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Acting "A Very Moral Type of God": Triage Among Poor Clients

Cover Page Footnote

Associate Clinical Professor, Boston College Law School. The ideas expressed here were presented, in very different fashion, at the New England Clinical Teacher's Workshop in Boston, and I thank the participants for their kind and wise comments. I also owe an enormous debt of gratitude to my research assistants, Amy DeLisa and Christopher Johnson, to my former Dean, Avi Soifer, to my current Dean, Jim Rogers, and to Boston College Law School for financial support.

ACTING "A VERY MORAL TYPE OF GOD":* TRIAGE AMONG POOR CLIENTS

Paul R. Tremblay**

I. INTRODUCTION

THIS Article aims to understand the ethics and the strategy of legal services triage. Poverty lawyers will inevitably encounter more potential poor persons than they have the resources, time, and money to serve. That scarcity is a fact of life for all public interest practice and will remain so for the realistic future.¹ The result is triage, and we therefore ought to explore its implications in a careful and systematic way.

Triage, though, is a more elusive topic to examine than one might originally expect. It is easy to acknowledge that triage is inevitable and necessary and to profess that it ought to be done well. After that, the assessment becomes more complicated, precisely where the insights are needed most. I attempt to understand triage through a systematic ethical critique of its various guises. While the proceeding analysis is at times elaborate, it remains quite tentative, largely because it rests on successive assumptions about contested questions of psychology, political theory, and ethics. Much of what one can say about triage has been said before in some context or another, so little is actually new here. My object instead is to pull together various strands of thinking about poor people and their advocates, and about fairness and justice, to see if one might be able to offer some coherent advice to those who work for the poor as a career. This project resembles a meditation more than a polemic.

* The quote in the title is a play on a phrase from Arthur R. Matthews, Jr. & Jonathan A. Weiss, *What Can Be Done: A Neighborhood Lawyer's Credo*, 47 B.U. L. Rev. 231, 242 (1967) ("To reject clients whose cases do not seem to make the legal points sought to win some social revolution . . . is to play a very immoral type of god.").

** Associate Clinical Professor, Boston College Law School. The ideas expressed here were presented, in very different fashion, at the New England Clinical Teacher's Workshop in Boston, and I thank the participants for their kind and wise comments. I also owe an enormous debt of gratitude to my research assistants, Amy DeLisa and Christopher Johnson, to my former Dean, Avi Soifer, to my current Dean, Jim Rogers, and to Boston College Law School for financial support.

1. Scarcity may be inevitable, and not the result of any particular funding crisis, given the elasticity of legal need and the fact that poverty law services are not allocated based on price. See Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. Rev. 282, 285 & n.14 (1982). Whether the scarcity is inherent or the result of a parsimonious political regime is a question we need not decide here, for there is little doubt that, for the foreseeable future at the very least, the demand for legal services will far outstrip the supply. See *infra* Part II.A (quantifying scarcity in terms of identified legal need and the shortage of available lawyers).

My undertaking proceeds as follows. I first establish a context in which to discuss triage. I imagine a legal services office dedicated in a broad way to advocacy for disadvantaged persons living in a defined area.² I then briefly summarize the settled truths about scarcity and unmet legal needs of the poor, as further context and background.³ The ensuing assessment, then, emerges from the context of a publicly or charitably-funded legal services organization with a commitment to a geographically defined constituency. This premise elides consideration of the important work performed for subordinated persons by private law firms, but for a fitting reason: private firms have no triage *obligations* that parallel there of not-for-profits. Any assumed commitments by private firms would, I assume here, mirror those of the not-for-profits, and in such a case the same assessment should apply.⁴

The first ethical theme that legal services triage invites is a fundamental one about what I call "weighted triage," in which some quality of the client or her case will matter in choosing whether she is served. I argue that choosing among persons other than in a random way is a justified and necessary endeavor.⁵ Weighted triage is not merely permitted, it is required. That conclusion, however, is not terribly contested outside the occasional philosopher's musing. A far more unsettled task is identifying the factors which ought to be considered in weighted triage. Assuming for the moment a scheme where individual clients are competing for scarce slots in a law office (I call this "microallocation"), I suggest several maxims which ought to apply to any choices among clients.⁶ Some maxims or principles are affirmative—they may or must be taken into account. Others are negative—these ought not influence the decisionmaker. While triage will never occur by means of an algorithm, and will always be a question of prac-

2. See *infra* Part II.B.

3. See *infra* Part II.B.

4. Recent "critical lawyering" scholarship has emphasized the important role for private lawyers in progressive law practice. See, e.g., Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, in Cause Lawyering: Political Commitments and Professional Responsibilities 118 (Austin Sarat & Stuart Scheingold eds., 1998) (examining the political pressures on left-activist Seattle lawyers who identify with the National Lawyers Guild); Louise G. Trubek, *The Worst of Times . . . and the Best of Times: Lawyering for Poor Clients Today*, 22 Fordham Urb. L.J. 1123, 1136-38 (1995) (citing the increasing number of private lawyers offering assistance to poor people through pro bono work). My focus on legal services practice is not intended to underestimate the importance of that work nor its prevalence. Private practices, it seems, either are different from legal services in their triage functions or they are not. If they are different, it is because as private firms the institution may choose to pursue whatever its owners or staff choose, and thus cannot be said to have the same trustee responsibility that I attribute to a legal services organization. See *infra* Part IV.B.4. If, though, the private firm opts to assume such a commitment, then all that I say about legal services should apply equally to the private setting as well.

5. See *infra* Part III.

6. See *infra* Part IV.

tical judgment, that discretion can be bounded by certain considerations, and I attempt to catalogue them here.

