and small-firm attorneys, or about 47.6% of N.Y. State's total registered lawyers. Allowing for a certain substantial margin of error, and especially recent uncertainty about the longer-term trend towards larger-firm practice, it is not unreasonable to estimate a likely solo/small firm population of between 60% and 70% of N.Y. State's lawyer population.

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<th>DISTRIBUTION OF NEW YORK STATE LAW FIRMS BY SIZE*</th>
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<td>(7) Other Cities and Locations</td>
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* Data From Martindale-Hubbell Library on Lexis, as of May, 1991  
** Binghamton  
*** Uniondale
A LAWYER'S LEGAL DUTY TO THE POOR

public interest group,” thus dispensing with the need to locate and join a service group. (Rep. at 799-801). It is this compliance option that may offer the greatest temptation to smaller-firm practitioners.

Assume, for example, that Smith is a solo practitioner or a member of a three-lawyer firm in a suburban location. Assume further that Smith bills fee-paying clients, on average, at a rate of $100 per hour. Clearly, a rational cost-minimizing Smith will prefer contributing an annual $1,000 (20 hrs. x $50) directly to an established legal services organization, according to the Marrero Report’s direct cash contribution standard. The service alternative will require Smith to forego twenty hours of billable time at a minimum opportunity cost of $2,000, so that he can actually represent a poor client or two.

Once again, this example does not exclude the possibility that Smith will still prefer actual service for a variety of reasons. Small-firm Smith may have a special taste for actual service, even at a high total opportunity cost. Like large-firm Jones in the earlier case, the expected benefits of actual service may exceed predicted costs. Moreover, certain distinctive characteristics of small-firm practice are properly incorporated into our analysis. First, it may be more likely that small-firm Smith will be underemployed as compared to large-firm Jones. If, in fact, Smith is underemployed, it is perfectly rational for him to offer service directly to a poor client instead of making a relatively large dollar contribution. Underemployed Smith will reduce his compelled leisure by actual service, rather than actually foregoing billable revenue.

In addition, the lower Smith’s income, the more he is likely to resist a relatively sizeable annual cash payment, even for a presumably good cause. Small-firm or solo practice may also affect certain transaction and anxiety-type costs. The smaller-firm practitioner may or may not find it difficult to acclimate himself to serving the poor. Smith may have less to learn about an eviction case than big-firm

58. The Committee, with some difficulty, concludes that the contribution rate will be initially computed at a value of $50 per hour required under its program, with periodic adjustments for inflation, thus requiring a minimum annual dollar contribution of $1,000. It is unclear whether this amount is to be paid annually or biennially at the time of re-registration with the Office of Court Administration. FINAL COMM. REP., supra note 1, at 802. The Committee relies upon this direct cash option for solo and smaller-firm practitioners to meet a number of objections to its proposal, including the frequent criticisms that mandatory pro bono invites grudging, incompetent service to the poor and fails to take into account important differences, in professional situations, between larger- and smaller-firm practitioners. Id. at 799-801. Like the group service option, this direct cash contribution option is to be unavailable to attorneys admitted to practice for less than two years. Id. at 801.
Jones, even if small-firm Smith lacks Jones’ law library and ready access to relevant training and expert advice. On the other hand, Smith may be more averse than Jones to the risk of malpractice liability. Smaller firm practitioners may be more likely to be charged with malpractice than large-firm lawyers like Jones. At the very least, a small-firm practitioner may resist even a modest increase in already high malpractice insurance premiums, given a possibly more limited capacity for shifting new practice costs to clients or support staff.59

Attitudes towards the poor may also be especially complex among the numerous population of small-firm practitioners. While some smaller-firm practitioners, especially in New York City, may be especially sensitive and sympathetic to the needs of the poor, the same attitudes may not prevail among smaller-firm lawyers in suburban and upstate communities outside the few larger cities. Though generalizations are risky with reference to professional attitudes toward the poor, there may be a special concentration of politically and socially conservative lawyers among the state’s smaller firms. Infrequent exposure to low-income problems and populations may only sharpen cultural and even racial differences.

While some large-firm as well as smaller-firm lawyers doubtless view the “underclass” with alarm and hostility, there may be a special risk of tension and misunderstanding where smaller firm practitioners from suburban and upstate areas confront real low-income clients and their myriad problems. For this reason, there may be special anxiety costs associated with direct service to the poor. A small-firm practitioner like Smith, therefore, may have an added incentive to avoid direct client service through a distancing cash contribution to an established legal services agency.

Finally, small-firm Smith may even be influenced by the income tax treatment of various compliance options. If Smith discharges his MPB liability by a cash payment to a legal services agency, this may

59. The Marrero Report observes that solo and smaller firm attorneys have been particularly concerned about the risk of malpractice liability and rising insurance rates as a result of the mandatory pro bono proposal. The Report also concedes that the perceived risk may discourage lawyers “from providing direct legal representation.” Lawyers deterred by the malpractice risk, or “cost,” will choose to comply with their MPB duties in ways other than actual client service. Final Comm. Rep., supra note 1, at 808. It is quite clear that both the number of malpractice claims and the average amount of damage awards have increased in recent years. By one estimate, “[s]maller law firms (with 15 or fewer attorneys) have generated over 60 percent [of the malpractice] claims brought in a five-year period.” Paul F. Mahaffey, Legal Malpractice: An Overview, Jan. 1989 N.Y. St. B.J. 32, 36. See also, Rita Henley Jensen, Turmoil in Malpractice Market, Nat’l L.J., Oct. 15, 1990, at 3.
be deductible, for income tax purposes, as an ordinary business expense, assuming the payment is a condition of maintaining his professional license. If the duty is discharged by Smith actually servicing a low-income client, the income tax deductibility of the value of his direct professional service is more problematic. While this tax uncertainty also affects larger-firm practitioners, it may be of greater importance to smaller-firm practitioners with more marginal professional incomes.

As a result, there are several reasons to predict that a cost-minimizing small-firm practitioner like Smith will be especially attracted to the direct cash contribution or “buy-out” option as it is sometimes pejoratively called. In addition, the group service option, available to all lawyers but neophytes, may still have considerable appeal for small-firm lawyers under certain circumstances. Indeed, the sizeable annual minimum of $1,000 ($50 x 20 hrs.), in lieu of actual service, may motivate Smith to search out an even lower-cost group alternative. If Smith can participate in a pro bono service group at an annual cost of $750, he will choose this alternative especially when he is only or primarily interested in minimizing his dollar compliance costs. A group that is sponsored and carefully administered by a bar association, local law school, or even by an independent professional “syndicate,” may be able to deliver legal services to the poor, especially in smaller communities outside New York State’s big cities, at a relatively modest cost.

60. Treas. Reg. section 1.170A-1(g) provides, in relevant part, that “[n]o deduction is allowable under [Internal Revenue Code] section 170 [charitable contributions] for a contribution of services.” For a negative response to the question of whether a compelled contribution of a lawyer’s services is deductible as a necessary business or trade expense under I.R.C. § 162, see Grant v. Commissioner, 84 T.C. 809 (1985).

61. The Marrero Committee itself recognizes that a buy-out option is especially appropriate for small-firm practitioners, though it rejects the option for all lawyers precisely because the idea may be too cheap and attractive a compliance alternative, and because it hopes that its mandatory pro bono proposal will provide an appropriate and needed mix of cash and human capital, even if much of the human capital comes from the large firm private bar. Final Comm. Rep., supra note 1, at 800-01. At least one dissent from the Marrero Report argues that both the group service option, available to all lawyers but neophytes, and the direct cash contribution option, available only to seasoned smaller-firm lawyers, are “at odds with the notion of individual (and universal) responsibility” to be assumed by all registered lawyers in New York State. Dissent by Sol N. Corbin, Esq., id. at 847, 849.

62. The mandatory pro bono program of the Orange County Florida Bar Association requires its approximately 1800 members to accept two pro bono referrals annually. The service obligation is in terms of cases rather than hours. “As an alternative to handling two cases per year, an attorney may choose to pay a ‘buy-out’ fee of $250.” Steven Wechsler, Attorney’s Attitudes Toward Mandatory Pro Bono, 41 SYRACUSE L. REV. 909, 935-36 (1990).
Solo or small-firm Smith, therefore, is no more likely than large-firm Jones to render service-in-kind, provided Smith is fully employed. This analysis assumes, of course, that Smith, like Jones, is reasonably well informed about his compliance options and rationally inclined to minimize compliance costs. With larger-firm lawyers like Jones more likely to share the financial burden of an in-firm service group, and solo and small-firm Smiths frequently making dollar contributions directly to established legal services agencies, it is most unlikely that a surly legion of practitioners will be forced to commit actual professional skills and increasingly scarce professional time to serve the civil legal needs of the poor.

Rather than a simple proposal for universal compulsory service, the Marrero Committee Report is actually something else. While some lawyers are still likely to discharge their MPB duties by rendering professional service directly to poor clients, many more are likely to comply by making a cash contribution in one form of another.

E. Describing Delivery System Changes

The Marrero Committee’s mandatory pro bono proposal may also stimulate important changes in the “system” that currently delivers civil legal services to the poor. Because the proposal permits least-cost compliance through pro bono group membership and, for some lawyers, through direct cash contributions, it is likely to encourage the formation of a number of new service providers, while simultaneously adding resources to at least some established legal services agencies. In turn, there may be greater competition, for better or worse, among an increasing number of service providers, with interesting consequences for both poverty lawyers and their low-income clients.

Before discussing a number of predictable scenarios involving law firm pro bono departments, as well as bar association-, law school-, and even practitioner-sponsored service groups, it is important to recall certain features of the current system that delivers, however inadequately, low-income civil legal services. For the better part of

In addition to the relatively lower dollar cost of membership in a bar association service group, there may also be an opportunity to join a pro bono service group organized and administered by private practitioners. A former legal services attorney, for example, might organize a service group and sell memberships at a price below an annual $1,000. This might allow an enterprising solo practitioner or small firm to service low-income clients while providing a modest economic base for a small law firm that also services a fee-paying clientele.
the last fifteen years or so, dated from about the creation of the U.S. Legal Services Corporation ("LSC") in 1974, we have provided civil legal services to the poor through a network of agencies financed by federal, state and private funds in different combinations. From the early '80s to the present time, we have also increasingly supplemented the efforts of established legal services agencies with the voluntary contributions of individual members of the bar and, in some cases, their law firms.63

At least three trends are especially noteworthy in this larger context. First, most communities in New York State and elsewhere continue to be heavily dependent on the centralized efforts of a very few general-purpose legal services agencies. In New York City, for example, the nation's largest and most complex poverty population (over 1.4 million persons) is primarily served by only two large general-assistance "umbrella" organizations. While both the Civil Division of the New York Legal Aid Society ("N.Y. Legal Aid") and Legal Services of New York (previously "Community Action for Legal Services," still known as "CALS") administer numerous neighborhood and special project offices, their combined efforts are widely regarded as falling well short of growing needs.64

Civil legal assistance is also provided to some of New York City's poor by a number of smaller-scale agencies that are primarily supported by private contributions. Such legal service providers usually have highly specialized service missions and include organizations like the Legal Action Center for the Homeless, and the Asian-American, Lambda, NAACP, NOW, and Puerto Rican Legal Defense Funds. Additional civil legal services are also supplied through a number of

63. Chapter 4 of the N.Y. LEGAL NEEDS STUDY, supra note 28, at 146-95, may be the single best available source of information about the funding, staffing, and operations of legal services programs and providers in New York State, at least through 1987. The Study also includes a short section on private bar involvement. Id. at 191-93.

64. CALS has seven delegate corporations which, in turn, have seventeen local offices throughout New York City. The Civil Division of N.Y. Legal Aid also has several neighborhood law offices, in addition to a specialized Brooklyn Office for the Aging, a Homeless Family Rights Project, a Civil Appeal & Law Reform Unit, a Family Law Unit, and a Volunteer Division known as Community Law Offices, or "CLO," located in East Harlem. For additional detail on the structure of civil legal services in New York City, as provided by these two very important agencies, see The [ABCNY] Committee on Legal Assistance, Improving The Delivery of Pro Bono Legal Services, 43 REC. 257, 280-81 (1988); THE COMMITTEE ON LEGAL ASSISTANCE, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, DIRECTORY OF PRO BONO SERVICES (Oct. 1988) (on file with the Hofstra University Law Library).
The pattern is similar throughout New York State, though with fewer providers (especially specialized and privately funded ones) servicing suburban and upstate communities. Including those in New York City, only twenty-six separate staffed programs, primarily funded by LSC funds, serve the State's entire eligible low-income population. In addition, another fourteen general purpose programs are scattered throughout the State, largely in urban areas. These programs, including the civil legal services components of the Legal Aid Society of New York, are primarily supported by private, state and local government funding in various combinations, and receive little or no federal funding through the federal Legal Services Corporation.66

Many of the established agencies, supported by federal funds, have also been affected by a reduction in real federal financial support for civil legal services during the 1980s. While state, local and some federal special purpose funding has substantially increased in recent years, at least in percentage terms, general purpose federal funding, provided through the Legal Services Corporation, declined some 25% in real dollar terms between 1980 and 1987. As a result, the number of full-time offices and staff attorneys in primarily LSC-funded staff programs has fallen rather dramatically, especially relative to growing client needs and statewide caseloads. Though the contraction of federal resources has been arrested and modestly reversed in the last few years, the longer-term trend indicates diminishing federal support for low-income civil legal services, with a predictable diversion of some unsatisfied client demand to legal services agencies primarily funded through non-federal sources.67

Finally, a third development must be taken into account before an analysis of the institutional effects of the Marrero Committee Report. In addition to a centralized system dependent on a relatively few service providers, and a contraction, in real dollar terms, in the scale and service scope of the New York delivery system over the last de-

65. Id.
66. As of 1987, only about 14% of the funding to support civil legal services provided through N.Y. Legal Aid came from LSC funds. See N.Y. LEGAL NEEDS STUDY, supra note 28, at 148-50.
67. Despite funding increases in certain non-federal categories, reduced federal funding through the LSC, in both nominal and real dollar terms, has resulted in a reduced number of LSC grantee offices and professional employees during a time of escalating private sector compensation for lawyers and growing demand for civil legal services. For a detailed review of funding data for New York State legal services agencies during the period 1980-87, see id. at 153-69. For a similar review of caseload and staff trends, see id. at 169-82.
cade, the profession has recently responded to unmet low-income needs in a historically different, though still voluntary, way.

While the organized bar has long since exhorted individual lawyers to volunteer services pro bono publico, voluntary pro bono programs now seek commitments from at least the larger law firms as well. In 1985, for example, Volunteers of Legal Service ("VOLS") was formed in New York City with pledges from various city law firms and corporate law departments to provide increased pro bono civil services to the poor. Beginning in the late sixties, organized efforts to recruit law firms, qua firms, have accelerated. The emphasis on law firm pro bono involvement grew during the years of active warfare between the Reagan Administration and the legal services establishment.69

Active law firm involvement, in voluntarily servicing the civil legal needs of the poor, has taken a variety of creative forms well beyond simply exhorting firm partners and associates to do their duty. Some few large firms, like Hogan & Hartson in Washington, D.C., have formally established pro bono departments. Others have imitated the pioneering efforts of the Baltimore firm of Piper & Marbury in opening a satellite office in a low-income neighborhood, staffed by firm lawyers. Still other firms, in New York City and elsewhere, have instituted "lend-a-lawyer" programs.70

Some of the largest firms have also made major financial commitments. New York City's White & Case, for example, supplements the salary of those associates who, prior to regular employment at

68. For the text of EC (Ethical Consideration) 2-25 of the Code of Professional Responsibility, see supra note 5.

69. 1991 Program of Volunteers of Legal Service, 99 Hudson Street, New York, NY 10013 (unpublished memo, on file with the author). The active solicitation of law firm support for civil legal services was motivated in part by the 1980 election of President Ronald Reagan. The implacable hostility of the Reagan Administration to the apparently successful law reform activities of legal services attorneys, in California and elsewhere, led to early Administration proposals for the defunding of the federal Legal Services Corporation and its eventual abolition. For descriptions of "the holy war" over federally funded legal services for the poor, see Gerald Caplan, Understanding the Controversy Over The Legal Services Corporation, 28 N.Y.L. SCH. L. REV. 583 (1983); Ken Englaed, The LSC Under Siege, 73 A.B.A.J., Dec. 1987, at 66. For the special tone of the attack, exemplified by a leading conservative opponent of the LSC, see Howard Phillips, Legal Services and The Public Interest, 8 HARV. J.L. & PUB. POL'Y 355 (1985).

70. For a description of the pioneering Community Services Department of Hogan & Hartson, as well as other law firm pro bono contributions outside New York City, see William J. Dean, Pro Bono Digest; Projects Outside of New York, N.Y.L.J., July 16, 1990, at 3.
that firm, choose to work for legal services or other public interest organizations. Perhaps the most widely praised initiative of recent years has been undertaken by the Skadden Arps firm of New York City. This firm has generously financed a large number of fellowships for well qualified recent law school graduates who initially choose public interest work over a more conventional law practice.71

This third trend, to more ambitious voluntary efforts, suggests that the Marrero Committee proposal may further stimulate many of the state’s larger law firms, individually or perhaps in combination, to formally establish firm pro bono departments. This is a plausible, though hardly certain, prediction for a number of reasons, in addition to the cost-minimizing ones previously discussed in this article. Even if a law firm’s partners and associates are unenthusiastic about the Marrero Committee Report and relatively unresponsive to the problems of the poor, there may be advantages to an in-house or law firm pro bono department staffed by one or more seasoned firm specialists in poverty law. Firm neophytes, for example, may actually serve the legal needs of the poor while working under the direct supervision of a member of the firm or a senior associate. This may produce better early training and a generally better learning experience that is more consistent with the professional norms and culture of a particular law firm. A more useful evaluation of neophyte work is also more likely if that work is largely done in a particular firm’s regular professional environment under skilled supervision.72

For neophytes and other firm lawyers choosing to render actual

71. Emily F. Mandelstam, Pro Bono: Bono for Young Lawyers at Big Firms?, N.Y. OBSERVER, Mar. 5, 1990, at 4,11; Jennifer Frey, White & Case Offers Bonus For Public Service Stint, MANHATTAN LAW., Aug. 8-Aug. 14, 1989, at 4, 26. Some larger law firms have already established pro bono specialty, positions though the recent recession and downsizing of some larger law firms may change existing in-firm commitments to provide pro bono services. See David Margolick, At the Bar, N.Y. TIMES, Sept. 8, 1989, at B5. Nonetheless, a number of large firms in New York City continue their institutional involvements. Volunteers for Legal Services makes pro bono “matches”, with participating firms agreeing to accept cases on a continuing basis from a legal services office. William J. Dean, Pro Bono Digest; Law Firms Matched With Legal Services Offices, N.Y. LJ., Feb. 20, 1991, at 7; and memo on 1991 VOLS Program, supra note 69.

72. For the training and public relations benefits associated with the institutional pro bono responses of some law firms, see Dean, supra note 71; Kirk Victor, Pro Bono Work Attracting Some Firms; More Needed, NAT’L LJ., Mar. 4, 1985, at 1. Though the 1979 ABCNY Rep., supra note 8, at 19, opposed collective satisfaction of a mandatory pro bono duty, it did concede certain utilitarian arguments in support of a group service compliance alternative. A law firm pro bono department would not only “facilitate the handling of complex matters requiring the work of a group of lawyers,” but it would also encourage “[s]upervision of younger lawyers by partners or other experienced lawyers . . . .”
service, the cost and frustration of providing low-income representation or of contributing to the solution of low-income problems may also be reduced. If professional work is supported by the normal staff services and firm management systems uniformly available at the larger law firms, this may encourage a higher level of actual service from firm lawyers as a complement to the work of the firm's poverty law specialist. Regular access to decent library and computer resources, photocopy machines, and to competent secretarial and paralegal assistance counts in the efficient production of legal work, whether for a poor or other clientele.

In fact, the professional efforts of neophytes, or other lawyers, are less likely to be wasted if they work from their regular law firm offices under the supervision and with the cooperation of both the firm pro bono specialist and other seasoned and committed firm lawyers as well. Though some established legal services agencies may be skilled in the use of large numbers of volunteer or "drafted" lawyers, there is no assurance that lawyers, "loaned" and temporarily relocated to such agencies, will be utilized in efficient ways. There is an all too human impulse to waste free or low-cost commodities, even in this context.

Such in-house pro bono departments may also work to encourage non-litigators to apply their distinctive expertise more readily to low-income problems. Whether by helping to develop a low-income housing venture or by incorporating a food cooperative, lawyers who specialize in corporate and other non-litigation areas have increasing opportunities to do pro bono work for the poor. Legal services offices and established provider agencies, with their traditional litigation orientations, may be less likely to employ such expertise effectively.73

There may also be other more intangible public and professional relations benefits for those firms that choose to establish a pro bono department. An in-firm service group may increase the appeal of the firm for new recruits and improve the morale of other public-spirited lawyers at the firm. An in-firm service group, for example, allows seasoned lawyers at the firm to engage in pro bono work for the poor in the knowledge that such work might aid in discharging the MPB obligations of firm partners and associates less inclined to serve the

73. Sheryl Nance, Pro Bono Projects Require Expertise Beyond Litigation, N.Y.L.J., July 18, 1989, at 1. For a more extended discussion of the advantages, for the firms, of operating in-firm pro bono departments, see Anne Huizinga, Private Attorneys, Public Commitments: The State of Law Firm Pro Bono, 7 PBI EXCHANGE 4, 6 (Fall 1989).
poor. In turn, this encourages mutual tolerance among co-workers with different levels of interest in pro bono work.

Even given recent law firm retrenchments, the long-term welfare of a law firm still depends upon its ability to attract and retain competent lawyers, some of whom are doubtless interested in diverse and enriching professional experiences. There is also some evidence of a resurgent interest among younger lawyers in public interest work in general and low-income problems in particular, especially in "interesting" environments like New York City.74

Assuming that numerous law firms are persuaded that the best available compliance option is to establish a formal pro bono department, the effects for the current legal services system may be significant. If, for example, a substantial number of the 47 very large law firms (100 or more lawyers) in New York City were to establish and staff pro bono departments, this alone might increase resources available to the City's delivery system.75

If each of these firms were to hire one or more staff specialists, this would not only increase the number of staff poverty lawyers in the city, but it might open satisfying employment tracks for a talented and dedicated number who might prefer to extend their careers working on behalf of the poor.76 It is also possible that some of these firm-based departments may offer especially creative complements to the law reform and so-called impact work of existing agencies.77

74. It is also arguable that younger lawyers, drawn from the "me generation" of the 1980s, are less interested in pro bono work than many of their seniors who graduated from law school in the 1960s and early 70s. See Mandelstam, supra note 71; Lisa Green Markoff, Number of Applications Declines For Skadden Public Interest Aid, NAT'L L.J., Jan. 8, 1990, at 4. Nonetheless, lawyers from the same firm who work together on an important pro bono case may generate "synergistic and energizing effects" for themselves and other firm lawyers. Despite the expense of an in-firm pro bono department, it may enhance a firm's standing among judges, lawyers, and public officials while it offers efficient training and client contact opportunities to younger firm lawyers. Myrna Oliver, Repaying Society; Pro Bono: Renaissance in Legal Aid, LOS ANGELES TIMES, April 7, 1987, at 1.

75. See "Distribution of New York State Law Firms By Size," supra note 57. Of course, the net increase in resources must take current voluntary service into account.

76. Relatively low salaries, heavy education related debts, and other frustrations may account for the relatively few legal services lawyers who choose extended careers at legal services agencies. Jeffrey Weill, Public Agencies Struggle To Overcome Salary Gap, MANHATTAN LAW., July 18, 1989, at 25.

77. There is a continuing debate over the appropriate pro bono emphasis upon so-called "impact" litigation. Some leaders of law firm pro bono programs recommend emphasis upon work for individual poor clients, while others express a strong preference for cases with broader impacts. Cameron Barr, The Am Law Pro Bono Rating; Doers and Talkers, THE AM. L.W., July/Aug. 1990, 51, 59. See also, Oliver, supra note 74.
To be sure, many such law firm pro bono departments are likely to be small-scale operations delivering highly specialized or focused services to a very limited portion of the poverty population. In fact, some large-firm lawyers and existing voluntary pro bono programs already apparently specialize in immigration matters, the problems of the homeless or service for the AIDS-afflicted, among other examples.  

Of course, there are also certain disincentives to the formal establishment of law-firm pro bono departments. The risk of conflicts with paying-client matters is a continuing problem, though actual conflicts of interest may be less likely for a pro bono department that specializes in low-income matters than for one that services non-poor clients as well by handling a wider variety of “public-interest” problems. A firm that represents a major public utility, for example, may be forced to avoid representing opponents of nuclear power plants. Low-income issues arising from disputes with public agencies that administer various low-income entitlement programs, however, may be less likely to generate such obvious conflict-of-interest problems. 

There is still the risk, however, of more generalized conflicts with the philosophical preferences or social attitudes of influential fee-paying clients. If, for example, a large-firm pro bono department were to litigate an exclusionary zoning case against a suburban community seeking to exclude high density residential development for lower-income persons, it is conceivable that certain valued clients might be offended as a matter of principle. While such law firm concerns, over what one commentator has called philosophical or “spurious” conflicts of interest, may have eased in recent years, there is still potential for controversy in the context of a very complex large-firm practice that services a large number of corporate, business and government clients.

The greater the law reform orientation of a firm’s pro bono department, the greater the possibility of such risks. For “pragmatic”


79. Smaller firms, with a smaller number of important fee-paying clients, may be even more vulnerable to client objections or hostility to particular kinds of pro bono work. It is not uncommon for some lawyers to argue that their commercially oriented law firms, as firms, should avoid identifying with particular controversial positions on public issues, contrary to a customary firm neutrality. For a discussion of “conflicts-in-interest” problems, see Note, Structuring the Public Service Efforts of Private Law Firms, 84 HARV. L. REV. 410, 411, 414 (1970). Such conflicts may argue for the existence of independent public interest law firms. Mama S. Tucker, The Private Lawyer and Public Responsibility—The Profession’s Armaggedon, 51 NEB. L. REV. 367, 381-82 (1971).
reasons, firm leaders may encourage a diversion of pro bono department efforts to less controversial low-income issues, including routine evictions, public benefits problems and similar individual service matters. A preoccupation with so-called individual service cases may or may not be desirable for a modestly staffed law-firm pro bono venture.80

The establishment of an in-firm pro bono department may also create a number of other problems. A law firm pro bono department will probably need to develop relationships with both established legal services agencies and community organizations serving the poor to provide a regular source of eligible low-income clients. This, in turn, may create certain misunderstandings over the coordination of legal strategies and the limits of particular law firm service commitments. In the extreme, some members of some law firms may even question the wisdom of allowing low-income clients physical access to firm offices at the risk of offending the aesthetic and other sensibilities of some clients and firm employees. Of course, lawyers and their fee-paying clients are hardly immune to class and racial tensions and biases.81

But even if larger law firms resist the formal establishment of such pro bono departments, there is still considerable potential for institutional change of a diversifying, specializing and decentralizing kind. A number of conceivable scenarios, with various institutional consequences, are suggested by the Marrero Committee Report both explicitly and implicitly as a result of the Committee’s support for those two key compliance alternatives to actual service: the very important group service option, and the slightly less important, but still noteworthy, opportunity for smaller-firm practitioners to make cash contributions in lieu of rendering actual service to the poor.

For a first alternative scenario to the establishment of a significant number of law firm pro bono departments, consider the new opportunities available to established legal services organizations. It is likely that a number of New York City lawyers will seek to discharge their MPB duties under the Marrero Committee proposal by volunteering their services to an established provider of civil legal services.

80. Some lawyers with interests in pro bono work argue forcefully for the efficiencies inherent in so-called “impact” litigation often taking the form of ambitious class actions. See Barr, supra note 77; Oliver, supra note 74.

Major agencies like N.Y. Legal Aid and CALS already have volunteer divisions and considerable experience in training and deploying volunteer lawyers.\(^8\)

Of course, it is possible that sheer numbers, particularly in the early period after MPB plan enactment, may overwhelm the capacity of such agencies to use MPB draftees effectively. Nonetheless, here is one opportunity for established providers to increase their services to the poor because they will have a new amount of professional "human capital" to complement and extend normal staff efforts.

Established legal aid providers are also likely to receive a certain amount of cash capital in the form of direct contributions from smaller-firm practitioners. While it is difficult to predict the amount or mix of cash and human capital that will be newly available to agencies like N.Y. Legal Aid from the Marrero plan, it is likely that most established agencies will benefit from enlarged resources, for at least a short time after plan enactment.

Finally, established agencies might create their own affiliated service groups. There is no reason why N.Y. Legal Aid could not establish a separate staffed unit and invite lawyers to join its pro bono service group as an alternative to actual MPB service, or even as an alternative, for the right low subscription price, to a direct cash contribution. This unit would be funded by numerous lawyer subscribers at a certain annual rate cheap enough to divert lawyers from the other MPB compliance options, yet sufficient to support the work of the new unit.

Suppose, for example, that N.Y. Legal Aid established a new division that specialized in problems of homeless children in New York City. Assume that it was staffed by three relatively experienced legal aid attorneys who would each be paid generous salaries, by current legal aid standards, of $75,000 annually. Suppose further that the new unit also budgeted an additional $225,000 for overhead, including unit paralegals. The total annual budget of $450,000 would be financed by selling subscriptions to lawyers who would be treated as delegating their mandatory pro bono duties to the three staff lawyers employed by the group.

\(^8\) The Volunteer Division of the N.Y. Legal Aid Society furnishes legal services to the poor through the Society's Community Law Offices in Upper Manhattan, especially in Harlem and East Harlem. The Volunteer Division also assigns pro bono cases to Legal Aid Society volunteers in all the neighborhood offices throughout the City. DIRECTORY OF PRO BONO SERVICES, supra note 64, at 19-20.
Assume further that the three staff specialists each averaged 2,000 working hours annually. This makes 6,000 hours available to subscriber members of the group. Using the Marrero Committee’s minimum annual obligation of 20 hours per lawyer, this means that the 6,000 available hours might be distributed to up to 300 subscribing lawyers. These 300 lawyers might make equal dollar contributions to support the service group’s annual budget of $450,000, at a per lawyer cost of $1,500 for the year.

Moreover, in strict dollar or least-cost terms, this relatively low per-lawyer subscription price might discourage a number of large firms from opening their own pro bono departments. It may well be cheaper for the larger firms merely to encourage their partners and associates to join such off-shore groups, especially those affiliated with established legal services providers. Of course, some large firms may still choose to create in-firm groups because of the various advantages discussed above.

This illustration also invites certain refinements. A downward adjustment in the total yearly budget of the service group, for example, might increase the dollar appeal to a larger number of lawyers, including small-firm practitioners who have a special opportunity simply to contribute an annual $1,000 directly to N.Y. Legal Aid in lieu of either direct service to the poor or service group membership. If, for example, the budget for the group were lowered to $300,000 through salary and overhead reductions, while increasing the number of hardworking staff lawyers to four, 400 small-firm practitioners might then be tempted to subscribe at a relatively attractive annual per-lawyer cost of about $750.

This example also suggests still other scenarios that might significantly affect the current system for delivering legal services to the poor. While the scale and resources of established legal services agencies might be considerably increased by the Marrero proposal, through the establishment of affiliated service groups, other entities can also use the same idea.

Both bar associations and law schools may establish their own pro bono service groups too. Local bar associations may usefully establish very large groups with broad appeal to local lawyers. This may be especially important in suburban and upstate areas now served by only one or a very small number of legal services providers with relatively few staff lawyers servicing a large area. Modest annual subscription rates for solo and small-firm practitioners may be a realistic possibility given important economies of scale and different
annual subscription prices for lawyers with different incomes, professional experience or practice situations.\textsuperscript{83}

There is also an intriguing variation on the theme for the law schools. All law schools in New York State have existing clinical programs that, to different degrees, suffer from inadequate resources. In addition, there has been increasing student and faculty interest in programs requiring law students to render some form of public service prior to graduation. A few law schools, like Maryland, Tulane, Pennsylvania, Valparaiso and Touro, have already initiated their own versions of mandatory pro bono programs for law students.\textsuperscript{84}

A particular law school, like Hofstra for example, might establish its own mandatory pro bono service group. By appealing to its alumni and other local practitioners, Hofstra might raise a considerable subscription income from a large number of lawyers to support a sizeable legal services affiliate, staffed by full-time poverty lawyers and paralegals, and assisted by law students who may now discharge their own MPB duty, assuming Hofstra were to institute one, in an eminently practical way. In addition to continuing current programs that permit students to do clinical work for academic credit, other financially hard pressed law students might have new part-time employment opportunities with such a law school-affiliated service group. Of course, useful professional learning can be stimulated by money as well as by credits towards a law degree.

There is, finally, at least one other relevant application of the group service idea. In addition to law firms, established legal service agencies, bar associations and law schools establishing mandatory pro bono service groups, it is equally possible for individual practitioners to do likewise.

Recall the situation of solo or small-firm practitioner Smith.

\textsuperscript{83} The annual dues schedule for the ABA varies dependent upon the date a member was originally licensed to practice. 76 A.B.A.J. (Jan. 1990), at 107. The organized bar, of course, has a longstanding history of support for legal aid agencies and legal services programs. See \textsc{Private Bar Involvement Project Of The American Bar Association, The 1990 Directory Of Private Bar Involvement Programs} (May 1990); William J. Dean, \textit{Pro Bono Digest; Bar Association Programs}, N.Y.L.J., April 22, 1991, at 3.

Smith may be particularly hostile to the Marrero Committee Report, perhaps for very good reasons. Of course, the Marrero Committee itself expressly recognizes the need for modestly differential treatment of smaller-firm and solo practitioners who probably far outnumber their larger-firm brothers and sisters.  

The Committee Report, however, does not discuss the following “syndication” idea. Assume that Smith is a suburban solo practitioner who is underemployed, working fewer hours as a lawyer at lower fees than he would like. In these circumstances, Smith is likely to resent even a supposedly least-cost required contribution of $1,000. While he may have available time for low-income clients, he is unlikely to be enthusiastic about giving his professional skills away in light of his struggle to earn a living.

If Smith is imaginative and enterprising, however, he may realize that the Marrero Committee Report offers him an unprecedented opportunity to kill two professional birds with one creative stone. Smith might actually syndicate his services, for delivery to the poor, by availing himself of the very same group service option, but this time as a service provider, rather than merely as a subscribing and passive group member.

Suppose Smith announces that he intends to spend one-half of his yearly working time, or about 900 hours, providing legal services to poor clients who will pay him no fees. He invites other lawyers to subscribe to the Smith Pro Bono Service Group for a reasonable annual fee of, say, $500. Smith actually sells participation in his new poverty law enterprise to 44 other lawyers who are more than willing to delegate their mandatory pro bono duty to Smith at a relatively bargain price. At an annual low subscription of $500, other solo and small-firm practitioners ought to be interested in joining the Smith Service Group with 45 members including Smith himself.

In return, of course, Smith receives an annual income from his new poverty-law practice of $22,000 (44 members x $500). While this produces a very modest rate of about $25 per service hour delivered to poor clients, Smith may still be grateful for the opportunity to put a dollar foundation under his struggling practice, while he also continues to serve fee-paying clients. Solo Smith may even find that his professional life is enriched and that he can make at least a mod-

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85. See supra note 57. FINAL COMM. REP., supra note 1, at 800-01, is expressly “[m]indful of the importance of striking a fair balance between the interests of large firms and small practitioners . . . .”
est living while still doing some professional good. For ex-legal services attorneys and for minority practitioners in minority communities, this syndication idea may have an especially powerful appeal.

In sum, therefore, the Marrero Committee Report offers a plan that may have a significant impact on the current system for delivering legal services to the poor. While we cannot be sure how many law firm pro bono departments, and bar association and law school service groups, will emerge and in what combinations, we can confidently predict that some new entities or organizations will offer additional civil legal services to the poor. Similarly, while we cannot confidently predict that all established legal services agencies will grow significantly in scale, or that hundreds of solo practitioners will enter new poverty law specialities, it would be surprising if none of these developments occurred.

That does not mean, however, that such institutional changes will all be desirable. While the evaluation of some such changes in the delivery system will be postponed to a later section of this article, it is still appropriate to note an interesting range of questions. Will greater competition among an increased number of providers truly improve the quality and quantity of civil legal services for the poor? What new specialty patterns will emerge as the number of service providers multiplies? Will the number of ordinary service cases increase, or will most of the new service groups emphasize law reform or so-called impact litigation in class action form? Are there predictable economies or diseconomies of scale associated with both very large and very small service providers? Are there ethical problems in allowing subscribing individual practitioners to finance, and to potentially control, the delivery of civil legal services to poor clients through the new pro bono service groups?

Whatever the answers to these important evaluative questions, we can be confident of at least one relevant proposition. Largely because the Marrero Committee allows for the collective discharge of mandatory pro bono duties through a group alternative to actual service, its proposal may very well produce noteworthy changes in the way we currently deliver civil legal services to the poor.

F. Describing Mandatory Pro Bono as a Tax

However we may characterize the Marrero Committee proposal

86. See infra part III.F.
for mandatory pro bono, there can be little doubt that it amounts to a form of "regulatory tax." If a tax may be defined as a compulsory levy or exaction, regularly imposed by government without conditioning taxpayer liability on any specific benefit received, surely the MPB proposal qualifies. Such a tax characterization, moreover, makes important analytic contributions to the debate over mandatory pro bono. The use of concepts and critical standards drawn from the very suggestive literature of public finance not only affects important aspects of the great debate; it challenges more than a little conventional wisdom. In short, a tax characterization is not only honest and incapable, it makes noteworthy contributions to different sides of numerous important issues.

To be sure, a tax characterization does reinforce certain opposition arguments. First, the proposal imposes an apparently large threshold tax liability in both absolute and relative dollar terms. While mandatory pro bono proponents seek to minimize the burden as only a small percentage (about 1%-1.5%) of most lawyers' annual available working hours, it is nonetheless a yearly obligation that may initially be measured, for many, in thousands of dollars. Such an

87. For the fundamental characteristics of a tax, see Taxation, ENCYCLOPEDIA BRITANICA, 17 Macropaedia 1076, 1076-82 (15th ed. 1974); and ENCYCLOPEDIA OF ECONOMICS, supra note 36, at 913-19.

88. Opponents of the Marrero proposal and other mandatory pro bono programs have frequently used the tax characterization, but without extended tax-related analysis. The Marrero Committee Report itself notes that many lawyers opposing the Committee's proposal view it as "a special tax on the legal profession that is unfair, and perhaps unlawful, because the State places no comparable burden on other licensed professions." FINAL COMM. REP., supra note 1, at 781. While the Committee strongly disagrees with this view, a number of academic critics of mandatory pro bono programs have similarly argued that mandatory pro bono programs may amount to "nothing less than . . . an excise tax on the practice of the legal profession." Of course, the same tax effect is produced whether a lawyer's duty is discharged through actual service or through a cash substitute. John A. Humbach, Serving the Public Interest; An Overstated Objective, 65 A.B.A.J. 564, 566 (Apr. 1979); David L. Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U.L. REV. 735, 783 (1980); Roger C. Cramton, Mandatory Pro Bono, 19 HOFSTRA L. REV. 1113, 1130 (1991). Conversely, some supporters of mandatory pro bono programs have taken pains to reject the tax characterization, perhaps because of concern over the need for legislative enactment of a tax. See Torres & Stansky, supra note 11, at 1019-20.

89. For large-firm Jones, we should recall, the initial dollar cost of actual service was an annual $4,000 (20 hrs. foregone x $200 per billable hour). Even after joining a service group, Jones will still suffer an annual tax cost of some $2,500, though this per capita group subscription price may be obscured because Jones' law firm makes the tax payment on behalf of Jones. Small-firm or solo Smith may avoid such a high cost but may still be obligated for $1,000 annually. Though Smith, too, may be able to reduce this amount through a creative group compliance strategy, he is more likely than Jones to be conscious of the dollar
amount is much in excess of any professional fee that New York lawyers currently pay. The biennial registration fee for New York lawyers, for example, is now only $300 even though it was tripled in 1990.90

The Marrero Committee Report also proposes an apparently selective tax, assigning tax liability to the legal profession but to no other profession. Whether or not this is ultimately unfair, as is often charged, the MPB tax is clearly a levy imposed on a particular commodity (legal services) that is produced by a particular category of professional (lawyers). As a result, it rather comfortably fits conventional definitions of an excise tax and invites analysis in excise tax terms.91

Moreover, this MPB excise tax will affect different lawyers differently. It is simply not a uniform tax within the legal profession itself. Despite the nominally uniform burden of an annual 20 hours for all lawyers, this constant figure actually produces great variations in threshold cost consequences, not only between large- and small-firm practitioners but within each category as well.

Even within the same taxpayer category, for Marrero Committee Report purposes, large-firm Jones and large-firm Johnson may suffer very different initial tax burdens assuming that each uses the group service alternative to actual service. Different groups, with different service missions, staffing patterns, overhead costs and volunteer complements, may require very different per capita subscription prices. An apparently identical tax liability may be even more highly differentiated in effect within the population of smaller-firm lawyers. A $1,000 annual dollar contribution may be either a relatively large or relatively trivial amount depending on the economic success of particular solo or small-firm practices.

Obviously, an incredibly diverse and numerous legal profession is professionally situated in a very complex state environment that includes the largest city in the country and very different suburban and

90. Effective as of May 25, 1990, the biennial registration fee was increased from one hundred to three hundred dollars. N.Y. JUD. LAW § 468-a.4. (McKinney 1991). Initially, the registration fee was fifty dollars. 1981 N.Y. Laws 1446. The fee was subsequently doubled to one hundred dollars. 1985 N.Y. Laws 1800.

91. See JOHN F. DUE & ANN F. FRIEDLANDER, GOVERNMENT FINANCE: ECONOMICS OF THE PUBLIC SECTOR 374-403 (7th ed. 1981). Some critics of mandatory pro bono programs have characterized them as the equivalent of excise taxes because of their apparently selective characteristics. See Spencer, supra note 31, at 500.
upstate communities. As much as the Marrero Committee yearns for simplicity and uniformity of treatment, New York State's legal profession does not neatly divide between two simple categories of large-firm and small-firm lawyers.92

A related matter of considerable tax uncertainty also adds to the opposition arsenal.93 For a variety of reasons, including some previously noted, the MPB tax will have uncertain consequences for many taxpayer lawyers. Perhaps the most bedeviling uncertainty relates to the very complex phenomenon of tax shifting and regularly involves very high, if not impossible, information costs. The public finance literature frankly concedes extreme difficulties in conducting a persuasive "tax incidence" analysis in specific but problematic and changing market circumstances. Depending on competitive market conditions, lawyers taxed for the poor may or may not have the capacity to shift all or part of the tax cost forward to fee-paying clients, or backward to law firm employees and other so-called factors of lawyerly production.94 Uncertainty over who really bears the tax burden also interferes with efforts to judge the fairness of the program. It will be very difficult to conclusively characterize the Marrero Committee's tax proposal as either regressive or progressive so long as serious tax incidence questions persist.95

92. A twelve-person practice in a suburb of Syracuse may only weakly resemble the practice of the 47 firms in Manhattan with 100 or more lawyers. See "Distribution of New York State Law Firms by Size", supra note 57. Yet for Marrero Committee purposes, both these firms are classified as "large." Similarly, an eight-person firm specializing in intellectual property in Manhattan may have little in common with a three-person general practice in a largely rural area of Western New York State, yet both firms are classified as "small" for purposes of the Marrero Committee proposal. Nor does the Marrero Committee Report expressly consider a possibly large number of registered attorneys who earn their living in ways other than the conventional practice of law.

93. Adam Smith has been widely credited with a very suggestive effort to state systematically the principles that should govern a rational system of taxation. Among several canons discussed in The Wealth of Nations, he argued that "[f]he tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person." ENCYCLOPEDIA BRITANNICA, supra note 87, at 1078.

94. For an overview of the complexity in analyzing the incidence of commodity taxes, including excise taxes, see DUE & FRIEDLAENDER, supra note 91, at 374-403; RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 256-300 (3d ed., 1980). Surprisingly little of the literature on mandatory pro bono programs explicitly analyzes prospects for cost shifting. For very brief mention of the cost-incidence problem, see Shapiro, Humbach and Cramton, supra note 88.

95. Very difficult equity questions are also likely to emerge even if we are able to track shifted costs with some degree of confidence. Who is to say how much the same dollar tax reduces the welfare of different persons with different load-bearing capacities? What yard-
The tax characterization, however, is not simply a weapon in the arsenal of opponents of the proposal. It also serves, in various ways, to support a mandatory pro bono program. For example, both the seemingly high initial burden of the tax and its apparently unfair selective quality may both be minimized if most of a particular year's MPB tax is shifted forward to and dispersed among a numerous clientele. A lawyer who suffers an initial $1,000 cost in complying with the new program may barely notice if he is able to collect $100 from each of ten clients, at least some of whom may themselves have a re-shifting capacity.

There is also a long history of domestic regulation that selectively burdens some producers for the benefit of consumers or clients who might otherwise go underserviced or completely unserved. American governments, at all levels, have regulated public utilities and common carriers presumably to protect the public against the adverse effects of monopoly. The classic concern, of course, is that an unregulated monopoly will restrict output or curtail service to maximize price.96

Judge Richard Posner, among others, reminds us just how old such regulatory efforts are. In 1827, for example, an Illinois statute required that:

Every keeper of a ferry, toll bridge, or turnpike road . . . shall give constant and diligent attention to the same, from day light in the morning until dark in the evening of each day, and shall give passage to all public messengers and expresses; to all grand and petit jurors when going to and returning from court, without any fee or reward whatsoever.97

Judge Posner also notes a number of other cases in which governments have ordered private parties to produce and distribute important or merit goods at nonremunerative prices. Various forms of selective regulation have been intended to correct market underproduction.

96. STEPHEN BREYER, REGULATION AND ITS REFORM 15-17 (1982).
of such goods as railroad passenger service, domestic telegraph service, local airline service, certain news and public affairs broadcast programming, and liability insurance for high risk auto drivers. Even conceding that the Marrero Committee proposes a new kind of selective regulation of the legal profession to assure the provision of civil legal services to the underserved poor, this hardly qualifies as an unprecedented form of "taxation by regulation," despite rather obvious wealth redistribution or transfer effects.

A final important concept that might be called "taxpayer sovereignty" also illustrates the utility of certain tax policy analogies for those who argue that a mandatory pro bono program like the Marrero Committee proposal is relatively efficient in character. A typical taxpayer, of course, has little or no direct power to influence, let alone control, the use of that tax revenue which is actually exacted from him, her or it. Even a politically and economically powerful corporate taxpayer may have quite limited power to influence the expenditure of that tax revenue actually collected from its corporate treasury, even at more responsive local government levels.

Lawyer taxpayers, however, may have quite uncommon powers qua taxpayers under the Marrero Committee proposal. First, tax revenue, so to speak, in the form of either actual service or cash contributions, will not be collected and irrevocably controlled by any government entity unless we count grantees of the federal Legal Services Corporation. Rather, a lawyer's actual required service or a cash substitute, though earmarked for the civil legal needs of the poor, will either be contributed directly to eligible clients or directed to provider agencies or pro bono service groups without an intervening and arguably wasteful government presence.


99. Judge Posner notes that such regulation may be explained, not only in conventional monopoly control terms, but also as a way of performing "distributive and allocative chores usually associated with the taxing or financial branch of government." Id. at 22-23. In short, regulation that has predictable "cross-subsidy" or "internal subsidy" effects is functioning as a kind of tax:

[A service is provided that does not pay its way in the market. Someone must pay its way, however. Normally it is other customers of the firm rendering the service, who pay a price higher than the cost of serving them. Sometimes it is future generations of consumers . . . or the stockholders or creditors of the firm . . . [Cross- or internal subsidies] are also commonly found among public enterprises here and abroad, the structure of postal rates providing a conspicuous example.

Id. at 24
Most importantly, the lawyer taxpayer may directly control which eligible client, organization or service group receives and retains the use of her tax contribution. If the taxpayer is dissatisfied with a particular revenue use or provider agency, the taxpayer may divert the tax revenue in question to another eligible use. This most unusual degree of taxpayer sovereignty in turn may induce greater efficiencies in the operations of service providers. Of course, it may also lead individual lawyer “funders” to meddle inappropriately with the operations of certain service providers.