The taxonomy of maxims informing the triage process should aid those individual microallocation choices, but legal services or public interest work includes much more than single-client representation. After exploring the ethics of microallocation, I then retreat to a more distant perspective and inquire about the kinds of "visions" that an organization might adopt. I suggest four such practice visions: individual case representation; focused case representation; law reform; and mobilization lawyering.⁷ With distinct choices in institutional orientation and direction, an advocacy center needs to be able to assess how to decide upon an appropriate vision or blend of visions. I then inquire whether there are any *ethical* criteria that might direct that task.

I explore, but reject, an alternative I call the "happenstance perspective," which asserts that the choice of visions is never anything more nor less than the result of whoever happens to be in charge of the program, or whichever poor people or groups happen to ask for, or need, assistance. I reject that view by positing an inherent goal of poverty law advocacy, one that is independent of the requests for help or the politics or personalities of the administrators. I call that inherent aim a *telos*, and accept it as a fact from which an ethical assessment might proceed.⁸

The *telos* of poverty law practice is empowerment of the organization's constituents, I argue.⁹ I disagree with those who might say that the *telos* is increased access or accommodating unmet legal needs, for those aims are only relevant as tokens of power achievement. I follow that argument by concluding that the constituents to whose empowerment the organization is committed must include future generations. Poverty law practitioners have a "trustee responsibility" to attend both to present community members and to future ones. Their activities must accommodate this dual mission.¹⁰

Once we have recognized a *telos* of poverty law practice, the ethical assessment of a practice vision enterprise looks to which vision or combination of visions best meets the inherent goal of the practice.

7. See *infra* Part IV.A. The four practice visions are similar to a taxonomy suggested by Susan Sturm. Sturm identifies four kinds of public interest legal strategies: individual service, impact litigation, institutional change, and political empowerment. See Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. Mich. J. L. Reform 1, 8-11 (1993); see also John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in *Cause Lawyering: Political Commitments and Professional Responsibilities*, *supra* note 4, at 181, 183-86 (comparing "styles of lawyering" which he labels "individual client lawyering," "impact lawyering," "mobilization lawyering," and "client voice lawyering").

8. See *infra* notes 130-32 and accompanying text (discussing the term "*telos*").

9. See *infra* Part IV.B.3.

10. See *infra* Part IV.B.4.

Once power has eclipsed access as the *telos* accepted for the resulting ethics critique, one might expect that the "better" practice vision for an advocacy center would be mobilization lawyering, instead of one of the other, litigation or conventional lawyering-oriented visions. That is an attractive argument, but it is wrong as it stands. It is wrong because it is unfair to the existing constituents by privileging future benefits over present relief. It is also wrong because of the speculativeness of mobilization work.¹¹

Rejecting mobilization alone as a preferred vision does not mean that a poverty law office ought to engage only in safer, more reliable, and more present-directed individual work. That suggestion invites the converse objection that it privileges the short-range interests of the program's constituents over the long-range benefits. This Article instead proposes a balanced "portfolio" as an ethical mandate.¹² Only by a commitment to both visions can an advocacy center meet its trustee obligations in a responsible but prudent way.

It is not difficult for a program to meet its trustee duties to the present generation. The faces and the stories in the waiting room ensure that immediate needs will never be overlooked. The risk of minimizing the more speculative mobilization work, though, is far greater. A phenomenon I call the "rescue mission" operates to pressure staff to ease pain now at the expense of deeper but deferred benefit. As there will *always* be too many stories of desperation in the community, some formal institutional measures are necessary to safeguard the essential mobilization task. Those measures amount to a "division of labor," through which the staff working on substantive social change is insulated from the demands of the here-and-now. That insulation must persist even in the face of great tragedy and injustice, for otherwise the current crises will inevitably absorb all of the program's resources.¹³

If the mobilization staff is so insulated from the present pleas for assistance to respond to daily tales of violence and abuse, and if the staff responding to those daily tragedies is capped in its resources, then the predictable consequence is that many worthy cases will be turned down. Families will be dispossessed, some will begin to live on the streets, women and children will suffer physical and sexual abuse, and the program will not be able to respond. That realization invites a reassessment of earlier commitments to clients whose cases might no longer be so urgent. The Article assesses this "abandonment" issue: whether ongoing clients have a right to continued care that operates as a trump against a new, more critical request for help.¹⁴ I conclude that, for the most part, the commitment to one client by and large

11. *See infra* Part IV.C.

12. *See infra* Part IV.A.

13. *See infra* Part V.B.

14. *See infra* Part V.C.

overrides any requests from any prospective client, however worthy the newer matter. That trump ought not, however, be universal or absolute. If the program were to warn clients at the outset that resource shifts might be necessary in instances of deep crisis, and if the particular context were sufficiently compelling, then abandonment may withstand both ethical and legal scrutiny.

The Article then turns to the question of "who decides" the nature of the formal allocation and priority-setting schemes within a poverty law setting.¹⁵ Comparing the alternatives of program staff, clients, client representatives, community organizations, or the poor community as a whole, I conclude, if perhaps uncomfortably, that there is no escape from the assignment of this responsibility to the program staff. Concerns associated with self-interestedness, logistics of polling preferences, and doubtfulness about representativeness all combine to make any explicit community-based scheme illusory and unworkable. At the same time, the interests and preferences, personal as well as political, of the staff cannot serve as legitimate ingredients in their allocation schemes. As an ethical matter, the staff's mandate is as fiduciary for the interests of its constituencies, even if it cannot delegate its responsibility directly to those constituents.