There is considerable analytic potential, therefore, in characterizing the Marrero Committee proposal as a tax program. While some critics have superficially embraced the tax characterization as a persuasive reason, of itself, to oppose mandatory pro bono, there is more to be said about the rich implications of this very suggestive classification. While tax programs may require a certain kind of enactment process, in our constitutional order, and special administrative arrangements, we have also developed a menu of tax policy standards to assist us in distinguishing more and less tolerable forms of taxation. It is just possible that the Marrero Committee proposal for

100. Adam Smith is widely respected for his succinct statement of tax policy standards. He proposed four very suggestive, if somewhat imprecise, “maxims” that he regarded as of such “evident justice and utility” as to commend them “to the attention of all nations.” Because of their continuing influence, it is appropriate to quote Smith’s maxims “with regard to taxes in general,” if only in abbreviated form:

I. [ability to pay/equality/uniformity] The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state.

II. [certainty/tax due process] The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer . . .

III. [convenience of payment] Every tax ought to be levied at the time, or in the manner in which it is most likely to be convenient for the contributor to pay it . . . [O]r, when he is most likely to have wherewithal to pay . . .

IV. [administrative waste/excess burden] Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the publick treasury of the state. A tax may either take out or keep out of the pockets of the people a great deal more than it brings into the publick treasury . . .

mandatory pro bono, despite its clear resemblance to an excise tax, is a more tolerable form of tax than its opponents regularly assume, with all too little informed analysis from a tax policy perspective.

III. EVALUATING THE MARRERO COMMITTEE PROPOSAL

A. The Conventional Opposition

There is considerable and determined opposition to the mandatory pro bono proposal of the Marrero Committee. At least fourteen state and local bar associations have expressed opposition, as well as numerous individual lawyers throughout the state. The opposition has combined a variety of policy arguments with more technical legal arguments, many of them of a constitutional kind. Though it is arguable that such legal arguments merely reflect various policy arguments in a more conventional or technical lawyer's vocabulary, it is appropriate to note those arguments, however briefly.

Opponents charge, with varying emphasis, that the Marrero Committee proposal amounts to unconstitutional involuntary servitude, that it is a taking of lawyer property without compensation, and that it contravenes lawyer entitlements to both due process and equal protection of the laws. Each of these four categories of legal argument is grounded, of course, on particular provisions of the Federal Constitution and parallel, if not identical, provisions of the New York State Constitution.

While "the bulk of scholarly opinion rejects such constitutional attacks," there are still two categories of legal argument that re-

101. NCBA to Wachtler: Reject Mandatory Pro Bono, 37 NASSAU LAW. 1 (No. 8, Oct. 1989). The Marrero Committee itself, of course, candidly concedes the widespread opposition expressed during its statewide hearings in the fall of 1989. "Among the opponents of the Committee's plan were the New York State Bar Association and the local bar associations from most of the major counties throughout the State." Even the one notable exception, the Association of the Bar of the City of New York, reserved comment on the particulars of the Committee's proposal while supporting the principle of mandatory pro bono services. FINAL COMM. REP., supra note 1, at 767; see also New York State Bar Association, Report of the Special Committee to Review the Proposed Plan for Mandatory Pro Bono Service (Oct. 16, 1989) (on file with the Hofstra University Law Library) [hereinafter N.Y. State Bar Rep.]; 1989 CIALS Hrgs., supra note 2, passim.

102. Wechsler, supra note 62, at 928-29. Unsurprisingly, the Marrero Report finds the constitutional arguments against mandatory pro bono "unpersuasive." See FINAL COMM. REP., supra note 1, at App. C, 857-61. For other extended analyses rejecting various constitutional attacks, see Rosenfeld, supra note 5, at 286-96; and Torres & Stansky, supra note 11, at
quire more serious attention. First, as noted later in this article, opponents have contended that the New York Court of Appeals currently lacks authority, under the New York State Constitution and applicable statutes, to implement the Marrero Committee’s MPB proposal simply by judicial rule without further enabling legislation.103

Though the Committee offers an extensive and technically detailed rebuttal to such criticism, it also ignores an important category of constitutional argument. Particularly because of recent opinions from both the U.S. Supreme Court and the New York Court of Appeals, it is arguable that the Marrero Committee plan implicates, if it does not contravene, certain protected First Amendment speech and associational rights. Had the Marrero Committee merely proposed that lawyers render actual civil legal service to the poor, without the group service or cash compliance options, there would be an especially serious case for the violation of First Amendment rights.104

Assume, for example, that a particular lawyer has the following set of deep and connected convictions about public programs designed to help the poor. First, this principled lawyer is convinced that some forms of public assistance to the poor are likely to discourage recipient self-help and to create a disabling and life-diminishing kind of long-term dependency on government “hand-outs.”105 Second, this

1015-22. For commentary much more sympathetic to these constitutional attacks, see John C. Scully, Mandatory Pro Bono: An Attack on the Constitution, 19 HOFSTRA L. REV. 1229, 1244-61 (1991). Virtually all commentators, however, are inclined to reject the formal legal argument that mandatory pro bono will amount to unconstitutional involuntary servitude, though some still argue that mandatory pro bono still compromises the spirit of the Thirteenth Amendment. Id. at 31-32; Shapiro, supra note 88, at 777; Bretz, supra note 12, at 628-29.

103. See infra part IV.B.

104. App. C to the FINAL COMM. REP., supra note 1, at 857, ostensibly prepared to discuss a variety of constitutional and statutory issues in greater detail than the Report itself, mysteriously omits all discussion of First Amendment problems, despite well-known law journal commentary on such problems. For a succinct analysis of the First Amendment difficulties associated with at least some mandatory pro bono programs, see Shapiro, supra note 88, at 763-67; see also Scully, supra note 102, at 1244-54; Cramton, supra note 88, at 1129-30.

105. “The defects of the current welfare system are well-known to most economists. Transfer programs aiding the able-bodied poor discourage work and encourage illegitimacy and family dissolution. They provide too little help to prevent families from falling into destitution but too few incentives to spur breadwinners to become self-sufficient.” Gary Burtless, The Economist’s Lament: Public Assistance in America, 4 J. ECON. PERSP. 57, (Wint. 1990). See also, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 442-43 (3d ed. 1986). Much of this indictment has impressed scholars and commentators of both so-called conservative and liberal/left orientations. See CHARLES MURRAY, LOSING GROUND 16-23, 150-53, 296 and passim (1984); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE
same lawyer believes that public assistance, if it must be offered at all to the poor, should be offered only in cash form, rather than in kind. It is, she believes, an inefficient and unwise policy for government to choose certain kinds and quantities of food, housing and medical care for welfare recipients who may have very different preferences.  

Third, and perhaps most important, our principled lawyer particularly objects to being forced to provide civil legal services to the poor without compensation. Such a requirement not only amounts to an unfortunate subsidy-in-kind, but will directly force our objecting lawyer to use legal instrumentalities, especially the courts, for offensive redistributive purposes on behalf of poor clients. Even a duty to represent poor clients in routine civil actions against government agencies, for example, will force our principled lawyer to foster a form of public policy that effectively redistributes wealth to the poor. If such redistributive programs are ever justifiable, they should be created and enforced, he believes, only through the political process and not through the courts.

Whether or not our principled lawyer is right or wrong is irrelevant for First Amendment purposes. What matters is that, through a strict mandatory service policy, he or she is being forced by government not just to indirectly support but to actively foster or defend policies and programs that might fairly be regarded as political or ideological in character. While this conclusion is more compelling where actual service to the poor is required, there is also arguably a "fostering" or "disseminating" of objectionable policy even where dollar contributions are allowed as a substitute for service-in-kind.

FUNCTIONS OF PUBLIC WELFARE 343 (1971).

106. Economists have also been critical of aid given to low-income persons in the form of in-kind assistance. Such assistance is widely regarded as an inefficient compromise of consumer sovereignty. See Burtless, supra note 105, at 66-67.

107. The sharp opposition of some political conservatives to some legal services programs has had much to do with their aversion to judicially engineered redistributions of "societal advantages and disadvantages, penalties and rewards, rights and resources ... [through] the imaginative use of ever-expanding constitutional concepts ... to redress an alleged imbalance created by the political processes." Spiro T. Agnew, What's Wrong with the Legal Services Program, 58 A.B.A.J. 930-31 (1972). For a more extended and more studied opposition to the use of judicial power for redistributive purposes, see Ralph K. Winter, Jr., Poverty, Economic Equality, and The Equal Protection Clause, 1972 SUP. CT. REV. 41.

108. In Wooley v. Maynard, 430 U.S. 705 (1977), the Supreme Court upheld the First Amendment objections of a New Hampshire couple who objected to the New Hampshire motto "Live Free or Die" on their license plates as repugnant to their moral, religious and political beliefs. Id. at 713. The State of New Hampshire argued that the motto "facilitates
The First Amendment, of course, does a great deal more than protect the right to speak freely. Most relevant to the Marrero Committee proposal, it also protects “the right to associate with others to promote certain causes and ideas, and to be free from coerced association with causes, ideas, and conduct espoused or engaged in by others.”

Two very recent opinions are especially noteworthy supplements to a growing and complex body of relevant First Amendment doctrine. In Keller v. State Bar of California, certain plaintiff members of the “integrated” State Bar of California sued to enjoin the State Bar from using mandatory membership dues “to finance certain ideological or political activities to which they were opposed.” Since bar association membership was a condition of practicing law in California, plaintiffs complained that they were being compelled to support legislative lobbying for bills providing for objectionable initiatives like the creation of an unlimited right of action against air polluters. They also objected to the bar association’s filing of amicus briefs on issues like the power of a workers’ compensation board to discipline attorneys, and the constitutionality of a crime victim’s bill of rights.

While conceding certain analytic difficulties, a unanimous U.S.

the identification of passenger vehicles,” and “promotes appreciation of history, individualism, and state pride.” Id. at 716. Nonetheless, the Court held that the State “may [not] constitutionally require an individual to participate in the dissemination of an ideological message . . . .” Id. at 713. The Court crisply concluded that the “First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.” Id. at 715. Of course, the justification for a mandatory pro bono program may be considerably stronger. It is also noteworthy that the Marrero Committee proposal provides lawyers with a number of compliance alternatives that will not directly involve them in the “fostering” of morally or ideologically repugnant redistributive policies.

109. Shapiro, supra note 88, at 763. Professor Shapiro argues that “a system of taxing lawyers in order to pay for representation of the indigent or for other public service work is not free from first amendment difficulty.” Id. at 764. He also suggests that mandatory pro bono programs may be saved from First Amendment invalidation by leaving “room for the conscientious objector, on a proper showing of the objection, to obtain a proportionate reduction of the tax or an exemption from a particular assignment.” Id. at 766-67.


111. 110 S. Ct. 2228, 2231 (1990).

112. Id. at 2231-32 n.2.
Supreme Court suggestively held that:

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.\textsuperscript{113}

Just as recently, in 1990, the New York Court of Appeals addressed the First Amendment implications of a state authorized exaction of money, with similar “ideological coloration.” In \textit{Cahill v. Public Service Commission}, plaintiffs challenged a policy of the New York Public Service Commission (PSC) authorizing public utilities to pass along to their customers, or ratepayers, part of the cost of certain objectionable charitable contributions.\textsuperscript{114} The lead plaintiff objected, on First Amendment grounds, to:

forced funding, through these publicly regulated corporate conduits, (1) of organizations engaged in activities and causes contrary to his political or personal beliefs; (2) of religious institutions that expound beliefs inconsistent with his own; and (3) of organizations that promote the right to abortion, to which he is opposed on moral and religious grounds.\textsuperscript{115}

After reviewing almost fifty years of a complex and nuanced “precedential array,” and despite the small amounts directly extracted from individuals, the Court held “that the ratepayers are entitled to protection against forced financial support for causes and messages personally distasteful to them, because that would render those individuals faithless to their own beliefs.”\textsuperscript{116} Indeed, “the constitutional

\textsuperscript{113} Id. at 2237; \textit{see also} Lehnert v. Ferris Faculty Ass’n, 111 S. Ct. 1950 (1991).
\textsuperscript{115} Id. at 134-35.
\textsuperscript{116} Id. at 136. As the Court of Appeals understands it, “the essence of the First Amendment impingement” is a mix of objective and subjective factors. While the amount of money exacted from each ratepayer is small, “[i]t is enough that the extracted payments im-
canopy" of the First Amendment is especially needed by objecting ratepayers because they "are powerless against governmentally regulated monopolies and have no place else to seek indispensable public utilities services."\(^{117}\)

While even such serious burdens upon the First Amendment freedom of ratepayers might be justified, nothing less than a compelling state interest will allow a utility’s charitable contributions policy to pass constitutional muster in this case.\(^{118}\) As a result, the Court of Appeals concluded that "the utilities have not fulfilled their burden of justification for imposing on their ratepayers, rather than on their shareholders, the bill for their selected philanthropy."\(^{119}\) Finally, the Court rejected the utilities’ argument that their charitable giving programs are little or no different from any government program that some taxpayers may find ideologically offensive.\(^{120}\)

While this is not the occasion for a detailed analysis of either Keller or Cahill, both opinions contain language and concepts germane to a critical analysis of the First Amendment implications of the Marrero Committee proposal. It is particularly noteworthy, for example, that a mere money exaction, in nominal individual amounts, suffices for the conclusion that First Amendment values have been contravened. The degree of First Amendment intrusion is arguably even greater where a lawyer is actually required to service a poor client.\(^{121}\)

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\(^{117}\) Id. The absence of options for protesting ratepayers makes an even stronger case for a First Amendment violation than a case where nonunion employees are compelled to contribute to a union that spends money advancing ideological or political views. Id.

\(^{118}\) Id. at 137

\(^{119}\) Id. at 137-38.

\(^{120}\) Id. at 138.

\(^{121}\) Some cases invite a relevant First Amendment distinction between compelling a lawyer to actually render service to a client that is somehow ideologically or politically offensive to that lawyer, and merely making a required money contribution that is pooled and expended by a group. See Cantor, supra note 110, at 19. Nonetheless, a lawsuit has recently been filed challenging the IOLTA program in Massachusetts as violative of the First Amendment rights of both lawyers and their clients. The plaintiffs argue that “[i]taking the interest generated by the clients’ funds held in IOLTA trust accounts and distributing that interest to the Recipient Organizations forces the clients to support financially organizations to which the client may object for political or ideological reasons . . . .” Joseph Calve, Is IOLTA Unconstitutional; WLF Hits Program Funding Indigent Legal Aid, LEGAL TIMES, May 27, 1991, at 2. Of course, the classic call to constitutional arms comes from no less than Thomas Jefferson: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Abood v. Detroit Bd. of Educ., 431 U.S. 209,
At the same time, there are at least two factors that may distinguish the Marrero Committee proposal from these very recent cases. First, the mandatory pro bono requirement, or tax as I have characterized it, is to be imposed directly by government (judicial) agencies rather than by a governmentally authorized private entity like a public utility or a bar association. This allows defenders of the Marrero Committee proposal to invoke a well established "government speech" exception recognized in both Keller and Cahill. While the First Amendment generally prohibits government from compelling citizens "to express or even associate with ideas offensive to them, there can be no doubt that the government may, through general taxes or special levies, force citizens to pay for projects and causes that are abhorrent to their beliefs."\(^{122}\)

The case for consistency between the Marrero Committee proposal and the First Amendment will be all the stronger, however, if the N.Y. State Legislature expressly initiates the mandatory pro bono program instead of, as is currently planned, the state judiciary under the leadership of the Chief Judge of the Court of Appeals. It is arguable that the government speech exception, allowing governments to constitutionally exercise ideologically objectionable taxing powers, is justified only where the government "taxing" agency is a representative or politically accountable body.\(^{123}\)

Second, though less clearly, the kind and degree of coercion may

\(^{234-35}\) (1977).

122. Jefferson to the contrary, see Cahill, 556 N.E.2d at 139 (Titone, J., concurring). The majority in Cahill agrees with the government speech exception and distinguishes direct and delegated government compulsion:

To be sure, the government may collect and spread benefits—even ones highly offensive to some citizens—through the entire tax-paying society. But this cannot form a constitutional predicate for the government to go the next gigantic step and delegate this unique power to publicly regulated enterprises, especially corporate utility monopolies, and to allow them to extract across-the-board ratepayer subsidies.

Id. at 138.

In the Keller case, the U.S. Supreme Court has also apparently accepted the "so-called 'government speech' doctrine," 110 S. Ct. at 2234, while refusing to characterize the State Bar of California as a governmental agency for First Amendment purposes. Id. at 2234-36. Of course, there might be a considerable volume of litigation generated if governments were vulnerable to constitutional challenge every time they used tax money to promote policies or causes offensive to some citizen. See Laurence H. Tribe, American Constitutional Law § 12-4, at 807-08 (2d ed. 1988).

123. For Judge Titone, concurring in Cahill, 556 N.E.2d at 847, the distinction is dispositive. See also Abood, 431 U.S. at 259 n.13 (Powell, J., concurring); Keller, 110 S. Ct. at 2234.
also count in characterizing the Marrero Committee proposal as consistent with First Amendment values. Lawyers, taxed for the benefit of the poor under the proposal, will have both a range of compliance options and unusual powers to control the use of any “tax revenue” exacted from them, unlike either the dues-paying lawyers in Keller or the ratepayers in Cahill.\textsuperscript{124} An anti-abortion lawyer, for example, may offer legal services to a shelter for pregnant low-income females refusing abortion, as a way of discharging his mandatory pro bono obligation. He also has an opportunity, under the Marrero Committee proposal, to distance himself from any litigation or involvement with any legal services enterprise that will compromise his deeply held anti-abortion principles. The very permissive MPB proposal allows an extensive menu of compliance alternatives for even the most ideological lawyers among us, and a further opportunity to change a troubling compliance choice more than once.\textsuperscript{125}

While legal argumentation may eventually influence if not decide the fate of the Marrero Committee proposal, there is a higher analytic priority, for purposes of this article, if we are to understand the substantial opposition to this plan for mandatory pro bono. Despite the inclination of many opponents to argue against mandatory pro bono in rather technical constitutional terms, the truly important arguments are more accurately characterized as policy arguments.\textsuperscript{126}

Though there are risks in reducing complex and numerous opposition arguments to a summary catalog, the effort does identify a number of important questions that must be engaged in any serious

\textsuperscript{124} See supra text accompanying note 117.

\textsuperscript{125} For a brief discussion of the “taxpayer sovereignty” generated by the wide-ranging ability of lawyers to choose their method of mandatory pro bono compliance, see supra text following note 99. Despite the number of discretionary compliance options under the Marrero proposal, however, there is still cause for First Amendment concerns. Though the Marrero plan incorporates a pragmatic and perhaps “saving” flexibility, it also reflects a clear central principle or irreducible core policy commitment that some lawyers may regard as an offensive intrusion on their freedom of professional choice if not conscience. The poor must be provided with more civil legal services, either directly or indirectly. As we shall see in a following part of this Article, infra text accompanying notes 357-86, it is entirely possible that some lawyers may object as a matter of principle to what is widely but mistakenly regarded as consensus professional support for expanding the amount of free civil legal services for the poor.

\textsuperscript{126} Professor David Shapiro has suggested that at least some of the constitutional issues raised by a service requirement selectively imposed on the legal profession, particularly under the Fifth and Fourteenth Amendments, amount “in essence [to] a question of policy raised to a higher power.” Shapiro, supra note 88, at 783. Similarly, Professor Cramton believes that “the policy issues are likely to be determinative” in the debate over the Marrero Committee’s proposal for a mandatory pro bono program. Cramton, supra note 88, at 1126.
critical effort to evaluate the Marrero Committee proposal. In no particular order of priority, opponents frequently argue that the Marrero Committee plan is:

1) **unduly burdensome**, particularly for solo and small-firm practitioners, specialists with little poverty law expertise, part-time and government lawyers, especially part-time or underemployed female and minority practitioners, and lawyers already servicing the poor;\(^{127}\)

2) **wasteful** in several different ways, because some eligible clients are "unworthy" clients (e.g. tenants facing eviction who spend their rent money on something else, clients who lie or misrepresent their cases, etc.); and because the cases of even many worthy clients may require $500 blocks of lawyer time to solve $50 problems;\(^{128}\)

3) an **unproductive** strategy that will only modestly in-

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127. The Marrero Committee itself is sensitive to the special difficulties that some solo, small-firm and highly specialized lawyers will have in complying with an actual service requirement. It, therefore, offers lawyers in firms of fewer than ten lawyers a "monetary contribution option" in lieu of service. "For these attorneys, as well as for government, legal services and corporate attorneys, more flexible options should be available to permit compliance, in whole or in part, by way of options other than personal legal services." Final Comm. Rep., supra note 1, at 799. The Committee, however, opposes exempting government, corporate, and public interest organization attorneys from the mandatory pro bono program despite "some legitimate concerns." Id. at 785-89. The Committee does not mention the arguably special circumstances of some minority and female practitioners. For concern over "minority attorneys...[whose] practices are generally overloaded with clients who can only afford to pay small fees..." see testimony of Hon. Kevin M. Dillon, Erie County District Attorney, in 1989 CIALS Hrgs., supra note 2, at 146, 148. For concern over female lawyers with burdensome family responsibilities, who may work part-time for modest compensation, see testimony of Linda J. Nenni, President, Western N.Y. Chapter, Women's Bar Ass'n of the State of New York, id. at 187.

128. Professor John Humbach, with reference to proposals for actual mandatory service (with no cash buy-out) made during the late '70s, has succinctly asked: "Why cannot the law's protection [of the poor] correspond fully to its promise? The answer [is to be found in most lawyers' sense of] priorities. Nobody wants to devote $500 blocks of lawyers' time to $15 problems." Humbach, supra note 88, at 564. Moreover, "[a]n attorney who is assigned a case having no merit, a trivial matter, or a matter which wastes a great deal of time such as waiting in court, will sour the attorney on pro bono cases." Preliminary Report of the Erie County Bar Ass'n Voluntary Pro Bono Task Force, 1989 CIALS Hrgs., supra note 2, at 125, 141.
crease the amount of civil legal services, because many lawyers already do plenty of pro bono work, because many will evade a mandatory requirement, and because some who do serve, as required, will render only grudging and marginally competent services; even assuming impressive contributions from the bar, the extent of the unmet need is so enormous that mandatory pro bono will make no more than the slightest dent in the problem;¹²⁹

4) unfairly selective, first because only lawyers, and no other professionals, are required to serve the poor; and because many solo and small-firm practitioners will be taxed regressively in comparison with their larger-firm colleagues;¹³⁰

5) unnecessary, given the notable increases in voluntary pro bono programs over the last decade, and because these programs can do even more in the future to serve the poor;¹³¹

¹²⁹ A telephone survey of Erie County, N.Y. lawyers, conducted by the county bar association, indicated that, "using the definition . . . of pro bono service [in the Marrero Committee Report], 72 percent of the lawyers in Erie County perform pro bono legal work. Of the lawyers contacted in the survey who say they do pro bono legal work, over three-quarters perform 36 hours or more per year." Testimony of Peter J. Brevorka, President of the Erie County Bar Ass'n, 1989 CIALS Hrgs., supra note 2, at 119, 120-121. President Brevorka is also concerned that some lawyers, in a mandatory program, would participate only "grudgingly" or "half-heartedly," while others would be "inexperienced and untrained . . . in complex areas of poverty law." Id. at 121-22. Some academic commentators are similarly concerned about the practical efficacy of mandatory pro bono programs given the "massive shortfall" in civil legal services for the poor. See Humbach, supra note 88, at 564; Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 TEX. L. REV. 689, 700-01 (1981).

¹³⁰ The charge that the Marrero program is unfairly selective in its burdens is perhaps the single most frequently expressed criticism. It is noted in virtually every law review article on mandatory pro bono cited in this Article. See, e.g. Humbach, supra note 88, at 566; Rhode, supra note 129, at 700. See also 1989 CIALS Hrgs., supra note 2, passim.

¹³¹ The Marrero Committee discovered, during its fall 1989 public hearings, that "almost uniformly bar associations across the State concluded that any contribution by lawyers to relieve the problem should be strictly voluntary." In fact, many bar groups proposed alternative plans, "all of which rely on raising lawyers' contribution of voluntary pro bono services to unprecedented heights." FINAL COMM. REP., supra note 1, at 822.
6) administratively cumbersome and costly, because of various definitional problems, the need to make hardship exceptions, and the risk of widespread evasions of duty;\textsuperscript{132}

7) ethically suspect, primarily because of the offensive group service and buy-out compliance options, which permit wealthier lawyers to buy their way out of a draft;\textsuperscript{133} and

8) difficult to implement, because the judiciary lacks current implementation authority, and because the legislature will be reluctant to enact the proposal.\textsuperscript{134}

Whatever the strengths and weaknesses of such arguments, even this summary list suggests numerous difficulties in evaluating the Marrero Committee proposal. While most efforts at MPB program evaluation have proceeded in conventional terms, it may also be fruitful to incorporate, into the following critical analysis, certain less conventional concepts and analytic strategies drawn from disciplines like economics and public finance.

B. Is Mandatory Pro Bono Needed?: A Demand-Side Analysis

The “need” for a mandatory pro bono program is obviously a function of two variable and complex factors: the demand for additional civil legal services by the poor; and the supply of resources available to meet that demand. The greater the disparity or mismatch

\textsuperscript{132} The Marrero Committee prefers an administrative and enforcement mechanism that will be “as simple and familiar as possible.” It “is well aware . . . that the practical difficulties of administration and enforcement of a pro bono services requirement are among the primary sources of objection to its imposition . . . .” Id. at 820.

\textsuperscript{133} Id. at 849 (dissenting statement of Sol Neil Corbin). Similarly, at least one judge of the New York Court of Appeals has declared that he is “troubled about the limited buy-out provision in the Marrero Report, because that seems a throwback to the notorious Civil War draft avoidance device . . . .” Joseph W. Bellacosa, Obligatory Pro Bono Publico Legal Services: Mandatory or Voluntary? Distinction Without a Difference?, 19 Hofstra L. Rev. 745, 749 (1991). Nonetheless, the Committee responds sharply, if not impatiently, to those who would oppose “the monetary and group delivery options . . . on what were termed moral grounds.” Final Comm. Rep., supra note 1, at 802-04.

\textsuperscript{134} Scully, supra note 102, at 1239-44. The Committee concedes, in wonderfully succinct understatement, that legislative implementation of its mandatory pro bono proposal would be “cumbersome.” Final Comm. Rep., supra note 1, at 814-15.
between a larger amount of service demand and a more limited supply of resources available to meet that demand, the more compelling the scarcity justification for an arguably burdensome mandatory pro bono program becomes. Because the burdens associated with such a program may vary widely within a very diverse profession, and because justifying a mandatory program is both relevant to the disposition of various constitutional issues and a practical key to program enactment, it is especially important for proponents to make the case for overwhelming need in scarcity terms.

The Marrero Committee attempts to do just that by confidently proclaiming a "crisis of unmet legal needs":

The scope and dimension of the crisis of poverty and the gap between legal needs and legal services associated with them are matters of common experience and are confirmed by information, studies, documentation and statistical evidence that put the size and importance of the crisis beyond reasonable doubt. (Rep. at 15.)

Despite the controversy over the proposal, the Committee "found almost universal acknowledgement, particularly among bar associations, . . . that a significant gap exists between the [civil legal] needs of the poor . . . and the availability of lawyers to address the need." (Rep. at 766.)

The Committee is also well aware that some critics of its mandatory plan disagree with such "crisis" conclusions. At least one of its own members, Sol Neil Corbin, forcefully argues in dissent that "although there is some empirical evidence that the poor require more free legal services than they now receive, there is inadequate support for the Committee's conclusion that a 'crisis' exists." (Rep. at 848.) Indeed, a former President of the Legal Services Corporation has recently argued that the problem of "unmet needs" has been exaggerated by some local legal services programs, largely because of misplaced service priorities.135

135. Oversight Hearing on Legal Services Corp.; Hearing Before the Subcomm. on Admin. Law & Gov't Relations of the House Judiciary Comm., 101st Cong., 1st Sess. 53, 57-60 (1989) [hereinafter 1989 Oversight Hrg.] (statement of Terrance J. Wear, Pres., LSC). For still another sceptical assessment of the "crisis of unmet civil legal needs," see Scully, supra note 102, at 1233-39. Questions about needs estimates and studies have also been raised by others less seemingly committed to so-called conservative perspectives and more sympathetic to legal services programs. While the Legal Services Corporation itself concluded in 1979, for example, that the low-income need for legal services "far exceeds the capacity with existing resources of the LSC and non-LSC programs," the LSC also conceded that available needs surveys still had a number of weaknesses and technical limitations. Legal Services Corp.:
The Marrero Committee, however, defends its conclusions about extreme scarcity with both generalized characterizations and more systematically collected data. It briefly begins on the demand-side of the need calculus by reminding us that legal services are especially significant to the poor who "must make legal claims to get basic goods and services that other people [of means] can obtain more readily." (Rep. at 771-72.) It also reflects on the varied conditions of low-income life that all too often include homelessness, domestic violence, hunger, disease, crime, and public dependency. These distress conditions are both visible as "street facts" to even casual observers and confirmed by demographic data that show a substantial rise in poverty levels in New York State between 1979 and 1987. (Rep. at 772-73.)

The Committee further notes that this increase in poverty is synergistically related to newer problems like AIDS, the use of crack-cocaine, and widespread homelessness. Very briefly, the Committee Report describes both a recent study of the New York City Housing Court, and the 1989 New York Legal Needs Study prepared for the New York State Bar Association.136 In two paragraphs, the Marrero Committee distills certain essential findings from the N.Y. Legal Needs Study, which is over two hundred pages long in unpublished draft form:

[D]uring the study year the low income households interviewed reported having experienced, on average, 2.37 non-criminal legal problems per household for which they had no legal help.

The legal problems . . . reported most frequently by percentage of respondents included: housing—34%; public benefits—22%; health care—15%; consumer—15%; discrimination—11%; family—8%. (Rep. at 773-74.)

The Marrero Committee was particularly impressed by the Legal Needs Study conclusion that "at best no more than 14% of the need for civil legal services for the poor was being met with all available resources." (Rep. at 774.)

While the Committee Report incorporates the N.Y. Legal Needs Study by reference, it still treats the issue of rising and unsatisfied low-income demand for civil legal services all too summarily and

136. FINAL COMM. REP., supra note 1, at 772-74. See supra note 28.
generally. In fact, one critic of the Marrero Committee proposal, John Scully of the Washington Legal Foundation, charges that the Report relies upon questionable assumptions of demand-related fact. Scully criticizes the lack of “hard evidence . . . to support the Committee’s view that poverty and the distress of the poor are increasing.” In his view, the Marrero Committee relies on “little more than . . . rhetorical flourish” to support its conclusion of mounting low-income distress.\footnote{137. Scully, supra note 102, at 1234. The conclusion that “the incidence of poverty in the United States has declined markedly over the years,” is compatible with the observation that poverty is still significant in American life, especially for the impoverished. See Fosner, supra note 105, at 438-39.}

Though this charge is unfair to the Committee, it does serve as an occasion to note a rare deficiency in the writing of the Marrero Committee’s Report. While the Committee was doubtless concerned that its Report be kept to an accessible length, it compromised an important persuasive opportunity, apparently on the mistaken assumption that many lawyers are already familiar with the compelling facts of low-income life or have easy access to the N.Y. Legal Needs Study. The Committee lost a precious opportunity to offer more vivid

\footnote{For a description of how the federal government measures poverty, with references to changing methodology over the years, see Staff of House Comm. on Ways and Means, 102d Cong., 1st Sess., Overview of Entitlement Programs; 1991 Green Book 1132-33 (Comm. Print 1991) [hereinafter 1991 Green Book]. The 1991 Green Book describes trends in the overall poverty rate, though it it is careful to note that the 1988 and 1989 income and poverty data may not be comparable to earlier data “because of changes in the methods used by the Census Bureau to process survey results.” Id. at 1133. Nationwide, for the time period 1959-89, the overall poverty rate for individuals fell from a late 1950s high of 22 percent, representing 39.5 million poor persons. The poverty rate declined dramatically and steadily between 1959 and 1969 to 12.1 percent:

As a result of a sluggish economy, the rate increased slightly to 12.5 percent by 1971. In 1972 and 1973, however, it began to decrease again. The lowest rate over the entire 24-year period occurred in 1973, when the poverty rate was 11.1 percent. At that time roughly 23 million people were poor, 42 percent less than were poor in 1959.

The poverty rate increased by 1975 to 12.3 percent and then oscillated around 11.5 percent through 1979. After 1978, however, the poverty rate rose steadily reaching 15.2 percent in 1983. In 1989, the last year for which data are available, the poverty rate was 12.8 percent and 31.5 million people were poor. Id. at 1135.

At the same time, even if nationwide poverty has declined markedly over the longer term, by federal standards, a more important question exists. Has the decline in poverty increased access of the previously poor to fee-charging lawyers? There is no evidence that this has occurred; in fact, there is abundant anecdotal evidence to the contrary. Of course, a key relationship is the one between the rate of income improvement of the once poor and the rate of increase in the cost of hiring fee-charging lawyers.}
and compelling detail about the special crisis of New York City's poor in particular.

Certain relevant information is well worth recounting in greater detail, even for lawyers who live and work in New York City, and especially for those more removed from the distinctive conditions of urban poverty. A number of interacting social and economic trends are related to high and growing low-income demands for civil legal services. Certain demographic changes, receding local economies, reductions in government aid to the poor, specialized and complex systems for the administration of low-income entitlements, and new legal developments are all factors generating low-income demand for civil legal services, especially in synergy with one another. Numerous studies, in addition to the N.Y. Legal Needs Study, in effect predict a growing number of legal problems for changing low-income populations, often living in crisis densities and increasingly vulnerable to new kinds of extreme social pathologies.138

The 1989 N.Y. Legal Needs Study ("Needs Study"), assuming that it is actually read, offers very suggestive detail about poverty population increases throughout New York State. Those who doubt the actual and potential demand for legal services would do well to focus on the following estimate. Based on 1988 Census Bureau data, the Needs Study reports that:

2,578,000 persons or 14.6% of New York State's total population of 17.7 million lived below 100% of poverty in 1987. In absolute

138. The founding and early development of legal aid organizations in the late 19th and early 20th century, in large cities like New York and Chicago, were related to:
the rapid social and economic changes that transfigured the whole tenor and complexion of American life. Large numbers of immigrants, finding that the free lands suitable for agriculture were largely appropriated, remained in the cities and swelled the fast-growing ranks of the wage earners . . . . In 1875 New York became a city of a million inhabitants, and it is not a mere coincidence that the first legal-aid organization came into being in that city in 1876.

RIGINALD HEBER SMITH & JOHN S. BRADWAY, GROWTH OF LEGAL-AID WORK IN THE UNITED STATES 98-99 (1936).

For sources to complement the N.Y. Legal Needs Study, supra note 28, specifying various relevant poverty conditions and trends nationally, and especially in New York City, see ALAN W. HOUSEMAN & ARLOC SHERMAN, TRENDS AMONG THE POOR (Nat'l Leg. Aid & Defender Ass'n 1989); WILLIAM O'HARE ET AL., REAL LIFE POVERTY IN AMERICA (A Center on Budget and Policy Priorities and Families USA Foundation Report 1990); TERRY J. ROSENBERG, POVERTY IN NEW YORK CITY, 1985-1988: THE CRISIS CONTINUES (Comm. Service Soc'y of N.Y., 1989); N.Y. CITY DEPT. OF CITY PLANNING, ANNUAL REPORT ON SOCIAL INDICATORS (1990); CITY OF NEW YORK, THE MAYOR'S MANAGEMENT REPORT (1990); and especially the invaluable 1991 GREEN BOOK, supra note 137.
terms, 279,078 more persons were living below 100% of the poverty level than in 1979, or an increase of 12% in the number of people in poverty. . . . It can [further] be estimated that approximately 3.5 million people in New York State lived below 125% of poverty in 1987, an increase since 1979 of approximately 13% or 400,000 individuals. (Needs Study at 12.)

Quite predictably, the New York City data is even more striking. Some sixty percent of the state’s poor live in the City. Based on recent data, the number of city residents living below 100% of the poverty line increased from 1.4 million in 1979 to 1.7 million in 1987. The City’s poverty population, by this measure, increased from 20.2% to 23.5% of New York City’s total population. The same data also show that over two million residents of New York City had incomes below 125% of the recognized poverty level. (Needs Study at 14.)

While such data is typically consigned to footnotes or largely omitted, as in the Marrero Committee Report, the absolute numbers especially translate into an impressive, if not overwhelming, image of concentrated human misery. Almost one out of four residents of New York City lives in a household with an annual income no higher than subsistence levels. (Needs Study at 14.) It is also important that the total poverty population includes a very large and apparently growing number of children and persons of color, increasingly residing in households headed by unemployed females. Though it is fashionable to debate where the poverty line should be drawn, there can be little doubt that millions of persons statewide exist in conditions of both quiet and unquiet desperation.

Even more serious a portent of the future is that of the 1.7 million living in poverty [in New York City], 700,000 are children. This represents a dramatic and unprecedented growth of nearly 150,000 children in less than a decade. This fact, combined with the well-established failure of the city’s public education system to equip poor children to meet the demands of the workforce for the ‘90s, means that further increases in numbers of impoverished youngsters spell disaster for all of us.

Rosenberg, supra note 138, at ix-x. Poverty differentials among racial and ethnic groups in New York City especially increased during the 1980s. “Throughout the late 1980s, the poverty population of New York City has been predominantly a minority population. By 1987, 77.8 percent of the City’s poor were either black or Hispanic.” Id. at 5.

For various problems in measuring poverty and setting poverty-line standards, see O’Hare, supra note 138, at 5-15. They include out-of-date data, geographic cost variations, age variations, cost inflation, the relevance of asset values, different measures of poverty using before-tax and after-tax income, and, everyone’s favorite, the debate over whether and how to account for non-cash benefits. Id; see also Jason DeParle, Number of People in
But what is the relationship between this raw human misery and the demand for legal services? New York City, once again, offers a compelling example of the connection through a number of undisputed and related propositions. First, since 1989 the City’s economy has been in decline, with increasing unemployment especially in lower-income minority populations. Second, this has increased demand for public assistance of all kinds, and increased the already severe frustrations of a life of poverty at the very time that programs servicing the poor are contracting in the nation’s most complex city. Third, these economic and program developments have combined with certain important changes in the law to generate increased demand for legal services. Two concrete examples, among many, will suffice.

Twenty years ago, a U.S. Supreme Court ruling materially altered the administration of New York City’s welfare system by prohibiting any cut-off of public assistance benefits until the affected welfare recipient is given an opportunity to request a fair hearing before an impartial decision-maker. After a request for a fair hearing, there may be no suspension or termination of benefits until the hearing is held and the challenge resolved.

Predictably, this new form of constitutionally required administrati-

Poverty Shows Sharp Rise In U.S., N.Y. TIMES, Sept. 27, 1991, at A1. These various normative and empirical problems have predictably produced scepticism over claims that poverty is increasing. See Scully, supra note 102, at 1234-35.

141. The New York City economy has been in recession since at least 1989. ANNUAL REPORT ON SOCIAL INDICATORS, supra note 138, at 14. Civilian labor force unemployment in N.Y. City increased from 5.0% in 1988 to 6.9% in 1989. The black unemployment rate increased for the same period from 7.3% to 11.6%. Id. at figs. 2-19 & 2-20.

142. Id. at 45. The N.Y. City Human Resources Administration has related recent increases in the number of persons on public assistance and food stamps to a variety of factors, including the economic recession, expanded program eligibility for public assistance as of January 1990, an influx of immigrants, an increase of eligible clients enrolled in residential drug treatment programs, and a growing number of eligible public assistance clients with AIDS or HIV-related illnesses. THE MAYOR’S MANAGEMENT REPORT, supra note 138, at 399; see also Fox Butterfield, Record Number In U.S. Relying On Food Stamps, N.Y. TIMES, Oct. 31, 1991, at A1; Todd S. Purdum, Spiraling Welfare Roll Dominates Dinkins’ Report Card, N.Y. TIMES, Sept. 18, 1991, at B1.

143. Creative legal actions on behalf of the homeless have, in turn, generated new causes of action and fueled shelter-related demands for still more civil legal services for the poor. N.Y. LEGAL NEEDS STUDY, supra note 28, at 142-45. Other legal developments, less favorable to the poor, can also increase demands for legal services. The N.Y. Court of Appeals’ 1989 invalidation of a N.Y.C. law imposing a moratorium on demolitions and conversions of large single room occupancy (SRO) buildings may eventually lead to inequitable SRO buyouts and increased harassment of frail and vulnerable SRO tenants once the City’s real estate economy recovers. Id. at 41-42.

tive due process produced a "fair hearings explosion." Just as predict-
bly, it increased the need for legal representation in at least the more
complex termination cases:

Before 1970, New York State's welfare recipients requested fair
hearings in only a few hundred cases each year. By 1987, the City
participated in 60,713 fair hearings, losing about ninety percent of
these challenges. One out of every ten administrative actions taken
by the City's Human Resources Administration . . . in welfare cases
is challenged through a fair hearing.145

A fiscally distressed New York City is all the more likely to
closely monitor its welfare system for the purpose of avoiding bene-
fits overpayments and various abuses. An unhappy combination of
City fiscal stress and a growing number of welfare dependents is very
likely to generate even more work for lawyers on behalf of the poor,
confronting an increasing volume of termination and other problems
within a complex and overburdened public assistance system.146

Another example of the connection between various social and
economic trends and increased demand for legal services relates to the
widespread use of crack-cocaine, dating from the mid-1980s. This
particularly ugly development has been linked to the increasing abuse
of low-income children. In addition to a stunning increase in foster
care admissions in New York City, there has been a threefold in-
crease in the City's child abuse and neglect cases involving parental
drug problems between 1986 and 1988.147 Despite some recent indi-
cations that the crack epidemic is easing,148 such cases obviously
generate increased burdens for the City's Family Court and for the
legal services lawyers who specialize in that sad and demanding
work.

In short, the Marrero Committee Report, while essentially correct
in its brief analysis of increasing demands for civil legal services, is
all too summary and "bloodless" in its argumentation. While it is
easy to assume that most lawyers know the truth about the desperate
consequences of poverty-burdened lives, and the legal problems gener-

145. The [ABCNY] Committee on Administrative Law, Administrative Closings and
146. Id. at 379-80.
147. 1991 GREEN BOOK, supra note 137, at 837. The impact of crack-cocaine has
stretched the child welfare systems in New York State and elsewhere to a near crisis point.
From 1985 to 1988, New York foster care admissions of children less than 1 year old
increased 89 percent. Id. at 838.
ated by such conditions, I suspect that a considerable number are less than ideally well informed and appropriately sensitive. The Marerro Committee, therefore, may have a greater burden of persuasion than it knows. 149

Moreover, there are analytic problems associated with the Committee’s heavy reliance on the N.Y. Legal Needs Study, at least insofar as this Study surveys and analyzes low-income demand for civil legal services. In fact, the N.Y. Legal Needs Study and many of the numerous legal needs studies throughout the country, during the last decade, suffer from certain limitations. 150

First, the N.Y. Legal Needs Study relies primarily upon a telephone survey of randomly sampled low-income households throughout the state for its demand-related conclusions. (Needs Study at 6-8.) While the Study does supply, for the first time on a statewide basis, interesting quantitative data and respectable estimates of unmet demand, there is a threshold problem related to a key distinction between what might be called “price-revealed” preferences on the one hand and mere “stated” client preferences on the other hand.

Professor Burton Weisbrod observes that economists are often reluctant to use public opinion polling data to support conclusions about consumer demand:

149. The one exception to the Report’s lack of compelling need-related details, other than limited statistics from the N.Y. LEGAL NEEDS STUDY, is drawn from the experience of the New York City Housing Court. FINAL COMM. REP., supra note 1, at 773-74. While the unspeakable conditions prevailing in that court, citywide, are well-known, the Committee extrapolates, perhaps unpersuasively, from certain noteworthy data. Id. Though it is very likely that evictions are an important contributor to homelessness, it is not clear that legal representation for all or most tenants facing eviction proceedings will significantly reduce the number of court ordered evictions.

150. There have been at least seventeen . . . surveys of the legal needs of the poor conducted across the country over the past ten years [from 1977 to 1987] . . . . The annual rate of unmet legal needs per household as reported in these studies ranges from a low of 1.0 to a high of 5.5. There are a number of reasons for the wide variance . . . .” 45 C.F.R. 1620.2 (a)(1) (1990). A number of the more recent needs studies, including the NEW YORK LEGAL NEEDS STUDY, supra note 28, have been prepared by The Spangenberg Group of Newton, Massachusetts.

MASSACHUSETTS LEGAL SERVICES CORPORATION, MASSACHUSETTS LEGAL SERVICES PLAN FOR ACTION (1987), reprinted in 1989 Oversight Hrg., supra note 135, at 274, 283. For additional references to various state legal needs studies, see FINAL COMM. REP., supra note 1, at 774 n.20; see also supra notes 18, 20. For criticism of some needs studies, see supra note 135. Since 1984, the LSC has required local grantee agencies to follow specified procedures in establishing service priorities including “an effective appraisal of the needs of eligible clients . . . .”
Opinion poll respondents are not explicitly confronted with a price tag on the commodity or activity in question. Economists take more seriously a person's statement of preference when he reveals it by actually paying for a commodity, by buying it, than we do a mere expression of preference—as to a pollster—when no payment is required. The preference for information on revealed preferences over stated preferences is partly a matter of how well the consumer understands the question, partly a matter of how much effort he will put into offering a serious response when he knows that it may have no consequences, and partly a matter of how honest he is in indicating how much he would be willing to pay for the good under consideration.\(^{151}\)

The inherent problems of a telephone poll or survey are compounded by the simple reality that legal services will be supplied to the poor at a zero or near zero price.\(^{152}\) This means that at least some respondents may be inclined to inflate their estimates of their households' unmet legal problems because free or very low cost service is likely to be "overdemanded" in larger quantities than a higher priced good. Even if legal service has only minimal or very speculative benefits for a poor client, that client may still want it at a zero or nearly zero price.\(^{153}\)

The risk of a high estimate of aggregate demand from a telephone survey, however, is offset by another kind of risk. There is a countervailing risk that this kind of survey research understates the

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152. Even where there is no charge by the provider for legal services, poor clients may still suffer waiting and travel time "costs" in addition to the dollar cost of using public transportation. Time lost from work, of course, may reduce a low-income client's income even if the work is something like the collection of empty cans and bottles.

153. Giving public outputs away will result either in overproduction or in shortage (which sometimes shows up as congestion) or both. In either of these cases, there will be a misallocation of resources or economic waste . . . . In fact, there would be a shortage of all goods from steaks to medical care to automobiles if they were sold at a zero price. To give a good away is to stimulate use of it by all people—from those who value it highly to those who will choose to use it only if there is no charge. If a good is given away, people will continue to demand it as long as its value to them is anything above zero.

HAVEMAN, supra note 95, at 177-78. Nor have such implications of providing legal services at a zero price escaped legal aid lawyers and those sympathetic to legal services programs. See Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NAT'L LEGAL AID & DEFENDER ASS'N BRIEFCASE 106, 110 n.8 (1977).
demand for civil legal services, both because of certain important information problems and because the survey proceeds by telephone largely, if not exclusively, at the level of established household units.

The telephone survey used in the N.Y. Legal Needs Study, for example, does not appear to account for the possibility that at least some low-income respondents will fail to recognize certain needs for legal services. A threshold failure to recognize a problem, a relative lack of information about the utility of legal remedies, general unfamiliarity with lawyers and the civil legal system, and a relative lack of education or capacity to process information may converge to create an understatement of the aggregate need for legal services.\(^5\)

The fact that the Study surveys household units by telephone further contributes to the risk that aggregate demand will be understated. First, certain low-income client categories may be deemphasized if not ignored by a telephone survey, even where survey data is supplemented by data and anecdotal information from legal services lawyers and provider agencies. There is no assurance that even such a supplemented survey approach has provided a reliable basis for estimating the amount and distribution of the civil legal problems of institutionalized persons, the frail elderly, migrant farmworkers, and the homeless, as well as a number of recent immigrants some of whom probably speak no or limited English.\(^5\)

Finally, a survey of household units may miss certain kinds of community-level problems that might respond to legal strategies. For example, some low-income neighborhoods have arguably been overburdened with public facilities and private developments that expose low-income residents to certain environmental and social hazards. The

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154. Wishful thinking about the learning potential of poor people may lead some to underestimate, euphemistically put, the “informational costs” of poverty. “Even though it has been two decades since the War on Poverty began, there is still substantial ignorance among the poor concerning the availability of legal aid.” James W. Meeker et al., Legal Needs of the Poor: Problems, Priorities and Attitudes, 7 LAW & POL’Y 225, 244 (1985). See also JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 185 (1978). In contrast to the N.Y. Legal Needs Study, some earlier surveys have attempted to estimate unrecognized legal needs. See Gresham M. Sykes, Legal Needs of the Poor in the City of Denver, 4 LAW & SOC’Y REV. 255, 262-63 (1969); MASSACHUSETTS LEGAL SERVICES PLAN FOR ACTION, in 1989 Oversight Hrg., supra note 150, at 283-84. Of course, efforts to estimate unrecognized needs have also been criticized. See statement of Terrence J. Wear, 1989 Oversight Hrg., supra note 135, at 59.

155. The N.Y. LEGAL NEEDS STUDY, of course, does not ignore the legal problems of the homeless, though it appears to rely entirely upon information from the service provider side and to avoid quantitative estimates. N.Y. LEGAL NEEDS STUDY, supra note 28, at 142-45.
sitings of jails, halfway houses for recovering addicts, waste disposal facilities, and shelters for the homeless have become increasingly controversial as various communities resist being used as "dumping grounds." Legal developments like the new Charter of the City of New York may arm lawyers with new strategies on behalf of certain neighborhoods and their beleaguered lower-income residents.

This last example, in particular, suggests that survey research of low-income demand for civil legal services is inherently compromised by fundamental limitations that make "conceptualizing, defining, and measuring legal need . . . a problematic venture." In truth, the concept of "unmet demand" for legal services is deeply ambiguous, contingent in character and variable over time. Quantified estimates of unsatisfied demand or unmet needs invite debate partly because:

[Legal needs are social constructs composed of a perception first, that something is wrong and, second, that what is wrong ought to be corrected through the legal system. There are a great many social relationships which meet neither of these conditions. Many problems or wrongs remain hidden from view, and people are often unaware that wrongs are being committed against them. A common example is to be found in cases where officials do not disclose the existence of entitlements or remedies. Unless clients obtain information from other sources, they are not likely to be aware of any problem. At other times, wrongs are recognized but not considered amenable to correction by the legal system. People can feel aggrieved by government decisions or professional malpractice, for instance, but not think of the problem in terms of legal remedies. Besides the perception that a problem exists and that it is or ought to be correctable through the legal system, the final step is to persuade the sources of the law—courts, agencies, or legislatures—that the need should officially be recognized as such.]

In short, demand for low-income civil legal services is a function of a number of elusive factors, including, but not limited to, the tastes and preferences of low-income clients and their special friends


157. N.Y. CITY CHARTER, Ch. 8, section 203 (effective Jan. 1, 1990) provides criteria for the "fair share" location of New York City facilities.

158. Meeker et al., *supra* note 154, at 228.

159. Handler et al., *supra* note 154, at 185; see also Rhode, *supra* note 129, at 700 (quoting Leon Mayhew).
and advocates. Even television and other expectation-fueling media may play a role in generating legal needs that are fairly characterized as "not static" or "elastic" with a discernible "tendency to expand as potential beneficiaries see lawyers as capable of responding to their problems." Though it may appear to be economic heresy, the demand for low-income civil legal services may "increase to the limits of the available supply," inducing a permanent form of scarcity.\footnote{160}

An honest recognition of both the technical and more fundamental or normative limitations of such survey research, however, should not obscure two noteworthy conclusions. While there is a risk that the N.Y. Legal Needs Study overstates the amount of unmet demand, the opposite conclusion is more compelling. It is more likely that the study’s survey research actually understates the unmet low-income demand for civil legal services. At the same time, it is important, for both the continuing policy debate and eventual litigation over mandatory pro bono proposals, to underscore the current limitations of even our very best relevant science. We currently lack the skill to generate conclusive and precisely quantified empirical evidence about the kind, degree and distribution of unfulfilled demands for low-income civil legal services. While imperfect survey research tends to support the Marrero Committee’s demand-side conclusions, ultimate justification for the Committee’s mandatory pro bono proposal still has much to do with a complex web of professional, political, and personal values, some of them undisclosed by the contending parties. A self-righteous over-reliance on supposedly obvious need-related facts, and on supposedly systematic but flawed scientific efforts, only reduces prospects for a truly productive and resolving debate among interested parties with very sharply competing points of view.

C. Is Mandatory Pro Bono Needed?: A Supply-Side Analysis

The supply side of the Marrero Committee’s analysis of need is both more extended and ambitious than its analysis of the demand for civil legal services. At various points in its Report, the Committee discusses different resource categories reserving most of its detailed attention for federal funding through the Legal Services Corporation

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and, especially, for organized bar efforts to encourage and to expand voluntary pro bono legal services. (Rep. at 775-77, 822-32.)

While the N.Y. Legal Needs Study (Needs Study at 153-54) identifies funding sources in at least eight broad categories, including federal LSC money, the Marrero Committee is generally persuaded that most of the specified funding alternatives have serious practical limitations. Though the Committee encourages both the increased use of case assignments under New York Civil Practice Law section 1102(a) (Rep. at 816-17.), and the use of other resources like law school clinical programs (Rep. at 834-35.) and the new Interest on Lawyers’ Accounts (IOLA) program (Rep. at 837-38.), its advocacy of mandatory pro bono is a necessary consequence of an unequivocal conclusion from the supply side of the needs calculus. Very clearly, the “[r]esources now available to legal services providers are not enough to address the problem adequately.” (Rep. at 843.)

1. Government Funding Failures

Like so many parties concerned with the inadequate resources available for low-income civil legal services, the Marrero Committee simultaneously recognizes the sharp decline in federal funding, sees no reason to expect substantial increases in the reasonably near future, yet still urges new federal commitments at least over the longer term. It is government, at all levels, that has both an obligation to “help provide civil legal assistance” and a more fundamental obligation to better “provide for the life necessities of our neediest citizens.”

The Committee, however, mixes hard reality with hopeful expres-

161. FINAL COMM. REP., supra note 1, at 838. The Marrero Committee’s advocacy of more government, especially federal government, funding is understandable given the substantial amounts necessary to restore a modest level of “minimum client access” to LSC-financed legal services programs. In 1989, the President of the American Bar Association estimated that 1989 federal funding of LSC programs, to restore 1981 funding levels and to assure minimum access at a ratio of two lawyers for every 10,000 poor clients, “would require a [federal] funding level of well over $500 million,” 1989 Oversight Hrg., supra note 135, at 7, 13 (statement of Robert D. Raven for the A.B.A.), an amount substantially higher than the 1989 funding level of little more than $300 million. Legal Services Corporation Reauthorization; Hearing Before the Subcomm. on Admin. Law and Gov’t Relations of the House Judiciary Comm., 101st Cong., 1st Sess. 107, 134 (July 19, 1989) [hereinafter 1989 Reauth. Hrg.]. It is understandable, therefore, that Chief Judge Wachtler should conclude that “almost everyone who has joined the debate about mandatory pro bono, including the Marrero Committee, agrees that the best way to provide legal services to the poor is to increase [public] funding for legal services and other social programs.” Wachtler, supra note 2, at 740.
sions in a most conclusory way—without attempting to account for either the decline in federal funding or for its own short-term pessimism. The Committee merely exhorts government to do more, without any effort at predictive analysis and without assigning blame to particular public agencies or officials for the sorry levels of federal government funding.

Notwithstanding this analytic gap, there is considerable evidence that various political factors have played an important role in the longstanding and continuing debate over federal government financial support for low-income civil legal services. By one political account, the dramatic real (adjusted for inflation) decline in federal government funding has principally been caused by the passionate opposition of an exceptionally ideological President Reagan, and his equally benighted colleagues in and out of the federal government. This account suggests that the crisis in federal funding for legal services is largely a partisan political or ideological response, subject to change as political and electoral preferences change.


163. Federal funding for the Legal Services Corporation had increased from $70 million in 1975 to $321 million in 1981, when the new Reagan Administration and its Congressional supporters forced a retrenchment in federal legal assistance programs. After the LSC's budget was cut in 1981 from $321 million to $241 million, President Reagan announced in early 1982 that he intended to abolish the Legal Services Corporation. Despite the continuation of the LSC on a reduced program scale, President Reagan was successful in appointing various LSC board members who were widely regarded as hostile to the fundamental purposes of the LSC. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 938-39 (1986); see also Roger C. Cramton, Crisis in Legal Services for the Poor, 26 VILL. L. REV. 521 (1981); Gerald M. Caplan, Understanding the Controversy Over the Legal Services Corporation, 28 N.Y.L. SCH. L. REV. 583 (1983). Political controversy over federally funded legal services for the poor began during the Johnson Administration and continued during the Nixon Administration. See JOHNSON, supra note 162; Cramton, supra. Despite the creation of the LSC literally during the last hours of his administration, President Nixon had earlier decided to dismantle the predecessor OEO Legal Services Program. For the complex and controversial gestation of the federal LSC, see JOHNSON, supra note 162, at ix-xxiii; Warren E. George, Development of the Legal Services Corporation, 61 CORNELL L. REV. 681 (1976); Phillip J. Hannon, From Politics to Reality: An Historical Perspective of the Legal Services Corporation, 25 EMORY
This form of politicized analysis, of course, has a certain credibility. The confrontation between Governor Ronald Reagan and the unusually creative and aggressive lawyers of California Rural Legal Assistance has become the stuff of legend among legal services lawyers and interested commentators on the history of American legal aid for the poor.\textsuperscript{164} Similarly, the tone and substance of various statements by certain Reagan Administration appointees to both the board and staff of the LSC provide rather compelling evidence of Reagan Administration hostility to legal services programs.\textsuperscript{165}

At the same time, it is arguable that the decline in federal government support is rather more permanent than partisan political accounts suggest. The Marrero Committee, like most proponents and opponents of mandatory pro bono, ignores a compelling argument for a theory of permanent government failure in the funding of low-income civil legal services.\textsuperscript{166}


164. "CLRA was a particularly aggressive program that had gained notoriety for its successful efforts to stop certain welfare and Medicaid policies of Governor Reagan and to advocate for farmworkers against the growers." John A. Dooley & Alan W. Houseman, \textit{Legal Services History} 9-10, 12-13 (Nov. 1985) (unpublished typescript available in the Hofstra Law Library); see also George, \textit{supra} note 163, at 683-87. Governor Reagan, however, was not the only governor or public official who objected to legal services activities. Dooley & Houseman, \textit{supra} at 11-12. Controversy over the representation of migrant farmworkers by LSC grantee attorneys continues. \textit{Legal Services Corporation Reauthorization; Hearings before the Subcomm. on Admin. Law & Govt. Relations of the House Judiciary Comm., 101st Cong., 2d Sess.} 256-64 (1990) [hereinafter 1990 Reauth. Hrgs.] (statement of Thomas E. Wilson on behalf of the New England Apple Council); 268-73 (statement of Jeffrey J. Ward on behalf of Sugar Cane Growers Cooperative of Florida); and \textit{passim}.

come legal services.\textsuperscript{166} In the process, the Committee misses an important opportunity to strengthen its argument for mandatory pro bono as a remedy of near last resort.

This theory of permanent or durable government failure is built from a set of quite elementary concepts, including certain simplified and rather extreme presuppositions about the behavior of government policy-makers in legislative and other policy roles. The analysis begins with two well-known and opposing decisional models. While neither a so-called "self-interested policy-maker" model nor a so-called "public interest" model adequately accounts alone for the complex policy-making realities of major legislative, administrative or executive agencies, each has considerable explanatory and predictive potential, at least in the context of the debate over mandatory pro bono programs.

The self-interest model is inspired by a kind of economic study of political decision-making widely called public choice theory. In very general terms, this form of theory presumes that people in policy-making roles still act rationally in light of their own objectives. Despite their government responsibilities, they are still, first and foremost, rational maximizers of their own satisfactions whatever those may be. In short, there is no distinction between our political and our private selves. We are all seekers after our own "self-interests" whether we are voting on matters of public concern or buying groceries.\textsuperscript{167}

\textsuperscript{166} Despite a substantial decline in federal government support for the LSC, in real dollar terms adjusted for inflation, see supra note 161, it is unlikely that our very large federal deficit and other compelling social and program priorities will permit any substantial increase in federal funding for the foreseeable future. See Richard L. Abel, \textit{American Lawyers} 231 (1989), for an atypical analysis of the "structural" kind.

\textsuperscript{167} Haveman, supra note 95, at 145-46. Haveman observes that while the self-interest model emphatically rejects the "notion of the public servant guided only by the 'public interest,' . . . [t]his is not to say that a public servant never makes decisions that are in the general interest." Rather, the economic theory of politics predicts that a public official "will make decisions that are in the public interest only when they are also in his own personal interest." Id. at 146 n.2. For a broader yet succinct survey of key ideas in public choice theory, see JAMES M. BUCHANAN, \textit{From Private Preferences to Public Philosophy: The Development of Public Choice, in Constitutional Economics} 29 (1991).

While public choice theory fuels scepticism of government at all levels and predicts what many would regard as abuses of public office, Buchanan argues that:

In one sense, public choice—the economic theory of politics—is not new at all. It represents rediscovery and elaboration of a part of the conventional wisdom of the 18th and the 19th centuries, and notably the conventional wisdom that informed classical political economy. Adam Smith, David Hume, and the American Founding Fathers would have considered the central principles of public-choice theory to be
In very simple and more concrete application, this means that policy, whether in the form of legislation, administrative regulations, or particularized executive or bureaucratic decisions, will be sold to the highest bidder. Policy-makers are essentially sellers of policy goods who seek to exchange their wares for consideration like votes, campaign contributions, honoraria, free vacations, public and professional respect, and future public and private-sector employment. The typical buyers of these policy goods are likely to be organized interest groups seeking wealth transfers.\(^6\)

While this image or "model" may be oversimplified, as against a reality where some decision-makers value more intangible kinds of consideration (e.g., satisfaction from doing good for the weak) and sometimes reflect apparently altruistic impulses, it does suggest certain relevant conclusions.\(^7\) First, the model helps to explain the chronic underfunding of most government programs for the poor. Because the poor, and their representatives, have few resources for bargaining purposes, they are likely to be relatively unsuccessful participants in the policy trade, especially over the longer term.\(^8\) Particularly as so elementary as scarcely to warrant attention. A mistrust of governmental processes, along with the implied necessity to impose severe constraints on the exercise of governmental authority, was part and parcel of the philosophical heritage they all shared. This set of attitudes extended at least through the middle years of the 19th century, after which they seem to have been suspended for at least a hundred years. Perhaps they are on the way to return.

Id.\(^9\)

168. **Buchanan, supra note 167, at 43.** For an additional relevant overview of what may be a "sub-genre" of public-choice theory, see Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s,* 139 U. PA. L. REV. 1, 64-68 (1990). Professor Shaviro also observes that certain renderings of public choice theory incorporate certain questionable assumptions and provide a view of politics that is so reductive that it "begins to look like the 'shallow and incomplete' caricature of human nature expected by critics of economists." Id. at 66. Among his other criticisms and efforts to enrich the model, id. at 66-106, Shaviro argues that "[p]oliticians . . . may care about ideological or symbolic issues that have no direct bearing on their monetary or professional interests." Id. at 66.

169. Politicians' varied motives may include a "desire for attention and adulation, intense and ungratified craving for deference, ache for applause and recognition, and an urge for that warm feeling of importance. Thus, self-interest is agreed to be extremely important to politicians, but not primarily the narrow monetary self-interest emphasized by economists."

170. Legislative failures to respond to the preferences and needs of the poor are also
wealth disparities grow among social and economic classes in American society, we can predict increasingly unsatisfactory policy and program outcomes for the less competitive poor.171

The same reasoning also helps to explain why lawyers for the poor were early supporters of both various forms of community political action and certain kinds of law reform or impact litigation, usually in class action format. It makes obvious sense for prospective buyers of policy goods either to maximize their bargaining resources or to leave the market by pursuing favorable policy outcomes through judicial coercion.172 Much the same analysis also suggests that the War on Poverty during the 1960s was a form of historical aberration and cautions those who expect a return to the low-income programs and funding levels of the New Frontier and the Great Society, if only the right enlightened political party wins.

Finally, this self-interest model predicts that many policy-makers and important government officials will be especially averse to financing significantly increased levels of civil legal services. Since self-maximizers are predictably risk averse and rationally cost-minimizing,
why should they be expected to finance their own pain? Even if they were persuaded to increase funding for the poor in other program categories like food and housing assistance, why increase low-income legal power to challenge government agency decisions in costly, inconvenient and even politically embarrassing ways?

This theoretical prediction that government officials and politicians will be self-protectively reluctant to finance increased civil legal services, at least of the so-called law reform variety, is richly confirmed by both historical evidence and more current experience. The aggressively creative law reform and social impact strategies of some OEO legal services lawyers and programs, for example, very quickly triggered hostile political reactions. In 1967, 1969 and 1972, various landlord and merchant interests, as well as various welfare administrators and displeased government officials, persuaded certain members of Congress to seek important restrictions on the work of legal services attorneys. While these restrictive proposals failed largely because of the opposition of the American Bar Association, various governors did veto Legal Services refundings in California, Florida, Connecticut, Arizona and Missouri.

In 1971, during early debate over the establishment of the Legal Services Corporation, President Nixon observed that:

[m]uch of the litigation initiated by legal services has placed it in direct conflict with local and State governments. The program is concerned with social issues and is thus subject to unusually strong political pressures.

Unsuccessful efforts to insulate government agencies from legal...
action, by publicly supported legal services lawyers, were succinctly defended by Senator Long of Louisiana during the 1974 debate over the chartering statute for the new Legal Services Corporation: "[n]o one but an idiot would hire a lawyer to sue himself." Although the Congress rejected limitations on suits challenging state legislation or a governor's veto of such legislation, and on suits against federal programs, it did incorporate certain restrictions on class actions, abortion and Selective Service litigation into the original LSC statutory charter.

Local government concerns over the budgetary and political costs associated with legal services litigation and reform agendas have continued. To this day, some state and local government officials in New York express similar complaints, though usually with reference to particular programs. Recently, for example, a New York State plan to provide lawyers to lower-income people in danger of eviction was embroiled in a dispute over official proposals to restrict the professional discretion of lawyers receiving "homelessness prevention" grants. Lawyers and legal services agencies accepting such grants "would get them only on the condition that they agree not to sue the agencies that handed them out."

Such objections to legal services litigation and other purported "political" activity by representatives of the poor may also be con-

176. 120 CONG. REc. 1685 (1974). For the floor debate over the Legal Services Corporation Act, including the rejected Long Amendment to prohibit the use of federal funds "to undermine programs" under federal and state law, see id. at 1616-1723.
177. George, supra note 163, at 697-98.
178. Kansas City, Missouri Councilman Leon Brownfield succinctly summed up the relevant official opposition by observing that "You don't sue the hand that feeds you." See Wrong on Legal Aid, THE KANSAS CITY TIMES, June 20, 1980, in Legal Services Corporation Reauthorization: Hearings Before the Subcomm. on Courts., Civ. Liberties, and the Admin. of Justice of the House Judiciary Comm., 96th Cong., 1st Sess. 690 (1979). In 1981, the Chairman of the Board of Directors of the LSC opposed putting legal services funding into a block grant program to be administered by the states with substantial program discretion. Because legal services lawyers are "frequent antagonists of . . . local welfare departments, housing departments, school systems, public hospitals or . . . other [city, county or state] agencies," it is likely that state officials will be reluctant to allocate scarce block grant funding to aggressive legal services programs. Legal Services Corporation Reauthorization: Hearings on H.R. 2505 and H.R. 3480 Before the Subcomm. on Courts., Civ. Liberties, and the Admin. of Justice of the House Judiciary Comm., 97th Cong., 1st Sess., 5, 15 (1981) (testimony of F. William McCalpin). For other reflections on the problem of local political interference with aggressive legal services programs, see the comments of Rep. Bruce Morrison of Connecticut in 1989 Oversight Hrg., supra note 135, at 105; Cramton, supra note 163, at 533.
nected to another kind of official "public interest" mentality. Even a
government official primarily motivated by so-called public interest
concerns, rather than by a dominating desire to maximize his or her
own satisfactions, may hesitate before supporting a significant increase
in funding for low-income civil legal services perceived as producing
outcomes contrary to the "public interest."

While it has become fashionable to depreciate public interest
theories of legislation and policy-making, the model, though often
vaguely stated, continues to have a powerful normative appeal, partic-
ularly for the numerous non-economists among us. One version may
be described in terms of:

[g]overnment attempts to improve the general welfare, for example,
by financing public goods and correcting instances of market failure.
Conceived somewhat more broadly, the public interest view empha-
sizes the importance of ideology and the desire to make good poli-
cy, which are seen as motivating legislators to seek to improve
society (according to their perhaps controversial notions of what is
good).180

But even if we imagine an extreme official commitment to poli-
cy-making in the public interest, it is still likely to involve rational
attempts to analyze particular programs and government initiatives and
responses in some kind of cost-benefit terms.181 It is precisely this
rational "good government" commitment to a form of cost-benefit
analysis that may restrain government financing of civil legal services
for the poor.

An appropriate starting point, in assessing the benefits of civil
legal services for the poor, is to estimate the value that the poor

180. Shaviro, supra note 168, at 6. Shaviro observes that "public interest theory has been
powerfully challenged in its narrow form as lacking a causal mechanism and failing to
explain actual government behavior. In its broader form (relating to ideology), the view has
received some empirical support, but seems to over-predict the coherence and stability of
legislative policy-making." Id. For a more detailed description of the various strands of public
interest theory and relevant criticisms, see id. at 31-50. For a rendering of a public interest
theory of economic regulation, see Richard A. Posner, *Theories of Economic Regulation*, 5

181. However much this decisional model owes to various political theories, a public-in-
terest type analysis also usually incorporates certain important elementary economic concepts.
Conventional evaluations of resource-using public programs, for example, regularly seek to
apply a benefit-cost or social gain-social loss test in one form or another. "If the gain to
society from . . . [a government] expenditure exceeds the cost, the expenditure is an
"efficient" one. Such an expenditure is in the public interest and should be undertaken."
*HAVEMAN*, supra note 95, at 84. For a simplified description of both the Pareto and the
more practical Kaldor-Hicks measures of efficiency, see *MALLOY*, supra note 48, at 38-42.
themselves assign to this supposed good. In part because the price paid by poor clients for legal services is zero or nearly zero,\footnote{182} it is difficult to estimate the relative preferences of a heterogeneous poverty population for civil legal services as compared to other goods supplied at no or very low price like education, housing and food subsidies, or medical care. Normally, the willingness of a consumer to pay the market price for one good in preference to another is the best evidence of the relative value of the goods to him.\footnote{183}

In the absence of such marketplace price signals, therefore, even a compassionate legislator must guess about the benefits realized by low-income consumers. Of course, simple willingness to use nearly free legal services is quite compatible with relative consumer indifference. Where legal services cost a poor client almost nothing, even minimal perceived benefits may justify the consumption of those services. Moreover, some commentators have guessed that civil legal services are valued by many low-income persons at or near the bottom of a list of wants and well below such other goods as decent food, housing, education, medical care and even entertainment.\footnote{184}

This first kind of information problem of itself discourages decisive policy-making. Why should a conscientious official act to increase legal services funding in the face of such benefits-related uncertainty, especially where very partial information leads him to guess that many poor folks prefer other kinds of goods? Inaction is particularly advisable because every new dollar provided for civil legal services may be a dollar lost to other low-income benefits programs.\footnote{185}

On the other hand, a sympathetic and public-spirited legislator may be understandably tempted to take the plausible ignorance, or information problems, of the poor into policy-making account. Even at the risk of a certain degree of paternalism, good government sometimes compensates for the disabilities of the governed. Put another way, it is very arguable that poor persons will often find it difficult

\footnote{182. Even poor clients who pay no legal fees may incur cash costs such as carfare to reach a legal services office. Babysitting arrangements, waiting time and the frustration and anxiety produced by an intimidating and complex legal system together may constitute a price for legal assistance.}

\footnote{183. This form of serious informational problem exists with respect to many components of our public welfare system, which provides various earmarked subsidies and benefits in kind such as public housing, rent supplements, food stamps, health care, and job training, in addition to free legal services. \textsc{Posner, supra} note 105, at 443.}

\footnote{184. \textsc{Scully, supra} note 102, at 1234-35.}

\footnote{185. \textsc{Posner, supra} note 105, at 443-44.}
to assess their own need for civil representation. They are especially likely to be handicapped in acquiring and processing information about the value of civil legal services for an entire poverty population. Given the extraordinary ethnic, age and cultural diversity of New York State's low-income population, low educational levels and other disadvantages, it may be appropriate for altruistic policy-makers to choose civil legal service increases whatever the poor might choose for themselves.

Our public-interest policy-maker, however, ought to be cautiously rational before substituting her judgment for the judgment of poor consumers. To justify more government funding for increased civil legal services, she is likely to focus on predictable marginal benefits. The problem of likely declining marginal utility aside,\textsuperscript{186} what evidence does our very conscientious policy-maker have for the proposition that more civil justice will be a net benefit to the poor? In short, probably not much.

At the level of individual clients or cases, of course, the benefits micro-analysis may be relatively uncomplicated. Where, for example, a particular low-income person's public assistance is suspended through administrative error, there is no doubt about the benefits that a good lawyer may deliver to such an individual low-income client. It is also possible to conceive of particular cases, however, where the benefits question is more complex on deeper analysis. A legal services lawyer who helps a sometimes addicted and sometimes abusive client regain custody of an often neglected child has reason to reflect on the net effects of her particular professional effort.

In fact, it is precisely this kind of complexity within low-income communities that bedevils a benefits analysis at an aggregate or macro-level. It may be self-evident to some, for example, that legal services lawyers should devote considerably more time to the enforcement of child support orders.\textsuperscript{187} If, however, more effective enforcement of such orders adversely affects a large number of low-income fathers with limited incomes and life prospects, surely there is cause to wonder about the net effects of such a service priority for the poverty population as a whole. Additionally, the opportunity costs in reordering service priorities to handle more such child support cases may be extraordinary. How many successful enforcement actions

\textsuperscript{186} See MALLOY, supra note 48, at 25.
\textsuperscript{187} See Douglas J. Besharov, Introduction, in LEGAL SERVICES FOR THE POOR: TIME FOR REFORM, supra note 165, at xiii, xiv-xv.
justifies refusing how many eviction or medicaid cases?

Finally, there is the rather notorious matter of law reform or social impact work. Even if our public-spirited legislator firmly believes that there will be a considerable net marginal benefit to the poverty population, as a whole, in increasing government funding for individual service cases, there may still be considerable doubt over the net effects of certain ambitious law reform initiatives, including, but not limited, to class action litigation.

In fact, the longstanding controversy over the law reform component of legal services for the poor is appropriately analyzed in important cost-related terms. While some political conservatives have been particularly prominent in demanding an end to class actions, lobbying and other forms of offensive “political” activity, one need not be an ideologue of the political right to raise certain troublesome questions about the costs (and therefore net benefits) of various law reform efforts.188

Indeed, our ideal public-spirited legislator is duty-bound, as individual lawyers are not, to protect and advance the public interest or the general welfare.189 This requires sensitivity to the net social costs of reform litigation in the aggregate. Even with reference to a particular lawsuit, there may be notable external or spill-over effects for persons other than the actual parties to that suit.

Assume, for only one example, that a legal services lawyer creatively sues, on behalf of certain low-income public school students, to expand special education services for mildly retarded or learning-disabled students who speak little or no English. Assume further that this lawyer wins injunctive relief that compels the school administration to make expensive changes in the current special education system.

These changes may surely benefit the lawyer’s particular client or class of clients, but not without negative consequences for others. Because more bilingual special education teachers must now be hired system-wide, fewer math teachers may be hired to teach regular stu-

188. Class action litigation has often been politically controversial because of its perceived redistributive effects. See supra note 107. For controversial insights into “the dark side of class action suits,” see Harry Brill, The Uses and Abuses of Legal Assistance, 31 THE PUB. INTEREST 38 (1973).

189. In contrast to a policy-making servant of the public interest, a lawyer is obliged, qua lawyer, to exercise his or her professional judgment solely for the benefit of clients, arguably without regard for third party interests. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1980).
students in the school system, some of whom are from low-income households. In fact, to finance the necessary tutoring of special education students from non-English speaking homes, it is even possible that certain parts of the existing special education program may be curtailed. If this happens, the cost of benefiting some special education students will be borne partly by other special education students, including some low-income ones.

Of course, the net outcome in this case is problematic in both positive and normative terms. It is likely to be difficult, if not impossible, to concretize, let alone quantify, the total benefits and costs of this litigation over special education policies and program priorities. The cost-related uncertainties alone, related to spill-over effects for persons not party to the lawsuit, ought to trouble and perhaps immobilize conscientious policy-makers. Evaluating such effects, even if they can be reliably determined, is likely to create an even deeper puzzle. Assuming that the math education of a larger student population, including numerous low-income students, will be adversely affected by the suit described above, which social preference better serves the public interest “on balance” (as the saying goes)—enhanced special education programs for that subgroup with limited English or improved math education for some other students?

In addition, certain transaction costs ought to be taken into account by government policy-makers sincerely committed to the systematic delivery of low-income civil legal services. It is by no means clear, for example, that the current system used to allocate general purpose legal services funding is cost-efficient. There are obvious transaction and administrative costs in disbursing federal funds through a centralized Legal Services Corporation that dispenses no legal services itself but, rather, makes grants to a large number of diverse community-based provider agencies nationwide. In turn, these local grantee agencies decide service priorities, within certain limits, and hire the lawyers who ultimately do the law jobs for poor clients. In the process of administering this complex, decentralized multi-layer system, certain planning, monitoring and general administrative costs are inescapable. For some time, the degree of waste in administering this complex delivery system has been the subject of heated debate.

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190. For additional refinements on the external costs theme, see POSNER, supra note 105, at 444.
191. For sharply opposing points of view, see Statement of Terrance J. Wear, Pres., LSC,
In short, there are multiple reasons to predict a continuing lack of government enthusiasm for substantial funding increases for civil legal services. Both dominantly self-interested officials and those more committed to advancing the public interest have important reasons to hesitate. At either decisional extreme, empirically based theories explain the real decline in federal government spending. From the vantage point of a real world of mixed policy-making motives, somewhere in the complex middleground between oversimplified and unrealistic public choice and public interest models of government, we can further predict permanently restrained levels of public funding for low-income civil legal services regardless of the ebb and flow of partisan political influences. If only for this reason, the Marrero Committee’s proposal to “privatize” a portion of the funding for civil legal services, through an earmarked tax program, ought to have powerful appeal for all but the most naive supporters of expanded civil justice for the poor.  

2. The Facts and Fantasies of Voluntary Service

However brief and conclusory its treatment of government funding, the Marrero Committee Report addresses the prospects for voluntary pro bono services in a far more extended and detailed manner. The Committee is obviously concerned by the near universal opposition of the organized bar and the proposals of many bar associations to raise the “lawyers’ contribution of voluntary pro bono services to unprecedented heights.” (Rep. at 822.) The New York State Bar Association, for example, while recognizing that voluntary pro bono is only a partial and imperfect solution, still recommends a detailed twenty-point plan “to facilitate an intensified voluntary . . . effort.”

\[\text{in 1989 Oversight Hrg., supra note 135, at 53; Statement of F. Wm. McCalpin, Pres., NLADA, in 1990 Reauth. Hrgs., supra note 164, at 176, 185-97. Virtually any congressional hearing on the Legal Services Corporation reflects the ongoing debate over arguably wasteful administration related to various concerns over local board control, the setting of service priorities, the monitoring of grantees, information and data reporting systems, and other matters. See, e.g., various hearings cited supra notes 135, 161, 164, and 178.}

192. See infra text accompanying notes 357-86 for further elaboration on various efficiency concerns and redistributive puzzles related to low-income civil legal service programs. The responses of government, well-intentioned lawyer volunteers and organized bar leaders, as well as the responses of certain opponents of civil legal services programs, have all arguably been influenced by a number of deeply troubling functional questions that deserve more explicit attention.  

193. N.Y. State Bar Rep., supra note 101 at 28-32. For a brief history of a revitalized
Nonetheless, the Marrero Committee argues that "[i]n jurisdiction ... volunteers failed to materialize in sufficient numbers." Even if voluntary pro bono levels were to rise dramatically, such costly efforts are essentially "uneven and sometimes unreliable." While a sceptical Committee does offer evidence to support its deep reservations about voluntary programs, once again it stops short of marshalling certain compelling, if theoretical, arguments. It is one thing to report that no bar association, including some with very imaginative programs, has been able to generate "volunteer lawyer participation in excess of 10 to 15 percent of their members ..." (Rep. at 827-28); it is quite another thing to explain why.

A certain theoretical orientation, emphasized in this article but largely missing from the Marrero Committee Report, leads to an interesting prediction of permanent failure for voluntary solutions despite recent survey data that suggest a higher rate of voluntary pro bono participation in New York State than the 10-15% estimate offered by the Marrero Committee. While disappointing voluntary
pro bono participation may be related to numerous factors, including sincere convictions about lack of poverty law expertise and an increasingly competitive market for legal services in general, there is also good cause to assume that most lawyers are inclined to consider voluntary service to the poor in cost-benefit terms.

For reasons that have already been briefly discussed in the preceding section on government funding, many lawyers are likely to be troubled by complex uncertainties on the benefits side of the question: "If I volunteer my professional services to the poor, what good will it do for whom?" Questions about how the poor themselves value legal services, reservations about certain key disincentive and redistributive effects, and concern over longer-term and spillover effects of legal action for the poor, combine to produce a perplexing degree of uncertainty even for those who are not viscerally repelled by the undeserving poor and the so-called culture of poverty.

The greater the degree of benefits-related uncertainty, of course, the greater the natural inclination to emphasize the cost consequences of voluntary service. As already argued in this article, the opportunity, transaction and other costs of low-income service are at least noteworthy if not substantial, particularly for those lawyers hostile or indifferent to the needs of the poor.

spondents reported performing no law-related service pro bono publico of any kind." Id. at 3. For a summary of survey results, see id. at 3-5; see also Gary Spencer, Half of State's Lawyers Handle Pro Bono Work, N.Y.L.J., Sept. 25, 1991, at 1. Of course, it is possible to speculate that survey results were affected by the continuing threat that a mandatory pro bono program may be imposed on New York State lawyers during 1992.

197. The pressure to "rack up billable hours," particularly for younger lawyers, makes voluntary pro bono activities more difficult, if not impossible. Emily F. Mandelstam, Pro Bono: Bono for Young Lawyers at Big Firms?, N.Y. OBSERVER, Mar. 5, 1990, at 1; see also Ellen Joan Pollock, Big Law Firms Learn That They, Too, Are a Cyclical Business, WALL ST. J., Aug. 15, 1991, at A1.

198. "In the economist's way of thinking, much (but certainly not all) of our behavior is based on cost-benefit analysis . . . ." MCKENZIE & TULLOCK, supra note 38, at 21. Optimally rational decisions also require the use of marginal analysis to isolate the costs and benefits of a particular decision. WILLIAM J. BAUMOL AND ALAN S. BLINDER, ECONOMICS; PRINCIPLES AND POLICY; MICROECONOMICS 17, 154-57 (3d ed. 1986).

199. See supra notes 188-90.

200. Some commentators argue that "[p]overty results from indolence, cynicism, and the demonizing impact of public policy." KATZ, supra note 170, at 144-5. For Katz's description of attacks by George Gilder and Charles Murray upon our perverse welfare system, see id. at 143-56. One need not be wed to a particular ideology to share reservations over the disincentive effects of government welfare and benefits programs for the poor. See Burtless, supra note 105; POSNER, supra note 105, at 440.

201. The greater the demand for a lawyer's services, the greater the dollar opportunity cost in diverting market-valued professional time to uncompensated low-income service. See
economy, with declining client demand depressing hourly rates and gross professional revenue, cost-conscious lawyers will be increasingly reluctant to serve the poor voluntarily.

This cost-related reality is likely to affect even that group of prospective lawyer volunteers most sympathetic to the needs of the poor and the most convinced that civil legal services have considerable potential for delivering important net benefits. Even assuming a very large sympathetic group of prospective volunteers, certain cost- and waste-related factors still work to discourage their voluntary service.

First, the ambitious efforts to organize voluntary pro bono programs, over the last decade in particular, have often been associated with a number of administrative costs. The proper management of such programs, for example, requires that volunteer lawyers be skillfully recruited, appropriately matched to suitable and acceptable cases, usefully trained, and offered necessary technical assistance and even, in some cases, out-of-pocket expenses. While programs vary widely in scale, specialties, geographic context, and in available staff management skills, many volunteer programs have reported various noteworthy problems (read costs) especially in the initial recruiting of lawyers, the high turnover in volunteer panels, and in assuring an adequate quantity and quality of service to clients with few, if any, consumer options.

While such program costs may often be reduced with experience and skillful management, they can never be entirely eliminated.

supra text accompanying notes 46-53.

202. Despite the new wave of stated enthusiasm for organized voluntary pro bono programs, there has been little or no systematic assessment of such programs. At least one commentator, Esther Lardent has recently identified several categories of program problems based “on anecdotal discussions and a limited sample of program visits.” Lardent, supra note 46, at 5-7. While conceding “that a number of excellent pro bono programs exist today . . . there is a great deal of unevenness in program quality” due to staff turnover, ineffective program systems and other problems. Id. A more systematic study, now over a decade old, similarly concluded that “[o]rganized pro bono projects are not without cost . . . . [O]ffice, staff and support costs . . . are incurred by even the most modest pro bono effort. Recruiting, training, technical assistance, and community education and outreach are minimum requirements for an effective program.” LEGAL SERVICES CORPORATION, A DELIVERY SYSTEMS STUDY; A POLICY REPORT TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES (June 1980) [hereinafter LSC DELIVERY SYSTEMS STUDY]. For greater detail on various problems in administering voluntary pro bono programs, see id. at A-42 to A-51. “[P]ro bono projects had particular problems getting information from participating volunteer attorneys about the work they did for clients and the final disposition of cases. Pro bono project staff devoted substantial effort—with some success—to overcoming those difficulties.” Id. at iv.
Where such costs remain high because of weak administration or more fundamental obstacles, they translate into frustration for both program managers and volunteer lawyers. In turn, such frustrations (read costs again) understandably deter even the initially committed from extending their voluntary service over a longer period of time.  

Moreover, there is also a waste-related consideration that will discourage even the best-intentioned volunteers. In addition to the deterring effects of various technical inefficiencies or transaction costs associated with organized volunteerism, there is a more fundamental concern over what the economists call “allocative inefficiencies.” In simpler terms, a volunteer often runs the risk of using professional skill worth, say, $500 to solve a low-income problem worth $50. This kind of mismatch, between the cost of rendering civil legal service and the value of the delivered service, should trouble all but the most unprofessional of lawyers. In a word, good lawyers should not waste or “over-supply” their scarce skills.

Of course, the matter is not quite as simple as the example suggests. Even where a sympathetic volunteer has accurately costed-out the value of her services, she may find it very difficult to estimate after the fact, let alone predict, in any but the loosest way, the value of the benefits that her voluntary service produces. To complicate the measuring problem on the output side, civil legal services provided to the poor may sometimes have important symbolic values beyond our measuring capacities. Even a failed professional effort, for example, may still demonstrate that a lawyer cares enough about a poor client to commit time and professional skill. But who can be sure in any given case?

As a result, even those volunteers who are generally sympathetic to the poor may have good faith reservations about the value of the particular legal services rendered in a particular case. At the same

203. Lardent, supra note 46, at 5.

204. An overarching social goal (though not the only one) is clearly to minimize the inputs of scarce resources while maximizing or optimizing the output generated by that resource use. It is natural to be concerned over the input/output ratio, or the relationship between the total costs and total benefits of any course of behavior or program. Where a large input of energy or valuable resources (costs) produces only a modest output of minimal value (benefits), we may say that we have used or allocated scarce resources wastefully or inefficiently. See POLINSKY, supra note 173, at 7-10; MALLOY, supra note 48, at 38-42.

205. Humbach has succinctly made the point: “Why cannot the law’s protection correspond fully to its promise? The answer is priorities. Nobody wants to devote $500 blocks of lawyers’ time to $15 problems.” Humbach, supra note 88, at 564.
time, a specific lawyerly reluctance to waste high-value professional skills by producing a merely problematic case result is still logically compatible with general support for expanded civil legal services for the poor.

But even if most lawyers are not discouraged by such waste-related problems from volunteering, there is a final important barrier to the expansion of voluntary pro bono programs: so-called “free-rider” concerns. Even assuming a lawyer who is sincerely convinced that the poor as a group need increased civil legal services, there is still good reason for this lawyer to “hang back” while letting others make their voluntary contributions to civil justice for the poor. This is especially so if we further assume an ambitious campaign by a local bar association to expand local voluntary pro bono programs on the grounds that the unmet need is overwhelming if not of a crisis kind.

Despite sincere convictions about the aggregate social benefits of civil legal services for the poor, this lawyer (call her Jane) is still likely to be a “rational shirker” for both benefit- and cost-related reasons. First, because lawyer Jane is told that the need is so great, it is clear that a modest service contribution from her will not go very far in solving the general social problem. She concludes that she can offer no more than a drop of help in a sea of unmet legal needs.

It also makes cost-related sense for Jane to wait and see what other lawyers do. If enough volunteer, the general problem of inadequate legal representation will have been addressed at no direct cost to her. If not enough lawyers volunteer, Jane reasons that government may fill the gap. This, of course, would spread the cost of solving this social problem over a larger tax-paying public, but at the cost of a certain degree of government coercion. Finally, if government fails to respond, and the problem persists because not enough lawyers have volunteered, lawyer Jane still has rational cause to withhold her services. If she now were to volunteer, and many others did not,

206. A free rider receives benefits in spite of not participating. The actual benefit from not participating arguably justifies government compelling contributions from a community of free riders. See John C. Winfrey, Public Finance 101 (1973); Posner, supra note 105, at 439-40. While the Marrero Committee Report never uses the free-rider terminology, it does argue that “the vast number of lawyers . . . , unless required to participate in public interest service, would leave the problems to others . . . .” Final Comm. Rep., supra note 1, at 106.

those others would be free-riding her costly, but probably insignificant, service contributions.  

In short, if Jane is rational and, therefore, cost-minimizing, she is tempted either to free-ride the voluntary contributions of others or to wait for government to act. She is just as inclined to resist the free-riding efforts of others even though she understands that their professional inaction is as rational as hers.

The net effect is doubly ironic. First, both the powerful temptation to free-ride and the likely aversion to the free-riding behavior of others will immobilize not only Jane, but other rational lawyers like her as well. When everyone waits for someone else to bear the costs, this tends to result in an inefficient underprovision of goods. This means a disappointingly low rate of participation even in voluntary pro bono programs designed to appeal to the very most public spirited lawyers among us.

The final, almost overwhelming, irony has to do with the likely energetic campaign to promote voluntary pro bono. The more Jane’s local bar association advertises the gravity of the crisis and the extreme degree of unmet need, the more she is convinced that her efforts alone will make little or no dent in a very large and perhaps insoluble problem. Similarly, the louder the complaints of local bar leaders over the inadequate number of volunteers, the more Jane is convinced that her professional colleagues are taking advantage by withholding their services as rational free-riders are prone to do.

Perhaps members of the bar can be persuaded that they have a duty to resist the free-rider mentality because it threatens organized voluntary pro bono programs. Nonetheless, I doubt it. Most smart lawyers, given a choice between a wishful form of costly charity and rational least-cost inaction, are likely to choose the latter sooner or later, particularly as they mature in professional terms and as the opportunity costs of volunteering inevitably increase.

This analysis also raises important questions about the accuracy of certain recent surveys that report seemingly high levels of voluntary service. While some lawyers doubtless render considerable amounts of voluntary service to the poor, particularly where volunteering exposes larger-firm lawyers to unusual client contact or to

208. See Winter, supra note 107, at 76.
210. See The Am Law Pro Bono Rating: Doers and Talkers, supra note 77, and the most systematic recent effort to survey the New York profession, supra notes 196 & 2.
exciting law reform work, it is hard to avoid doubting the data if only because of these powerful cost-related and free-rider disincentives to extensive voluntary pro bono participation. Even if we concede a higher than expected rate of lawyer participation, that aggregate voluntary commitment ought to be assessed in the context of more general trends toward increased charitable giving.\textsuperscript{211}

In short, this kind of theoretical argumentation reinforces the Marrero Committee’s deep scepticism about voluntary pro bono service to the poor. It also provides an important foundation for a negative prediction about an exceedingly popular though vastly overrated charity strategy.

\textbf{D. Is Mandatory Pro Bono Too Burdensome?}

The Marrero Committee concludes that its proposal for a minimum of forty hours of qualifying pro bono service service every two years “is modest and unlikely to be considered onerous by many attorneys.” (Rep. at 784.) On both counts, the Committee is probably wrong. While estimating the real burdens of the proposal is complicated by variable professional and economic factors and by imperfect science, there can be little doubt that individual lawyers and their firms will suffer an initial annual burden of thousands of dollars in many cases, with the exact amount dependent on the practice situation of particular taxpayer lawyers and relevant competitive and market conditions. An initial or first-level annual impact of at least one thousand dollars per lawyer is likely whether an individual lawyer discharges his or her mandatory pro bono liability by rendering actual service directly to a low-income client or by substituting a cash payment, directly or indirectly, in lieu of such service.\textsuperscript{212}

There are multiple reasons why such a tax burden is likely to be regarded as “onerous” by numerous lawyers despite the best efforts of


\textsuperscript{212} On somewhat conservative assumptions, I have already estimated, in this article, \textit{supra} text following note 48, that some larger firm practitioners, choosing to render actual service to a poor client, might suffer a minimum annual opportunity cost of about $4,000. Even smaller firm or solo practitioners, with a special program option, will be liable for a minimum annual cash contribution of $1,000 in lieu of service. Should such practitioners, assuming that they are fully employed, choose to render actual service, they may forgo twenty hours of billable time at an even higher dollar cost. \textit{See supra} text accompanying note 58.
the Marrero Committee to minimize the burden of the new mandatory pro bono liability. First, a practitioner who compares the new obligation in dollar terms to other existing professional fee obligations cannot help but be concerned. The biennial registration fee for New York State lawyers, for example, is now only $300 even after being increased six-fold over the last decade. Indeed, the substantial increase in that fee is disquieting insofar as it suggests that similarly dramatic increases in the mandatory pro bono (MPB) tax might occur over a similarly short period. What may be an initial biennial $2,000 burden for a small-firm practitioner making a direct cash contribution, in lieu of actual service, may quickly grow as actual and perceived needs for low-income civil legal services increase.

Moreover, such a dollar tax burden is proposed just as the profession finds itself increasingly subject to both the costs of additional regulation and constrained by a recession economy and increasing professional competition. A lawyer in New York State, for example, faces not only a relatively high biennial registration fee, but may soon be forced to bear the added cost of mandatory continuing legal education as well. Rising malpractice insurance premiums for some practitioners, the increasing need for a computerized approach to practice, and even bar association dues increases, may also contribute to a generally higher-cost professional environment that especially burdens solo, smaller-firm and economically marginal practitioners.

But even if the initial or first-level impact of a new mandatory pro bono tax were lower in dollar terms, it might still provoke determined opposition from individual lawyers and their law firms and other employers. Any new tax may be sharply resisted as a largely psychological response to higher taxes per se, even where the modest initial liability does little in fact to curtail taxpayer living standards. This phenomenon has been called "the threshold effect." Absent a compelling and visible public emergency, when people are accus-

213. See supra note 90.

214. At least 37 states, not including New York, have adopted mandatory continuing legal education (MCLE) in some form. A proposal for New York lawyers, requiring 18 hours of MCLE every two years, has already been endorsed by both the New York State Bar Association and by the New York Court of Appeals. This proposal, however, requires an appropriation of "start up" funds by the New York State Legislature, which may be unlikely in a recession economy. See MCLE Requirements; Passed in Most States, Pending in Five Others, Nat'L L.J., June 10, 1991, at 21 & 27.