In the last part of this Article, I turn from conceptions of an ideal poverty law setting to address the real-world distortion caused by "the money-chase." I answer the question "Is it always better to have more money than less?" in poverty law work with a negative reply.¹⁶ More resources are always presumptively welcome, of course, but there will be grant proposals where the collateral commitments accompanying the added money too deeply divert the mission of a program. The test of any funding consideration must be whether the number of priority cases that the program handled before the new funding will be diminished after accepting the new grant. If so, the new resources cannot be justified.

II. THE CONTEXT OF TRIAGE: LEGAL NEEDS, AVAILABLE SERVICES, AND A SAMPLE LANDSCAPE

A. *The Phenomenon of Scarcity*

This Article treats scarcity as a given in contemporary American poverty law practice. It might have taken a different tack. Case and client-selection might be addressed, perhaps more productively, by an exploration of ways to abolish the phenomenon of scarcity, through creative delivery systems and other innovative means to ensure that all persons with legal needs have access to a form of representation or

15. See *infra* Part VI.

16. See *infra* Part VII.

an opportunity for substantive justice.¹⁷ It is with a grim measure of reality-testing that this Article accepts the fact of scarcity. It would be welcome news to learn that the topic we examine here has reached obsolescence, that the innovative suggestions developed by other contributors to this Symposium¹⁸ have succeeded in achieving a satisfactory dimension of access to justice. Welcome, certainly, but visionary. Even the most optimistic of us find those possibilities unlikely within the foreseeable future. In the meantime, and (for those less optimistic among us) maybe almost forever, scarcity of legal resources remains a phenomenon that affects the daily operations of public service organizations everywhere. Until a true new age of legal services delivery, those programs must confront allocation questions.

This part will describe the depth of the scarcity phenomenon, but without rehashing in great detail the scope of the problem.¹⁹ Scarcity of legal services has been a constant theme and obstacle and, in fact, appears to be increasing. Since the advent of the legal aid movement in the middle of this century, the funding available for legal services for the poor increased through the mid-1970s, and then decreased dramatically after the inauguration of President Reagan.²⁰ The inceptive Legal Services Corporation ("LSC") budget was \$61 million in 1974,²¹ rose to a high of \$321.3 million in 1981, and was then slashed to \$241

17. See Talbot "Sandy" D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 Fla. St. U. L. Rev. 631 (1998) (summarizing eight ways to attempt to achieve full access to justice for the indigent).

18. A number of commentaries included in this Symposium suggest differing ways to increase access to justice for those who cannot afford to pay for lawyers in the private market, although none of the contributors foresees innovations which might eliminate the scarcity problem. See, e.g., Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 Fordham L. Rev. 1879 (1999) (reviewing successful pro se clinics); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999) (proposing institutional changes to assist pro se litigants); Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 Fordham L. Rev. 2241 (1999) (advocating for increased use of non-lawyers); Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Students*, 67 Fordham L. Rev. 2415 (1999) (developing the case for increased pro bono); Louise G. Trubek, *Context and Collaboration: Family Law Innovation and Professional Autonomy*, 67 Fordham L. Rev. 2533 (1999) (describing innovative family law practices).

19. For a fuller description of the scarcity question, see Gary Bellow & Jeanne Kettleison, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. Rev. 337 (1978); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 Geo. L.J. 1529, 1536-38 (1995) [hereinafter Feldman, *Political Lessons*]; Carol Ruth Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. Urban Law 217, 221-24 (1969).

20. For a review of the Reagan Administration's attack on the Legal Services Corporation, see Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 Vill. L. Rev. 521 (1981).

21. See Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. Rev. 474, 631 tbl.6 (1985) [hereinafter Abel, *Legal Aid*]. The budgets for the predecessor OEO were at more modest levels, beginning with \$20 million in 1966 before reaching \$61 million in 1973. See *id.*

million in the first year of the Reagan presidency.²² The LSC budget reached its historic high of \$400 million in fiscal year 1995, but a revived Republican Congress again cut funding to \$278 million in fiscal year 1996, and then to \$283 million in fiscal year 1997 and fiscal year 1998.²³

The addition of Interest on Lawyer Trust Accounts ("IOLTA") funds²⁴ and state funding for general legal services and for specialized representation²⁵ has softened the blow of the federal cuts in a substantial way, but even with these sources of support there are no more than 6000 full-time legal services staff lawyers available to meet the needs of poor clients.²⁶

This small cadre of lawyers, barely seven-tenths of one percent of the lawyers licensed to practice in this country,²⁷ must provide for an ocean of legal needs. As of 1992, there were 45 million persons whose

22. *See id.*

23. *See* Steven Epstein et al., *Foreword—The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions*, 25 *Fordham Urb. L.J.* 279, 280 (1998); Alan W. Houseman, *Civil Legal Assistance for the 21st Century: Achieving Equal Justice for All 10* (July 13, 1998) (unpublished manuscript, on file with author) [hereinafter Houseman, *21st Century*]. For FY 1999, Congress has approved an increase in the LSC budget to \$300 million. *See* 144 Cong. Rec. H11592-03, H11653 (daily ed. Oct. 20, 1998); Judy Holland, *Spending Bill Inspires Revolt: 20 GOP Members, 9 Democrats Revolt Against Massive Measure*, *Sun-Sentinel Ft. Lauderdale*, Oct. 22, 1998, at A6.

24. States across the country have established mandatory IOLTA programs as a means to increase funding for legal services. In IOLTA schemes, lawyers pool client trust accounts and escrow funds which would not otherwise earn interest for its owners. *See* Joseph L. Kociubes, *IOLTA Wars*, 42 *Boston B.J.* 15 (1998). The resulting earnings, which have amounted to more than \$100 million per year, or more than a third of all LSC funding, are then distributed to public service efforts, with the bulk usually assigned to staff-based legal services organizations. The future of IOLTA may be in jeopardy after the U.S. Supreme Court ruled last term that clients and others whose funds are placed into IOLTA accounts possess a property interest in the principal. *See* *Phillips v. Washington Legal Found.*, 118 S. Ct. 1925, 1936-37 (1998).