215. For references to the changing market for malpractice insurance, see supra note 59.
tomoted to a certain tax level, or to no tax at all, any tax increase that crosses the line of an established threshold amount or impairs settled expectations may provoke opposition disproportionate to actual new economic burdens, at least for a time.\textsuperscript{216} Uncertainty as to the exact amount of new tax liability, as well as inflexible tax-related ideologies, may also help to transform rational reservations over a new tax or proposed tax increase into quite passionate resistance.\textsuperscript{217}

Lawyer opposition to the Marrero Committee’s proposal for mandatory pro bono, therefore, is predictable if only for its initial or apparent dollar impact. Whatever the ultimate burden for New York State lawyers on more comprehensive analysis, the new MPB tax can all too easily be quantified in significant dollar amounts. In terms of first appearances, the size of this tax is anything but trivial for many, if not most, lawyers. Efforts to minimize the burdens of the proposal are particularly likely to be resented by the many solo and smaller-firm practitioners who clearly feel that they will be especially burdened by the Marrero Committee’s proposal.\textsuperscript{218}

A more accurate assessment of the real or net tax burden, however, requires more than simple arithmetic estimates of the initial or first-level impact of twenty hours of annual service or a dollar substitute. What matters even more than first effects or impacts is the eventual “economic incidence” of the tax—in other words, its final resting place. Who will really bear the burden of a new MPB tax? The lawyers themselves or someone else? That is a key, if very difficult, question in assessing the real, as opposed to the apparent, burdens of the new proposal for a mandatory pro bono program.\textsuperscript{219}

Determining the actual distribution of any tax burden requires an analysis of plausible economic adjustments and re-adjustments. Taxpayer lawyers, and their firms, will certainly try to minimize their

\begin{footnotesize}
\begin{enumerate}
\item[216.] DUE & FRIEDLAENDER, supra note 91, at 222.
\item[217.] Id. at 223-24. Uncertainty as to the amount of initial tax liability is arguably connected to a more general concern for a “due process of taxation.” For relevant reflections of the great Adam Smith, see supra note 100.
\item[218.] See 1989 CIALS Hrgs, supra note 2, passim. Of course, the Marrero Committee Report, itself, offers certain compliance concessions to solo and smaller-firm practitioners to reduce the risk of compliance hardship that may be unique to solo or smaller-firm practice situations. FINAL COMM. REP., supra note 1, at 800-01.
\item[219.] MUSGRAVE & MUSGRAVE, supra note 94, at 260, characterize the first impact point of a tax as “the place of statutory incidence,” which is distinguishable from the “final resting point” of any tax, which might be called “the place of economic incidence.” Winfrey, supra note 206, at 349, simply defines tax “impact” as “its initial effect on the firm or person who must make payment to the governing body.”
\end{enumerate}
\end{footnotesize}
new MPB tax costs by shifting or transferring these costs elsewhere if they can. Depending on market conditions, affected lawyers and their firms may try to shift some or all of the new tax burden "forward" by charging clients higher legal fees, or "backward" by reducing the compensation or employment of certain persons or resources assisting in the production of legal services. It is also possible to have a mixed shifting process, with some costs moving forward and some backward simultaneously.\textsuperscript{220}

The direction and extent of the tax shifting are primarily dependent upon a key substitution principle. If fee-paying clients can reduce the amount of legal services they consume or can find lower-cost alternatives, like the hiring of in-house staff attorneys, they can successfully resist the higher prices charged by their lawyers in response to the new MPB tax. Where the demand for legal services is relatively "elastic" or responsive in this way to price increases, the lawyers attempting to shift the new tax cost are more likely to consider other backward-shifting strategies. The direction and extent of any tax-cost shifting may also vary over time and are also functions of the size of the tax and the eventual number of load-bearers or the size of the tax base.\textsuperscript{221}

Despite numerous relevant market and economic variables, however, it is still predictable that at least the larger law firms, impacted by the new MPB tax, may have a special capacity to shift this tax cost forward to fee-paying clients provided certain conditions exist. While daunting scientific complexity affects most efforts at tax incidence analysis\textsuperscript{222} the importance of high-quality legal service to many larger law firm clients, and the small proportion of many corporate budgets committed to buying legal services, together suggest a high level of client tolerance for modest fee increases. This is especially predictable where there is a low ratio between the size of the new MPB tax, aggregated at a law firm level, and the total fees

\textsuperscript{220} For a particularly accessible and brief elementary explanation of the principles of tax shifting and tax incidence analysis, see Taxation, ENCYCLOPAEDIA BRITANNICA, supra note 87, at 1080.

\textsuperscript{221} For elaboration of the general principles and concepts of tax incidence analysis, see MUSGRAVE & MUSGRAVE, supra note 94, at 280-300. For more focused analysis of the incidence of commodity and excise taxes, see DUE & FRIEDLAENDER, supra note 91, at 374-403. For even more explicit analysis of the incidence of a lawyer draft or "tithe" to finance public interest law activities, see Russell F. Settle and Burton A. Weisbrod, Financing Public Interest Law: An Evaluation of Alternative Financing Arrangements, in PUB. INTEREST L., supra note 51, at 532, 540.

\textsuperscript{222} See DUE & FRIEDLAENDER, supra note 91, at 387-90.
charged by that firm to paying clients. Tax shifting may also be more feasible when a firm has numerous business and corporate clients. These professional conditions, especially where they exist in combination, invite forward-shifting of the new MPB tax cost, though economic recession clearly fuels client resistance to higher legal fees.

Assume, for example, that ABC is a 100-lawyer law firm that bills all of its clients together an average annual sum of $30 million. Assume also that ABC has decided to open a pro bono department at the firm that will cost about $300,000 yearly to support. The department’s two full-time poverty lawyers, of course, will be expected to discharge the mandatory pro bono obligations of all firm lawyers, except for certain neophytes, under the group service compliance option provided by the Marrero Committee Report. Assume further that the firm has at least 50 substantial business and corporate clients.

On these assumptions, ABC is likely to have a considerable potential for forward tax-shifting, at least in reasonably normal economic times. First, on average, each of the 50 targeted business clients will annually bear $6,000 shifted cost ($300,000 total compliance cost/50 clients). These clients, moreover, are themselves inclined to minimize their own costs of doing business by reshifting this new $6,000 cost forward to their own consumer base. Assuming that each of these 50 clients sells goods or services to at least 1,000 customers annually, each of these customers will absorb an average annual share of the new MPB tax cost equal to $6 ($6,000/1,000 customers). Even

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223. Assume that a single law firm services a corporate client with an annual operating budget of $50 million, with $1 million of this budget allocated for corporate legal fees. Assume further that a mandatory pro bono program is adopted and the law firm decides to increase its billing to this corporate client by $50,000 to cover this client’s share of the firm’s total MPB tax cost, aggregating all of its partners’ and associates’ liabilities under the new program. Of course, the law firm has a number of corporate and business clients to which new costs may be shifted. Even if this particular corporate client pays the $50,000 increase, its total corporate operating budget will be increased by only one-tenth of 1%. 

MUSGRAVE & MUSGRAVE, supra note 94, at 285-86, remind us that “[i]f a particular product is essential and if only a small part of the budget is spent thereon, price elasticity will be low. A tax on salt is likely to be borne by the consumer.”

224. While even the deepest economic recession will eventually pass, current economic conditions as of December, 1991, are clearly an impediment to any forward cost-shifting. See Judy Temes, Legal Bills Go On Trial, CRAIN’S N.Y. BUS., Mar. 25, 1991, at 1; Ellen Joan Pollock, In a Bid to Trim Costs, Many Companies Are Forcing Law Firms to Reduce Fees, WALL ST. J., Dec. 4, 1991, at B1.

225. See supra text accompanying note 31 and thereafter.
if the tax shifting stops here, and it might not depending on the nature of each business, there has been a substantial diffusion of the initial tax burden of $300,000 over a population of 50 corporate clients and their total of 50,000 customers.\footnote{In fact, the new tax cost might be diffused to the near vanishing point. If one of ABC's clients, for example, is a manufacturer of aircraft that are sold to major commercial airlines, the new cost may be ultimately reshifted into the ticket prices charged to tens, if not hundreds, of thousands of airline passengers over a number of years.}

Of course, this kind of tax incidence analysis is designed to be more suggestive than a precise prediction of an entire detailed chain of economic adjustments and readjustments. A number of factors makes such predictions risky. Even if the MPB tax proposed by the Marrero Committee becomes a reality, it will be very difficult, if not impossible, to track the ultimate incidence or effects of an MPB tax through a sequence of tax shifts and re-shifts.\footnote{For the empirical problems of tax incidence analysis, see DUE & FRIEDLAENDER, supra note 91, at 387-90; and Posner, supra note 98, at 42, who observes that "the determination of the incidence of particular taxes is immensely complex . . . ."}

Moreover, even a large law firm like ABC may have a very diverse but economically limited clientele. Even if we ignore the individual, non-business clients of the firm for purposes of this analysis, ABC's business clients may be reluctant to absorb even a very modest dollar increase in legal fees. A relatively small retail business client like an appliance store chain may be prevented, by competition and price-resistant customers with purchase options, from raising its prices on television sets or vacuum cleaners very much, especially during an economic recession. Even in better economic conditions, a large corporate client with a nationwide business that sells 100,000 widgets per month may be constrained from raising prices because of strong competition and the nagging inability of its managers to confidently predict, or even to determine after the fact, the demand effects of a particular price increase.\footnote{"In many situations, . . . the manager has little information as to the elasticity of demand. His procedure for setting price is simply to determine the firm's 'full' costs (to include both fixed and variable costs) and to add to this a conventional markup." WINFREY, supra note 206, at 381.}

In short, the potential for tax shifting is impressive in theory but still subject to a variety of important and changing market factors and stubborn empirical uncertainties. At the same time, this cost-minimizing strategy has important implications. First, those who ignore such forward tax-shifting possibilities may badly exaggerate the real burdens of a mandatory pro bono tax for affected lawyers, their law
firms, and even for their clients. While there are serious barriers to confident predictions of tax incidence, it is also clear that bad economic conditions do eventually change and that many business clients and their customers may soon be more willing to accept modest price increases, particularly where these increases are small and phased in over a longer term.229

The same general theory of tax shifting, however, may also be used to argue against the proposed mandatory pro bono program for its potential to damage the profession "internally." It is possible, perhaps likely in the current economy, that law firms and firm members, newly taxed for the poor, will decide to shift some or most of this new tax cost backward to firm employees rather than forward to fee-paying clients. This may mean lower salaries for associates, paralegals, secretaries, messengers and other clerical personnel. More importantly, the law firm may decide to fire more quickly and hire fewer replacements. This kind of backward tax shifting is most likely to burden the very most vulnerable law firm employees who have little or no opportunity themselves to re-shift these costs to others.230

Even if a dominantly forward shift in tax costs occurs, there may be burdens for both lawyers and their clients that exceed the value of the tax "revenue" raised. For example, if ABC raises its hourly rates because of the new MPB tax, it may discourage the consumption of legal services by at least some of its clients. Even if there is no immediate substitute for ABC's services, these price-sensitive clients may eventually reduce the amount of legal services that they consume, whatever their opinion of the quality of ABC's work.231

229. It is also arguable that demand elasticity, and client price resistance, will only increase over time as clients alter their habits related to the consumption of legal services by making lower-cost substitute arrangements, including enlarged in-house legal staffs and the increased use of paralegal and business personnel for jobs previously, but unnecessarily, done by lawyers. See MUSGRAVE & MUSGRAVE, supra note 94, at 286.

230. The largest law firms in Manhattan, for example, together approach a monopsony position in purchasing the services of new law school graduates. As a group, these so-called Wall Street mega-firms offer a kind of professional work and premium compensation that no other employer sector of the legal marketplace duplicates. More generally, where a producing firm does not purchase inputs in a competitive market, but is the sole buyer from many sellers, it may be profitable to shift a tax burden backward to those input suppliers. WINTER, supra note 206, at 349. During the current recession, an increasing number of larger law firms, though still profitable, "are turning to a rare tactic: laying off lawyers to bolster profits." Ellen J. Pollock, Trying Case: Big Law Firms Learn That They, Too, Are A Cyclical Business, Wall St. J., Aug. 15, 1991, at A1.

231. In fact, high-quality legal services may be available more cheaply in an adjoining
If client demand for ABC’s services actually declines, this in turn threatens ABC lawyers, and lawyers in similarly taxed firms, with something less than full employment. In the extreme, some associates and partners may be forced by a reduced firm output to seek employment elsewhere, perhaps leaving the legal profession altogether. In sum, ABC’s clients are forced, by higher prices, to use less or different legal services than they actually prefer, firm lawyers are less likely to do the work they prefer doing for the profits that they prefer, and more professional resources are more likely to be underemployed. This form of efficiency analysis is highly speculative, of course, and resists empirical confirmation in particular cases. It is also dependent on the magnitude of any price increase and other variable economic and professional factors.

In short, a more extended tax incidence analysis, of a kind rarely done in debate over mandatory pro bono, promises something for everyone. Proponents of the Marrero Committee proposal can use such analysis to argue rather persuasively against opposition arguments that may exaggerate the burden for individually affected lawyers. At the same time, a tax incidence analysis, with certain of the refinements above, raises serious if speculative concerns about a range of undesirable consequences for the lawyers themselves, as well as for some of their fee-paying clients.

Moreover, this analysis also supports the charge that the Marrero Committee’s mandatory pro bono proposal discriminates against solo and smaller-firm practitioners. Because Solo Smith has few, if any, employees, and less than ample support services and resources, the only practical shifting target may be Smith’s clients. Unlike Large-Firm Jones, however, Smith represents mostly individuals and a few small businesses. The individual clients serviced by Smith in residen-

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232. The potential for a tax, especially an excise or commodity-specific tax, to “inefficiently” alter economic activity, interfere with human preferences, and result in underutilized or wasted resources is variously described in the public finance literature as excess burden, deadweight loss or efficiency cost. Simply put, the total burden of a tax may exceed the revenue collected. See MUSGRAVE & MUSGRAVE, supra note 94, at 258, 301-24; DUE & FRIEDLAENDER, supra note 91, at 228-29; see also David Wessel and Jackie Calmes, Momentous Grows Against Luxury Tax As Critics Complain It Enriches No One, WALL St. J., June 12, 1991, at B1. Of course, excise taxes on “demerit goods” like alcoholic beverages and tobacco products may be designed to “correct” certain socially undesirable preferences. MUSGRAVE & MUSGRAVE, supra note 94, at 320.
tial real estate deals, personal injury cases, and domestic relations matters are likely to be more price-sensitive than Jones’ business and corporate clients, many of whom operate large-scale businesses. Smith’s professional services may also be much like those offered by numerous competitors, inviting even wealthier individual clients to substitute another competing practitioner for Smith if he charges too much.

Nonetheless, proponents of mandatory pro bono may still have more to gain than opponents from these efforts at a more extended kind of economic analysis. While estimates of the ultimate incidence of MPB tax costs, however imperfect, are important to assessing the real burden of the Marrero Committee proposal for individual lawyers and law firms, there is another benefits-related perspective that should be incorporated into our analysis. In a word, some lawyers may actually realize tangible net gains, rather than net costs, from a mandatory pro bono program.

Of course, one conventional justification for taxation relates to a so-called benefits principle. Taxpayer tolerance varies in relation to benefits received from a particular tax program. Quite clearly, analysis of the burdens of the MPB tax proposed by the Marrero Committee should take the distribution of tax benefits, as well as tax costs, into careful account before reaching conclusions about real, and therefore net, tax burdens.233

First, increased civil legal services for the poor will require more representation for the adversaries of the poor. A private landlord who tries to evict tenants who are now regularly represented by counsel may be forced to hire more lawyer resources to do the same eviction jobs. A private real estate developer who seeks an ambitious zoning

233. The very concept of tax burden implies an assessment of net effects. Suppose a government collects $1 billion from taxpayers and spends it on highway improvements. While taxpayer resources are reduced by $1 billion at a first level of analysis, this burden is eventually related to highway benefits for many in the taxpayer group. The total gain in highway services for the total taxpayer group must logically be taken into account to determine the degree of net burden or gain in the aggregate that this particular tax produces. Arguably, the best tax programs produce benefits net of costs. MUSGRAVE & MUSGRAVE, supra note 94, at 257. Put another way, the benefit principle of taxation reflects a contract or exchange theory of government, where government is conceived of as charging a tax price for benefits provided to taxpayers. This theory implies that taxes should vary among individuals in relation to benefits received. Unfortunately, this tax equity standard is very often difficult to apply because it is very difficult to assess the amount of benefits received by individuals from government provisions of public goods and services. DUE & FRIEGLAENDER, supra note 91, at 233-34.
change for his next project may find a low-income community newly armed with legal talent. This, in turn, may require the developer to employ more, rather than less, legal talent. Similarly, a city or state welfare agency may find itself less able to terminate public assistance in numerous administrative proceedings without deploying more legal resources to meet the arguments of a more adequately represented low-income clientele.234

The Marrero Committee plan also offers increased employment opportunities to poverty law specialists who are recruited to manage new pro bono service groups both within and outside the larger law firms. Established legal services agencies may also hire and retain more staff lawyers with increased dollar contributions and because of the need to train and coordinate the efforts of numerous lawyers drafted into low-income service.

This first category of benefit may be even more significant to the extent that such beneficiaries are solo or smaller-firm practitioners. While lawyers in diverse professional situations are likely to benefit from an MPB tax, solo or smaller-firm practitioners are more likely to represent the numerous small landlords and merchants who interact with the poor in private markets. While larger-firm lawyers may represent public agencies, especially in important reform or impact litigation, it is also likely that a larger number of more modestly credentialed lawyers will be hired by public agencies and legal services providers to cope with the consequences of an enlarged system of civil justice for the poor.

There is also another, though highly speculative, benefit for some law firms newly taxed under a mandatory pro bono program. While a new tax of noteworthy size may produce excess burden in some practice situations as explained above, it may also promote certain firm efficiencies under other conditions. While cost-cutting is often painful, it may also induce certain healthy longer-term effects for those law firms and practices that are less than optimally managed. While it is difficult to estimate the magnitude of such efficiency gains, certain firms have been overstaffed, with excess professional

234. Judge Posner observes that:
legal services are typically although not invariably utilized in a dispute—in the case of a poor person, with a landlord, spouse, merchant, welfare agency, finance company, etc. The legal efforts made on behalf of one of the parties to the dispute will increase the costs to the other, who must either increase his legal efforts or abandon the stakes in the dispute to the other party.

POSNER, supra note 105, at 444.
and support services arguably wasted. Larger firms may reexamine the number of lawyers assigned to particular cases, and increase the roles of paralegals with little or no loss of quality in professional work. Twenty-four hour secretarial service may be an unnecessary luxury in all but the most demanding matters. Lower salaries for young lawyers may be a blessing in disguise as firms are moved to ease at least some of the intense early career pressure on rank neophytes. Members of a law firm newly beset by significant costs may become all the more imaginative and committed to cultivating new clients and professional specialties.235

The Marrero Committee's mandatory pro bono proposal, therefore, is not only likely to impose costs on lawyers and their firms, but is also likely to produce certain offsetting benefits for at least some of these taxpayers. Though some lawyers will be net losers, others are likely to be net gainers from the plan. While uncertainties persist about both the short and longer-term effects of the Marrero Committee plan, it is still very likely that opponents of the plan have exaggerated its burdens for many individual lawyers and their firms.

E. Is Mandatory Pro Bono Fair?

The Marrero Committee proposal for a mandatory pro bono tax has been sharply and widely criticized as unfair in different ways. This kind of opposition, and a well established critical tradition of assessing tax equity effects, encourages an analysis that incorporates at least three perspectives on the fairness of the proposal. It is first appropriate to ask about lawyer load-bearing capacities. A judgment about the fairness of the MPB burden is not only influenced by the dollar magnitude of any new liability but is also dependent upon the varied abilities of lawyer taxpayers to pay the tax in question.

A second tax equity concern requires us to examine the distribution of the burden within New York State's legal profession. Though the Marrero Committee seeks to impose a uniform, or at least a proportional, burden on lawyers throughout the profession, there are still likely differential effects for different kinds of lawyers in different

235. Taxes may stimulate businesses to greater efficiency in production. This is particularly likely when the firm has been dominated by the satisfactory profit motive and actual profit is reduced below the satisfactory figure by the tax. But to the extent that the private sector attains maximum efficiency—and there are strong pressures in this direction—taxes may lessen efficiency and thus produce excess burden. DUE & FRIEDLAENDER, supra note 91, at 232.
professional situations. While it may be fair to impose different tax burdens on different lawyers, such distinctions must be justified.

Third, a more complete equity analysis requires external references beyond the limits of the legal profession itself. However fairly or unfairly the Marrero Committee program will distribute tax burdens internally, within the legal profession, it is still important to ask whether it is fair to selectively burden the legal profession as a whole, when other professional and vocational groups apparently remain free of legal duties to the poor.

Finally, it is also important to recognize certain inescapable limitations in any analysis of tax equity issues. While efforts to evaluate the fairness of the Marrero proposal, from all three perspectives, will be enriched by data, relevant anecdotal information, and conventional equity criteria familiar to both lawyers and economists, it is also clear that most equity judgments have certain subjective and unscientific characteristics.  

1. Lawyerly Abilities To Pay

It is very widely accepted that a person should pay tax based on relative ability to pay. However intuitively appealing, this principle still requires considerable elaboration. While the concept obviously relates tax liability to economic well-being, there may be serious dispute over the appropriate measure of economic well-being. Though some commentators have argued for the use of wealth or consumption measures in various contexts, the single most useful determinant of ability to pay is probably the income measure, both generally and in our specific context involving MPB liability.

Of course, it is perilous to generalize about the income of lawyers in New York State for at least two basic reasons. First, reliable

236. What is fair or equitable in taxation is inevitably a value judgment; no scientific specification of an equitable distribution pattern is possible. Such a pattern can be specified only on the basis of a consensus of attitudes of persons in the contemporary society. There are two principal elements in the question of equity: equal treatment of persons in equal circumstances and acceptable relative treatment of persons in different circumstances. The former requires definition of equal circumstances; the latter, of the nature of an acceptable relative treatment.

Id. at 233.

237. Adam Smith, supra note 100, endorsed this principle of good taxation in suggestive if somewhat imprecise language.

238. MUSGRAVE & MUSGRAVE, supra note 94, at 243.
localized data is largely unavailable except for the very largest law firms. In addition, the state's profession is exceptionally diverse, ranging from solo practitioners in rural upstate areas to the largest concentration of highly paid corporate law specialists in the world, most of whom practice in very large firms in Manhattan.239

Nonetheless, certain income-related data, however generalized or partial, suggest that the legal profession has recently enjoyed an impressive kind of economic success. Nationwide, the median weekly earnings of lawyers have exceeded all other professional specialties, including physicians, for several consecutive years. The U.S. Labor Department reports 1990 median weekly earnings for 390,000 lawyers, nationwide, at a level of $1,045, nearly 27% higher than the 1990 median weekly earnings for physicians and dentists as a combined group. Moreover, weekly median earnings for lawyers have increased 11.5% in real dollar terms (adjusted for inflation) from 1987 to 1990.240

Recent data of a more particularized and localized kind is also revealing. Since 1985, *The American Lawyer* has published an annual report on the largest law firms nationwide, with important revenue and profit data as well as an analysis of certain economic and professional trends in very large firm practice. While the economic conditions of large firm practice, of course, are very different from those affecting many smaller firms, certain data are still suggestive partly

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239. For a table of the distribution of New York State law firms by location and size, see supra note 57.

240. The following table has been prepared by Susan Silverman Collins, using data from U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS, 223 (Jan. 1991); and HANDBOOK OF LABOR STATISTICS, Bulletin 2340, at 169 (Aug. 1989).

**MEDIAN WEEKLY INCOME: CONSTANT 1990 DOLLARS**

<table>
<thead>
<tr>
<th>Date</th>
<th>Lawyers</th>
<th>Physicians and Dentists</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>$820</td>
<td>$664</td>
</tr>
<tr>
<td>1987</td>
<td>$937</td>
<td>$805</td>
</tr>
<tr>
<td>1990</td>
<td>$1,045</td>
<td>$824</td>
</tr>
</tbody>
</table>
because so many of the most prosperous large law firms are located in New York City.

Of the nation’s 100 largest firms, ranked by 1990 gross revenue, 33 have their principal offices in New York City; 28 of the 59 with gross revenue of $100 million or more are New York City firms. Other even more important measures of revenue per lawyer and profits per partner confirm the economic prominence of very large New York City law firms. Indeed, 19 of the 25 highest ranking firms, in terms of revenue per lawyer, are New York City firms with individual lawyers in such firms averaging 1990 per lawyer revenue of between $1,110,000 and $415,000.241

These figures are especially relevant in comparison to the cost, estimated earlier in this article, of establishing a law firm pro bono department under the group service option of the Marrero Committee Report. For a 100-person service group, I estimated an annual cost of about $200,000 to maintain a department staffed by a single full-time poverty law specialist working in a large-firm environment.242 This seemingly sizeable amount is considerably less than the 1990 profit attributed to a single partner, on the average, at one of Manhattan’s most profitable larger law firms. Of the top 25 firms, nationwide, in terms of 1990 profits per partner, 18 have their principal offices in Manhattan. The dollar range in profit per partner for Manhattan firms in this select group of 25 is between $1,545,000 and $505,000. Such data suggest, of course, a considerable and continuing large firm ability to bear the relatively modest burden of a mandatory pro bono tax or program.243

At the same time, two important qualifications must be taken into account. While very large Wall Street practices remain fabulously lucrative for several thousand large firm practitioners, there are also clear indications of very recent and important negative changes in the economic and competitive situations of the very largest firms. Though 1990 gross revenue at the nation’s largest firms did increase by nine percent in the aggregate over 1989, the national recession also reduced the profitability of many of these firms. Notably, an unprecedented number of associates and neophytes were either discharged or never hired as even the most powerful and successful firms restrained

242. See supra text following note 50.
243. The Am Law 100, supra note 241, at 36. "[F]irms with heavy billings per lawyer typically reap the highest profits per partner, even if expenses are high." Id. at 34.
their growth or reduced their size.\textsuperscript{244}

Most importantly, data related to the very largest Manhattan firms offer only limited insight into the economic conditions for the rest of a diverse profession. Solo and small-firm practitioners located in upstate and suburban areas are typically constrained by very different economic and competitive situations. While imperfect data from the late 1980s indicate that some smaller-firm practitioners in the Northeastern United States recently averaged an annual income of $100,168,\textsuperscript{245} many solo and small-firm practitioners are still very likely to have been hurt by a receding economy. Even in a healthy economy, the ability of numerous solo and small-firm practitioners to bear the burden of a mandatory pro bono tax is clearly much less than that of larger-firm lawyers uniquely situated in the extraordinary professional environment of New York City.

A continuing puzzle with both empirical and normative dimensions, therefore, affects our best efforts to apply the ability-to-pay principle to an equity evaluation of the mandatory pro bono program proposed by the Marrero Committee. To conclude that a lawyer taxpayer has the ability to pay a new MPB tax depends upon our measuring the relationship between the dollar MPB burden and that particular lawyer’s income from law practice and related ventures. Obviously, the greater the uncertainty about each value or amount, the

\textsuperscript{244} In the first few years of the Am Law Survey, which began with the Am Law 50 in 1985, virtually all revenue, income and profit measures indicated steady growth for almost all firms in the ranking, and spectacular economic growth for some. Between 1985 and 1989, for example, Skadden, Arps, Slate, Meagher & Flom grew from 428 lawyers to 948, while per-partner profits similarly increased from $540,000 to $1.2 million. The “demand explosion of the eighties,” however, has now clearly yielded to the recession of the early ’90s:

In 1990 17 firms saw their gross revenue drop or hold flat. (Thirteen of these firms were in New York.) Even more startling, revenue per lawyer—the best measure of productivity—dropped at 22 firms, holding flat at six . . . . [M]ore than half the Am Law 100 firms saw their profits per partner decline or hold flat. These numbers offer the clearest signs yet of a fundamental change in the economics and competitive environment of big-firm practice.

\textsuperscript{245} What Lawyers Earn, NAT'L LJ., Mar. 27, 1989, at S1, S11. For references to another perhaps more accurate survey of economic developments in the profession, see Barnaby J. Feder, Gains at Big Law Firms Slower in ’90, N.Y. TIMES, July 1, 1991, at D1. It is possible that the larger law firms are among those most affected by the recession since they had expanded during the 1980s to the point of being “bloated” by a staff capacity designed “to maintain a growth rate that is impossible to sustain.” Id.
more unconvincing our ability-to-pay conclusion. But even if we can ascertain the true incidence of the MPB tax (Does the lawyer really “absorb” all or only some of the burden?) and anticipate changes in the key relationship between the size of the MPB tax and lawyerly income, what standard controls our ability-to-pay determination? Is a tax burden equal to 2% of a lawyer’s income always consistent with ability to pay or does it depend on income levels? Should a lawyer with an unusually high-cost practice be given special relief from the marginal burden of the new tax cost?

These and other conceivable normative questions make an ability-to-pay principle difficult to apply. At the same time, even an imperfect analysis, especially in aggregate terms and localized to New York City, suggests a likely capacity on the part of many lawyers to offset a new MPB tax through a very substantial and probably increasing professional income, at least over the longer term. While the burdens of a mandatory pro bono program are hardly trivial in absolute dollar terms, it is also difficult to resist the judgment that many in the profession will be able to bear the burden without a significant adverse impact upon their professional or living standards.

2. Fairness for Different Lawyers

It is also desirable to convince lawyer taxpayers that they will be treated fairly when compared to all other lawyers in the state subject to the MPB tax. Simply and generally put, a commitment to what the economists call horizontal equity, and the lawyers call equal protection of the laws, requires that individuals in the same circumstances should be treated the same way. Conversely, a principle of so-called vertical equity directs that lawyers in different situations be taxed or burdened in different ways.246

Vertical equity considerations are especially complicated once we take into account the real world diversity of New York State’s legal profession and slightly different applications of the vertical equity concept. If we assume, for example, that Solo Smith has an annual professional income of $75,000 and Large-Firm Jones has an annual professional income of $250,000, it seems right to impose a higher dollar tax liability on Jones than on Smith. There is, however, a way to do this while at the same time providing for a kind of equal treatment in percentage terms. If Jones and Smith are both required to

246. Settle & Weisbrod, supra note 221, at 542; supra note 236.
pay 1% of their income to provide civil legal services to the poor, they will still be taxed an annual $2,500 and $750 respectively.

The Marrero Committee adopts this kind of proportional tax policy, though keyed to billable hours and professional revenue rather than to the income of taxed lawyers. This is very clear if we focus upon the mandatory pro bono requirement in terms of 40 hours of biennial service. If Jones, billing at an hourly $200, renders actual service to the poor, this will amount to an annual tax liability of $4,000 in the form of foregone billable revenue (20 service hours x $200). Smith, rendering the same 20 hours of annual service, but billing at a lower hourly rate of $100, will pay a tax of only $2,000 for the year. Despite very different practice situations, each still suffers the same percentage loss in both billable hours and professional revenue, assuming that each is fully employed and works the same number of billable hours for the year.

This form of apparently proportional tax may be criticized as failing an internal equity test on two counts even though Jones and Smith do surrender billable hours with different market values. First, it is arguable that a tax imposed on practitioners whose annual dollar billings and professional incomes are very different should be more than merely proportional. It is arguable that real vertical equity requires progressive taxation, with the percentage of tax liability rising as the taxpayer's professional revenue or income rises.

This means that Jones should contribute a higher percentage of her annual professional time or revenue than Smith. While the percentage differential is debatable, it might mean that Large-Firm Jones effectively pays a 2% tax on the revenue from her billable hours while Solo Smith pays a tax of only 1% on the same amount of revenue-producing hours. Because they bill at very different hourly rates, this produces an even more striking dollar differential in tax liability. If the Marrero Committee plan incorporated a progressive principle of this kind, Jones would be obliged to render 40 annual hours of service to poor clients (assuming full employment is defined as 2,000 billable hours) while foregoing billable revenue of $8,000.

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247. There are three possible relationships of tax to income: regressive, proportional, and progressive. The relationship is regressive if the ratio of tax to income declines as income rises; it is proportional if the tax constitutes the same percentage of income at all levels; it is progressive if the percentage rises as income rises.

DUE & FRIEDLAENDER, supra note 91, at 236.

248. Id.
This effective yearly tax payment of $8,000 (40 billable hours x $200) would be much greater than the compelled $2,000 contribution of Solo Smith (20 billable hours x $100) who is only obliged to forego 1%, rather than 2%, of his yearly 2,000 billable hours.

Nonetheless, the Marrero Report does not incorporate such a progressive tax approach despite the unique concentration of very lucrative large-firm practices in New York City. This may be due to good faith reservations about progressive taxation in general, or it may be due to certain political considerations or to a combination of factors. Some critics have noted that a disproportionate number of Marrero Committee members are associated with larger law firms in New York City and upstate.

Criticism of the Marrero Report has also emphasized another related equity concern. Even if the Committee is not to be faulted for failing to adopt a progressive system of MPB taxation, some critics have argued that the proposed mandatory pro bono program will have regressive effects.

First, at least some solo or smaller-firm practitioners are more likely to be underemployed, especially in hard times. For such practitioners, even an annual $1,000 cash substitute for actual service is likely to be a special burden on a modest professional income. To avoid this, there may be little choice but to render actual service to the poor despite the Committee's intention to provide such practitioners with a practical cash alternative. Much the same situation may exist for an increasing number of practitioners, especially female

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249. For a defense of progression built upon the principle of diminishing marginal utility of income, see id. at 237. Progressive taxation, however, has also been criticized as a misapplication of that principle, and further faulted for its disincentive effects. Id. For a classic treatment of the controversy over progressive tax arrangements, see WALTER J. BLUM & HARRY KALVEN JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION (1953).

250. The New York State Bar Association Special Committee to review the Marrero Committee Report had a membership that its Report explicitly characterized as including "a broad cross-section of the New York bar, geographically and otherwise." N.Y. State Bar Rep., supra note 101, at 4.

251. Despite the Marrero Committee's expressed concern for solo and smaller-firm practitioners and the fact that such practitioners are given a special lower-cost cash compliance option, some critics still claim that many lower-income lawyers will suffer disproportionate burdens compared to larger-firm, higher income lawyers. For a working definition of a regressive tax arrangement as one where the ratio of tax to income decreases as income increases, see supra note 247. Cramton, supra note 88, at 1133 observes that: "mandatory pro bono proposals tend to be regressive and inequitable, imposing a heavy burden on economically marginal lawyers and harried associates, while treating more gently those at the senior ranks of large law firms. The Marrero proposal does not avoid this unfairness." In general, most commodity or excise taxes do tend to be regressive. HAVEMAN, supra note 95, at 80.
lawyers, who "choose" to practice part-time because of pressing family obligations.

But even if both Solo Smith and Large-Firm Jones suffer from recession-induced underemployment, there is still likely to be an advantage to practicing in a firm, especially a larger one. Assume, for example, that both Solo Smith and Large-Firm Jones are prepared to work an annual maximum of 2,000 hours for fee-paying clients. Assume further that, in hard economic times, each suffers slightly different disappointments. Jones works only 1,800 hours at a reduced hourly rate of $180 (down from the normal $200). Solo Smith also suffers, but to a greater degree, by working only 1,400 hours at a reduced average hourly rate of $70 (down from the normal $100). Of course, the average hourly rate includes some supposedly fee-paying clients who fail to pay. Solo Smith may have more of these clients than Large-Firm Jones.

If, in this case, Smith chose to contribute the minimum $1,000, in lieu of service, directly to a local legal services agency, this would amount to about 1.02% of his total annual professional revenue of $98,000 (1400 hrs. x $70). Nonetheless, such a dollar amount is still likely to be resisted by a struggling Smith whose net income from his practice will certainly be less than his gross practice revenue, which is already 30% less than he had hoped for.

Jones, on the other hand, still satisfies her mandatory pro bono obligation by agreeing to participate in her large firm's service group, which costs the firm and all participants a yearly total of $200,000 to support. Jones, as one among 100 group members, suffers an allocated cost of about $2,000, or twice the dollar amount of the Smith contribution. Nonetheless, she has a real economic advantage over Smith in part because she has suffered a lesser rate of revenue disappointment. Unlike Smith, who is 30% underemployed in hourly terms, she is only 10% underemployed and generates a total of $324,000 in professional revenue for the year (1,800 hrs. x $180). Even though Large-Firm Jones spends the equivalent of $2,000 supporting her firm's pro bono service group, that figure still amounts to only six tenths of one percent of her professional revenue ($2,000 pro bono cost divided by $324,000 professional revenue). In percentage terms (Smith load = 1.02%; Jones load = .6%), Solo Smith's burden is actually about 70% heavier than Jones' when the dollar MPB contribution is related to total professional revenue in each case.252

252. Of course, if Jones and Smith were strict dollar-cost minimizers, each ought to
Large-Firm Jones is also likely to have still another advantage over Solo Smith that contributes to a regressive tax effect. Even in the worst of economic conditions, Jones is more likely to have greater tax-shifting options. While large firm practitioners may be constrained by market conditions from shifting tax cost forward to clients, there is a greater likelihood that Jones will have a greater number of larger-scale business and corporate clients. As already explained in this article, this kind of clientele may be more tolerant of increased legal fees in part because of their market power to re-shift such costs to very numerous customer bases.

Even if client demand is very responsive to price increases, Large-Firm Jones and her numerous partners may have opportunities to shift a new tax cost backward to associates, support staff and other factors in the firm’s professional production. Solo Smith, while he probably has some cost-cutting options too, is likely to have fewer than Jones.253

A practitioner like Jones may also have a third advantage compared to lawyers like Solo Smith because she may already do significant voluntary pro bono work. A recent survey, for example, reported that numerous lawyers employed at 23 of the largest law firms in New York City have averaged at least 20 annual hours of actual voluntary pro bono service. While there may be good reason to question the accuracy and relevancy of such a survey, it still suggests that pro bono starting points may be different for lawyers in different size firms.254 Obviously, to the extent that large-firm lawyers, like Jones, already do a considerable amount of voluntary pro bono work, the modest Marrero Committee proposal for an annual minimum of 20 hours of service may add little or no burden. On the other hand,
A LAWYER'S LEGAL DUTY TO THE POOR

practitioners like Solo Smith may have little time or energy for voluntary pro bono work that will meet Marrero Committee standards. As a result, an apparently uniform service requirement may actually be more burdensome for the Smiths of our professional world despite their comparatively lower incomes.255

Finally, there is a possibility that larger-firm lawyers will have a special opportunity to reduce their compliance costs dramatically because of their practical ability to avail themselves of the group service option.256 While such an option is theoretically available to lawyers like Solo Smith, Smith may not find a pro bono service group that will accept him as a member at an attractive subscription price. To make the group service option practical for Smith, a group must charge him something less than a yearly membership fee of $1,000 because he is already permitted to substitute cash for service at a rate of $50 per obligated hour. Even if Smith does identify a low-cost service group, he is unlikely to reduce his compliance costs as much as Large-Firm Jones does simply by joining the service group established by her large law firm.

In sum, there are several reasons to credit the charge that the Marrero Committee proposal will be a relatively greater disadvantage to solo and smaller-firm practitioners, as well as to certain government attorneys. At the same time, the degree of regressive effects in the aggregate is difficult to estimate. Our very limited and imperfect information about the state of the profession and the need to speculate about certain operating details of an MPB program make it difficult to quantify the size of the inequity.

3. Are the Lawyers Unfairly Singled Out?

Virtually all critics of mandatory pro bono programs, including the Marrero Committee proposal, have argued that it is unfair to select or single out the legal profession for special service to the poor when other licensed professions and vocational groups are spared

255. It is also possible that smaller-firm attorneys do comparatively more pro bono work than predicted. While the 1991 N.Y. Pro Bono Survey, supra note 2, at 3, reports that 43% of survey respondents performed "no law-related service pro bono publico of any kind," it also noted that "[p]roportionately more attorneys in smaller firms said they engaged in qualifying pro bono service than did those in larger firms." Id. at 4, 22; see also Mandelstam, supra note 71. Of course, it is also arguable that smaller-firm lawyers have more reason to inflate their reported pro bono hours.

256. See supra text following note 45.
comparable burdens. However great the need for expanded civil legal services to the poor, so the argument goes, the entire community should bear the cost of meeting a social responsibility through our public treasuries.  

Even supporters of mandatory pro bono often concede the power of such arguments. Unfortunately, the Marrero Committee Report itself responds to this very important criticism with a burst of indignant and ultimately unpersuasive rhetoric that only serves to obscure a number of impressive countering arguments. (Rep. at 781-83.)

First, it is unclear as a matter of fact that the legal profession will be as selectively burdened as some critics maintain. Once again, prospects for tax shifting are relevant. Though we cannot be sure how much forward tax-cost shifting to fee-paying clients will occur in complex and varying market circumstances, it is still likely that some will occur with certain cost-spreading effects, especially over a longer-term period of gradual client adjustment to slightly higher legal fees.

As already argued, there is a real possibility of a sequence of cost adjustments with initial shifting from lawyers to business or corporate clients, followed by second-level re-shifting from that business clientele to very numerous customers, some of whom may themselves shift these costs yet again. Especially in a state like New York, with a large absolute and relative number of lawyers, an apparently selective MPB tax may be surprisingly broad-based in its ultimate effects with a significant portion of the population eventually sharing in the widely spread cost of a mandatory pro bono program.

But even if the lawyers were to be selectively burdened by mandatory pro bono costs with relatively little forward tax shifting to clients and beyond, it is simply not true that they will be the only professionals bound by legal duties to the poor. It is arguable that the medical profession is already more heavily burdened by the poor than the legal profession will be by the Marrero Committee proposal.
Some doctors claim, for example, that hospital affiliation, with staff privileges, requires substantial donations of professional time. This may be due in part to the fact that hospitals, and the physicians who staff them, are barred by federal and certain state laws from denying emergency treatment to medically indigent patients and from unjustifiably transferring or "dumping" such patients.

While neither the federal Medicare nor Medicaid program formally compels doctors to serve either the elderly or the poor, the practical constraints are still noteworthy. Many doctors discover that an increasing population of elderly patients provides an important financial foundation for their private practices in increasingly competitive professional circumstances. At the same time, doctors who accept elderly Medicare patients are now subject to a form of price control with limited ability to charge Medicare patients more than Medicare approved amounts. This means that many poor and modest-income elderly patients, along with the nonpoor, benefit from fees held by regulation to below-market levels.

exception of lawyers, doctors, and social workers, are relatively insensitive to the needs of the poor for professional services. See JOHN KULTGEN, ETHICS AND PROFESSIONALISM 125-26, 197-200 (1988). For references to the doctor's ethical obligation to treat the poor, incorporated both in the American Medical Association's original 1846 code of ethics and reflected in a 1987 resolution of the AMA House of Delegates, see George D. Lundberg & Laurence Bodine, 50 Hours for the Poor, 73 A.B.A.J., Dec. 1987, at 55. For initiatives by the architects, see Natalie Shivers & Douglas MacLeod, Ethics: Pro Bono Publico; Architects Donate Services, 72 PROGRESSIVE ARCHITECTURE, Mar. 1991, at 40.

261. Seth Fielding, M.D., N.Y. TIMES, Aug. 17, 1989, at A22 (letter to the ed.); & Benjamin Weinstein, M.D., N.Y. TIMES, Feb. 3, 1991, 12NJ, at 12 (letter to the ed.). A 1988 survey reported that "62 percent of all physicians provided charity care (services at reduced or no fee), averaging 6.6 hours per week or 11 percent of their weekly hours." Shivers & MacLeod, supra note 260.


263. For federal Medicare cost containment legislation, effective since 1989, see 42 U.S.C.A. § 1395w-4(g) (West 1983 & 1991 Supp.); National Senior Citizens Law Center, The MAA: Medicare Cost Containment Efforts in OBRA 1986, 21 CLEARINGHOUSE REV. 351 (1987). Even more stringently, Massachusetts requires physicians, as a condition of licensure, to limit Medicare charges to the "reasonable" amounts reimbursed by the Medicare Administration. See Massachusetts Medical Soc'y v. Dukakis, 815 F.2d 790 (1st Cir.), cert. denied, 484 U.S. 896 (1987). The Medicaid program also arguably involves similar wealth transfer effects for at least some physicians. While many doctors are reluctant to participate in this low-income program, those who do apparently feel compelled to treat medically indigent patients for fees paid by federal, state and local governments at well below market levels.
There is also another information-related perspective that responds to the charge that mandatory pro bono unfairly singles out the lawyers, thus representing an effort to solve everyone’s problem by “drafting” only a few. What the “singling-out” argument often seems to lack is an appropriate sense of the broader funding context. In fact, we have grown so accustomed to cursing our benighted federal government for its decade-long failure to finance civil legal services for the poor adequately, that we risk depreciating, if not ignoring, what is still a very important and continuing government presence.

The society at large, through both the federal treasury and increasingly through state and local government treasuries, already shoulders a considerable burden in supplying the poor with civil legal services. The 1991 fiscal year appropriation for the Legal Services Corporation was $327 million. While it is true that this is only about 65% of the real-dollar funding level of ten years ago, this amount has been modestly supplemented by other government initiatives, including the federal Older American Act. However inadequate to meet the growing need for low-income civil legal services, existing government programs already spread the burden very broadly over a national or state income tax base.

In short, the sequence of actual and proposed programs counts in evaluating the charge that the Marrero Committee proposal is an unfairly selective imposition on a relatively small population of lawyers. Even if the proposal for mandatory pro bono does single the lawyers out, this seemingly selective funding experiment comes after,

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This has the practical effect of subsidizing low-income patients because participating doctors relinquish a portion of the supposed higher market value of their services. Of course, the difference between Medicaid fees and fees charged private unsubsidized patients is likely to be very substantial. Susan Rose-Ackerman, *Social Services and the Market*, 83 Colum. L. Rev. 1405, 1410 n.23 (1983). It is also arguable, however, that doctors who settle for very low Medicaid fees cannot sell their services elsewhere for more. Therefore, they are actually selling their services at market value without a real loss of income.

264. If the 1981 FY appropriation of $321 million is adjusted for inflation, the appropriation for FY 1991 should be over $500 million simply to match that earlier appropriation in real dollar terms. For various data on federal financing and legal needs, see Statement of Jack W. Londen on behalf of the A.B.A., before the Subcomm. on Admin. Law & Govt. Relations of the House Judiciary Committee, pertaining to Reauthorization of the Legal Services Corporation 1-2 (Mar. 13, 1991) (on file with author). For data on Older American Act and state and local government funding for New York State legal services, see N.Y. Legal Needs Study, *supra* note 28, at 160-61 & 156-59 respectively. For citations to various N.Y. State programs requiring or permitting the appointment of free counsel in various civil proceedings, particularly Family Court matters, see Morgenthau v. Garcia, 561 N.Y.S.2d 867, 868 (Sup. Ct., N.Y. Cty. 1990).
not before, continuing efforts at more broadly based social solutions through our public treasuries. Since public treasury support, for a variety of reasons, has proven inadequate to the task, it may be easier to justify imposing a special burden on the lawyers as a kind of funding last resort.\footnote{265}

Finally, there is another very compelling perspective that is often missed in efforts to respond to the “singling-out” criticism. Even if we entirely reject the preceding efforts to recharacterize or to justify the seemingly selective aspects of the Marrero Committee’s proposal for mandatory pro bono, there is still a powerful answer for those who claim that the lawyers are being unfairly asked to selectively shoulder a burdensome solution to everyone’s problem. In short, even assuming that the lawyers are truly singled out by mandatory pro bono programs, they deserve to be.