25. States often supplement LSC and IOLTA funding with other general or specialized support for legal advocacy for poor persons. *See, e.g.*, Lonnie Powers, *Legal Needs Studies and Public Funding for Legal Services: One State's Partial Success*, 101 *Dick. L. Rev.* 587 (1997) (describing the Massachusetts experience). The total funding for civil legal services in the country in 1997, including LSC, IOLTA, and specialized state and federal programs, has been pegged at \$611 million in one estimate, *see* Center for Law & Soc. Pol'y, *Survey* (1998) (on file with author), and at \$830 million to \$880 million in a different source, calculated at \$530 million within LSC-funded programs (including all sources) and \$300 million to \$350 million for non-LSC-funded sources. *See* Houseman, *21st Century*, *supra* note 23, at 7.

26. I am extrapolating from figures several years old. *See* Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 *Case W. Res. L. Rev.* 531, 543-44 (1994) (reporting approximately 5000 lawyers employed by legal services organizations and public interest not-for-profits in 1989).

27. *See* Karen E. Kelleher, *The Availability Crisis in Legal Services: A Turning Point for the Profession*, 6 *Geo. J. Legal Ethics* 953, 953 (1993) (reporting 777,119 lawyers in the United States in 1991).

incomes are low enough to qualify for legal services.²⁸ Another 15 million people are near-poor, and cannot reasonably afford counsel given their modest budgets.²⁹ The resulting arithmetic shows one lawyer for every 9000 financially eligible poor persons, and one lawyer per 14,200 poor or near-poor persons. Several surveys have demonstrated that close to half of poor persons at any given time face *at least* one legal problem, and often more than one.³⁰ Plainly, not all of these clients and their problems will be served by the available lawyers. That reality reflects the challenge of triage. Whether they want to or not, legal services providers will engage in significant triage. The only question is how to make those allocational choices in some responsible way.³¹

B. *Developing Necessary Context*

Any discursive exploration of triage among poverty lawyers encounters a problem of confounding circularity. The articulated mission and charter of any given program will determine whom the program ought to accept as clients, or what kinds of work the staff ought to engage in. That mission or charter will be influenced, if not driven, by the program's sources of funding and its governance process. The choice of funding sources, in turn, will be dependent on the available grant-making programs, on the needs of the people served by the office, and on the choices made by the persons who administer the office. All of the interesting choices—the ones which represent the gist of triage—will thus be highly contextual and not susceptible to universal or widely applicable discernment. The very choice of a context through which to exemplify and then assess triage choices will itself have answered many of the more nagging questions. Hence, the circularity.

One response to this perhaps overstated tautology³² is to envision, for present purposes, an institution that has open to it as many of the

28. See Feldman, *Political Lessons*, *supra* note 19, at 1536 n.11 (citing Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 1992, at 456 (112th ed. 1992)).

29. See *id.*

30. See, e.g., Consortium on Legal Services and the Public, American Bar Ass'n, Legal Needs and Civil Justice: A Survey of Americans: Major Findings from the Comprehensive Legal Needs Study 3 (1994) (noting that 47% of low-income households surveyed had one or more legal problems in 1992); Powers, *supra* note 25, at 590 (noting that a Massachusetts study showed 47% of low-income households faced an average of 2.2 legal needs per year); see also *id.* at 588-89 (summarizing the years of "unmet needs" studies).

31. The accusation of less-than-responsible reactions to the overwhelming needs of the poor has been a frequent one in recent years. For the most recent and perhaps most cutting, see Feldman, *Political Lessons*, *supra* note 19, at 1534-58 (charging that legal services organizations provide random, sloppy, and unfocused solutions to poverty).

32. The alleged tautology is overstated because suggesting a context obviously will not define away *all* of the ethical or strategic quandaries that the institution will face.

important questions that deserve scrutiny as possible. Let us assume, for our purposes here, a legal services office called the Essex Legal Services Institute ("ELSI"). ELSI has a history, which may or may not matter as we develop its case-selection protocols. It was created in 1965 as an Office of Economic Opportunity ("OEO")-funded³³ office to provide civil legal services to low-income persons living within the city of Essex. It became an LSC-funded office in 1974 with the establishment of LSC³⁴ and remained so until 1996 when, with the advent of more intensive LSC restrictions, ELSI chose to forego LSC funds altogether.³⁵ It is now funded by a melange of grants, including a general civil legal assistance grant from its state IOLTA program,³⁶ a grant funded by the state government to provide representation in Social Security disability cases,³⁷ and a grant to work with battered women. ELSI also receives funding from the local United Way for general anti-poverty work.

The IOLTA (\$750,000 per year) and United Way (\$100,000) grants are unrestricted and can be used by ELSI in any fashion it chooses as long as the recipients are poor, which in Essex means earning less than 125% of the national poverty standard.³⁸ With that combined funding

It is true that some issues, such as what types of cases to accept, can be preordained through funding sources which only pay money if certain kinds of work are accomplished. It is also true that an assumption of governance will beg the question of what kind of governance is preferable. But even assuming an institution where those questions have either been begged or resolved, the difficult choices regarding triage among individuals (or groups), and debates about the relationship between the consumers, the citizens, and the office staff, will always remain.

33. During the 1960s' War on Poverty, Congress passed the Economic Opportunity Act, establishing the Office of Economic Opportunity ("OEO"). Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508. A significant element of the OEO program was the funding of poverty law programs. See Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 Geo. L.J. 1669, 1673 (1995) [hereinafter Houseman, *A Commentary*]; see also Feldman, *Political Lessons*, *supra* note 19, at 1558-82 (reviewing the OEO history and critiquing its merely nominal encouragement of political work by legal services programs).

34. In 1974, Congress replaced the OEO programs with the more independent, quasi-private Legal Services Corporation. LSC represented a political compromise brokered by the Nixon administration to resolve political disputes about the proper role of poverty law advocates. See Allen Redlich, *A New Legal Services Agenda*, 57 Alb. L. Rev. 169, 170 n.7 (1993).

35. In 1996, Congress substantially tightened the restrictions on the work that any LSC-funding institution might engage in with its LSC funds or even with its non-LSC funds. See Alan Houseman, *Address: Interpretation of LSC Restrictions*, 25 Fordham Urb. L.J. 286, 288-97 (1998) [hereinafter Houseman, *LSC Restrictions*]; *infra* notes 219-22 and accompanying text.

36. See *supra* note 24 and accompanying text.

37. Because Social Security benefits are federally-funded, state governments deem it cost-effective to support efforts by legal services lawyers to advocate on behalf of individuals otherwise receiving state welfare or disability program benefits, and to shift the burden of supporting those individuals from state budgets to the federal Social Security program.

38. Poverty law programs traditionally limit client eligibility based upon poverty figures established by the federal government. See Committee on Ways & Means,

the office can cover five lawyers, two paralegals, support staff, and overhead. The city of Essex has a population of 75,000, of which 20%, or 15,000, would be deemed "poor" by the above standards. Approximately two-thirds of the poor in Essex are racial or ethnic minorities; the remainder are white.

ELSI has a board of directors which sets general policy for the office but otherwise is rather *laissez-faire* in its governance of the institution. The board has seven members: three lawyers working for private law firms in Essex, two clients, and two staff attorneys from ELSI. ELSI is not the only legal services office in Essex. After ELSI turned down the federal LSC funding because of the restrictions imposed by Congress, the pro bono coordinating office of the state bar, an agency known as Public Counsel, applied for and was awarded the LSC funds. Public Counsel uses those funds to increase its pro bono efforts, to maintain two staff attorneys for direct service, and to fund a law school clinical program operating at the University of Essex Law School.

We might pretend, for the remainder of this Article, that ELSI has consulted a progressive think-tank about how to use its resources most effectively. Its mission statement offers various possibilities. That mandate, included in ELSI's charter, includes the commitment to provide free, high-quality legal representation to the poor who live within the City of Essex and "to commit a significant segment of its resources to addressing the underlying causes of poverty and to reducing the hardship of poverty on its clients."³⁹ ELSI now asks the consultants to review the entire scope of ethical and strategic considerations that affect its choice of direction in the use of its resources. What follows will serve as the advice and analysis of the consultants.

III. WEIGHTED TRIAGE: JUSTIFICATION AND CRITERIA

A. *Justifying a Non-Egalitarian Solution*

ELSI must service the legal needs of thousands of poor persons each year. It understands that it cannot meet all of those needs or demands with its meager, if committed and talented, staff. It therefore needs to engage in a form of rationing of legal services.

This reality presents for ELSI a number of philosophical and strategic questions, the first of which concerns the moral implications of allocating program resources on something other than a random basis

U.S. House of Representatives, 1998 Green Book, 105th Cong., 2d Sess. 1297, 1301 tbl.H-2 (1998) (establishing the poverty level).

39. This language is adapted with a minor modification from the mission statement of Evergreen Legal Services in Seattle. See Evergreen Legal Servs., Case Studies—State Level Advocacy 1 (n.d.), cited in Houseman, *A Commentary*, *supra* note 33, at 1688-89 n.81.

among all potential comers. The history and practice within legal services programs, as well as the strong intuitive sense of the staff, favors what we shall call here "weighted triage"—the selection of clients based upon some assessment of the nature of the legal problem that the client presents. ELSI will continue that tradition but only if doing so is ethically justified. A sustained history of doing so is insufficient justification.

Of course, there is no question that *some* rigorous preliminary screening must occur, if only to check for geographical and financial eligibility⁴⁰ and to assure that the problem presented is in fact a "legal" one.⁴¹ That kind of screening raises no substantial moral questions. ELSI must, though, defend its case selection processes for those remaining persons who live within the relevant catchment area and whose income and resources are beneath the categorical caps.

The fundamental moral question whether *some* substantive criteria may be used to screen prospective clients is an interesting one, which we need not rehearse in detail here, as it has been addressed with great insight by others.⁴² A brief summary of the reasons why weighted triage is fully justified should suffice here.

40. The assumption that only persons of certain economic qualifications shall be eligible to be even considered for ELSI services is actually more complicated than treated here. It is easy to identify some persons with resources adequate to pay private counsel, and those persons should be screened out categorically and immediately. Whether a working couple with \$50,000 in income but substantial debt ought to enter the screening process is not so clear-cut. Real world constraints will inevitably moot whatever complex questions might arise from this issue, however, because the funding sources for ELSI will establish some quite low, if arbitrary, income cap that will categorically exclude all who exceed it. For a discussion of the wisdom of legal services programs screening out middle class, or working poor, clients, see Abel, *Legal Aid*, *supra* note 21, at 616 (questioning whether the middle class shares sufficient interests with the poor); Feldman, *Political Lessons*, *supra* note 19, at 1625 (supporting an extension of legal services mandate to the working poor); Houseman, *A Commentary*, *supra* note 33, at 1708 n.142 (same). For those who are not categorically excluded, important questions remain concerning the role relative income ought to play in screening. That question is the subject of discussion below. See *infra* notes 79-83 and accompanying text.