Professor David Luban, almost alone, has offered the argument in an extended and persuasive form. Luban concedes the power of the following troublesome question: “Wouldn’t it be wrong for the community to require grocers to feed the hungry ‘pro bono’, if it is unwilling to tax itself to feed the hungry?” He is quick, however, to distinguish the grocers from the lawyers in terms of the effects of their respective vocational behavior:

\begin{quote}
[L]aw practice is not a victimless pastime. It is an adversarial profession, and those who can’t afford it are often damaged by those who can. One day spent in housing court, watching landlords’ lawyers winning against unrepresented poor people who may have had defenses if only they had had lawyers, can convince anyone of that. Even when the result is defensible, as it sometimes is, the mismatch is a scandal . . . . Even an office practice that on the face of it has no adversaries may harm the legally disempowered . . . . [T]he law allows us to do many things we couldn’t do otherwise. When lawyers secure these advantages for their clients, safeguarding their interests against a range of potential dangers and adversaries, they change the face of society. They set up a network of social practices from which the poor are, willy-nilly, excluded. This is a second way in which the grocer analogy breaks down. The grocer does not make the hungry worse off by
\end{quote}

\footnote{265. A more comprehensive view of existing social efforts to spread the burden of providing free counsel to indigents also requires that we account for a number of expensive government-funded programs providing low-income defendants with counsel in criminal cases. For an overview of New York programs in a criminal case context, see Garcia, 561 N.Y.S.2d at 868.}
selling to the cash customer; grocery retailing is not an adversarial profession. But law retailing is.266

This kind of argument, moreover, is nothing radical. Though Professor Luban does not make the connection in quite these terms, there is no doubt that this kind of consequentialist argument is connected to both conventional legal concepts and to a second category of newer but very powerful legal concerns over certain relevant spillover effects.

First, the argument is securely grounded on a concept of causation. Lawyers have a special duty to respond to the legal problems of the poor because they have helped to cause some of those problems. Few if any concepts are more basic to theories of liability; few have a more powerful intuitive appeal.267

Lawyers are also presumably familiar with a second concept of shared causation. Many injurious effects have multiple causes. There is no need, therefore, to overargue the causal case. While it is silly to argue that lawyers alone have caused the life and legal problems of the poor, there is also compelling evidence that the profession collectively, and some individual lawyers in particular, have contributed to the low-income need for more legal representation.268

266. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 286-87 (1988). Luban supports his moral reservations about the lawyer's client-centered "instrumentalism" with telling examples of damage-doing lawyers who adversely affect the interests of the non-poor as well as the poor. Id. at 13-14. Of course, the general point is not new. Professor Morton J. Horwitz has argued that lawyers have rather ruthlessly exercised legal power, on behalf of powerful economic interests, to bring about economic redistributions disproportionately favoring emergent entrepreneurial and commercial classes. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 xvi, 99, 201, 266 (1977). For a critical perspective on the Horwitz critical perspective, see Stephen B. Presser, Revising the Conservative Tradition: Towards a New American Legal History, 52 N.Y.U.L. REV. 700 (1977) (book review). While the now voluminous literature on mandatory pro bono generally ignores the Luban line of argument, some commentators have taken brief note. See Esther F. Lardent, Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question, 49 MD. L. REV. 78, 87 (1990).


268. One of the most telling arguments against mandatory pro bono is the contention that unmet legal needs are but a part of the larger social problem of poverty and that it is unfair to expect lawyers to shoulder a burden that properly belongs to the whole of society. On the surface, at least, this position might seem to have some merit. But does the fact that a problem attributable partly to the profession's privileged status is also part of a larger social problem relieve the profession of any responsibility at all? The so-called energy crisis is a problem of the entire society, but does that fact absolve automobile manufacturers of responsibility for
A third related concept is also relevant to this argument justifying a selective form of liability for the profession. To hold the lawyers partly responsible for some life and legal problems of the poor is not necessarily to condemn these same lawyers as morally blame-worthy, though Professor Luban might disagree. It is enough to regard the lawyer's liability for a presumably selective mandatory pro bono tax as a form of strict or absolute liability. Such liability, of course, is not conditioned upon legal fault. Rather, a theory of strict liability is relentlessly consequentialist in character. "A is liable, at least prima facie, if he is the cause of B's harm, regardless of A's ability or inability to avoid the harm by the exercise of due care."269

This characterization of the MPB duty as liability of the strict kind is particularly important because many lawyers feel themselves bound by a certain client-centered ethic. It is conventional for lawyers to view themselves as steadfast partisans for a particular client's interests. A good lawyer, on this view, is obliged to disregard all other interests to the extent that they are incompatible with client interests. While some lawyers, of course, question such principles of "partisanship" and "nonaccountability" and their disturbing implications, many others still have a deeply cultivated and professionally sanctioned insensitivity to the third-party effects of their professional behavior.270

Nonetheless, it is relatively easy to demonstrate that lawyers qua lawyers, both collectively and individually, regularly do damage to other human beings, including poor folks. For example, to the extent that lawyers seek tax preferences for wealthy individual and corporate

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269. Rizzo, supra note 267, at xi.

270. While Professor Luban sharply criticizes "the standard conception" of the lawyer's role incorporating the principles of "partisanship" and "nonaccountability," he also recognizes that this standard conception "accurately represents leading themes in the official rules of the American legal profession." LUBAN, supra note 266, at 393. He also notes the longstanding legitimacy conferred by lawyers like Lord Henry Brougham:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

Id. at 54.
clients, they are actively engaged in certain redistributive strategies
that may diminish public resources otherwise available to the poor
and to the middle class. Similarly, one need not adopt a politically or
professionally extreme philosophy to be concerned over the immediate
and ultimate effects of a wave of highly leveraged corporate mergers
and acquisitions. While very competent lawyers have often served
brilliantly in the corporate takeover wars of the ‘80s, their profession-
al behavior has sometimes cost real people real jobs and has pro-
duced other arguably undesirable third-party or spillover effects.
While America’s mighty corporate bar does professional work seem-
ingly far removed from the problems of poor people, such work in
the aggregate still plausibly affects the living welfare of many citizens
not directly involved in a world of complex business and financial
transactions.271

Lawyers have a certain degree of collective responsibility, not
only for the resource-related problems of the poor, but also for the
high costs of access to our formal system of civil justice. We are,
after all, the great self-regulating profession. Arguably, no one gov-
erns the lawyers but the lawyers. Whether or not the legal profession
may be fairly characterized as a monopoly, until recently it has his-
torically exercised its collective power to restrict the ability of law-
yers to compete with one another through advertising and price con-
cessions.272

The profession has also discouraged, until very recently, certain
“informalizing” and cost-reducing justice innovations like arbitration
and mediation alternatives to litigation. While many lawyers have
now warmly embraced the counter-movement to alternative, non-liti-
gation models for dispute resolution, even this widely applauded trend
may not be an unqualified boon to the poor. Indeed, some commenta-
tors have argued that more informality in the resolution of disputes,
like those between landlords and low-income tenants, only further
disadvantages aggrieved tenants and generally increases undesirable

271. See id. at 401. Even well-intentioned environmental and conservation efforts, pur-
purportedly in the public interest, may hurt the poor. See, e.g., Sarah Lyall, New Rules for
Bluefish Give the Poor the Blues, N.Y. TIMES, Aug. 17, 1991, at 23.
272. Nonetheless, Shapiro, supra note 88, at 776, argues that while the legal services
market is not a model of perfect competition, there is an increasing trend towards competition
within the profession internally, in part because many formal and informal barriers to competi-
tion are “rapidly crumbling.” As a result, it seems inaccurate and unnecessarily pejorative to
characterize the profession in monopoly terms. For a competing point of view, see
Christensen, supra note 268, at 14-16.
Similarly, the profession still restricts certain forms of the so-called unauthorized practice of law, to the arguable disadvantage of low-income clients who might benefit from expanded and lower-cost paralegal and lay services. While the profession has increasingly tolerated client self-help, most of the organized bar still resists the deregulation of paralegals and other non-lawyers who might function efficiently in certain routine law-related matters without the active supervision of lawyers.

Though the organized bar, with certain strong judicial stimuli, has recently adjusted to lawyer advertising, greater fee competition, legal insurance plans, and lower-cost legal clinics, it has a long and controversial history of promoting high-cost justice systems, sometimes seemingly for the best of reasons. Formal legal education, for example, has improved in quality especially since the Second World War. At the same time, the growing costs of acquiring a legal education and a license to practice law have also posed certain barriers to increasing the supply of reasonably priced legal talent available to poor and middle-income Americans. Very recent requirements in many states for mandatory continuing legal education only exacerbate the cost problems that generally work to discourage client access to lawyers.

Despite a certain degree of collective responsibility, however, it is not difficult to predict that many lawyers will fail to see why they should be held accountable for the unmet civil justice needs of the poor.


275. Abel, supra note 166, at 7. Professor Abel also sketches the entry barrier effects associated with requirements for more prelegal education, higher law school tuitions, more stringent law school accreditation standards, and more rigorous bar examinations. While the profession has recently expanded and diversified, despite such barriers and the costs they entail, he also notes that "competition to enter law school, attrition within it, and indebtedness upon graduation all affect the size of the profession as well as its class and racial composition." Id. at 71-72.
poor. Of course, they have a point. However secure the general intellectual connections between a highly selective mandatory pro bono program that burdens only the lawyers as a group and foundation concepts of collective causation and strict liability, the lawyers also know something about the related concept of proximate cause.

Even if the profession as a whole, or a significant leadership component, collectively makes some contribution to civil justice problems of the poor, the connections may be too attenuated to justify individual-level liability for costly solutions. Even if some members of the very largest law firms, heavily concentrated in Manhattan, sometimes work to service fee-paying clients in ways that ultimately harm the poor, and even if the organized bar has historically engineered a very high-cost and relatively inaccessible justice system, just what do individual solo or small-firm practitioners in upstate or suburban New York communities have to do with all of that? To make a more powerful case for selective liability for the legal profession as a whole, under a mandatory pro bono program, individual lawyers must be persuaded that, as individual professionals, they have more directly acted to harm the poor in ways that create civil legal problems.

Luban, of course, suggests the classic case of a lawyer who is retained by a private landlord to evict low-income tenants who fail to pay their rent. Whatever the justification for various evictions, this lawyer’s individual professional efforts directly contribute to at least inconvenience or, in a worst case, homelessness for some low-income tenants. Other examples also illustrate the numerous cases where individual lawyers, both directly and more indirectly, negatively affect the lives and legal problems of the poor.

In a first case, Lawyer A works for a government social services agency. The agency administers a program of supplemental food allowances for welfare recipients who incur an additional cost because they are unable to prepare meals at home. Agency officials, however, decide to deny such a food allowance to all homeless residents of a public shelter that provides three meals a day, despite the fact that some shelter residents are employed and cannot take advantage of the shelter’s free food.276

A’s government client, of course, expects her to defend this policy of no supplemental food allowances to the best of her ability. Even if shelter residents bring a successful law suit, A’s professional

behavior has probably adversely affected their lives and helped to create a particular kind of legal problem. If A is particularly adept, she may even be successful in defending this money-saving policy to the permanent disadvantage of a number of low-income persons. Of course, A did not make the damaging policy but her advice may have been sought before the policy was adopted. Almost certainly, she played a significant role in deciding whether and how to litigate the related legal issues. To be sure, she shares responsibility for defending the policy with others, including non-lawyer superiors, but she still makes a notable contribution as an individual lawyer who damages the interests of the poor persons denied the supplemental food allowance.

Lawyer B is less directly involved with the poor, though there is still a clear causal connection. B represents a major retail merchant of household furnishings with numerous stores. B drafts an installment credit agreement for general use in all client stores in all sorts of neighborhoods. The form agreement contains a cross-collateral clause that secures all installment debt with all items purchased. If certain low-income consumers buy various household furniture on credit at different times, fall behind in some of their installment payments, and lose all their furniture as a result, B has played a role in producing such effects. Whatever B’s intentions or awareness that poor consumers may be particularly confused and harmed by such secured credit arrangements, he is a cause of certain low-income injury. Of course, some aggrieved low-income consumers may actually sue to recover their furniture. If that happens, B has helped to cause a kind of legal problem even if some other lawyer handles the resulting litigation.

One final example involves Lawyer C, in a less direct way, with the welfare of certain poor persons. C represents a major developer seeking financing and development permits to build a new large-scale mixed-use development on a sizeable parcel of vacant land in an older, deteriorating ethnic neighborhood. Lawyer C performs his professional duties brilliantly and the project is successfully built. In due course, the neighborhood changes dramatically. A large number

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of poor tenants, and the small stores that service them, are displaced from the neighborhood because real estate market values are bid upwards by newcomers who are willing and able to outbid existing residents. Clearly, this process of gentrification and secondary displacement has not been caused by C alone. Nonetheless, C is still a cause, albeit one among many, of a neighborhood transition that ultimately hurts numerous poor people.

Individual lawyerly involvement to the disadvantage of the poor, therefore, is hardly uncommon. Put another way, certain professional behavior may have negative spillover or external effects for numerous and vulnerable low-income interests. Such a problem of negative externalities, as the economists call it, is a classic justification for both certain forms of public regulation and some longstanding excise taxes. Whether or not an industrial polluter intends to harm its neighbors, restraining regulation or even a special pollution tax on output may be justified.\textsuperscript{279} While excise taxes on alcoholic beverages and tobacco products are defended on several different grounds, one compelling reason for such sumptuary taxation relates to the negative social or spillover effects produced by the consumption of these addictive poisons.\textsuperscript{280}

Of course, there are limits to this kind of cause and effect theorizing. At least some causal connections are elusive and likely to provoke good faith debate over very partial and speculative evidence. Some lawyers (e.g., patent specialists or even legal services lawyers), who may concede that the profession has a collective responsibility to assuage the aggregate negative impact of the profession's collective work, may logically seek to avoid any MPB tax liability for themselves precisely because they contribute or cause so little low-income pain or so few low-income legal problems. While it is clear that not all working lawyers are equally involved in professional work that adversely affects the welfare of lower-income persons and populations, any mandatory pro bono program that tried to differentiate lawyers, based on the actual degree of low-income injury caused, would be hopelessly expensive if not impossible to administer.

Indeed, what finally commends a tax policy that singles out the lawyers as a group is its appealing compromise character. While it has become fashionable to criticize the extreme client-centered orientation of many lawyers, who function in a very partisan and adver-

\textsuperscript{279} STEPHEN BREYER, REGULATION AND ITS REFORM 23 (1982).
\textsuperscript{280} DUE & FRIEDLAENDER, supra note 91, at 393-94.
sary system, there is also something to be said for lawyers continuing to devote themselves rather singlemindedly to the interests of their particular clients. Excessive reverence for a vague and elusive public interest threatens to immobilize the best aggressive and protective instincts of a brilliantly successful legal profession in the aggregate. While some may think that landlords, merchants, and enterprising real estate developers are simply the unprincipled manipulators of an exploitative economic system, others may be more cautious about preventing such soldiers of capitalism from recruiting very competent lawyers to represent them and no one else.

The compromise solution, therefore, is unsurprisingly a money solution. There can be no doubt that some lawyers (perhaps a very significant number) contribute to numerous life and legal problems of the poor simply by being lawyers for various fee-paying clients whose interests compete with low-income interests. By contributing cash and actual pro bono services, we can avoid a radical disruption of conventional lawyer-client relations while still recognizing that lawyers bear a certain special, if not unique, responsibility towards the poor. Unlike the doctors, grocers and most other professional and vocational groups, lawyers have a special duty to help resolve problems partly of our own professional making. If, indeed, the lawyers will be singled out by the Marrero Committee's proposed mandatory pro bono program, perhaps there is special justification for doing just that.

F. Evaluating the Institutional Effects of Mandatory Pro Bono

As already discussed in this Article, the Marrero Committee proposal for mandatory pro bono has considerable potential for inducing important kinds of changes in the system that currently delivers civil legal services to the poor. While it is difficult to predict such institutional changes in reliable detail, there is still a strong likelihood that the current highly centralized delivery system will be usefully modified by the emergence of a relatively larger number of smaller-scale provider agencies that will deliver a greater diversity of civil justice services in more specialized and decentralized ways.

Such developments, largely related to the range of compliance options provided by the Marrero Committee Report, invite evaluations with reference to several general questions. We should first consider whether the Marrero program is likely to produce a significant quantitative expansion of current resources available for low-income civil justice purposes. It may be even more important to ask whether the
new program will improve the quality of provider agencies and change the mix of provided services for the better. Finally, it is appropriate to examine the negative implications or costs of any such institutional changes.

1. Estimating New Resources

Various critics of mandatory pro bono programs have pessimistically predicted that such programs will make very little difference in meeting very substantial unmet needs. They are probably right that the additional resources generated by the Marrero Committee proposal, even with very optimistic estimates, will fall well short of completely meeting the estimated extreme need.

By another standard, however, the particular Marrero Committee MPB program seems more promising in quantitative terms. Though there are certain obvious risks in offering even carefully hedged estimates, the following very limited effort at quantitative analysis suggests that the proposed program has a noteworthy potential for enlarging the resources now devoted to providing low-income civil legal services. At the same time, it is also clear that efforts to predict the incremental impact of any proposal for a mandatory pro bono program, even in limited quantitative terms, are severely handicapped by a general lack of current and reliable data about the profession in New York State and about the existing pro bono activities of New York State lawyers in particular. While a very recent and generally commendable report does appear to supply more reliable survey data about the bar’s voluntary pro bono activities, both its methodology and timing raise certain questions. Nonetheless, in the absence of

281. The critical metaphor of choice holds that mandatory pro bono programs are unlikely to make much of “a dent” in an extremely serious problem, described in terms of a very large unmet need for civil legal services. For statements like this, in the context of early ‘80s proposals for a broader type of “public interest” mandatory pro bono program, see Humbach, supra note 88, at 564; Rhode, supra note 129, at 700.

282. The N.Y. LEGAL NEEDS STUDY, supra note 28, at 1-2, “shows that low-income households throughout the state had an average of 2.37 distinct non-criminal legal problems for which they had no legal help in the study year. That translates into nearly 3 million such situations each . . . .” The final Marrero Committee Report itself makes no effort to estimate quantitatively the incremental impact of its mandatory pro bono proposal.

283. The 1991 N.Y. Pro Bono Survey, supra note 2, at 2-3, was designed to establish “a baseline measure of pro bono activities” for future comparative purposes. While there may have been no practical alternative, given funding and scientific constraints and the urgent need for information in the context of statewide deliberations over the Marrero Committee proposal, the baseline figures were established “through a voluntary, anonymous mail survey
better data, I shall utilize several of its more important conclusions in providing my own imperfect quantitative estimates of the proposal’s potential for resource expansion.

Though I have already argued that many, perhaps most, lawyers will meet their new pro bono obligation with cash, rather than actual service, there is still potential for a service increment from individual lawyers who decide, for one reason or another, to actually serve the poor. Using figures from the 1991 N.Y. Pro Bono Survey, let us conservatively assume a base population of about 100,000 registered lawyers who will be subject to the new mandatory pro bono program, exclusive of retirees and those who receive administrative exemptions from the new program. Since over 40% of survey respondents reported neither qualifying low-income pro bono service nor any other work they deemed of pro bono character, it is this group that offers special potential for a significant if coerced addition to the civil legal services already contributed by other members of the bar. But of

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284. For the prediction that a substantial majority of New York lawyers will be cash, rather than actual service, contributors under the Marrero proposal for mandatory pro bono, see supra text accompanying notes 42-62. At the same time, some practitioners will still predictably comply with the new requirement by rendering actual civil legal service to poor clients. Those who contribute such actual service will include neophytes (within two years of license) who have no other compliance choice, underemployed practitioners for whom actual service may be the cheapest form of compliance, and a number of lawyers with a special taste for contributing actual service to the poor despite the opportunity and other costs.

285. The 1991 N.Y. Pro Bono Survey, supra note 2, at 3, reports an “attorney registration data base file of 120,478 active and retired members of the Bar in good standing, residing and working in the United States as of January 1990.” While this figure is about 30% higher than earlier estimates of the eligible attorney base of 92,000 used in this article, supra note 42, I have used the larger figure for purposes of this analysis (conservatively reduced for retirees and other “departures” from the base population). I have done this both because the Pro Bono Survey was professionally and very recently completed and because I have drawn various other data from the survey for the purposes of roughly estimating the incremental resource potential of the Marrero Committee’s proposal for mandatory pro bono.

286. Nearly half of certain survey respondents (48.3%) reported the voluntary performance of some qualifying pro bono service. Of course, the 48.3% figure is probably much too high an estimate of those with a likely “taste” for contributing service-in-kind under a mandatory pro bono program that requires at least 20 hours of service annually. Not only does this
this reluctant 40,000 (who will now be subject to the new MPB requirement), how many will actually volunteer their services, rather than subscribe to a service group or make a cash contribution to a legal services agency? Because many lawyers in this reluctant group are at best indifferent to the legal problems of the poor, and because many will have compliance options that may be less costly than rendering actual service, I will assume that only about 10% of this group, or 4,000 lawyers, will choose to render actual service to poor clients. This means that the mandatory pro bono requirement has the minimum potential to generate annually, on these restrained assumptions, a total of about 80,000 additional low-income service hours (4,000 lawyers x 20 hrs. minimum service).

It may also be useful to express such a minimum estimate in terms of an additional number of full-time equivalent poverty lawyers (FTE), so that we may better compare this predicted increment of actual service, from a limited number of pro bono-reluctant lawyers, to the current level of lawyer resources employed by existing legal services agencies. If we assume that a full-time legal services attorney works an annual 2,000 professional (analogous to billable) hours, this results in the equivalent of an additional 40 full-time legal services lawyers statewide (80,000 new service hrs./2,000 “billable” hrs. per legal services lawyer) generated from those lawyers who formerly did no voluntary pro bono work and who now choose, as I estimate it, MPB program compliance through actual service.

Expressed in percentage terms, however, this service increment from this one limited component of a new mandatory pro bono program will amount to only about a modest 9.7% increase in the base estimated number (410 FTE) of legal services lawyers currently employed full-time by various providers of civil legal services in New York State. Moreover, such additional service is unlikely to be delivered as efficiently as it would be if 40 full-time staff lawyers were actually added to legal services agencies. Especially because this figure of 48.3% exclude registered lawyers with a principal place of business outside New York but, most importantly, it includes lawyers who have merely rendered some qualifying pro bono service in 1990, perhaps in many cases well under the annual 20 hour minimum. 1991 N.Y. Pro Bono Survey, supra note 2, at 3, 31.

287. Tables 4-12 & 4-13 of the N.Y. LEGAL NEEDS STUDY, supra note 28, at 177-78, report a 1987 FTE total of about 356 staff attorneys, exclusive of supervising and managing attorneys, employed by legal services agencies in New York State. This figure includes both agencies that are and are not primarily funded by the Legal Services Corporation. If we rather optimistically assume a 15% increase in staff attorneys between 1987 and 1992, this will add another 54 staff attorneys for a total of 410.
new service comes in small units from numerous lawyers with little experience and, probably, less interest in servicing the poor, it may be that other components of the Marrero program will provide more significant increments to the current resource base.

It is also predictable that the Marrero program will generate a considerable amount of cash capital in addition to the incremental human capital provided through actual service by individual “drafted” lawyers. The Marrero Committee’s proposal for mandatory pro bono, of course, flexibly allows lawyers, in firms of fewer than 10 lawyers, to have an important cash option in lieu of rendering actual service to poor clients. Such lawyers may contribute cash directly to an established legal services agency at a rate of $50 for every hour of obligated service. This cash option contemplates an annual $1,000 contribution and may also presumably be combined with actual service in various amounts. (Rep. at 799, 802.)

Assume that the state’s total registered lawyer population, likely to be subject to the new MPB program, is still 100,000. On my estimates, based on data from the Martindale-Hubbell Directory, this total eligible population of 100,000 contains a minimum of about 52,000 solo or small-firm practitioners who will qualify for the annual direct cash option of $1,000 (20 required hrs. x $50). Using data from the 1991 Pro Bono Survey, I very conservatively, and probably unrealistically, assume that only about 21%, or 11,050 lawyers, from this total group will actually choose this direct cash or buy-out option. The real number, in fact, may be considerably larger.

Since the survey data suggests, somewhat surprisingly, that 57.5% of these solo/small-firm practitioners did some amount of qualifying low-income pro bono work during 1990, I assume that the taste for actual service will be just as strong under a mandatory pro bono program. Of the remaining 42.5%, or 22,100 pro bono-re-

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288. Using data from the table supra note 57, I computed a “high-end” estimate of larger-firm (10 or more lawyers) attorneys. This means, for example, that for the 65 firms statewide with 50-99 lawyers, I assumed that each such firm had 99 lawyers for a category total of 6,435 lawyers. After estimating, at this high end, that there is a total of 48,394 larger-firm attorneys in New York State, I subtracted this figure from the base population of 100,000 lawyers to produce the estimate that approximately 52,000 lawyers practice by themselves or in firms of nine or fewer members and, therefore, qualify for the cash compliance option in lieu of actual service and in addition to the right to join a pro bono service group. Obviously, this estimating technique is designed to understate the likely number of solo or smaller-firm attorneys, as the Marrero Committee defines that practice situation.

289. Respondents in firms with 41 to 70 attorneys had the lowest percentage doing [some] qualifying pro bono activities (27.9%) and respondents in single and 2-to-10 attorney
luctant solo/small-firm practitioners, I assume that only 50% of these, or 11,050 lawyers, will choose the cash contribution option in lieu of actual service. I am also roughly guessing that an unusually large percentage of the reluctant small-firm bar will find actual service cheaper because they are underemployed in current economic conditions. Some others may be able to join pro bono service groups cheaply, perhaps organized by local bar associations.

On these roughly estimated figures, this means about 11,050 lawyers, or 11.05% of a base lawyer population of 100,000, will contribute an annual amount of about $11 million directly to established legal services providers, according to the formula provided by the Marrero Committee Report. This additional amount of cash capital will significantly increase funding for established legal services agencies, assuming that relatively few among the 11,050 new lawyer contributors already make voluntary dollar contributions to legal services providers. The N.Y. Legal Needs Study, for example, reports a 1987 total of $48,437,818 in statewide funding for all reporting legal services programs. Assuming a 20% total increase in this funding between 1987 and 1992, this means that the $11.05 million increase attributable to the Marrero MPB program will add about 19% to existing 1992 total legal services funding estimated at about $58 million.290

There is at least one more important quantitative measure of the Marrero program's resource potential. While the Marrero proposal is designed to produce a combination of both new cash and human capital, it is very arguable that the contributions of the new pro bono service groups will be of special significance, especially because it is likely that many, if not most, of these groups will hire or assign lawyers to provide civil legal services to the poor on a full-time basis.
In order to estimate the minimal number of new service groups, and especially the number of new poverty law specialists that such groups will employ, I focus exclusively on lawyers in firms with 10 or more lawyers. This focus assumes that larger-firm lawyers, as defined by the Marrero Committee, are much more likely to finance and to join such groups than solo and small-firm practitioners from firms of fewer than 10 lawyers. Smaller-firm lawyers, however, do have this group service or pooling option under the Committee’s proposal.

Within this group of larger-firm lawyers, I further assume that those most likely to join a service group, on the earlier cost-related analysis in this article, are lawyers in firms with 100 or more lawyers. There are 52 such firms in the state, with 47 located in Manhattan. These firms, on a very low-end estimate, employ at least 10,000 lawyers, exclusive of neophytes within two years of being licensed. Assume, first, that 50% or 26 of these firms decide to open new in-firm pro bono departments, and that each of these new departments hires the equivalent of one full-time specialist to discharge the MPB liabilities of all group members. This restrained estimate reflects the possibility that a number of very large firms may already have the equivalent of pro bono departments or will be reluctant to open one for a variety of reasons.

We may also add another 43 new poverty law specialists to the 26 very large-firm pro bono department lawyers. These additional 43 lawyers will be employed by still other service groups, let us assume, financed by lawyer members drawn from law firms in the state with between 10 and 99 lawyers. On a similarly low-end estimate, we will further assume that these 607 firms employ at least 8,670 lawyers and that 50% or 4,335 of these lawyers will join various service groups to discharge their MPB responsibilities collectively. Finally, assume that this total of 4,335 pro bono service group members is evenly distributed into service groups of 100, each of which hires at least one full-time poverty law specialist.

291. See table on “Distribution of N.Y. State Law Firms by Size,” supra note 57. A low-end estimate assumes, for example, that the 13 firms with between 201 and 300 lawyers all have 201 lawyers for a low-end total estimate of about 2600 lawyers in this category.

292. A poverty law specialist hired to staff an in-firm pro bono service group may have his or her full-time efforts supplemented by members of the group who are not full-time specialists.

293. For the 542 firms with 10-49 lawyers, I estimate a low-end total of 5,420 lawyers; similarly, for the 65 firms with 50-99 lawyers, the low-end total estimate of lawyers is 3,250
Even these very restrained estimates, therefore, suggest a considerable potential new resource with at least 69 new full-time poverty law specialists added to the current estimated statewide roster of about 410 full-time legal services attorneys, for about a 17% increment to existing full-time staff lawyer resources. It is also likely that most, if not all, of these additional poverty law specialists will be more experienced than most staff lawyers currently employed by existing legal aid providers. While it is more difficult to predict the total number of new pro bono service groups that will be formed with a variety of sponsors, it is arguable that a significant number will supplement the efforts of the approximately 40 staffed legal services agencies that now exist in the State of New York.

Though these rough estimates are merely suggestive, and require numerous refinements, they do indicate the Marrero program’s quantitative potential. When we add the estimated amounts of new human capital to millions of dollars in new cash capital, it is difficult to dismiss the mandatory pro bono program proposed by the Marrero Committee as quantitatively inconsequential. At the same time, this imperfect analysis also suggests that the proposal has its limits and is hardly the answer to the crisis of unmet need for low-income civil legal services. Indeed, the most significant impact of the Committee’s mandatory pro bono proposal may be more qualitative than quantitative.

2. Improving Provider Agencies

Most low-income civil legal services are delivered in New York State through programs staffed by full-time poverty law specialists. At least forty staffed legal services programs currently exist in various communities throughout the state. Many of them provide, at least in theory, a broad spectrum of service to the poor. Twenty-six of these general purpose agencies are primarily funded through the federal Legal Services Corporation, while another six are primarily supported by private, state, and local funds. In addition, at least eight other

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for a final total of 8,670 potential members of pro bono service groups formed by bar associations, law schools and through law firm cooperation. See supra note 291.

294. It is predictable that these pro bono service groups, particularly the ones established within law firms or by a group of firms, will offer relatively higher compensation to relatively more experienced legal services attorneys who seek a career path outside the established legal services agencies.

programs deliver services more restrictively to either a special population or with respect to limited issue categories. All but one of these more specialized agencies, supported primarily by private, state, and local government funding, are located in New York City.296

While a number of these professionally staffed service providers have multiple neighborhood offices, and while their efforts are supplemented by certain voluntary pro bono and law-school based programs, the “delivery system” in New York and elsewhere is a highly centralized one that relies on a relatively few provider agencies to deliver civil legal services to entire communities. Often, a single populous community will be serviced by only one provider agency.297

Whatever else the Marrero Committee proposal may accomplish, it has impressive potential for stimulating important changes in this centralized delivery system. Largely because the Committee’s proposal is likely to encourage the creation of numerous service groups sponsored by law firms, bar associations, law schools, and even unaffiliated professional syndicates, it may influence existing provider agencies in different ways. At the very least, the new program’s group service option may have a certain decentralizing effect on the existing system with the addition of a relatively large number of new smaller-scale providers, each of which is likely to deliver at least a small amount of civil legal services, perhaps in a specialized way.298

There is also reason to predict that the Marrero Committee’s mandatory pro bono program may actually work to enlarge the operating resources and scale of at least some well established provider agencies. Despite the predicted appeal of the group service compliance option for many lawyers, a certain number of lawyers will still contribute cash or their actual services to discharge their new MPB liability, in many cases to or through established agencies like the Legal Aid Society of New York.

To evaluate these predicted and somewhat competing institutional trends, it is first important to understand that the current delivery system has been subject to criticism from diverse quarters virtually from the moment that the federal Legal Services Corporation was established in 1974, if not before. Various members of Congress, ideological opponents of the LSC and the legal services program,

296. Id.
297. See supra text accompanying notes 63-66.
298. For a description of predicted delivery system changes, see supra part I.E., and notes 63-86.
legal services professionals, and more disinterested academic commentators have together constructed an extensive and complex institutional critique.

Though somewhat reductive, it is possible to describe the various criticisms in terms of three basic, if overlapping, categories. First, a number of legal services professionals and sympathetic commentators have criticized the quality of the civil legal services actually delivered to the poor. While much of such published criticism predates the 1980s and the attack of the Reagan Administration on the LSC and the legal services program, there is no reason to believe that the critical insights of reflective persons like Gary Bellow and Jack Katz are irrelevant to the system as it exists today in somewhat reduced scale. Bellow, for example, asks:

Why, after all, should professional legal advice to the poor become shallow, cautious, and incomplete? Why should cases be handled passively, routinely, unaggressively? Why are [legal services lawyers] not more cognizant of and resistant to influences which tend to undermine professional norms that support personal, partisan “legal care”?299

More specifically, Bellow and others complain about the routine processing of cases, with client problems often treated in a perfunctory way in accordance with a standardized office pattern that involves little or no research and all too little professional follow-up.300 Relationships with clients are subject to lawyer domination, if not manipulation, as many legal services lawyers define client problems in the very most conventionally, narrow and therefore manageable terms.301 Bellow also complains about frequently “inadequate” outcomes, all too often involving undesirable settlements for poor clients.302 Jack Katz similarly reflects on the external pressures that converge to limit

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299. Bellow, supra note 153, at 110.
300. Charles H. Baron, Bureaucratism in Legal Service Projects: The Case For a Mandatory Time Limit on Tenure, 28 LEGAL AID BRIEFCASE 275, 277 (1970); Abel, supra note 165, at 570-73.
301. The Cahns have observed that legal services lawyers, as compared to private fee-charging practitioners, have a “greater tendency to manipulate, to usurp group decision-making functions, to use clients to fit [a] private agenda . . . .” There are several causes for such patronizing approaches to poor clients, including “condescension based on race and class.” Edgar S. Cahn & Jean Camper Cahn, Power To the People or the Profession?—The Public Interest in Public Interest Law, 79 YALE L.J. 1005, 1035-6 (1970). See also, Douglas J. Besharov, An Agenda for Reform, in LEGAL SERVICES FOR THE POOR, supra note 165, at 3-5; Bellow, supra note 153, at 108.
302. Id. at 108-09.
professional responses to low-income problems. Legal services lawyers, he explains, are all too likely to confine their services to the poor by adopting "an ethic of 'reasonableness' in working with adversaries, opposing counsel, and local courts." 303

A second related category of criticism comes primarily from certain critics with a distinctive political perspective. While Bellow, Katz, and others have criticized the lack of aggressive innovation in the organized delivery of civil legal services, other more conservative commentators sharply disagree. They charge that legal services staff attorneys are too often absorbed in "creative" ventures like class action litigation and other kinds of highly politicized law reform activity at the expense of the ordinary or daily legal needs of the poor. Douglas Besharov, for example, complains of "lawyer dominated priority setting" that produces "an apparent unresponsiveness to the legal needs of poor people." 304

In more extreme terms, Professor William Harvey, a former Chairman of the Board of the Legal Services Corporation, dismisses the LSC, and the program of staffed civil legal services that it funds nationwide, as a kind of political fraud that actually harms the poor, especially through class action litigation and administrative and legislative lobbying. 305 Even where such criticism stops short of calling for the abolition of the LSC, it is likely to propose adoption of or emphasis upon a judicare system. Such a system would reduce or eliminate reliance upon staff lawyers, employed as full-time poverty law specialists by LSC grantee agencies, and would largely rely upon private practitioners to deliver civil legal services to the poor in exchange for modest fees paid by government, usually through the use of a voucher mechanism. 306

There is a third basic category of criticism that may be the most important, in part because it has been embraced by critics of all political persuasions. Many observers have faulted the system delivering civil legal services for at least some of the following interconnected

303. Jack Katz, Lawyers For The Poor In Transition: Involvement, Reform, And The Turnover Problem In The Legal Services Program, 12 LAW & SOC'Y REV. 275, 294-5 (1978). A working ethic of professional "reasonableness" may also be more likely where government is an important funding source. Where that occurs, the leadership of a legal services agency may "walk a fine line between alienating city officials and pandering to them." Mary Ann Giordano & Jeffrey Maclin, Legal Aid in Transition, MANHATTAN LAW., Mar. 15-Mar. 21, 1988, at 1.


305. Harvey, supra note 165, at 83.

management deficiencies:

- declining productivity, with a disproportionate amount of staff attorney time spent giving informal advice or deciding not to serve potential clients;\footnote{307}

- difficulty in recruiting competent staff lawyers, in part because of low salaries, and in part because of the routine nature of much legal services work;\footnote{308}

- lack of staff training, inadequate supervision of case management, and generally insufficient staff leadership;\footnote{309}

- high rates of staff turnover, resulting in relatively inexperienced attorneys in both staff and supervisory positions;\footnote{310}

- increasingly complex labor relations between management and staff lawyers and paralegals;\footnote{311}

- imperfect budgeting and financial control systems, leading to charges of misplaced service priorities and even, in the extreme, criminal mismanagement;\footnote{312 and}
A L A W Y E R ' S  L E G A L  D U T Y  T O  T H E  P O O R

- inadequate information systems, leading to aggressive LSC efforts to audit grantee agencies, and to complaints about a lack of "monitoring due process."**313**

While emphasis varies, the critical literature, taken as a whole, also reflects a certain kind of "structural" theory that helps to account for a flawed delivery system. Though numerous observers complain that many problems with the system are related to deplorably low levels of government funding, some commentators have also been concerned with the degree of competition and monopoly that characterizes the market for low-income civil legal services. Others have analyzed additional and distinctive market-structure factors that include the characteristics of the typical legal services client, "pricing" and funding arrangements, and the nature of much legal services work.

The current structure of the delivery system, dominated by one service provider or a relatively few agencies in most communities, encourages us to characterize this system as one largely dependent upon monopoly suppliers of legal services that are also monopoly (monopsony) buyers of lawyer talent.**314** Indeed, there is a rather impressive fit or correlation between various general and widely accepted propositions about monopoly enterprise and more specific propositions about the various failings of the system used to deliver civil services.

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314. Commentators with very different political perspectives have utilized the monopoly characterization as an explanatory and critical tool. See James L. Gattuso, New Ways to Provide Legal Services to the Poor, HERITAGE FOUNDATION REPORTS No. 496 (Mar. 19, 1986); Edgar S. Cahn & Jean C. Cahn, The War on Poverty: A Civilian Perspective, 73 Yale L.J. 1317, 1322-23 (1964). Of course, there are also strong defenders of the existing delivery system as currently structured, even with minimally competitive features. On this view, a legal services delivery system should continue to be "based on one primary provider within a particular geographic area, which is integrated into an overall system of delivery . . . [because] an integrated and coordinated delivery system is essential to deliver legal services in an effective and cost-efficient manner." Alan W. Houseman, Competitive Funding for Legal Services, in LEGAL SERVICES FOR THE POOR, supra note 165, at 158, 165. This preference for coordination over competition, and the view that social service organizations in general should be spared the pressures of the marketplace so that wasteful duplication can be avoided, is a popular one among social service professionals. See Rose-Ackerman, supra note 263, at 1405.
justice to the poor.\(^{315}\)

Because the low-income clients of a legal services agency may have few if any alternatives, the agency may be slack in providing a smaller amount of legal services of lower quality than would be the case if the agency had competition for funding and other resources. Even when low-income clients are reasonably well-informed and unforgiving, they lack the wherewithal to penalize the leaders and lawyers of a legal services agency in economic or even in political terms for disappointing service. More generally put, few if any internal market factors motivate these near-monopoly suppliers to maximize the value of their output. Even a high level of professional responsibility and a deeply felt commitment to the vulnerable poor may be insufficient to consistently assure that high quality legal work is produced with the least expenditure of time and other scarce resources. More concretely, the efficiency loss in monopoly, in this context, is likely to mean:

- that the poor indirectly pay a higher price for their legal services despite the fact that they pay no fees directly to provider agencies;\(^{316}\)

- fewer incentives to control operating costs, especially where a provider agency has a presumptive claim on refunding at the previous year's level;\(^{317}\)

- fewer incentives to provide innovative legal services where there is no need to distinguish a provider agency from competitors, and where innovations may prove controversial with various funders and other influential members of the community;\(^{318}\)

\(^{315}\) For an overview of the theory of monopoly, see BAUMOL & BLINDER, supra note 198, at 221-33; POSNER, supra note 105, at 254-59; ROGER LEROY MILLER, ECONOMICS TODAY: THE MICRO VIEW 265-92 (5th ed. 1985).

\(^{316}\) Though the poor pay no fees as such, they do pay a price in terms of travel and waiting time, the need to cope with complicated and intrusive intake systems to establish service eligibility, and perhaps in terms of anxiety related to unhappy personal interactions with legal services attorneys who are distanced from many clients by class and racial factors. The closing of neighborhood offices, for example, increases the cost of access if only in travel time and in terms of higher bus fares and babysitting expenses.

\(^{317}\) See ALCHIAN & ALLEN, supra note 45, at 372-73.

\(^{318}\) For competing arguments on the relationship between monopoly and innovation, see
fewer incentives to incur the costs of collecting and disseminating information about the kinds of service provided and the details of agency administration;¹⁹

as a monopoly buyer of legal services lawyers, reduced incentives to increase staff salaries and improve working conditions;²²⁰ and

increased public interest in the regulation of monopoly-type legal services agencies.²²¹

At the same time, it is very likely that many of the problems besetting legal services agencies would continue even if a larger number of agencies competed for government funding and serviced the same community. Certain distinctive, if not inherent, factors mark and impair the market for low-income legal services. Such problem-inducing factors include various client incapacities, high information costs, competing service goals, certain characteristics of many low-income legal problems, class, ethnic and racial complications, and a continuing need for government financing of legal services for the poor.

First, many low-income clients may be relatively disabled consumers of legal services. Any occasional consumer of legal service is likely to be handicapped, to some degree, by the complexity of the commodity and lack of information. The value of legal services may not be readily apparent to many clients, including numerous middle-class clients, until such services have actually been consumed.²²²

Where the consumer is relatively uneducated, and perhaps burdened by language problems, he or she may be especially slow in seeking a lawyer's aid even though the legal service will be provided at a zero fee.²²³ Even if a prospective low-income client generally

²²⁰. For the concept of monopsony and its implications, especially where the same firm is in both monopsony and monopoly positions, see Miller, supra note 315, at 379-82; supra note 311.
²²¹. Of course, government regulation of public utilities is a longstanding fixture of American life. See ACHIAN & ALLEN supra note 45, at 372-73. For the continuing controversy over LSC efforts to monitor grantee agencies, see supra note 313.
²²². See Handler et al., supra note 154, at 187.
²²³. While the zero fee encourages consumption of legal services, consumption is also
realizes that a problem is one for a lawyer's attentions, there may be serious difficulties, on both sides of the lawyer-client relationship, in explaining the problem in a comprehensible way. Since the client does not send a price signal to the legal services supplier, that supplier is also handicapped in assessing the value that the client places on the service.\footnote{324}

Many of the same and additional factors may prevent such clients from evaluating the quality of any legal services actually provided. Uncertain standards for judgment, lack of information about the actual professional behavior of the lawyer, the generally low expectations of a poverty-stricken consumer, and the distancing effects of class and racial attitudes, real or perceived, all clearly affect the capacity for informed consumer judgments and related consumer action.\footnote{325} Even if alternative legal services agencies are available in the community, it is likely that this particular marketplace will not benefit from aggressive consumer monitoring for the most part.

The distinctive market for low-income legal services is also affected by a second fundamental factor. In addition to the market being substantially insulated from aggressive consumer policing and generally affected by limited client autonomy, the very nature of much low-income legal work has an important connection to problems of service quality and service priorities. Bluntly put, much of the routine legal services work is likely to bore lawyers in professional terms, sooner rather than later.

Jack Katz has explained this important feature of the legal services culture brilliantly. His analysis is so rich and revealing that he

\footnote{324. Judge Posner argues that even the most unselfish and benevolent allocator of goods, at a zero price, will have difficulty "sensibly ranking the demands made upon his limited resources." Where the consumer pays nothing, the supplier lacks key information in allocating his resources among demanders. \textit{Richard A. Posner, Teacher's Manual; Economic Analysis of Law} 2 (3rd ed. 1986) (with reference to prob. 3 at p. 17 of text). Zero pricing, therefore, may contribute to supplier insensitivity to consumer preferences, and lead to a supplier's mistakes in ranking service priorities.}

\footnote{325. Decades of social research suggest that "low-income, less educated individuals ... are exactly the ones who are least likely to seek and process the information they need to make intelligent choices." This "positive correlation between information levels and social class ... is true for a wide range of subjects including child rearing practices, education, nutrition and general information." Rose-Ackerman, \textit{ supra} note 263, at 1409 n.15 (quoting \textit{Bridge, Information Imperfections: The Achilles' Heel of Entitlement Plans}, 86 \textit{Sch. Rev.} 504, 512 (1978)). The poor also often expect no more than summary service from legal services lawyers and may have an unflattering opinion of these lawyers' professional competency. \textit{Jack Katz, Poor People's Lawyers in Transition} 23 (1982).}
deserves very extended quotation:

The poor seek out lawyers for assistance with personal troubles which are often in or near a crisis state: having been denied public aid, having received an eviction notice, having had utilities shut off, having had a violent domestic argument. Often the situation is within or at the edge of litigation, the client with court papers or "final" dunning letters in hand. This context of personal conflict initially gives the work of the legal assistance lawyer a very local setting. The client's emotions typically are focused on recent events and on particularistic features of current adversaries. In such a practice, it is unusually difficult to treat problems as of far-reaching significance.326

The need for quick problem-solving, on behalf of vulnerable if not panicky clients, leads the legal services lawyer to regularly accommodate adversary interests. "Practical" settlements are encouraged by an "ethic of reasonableness":

The ambience into which the legal assistance lawyer walks every day is one that implies that the problems of the poor are insignificant, can be handled satisfactorily without reaching far beyond a poor person's small social world; that summary advice and assistance will often be satisfactory; that conflicts should be negotiated without making "a big deal" of them; and that if a dispute goes to litigation, he should not make a federal case of it.327

Moreover, the nature and commitment of the adversary counts heavily in affecting opportunities for a lawyer's professional growth and challenging work:

Poor clients may insist their problems are of unsurpassed importance, and their lawyers may agree; but the latter will not be urged to that opinion by adverse parties and opposing counsel. Typical adversaries for legal assistance lawyers include other poor people, as for example, in domestic relations conflicts; small real estate owners, as in disputes between tenants and resident landlords; and the lower echelons of workers in public-aid bureaucracies, retail stores and debt-collection agencies.... Among adversaries who are represented, the modal opposing counsel is the collection lawyer who bases the economics of his practice on high volume and low unit costs. A poor person usually will have a great deal to lose from litigation but not enough to make it worthwhile for an advers-

326. Id. at 21.
327. Id. at 33.
sary to expend substantial legal resources to take it from him.\textsuperscript{328}

The consequences of this constraining practice environment are particularly significant. Given the relentless pressure for a routine and "reasonable" approach to practice, it should not surprise anyone if the more professionally ambitious staff lawyers seek to invest their poverty law work with increased significance by developing ideas for more wide-reaching impact litigation and other law reform initiatives.\textsuperscript{329}

Where the sheer volume of cases, or a particular lawyer's neighborhood office role, prevents law reform work, there are good professional reasons to quit legal services work altogether. The rapid turnover of staff lawyers in provider agencies is at least partly attributable to the deadening and routine nature of the work, as well as related to comparatively low wages and dreadful working conditions. For the fortunate minority who can spend a considerable portion of their time on so-called law reform activities, there may also be a certain degree of ethical tension that may contribute to a relatively quick decision to depart for other kinds of practice outside the legal services agencies.\textsuperscript{330}

Finally, there is the significant matter of federal funding, now widely judged indispensable to a viable legal services program nationwide. Assuming that federal funding is truly indispensable, even the diminished federal support of the last decade encourages two significant conditions that will affect the operations of provider agencies and the career decisions of many legal services attorneys.

First, federal funding encourages a high-volume general purpose approach to the delivery of civil legal services. Provider agencies that are primarily supported by all of us may feel compelled to offer service broadly to all eligible persons in need. Even more importantly, federal or public support inescapably embroils legal services agencies in controversy over certain important redistributive and political functions. Political liberals and conservatives have long since recognized and debated the profoundly important social and philosophical implications of a creatively administered and professionally staffed legal services program.

The sizeable menu of problems afflicting legal services agencies, therefore, is connected in complex ways to certain interacting founda-

\textsuperscript{328} Id. at 21-22.
\textsuperscript{329} Katz, supra note 303, at 284.
\textsuperscript{330} See id. at 296-97 n.18; Bellow & Kettleson, supra note 160, at 342.
tion conditions. The question now remains whether the Marrero proposal for mandatory pro bono offers solutions, however partial, to at least some of these institutionalized problems.