41. This latter criterion is something that will call for further assessment below. At one level it is self-evident: ELSI cannot use its resources to provide cobbler services to local residents whose shoes need repair, or to serve Northern Italian cuisine at sidewalk tables. The funding sources, if not logic, would rule out such obvious non-legal activities. But assume that the grants which support ELSI require the recipients to employ the grant funds "to provide services to persons of limited means in their quest for justice, for effective access to the legal system, and for an equal opportunity to obtain the necessities of daily living." Such a broader mandate would leave open to interpretation whether traditional "legal" services are the only services which ELSI ought to offer to its customers.

42. There are philosophical, bioethical, and legal treatments of this question, which the following text will seek to summarize. For the philosophical debate about whether triage may defensibly account for something other than chance, compare John M. Taurek, *Should the Numbers Count?*, 6 *Phil. & Pub. Affairs* 293, 293-94 (1977) (opposing weighted triage), with Derek Parfit, *Innumerate Ethics*, 7 *Phil. & Pub. Affairs* 285, 285 (1978) (supporting weighted triage). The question has received

Because the wisdom of weighted triage is so well established and intuitively attractive, let us begin with the possible objections to it. Critics tend to start with principles developed from philosophers' hypothetical tragedies involving, say, lifeboats or spelunkers trapped in a cave. Each such story suggests that many lives might be saved by sacrificing one of the group—the stranded lifeboaters might eat one of their members, or throw one overboard to save the rest;⁴³ the spelunkers either also engage in cannibalism⁴⁴ or use explosives to free a trapped party member blocking egress from the cave.⁴⁵ From these tragedies emerges a principle that one may not sacrifice one life to save several other lives. From this principle, which is not entirely established within philosophical ethics,⁴⁶ the argument proceeds to a story in which there are six ill persons and five dosages of needed medicine.⁴⁷ One person requires five dosages—all the available treatment—for his cure; each of the other persons requires one dose. The choice is then clear: the provider could save five persons or one per-

great attention within bioethics, where triage is a common ethical conundrum. See, e.g., Garrett Hardin, *Exploring New Ethics for Survival* (1972) (defending forms of weighted triage); Gerald R. Winslow, *Triage and Justice* 133-68 (1982) (same); Marc D. Basson, *Choosing Among Candidates for Scarce Medical Resources*, 4 J. Med. & Phil. 313 (1979) (same); James F. Childress, *Who Shall Live When Not All Can Live?*, 53 Soundings 339, 346 (1970) (opposing weighted triage); Joseph Fletcher, *Donor Nephrectomies and Moral Responsibility*, 23 J. Amer. Med. Women's Ass'n 1085 (1968) (same); Charles Fried, *Rights and Health Care—Beyond Equity and Efficiency*, 293 N.E. J. Med. 241 (1975) (same); Nicholas Rescher, *The Allocation of Exotic Medical Lifesaving Therapy*, 79 Ethics 173, 182-84 (1969) (same). The question has then been addressed in the legal aid context, relying on some of the above sources. See David Luban, *Lawyers and Justice: An Ethical Study* 306-16 (1988); Breger, *supra* note 1, at 286-87 (defending an "access" model over a "social utility" model); Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 Ohio St. L.J. 1, 18-32 (1984) (criticizing Breger); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. Rev. 1101, 1110-14 (1990) [hereinafter Tremblay, *Community-Based Ethic*] (same).

43. See Hugo Adam Bedau, *Making Mortal Choices* 5-37 (1997); Edmond Cahn, *The Moral Decision: Right and Wrong in the Light of American Law* 71 (1981); Alan Donagan, *The Theory of Morality* 175-77 (1977); Paul Ramsey, *The Patient as Person* 259-66 (1970); Winslow, *supra* note 42, at 88-91; Childress, *supra* note 42, at 340-43; see also *United States v. Holmes*, 26 F. Cas. 360 (E.D. Pa. 1842) (No. 15,383) (involving a manslaughter charge after a seaman jettisoned passengers from a leaking lifeboat); *Queen v. Dudley & Stevens*, 14 Q.B.D. 273 (1884) (involving a murder charge after seamen ate their companion to survive).

44. See Anthony D'Amato, *The Speluncean Explorers—Further Proceedings* 32 Stan. L. Rev. 467, 469 (1980); Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616, 618 (1949). For a discussion of the Fuller hypothetical, see Bedau, *supra* note 43, at 41-68.

45. See Kent Greenawalt, *Lecture, Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law*, 36 Cath. U. L. Rev. 1, 17-19 (1986) (using the example to explore the nature of intentionality in criminal law); see also Eric Rakowski, *Taking and Saving Lives*, 93 Colum. L. Rev. 1063 (1993) (summarizing several cave, desert island, and similar examples).

46. See Bedau, *supra* note 43, at 60-63 (discussing the difficulties with such a broad conclusion).

47. See Taurek, *supra* note 42, at 294.

son, but not all six.⁴⁸ John Taurek, the most noted defender of "innumerate ethics,"⁴⁹ suggests a random method to make that choice, giving each of the six persons an equal (50/50) chance of survival.⁵⁰ He defends that tactic on the basis of the equal respect principle.⁵¹ Most ethicists are not persuaded, however. As Derek Parfit writes, "Why do we save the larger number? Because we *do* give equal weight to saving each. Each counts for one. That is why more count for more."⁵²

In the poverty law context, Marshall Breger has employed the Taurek analysis to defend what he calls an "equal access" model of legal services triage, in which questions of "social utility" ought to be prohibited.⁵³ Breger objects to weighted triage and defends random measures, like a lottery or queuing, to allocate scarce legal resources.⁵⁴ Marie Failinger and Larry May,⁵⁵ as well as David Luban,⁵⁶ show why Breger is wrong. Failinger and May accept Breger's operating assumption about the importance of access to courts to individual poor persons, but focused representation, class actions, and similar "weighted" case selection are simply better able to achieve that very goal.⁵⁷ Luban addresses the "innumerate ethics" question more philosophically but with similar force, explaining that less collective pain is always preferable to more pain.⁵⁸ Both arguments rely on a form of casuistry,⁵⁹ suggesting evocative case examples for which the elegant

48. *See id.*

49. The phrase, though, comes from Derek Parfit in his response to Taurek. *See* Parfit, *supra* note 42, at 285.

50. *See* Taurek, *supra* note 42, at 303.

51. *See id.* at 295.

52. Parfit, *supra* note 42, at 301.

53. Breger, *supra* note 1, at 287, 351-52.

54. *Id.* at 353.

55. *See* Failinger & May, *supra* note 42, at 18-32.

56. *See* Luban, *supra* note 42, at 306-16.

57. *See* Failinger & May, *supra* note 42, at 18-32. The authors thus present a "regnant" defense of weighted triage, one that accepts the liberal idea of more effective legal representation as the goal of legal services practice. *See* Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* 23-24 (1992) [hereinafter López, *Rebellious Lawyering*] (coining the "regnant" label). They meet Breger on his own terms and with an acceptance of his goals, rather than challenging Breger's ideal of poverty law practice with a more rebellious vision.

58. Luban, *supra* note 42, at 310-13. Luban challenges the arguments of Taurek and his predecessor, C.S. Lewis, that there is no moral or metaphysical difference between one person with a toothache and a million toothache sufferers: "There is no such thing as a sum of suffering, for no one suffers it. . . . The addition of a million fellow-sufferers adds no more pain." *Id.* at 312 (quoting C.S. Lewis, *The Problem of Pain* 115-16 (Macmillan 1962)). Luban rejects that thesis with a simple but powerful observation that "[e]ven if Lewis is right that 'the total amount of toothache pain in the room' is a fiction, the total number of toothaches in the room is not." *Id.* at 313.

59. Casuistry is a revived form of moral reasoning which relies upon paradigm cases and analogical reasoning as the best source of pragmatic judgment on ethical matters. For an elaborate defense and rehabilitation of the casuist endeavor, see Albert R. Jonsen & Stephen Toulmin, *The Abuse of Casuistry: A History of Moral*

philosophical theories are less than satisfactory, as they differ too markedly with our considered moral judgments.⁶⁰

Even Breger, however, ultimately acknowledges that his theory for neutral means of allocating legal services cannot survive more difficult examples. After his deep defense of non-judgmental processes for screening clients, Breger concedes that "consideration must also be given to emergency situations. . . . A legal services office has to give emergency cases priority just as a doctor ought to treat an individual with a heart attack before one with a headache."⁶¹ Breger's correct observation undercuts most of his otherwise elaborate defense of neutral principles, for if "emergencies" matter, then not all legal problems are *a priori* equal, as his earlier arguments seemed to imply.⁶² Bre-

Reasoning (1988). For an effort to establish casuistry as a form of ethical decision-making in law, see Paul R. Tremblay, *The New Casuistry*, 12 Geo. J. Legal Ethics (forthcoming 1999) (manuscript at 119-49, on file with the author).

60. Failinger and May pose three companion examples, all concerning a legal services program with one lawyer available for one new case: (1) two clients seek service, one needing a divorce and the second wishing to challenge a gas company termination policy; (2) eleven clients seek service, the first for a divorce and the remaining ten wishing to challenge a gas company termination policy; and (3) two clients seek services, one for a divorce, a second wishing to challenge a gas company termination policy, but the lawyer knows that at least nine other persons living in the community want to challenge the gas company policy. See Failinger & May, *supra* note 42, at 24-25. They demonstrate that if access to justice is one's identified goal and respect for persons a deep value (both Breger premises), it compromises respect for persons to ignore the differences among the prospective clients and the benefits of assisting more persons rather than less. See *id.* at 25-26.

Luban's example likewise demonstrates the inability of purportedly random allocation measures to achieve Breger's aim of "respect for individuals." He suggests that a lottery or a queue would give equal opportunity to a woman facing court-sanctioned sterilization as a woman in dispute with Montgomery Ward over the store's failure to honor her clothes dryer warranty. See Luban, *supra* note 42, at 309. Luban borrows from H.L.A. Hart's critique of utilitarianism to observe that "[a] lottery . . . treats every potential client with equal concern and respect only by treating every potential client with no concern and respect." *Id.* (footnote omitted).

61. Breger, *supra* note 1, at 354.

62. See *id.* at 293, 295 n.69 (choosing cases based on social worth "is to play a very immoral type of god" (quoting Arthur R. Matthews, Jr. & Jonathan Weiss, *What Can Be Done: A Neighborhood Lawyer's Credo*, 47 B.U. L. Rev. 231, 241-42 (1967))). Breger's concession on emergency cases does not undercut all of his arguments against social utility considerations, however. His major objection to non-neutral screening principles is a political one, reflecting a fear of programs and legal services lawyers using cases for certain political ends. See *id.* at 302-03. That argument withstands any concession about screening on emergency grounds. Luban challenges Breger directly on the propriety of the political ends of legal services work. See Luban, *supra* note 42, at 317-40.