While the Marrero Committee’s program is no panacea, it does have a considerable, though largely unrecognized, potential for inducing certain important changes in the system that we have institutionalized for the delivery of civil legal services. The predictable key to a number of healthy institutional changes is once again the very important group service option available to all practitioners. The direct cash compliance option, available only to solo and small-firm practitioners, is also relevant but to a lesser degree.

First, I have predicted that a number of new provider agencies will be created through law-firm pro bono departments, local bar associations and law schools, and even as a result of private syndication efforts. This increased number of legal services providers may provide low-income clients with service alternatives that they do not now have. In turn, this should encourage even normally passive consumers to exercise their judgments respecting the quality of service offered by a previously “market dominating” agency. Of course, much depends upon the geographic location, scale, and specialties of such new agencies, and how accessible they are to low-income clients.

A second and quite unique feature of the Marrero Committee program is even more important in addressing certain service quality problems. The mere proliferation of service agencies, many of relatively small scale with limited specialty missions, is unlikely of itself to activate a large number of relatively disabled and passive consumers and convert them into aggressive monitors of provider agencies, old and new. The Marrero Committee proposal, however, will also create a new and powerful group of monitoring agents who can more effectively police the marketplace.

The lawyers themselves will in many instances be effective monitors of the kind and quality of civil legal services delivered to the poor. Even if poor clients continue to be too accepting and uncritical as consumers, numerous lawyer funders may fill the monitoring gap on behalf of an all too passive low-income clientele. While some lawyers will choose to actually service the poor directly, more will comply with their MPB obligations through provider agencies. Contributions of both actual service and cash are likely to be offered to established service providers by numerous lawyers. A significant number, as already argued, is also likely to subscribe to newly created pro bono service groups. The subscription fees paid by group
members will be used to hire and to support group poverty law specialists.

Because lawyers, under the Marrero Committee proposal, are given considerable discretion to select the provider agency that they will support with actual service or cash contributions or both, these lawyers will have ample opportunity and incentive to review and to influence the professional behavior of particular service providers. If Small-Firm Smith, for example, approves of the work of the local legal aid society, he may direct his compelled contribution to that long-established agency. If, on the other hand, Smith finds much to disapprove in the society’s operations, he may exercise his dollar power and divert his resources elsewhere.

Similarly, Large-Firm Jones may or may not be enthusiastic about the service priorities of the new pro bono service group that Jones helps to finance for the purpose of discharging her MPB liability. Since her dollar contribution is relatively large, she may be stimulated to acquaint herself with the new agency’s work. This may be particularly true if the group is actually a department of Jones’ large firm, with certain implications for the reputation of the firm. Jones, in other words, is much more likely to inquire into and to influence the activities of the new group because she has both a dollar stake and the dollar power to act on her best judgment. In turn, this means that provider agencies, both established and new, can expect a new form of market discipline from numerous funders who happen not to be the actual consumers of low-income legal services, but who nonetheless have a considerable stake in the legal services enterprise thanks to the Marrero Committee’s proposal.

The infusion of private support for provider agencies also may work to ease certain pressures for the mass processing of an unspeakably high volume of cases. Newly created service groups, in particular, may have a better opportunity to offer specialized and perhaps innovative forms of service to a limited clientele, in part because of the specialized preferences of its lawyer funders and in part because the total mandatory pro bono program promises additional resources for the larger general purpose legal services agencies.

331. Of course, there may be ethical complications if lawyer funders were to overrule the judgments of particular staff attorneys with reference to particular cases. At the very least, it is predictable that certain legal services agencies will chafe under the new “discipline” exerted by some lawyer funders even if those monitoring lawyers make only general critical judgments of agency work.
While new pro bono practice groups that specialize may be characterized by some as subverting important quantitative service goals, such specialty commitments may also have promising implications for the various personnel problems associated with conventional legal services operations. Where an agency resists restricting case intake as a matter of policy, or remains obligated, as a result of extensive government funding and fear of political reprisals, to expend most of its resources on so-called ordinary service cases, that agency is more likely to suffer from higher staff turnover and less experienced and less competent personnel.

The new service groups, in particular, may offer new career options to committed legal services attorneys who understandably tire of the pressures of the much larger, publicly financed agencies. The poverty law specialists hired by the new groups may also be compensated at a wage more nearly comparable to private law firm levels. In some cases, such group specialists will also benefit from generous support services largely unavailable even at the larger established legal services agencies. The Marrero Committee proposal, therefore, offers new incentives to legal services personnel who may wish to commit their careers, or a substantial period, to providing civil legal services to the poor.

In sum, the Marrero proposal has a considerable potential for promoting important kinds of institutional change. In a sense, it offers a new kind of compromise between delivery-system extremes. It may very well increase service options for a certain number of low-income clients, incorporating an attractive "freer-choice" feature long associated with judicare systems, at least in theory. Even if a relatively few large and established provider agencies continue to dominate the market for low-income civil justice, there is cause to predict greater agency efficiency, in part because of new and aggressive forms of marketplace monitoring provided by numerous and relatively well-informed private attorney funders, with considerable dollar and resource discretion.

At the same time, a new delivery system, with a larger number of highly specialized legal services providers generating greater service diversity, if not increased competition for scarce resources, does not sacrifice the advantages of a system staffed by full-time poverty

332. For a suggestive hybrid model, see Andrea J. Saltzman, Private Bar Delivery of Civil Legal Services to the Poor: A Design For a Combined Private Attorney and Staffed Office Delivery System, 34 HASTINGS L.J. 1165 (1983).
law specialists. Unlike a judicare system that may rely all too heavily upon the limited and sometimes inexpert efforts of numerous private practitioners, the Marrero Committee proposal is likely to encourage a net increase in the number of professionally mature specialists in poverty law. This, in turn, may have important implications for both the quality and the mix of services provided by a partly reconstituted system for the delivery of civil legal services to the poor.

3. Changing the Service Mix

However much the Marrero Committee proposal will affect the number of provider agencies and service quality, it may also have a discernible impact on the kind of civil legal services provided to lower-income clients. It is very arguable that the new mandatory pro bono program will encourage a new variety of so-called law reform and impact strategies, rather than simply providing new resources for an apparently growing number of ordinary service cases involving the daily or routine disorders of low-income life.

The Marrero Committee's own Report predicts that the group service compliance option will encourage firm-based service groups to handle "complicated cases." (Rep. at 803-04.) At least one opponent of the Committee's proposal has already predicted that "[t]he special provisions for large firms to pool their hours is also likely to result in a staffing of ideological cause-oriented litigation at the expense of the day-to-day type of legal services that some individual poor people may genuinely need."  

More careful analysis of such predictions requires reasonably comprehensible working definitions, less loaded with either vaguely euphemistic or provocative diction. The LSC's 1980 "Delivery Systems Study," in seeking to measure the amount of and potential for so-called "impact" legal services, defined "'impact' . . . as achievement, or expected achievement, of relatively permanent improvement or avoidance of relatively permanent deterioration in the legal rights or basic living conditions of significant segments of the eligible population."

More concretely, this study classified the following as impact activities: "major litigation, legislative and administrative representation; group representation; community education; and work with the organized bar, the judiciary and administrative systems to further the

333. Scully, supra note 102, at 1267.
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interests of poor people." A legal services strategy was also more likely to be judged an "impact" strategy to the extent that it produced certain outcomes or results "directly affect[ing] legal rights and basic living conditions such as housing, income, food, employment, education, health, family relations, consumer affairs, transportation and public safety."

Given this definition in terms of both process choices and outcomes, there are several reasons to predict that many of the new service groups, emerging under the Marrero Committee proposal for mandatory pro bono, will emphasize impact or law-reform work. Lawyers who are sympathetic to the problems of lower-income clients, for example, are likely to be especially interested in maximizing the net low-income benefits delivered by their service group, perhaps at relatively high costs. In fact, law reform goals were articulated early in the history of the legal aid movement as a response to "the inadequacies of case-by-case remedies for many of the common problems suffered by the poor."

Many group-member lawyers who are less sympathetic to the interests of the poor, or actively hostile to mandatory pro bono, are still likely to understand their professional responsibilities. All competent lawyers understand, for example, that there are well established litigation techniques for aggregating numerous small claims. Class actions spread fixed litigation costs over many claims, making the vindication of individually modest claims possible without individually prohibitive litigation costs.

Still other factors may influence pro bono group members, or even lawyers rendering actual low-income services, to emphasize impact or law reform work. While larger-firm business lawyers may welcome a professional change of pace and the opportunity to offer concretely useful service to an individual client whose public assis-

334. LSC Delivery Systems Study, supra note 202, at 132. Even more broadly, relevant impact or law reform work may be any work done by lawyers, on behalf of a poor client or population of poor persons, that "challenges the status quo." Joel F. Handler et al., The Public Interest Activities of Private Practice Lawyers, 61 A.B.A.J. 1388, 1391 (1975).

335. Because the costs for many firm-based service groups, in particular, are likely to be relatively high either in terms of salaries for poverty law specialists or in terms of billable revenue foregone by firm lawyers who actually provide service through the group, there is a cost-related incentive to emphasize services that benefit relatively large numbers of poor clients in seemingly significant ways.

336. Merkel, supra note 162, at 17. For the "preventive law" strategy advocated by no less than Reginald Heber Smith, see id. at 17-19.

337. POSNER, supra note 105, at 536.
tance has been cut off or who faces eviction, such legal work is still less likely to be engaging in technical or professional terms particularly over a longer period.  

Challenging test cases, creative lobbying efforts, and participation in various law reform activities through bar associations and various "cause" organizations are also more likely to encourage useful forms of professional development in younger lawyers employed by private law firms and corporate legal departments. While some law firms may seek to avoid involvement in controversial litigation and politically complicated professional ventures, more firms may be interested in using the pro bono group service option to improve the morale and to diversify the professional training of their associates.

The unique working environments of the larger law firms are also more likely to facilitate more creative impact efforts on behalf of the poor. While the Marrero Committee speaks somewhat vaguely of "complicated cases," it does note the substantial infrastructure and support services in the larger firms, and especially approves the possibility that more experienced practitioners will be readily available to supervise those junior lawyers who contribute actual service to the poor by working through the firm group. (Rep. at 803-04.)

While this image may depart from the true "teaching" realities of the larger law firms, there can be little doubt that a pro bono service group located within a larger firm will have more resources than most established legal services agencies to engage in class action litigation and other ambitious reform or planning ventures. In addition, many of the established agencies, especially those receiving substantial federal funding through the LSC, may be barred by law or handicapped by various political realities from aggressively engaging in a variety of impact strategies.  

Finally, lawyers who are sympathetic to the legal problems of the poor may also be interested in promoting various forms of distributive justice. Assuming that one believes that civil legal services have

338. Jack Katz has argued the point in considerable detail. As previously indicated in this article, supra notes 326-29 and accompanying text, the typical crisis character of many cases brought to legal services agencies, the likely unsophisticated adversary responses, and a pervasive "culture of reasonableness" tend to make ordinary service work for most individual clients professionally unsatisfying for full-time legal services lawyers. There is no reason to predict a different response for even sympathetic draftees under a mandatory pro bono program.

339. For various restrictions on LSC grantees, see Douglas J. Besharov & Paul N. Tramontozzi, Background Information on the Legal Services Corporation, in LEGAL SERVICES FOR THE POOR, supra note 165, at 209, 214-15; infra notes 343-44.
important potential to aid the poor by "encouraging" the redistribution of wealth and certain forms of power, there is a good philosophical or ideological reason to emphasize impact type work even at the high cost of turning away a certain number of low-income persons in need of a more limited kind of individualized service.340

An important critical question, however, remains to be resolved. If the Marrero Committee proposal, especially through its group service option, is likely to encourage an increased amount of impact or law reform work, is this a desirable or an undesirable result? However resistant this question may be to final resolution, we can say with confidence that there has been fierce and continuing disagreement over the redistributive implications of civil legal services since the 1960s.341 This has been true even though there is evidence that most government-funded legal services programs have always devoted most of their resources to more routine matters and to the servicing of individual low-income clients.342

In fact, the Congress has reflected a certain ambivalence over the public funding of impact and law reform strategies on behalf of the poor. The chartering legislation for the Legal Services Corporation incorporates both language that seems to encourage impact strategies and important restrictions on the professional services that may be provided through LSC grantees. While legal services providers are to "assist in improving opportunities for low-income persons,"343 class actions must still be approved by a grantee's project director, and grantee agencies are prohibited from using federal funds to influence legislation or executive or agency actions, with certain exceptions.344

340. "The most artfully conceived and executed legal stratagem will have negligible impact if employed to secure benefits only for a single client or a few individuals. Only by allocating substantial resources to cases with more general impact can an individual legal services lawyer or the entire Program make a meaningful contribution to the reduction of poverty." JOHNSON, supra note 162, at 249.

341. For the aversion of various politicians to the law reform and redistributive uses of legal services, see Agnew, supra note 107; and from a later political generation, 1990 Reauth. Hrgs., supra note 164, at 6, 9-10 (statement of Rep. Bill McCollum), and at 27, 28 (statement of Rep. Charles Stenholm). For the opposition of academic commentators to judges and lawyers resolving "fundamental issues of the proper distribution of wealth", see Shapiro, supra note 88, at 780; Winter, supra note 107. For similar opposition to "achieving 'law reform' through lobbying and litigation," from the Chairman of the LSC Board of Directors, see 1989 Reauth. Hrgs., supra note 161, at 18, 20-21 (statement of Michael B. Wallace).

342. HANDLER ET AL., supra note 154, at 52, 54-55.

343. 42 U.S.C. § 2996(3) (1988). This language from the Congressional findings and declaration of purposes has been used to justify LSC funding of various impact and law reform ventures by LSC grantees. See LSC Delivery Systems Study, supra note 202, at 131-32.


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While it is very arguable that a larger-scale legal services program should contain both a considerable individualized service component and a commitment to impact strategies, the appropriate mix is still the subject of continuing and often heated debate. Because this debate raises complex and logically inescapable questions about the use of judicial power and legal instruments to accomplish certain reform goals, further consideration of such issues has been postponed to section III.G. of this article, which analyzes a number of fundamental functional questions.

4. Estimating Negative Consequences

A mandatory pro bono program, as proposed by the Marrero Committee, may have negative as well as positive consequences for the system currently used to deliver civil legal services to the poor. The Marrero Committee proposal, despite its positive institutional potential, is also likely to induce certain resource shifts and agency conflicts that some will find objectionable.

First, there is the risk that the new program will lead to a further decline in conventional forms of government funding for low-income civil legal services. The availability of alternative funding and new resources for civil legal services will tempt fiscally hard-pressed governments at all levels to reduce contributions from their general treasuries. The success of a number of new mandatory state IOLTA or IOLA programs, generating millions of dollars annually for legal services and other programs, may already be having such an effect.345

It is also arguable that a successful mandatory pro bono program will work to reduce the amount of, or at least the rate of increase in,
voluntary pro bono activity. Lawyer Jones, for example, may initially have been moved to volunteer because of dramatically declining real financial support for legal services programs from the federal government, seasoned by the unremitting and quite explicit hostility of certain important officials, including the President. (Rep. at 823-24.) But if she now identifies an alternative program that plausibly meets more of the need by spreading the burden more widely over a larger population of lawyers, she has less incentive to do good professional deeds voluntarily for the underserviced poor. If she had previously volunteered thirty hours of actual service annually, she may be tempted to reduce that costly commitment to the required minimum of 20 annual hours under a new mandatory pro bono program. Even if Jones maintains her previous level of service to the poor, she may now lack the incentive to increase that commitment.

It is still possible, however, that the net number of lawyers rendering actual service to poor clients through the established agencies may actually increase due to the Marrero Committee’s mandatory pro bono program. Nonetheless, the prior volunteers may have delivered a superior quality of service as compared to an even larger number of draftee replacements. This will occur if more experienced and committed volunteers, like Jones, reduce or eliminate their affiliations with established legal services agencies, only to be replaced by a larger number of lawyers who are more grudging and less skilled in rendering actual service as a matter of compulsion rather than by free choice.

Other arguably negative and related effects are also predictable. Established legal services agencies, for example, now receive voluntary cash contributions from a number of law firms and lawyers. If numerous cash-contributing firms, as a result of the Marrero Committee proposal, open pro bono departments as qualifying service groups for the collective discharge of MPB liabilities, there is reason to predict a diversion of cash. If Jones’ very large firm has donated an annual average of $50,000 to the Legal Aid Society of New York, will her firm not be tempted to divert this cash contribution from the established agency to the support of its own new pro bono depart-

346. It is also possible that Jones will be persuaded by the enactment of the mandatory pro bono program, and the related debate, that the unmet need for low-income civil legal services is even more overwhelming than she thought. This new recognition might stimulate her to increase her costly contribution by both paying the new MPB tax and continuing her previous level of voluntary service. But see POSNER, supra note 105, at 440 n.10, on the negative effect on private charitable giving of increased government transfers to the poor.
ment? Unless the passage of the Marrero Committee plan somehow inspires the firm to increase its commitment to the poor, Jones and her partners may decide that their dollar resources are better employed closer to home for the purpose of discharging their new MPB liabilities.347

Obviously, the leadership and staff of existing legal services agencies may deeply regret such a reduction in cash contributions, if it occurs. While any decline may be more than offset by new cash and service contributions stimulated by the new mandatory pro bono program, it is difficult to predict the net impact on the level of private contributions. The Marrero Committee, itself, is concerned about this potential adverse cash effect. By expressly limiting the direct cash compliance option of $50 per hour only to solo and smaller-firm practitioners, the Committee hopes to discourage "large firms which now make charitable cash contributions to legal services organizations [from counting] these donations towards satisfaction of their collective pro bono obligations."348

This diversion of cash and human capital from the established legal services agencies may also affect the total mix of legal work for the poor. Reducing the net resources of the larger long-established service providers may reduce the proportion of total resources available to respond to the daily disorders of low-income life. The larger general-purpose agencies that will be losing resources are likely to provide most of the routine legal services in eviction and domestic relations cases as well as in numerous disputes between social service agencies of all kinds and poor clients.

It is also possible to predict the diversion of professional resources from various public interest activities to a more limited menu of low-income civil legal problems. While many questions exist about the character and extent of the bar's voluntary work, it is clear that many lawyers now render professional services, without compensation, to a wide range of organizations and individual clients with respect to

347. During 1988, the New York Legal Aid Society raised an unprecedented $7,113,828 for civil legal services. Of this total, $2,748,935 was contributed at the Sustaining Level of $500 per lawyer by 28 larger law firms. Numerous other firms also contributed at lower per-lawyer levels. The Legal Aid Society of New York, 1988 Annual Report 7-9.

348. Final Comm. Rep., supra note 1, at 805. Of course, even if the larger firms reduce or eliminate their cash contributions to established agencies, it is still arguable that such a resource shift is more desirable than not. For those who believe that many established provider agencies operate inefficiently at too large a scale, such a resource diversion is more commendable than regrettable.
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a wide variety of public interest issues if not causes. Recent surveys of voluntary pro bono work, even if they exaggerate the total amount of voluntary service, report that lawyers voluntarily engage a wide range of civil rights, environmental, cultural, community and other problems that may impact only indirectly on the poor if at all.  

If a busy lawyer like Large-Firm Jones, for example, now devotes 50 hours per year to service on the board of a shelter for battered women, she may be forced to reexamine and even reduce this voluntary commitment once the Marrero Committee proposal takes effect. While Jones may deeply regret resigning or reducing her board responsibilities, she may have little practical choice if the new MPB obligation requires her actual service to the poor. Similarly, small-firm Smith does free legal work for a local animal rights organization. He too must reconsider the total time that he can afford to spare from his fee-generating practice as a result of his new MPB obligation.  

Several factors, however, suggest that the negative potential for this kind of diversion effect has probably been exaggerated by a number of sincerely concerned organizations that now benefit from the voluntary service of lawyers in both professional and non-professional roles. First, many civil rights, religious, environmental, and even cultural groups devote at least part of their mission to lower-income concerns. While an environmental group may advocate the preservation of a pine barrens area or engage in other projects far removed from the civil legal problems of the poor, it may also take an interest in the siting of a waste treatment facility that adversely affects a low-income neighborhood or population.

349. See the Am Law Pro Bono Rating, supra note 77. For recent data on the pro bono activity of New York State lawyers, other than low-income work qualifying under the basic definition used in the Marrero Committee Report, see 1991 N.Y. Pro Bono Survey, supra note 2, at 29-33. The Marrero Committee, itself, apparently recognizes the risk that a new pro bono obligation might divert legal resources from a variety of public interest issues that do not qualify under a more restrictive definition of low-income service. FINAL COMM. REP., supra note 1, at 784, 794-95.  

350. Representatives of various organizations, during the fall 1989 statewide hearings on the Marrero Committee proposal, stated their concern that volunteers not be diverted by a mandatory pro bono program from service on criminal assigned counsel panels, participation in an animal rights organization, the United Jewish Appeal, and other non-profit organizations. 1989 CIAALS Hrgs., supra note 2, at 251, 262 (statement of Robert M. O'Leary, Broome County Public Defender), at 274 (statement of Broome County Court Judge Patrick D. Monserrate), at 343, 345 (statement of Legal Action for Animals), at 435-36 (statement of David G. Sacks & Stephen D. Solender, United Jewish Appeal-Federation of Jewish Philanthropies), at 452 (statement of Peter Swords, Nonprofit Coordinating Committee of New York); see also 1979 ABCNY Rep., supra note 8, at 59.
Second, there are often considerable professional and personal benefits for lawyers doing certain kinds of voluntary work. A lawyer who raises funds for a local museum may find himself interacting with a number of potential fee-paying clients. A lawyer who serves as a church leader may similarly find her good judgment and professional skills on useful display while a lawyer who represents young artists at no or very low fees may find special cultural and personal gratifications in this form of voluntary pro bono work. While mandatory pro bono may divert some such volunteer efforts to low-income problems, the professional advantages and personal appeal of many forms of non-poor pro bono work suggest that many lawyers will continue such pro bono activity even if newly obligated to aid the poor.351

It is also clear that many persons who fear the diversion of lawyer volunteers from various good causes have failed to understand the true character of the Marrero “service” obligation. If Jones complies with her new MPB duty through a cash, rather than through an actual service, contribution, she may remain free to continue her prior service to that shelter for battered women. The opportunities to avoid actual service to the poor, especially through passive membership in a MPB service group, reduce the risk that substantial volunteer talent will be drained from a large number of non-profit organizations active in a wide-range of worthy public interest categories.

Finally, there are predictable “operational” risks for the currently centralized delivery system as it becomes more decentralized and even fragmented in character. If, as predicted, a relatively large number of smaller-scale service providers are organized, it is likely that there will be certain transition costs and new operating challenges of a more permanent kind for a reconstituted delivery system.

Established legal services agencies have typically occupied dominating “market” positions in at least three important respects. The Marrero Committee proposal may well affect fund-raising, the setting of service priorities, and the competition for professional talent, much to the likely displeasure of the administrators of at least some established legal services agencies.

First, many agencies may have been successful in fund-raising

351. This argument is consistent with recent findings of the 1991 N.Y. Pro Bono Survey, supra note 2, at 33, on the number of lawyers doing both qualifying low-income pro bono work as well as other pro bono activities. Those lawyers who engaged in both types of pro bono work “devoted more hours to each type of activity than did those who participated in only one type.” Id.
partly because they are almost the only game in town. Like it or not, these market-dominating agencies will be facing new funding-related competition under the Marrero Committee proposal. In addition to coping with the diversions, and perhaps net reductions, in private cash contributions as discussed above, many established legal services agencies may also find themselves in a serious competition for federal and other government funding for the first time. While the LSC may continue to channel funds to one primary provider agency or to a very few general purpose grantees in every community, it is very likely that the leaders of the LSC and some members of the Congress will promote competitive funding, particularly if new alternative service providers actually exist to provide government funders with real rather than theoretical choices.352

The Marrero Committee proposal is also likely to generate a certain disorder, for better or worse, in the setting of service priorities and in the actual delivery of low-income services. With certain limitations, the service priorities of most federally funded agencies are now set by the leadership of these local legal services agencies despite some efforts to impose a more centralized service agenda by some members of Congress and the leadership of the Legal Services Corporation.353 The process of setting such priorities locally, however, is likely to be complicated by the emergence of a larger number of smaller-scale providers, many with highly specialized and overlapping,

352. Recent Congressional hearings testify to continuing interest in stimulating competition for government funding of civil legal services programs. Of course, proposals for more competition have also generated controversy. See 1989 Oversight Hrg., supra note 135 passim; 1989 Reauth. Hrgs., supra note 161 passim; 1990 Reauth. Hrgs., supra note 164 passim. See also, LEGAL SERVICES FOR THE POOR, supra note 165, at 150-83.

353. Subject to certain statutory prohibitions and limitations on the use of LSC funds, see supra notes 339, 343-44, and subject to LSC regulations, local LSC grantees are required to "adopt procedures for determining and implementing [service] priorities . . . ." 42 U.S.C. § 2996f(a)(C)(i). For an overview of LSC regulations related to this local priority-setting process, see Basharov & Tramontozzi, supra note 339, at 218-21. At various times, Congressional critics of the LSC have attempted to further restrict the services offered by LSC grantees. Recent proposals to restrict service in redistricting cases and on behalf of farm workers, as well as to restrict LSC grantees in the use of privately contributed funds, have been matched with more affirmative proposals that would require local legal services agencies to earmark funds for "child support litigation and anti-drug trafficker cases." 1990 Reauth. Hrgs., supra note 164, at 6, 9-10 (statement of Rep. Bill McCollum). Rep. McCollum has also proposed a clarification and strengthening of the priority-setting powers of local grantee boards of directors, apparently in the hope that this will restrain certain "creative" legal services lawyers all too inclined to experiment with law reform and impact strategies. Id. at 14. Predictably, such restrictive proposals have been controversial. Id. at 71, 72-76 (statement of John J. Curtin, Jr., for the A.B.A.).
if not duplicative, service missions.

If, for example, a large established legal services agency has a division that specializes in the problems of the AIDS-afflicted poor, its budgeting for this division ought to be affected if new pro bono service groups are created that also specialize in AIDS-related problems. Planning by a large long-established legal services agency may be further complicated by the more flexible capacities of these new smaller-scale agencies to change their service priorities rather quickly, perhaps at the insistence of various lawyer funders with strong and sometimes changing opinions about service priorities.

As a result, it is very possible that the Marrero Committee proposal will result in certain duplicated service efforts, lack of coordination and planning inconsistencies among provider groups, particularly in the early period of adjustment to a reconstituted legal services environment. Depending on the number and kind of new pro bono service groups emerging, there may even be a certain tension between and among professional competitors with both similar and sometimes conflicting service priorities.

There is also cause to predict still another form of unsettling and costly competition. In addition to a new competition for funds and new competition on the output side in terms of service priorities, the large established legal services agencies may also find themselves competing for staff talent with a number of the newer provider groups stimulated into existence by the Marrero Committee’s mandatory pro bono program.

While the best staff lawyers and lawyer-administrators will be the direct beneficiaries of any dilution in the monopsony power of certain very large existing agencies, it is also possible that the current professional staffs of the established agencies will be reduced in size. This will permit such agencies to competitively increase the wages and improve working conditions for smaller professional staffs. In turn, this may mean that a smaller number of better paid staff lawyers may be unable or unwilling to service the large and apparently growing number of poor clients who need legal attention for more routine problems. A growing scarcity of competent and committed

354. "Multiple unconnected [legal services] providers in a single area create great potential for inconsistent priorities, with scarce resources being expended on problems of little significance. A decentralized group of providers cannot effectively set priorities for a service area." De Miller, Copayments, Vouchers, and Judicare, in LEGAL SERVICES FOR THE POOR, supra note 165, at 197, 201.
staff lawyers will also require especially wise budgeting of available resources.

It is also conceivable that some established agencies will be unable or unwilling to compete for staff talent. The end result might be an undesirable differentiation of a number of large well-established agencies that do a high volume of very routine work and regularly and deliberately hire second-rate talent to do it. Such a system would eventually isolate the larger agencies in a kind of professional ghetto and allocate much of the most important and creative legal services work and virtually all of the best talent to a number of smaller-scale specialist agencies.

In short, the Marrero Committee program is likely to increase the cost of administering the larger general purpose legal services agencies that have risen to market dominance in most cities and other communities. This may occur at the very time that some of these agencies may actually be losing net resources. At the least, the Marrero Committee’s mandatory pro bono program may confront the leadership of many established legal services organizations with special new challenges, particularly in the earlier stages of the transition to a program of institutionalized mandatory pro bono.

* * *

The institutional implications of the Marrero Committee proposal, therefore, are numerous, far reaching and, in some ways, problematic in character. Efforts to evaluate the net effects of a large number of connected changes in the current delivery system for low-income civil legal services necessarily requires a certain amount of speculation, albeit speculation of a relatively disciplined and informed variety. Despite a nagging lack of truly current and reliable data about the profession at large, its voluntary pro bono service patterns, and especially about the operation of existing legal services agencies, we do have certain impressionistic and partial information of relevance that combines with certain basic concepts to allow plausible institutional predictions of considerable importance.

Though the Marrero Committee proposal is very likely to have certain unsettling effects upon the current delivery system, more of these effects seem likely to be healthy and eventually beneficial than not. While the subject is understandably delicate, no effort to evaluate potential institutional changes can avoid characterizing the current delivery system and its personnel in relatively unflattering terms.
While the legal services establishment and "movement" has had its share of heroes, past and present, and its moments of professional glory, it is still arguably a non-system in need of many changes. To be sure, some of the weaknesses in the current system are related to inadequate funding and the seemingly endless war against legal services lawyers mounted for the last decade and more by certain conservative politicians, many of whom appear to have only a rudimentary understanding of law, the problems of the poor and the varied needs for lower-income civil legal services. Nonetheless, despite its ideological passion, the conservative critique has identified certain serious, if not fundamental, problems. There is cause to believe that the quality of low-income legal services has suffered from an overcentralized delivery system that has been dominated by relatively few provider agencies in most geographic service areas. Even if existing large-scale agencies do not exercise true monopoly powers, there are still good reasons, on balance, to encourage a transition to more competitive systems for the delivery of civil legal services in more decentralized, specialized and smaller-scale ways. Most importantly, the conservative assault upon civil legal services for the poor calls attention to inescapable kinds of fundamental critical questions. What are the appropriate functions for a system that seeks to deliver civil legal services to the poor in both professionally responsible and socially beneficial ways? Does the system actually provide services that meet those performance standards?

G. Addressing Fundamental Questions

The explicit debate over mandatory pro bono proposals, in New York and elsewhere, has been heavily instrumental in character, focusing on means rather than ends and incorporating key assumptions. Almost all parties to the debate over the Marrero Committee proposal, including many who oppose the plan for mandatory pro bono, concede that it is desirable to make more civil legal services available to the poor. Many who offer this concession are apparently assuming that more civil legal services will improve the net welfare of the poor, both as individuals and as a group.355 Moreover, our conven-

355. The N.Y. State Bar Rep., supra note 101, at 1, quickly "acknowledge[s] the pressing need for increased legal services to the poor and disadvantaged and the important role the bar must play in assuring that the need is met." Not all critics of mandatory pro bono programs, however, make a similar assumption. See Scully, supra note 102, at 1233-39; see also Geoffrey C. Hazard, Social Justice Through Civil Justice, 36 U. Chi. L. Rev. 699
tional professional wisdom directs that justice be done alike to rich
and poor. "The idea that all persons should have equal access to the
judicial system is at least as old as the Magna Carta."

Nonetheless, the Marrero Committee’s proposal for a mandatory
pro bono program may move some prospective lawyer taxpayers to
examine these assumptions even at the risk of thinking the unthink-
able. Even if important foundation assumptions about the worthy
functions of civil legal services are never expressly reexamined during
more formal debate, many lawyers will be logically if quietly moti-
vated to consider the costs and benefits associated with the Marrero
Committee’s provocative proposal. While many lawyers have been
content to leave the general subject of low-income justice to a con-
cerned few, the proposal for a mandatory pro bono program promises
to stimulate a much broader interest in both important “efficiency”
and “distributive justice” questions.

1. Efficiency Concerns Over Low-Income Civil Justice

The provision of civil legal services to the poor, at no or very
low cost, may be judged socially desirable if it produces net social
gains for the entire population of affected parties. At the very least,
we should require that such public policy produces more gains or
advantages for the total poverty population than disadvantages or
costs.

At the same time, efforts to evaluate the net effects of providing
the poor with civil legal services are often complicated by important
information costs related especially to certain third-party effects and
the logical need to assess consequences comprehensively over a lon-
ger, as well as over a shorter, period. Estimating the aggregate be-
fits and costs of litigation or other professional strategies, undertaken
numerous times on behalf of many poor clients, is obviously difficult
to do. At best, such an analysis will be impressionistic, based more
on anecdotal information than reliable data, and partial in charac-


356. Stephen K. Huber, Thou Shalt Not Ration Justice: A History and Bibliography of
Legal Aid In America, 44 GEO. WASH. L. REV. 754, 755 (1976). See also SMITH, supra note
46, at 3.

357. For an economist’s conception of rational behavior in cost-benefit terms, see
MCKENZIE & TULLOCK, supra note 38, at 21. For a simplified description of the more prac-
tical Kaldor-Hicks efficiency standard, as compared to a more restrictive Pareto standard, see
MALLOY, supra note 48, at 38-42.
ter.\(^{358}\)

In addition to serious informational barriers, conventional client-centered thinking may encourage many lawyers to underestimate the total costs associated with civil legal services, while exaggerating the benefits. Of course, a lawyer is obliged by well-developed standards of professional responsibility to concern herself only with her client's interests to the exclusion of any distracting third party or broader social concerns.\(^{359}\) Such professional norms only reinforce the habitual insensitivity of many lawyers to the social costs of their professional behavior.

A relevant cost-benefit analysis, however, may be more manageable and more likely to support expanded civil legal services if it proceeds at the level of individual cases. An individual low-income client who justifiably complains about the deplorable conditions of his underheated, roach-infested and physically decrepit rented apartment may actually be benefitted if a legal services lawyer successfully sues, using a theory like the implied warranty of habitability, to force the landlord to repair and maintain the premises. Similarly, there can be little doubt about the immediate benefits for an individual public aid recipient who successfully resists an administrative termination of aid because of skillful representation from a sympathetic legal services lawyer at a pre-termination hearing.

Even if the expenditure of time and energy by the legal services lawyers in both cases is substantial, most of us would approve this form of legal assistance. Political conservatives, for example, regularly call for emphasis upon just this kind of so-called individual service case. Indeed, the justice appeal of such individual case outcomes is so powerful, that many of us would approve even if the tangible costs of providing legal services in these cases seemed higher than the tangible benefits received by the two low-income clients.\(^{360}\)

\(^{358}\) JOHNSON, supra note 162, at 230, observes that "[a]ppraising the cost effectiveness of the Legal Services Program is, in many ways, a more complex task than it is for most other programs of the war on poverty." Nonetheless, he still attempts to compute cost-effectiveness ratios for some low-income litigation involving challenges to state welfare residency requirements. Id. at 367-68 n.228.

\(^{359}\) See supra notes 189, 270.

\(^{360}\) Even under this so-called micro-view, some critics of mandatory pro bono proposals have still objected to devoting "$500 blocks of lawyers' time to $15 problems." Humbach, supra note 88, at 564. More sympathetic commentators have also conceded "that Legal Services will not be a particularly cost effective program to the extent that its collective lawyer resources are focused on cases whose benefits are confined to the individual client." JOHNSON, supra note 162, at 231.
In fact, a more comprehensive evaluation of the worth of particular legal actions on behalf of individual poor clients arguably ought to incorporate certain less tangible values. While we may be able to cost out the direct expenditure of a legal services lawyer's time in dollar terms, it may be more difficult to assess the benefits delivered in these two cases in strict dollar terms even though dollar values are involved. A victorious tenant may benefit not only from an ascertainable dollar amount of landlord repairs, but from the intangible feeling that justice was done at last and from the more secure prediction that the landlord will be deterred from similar future abuses. While it certainly matters for the tangible welfare of a poor client that public aid continues without interruption, it is also important that the threatened low-income client now feels less a victim than before of still another insensitive government bureaucracy. Though the administrators of legal services agencies will be justifiably concerned with matters like cost-benefit ratios, some self-proclaimed lovers of justice are likely to argue, with good cause, that the intangible benefits should also count in any cost-benefit analysis.

But even with this expanded analysis, there is still a risk that we have failed in accounting for the costs and benefits in these two commonly encountered and relatively uncomplicated cases. The immediate benefits reaped by our victorious tenant may be more illusory than real if the landlord fails to comply fully with the judicial repair order or cuts quality corners in grudgingly making repairs. Even if the losing landlord cannot directly raise the rent of our victorious tenant to pay for any new repairs, this landlord may still attempt to shift or recoup the new costs associated with his new liability. This may mean less landlord patience and forebearance if the same trouble-maker tenant misses a future rent payment by even a few days. It may also mean that other low-income tenants in the building will suffer in new ways because of the landlord's new costs and the irritation of defeat in a single case. It is possible, therefore, to exaggerate the benefits from a single case victory, especially when we enlarge the scope of our analysis to include not only the particular tenant but his low-income neighbors as well.

The related matter of total case costs may also be underestimated. Obviously, if the neighbors of our victorious tenant suffer higher rents or poorer service, or a combination, the cost of the landlord's liability has been at least partly shifted to them. In addition, though some landlord-lovers will not much care, the losing landlord may have also suffered the direct cost of hiring a lawyer to defend him in
his losing cause. A similar direct cost, in hiring a lawyer's time, may also be suffered by a government agency attempting to terminate the public benefits of a particular poor client. More accurate accounting for total conflict costs should include the cost of counsel for all adversaries, as well as the costs to the judicial system in terms of the time devoted to the case by a judge and other court officers.361

This observation also leads to another relevant conclusion about the cost-benefit complexities of some individual service cases. Not only may we exaggerate the benefits of victory for our tenant and his neighbors and underestimate total case costs, but it is also possible to ignore an important category of third-party benefit. A system of civil justice that better assures that poor clients will be represented by lawyers will certainly benefit lawyers. In our landlord-tenant case, not only did the tenant employ a lawyer, but the landlord did too. The case, therefore, makes more work for lawyers. The greater the degree of conflict, including litigation in the extreme, the greater the demand for and value of lawyer services on both sides of the dispute.

Cost-benefit analysis is even more challenging and problematic when it is conducted at an aggregate level, rather than with reference to only a particular case. Even if we conclude that the total benefits of providing a lawyer to a particular low-income tenant, like the one above, exceed the total costs of the specific case, there is no assurance that a number of similar landlord-tenant cases will reliably produce aggregate net benefits for the total or larger low-income population, in excess of costs.

If, for example, a total population of 1000 landlords who rent to low-income tenants must now deal with regular and time-consuming housing code inspections that require a total new expenditure of several million dollars for largely minor repairs, this new code compliance cost may affect not only the landlords but their numerous tenants as well. Every landlord, perhaps including some honest and conscientious ones, will be interested in shifting this new cost, inspired initially by an imaginative class action against the local housing department. Assuming that tenant rents are raised slightly either by actual dollar amounts or through a decrease in certain housing services beyond the reach of the code inspectors (e.g., a little less heat each day), the net aggregate benefits of the new housing code program are problematic.362

361. Court congestion and delay may also adversely affect the parties to other cases. Spencer, supra note 31, at 511.
362. See Bruce Ackerman, Regulating Slum Housing Markets On Behalf of the Poor: Of
The same basic point about countervailing economic effects from legal assistance, adversely affecting the poor as a group, may be made with reference to legal action taken against a variety of private economic actors who may well be victimizing poor people:

Dropped in the middle of a fluid market, a new rule may generate unintended, even counterproductive economic ripples. Potentially, at least, abolishing wage garnishment or some other collection device might induce merchants to deny credit to low-income customers. Strict enforcement of usury limitations also might cut the credit supply to the poverty community. Similarly, merchants barred from charging unconscionable prices may lower quality, quantity, or services. In theory, sellers, landlords, and creditors can accommodate to new legal restrictions in almost endless ways, and it is conceivable that they will always be able to manipulate quality and price variables to perpetuate their advantage. And if they succeed, low-income consumers will not experience any net gain in purchasing power [from legal action on their behalf].

Another classic example of the risks associated with civil legal services for the poor, and the difficulties in evaluating aggregate effects, relates to the much discussed matter of procedural due process for low-income recipients of public aid. As a result of the justly famous case of *Goldberg v. Kelly*, welfare agencies must now provide adequate notice and an opportunity to be heard before depriving the poor of various forms of public assistance.

This is not to say, however, that we can confidently conclude that this new housing quality program, engineered by legal services attorneys, is not worth having. The more important observation relates to the various information barriers to a satisfactory evaluation of the total so-called reform effort. Since the group of poor tenants, represented by legal services attorneys, are receiving free or nearly free legal services, it is hard to gauge how much they value a better housing code program. Even if these tenant clients anticipate only minimal benefits, they may still be willing to proceed to the point of costly litigation or extensive lobbying efforts since, from their limited and largely cost-free perspective, any benefit is better than none. For the risk of waste associated with goods, including legal services, priced at zero, see Winter, *supra* note 107, at 73. 

363. *Johnson*, *supra* note 162, at 208. Judge Johnson, however, is ultimately sceptical of these arguments. *Id.* at 208-11; see also *Hazard*, *supra* note 355, at 707.

364. 397 U.S. 254 (1970). For the limitations and consequences of this landmark case,
Of course, this now well-established right to a pre-termination hearing does not come cheaply. While the Goldberg case involved terminations from the Aid to Families with Dependent Children (AFDC) and related home relief programs, the principle of required pre-termination fair hearings has been extended to "a host of [public benefits] programs" with predictably high administrative costs. In New York, for example, the State Department of Social Services employed, as of 1989, 105 hearing officers and a support staff numbering 141. The volume of fair hearings can only be described as staggering. In 1989, more than 150,000 hearings were requested and 77,000 decisions were issued by hearing officers administering average daily calendars of between 28 and 35 cases.

While it is arguable that the right to a pretermination hearing is very beneficial to a substantial number of poor persons, there are also likely negative consequences from this revolution in procedural due process. Even if it is true, in some years, that some eighty percent of the issues decided in such hearings are in favor of low-income petitioners, the aggregate beneficial effects for the state's total low-income population may still be surprisingly problematic. Professor Jerry Mashaw has described a series of noteworthy systemic effects from the Goldberg decision:

Welfare rolls were already increasing rapidly. State legislators were unwilling to provide more funds either for well-constructed hearings or for welfare benefits. A strategy was needed that would preserve fiscal integrity and produce defensible decisions.

A number of tactical moves ultimately comprised the grand design. One was to tighten up and slow down the initial eligibility determination process. Another was to generalize and objectify the substantive eligibility criteria so that messy subjective judgments about individual cases would not have to be made and defended. This move led to the realization that professional social workers were no longer needed. Costs could be reduced further by lowering

366. Id. at 891. By comparison, "[I]n 1969, the [N.Y.] State Department of Social Services employed eleven hearing officers and a support staff of twenty." In the same year, only "thirteen hundred appellants sought hearings and one thousand decisions resulted." Id. See also Admin. Closings Rep., supra note 145.
367. Perales, supra note 365, at 892.
the quality of the staff and by depersonalizing staff-claimant encounters. If these reactions were not sufficient to restore fiscal balance, then payment levels could be reduced or allowed to remain stable in the face of rising prices. A tougher stance was also to be taken with respect to work requirements and prosecution of absent parents. Moreover, because hearings presumably protected the claimants' interests, internal audit procedures were skewed to ignore nonpayment and underpayment problems and to concentrate on preventing over-payments and payments to ineligibles.268

Both this account and the related and very trenchant analysis of Professor Richard Epstein make the same basic point.369 Given the connected components of our welfare system, a legally induced change of one part is likely to produce significant and perhaps offsetting changes elsewhere in the system. Obviously, the net gain for a total population of welfare recipients from enhanced procedural due process is open to serious question if the dollar level of welfare benefits is reduced or restrained for all or even some aid recipients as a result. To make matters even worse, if new procedural benefits for some low-income Joes are paid for by reducing the actual aid level available to a number of low-income Janes, there is good cause to question the fairness, as well as the efficiency, of any such reform. Though we cannot be certain of the net effects, there is no assurance that a fair hearing innovation, on balance, is desirable for the total low-income population.370

Some supporters of civil legal services for the poor correctly observe that there is a lack of empirical confirmation of this problem of "countervailing readjustments" by government agencies and private parties like landlords and merchants.371 Nonetheless, numerous commentators have still noted the problem with special reference to the law reform activity of legal services agencies.372 While there is cer-

369. Epstein, supra note 368.
370. Justice Black, in vigorous dissent from the majority opinion in Goldberg, disagrees that the decision will benefit the poor, especially given certain logical and longer-term implications of such costly procedural due process. 397 U.S. at 278-79 (Black, J., dissenting). For similar judicial sensitivity to the possibility of net negative effects for the poor of costly administrative and other forms of decisional process, see Mathews v. Eldridge, 424 U.S. 319, 348 (1976); Fuentes v. Shevin, 407 U.S. 67, 102-03 (1972) (White, J., dissenting).
372. KATZ, supra note 325, at 180, 182-83; Brill, supra note 188, at 43-44; Harry Brill,
tainly room for disagreement over the extent to which apparent benefits for the poor, generated by legal action, will be eroded if not erased by a variety of economic adjustments, there is also cause to question the aggregate utility of civil legal services for the poor, particularly over the longer term. In turn, this offers opponents of a mandatory pro bono program a fundamental, if somewhat speculative, argument.\(^\text{273}\)

2. Redistributive Puzzles

Thoughtful lawyers are also likely to be slowed in evaluating the Marrero Committee proposal by certain plausible distributive or redistributive effects, in addition to concerns over the perplexing mix of costs and benefits that may result from increased civil legal services for the poor. Most obviously, the Marrero Committee proposal has a first-level redistributive effect insofar as it compels reluctant lawyers to transfer resources, in the form of their actual professional service or cash substitutes, to the poor or their representatives.

Once transferred, at least some such professional resources are likely to be used in ways producing a second kind of redistributive

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The Poverty Lawyers, 33 PUB. INTEREST 128, 130-31 (1973) (reply to Jerome E. Carlin); Cramton, supra note 163, at 551-52, 552 n.120 (quoting Marc Galanter); Hazard, supra note 355, at 707-08. Some commentators, of course, have defended law reform litigation as producing considerable net benefits for the poor. Most notably, Earl Johnson, supra note 162, at 230-31, has estimated such net benefits in an amount of several hundred million dollars, while criticizing the argument "that merchants, creditors, and landlords can and always will respond by readjusting quality and prices in a manner that leaves low-income consumers and tenants where they stood before the legal constraint was applied." \textit{Id.} at 209, 207-11. Similarly, another early proponent of law reform litigation offers details of the positive results produced through class actions on behalf of clients of the San Francisco Neighborhood Legal Assistance Foundation during the late 1960s. Jerome F. Carlin, \textit{The Poverty Lawyers}, 33 PUB. INTEREST 128 (1973). But see, for a more contemporary and pessimistic view of law reform litigation on behalf of the homeless, Robert Hayes, \textit{Litigating on Behalf of Shelter for the Poor}, 22 HARV. C.R.-C.L. L. REV. 79 (1987). See also the very recent case of a private university dental clinic that provides very low priced service to modest- and lower-income patients. Litigation that successfully voided the clinic's use of a comprehensive waiver of all liability, including liability for negligence, may only result in reduced or higher priced service for a sizeable population of needy patients with few if any alternatives for dental care. Ash v. New York Univ. Dental Ctr., 564 N.Y.S.2d 308 (App. Div. 1990); Ronald Sullivan, \textit{Liability Waiver Barred At N.Y.U. Dental Clinic}, \textit{N.Y. Times}, Dec. 30, 1990, at 23.

373. As this article already suggests, supra notes 186-90, 199-200, both the real decline in government support for civil legal services and disappointing levels of voluntary pro bono service by lawyers may be related to unstated reservations over the true value to the poor of more civil legal services. Merely the lack of information about net effects tends to discourage additional government and volunteer assistance.
effect. Law reform litigation, often in class action form, is especially likely to be perceived as a strategy that transfers resources from the more well-to-do to the poor. A large class of public aid recipients, suing for larger government shelter allowances, seeks a larger cash contribution from the rest of us through a public treasury.  

Similarly, though less obviously, a homeless person who seeks to establish a constitutional right to beg in the New York City subway system is also arguing, through his lawyer, for a right that may diminish the welfare of at least some nonpoor subway users while it enhances his begging advantages.  

In fact, the historic transition from older style legal aid to a new concept of low-income civil legal services, promoted initially during the 1960s by the federal Office of Economic Opportunity, reflected a policy determination to improve the opportunities and living standards of poor clients through various redistributive strategies, including, but not limited to, class action litigation. Early and seemingly important victories establishing certain rights for welfare recipients cast the mission of the new legal services movement in explicit redistributive terms.  

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374. Jiggets v. Grinker, 528 N.Y.S.2d 462 (Sup. Ct. 1988), rev’d, 543 N.Y.S. 2d 414 (App. Div. 1989), rev’d, 553 N.E.2d 570 (N.Y. 1990). See also JOHNSON, supra note 162, at 226-27, for distinctions among at least three different types of transfers that government can make to the poor. While the poor benefit from government transfers of “consumer resources” like food and shelter, providing immediate material satisfactions, and from “opportunity resources” like education and job training, the transfer of legal resources may provide the poor with a special kind of “redistribution resources.” Redistribution resources, like community organizers and legal services lawyers, “have the potential for inducing some relevant decision maker to distribute more goods and services to the poor.” Id. at 227.  

375. Young v. New York City Transit Auth., 729 F. Supp. 341 (S.D.N.Y. 1990), rev’d in part, vacated in part, 903 F.2d 146 (2d Cir. 1990), cert. denied, 111 S. Ct. 516 (1990). While the central issue on appeal in Young was “whether the prohibition of begging and panhandling [by homeless persons] in the New York City subway system violate[d] the First Amendment . . . ,” 903 F.2d at 147, the Circuit Court’s analysis might still be interpreted as expressing concern over a certain redistribution of “goods.” Because numerous subway riders, with no practical transit options, “feel harassed and intimidated by panhandlers,” and “intimidated into giving money to beggars,” id at 149, it is arguable that the protected presence of homeless panhandlers would be tantamount to government compulsion reducing the welfare of many subway riders while enhancing the welfare of the panhandlers. While the Circuit Court’s analysis was not explicitly conducted in such redistributive terms, its opinion was sensitive to the pervasive intimidation suffered by a captive subway ridership. Id. at 156, 159-60. For criticism of the Circuit Court’s refusal in Young to extend First Amendment protection to subway panhandling, see Helen Hershkoff and Adam S. Cohen, Begging To Differ: The First Amendment And The Right To Beg, 104, HARV. L. REV. 896 (1991); see also William Glaberson, Effort Renewed To Give Begging Legal Sanction, N.Y. TIMES, Mar. 1, 1991, at B3.  

376. For the various early contributions of the legal services program to “social reform”
At the same time, various politicians and members of the bar have objected to precisely that redistributive emphasis. While some such criticism has been rather extreme in tone, numerous and influential professional and academic commentators have also sharply criticized the redistributive ventures of some legal services lawyers. At least a few critics, of more so-called libertarian persuasion, have been inclined to characterize most government-compelled wealth redistributions as an unacceptable form of theft. Even those critics who recognize that redistributions between extreme wealth positions might be justifiable (transfers from the very wealthy to the very poor) have serious reservations about certain important disincentive effects. Concerns that both load-bearing transferors and transferee-beneficiaries will be discouraged from productive work continue to influence debates over distributive justice in a variety of contexts. In addition,
a number of law professors and judges have strongly objected to the judicial engineering of so-called distributive justice.\textsuperscript{380}

While this is not the occasion to review the complex arguments against governmentally commanded wealth transfers in general and judicial redistributions in particular, there is one argument that deserves special attention if only for its connection to previously discussed efficiency concerns. This argument is all too often ignored or deemphasized by the very lawyers most committed to expanding civil legal services for the poor.

Whether the possibility is admitted, there is a risk that certain litigation or other reform strategies initiated on behalf of poor clients will produce both unexpected and "perverse" kinds of third-party effects. Where litigation or legislative advocacy produces benefits for some members of a lower-income population, while simultaneously harming others, such use of legal instruments effectively shifts or redistributes goods or wealth from one poverty sub-group to another.\textsuperscript{381} While the problem, so posed, is actually a recharacterization

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380. A similar perverse effect may occur with respect to minimum wage laws and other forms of public policy purporting to protect vulnerable persons. If an employer is compelled by law to hire workers at a wage level higher than the market rate, such an employer may compensate for the added wage costs by hiring fewer workers, or by imposing more spartan working conditions to the extent such conditions are not controlled by law. See \textit{ALCHIAN} \& \textit{ALLEN}, supra note 45, at 438-40.
\end{flushright}
of a problem already discussed in terms of the net benefits associated with civil legal services, a few additional examples may be further illuminating.

Interestingly enough, such perverse redistributive effects are entirely possible even in the context of more routine legal services work for individual clients. Legal services lawyers, for example, who handle a large volume of eviction cases, may help their low-income clients at the expense of other non-client members of the poverty population.382

Assume that a legal services lawyer represents a large number of tenants facing eviction who have actually failed to pay their rent, in most instances because the money has been used for other purposes. The lawyer, who is obliged to serve his clients first and foremost, regularly delays eviction by an average of several months to provide his clients with additional time to make other living arrangements. The skillful use of various procedural technicalities also saves many of these same low-income clients a certain amount of rent, since the private landlords who ultimately prevail generally relinquish any claims for rent arrears upon successful eviction.

Obviously, on such assumptions, there is a first-level redistribution of wealth from landlord to tenant insofar as the tenant’s lawyer is successful in delaying eviction to the benefit of his client. There is also another plausible redistributive effect involved in this scenario, this time involving a transfer of goods from other tenants in the same building to the breaching tenant. Because the landlord’s costs are increased from the contested eviction, he will try to shift these costs to the other rent-paying tenants in the same building through higher rents or lower maintenance or a combination. Future tenants in the building may also be adversely affected either by the same negative welfare-reducing combination, or because the landlord is more cautious and selective in choosing new tenants to replace the ones evicted. The parties ultimately bearing the burden of the delay-related benefits for a tenant contesting eviction, therefore, may be other substantially innocent members of the same low-income community.383

382. The fashionable distinction drawn by some political conservatives between good legal services, which fit the category “individual service,” and bad legal services of the law reform variety, misses the point that a large number of service cases can have noteworthy redistributive implications in the aggregate. It is very likely that service work has always dwarfed law reform activity in most, if not all, general purpose legal services agencies. See Abel, supra note 165, at 573-79.

383. Of course, there is no assurance that the landlord will be successful in his cost-
Similar and even more visible redistributive effects may be associated with certain forms of law reform or impact litigation. The recent Jiggets case, referred to in the Marrero Committee Report, is an appropriate example. The plaintiff in Jiggets, representing a class of at least 100,000 public assistance recipients, complained that her shelter allowance was clearly insufficient to cover the costs of rental housing in New York City. The New York Court of Appeals agreed with the plaintiff that this violated certain statutory and state constitutional rights to adequate shelter and remanded to the court below to determine the adequate level of housing allowance under the circumstances.\(^3\)

Despite the powerful first appeal of the Jiggets decision,\(^3\) a judicially ordered increase in the housing component of state welfare allowances may produce perverse distributive effects. While a number of New York City lower-income residents may benefit in housing-related terms, other low-income residents may suffer off-setting reductions in Medicaid, education, or other important benefits as a result. Though it may be difficult, if not impossible, to quantify transfer effects between or among different segments of the low-income population, it is hard to resist concluding that some such effects will occur. Of course, this is especially predictable when government resources available for the poor are not only fixed but declining even while demand for assistance is increasing.\(^3\)
In short, if lawyers take the time to reflect on such problems, many may have good faith reservations about a number of unhappy redistributive effects. Though client-centered practicing lawyers may be unpracticed in tracing the elusive distributive effects of various programs for the poor, there is an undeniable risk that some benefits produced through civil legal services for particular low-income clients will ironically be paid for by other poor persons. Even if a mandatory pro bono program is judged to be an effective way to accomplish the seemingly commendable goal of more civil legal services for the poor, the goal itself may be suspect for its surprising potential to work distributive injustices.

3. Coping With Fundamental Problems

The problematic effects of civil legal services for the poor, particularly over the longer term, may well discourage many lawyers from supporting any expansion of such programs, particularly when the instrument for expansion is a seemingly burdensome and controversial mandatory pro bono plan. In truth, a considerable degree of functional uncertainty has surrounded low-income civil legal services for some time though such fundamental problems are rarely discussed explicitly by lawyers other than a few academics. Even for those lawyers genuinely concerned over the existence and distribution of various relevant costs and benefits, there are likely to be many more questions than answers as we continue to cope with important empirical and normative uncertainties over the comprehensive effects of civil legal services for the poor. 387

At the same time, lawyers have certain well developed strategies for coping with such uncertainties. For example, we are well practiced in applying useful presumptions and allocating related burdens of persuasion in order to promote decision making and to advance analy-
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sis. Such presumptions are more respectable to the extent that they have rational foundations and are open to rebuttal.

Therefore, I am prepared to defend a presumption in favor of more rather than less civil legal representation for the poor despite a number of nagging functional uncertainties. Such a policy presumption not only coincides with longstanding expressions of conventional wisdom about the need for equal access to justice, but it is also rationally defensible in light of certain important professional and social realities.

The first noteworthy reality relates to the general political functions of many practicing American lawyers; the second speaks to the disabling conditions of low-income life in America and the important political role for lawyers representing the poor. Like it or not, many American lawyers seek economic and power advantages for their often well-to-do clients by imaginatively engineering important resource gains and redistributions on their behalf. Twentieth century American business lawyers have been particularly successful in dealing with various governments to the economic advantage of a diverse and influential corporate and business clientele.

Many legal services lawyers have analogous goals. Collectively, they too seek to advance their clients' claims to a fair share of the national resources. Of course, their professional efforts on behalf of a poor clientele have often been intensely controversial. This is partly because this kind of affirmative lawyering on behalf of the poor is a recent professional and social development, dating only from the early 1960s. More importantly, such lawyering for the poor sometimes challenges a deeply ingrained social indifference, if not hostility, to the so-called undeserving poor, and provides at least some poor persons with a practical way to compete for resources against other more

388. Freedom and equality of justice are twin fundamental conceptions of American jurisprudence. Together they form the basic principle on which our entire plan for the administration of justice is built. They are so deep-rooted in the body and spirit of our laws that the very meaning which we ascribe to the word justice embraces them. A system which created class distinctions, having one law for the rich and another for the poor, which was a respecter of persons, granting its protection to one citizen and denying it to his fellow, we would unhesitatingly condemn as unjust, as devoid of those essentials without which there can be no justice.

From the dawn of Anglo-Saxon legal history, this idea has been manifest. The earliest laws continually directed that justice be done alike to rich and poor.

SMITH, supra note 46, at 3.
empowered sectors of American society. In short, poverty lawyers sometimes do for the poor what the poor cannot competitively do for themselves in most economic and political markets.

To maintain a decent balance between and among contending claims upon national resources, therefore, I am led to presumptively support more civil legal services for the poor, even in the face of serious uncertainties over the net effects of low-income justice systems. A due respect for important American traditions that encourage institutionalized checks and balances and that recognize the need for competition seems to require no less.

This kind of a commitment to a "balance wheel" philosophy, however, does not require a suspension of critical judgment. In fact, the Marrero Committee's proposal may actually enhance our professional ability to monitor and to minimize a number of risks associated with any expansion of civil legal services for the poor.

First, this article predicts that the proposed mandatory pro bono program will not only increase civil justice resources, but will also stimulate a restructuring of the system used to deliver legal services to the poor. The altered system, I have argued, is more likely to depend upon a larger more competitive number of new smaller-scale and specialized provider agencies. As a result, there is a better chance that previously unrepresented or underrepresented sub-groups, within the larger poverty population, will be more adequately represented. This includes some poverty sub-groups with competing interests.

This means that when creative litigation produces increased shelter allowances for some welfare recipients, Medicaid patients who might suffer reduced aid, from budget balancing set-offs, are more likely to have their own specialized lawyer advocates. While litigation on behalf of some poor clients, with particular interests, may still have unpredictable and adverse effects for other low-income persons, such risks are reduced because of the likely resource and institutional consequences of the Marrero Committee proposal.

In addition, a mandatory pro bono program in the form proposed by the Marrero Committee should also stimulate a new degree of professional monitoring by newly involved members of the bar. In truth, most lawyers are currently disengaged from the civil legal problems of the poor. Despite the long-standing ethical injunction to serve the poor, most lawyers simply do not.389 As a result, many are un-

informed about or insensitive to the complex effects of many civil justice strategies employed on behalf of poor clients.

Whatever else the Marrero Committee proposal promises to do, it is very likely to capture the attention of a large number of previously indifferent lawyers if it becomes a reality. Since individual lawyers will not only have a new kind of legal duty to the poor, but substantial new power to influence the delivery of civil legal services by controlling MPB tax revenue uses, they may be better informed about the effects of the new program. The gathering of information about program consequences may also be more feasible to the extent that individual lawyers are able to scrutinize and evaluate the work of a smaller-scale provider of specialized services to a relatively small client population. While various empirical and normative puzzles are likely to persist, a new decentralized delivery system may reduce certain important information costs.

Finally, the Marrero Committee’s proposal may generate more professional innovations and improved outcomes on behalf of poor individual clients and a larger poverty population. While many cost-minimizing lawyers will choose to avoid actual service, they will contribute cash, in lieu of service, to support an increasing number of more mature and creative poverty law specialists. This new form of support for a professional poverty law bar, related to the predicted formation of numerous pro bono service groups, will provide new career options for some of the most talented poverty lawyers, many now employed by large government-financed legal services agencies.

These lawyers will have an opportunity to work at a relatively decent wage, in more supportive professional environments, less burdened by intrusive governmental demands for the mass servicing of an impossibly large number of clients. As a result, we may predict an even greater degree of professional achievement to the net benefit of a poor clientele. While there are no assurances under the sun, it is even possible that a new generation of professionally mature and especially able poverty lawyers will better avoid those unhappy redistributive effects that penalize one low-income group for the sake of another.

390. For a brief discussion of the concept of taxpayer sovereignty as it applies to lawyers participating in a mandatory pro bono program, see supra text following note 99.

391. Of course, it remains arguable that a relatively large number of specialty pro bono service groups in the same community will compromise efforts to coordinate law reform initiatives and order priorities on behalf of the total low-income population.
IV. IMPROVING THE MARRERO COMMITTEE PROPOSAL

However much the Marrero Committee proposal may increase professional resources and usefully change the system for delivering civil legal services to the poor, there are still ways to improve the Committee’s mandatory pro bono program. While it may be premature to propose changes in such a complex program, with multiple and interactive components, certain modifications may improve its operation and enhance prospects for both its initial and longer-term acceptance by a deeply sceptical profession.

A. Limiting the Experiment

Given the present controversy and various uncertainties surrounding the Marrero Committee’s mandatory pro bono proposal, it may be appropriate to incorporate a number of program limitations. The current proposal may be improved by a more sensitive response to the special situations of certain lawyers and by limiting the geographic scope and duration of the program, at least in the earlier stages of what might usefully be described as a policy experiment.

Whether one supports or opposes this particular proposal for a mandatory pro bono program, there are clear risks in attempting to impose a largely uniform statewide legal obligation on a very diverse legal profession. At the same time, the Committee expressly rejects categorical exemptions for government attorneys, legal services and public interest lawyers, and for those employed on the legal staffs of business corporations. While the Committee recognizes that government attorneys, in particular, may have legitimate concerns, it is still determined to resist exclusions and broad exemptions that “would compromise the integrity of a pro bono services requirement.” Very clearly, the Committee believes that “universal application is important to enhance acceptability of any obligatory rule. Large exceptions would erode not only the credibility but the effect-

392. The Marrero Committee concedes as much in providing a special compliance option to solo and smaller-firm practitioners that permits them to contribute cash directly to established legal aid agencies, at a specified hourly dollar rate, in lieu of either actual service to the poor or membership in a pro bono service group. FINAL COMM. REP., supra note 1, at 799.

393. FINAL COMM. REP., supra note 1, at 786. The Committee does concede, however, that its program “could create some initial practical difficulties for some of these attorneys. To this extent, special attention may have to be paid to these concerns during the implementation phase of the plan.” Id. at 786-87.
tiveness of the program by substantially reducing the number of participating attorneys.” (Rep. at 786.)

Even if the Committee is correct in resisting wholesale exemptions for entire professional categories, it may be insensitive to the administrative burdens likely to be generated by its unflinching commitment to uniformity. While the Committee does recognize the need for an administrative mechanism that would exempt individual lawyers “who claim incapacity by reason of illness or other extraordinary circumstances occurring in any given year,” it is also committed “to keep[ing] the enforcement mechanism as simple and familiar as possible.” But without categorical exemptions for certain kinds of lawyers in special professional situations, we can expect a larger volume of requests for individual hardship exemptions and a corresponding need for more administrative resources to handle the load. Conversely, if certain lawyer categories were exempted from the MPB tax, there might be less need for the administrative disposition of a larger number of hardship claims, accompanied by understandable demands for a reasonable degree of decisional consistency and fairness.

Administrative complications aside, the Marrero Committee may be faulted for certain details respecting the participation of solo and smaller-firm practitioners, as well as some modestly compensated and professionally constrained government lawyers. Even if we agree that wholesale exemptions by firm size or practice specialty should be resisted, there is room for a more differentiated program response to the variable situations of some practitioners.

Solo and small-firm practitioners have been particularly indignant

394. Final Comm. Rep., supra note 1, at 786, 820. Professor Shapiro, supra note 88, at 777, suggests that a mandatory pro bono system that requires actual service “must leave room for the conscientious objector . . .” His suggestion, which would add considerable administrative complexity and cost, appears primarily motivated by concern over various constitutional impediments to a mandatory pro bono program, though he discounts the thirteenth amendment challenge. On the positive side, Shapiro’s proposal might enhance the political prospects of the Marrero Committee program by excusing those lawyers with principled objections, like those discussed supra in the text accompanying notes 355-91.

395. The Committee does recognize the need for “a uniform process . . . to resolve definitional questions . . . and to promulgate guidelines to aid the profession in complying” with the new program. Final Comm. Rep., supra note 1, at 822. Nonetheless, it still refuses to specify much more than the bare outlines of a concededly “sketchy” and relatively simple administrative and enforcement mechanism that would depend heavily upon the existing system of biennial registration of lawyers with loose judicial supervision. Most importantly, the Committee declares its reliance upon a largely self-regulating profession, the members of which will hopefully comply with their new professional responsibilities to serve the poor without the need for elaborate monitoring and enforcement mechanisms. Id. at 819-21.
over their treatment by the Marrero Committee, especially because the Committee’s membership arguably overrepresented larger-firm perspectives. Though solo and small-firm practitioners are to have the special option of paying an annual tax of $1,000 in lieu of actual service or membership in a pro bono service group, this amount will still be a heavy dollar burden for many such practitioners. Solo and smaller-firm lawyers who practice in upstate and suburban areas are especially likely to conclude that they are being treated unfairly given their comparatively modest professional circumstances as compared to many larger-firm practitioners in New York City.

During the 1989 statewide hearings on a preliminary version of the Marrero Committee proposal, for example, one lawyer from Buffalo, apparently with considerable experience in law firm management, was particularly explicit in distinguishing the different economic prospects of lawyers practicing in different locations:

I have found that the public’s appreciation of attorney income in Western New York is totally distorted by the newspaper releases of associate salaries in New York City, starting in the $60,000 to $70,000 range and the horror stories of partners with incomes well in excess of $200,000. Western New York, to my knowledge, has very few Park Avenue firms. Western New York has no L.A. law firm. This bar is comprised of hard working down to earth people with hourly rates in the $70 to $125 range. I would hazard to guess that if a survey were done the average income of a Western New York attorney would be only slightly higher than that of a skilled craftsman or tradesman in the area.

396. See the quoted observation of A. Thomas Levin, of the Nassau County Bar Association, supra note 26. For a number of other hostile statements from solo and smaller-firm practitioners, see generally, 1989 CIALS Hrgs., supra note 2, passim.

397. Testimony of Edward O’Connor, managing partner of Bouvier, O’Connor, of Buffalo, 1989 CIALS Hrgs., supra note 2, at 192, 193-94 (Nov. 2, 1989). Similarly, attorney Frederick Garwood of Rochester also observed, id. at 8, 13 (Nov. 3, 1989), that:

[The solo practitioner and small firm does [sic] not have extra hours available for mandatory pro bono. Many do not have retainer clients which guarantee a regular income. Many only have a small or part-time staff. Many do not have the books, computer and other legal tools at there [sic] disposal on a full time basis. The need to produce a certain portion of work in order to pay the bills and meet personal expenses adds to the pressures which in turn increase the risks of malpractice, which in turn increases the cost of living.

Helen Carroll Scholfield, President of the Nassau County Women’s Bar Association, was equally explicit in her criticism: “The fact that a ‘buy-out’ of the proposed mandatory program is to be permitted unfairly burdens sole practitioners, legal services attorneys and others whose incomes do not permit such an option, and minimizes the burden on large and profitable law practices.” Id. at 438, 440-41 (Oct. 19, 1989).
Despite the difficulty in accurately estimating the number and geographic distribution of solo and small-firm practitioners in New York State,\textsuperscript{398} there is less question about the declining professional prospects of such practitioners. Nationwide, the relative number of sole practitioners, in particular, has fallen dramatically since the Second World War, from about six out of every ten lawyers in 1948 to about one out of three in 1980. Both solo and small-firm practitioners have been increasingly eclipsed by larger law firms, particularly in the New York City area.\textsuperscript{399} While some solo and smaller-firm practices survive, of course, they are likely to be more dependent upon fewer categories of increasingly competitive but relatively routine professional work.\textsuperscript{400}

\textsuperscript{398} For very rough estimates of the numbers of solo and smaller-firm practitioners in New York State, see \textit{supra} note 57. While this data is limited and dated, it does suggest that the majority of lawyers, registered in locations other than the five largest cities in New York State, practice either alone or in small firms of fewer than ten lawyers. The information in note 57 is particularly suggestive when it is combined with certain data provided by the N.Y. State Office of Court Administration. Unofficially, the O.C.A. reports, for calendar year 1990, a total of 92,300 registered attorneys having a principal place of business in N.Y. State, exclusive of judges and retired attorneys (computer printout dated 1/7/91, on file with the author). Of this 92,300 total, 22,775 are registered attorneys from counties \textit{other than} New York, Kings, Queens, Bronx, Richmond, Albany, Erie, Monroe, or Onondaga Counties. It is fair to guess that most of these 22,775 suburban, small-city, or rural practitioners practice alone or in firms of fewer than ten lawyers. This is virtually certain to be true for the vast majority of registered attorneys from the 46 counties with fewer than 500 registrants. In fact, 31 of 62 N.Y. State Counties have fewer than 100 registrants. The 62 registrants from Chenango County or the 30 from Schoharie County doubtless practice in a very different professional environment from many of the 50,089 lawyers registered from New York County (Manhattan).


\textsuperscript{400} Throughout the country, solo and small-firm private practitioners derive their income from just a few kinds of work: real estate transactions, intergenerational transfers of property (drafting wills and trusts and distributing estates), personal injuries, and corporate and commercial law for small businesses. Despite their greater notoriety, divorce and criminal law generate a much smaller proportion of lawyers' work. Demand for many of these subjects is uncertain and likely to decline: real estate agents, title companies, mortgage lenders, and escrow agents all seek to perform land transactions; most people can draft their own simple wills and probate smaller estates; no-fault automobile insurance and caps on damage awards threaten personal injury plaintiffs' lawyers; do-it-yourself divorce is available to couples without children or substantial property; and public defenders represent most criminals. Furthermore, high-volume clinics can cut costs and spend large amounts of advertising . . . . And some subjects, such as property settlements in divorce matters, are becoming too technical to be handled by the general practitioner.
In fact, there is considerable evidence that the profession is becoming increasingly stratified, with professional incomes and specialities varying widely with firm and city size, as well as with the age of the practitioner. In addition, a growing number of solo practitioners may be minority group members or women practising part-time because of heavy family responsibilities. For such practitioners, either required actual service to the poor or the $1,000 annual cash contribution may be an especially heavy burden given their marginal professional incomes and difficult practice situations.

While it may be unwise to offer even such vulnerable practitioners total exemption from the new program, it may still be appropriate to divide the larger category of solo and smaller-firm practitioners by income. Though all lawyers in the solo or small-firm practice category should continue to have the option of making a cash contribution in lieu of actual service or service group membership, the amount required should be reduced for some. If a solo or small-firm lawyer certifies to an annual professional income of less than $50,000, the amount of the required cash contribution might be reduced to $25 per obligated hour or to an annual total of $500 cash liability instead of the Committee's recommended annual $1,000. A third income category for lawyers earning professional incomes under $30,000 might also be appropriate if only because of the current recession.

Abel, supra note 166, at 181.

401. Id. at 205-07. "There is an enormous range of variation in lawyer income .... Incomes are dispersed more broadly among lawyers than in any other profession. The great divide separates sole and law firm practitioners." Id. at 206. "Some lawyers serve a clientele of working-class and middle-class individuals, and others serve businesses and wealthy individuals, but few serve both categories. The growth in the size of law firms parallels a shift in the distribution of legal services from individuals to businesses. Lawyers serving these different clienteles specialize in different subject matters." Id. at 207.

402. In a statement submitted to the Marrero Committee, the Hon. Kevin M. Dillon, Erie County District Attorney, observed that in his conversations with minority attorneys "it has become obvious to me that their practices are generally overloaded with clients who can only afford to pay small fees that do not begin to compensate the attorney for his or her expertise." 1989 CIAALs Hrgs., supra note 2, at 146, 148 (Nov. 2, 1989). Similarly, Linda J. Nenni, President of the Western N.Y. Chapter of the N.Y. State Women's Bar Association, expressed concern for "attorneys who practice part-time. For example, one of our members works part-time for other attorneys on an hourly basis doing primarily research and writing. She has no malpractice insurance, no support staff and earns less than $10,000 per year." Ms. Nenni also asked the Marrero Committee to consider "the attorney who takes a leave of absence from her legal career to attend to child care responsibilities or an aging parent, but continues to file a registration statement and consults on specific legal matters for limited compensation . . . ." Id. at 187, 189.
While the exact amounts are debatable, as well as whether government and other modestly compensated lawyers should qualify for this kind of differential treatment, the basic income principle is hardly unprecedented. Some bar and professional associations, for example, key their dues to practitioner incomes or to time elapsed since date of license. While this modest re-classification proposal raises the possibility that a number of lawyers will lie about their incomes, it also will relieve the new system of the need to dispose of a certain number of individualized applications for hardship exemptions. Though this modification is likely to reduce the total amount of MPB tax revenue, it also increases the prospects for more widespread acceptance of the new program.

It may be even more important to limit the geographic scope of the new program to New York City, at least for a trial period of several years. This form of geographic exemption has much to commend it. First, about two-thirds of a total number of about 92,000 lawyer registrants statewide will still be covered by such a geographically limited program. Almost 60,000 lawyers, or 65% of the state total, will still be part of the new mandatory pro bono experiment because they are registered in one of New York City's five boroughs.

403. Annual membership dues for the American Bar Association are scaled according to the number of years since original U.S. bar admission. 77 A.B.A.J. 113 (Nov. 1991). Annual national dues for the American Planning Association are a function of a member's salary range plus other "profession-related" income. 57 PLANNING 38 (July 1991). Of course, federal, state, and some big city governments continue to rely on income-differentiated tax systems.

404. Unpublished data from the N.Y. Office of Court Administration reports 92,300 registered attorneys with a principal place of business in New York State, exclusive of judges and retired attorneys, for calendar year 1990 (computer printout of 1/7/91, on file with the author). This figure has been consistently used for the purpose of making the most conservative estimates throughout this article. In fact, the total number of all registered attorneys has recently been reported as 120,478. 1991 N.Y. Pro Bono Survey, supra note 2, at 3. This higher figure includes all active and retired members of the bar in good standing, presumably including judges, who reside or work anywhere in the United States as of January, 1990. Using the lower figure of 92,300, the O.C.A. reports the following distribution of 85,000 registered lawyers for the dozen most lawyer-populous counties:
Second, while serious unmet need for low-income civil legal services exists in other areas, the need is the very greatest within New York City. A very large underserviced and ethnically diverse poverty population, concentrated in high city densities within a relatively limited geographic area, offers an especially powerful justification for a controversial new program of mandatory pro bono. The legal problems associated with the modern scourges of drug addiction, homelessness, and AIDS are especially compelling realities for those lawyers who work in a very unique New York City. In short, if any crisis of unmet need for a wide range of civil legal services truly exists, it exists in New York City.405

New York City practitioners also work in a quite unique professional environment. While a considerable number of smaller-firm and solo practitioners work within the city limits,406 practice in New York City is much more likely to take place within a larger firm than in any other area of the state. 28 out of 29 law firms in the state with over 200 lawyers, for example, have their principal professional offices in New York City. Similarly, 19 of New York State's 23 firms with between 100 and 200 lawyers are located in the City. Even among smaller firms with fewer than 100 lawyers, the City's concentration remains impressive. Of a statewide total of 65 law firms with between 50 and 99 lawyers, 55 or 85% are located in New York City. Finally, among firms with between 10 and 49 lawyers, 328 of a

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<tr>
<td>New York County</td>
<td>50,089</td>
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<td>Kings County</td>
<td>4,356</td>
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<td>Queens County</td>
<td>3,042</td>
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406. Of a total 1,531 law firms in New York State with between two and nine lawyers, 630 (41%) are located in New York City. See the table titled Distribution of New York State Law Firms by Size, supra note 57.
statewide total of 542 (61%) are similarly located within the City.\textsuperscript{407}

This kind of practice environment, unique both in New York State and in the country at large, is significant for at least two reasons. New York City lawyers, on average, are more likely to have higher professional incomes and better resources than lawyers in most other areas of the state. Therefore, they may have a greater ability to bear the burden of the new mandatory pro bono tax though the high cost of living and practicing in the City must be taken into account. In addition, the City's relatively numerous larger law firms are especially likely to be involved in a variety of interesting changes in the system that delivers civil legal services to the poor. Law firm pro bono departments and law firm sponsorship of special pro bono service groups on a consortium basis are much more likely to emerge in New York City than elsewhere in the state. There is a realistic possibility that the City can become a unique laboratory for important and diverse institutional changes sponsored and promoted by numerous larger law firms.

Finally, certain practical factors commend a mandatory pro bono experiment initially limited to lawyers who practice within New York City. Some of the most impassioned opposition to the Marrero program comes from upstate and suburban lawyers who argue, \textit{inter alia}, that the apparent uniformity of the program actually discriminates against them. Many of these same lawyers have also argued that imaginatively conceived and conscientiously administered local voluntary pro bono programs will meet many of the needs in their particular area. A mandatory pro bono experiment, limited to New York City, would not only spare many upstate and suburban lawyers a new tax burden at least for a time, but it would also permit many local voluntary pro bono programs a further period to demonstrate their longer-term effectiveness.\textsuperscript{408}

\textsuperscript{407} Id.  
\textsuperscript{408} For a description of voluntary programs undertaken by the Nassau County Bar Association, see the statement of A. Thomas Levin, 1989 CIAALS Hrgs., \textit{supra} note 2, at 348, 354-57 (Oct. 19, 1989). As Mr. Levin describes it, his association's Volunteer Lawyers' Program (VLP) initially recruited "nearly 500 new volunteer lawyers," so many that the program's limited staff "was unable to cope with the abundance of lawyers." With staff increased and successfully organizing "the flood of new volunteers," the VLP, as of 1989, had "some 1,000 attorneys participating . . . ." During the first nine months of 1989, VLP lawyers "completed more than 300 \textit{pro bono} matters, and commenced 345 new ones." \textit{Id.} at 356. Similarly, the New York State Bar Association has called for "Broad and Unprecedented Efforts to Increase and Measure Voluntarism," N.Y. State Bar Rep., \textit{supra} note 101, at 24. The State Bar Report describes a number of local efforts by the organized bar around the
At the same time, such a geographic exemption need not be permanent. The geographic scope of the mandatory pro bono program might be gradually extended to areas outside New York City, in response to localized conclusions of unmet need. At the very least, an initial New York City experiment might be used to identify and to resolve various program problems, and to demonstrate the program’s potential more convincingly.

This is not to say, however, that such a geographically limited program will be free from both legal and other complications. While the state legislature (and perhaps other governmental authorities) has leeway to tax various classes or categories of taxpayer in different ways, there is still the possibility that any geographically limited program will be subject to litigated challenge for violating principles of equal protection of the laws. A geographic limitation may also threaten the ability of the Chief Judge of the Court of Appeals to implement the Marrero program since his administrative authority over the profession must arguably be exercised on a statewide basis. It is further possible, though not likely, that a jurisdictionally

state. Id. at 10-11. The recent 1991 N.Y. Pro Bono Survey, supra note 2, at 3-4, 22, also reports generally higher participation in voluntary pro bono programs outside New York City: “Relatively high participation was reported in an aggregate of 50 generally non-urban counties with populations less than 275,000 (68.4%), and in Erie (62.1%) and Westchester (54.7%) counties. The percentage of respondents reporting [some qualifying pro bono] activity was lower in New York City (42.5% in the five boroughs) than in any reported location other than Albany County.”

409. Notwithstanding N.Y. CONST., art. L, section 11, it is likely that “in the field of taxation, more than in any other field, the legislature possesses the greatest freedom in classification.” Consolidated Edison Co. v. State Bd. of Equalization and Assessment, 466 N.Y.S.2d 575, 579 (Sup. Ct. 1983), aff’d 480 N.Y.S.2d 789 (App. Div. 1984), aff’d 492 N.E.2d 130 (N.Y. 1986), appeal dismissed, 479 U.S. 801 (1986). If the state legislature were to approve a mandatory pro bono program applicable only to New York City, it is likely that reviewing courts would apply a strong presumption of constitutionality. While such a presumption would be rebuttable, the unconstitutionality of such a geographic classification might well have to be demonstrated beyond a reasonable doubt, with any showing that the classification is minimally rational being sufficient to save the tax program from invalidation. Id.; see also Mobil Oil v. Tully, 449 N.Y.S.2d 921 (Sup. Ct. 1982). Nonetheless, despite the heavy challenger’s burden, some tax classifications have been judicially invalidated on equal protection grounds. Merit OjI v. N.Y. State Tax Comm’n, 443 N.Y.S.2d 604 (Sup. Ct. 1981); Krugman v. Bd. of Assessors, 533 N.Y.S.2d 495 (App. Div. 1988). Of course, there is state statutory precedent for special tax programs limited to New York City, though such geographic classifications typically involve a state legislative delegation of taxing power to the local legislative body. N.Y. TAX LAW §§ 1201, 1301 (McKinney 1991).

410. Even assuming that N.Y. CONST., Art. 6, section 28.c. provides the judiciary with the authority to impose a mandatory pro bono program, such authority still appears to require the promulgation of “standards and administrative policies for general application throughout the state . . . .”
limited MPB tax will divert fee-paying clients to firms and lawyers outside New York City who are free of the new obligation and equally free of the temptation to shift a new kind of professional cost forward to clients.411

In addition to new concessions for solo and smaller-firm practitioners and a geographically limited mandatory pro bono program, there is also one more program limitation that is likely to increase the profession's tolerance for a new and controversial MPB tax on behalf of the poor. Given the number of functional and administrative uncertainties surrounding a new mandatory pro bono program, it may be wise to provide for its “sunset,” or automatic termination, after a reasonable trial period of six to eight years.412

Along with the obvious political implications, such a sunsetting feature should also encourage more careful monitoring of the new program. Data and more impressionistic information about both positive and negative program consequences will be influential, of course, in the inescapable deliberations over renewal of the program.413 It is important, however, that any such time limitation allow for a reasonably long period of initial program life. This is especially desirable because a number of predictable institutional changes in the legal services delivery system might be discouraged by an unduly short trial period.

In sum, a more limited program may be both more acceptable to a now hostile profession and more fairly responsive to the professional circumstances of some special solo and small-firm practitioners.

411. Students of public finance have concerned themselves with the “production distortion” or border effects of interjurisdictional tax differentials. MUSGRAVE & MUSGRAVE, supra note 94, at 316-18. Nonetheless, the size of any new MPB tax, particularly as related to hourly or total client charges, is unlikely to have much of an effect alone on client selection of counsel even assuming 100% forward shifting of the new cost. Where a larger New York City law firm offers special expertise that cannot easily be duplicated outside the city, the risk of any border effect is further reduced.


413. For a description of the functions of sunset laws or limited-life statutes, with historical references to early exponents of the sunset idea including Thomas Jefferson, see WILLIAM N. ESKRIDGE, JR. AND PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 857 (1988). At least one commentator, albeit a law student, has recommended that a mandatory pro bono program should incorporate a sunset provision, if only to meet the criticism that such a program, once created, would tend to become “self-perpetuating.” DeSteiguer, supra note 16, at 381; see also Christopher K. Braun, Pro Bono, Adam Smith, and the Marginal Morality Factor, 1 DET. C.L. REV. 175, 182 (1991).
Finally, income, geographic and time limitations need not necessarily be permanent features of a mandatory pro bono program, especially since there is some evidence that professional tolerance for such programs grows with time and actual experience.\textsuperscript{414}

\textbf{B. Implementing the Experiment}

The Marrero Committee may have made a mistake in recommending that its mandatory pro bono program be implemented by judicial regulation, without any additional state legislative action. At the very least, the Report deals inadequately with an implementation dilemma that implicates separation of powers principles as well as equally important practical considerations. Whether or not the Marrero Committee regards it as an open question, it is still important to ask: What is the best way to implement the mandatory pro bono proposal initially, all things considered?

The Committee argues that an existing framework of state constitutional and statutory provisions already delegates implementing authority to the judiciary. While the Marrero Committee Report does concede that “the scope and interrelation of the relevant constitutional and statutory provisions are not completely settled” (Rep. at 815.), it concludes that judicial implementation is still preferable to either of two other options: amending the Code of Professional Responsibility or legislation. (Rep. at 814-16.)

According to the Committee, judicial regulation is the most appropriate and efficient method of implementing the program because:

the judiciary is the branch of government most directly affected by the proposal and because judicial regulation provides an appropriately detailed, comprehensive, and cohesive program that can take effect immediately using existing methods of implementation, regulation and enforcement that will be easier to adjust if necessary once the program is in place.\textsuperscript{415}

\textsuperscript{414} Wechsler, \textit{supra} note 62, at 947-48, concludes that a variety of independent variables, including racial ones, may account for differing lawyer responses to mandatory pro bono programs. Nonetheless, he also observes that “intuition suggests that the attorneys’ experience with an actual mandatory program is the variable most likely to affect their attitudes.” \textit{Id.} at 948, n.14. Of course, still other limitations might be incorporated into a mandatory pro bono program. Evan A. Davis, for example, recommends, in his concurrence to the \textit{FINAL COMM. REP., supra} note 1, at 844, 845, a phasing in of the “enforceable pro bono requirement . . . . In the initial phase, I would require mandatory reporting by all and mandatory service during the ten years following law school graduation.”

\textsuperscript{415} \textit{FINAL COMM. REP., supra} note 1, at 814.
The Committee is probably right about the negative consequences of legislative implementation. Seeking explicit legislative authorization for a mandatory pro bono program will delay implementation, at the very least. Even assuming initial legislative approval, it is also very likely that the New York State Legislature will delegate considerable planning and administrative responsibility to the judiciary in any event, as authorized by Article VI, Section 30 of the New York State Constitution. (Rep. at 814-15.)

Despite its clear preference for by-passing the legislative process, however, the Marrero Committee does not contemplate that the Chief Judge of the Court of Appeals will singlehandedly provide for program implementation. Clearly, both the New York State Constitution and existing state statutes will require a form of collective implementation by the leadership of the state judiciary, including the Chief Administrator of the State Court System. Though the Chief Judge is free to take the initiative, he is required to “consult” with the administrative board of the courts, composed of himself and the presiding justices of each supreme court appellate division for each of the judicial departments. In addition, mandatory pro bono program regulations must also be “approved” by the Court of Appeals.\(^\text{416}\)

While the Committee is impressively succinct and somewhat evasive in simply rejecting legislative implementation as “more cumbersome” than judicial implementation (Rep. at 814-15), it is doubtless concerned that the New York State Legislature will reject any proposal for a mandatory pro bono program. The significant number of lawyers in the New York State Legislature,\(^\text{417}\) the nearly unani-

\(^{416}\) The Committee offers considerable detail about its proposal for judicial implementation, complete with citations to a number of New York State constitutional and statutory provisions, the most important of which are article VI, section 28 of the New York State Constitution and New York Judiciary Law sections 211 and 212 (McKinney 1983 & Supp. 1991). FINAL COMM. REP., supra note 1, at 816-19. The text of the above provisions, as relevant, is duplicated at notes 56-57, and 63 of the Committee's Report. Id. at 816, 818.

\(^{417}\) More than one-half of the current membership of the New York State Senate (32/61), and over one-third of the membership of the New York State Assembly (53/150) have law degrees. See THE NEW YORK RED BOOK (George A. Mitchell ed., 91st ed. 1991-92). The number has varied over time. By 1986, consistent with a national trend, the total number of lawyer-legislators in the New York State Legislature had declined to 54, down from 95 in 1976. Jeannie H. Cross, Commentary; Politicking, Not Lawmaking, Turning Legislature Full-Time, U.P.I., June 10, 1987. While the current number of 85 lawyer-legislators is still a decline from the 1976 total, New York appears to have a higher proportion of lawyer-legislators than many states. Nationwide, the number has dropped by about one-quarter, though “lawyers still make up the largest group of state legislators, 16 percent.” Elizabeth Kolbert, Lawmaking in States Evolves Into Full-Time Job, N.Y. TIMES, June 4, 1989, at 26.
mous opposition of the organized bar, and a tradition of influential special interest lobbying over tax measures may all be factors influencing the Committee's judgment regarding implementation.418

Nonetheless, implementation by judicial regulation without any legislative action raises serious legal and policy questions. However compelling the pragmatic and political reasons for by-passing legislative consideration of the mandatory pro bono program, the Marrero Committee makes its case for implementation through judicial regulation alone upon an uncertain technical foundation.419

First, the Committee understandably relies upon the expansive language of portions of Article VI, Section 28 of the New York Constitution and section 211 of the New York Judiciary Law.420 While these key provisions do appear to confer very substantial power upon the chief judge to establish "standards and administrative policies," in consultation with the administrative board of the courts and subject to Court of Appeals approval, it is still not clear how far the power extends. It is arguable that this regulatory power, while "complete" within its domain,421 principally relates to the management of the "unified court system" and may even be limited largely to controlling the "dispatch of judicial business" and "regulating practice and procedure in the courts."422 If the regulatory power is limited in this

418. Though the Committee offers no explicit political theory to justify its by-passing of the N.Y. State Legislature, it is conventional wisdom that our legislative process fails when interests are unable to organize in order to make themselves heard. It is arguable, on this theory, that many issues affecting the poor are not really capable of democratic resolution through legislative process. Given the likely skilled and energetic opposition of the organized bar to a mandatory pro bono program, it is especially arguable that we face a democratic failure in the case of proposals for a mandatory pro bono program, which must be compensated for by an enlightened judiciary. See Luban, supra note 266, at xxv; see also supra notes 167-74 and accompanying text, with reference to public choice theory.

419. The Marrero Committee is clearly aware that its proposal for judicial implementation is very controversial. Both the extended technical argument in the Report itself, Final Comm. Rep., supra note 1, at 814-19, and a special Appendix C on "Constitutional and Statutory Issues," id. at 857, 861-64, [hereinafter Rep. App. C], prepared for the final version of the Report, testify to the sharp debate over the power of the judiciary to adopt the proposed mandatory pro bono plan. Numerous opponents of the proposal have forcefully argued for legislative implementation. See the dissenting statement of Committee member Sol Neil Corbin, id. at 847, 850; Scully, supra note 102, at 1239-41; and the statement of Buffalo attorney Allan R. Lipman, 1989 CIALS Hrgs., supra note 2, at 177, 179 (Nov. 2, 1989).

420. See Final Comm. Rep., supra note 1, at 816 nn.56-57 for the text of these provisions.

421. The Committee, Final Comm. Rep., supra note 1, at 816-17, takes the position that the "power of the Chief Judge to administer the practice of law in the courts is 'complete,'" (citing Corkum v. Bartlett, 414 N.Y.S.2d 98, 100 (N.Y. 1979)).

way, there may be cause to question the judiciary's ability to implement a plan that requires certain forms of professional behavior that may be only remotely related to litigation or to the court system. As John Scully puts it:

[T]he [Marrero] Committee's proposed plan does . . . mandate activities outside the courtroom by requiring practicing attorneys to either represent indigent individuals or in some other manner fulfill the requirements of the plan outside the courtroom by engaging in activities such as lobbying the legislature, raising funds for legal aid or other charitable organizations, or making cash contributions to charitable organizations.423

Though Scully may be too inclined to read the operative constitutional and statutory language narrowly, the Marrero Committee Report does make a point of noting the number of compliance options available to non-litigators. (Rep. at 789.)

The Report also argues that section 1102(a) of the CPLR memorializes the inherent judicial power to provide for the "assignment of counsel to indigent litigants in civil cases."424 At the same time, there is no evidence that this inherent power allows for more than particularized and discretionary decision-making on a case-by-case basis. While the courts may have the capacity to balance the costs and benefits of appointing uncompensated counsel in particular civil cases, there is simply no existing authority for the proposition that they already have the wholesale policy power under CPLR section 1102(a) to enact a sweeping program of free representation in all or even some categories of civil cases.425

423. Scully, supra note 102, at 1240.
424. Final Comm. Rep., supra note 1, at 815, 816-17; see also Rep. App. C., supra note 419, at 861-63. Heavy reliance is placed upon In re Smiley, 330 N.E.2d 53, 55 (N.Y. 1975), for the proposition that section 1102(a) "codifies the inherent power of the courts."
425. N.Y. Civ. Prac. L. & R. § 1102(a) (McKinney 1976 & Supp. 1991) contains only the following case-particularized language: "The court in its order permitting a person to proceed as a poor person may assign an attorney." While this language does provide the courts with "a broad discretionary power to assign counsel without compensation in a proper case," it confers no statutory right to civil counsel for indigents in matrimonial or other cases. See Smiley, 330 N.E.2d at 58. Given the policy and fiscal implications of conferring a right to civil counsel upon poor litigants, the court in Smiley concluded that the matter was best left to the legislature. Id. Moreover, some courts are inclined to interpret the language of section 1102(a) "strictly" as a legislative creation in derogation of the common law. In re North County Legal Service, Inc., 407 N.Y.S.2d 127 (Sup. Ct. 1978); People ex rel. King v. McNell, 219 N.Y.S.2d 118 (Sup. Ct. 1961), cert. denied 370 U.S. 932 (1962). At least one leading treatise has interpreted the discretionary nature of section 1102(a) "as meaning that counsel should not be routinely assigned. Rather there must be a meaningful inquiry into the
To further complicate technical matters, still other state constitutional provisions more affirmatively indicate the need for legislative implementation. Since the mandatory pro bono program will be a kind of tax, Article XVI, section 1 of the New York State Constitution must be taken into account. This provision has been interpreted as vesting exclusive taxing power in the state legislature. While the taxing power is subject to legislative delegation, an effective delegation requires statutory specification of the particular tax to be imposed or administered.\textsuperscript{425}

Even though “taxation by regulation” through administrative agencies is not uncommon,\textsuperscript{427} and even though courts have occasionally exercised taxing powers in unusual circumstances, there are longstanding reservations over the judicial exercise of fiscal powers.\textsuperscript{428} In one relevant example, reflecting a preference for legislative implementation, licensed New York State lawyers are already subject to a biennial registration fee. Despite the ease with which this fee might be characterized as an administrative or regulatory exaction, rather than a tax, it was initially imposed by the state legislature. Recent and significant percentage increases in the biennial registration fee have also been specifically provided for by New York State statutes.\textsuperscript{429}

The Marrero Committee Report also ignores Article XVII, section 1 of the New York State Constitution, which expressly allocates responsibility for the “aid, care and support of the needy” to the legislature.\textsuperscript{430} While a technical Appendix to the Report itself does

\begin{quote}
merits of each request, just as the courts consider the merits of the application for poor person status in general.” Jack Weinstein et al., New York Civil Practice § 1102.01, at 11-42 (1990).

426. “The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review.” N.Y. Const. Art. XVI, § 1. See Mobil Oil v. Huntington, 380 N.Y.S.2d 466 (Sup. Ct. 1975); Kessel v. Purcell, 463 N.Y.S.2d 384 (Sup. Ct. 1983).

427. Posner, supra note 98.

428. In Missouri v. Jenkins, 110 S. Ct. 1651 (1990), the Supreme Court reversed a lower federal court order that directly imposed an increase in property taxes, to be levied by a school district, to insure funding for the desegregation of the district’s public schools. Id. at 1663. The Court, however, also held that a federal court could direct a local government body to levy its own taxes to remedy unconstitutional racial discrimination. Id. at 1665. For a discussion of the proposition that taxation is not a judicial function, see Kennedy, J. (concurring in part and in the judgment), id. at 1667, 1670-73; see also G.R. Wolchojlan, Comment, Judicial Taxation In Desegregation Cases, 89 Colum. L. Rev. 332 (1989); Linda P. Campbell, Senators Attack Taxing by Judges, Chi. Tribune, June 20, 1990, at 5.

429. For the changes in the biennial registration fee, see supra note 90.

430. “The aid, care and support of the needy are public concerns and shall be provided

http://scholarlycommons.law.hofstra.edu/hlr/vol19/iss4/7

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note the potential relevance of both the tax article and this Article XVII, the author of the Appendix unpersuasively dismisses their importance by arguing, largely without reference to either authority or policy, that both constitutional provisions are somehow subordinate to "the inherent common law power of the Court to require members of the bar to provide uncompensated counsel to the poor, the judiciary's power to regulate the practice of law by all attorneys, and the obligation of the judiciary, as a coequal branch of government, to maintain access to the justice system for the poor." 431

Even if state constitutional and statutory provisions can be creatively interpreted to authorize the judicial imposition of a mandatory pro bono program, there are still compelling policy reasons for legislative deliberation over the proposal, however "cumbersome" that may be. Because the Marrero Committee Report proposes nothing less than a potentially significant, seemingly selective, and intensely controversial form of new tax, legislative consideration may be legitimizing at the very least. 432

Even the Marrero Committee's commendable effort to hold statewide hearings on a preliminary version of its Report has not really provided the equivalent of an open legislative process with its numerous bargaining opportunities. While the final version of the Committee's Report includes some argumentation not present in the Preliminary Report, it is noteworthy that the structure and details of the original program were completely unchanged even after the completion of what appeared to be extensive and contentious hearings throughout the state. 433

Various plausible redistributive effects of the new program further strengthen the case for legislative consideration. As already noted in this article, the program will transfer lawyerly resources to the poor that are themselves of a redistributive kind. Lawyers servicing poor clients may have numerous occasions to argue for the

432. "Institutional legitimacy is an indispensable condition for institutional effectiveness. By endowing institutional decisions with an inherent capacity to attract obedience and respect, legitimacy permits an institution to achieve its goals without the regular necessity of threatening the use of force and creating renewed episodes of public resentment." JAMES O. FREEDMAN, CRISIS AND LEGITIMACY; THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 10 (1978).
433. For a description of the Committee's statewide hearings in the fall of 1989, see supra note 2.
strengthening of a wide variety of aid programs that clearly redistribute resources to the poor. Whether one views a mandatory pro bono program as promoting justified wealth transfers, or as unjustly burdening more productive citizens for the sake of the undeserving poor, controversy over the redistributive implications of public policy has more often been resolved by legislative, rather than by judicial, agencies in our governmental system.

Moreover, the proposed mandatory pro bono program also has a striking potential for improving, or at least altering, the system currently used to deliver civil legal services to the poor. The institutional significance of the new program is additional reason for legislative consideration of the program's structure and prospects, even if detailed administration is eventually left to the judiciary through a broad delegation of regulatory authority. As already noted in this article, the Marrero Committee's proposal might increase the number of service providers, decentralize the delivery of legal services through a number of specialized new agencies and entities, and materially affect the mix of public and private financing for much expanded civil legal services.434

This altered system, in turn, may generate significant new litigation and other legal activity that impact on a wide range of low-income assistance programs, many of which are funded at least in part by the state legislature. A newly expanded and more efficient system for the delivery of low-income civil legal services may also burden the already scarce resources of our court system. Ultimately, of course, the responsibility for financing the entire justice system rests with the New York State Legislature.435

An obvious degree of program and policy uncertainty also invites a legislative rather than simply a judicial initiative. Policy-making with complex and uncertain effects is best left to a politically accountable body with greater practical resources for regular program monitoring and expensive information gathering. In the face of uncertain effects, a legislative body that is restrained by the threat of political sanctions, as the courts are not, is the more appropriate body to make relatively risky public policy.436

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434. See supra part III.F.
435. See Smiley, 330 N.E.2d at 58. The Marrero Committee seems to concede that its proposal would burden the state court system with a "potentially large infusion of new legal activity" but rejects that as a reason for inaction. Fnal Comm. Rep., supra note 1, at 841.
436. "Taxation by a legislature raises no due process concerns, for the citizens' rights are protected in the only way that they can be in a complex society, by their power, immediate
There are also certain pragmatic reasons for recommending legislative implementation of the Marrero Committee program. First, the current statutory foundation, which presumably already authorizes a judicial mandatory pro bono initiative, will likely require a statewide mandatory pro bono program. Under both the State Constitution and relevant provisions of the Judiciary Law, the Chief Judge of the Court of Appeals has the power only to "establish standards and administrative policies for general application to the unified court system throughout the state..." As a result, it may be very difficult to limit a mandatory pro bono experiment to New York City if we merely rely upon the existing statutory structure to implement the new program.

More importantly, implementation by judicial initiative alone is more likely to generate successful, litigated challenges to the new program on state law grounds. Though judicial implementation, as proposed by the Marrero Committee, may avoid extended legislative debate and the risk of a legislative refusal to adopt the program, the state law grounds for challenging such judicial implementation, without further legislation, are substantial. The practical choice, therefore, is a bedeviling one. Is it more prudent to risk initial legislative rejection of a new mandatory pro bono program or to risk eventual judicial nullification of the program on state law grounds?

In addition, judicial implementation without further legislation may strengthen certain First Amendment arguments against any new program. While several of the constitutional arguments against the new program are unpersuasive, some lawyers opposed to mandatory pro bono are virtually certain to argue that they will be compelled to engage in forms of professional service that violate their deep convictions about social and redistributive policy as it relates to the poor. Such First Amendment arguments, especially related to freedom of conscience and association, are more compelling if the objectionable program has been initiated by a politically unaccountable or remote, over those who make the rule." Missouri v. Jenkins, 110 S. Ct. at 1671 (Kennedy, J., concurring in part) (quoting Bi-Metallic Co. V. Colorado State Bd. of Equalization, 239 U.S. 441, 445 (1915)).


438. See supra text accompanying notes 104-25. Recently, the Massachusetts IOLTA program has been sued by plaintiffs who allege, inter alia, that the program is "an infringement on clients' and attorneys' First Amendment rights of free speech and association." Barbara Lyne, IOLTA Fund Challenged In Bay State, NAT'L L.J., May 6, 1991, at 20.
authority like the leadership of the New York State Judiciary.\textsuperscript{439}

Finally, there are several noteworthy observations that bear somewhat speculatively upon the very difficult implementation choice. On the one hand, it is possible that the New York State Legislature will actually be willing to adopt a program that amounts to an excise tax on lawyers or, more correctly put, an excise tax on the consumption of legal services. While it is easy to predict intense opposition by the organized bar, the Legislature might actually win widespread public praise for giving the overwealthy lawyers a kind of overdue comeuppance in the name of social justice for the poor. If the Marrero program were modified to limit its impact on solo and smaller-firm practitioners, and to restrict its application initially to New York City and then only for a limited experimental period of several years, practical prospects for legislative enactment might be further enhanced.

On the other hand, it is possible to exaggerate the risk that the courts will destroy the experiment if it is implemented solely through judicial regulation with no legislative initiative or specific legislative consideration of the Marrero Committee's program. In a word, the current state constitutional and statutory framework for establishing the administrative standards and policies applicable to the court system, stacks the deck against state court invalidation on state law grounds. Since the New York Court of Appeals must initially approve any new mandatory pro bono program proposed by the Chief Judge,\textsuperscript{440} there is little risk that it will ultimately invalidate that same program because of its judicial implementation, however strong the technical arguments to support such invalidation may be.\textsuperscript{441} Of course, the new program may still be vulnerable to federal

\textsuperscript{439} See supra notes 122-23 and accompanying text.


\textsuperscript{441} Any state court litigation over a mandatory pro bono program that reaches the New York Court of Appeals for review poses an ethical problem for both the Chief Judge and his colleagues on the court, assuming that the program is implemented by the state judiciary as the Marrero Committee Report recommends. While the Chief Judge is likely to recuse himself, his colleagues may have a duty to dispose of the case under a "Rule of Necessity" despite their likely prejudgment of a number of issues, including state and federal constitutional ones. "As stated by Sir Frederick Pollock, that rule mandates that 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise'...". Morganhan v. Cooke, 436 N.E.2d 467, 469, n.3 (N.Y. 1982); see also Maresca v. Cuomo, 475 N.E.2d 95, 96 n.1 (N.Y. 1984), appeal dismissed, 474 U.S. 802 (1985); Anonymous v. Grievance Comm., 527 N.Y.S.2d 248, 249-50 (App. Div. 1988), appeal dismissed 547 N.E.2d 99 (N.Y. 1989); David Margolick, Ethics in Cooke Case, N.Y.
court invalidation on federal constitutional grounds.

As a result, the proponents of the Marrero Committee proposal are more likely to risk eventual program death by judicial order, rather than risk outright rejection or emasculation of the new program by a New York State Legislature led by lawyers and perhaps overinfluenced by a powerful and self-protective organized bar. At the same time, there may be an ultimate answer to the implementation dilemma that is not expressly reflected anywhere in the Marrero Committee’s Report.

While the current state of New York and federal law stops short of establishing a constitutional right to counsel in all civil cases, there is some cause to believe that the issue may be ripe for at least qualified reexamination. In recent years, counsel has been provided to indigents, both by limited constitutional right and by state statute, in certain categories of civil litigation where fundamental interests of the litigants are involved in custody, paternity, civil commitment and contempt cases. A limited state constitutional expansion of the...
right to civil counsel, to eviction cases for one categorical example, has been advocated by some commentators and in ongoing litigation.  

There would be a considerable advantage to the judicial recognition of a constitutional right to civil counsel in an appropriate case, even if the right were restricted to certain important categories of civil litigation. Since the courts have the well settled power to independently implement constitutional rights, the New York Court of Appeals might order the New York State Legislature to provide for free counsel in at least some additional categories of civil litigation, as a matter of state constitutional law.

Even if the Court of Appeals stopped short of ordering the State Legislature to implement a mandatory pro bono program, the Legislature might still be very responsive to just that idea under the compulsion of a constitutionally justified judicial order. If the current Marrero Committee proposal fails to become reality, because of either state legislative resistance or state judicial rejection of a judicially implemented program, as proposed by the Committee, there may still be another avenue for implementation within the constitutional power of the leadership of the New York State Court system.

C. Supplementing the Experiment with Fee Awards

Though the 1989 New York Legal Needs Study concludes that “attorneys’ fees awards can be an important source of income for legal services programs,” the Marrero Committee Report itself has nothing to say on the subject. Despite this silence, it is arguable that

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445. “[I]t is settled that the courts have the authority to order public expenditure in the fulfillment of a constitutional imperative.” WEINSTEIN ET AL., supra note 425, at 11-45 (citing Deason v. Deason, 343 N.Y.S.2d 321 (N.Y. 1973)). For a description of a Texas lawsuit seeking a judicially created mandatory pro bono program on constitutional grounds, see Gary Taylor, Texans Make Pro Bono Pitch, NAT’L L.J., April 1, 1991, at 3.
446. N.Y. Legal Needs Study, supra note 28, at 165. “In 1984, attorneys fees generated by [primarily LSC-funded] programs for successful litigation reached a high point of $1.2 million, with over one million dollars awarded to New York City programs. In 1987, 13 programs received some fees from litigation, although the total dollars were fewer, in large measure due to a decrease in New York City.” Id. at 164.
judicial fee awards or “fee-shifting” would usefully complement the Marrero Committee’s mandatory pro bono proposal.

Unlike most of the European justice systems, American state and federal courts supposedly honor the general rule that each litigant bears his or her own litigation expenses, especially attorneys’ fees. This general rule, however, has long been subject to a series of common law and, more recently, numerous statutory exceptions. Over one hundred thirty federal statutes now provide for various forms of so-called one-way fee shifting in favor of a prevailing plaintiff. Many of these federal statutes have been passed within the past thirty years to encourage the enforcement of a number of important civil rights, consumer and environmental laws.

Various states have also enacted fee-shifting statutes. By one slightly dated estimate, more than 1900 state statutes provide for attorney fee awards. California has a large number of state fee-shifting statutes including one that has been described as “a comprehensive attorney fee statute under which state courts routinely award attorney fees and costs to prevailing plaintiffs in matters of public significance, including suits on behalf of low-income persons who would otherwise be denied legal counsel. The statute encourages increased private attorney involvement in various areas on behalf of the low-income population.

New York law also provides certain fee-shifting opportunities for

448. Murray L. Schwartz, Foreword to Symposium, Attorney Fee Shifting, 47 LAW & CONTEMP. PROBS., 1, 4 (Winter 1984). Under a conventional one-way fee shift, only the losing defendant is liable for the prevailing plaintiff’s attorneys’ fees; a losing plaintiff is generally not liable for a prevailing defendant’s attorneys’ fees. A so-called two-way shift requires the losing party, whether defendant or plaintiff, to be responsible for the attorneys’ fees of the prevailing party. WOLFRAM, supra note 163, at 918. Some commentators have argued for two-way fee shifting in litigation for low-income clients. See LUBAN, supra note 266, at 273-77; Note, Fee Simple: A Proposal To Adopt A Two-Way Fee Shift For Low-Income Litigants, 101 HARV. L. REV. 1231 (1988).
450. Schwartz, supra note 448, at 4.
low-income litigants. For example, a residential tenant, including a low-income one, has a statutory right, under some lease circumstances, to recover "reasonable attorneys' fees and/or expenses" incurred either as a successful plaintiff in certain actions against a landlord or incurred "in the successful defense of any action or summary proceeding" arising out of a landlord's action on a lease.452 In 1990, after years of debate, New York State enacted an "Equal Access to Justice Act." This Act, modelled in part on federal legislation with the same short title, allows attorney fees to persons of limited means and small businesses who prevail in litigation against the state where the state's position lacks substantial justification.453

The modern popularity of fee-shifting has been explained in a variety of ways. The award of attorneys' fees to a victorious plaintiff may help to deter defendant misbehavior, redress the disparity in resources available for litigation purposes, and aid in vindicating important public rights.454 Because the prospect of collecting attorneys fees is thought to encourage civil litigation by private attorneys on behalf of the poor, some commentators have suggested that fee-shifting may offer an important alternative to mandatory pro bono programs.455 In addition, fee awards might supplement funding available for legal services programs.456

While the incentive effects of many fee-shifting arrangements are somewhat speculative and controversial,457 there is a useful applica-

452. N.Y. REAL PROP. LAW § 234 (McKinney 1989).

454. For a description and critical evaluation of six rationales for fee-shifting, see Rowe, supra note 447, at 653-66. The recent 1989 A.B.A. ACCESS REPORT, supra note 442, at 44-45, also suggests "an expansion of the use of contingency fees and fee shifting into new areas."

455. For qualified support of fee-shifting as a way "of harnessing the profit motive to the cause of those who could not otherwise avail themselves of legal services," see Shapiro, supra note 88, at 781; see also Cramton, supra note 88, at 1138.

456. Despite the possible supplement to government funding, the Congress and the LSC have been very cautious in allowing legal services attorneys to take fee-generating cases on behalf of poor clients. In general, LSC-funded programs may not accept fee-generating cases, though legal services lawyers may represent clients who seek statutory benefits in fee-generating cases where "appropriate private representation is not available." 42 U.S.C. § 2996(f)(1) (1988). See Christopher Brancart & Deborah Watson, Note, Integration of the Legal Aid and Fee-Shifting Exceptions to the American Rule: A Proposal for Amending the Legal Services Corporation Act, 5 REV. LITIG. 157 (1986); 1989 Reauth. Hrg., supra note 161, at 18, 26 (statement of Michael B. Wallace, LSC Board Chairman).

457. "The fee shifting system in effect seems likely to affect decisions whether to pursue
tion for the concept as an adjunct to, rather than as a replacement for, the Marrero Committee’s mandatory pro bono proposal. A simplified state court fee-shifting system, especially designed for prevailing lower-income plaintiffs, might apply to any judicial or administrative civil proceeding initiated on behalf of a lower-income person against any state or local government, or private party defendant or respondent.

To avoid imposing crushing fee awards on government agencies, a fixed fee schedule incorporating rather modest hourly or case rates of compensation might be appropriate. It may also be desirable to provide for a strong presumption that a fee award will be routinely made, absent a showing of compelling reasons to avoid such standard fee-shifting. This will serve to reduce the number of hostile and widely varying judicial responses to fee award requests, while avoiding complex and extended litigation over lawyers’ fees.

Such a low-income fee-shifting system might also include a special, though certainly controversial, incentive feature. A lawyer might be permitted to count his or her service against an annual mandatory pro bono minimum while at the same time retaining all or some part of the attorney’s fees collected from a defendant. While the modest fee levels incorporated into a mandatory schedule would be unlikely to make any participating practitioner rich, the fee-shifting opportunity would nonetheless ease the pain of the new mandatory pro bono tax for many lawyers feeling the pinch of the new obligation.

Solo and smaller-firm practitioners, in particular, might find even a limited opportunity to recover fee awards partial compensation for their vexing service to the poor. Certain underemployed practitioners might even have a new money incentive for exceeding the minimal

Legal relief and whether to settle or resist a claim pressed by another.” Rowe, supra note 447, at 665. See also Thomas D. Rowe, Jr., Predicting the Effects of Attorney Fee Shifting, 47 LAW & CONTEMP. PROBS. 139 (Winter 1984). For the observation that efforts to forecast the effects of fee-shifting have historically been uncertain and often inconsistent, see John Leubsdorf, Toward a History of the American Rule on Attorney Fee Recovery, 47 LAW & CONTEMP. PROBS. 9, 28 (Winter 1984).

458. In Austria, Germany and Switzerland, attorney fees are fixed by statutory schedule. Werner Pfennigstorfer, The European Experience with Attorney Fee Shifting, 47 LAW & CONTEMP. PROBS. 37, 56 (Winter 1984).

459. For the observation that an “unusual number of New York State Court decisions find reasons for denying fees” under the federal Civil Rights Attorney’s Fees Awards Act of 1976, see Martin A. Schwartz, Civil Rights Fees in New York State Courts, N.Y.L.J., Nov. 20, 1990, at 3.
service standards proposed by the Marrero Committee’s Report. While larger-firm practitioners would have less dollar incentive from such a limited fee award program, because of their higher hourly fees, many of these lawyers might still benefit from the program. Any attorneys fees recovered by these larger-firm lawyers might be dedicated to the special pro bono service groups that will have been formed to comply with the new MPB obligation. Even modest fee recoveries might be used to reduce the costs of maintaining such groups or, even better, to render additional civil legal services to the poor.

This is not to say, however, that such a fee-shifting program would be problem-free despite its restrained and simplified character. Even a program that provides for only very modest fee recoveries, with little or no opportunity for so-called premium billing, might divert the use of scarce legal resources in unhappy directions. This form of fee-shifting system might encourage the filing of more lawsuits, especially those lawsuits most likely to generate the highest attorney’s fee awards. This kind of incentive effect also obviously threatens to increase the burdens on the entire civil justice system, in part because some lawyers for some lower-income plaintiffs may be more reluctant to settle client lawsuits “prematurely.”

In addition, some lawyers and pro bono service groups, choosing their mandatory pro bono work under the new Marrero Committee program, may be less inclined to offer poor clients non-litigation services with little or no potential for fee recoveries. This form of fee-shifting incentive may also lead some lawyers to emphasize more complex forms of impact or reform litigation rather than meet the more routine or daily needs of the poor for less ambitious forms of civil legal services.

Finally, there are conceivable administrative complications to even a simplified program of routine attorneys’ fees awards. How, for example, is a fee award to be divided, if at all, between a private

460. For a more reliable effort to predict the effects of fee-shifting through economic analysis, see Rowe, supra note 457, at 147-70. For example, it is very likely that one-way, pro-plaintiff fee-shifting will encourage the pursuit of strong but small dollar claims on behalf of low-income clients. Id. at 148-49.

461. Settle & Weisbrod, supra note 221, at 546-47.

462. For the argument that “fee-shifting statutes have largely become a tool of liberal public interest lawyers to fleece businessmen and taxpayers,” see WASHINGTON LEGAL FOUNDATION, WASHINGTON LAW FIRMS’ PRO BONO WORK: SHORTCHANGING THE POOR? 50 (1988). For the suggestion that the financial benefits of fee-shifting arrangements will deter lawyers from aiding in “the resolution of a mundane legal problem for one poor person,” see id. at 54.
practitioner and the legal services agency through which he offers his services to discharge his new mandatory pro bono liability? If an established legal services agency, or a new pro bono service group sponsored by a local bar association, collects a substantial amount of attorneys' fees, will this jeopardize the tax-exempt status of such a non-profit organization? 463

Nonetheless, despite a number of problems remaining for detailed resolution, a special fee-shifting system of the kind described might well contribute to the single most important goal of a mandatory pro bono program. While a fee-shifting proposal that benefits individual lawyers is bound to be controversial, it may still be justified if it increases the quantity and improves the quality of civil legal services for the poor.

D. Supplementing the Experiment with a Voucher System

It may also be useful to supplement the Marrero Committee's mandatory pro bono program with a special form of voucher program that reinforces and extends certain healthy institutional changes. Of course, voucher mechanisms are already used to deliver a wide variety of goods and services to both poor and nonpoor citizens. Federal programs providing the poor with food, rent subsidies and health care all employ forms of voucher mechanisms, as do broader programs supplying veterans benefits, schooling for handicapped children and even Medicare for the elderly. 464 In some, though not all, voucher programs, program beneficiaries are given certificates, with a certain dollar or unit value, that can only be used to buy or procure specified

463. For similar problems with reference to a judicare type system, see Saltzman, supra note 332, at 1200-01.

464. Most of these programs do not qualify as "pure" voucher programs because beneficiaries are not left "entirely free to make choices according to their own preferences." Rose-Ackerman, supra note 263, at 1407. In addition, most such programs impose supplementary quality controls. The noteworthy low-income exception is the food stamp program, which comes the closest to a pure voucher system because the federal government "does not impose special quality-control regulations on suppliers that accept food stamps and does not try to control the diet of beneficiaries." Id. at 1407-08. Rather, the program assumes a consumer capacity to judge food quality effectively and to make rational trade-offs between quantity and quality. The pure form of voucher program also assumes that consumers have access to adequate alternative sources of supply. Id. Despite variations in voucher formats, the concept has attracted powerful interest among both conservatives and liberals. Interest in voucher-type proposals to improve education, for example, has been stimulated by important commentators like Adam Smith, Thomas Paine, and, more recently, Milton Friedman. See Michael A. Rebell, Educational Voucher Reform: Empirical Insights from the Experience of New York's Schools for the Handicapped, 14 URB. LAW. 441, 442-43 n.4 (1982).
goods or services directly from any qualified supplier or provider, usually private parties, chosen by the voucher holders. In turn, the suppliers who accept such vouchers redeem them for cash from various government agencies.\footnote{465}

In theory, such a subsidy mechanism provides consumers with voucher power and the freedom to pick and choose among competing suppliers of goods and services. Like any unsubsidized consumer, a voucher user who is dissatisfied with price or quality may search for alternatives. Providers of undesirable goods and services, so the theory goes, will be pressured or penalized by voucher-laden consumers with real freedom of market choice. This unleashing of competitive market forces may also reduce program or subsidy costs.\footnote{466}

While these theoretical justifications are very appealing, there is still considerable controversy over some voucher programs and proposals. Though voucher proponents reflect both so-called conservative and liberal points of view, there have been continuing policy debates over the use of vouchers for various purposes including housing, health care, and education.\footnote{467} There has also been continuing sharp debate over the use of vouchers for the purchase of civil legal services by low-income clients. Judicare programs, actually employed in some jurisdictions, are nothing less than voucher programs.\footnote{468}

While some studies of voucher plans and judicare have produced indeterminate results,\footnote{469} critics of such programs, as an alternative to legal services programs staffed by full-time poverty lawyers, have argued that certain realities seriously compromise a number of merely

\footnote{465. Rose-Ackerman, \textit{supra} note 263, at 1406-07.}
\footnote{466. \textit{Id.} at 1407. The lowering of program costs for a commodity like low-income legal services requires "that voucher recipients shop among available attorneys and that competition among those attorneys increases as a result of such comparison shopping." A.B.A. Special Comm. on the Delivery of Legal Services, \textit{Report on the San Antonio Study of Legal Services Delivery Systems} (May 1989), in 1989 Oversight Hrg., \textit{supra} note 135, at 355, 359 n.2. \textit{[hereinafter San Antonio Legal Services Study].}
\footnote{468. See \textit{BRAKEL}, \textit{supra} note 306; see also LSC Delivery Systems Study, \textit{supra} note 202, at A-57 to A-62, A-2 to A-26, for a description of various judicare and law-firm contract programs. Some judicare proponents argue that such programs, while difficult to administer well, have never been given adequate opportunities to demonstrate their true value. Gregg L. Hartley, \textit{Judicare, in LEGAL SERVICES FOR THE POOR: TIME FOR REFORM}, \textit{supra} note 165, at 187, 188.}
\footnote{469. LSC Delivery Systems Study, \textit{supra} note 202, at A-61 to A-62. For a more recent study failure, see \textit{San Antonio Legal Services Study}, \textit{supra} note 466, at 413-16.}
theoretical advantages. Low-income clients who lack information and the capacity to process information may be seriously handicapped in exercising their voucher power.470 In addition to limited education, some low-income clients may be distracted in choosing the right lawyer by important cultural and racial barriers.471 Even if clients were fully capable of making informed market choices about the type and quality of legal service, a lack of lawyers willing to service poor clients for relatively low government-prescribed fees will severely restrict real, as opposed to theoretical, freedom of choice.472

Whatever the limitations of real judicare programs, however, there is still an opportunity to use a form of voucher program to reinforce certain desirable institutional tendencies of the Marrero Committee proposal for mandatory pro bono. To the extent that a mandatory pro bono program encourages the emergence of a relative-

470. "The premise underlying a pure voucher plan is that informed market decisions by recipients of services will assure optimal quality. Yet in many contexts such informed choice is unlikely or impossible." Rose-Ackerman, supra note 263, at 1411; see also supra note 325. In addition to low-income clients being handicapped by lack of education, unfamiliarity with the legal system, and the complexity of legal problems, the simple lack of shopping wherewithal (unencumbered time and transportation) may be an impediment to the exercise of free choice. The use of vouchers for the purchase of legal service from private practitioners may also be complicated by the fact that low-income clients may not know, or know of, any lawyers. Obviously, this impairs the ability to make an unassisted choice of counsel even if the low-income client has the capacity to evaluate the competency of an attorney. See LSC Delivery Systems Study, supra note 202, at A-61.

471. For reflections on the typical alienation of poor clients, see Miller, supra note 354, at 202-03. The confusion and distrust felt by some low-income clients may be a response, in part, to the patronizing attitudes of some lawyers. See Cahn & Cahn, supra note 301, at 1035-36.

472. Robert Spangenberg, President of The Spangenberg Group, which prepared the N.Y. LEGAL NEEDS STUDY, supra note 28, among other important technical studies, has criticized contract and competitive bidding systems used in various jurisdictions to supply criminal defense services to the indigent. 1990 Reauth. Hrgs., supra note 164, at 89-118.

A contract defense program is one in which a state, county or municipality enters into an agreement with an individual private attorney, a group of private attorneys, or a law firm or firms to provide indigent representation [in specified criminal and quasi-criminal cases] at a certain level for a certain dollar amount over a given period of time. Id. at 93. While such programs are a relatively new phenomenon, Spangenberg identifies a number of program weaknesses. He observes, for example, that "[i]n many contract systems, over time, the most qualified and experienced practitioners drop out of the system and are ultimately replaced most often by recent law graduates and marginally competent criminal attorneys." He further observes that "[m]any contract jurisdictions are reporting that it is becoming increasingly difficult to find qualified attorneys to bid." Id. at 96. Obviously, a voucher system assures consumer freedom of choice and market discipline for suppliers only where there is an ample supply of goods or services available from a number of suppliers. See Stanfield, supra note 467.
ly large number of new smaller-scale providers of civil legal services, it offers poor clients new opportunities for choice. In turn, this may generate a healthy level of competition among a newly increased number of service providers. Under the Marrero Committee proposal, a client in need may seek service from an established legal services agency, from a new pro-bono service group sponsored by a law firm, group of firms, or local bar association, or from any number of individual lawyers who choose to render actual service to discharge their MPB liability. In a sense, this newly decentralized market structure may desirably combine the best of both judicare and staff models for the delivery of low-income civil legal services.473

To reinforce this kind of market or structural change, a special voucher or legal services coupon program might incorporate the following details:474

- Prospective clients will apply to a centralized administrative office for service coupons registered in their particular names. This office will issue a limited number of coupons to each low-income applicant that it judges to be eligible. It will also supply each eligible party with a list of lawyers, legal services agencies and pro bono service groups who have registered with the centralized office as willing to accept clients in specified problem categories. Each service coupon will entitle the holder to a specified period of professional service, perhaps in thirty minute units.

- Eligible low-income coupon holders will be responsible for selecting their own lawyers and arranging for "payment" in coupons. Coupons will be exchanged for service at a rate either subject to bargaining or at a rate prescribed by a "fee" schedule issued by the administrative office in the

473. For a discussion of the potential of a combined delivery system utilizing both private practitioners and staff attorneys, see Saltzman, supra note 332, at 1176-79.

474. At least two commentators have suggested combining a form of voucher plan with a mandatory pro bono program. See LUBAN, supra note 266, at 279-81; Arthur R. Block, Pro Bono Plan Should Help Those Who Want to Help the Poor, MANHATTAN LAW., Sept. 19-Sept. 25, 1989, at 11. While my proposal for a complementary voucher arrangement differs from both of these proposals, particularly with respect to my use of a secondary market feature, I agree with Luban that vouchers may be redeemed to discharge a practitioner's mandatory pro bono liability rather than for cash. See also Ellmann, supra note 259, at 159-60, for a brief, approving review of Luban's voucher or coupon plan.
Participating lawyers will redeem service coupons that they earn, but not for cash. Instead, the coupons will be redeemed to discharge the new obligation to render civil legal services to the poor. An individual lawyer will present forty hours of service coupons to the Office of Court Administration, along with a certificate of compliance, at the time of biennial registration. Lawyers who are members of pro bono service groups, or who render services through an established legal services agency, will receive their coupons indirectly from clients through their service group or agency. Solo and smaller-firm lawyers who have the option of contributing cash directly to an established legal services agency will receive coupons in exchange.

Low-income persons who hold coupons may transfer their coupons to other low-income persons who have been judged income-eligible for the program by an administrative office. Transfer may be either for consideration or for no consideration, through endorsement of the coupons. Original or transferee coupon holders will also be able to transfer service coupons to certain eligible community organizations who are permitted to “make markets” in such legal services coupons.

The new coupon or voucher program will be designed to coexist with the established legal services programs. Established agencies may require low-income clients to exchange all or part of their coupon entitlements for the services of a staff lawyer. Coupons accumulated by participating legal

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475. Bargaining possibilities may be impaired by lack of client information, client insecurities, or by the crisis character of the legal problem.

476. A local church or community organization, in a low-income neighborhood, may make a market in service coupons by buying or receiving such coupons as a gift from individual coupon holders who judge themselves to have a coupon surplus. The same organization may then distribute accumulated coupons to eligible low-income persons with special needs for civil legal services. A large coupon accumulation by a community organization might also be used to “finance” a more ambitious law reform effort through a larger law firm. It is further conceivable that such “community coupon banks” could provide important information to prospective clients about reliable practitioners and pro bono service groups operating under the Marrero Committee proposal.
services agencies in this way will be used, in turn, to purchase the professional services of private lawyers who "volunteer" to discharge their new mandatory pro bono liability by working on agency cases or referrals. Nothing in the voucher program as such, however, will prevent any established agency or any lawyer, for that matter, from servicing low-income clients even without a coupon exchange. 477

To be sure, any such voucher or coupon program will also raise a number of questions that may require complex and, therefore, costly administrative responses. For example, how many coupons, with what value, are to be issued both to the total number of income-eligible applicants and to individual clients? The total value of coupons issued must obviously be related both to projected demand and to the number of lawyers, agencies and pro bono service groups available to render actual service to the poor under a new mandatory pro bono program. If an eligible applicant is issued coupons for 20 hours of legal service, what happens if her legal problem requires more than 20 hours of a participating lawyer's attention? 478 In addition to the risk of a coupon shortfall on the client's side, what will happen if a lawyer does not earn 40 hours of service coupons in a two-year period? How will lawyers who suffer such a coupon shortfall comply with their minimum MPB obligations? 479

477. Established legal services agencies funded by the federal Legal Services Corporation will probably need permission of the LSC board to charge coupon prices for agency services to low-income clients. Though such approval ought to be forthcoming if the LSC board understands the efficiency-related implications of the voucher proposal, it is conceivable that the LSC leadership, or even the Congress, might resist the participation of grantee agencies in any such system. If that happens, LSC grantees will continue offering their services in the conventional way without requiring any coupon exchange from low-income clients. This, in turn, might be an advantage for those low-income clients who choose not to apply for vouchers because they are confused, intimidated by the new system, or otherwise unwilling to participate.

478. Critics of voucher "schemes" for the delivery of civil legal services have typically been concerned about the risk of voucher shortfalls in particular cases. Marshall J. Breger, Legal Aid For The Poor: A Conceptual Analysis, 60 N.C.L. REV. 282, 352-53 (1982); Miller, supra note 354, at 204. A client suffering a shortfall may have a number of options. First, the lawyer or provider agency may simply continue service without coupons. In the alternative, the client may seek more coupons from friends, family or a coupon bank run by a local church or community group. There may also be an opportunity for that client to apply for additional emergency coupons from an administrative office.

479. Luban, supra note 266, at 279, suggests that:

if an attorney does not have forty hours' worth of coupons, she must "buy" the
Even the administration of presumably uniform client eligibility standards, from centralized but locally accessible offices, may produce new controversy over those poverty-line standards. Vulnerable and confused individual clients, without some form of "price" control and quality monitoring, may be overcharged by at least a few lawyers who demand an unusually large number of vouchers for very routine or low-quality professional work. Like judicare programs, such a voucher arrangement may or may not reduce the amount of so-called impact and reform litigation, much to the disappointment of some lawyers and community groups.

Nonetheless, despite the risk of various complications, such a voucher arrangement also has considerable potential for addressing a shortfall at a reasonable hourly rate commensurate with or perhaps slightly below the rates charged by attorneys at that level of the profession. A senior partner in a major urban law firm might have to buy coupons at two hundred dollars apiece; an associate in the firm might pay sixty-five dollars.

This "buyout" approach to the problem, however, would reverse a basic decision of the Marrero Committee to deny larger-firm lawyers the compliance option of a making a direct cash payment, in lieu of service, to an established legal services agency. This restriction is designed to encourage not only the rendering of actual service but the formation of pro bono service groups sponsored by the larger firms. *Final Comm. Rep., supra* note 1, at 800-01. Another possibility is to allow a carryforward of any shortfall to the next biennial period with a penalty attached. For a 10-hour shortfall in one biennial period, for example, a delinquent practitioner will be forced to render 20 extra hours in the next registration period in addition to the normal 40-hour obligation. Of course, a practitioner suffering a coupon shortfall at the time for biennial re-registration might also "unlawfully" buy coupons from low-income persons for cash. Some such black market transactions are likely, though the risks of dishonesty in a voucher system are no greater, and perhaps less, than similar risks of lying under the original terms of the Marrero Committee proposal.

480. For the continuing debate over where and how to draw the poverty-line, see *supra* note 140. Controversy over poverty standards is especially likely as the number of poor, defined by conventional measures, grows. See Jason DeParle, *Fed by More Than Slump, Welfare Caseload Soars*, N.Y. Times, Jan. 10, 1992, at A1.

481. The hostility generated among practitioners by a mandatory pro bono program may make this a special risk. The reluctance of policy-makers to endorse relatively "pure" or largely unregulated voucher plans reflects a lingering suspicion that many voucher holders lack the ability to make the informed choices necessary to assure optimal service quality at fair prices. In the absence of reliable guardians to protect the vulnerable needy or feasible regulation of service quality, Susan Rose-Ackerman has suggested monitoring quality through a "proxy shopping plan." Rose-Ackenman, *supra* note 263, at 1411-17. Of course, monitoring the quality of delivered legal services becomes generally more difficult as the number of service providers increases and the service delivery system becomes more decentralized.

482. Proponents of judicare have long argued that such delivery systems better assure that the government will not be financing questionable law reform efforts and extreme social activism by litigious, if not radical, legal services staff attorneys. Saltzman, *supra* note 332, at 1175. The Marrero Committee's proposed mandatory pro bono program, however, even in conjunction with a voucher arrangement, still promises an increase in law reform efforts on behalf of the poor. See *supra* part III.F.3.
number of problems associated with legal services programs in general and a mandatory pro bono program in particular. First, the voucher proposal offers an intriguing opportunity to test and influence low-income demand for civil legal services. Some commentators have argued that many poor persons are very likely to assign a relatively low value to civil legal services. If given the choice, so the theory goes, many poor persons would prefer other goods and services. Therefore, providing a fixed amount of legal services in kind does not necessarily match real low-income wants and induces, especially because these services are available at a zero or very low price, a form of inefficient overconsumption or waste of legal resources by the poor.\textsuperscript{483}

The voucher proposal responds to just such concerns and works to produce an important kind of conservation effect. Since the vouchers available under the program will be limited in number, a thrifty low-income person may decide to accumulate his permitted annual allotments against the day when he may need substantial legal services. This rational act of saving vouchers of value for future use may actually reduce current demand for legal services.\textsuperscript{484}

It is also conceivable that this same voucher holder may decide to sell his annual voucher allotment to another eligible low-income person for dollars or other consideration. Because the vouchers will be transferable with certain limitations, persons who do not want legal services, or want them less than other things, may forgo those legal services and still realize benefit from the vouchers. At the same time, the eligible low-income voucher purchaser may have an especially pressing need for a lawyer’s services. Through the creation of a limited secondary market in vouchers, there may a desirable reduction in the number of casual low-income users of legal services and a corresponding shift in actual use to those who most value such services and are willing to pay something in order to increase their consumption of legal services.\textsuperscript{485}

\textsuperscript{483} POSNER, supra note 105, at 443-44.

\textsuperscript{484} It will be necessary to determine whether and how much of a voucher entitlement can be saved for later use. A carryforward privilege will tend to promote saving but may make it harder to predict demand for actual legal services in future periods.

\textsuperscript{485} Outside a low-income context, there are intriguing precedents for the concept of a transferable entitlement. Some municipalities, for example, have incorporated the concept of transferable development rights (TDR) into their local land-use control system. A TDR program may be used to promote historic landmark preservation by allowing the owner of a landmark site to transfer unused development rights from that site, for a price, to another nearby site where a developer wishes to exceed density limits. See DANIEL R. MANDELKER,
Nothing, of course, will prevent eligible poor persons from giving their vouchers away to friends and family in greater need of civil legal services. This kind of gift-giving also tends to move these valuable vouchers to the poor persons most in need and reduces casual demand for legal services at near zero prices. As a gift-giving alternative, a poor person might also give her vouchers to a local community group or church that might in turn identify eligible persons in relatively greater need of legal services. It is also conceivable that such community and religious organizations could pool voucher gifts to “finance” certain impact and law reform ventures on behalf of certain communities and low-income populations.

Since scarce and transferable legal services vouchers may have exchange value, actual voucher use by a poor client simulates a market purchase of legal services by a fee-paying client. Because the transfer of vouchers to a lawyer will force the low-income client to forego any other exchange value or satisfaction to be derived from those transferable vouchers on the secondary market, we can predict more careful client deliberations over the need for the legal service.

Even if a particular low-income client justifiably seeks relief against her abusive landlord, she is likely to consider the voucher price demanded by her lawyer. If she agrees to hire a lawyer in exchange for a quantity of vouchers, she is also more likely to scrutinize the quality of the service than she would be if she were receiving legal services at a zero price. In the event that she is dissatisfied with her lawyer, she has the new power to stop exchanging her scarce vouchers for unsatisfactory services. Provided that she has saved some vouchers or knows where to get more from friends or family, or even through a voucher loan, she can seek out and retain another lawyer. Because the Marrero program promises to increase the number of lawyers and provider agencies servicing the poor, she may have a real opportunity to substitute a better lawyer for a worse one.


486. Some commentators have argued for the similar advantages of client co-payments. See Douglas J. Besharov, Client Priority Setting, in LEGAL SERVICES FOR THE POOR: TIME FOR REFORM, supra note 165, at 20-23. No less an authority than Reginald Heber Smith has also observed that a legal aid “system of charging fees, however small, tends to eliminate fictitious and groundless complaints; that when a client has paid a fee he has a stake in the matter and is less likely to drop it; that by the payment the relationship is lifted from the plane of charity to one of self-respect . . . .” SMITH & BRADWAY, supra note 138, at 127.
In short, this kind of voucher system, in conjunction with certain changes in the delivery system for civil legal services induced by the Marrero Committee proposal, may create something resembling a conventional marketplace where currency of value, controlled by the low-income client and not by some third party, is exchanged for legal services available from a number of competing suppliers. At the same time, the redemption of vouchers by participating lawyers will not entail a new and direct burden for public treasuries since such vouchers will be used to discharge the new legal duty to serve the poor rather than being redeemed for cash.

A voucher proposal of the kind sketched above may also have certain enforcement and information advantages. Lawyers, newly obligated to aid the poor under the mandatory pro bono program, will evidence their compliance in a more verifiable way by submitting vouchers along with certifying that they have met minimum requirements. Voucher holdings or voucher income will also provide important evidence of professional success in offering low-income clients the services they want. The lawyers, pro bono service groups, and even established legal services agencies that offer the most desirable services to low-income clients should have the highest voucher incomes. Newly empowered low-income consumers will themselves identify, through the new market, the best providers of civil legal services for the poor.487

Despite a likely reluctance to complicate the proposed mandatory pro bono program with a voucher system, the several advantages of a new mixed system are hard to deny, even for those burdened by anti-market ideology. Though the Marrero Committee’s proposal, even standing alone, promises to produce a newly decentralized and potentially competitive system for the delivery of civil legal services, a voucher supplement better assures the poor of relatively higher quality professional service, more likely to be prudently used by the very most needy members of a larger and diverse low-income population.488

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487. Under the Marrero Committee’s proposal, even relatively uninformed low-income clients may learn, over time, to follow the preferences of unsubsidized clients. If important fee-paying clients, with virtually unlimited choice in lawyers, beat a path to Cravath, Swaine & Moore, or to White & Case, perhaps low-income clients ought to as well. See Rose-Ackerman, supra note 263, at 1412-13.

488. Legal services professionals and many organized bar leaders have been understandably alarmed by what can only be described as a ferocious assault on the legal services system primarily by political conservatives. The attack has now persisted for more than two
The Marrero Committee proposal for a mandatory pro bono program is uncommonly important for a number of reasons. It offers a real opportunity to increase the quantity and to improve the quality of civil legal services for the poor. My analysis of the Committee’s well drafted final report, incorporating arguments inspired by elementary economic concepts and various public finance perspectives, also offers a number of relatively surprising conclusions that differ from the conventional wisdom of both many proponents and opponents of such mandatory pro bono proposals.

First, assuming that it is desirable to increase civil legal services for the poor, there is probably only one reliable way to do it: mandatory pro bono. However well intentioned, conventional pleas for increased government funding and for more voluntary efforts often ignore certain powerful theories of permanent government and professional failure.

Second, the impact of the Marrero Committee’s proposal will be far less dramatic than predicted for many individual members of the bar. Many more lawyers will discharge their new obligations by making cash contributions than by providing actual legal services to the poor. This is primarily because the Committee has wisely provided most lawyers with a relatively lower-cost compliance opportunity to join a pro bono service group for the collective discharge of their new duties to the poor. Some solo and smaller-firm practitioners will also choose to contribute cash directly, in lieu of actual service or group membership, to certain established legal services agencies. Additionally, many (though not all) lawyers will have the capacity to shift some, if not most, compliance costs to others, notably to fee-paying clients.

Third, the Marrero Committee’s proposal may induce striking kinds of durable changes in the current imperfect system for the delivery of civil legal services to the poor. While many commentators decades. Nonetheless, a balanced candor also requires the recognition that some social services professionals, including many legal services lawyers, are burdened by an anti-market ideology that resists linking the delivery of quality legal service to market structures and market-simulating innovations. See id. at 1430-31. The literature on mandatory pro bono programs, generally inattentive to these perspectives and largely indifferent to economic analysis, is further evidence of an important kind of analytic blindness that compromises the interests of many poor persons in need of both more and better civil legal services.
have failed to notice, a mandatory pro bono program may well encourage the formation of a relatively large number of smaller-scale legal services providers supported by the subscription fees of individual lawyers and by the resources of some larger law firms and other professional entities like local bar associations and law schools. Though many of these new pro bono service groups will doubtless have specialized missions, most will be staffed by poverty law specialists who will themselves benefit from new career options. Most important, some of these new groups are likely to challenge established legal services agencies to improve. This structural shift, to a more decentralized and competitive system with certain market-mimicking effects, may well increase the quantity and improve the quality of civil legal services for the poor. Even strong supporters of legal services programs have argued forcefully for changes in a delivery system dominated by a relatively few larger-scale general-purpose agencies with near monopoly characteristics.

Fourth, the Marrero Committee proposes a kind of excise tax that is fairer than it appears on first superficial examination. While important equity concerns will persist, especially with reference to certain solo and smaller-firm practitioners, lawyers as a professional group still have an impressive ability to bear the burden of such new taxation. In fact, the proposal for a mandatory pro bono tax may be less selective in its ultimate effects as many, though not all, lawyers successfully shift at least a portion of the new burden to others, including, but not limited, to fee-paying clients. Even if the new program singles out the lawyers, the profession may deserve such special treatment. Like it or not, we are sometimes damage-doing professionals who often play controversial roles within an extremely competitive system of adversary justice. Though many lawyers never intend their professional work to harm the poor, that may nonetheless be the ultimate effect in some cases. Strict liability to the damaged poor may be a justifiable burden for a unique and privileged profession.

Fifth, while a tax characterization poses certain problems for the program’s initial implementation, program proponents still have more to gain from an analysis in tax terms than they think. Efforts to address social problems through earmarked tax revenue are hardly unprecedented. Though there can be no doubt that the Marrero Committee has proposed a form of tax program, it is also very arguable that this particular tax measures favorably against widely accepted tax policy standards. If we must tax to help the poor to more and better civil justice, this particular tax is not a bad way to do it.
Finally, the debate over mandatory pro bono is not quite what it appears to be. While it is common for proponents to assume that more civil legal services for the poor is an eminently desirable social goal, not everyone agrees. Like it or not, and many lawyers will not, serious consideration of a mandatory pro bono program stimulates deliberation over the goals and consequences of civil legal services for the poor. Certain fundamental efficiency-type concerns and puzzles over distributive effects are bound to intrude into any honest and comprehensive examination of the relevant issues. Whether or not the proposed mandatory pro bono program is ever implemented, it offers an especially challenging professional occasion for debate over both the means to and the ends of civil justice for the poor.