Breger also seems to suggest that one measures emergency based upon the *subjective preferences* of the prospective clients. See Breger, *supra* note 1, at 356 (stating that some name changes may be more pressing to the client than an eviction case). Breger implies that the headache patient may deserve priority over the heart attack patient if the former's suffering is subjectively more urgent. He may be correct about that but, as this Article develops below, the administrative structure of a functioning legal services program will seldom permit that kind of assessment to take place. See *infra* notes 95, 173, 184 and accompanying text.

ger's concession in the face of an example inconsistent with his theory is a reminder of the power of case judgments in ethical reasoning.⁶³

The idea of weighted triage is, then, fully justified, and ELSI may engage in some form of that activity as it responds to the many demands and requests for service from its community of clients. This conclusion, though, has been the easy part of the ethical assessment of ELSI's project, despite its interesting philosophical digressions. More complicated are the questions about what kind of factors ELSI ought to consider when it engages in a form of triage. To that question we now turn.

B. *Criteria for Weighted Triage*

1. Some Groundrules

In this part of the project we identify the factors which ought to play a role in ELSI's screening of its individual requests for services, if it intends to screen for individual work, which seems likely. The resulting inventory ought to include both permissible factors as well as those which, on reflection, ought not serve as relevant criteria for choices. Before turning to a catalogue of these two kinds of factors, two important caveats seem necessary. First, the following taxonomies address the *microallocation* mission of ELSI—the decisions the program might make if it were to choose among a group of identifiable persons who needed legal help. The later discussion will show that, while understanding the ethics and tactics of microallocation matters is critical as background, the office, at a *macroallocation* level, might opt not to engage in very much individual client representation at all.⁶⁴ We visit that debate below.⁶⁵ In any event, the following fac-

63. It is a well-accepted proposition within moral philosophy that one tests philosophical theory against "considered judgments," if the theory conflicts with powerful case sentiments, it is the theory that concedes. See, e.g., Jeffrey Stout, *Ethics After Babel: The Languages of Morals and Their Discontents* 40 (1988) ("If a moral theory implied that raping women was generally a good thing, morally speaking, all competent moral judges in our community would reject that theory as false."); Judith Jarvis Thomson, *Rights, Restitution and Risks* 257 (1986) ("[I]t is precisely our moral views about examples, stories, and cases which constitute the data for moral theorizing."); J.B. Schneewind, *Moral Knowledge and Moral Principles*, in *Revisions: Changing Perspectives in Moral Philosophy* 113, 126 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983) ("The moral principles most of us accept have had to survive a fair amount of testing and sifting in the course of time.").

64. The distinction between microallocation and macroallocation choices is part of Marshall Breger's review of triage. See Breger, *supra* note 1, at 285. In a prior article, I used these terms in a somewhat different fashion, noting three kinds of allocation. See Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 *Hastings L.J.* 947, 962-63 (1992) [hereinafter Tremblay, *Street-Level Bureaucracy*] (defining microallocation matters as "bedside" decisions by individual lawyers; mesoallocation matters as reflecting institutional national sharing of funds; and macroallocation matters as societal choices about where goods ought to be directed).

65. See *infra* Part IV.A.

tors serve as important guiding maxims for understanding the legal, political, personal, and demographic qualities that the office must prefer and those which it ought to take steps to avoid.

The second caveat concerns the nature of the positive factors that follow. Several factors can be identified that deserve some form of privilege in ELSI's screening processes, but the factors will seldom, if ever, determine the answer to any particular intake choice. The following principles serve more as *maxims*, as presumptively valuable qualities which ought to add weight to an applicant's plea, but without deducing a conclusion that any particular person ought to be chosen.⁶⁶ In other words, each microallocation choice will turn on pragmatic judgments which will involve complicated, particularized facts. That is the best that any process can hope to accomplish. Macroallocation choices, by contrast, can be more categorical and predictable. For both kinds of choices, the question of "who decides" remains essential, and not easily resolved.⁶⁷

2. Permissible Factors

The following principles represent factors that ought to inform the decisionmaking by ELSI as it screens its potential clients. Most, but not all, of these principles develop from a utilitarian notion of *efficiency*, of using the limited office resources in the most effective way for as many potential clients whom the office is obligated to serve as possible. The principles identified here also tend to mirror the factors developed within the literature exploring triage in the medical context.⁶⁸

ELSI should choose its clients with the following principles in mind:

- *The principle of legal success*: ELSI should favor those prospective clients for whom the staff's talent, resources, and time will make a difference in the outcome desired by the individual.⁶⁹ This principle would rule out, or suggest lower preference for, those individuals with very weak cases or very strong cases. It is a justifiable operating maxim, as the limited resources of ELSI should be directed to areas where the resources can make a palpable difference. It may be imperfect in execution, particularly since screening takes place without an enormous level of case detail, but when it is available it ought to count in a significant way.

66. Maxims play an important role in the pragmatic reasoning process known as casuistry. See *supra* note 59 and accompanying text.

67. See *infra* Part VI (addressing this question).

68. See, e.g., Winslow, *supra* note 42, at 63-109 (summarizing the utilitarian and egalitarian principles to be considered in selecting candidates to receive scarce medical resources).

69. This principle is one of the utilitarian factors developed by Winslow. See *id.* at 63-70.

- *The principle of conservation:* For reasons similar to those just discussed, ELSI ought to offer priority to those applicants whose cases require proportionally smaller amounts of the program's resources to accomplish the benefits that ELSI wishes to achieve.⁷⁰ A goal of ELSI's triage must be the efficient use of its limited assets, and this maxim privileges efficiency. If ELSI's staff can prevent the homelessness of four families with the same resource allocation as it would take to prevent the homelessness of one family, then, everything else being equal, the office ought to turn down the latter client family and accept the first four, subject to the preceding principle of legal success. Or, to use a different example, a family whose homelessness can be avoided with some quick but significant legal input would be preferred to another family, everything else being equal, whose eviction can be avoided only through months of active litigation.⁷¹
- *The principle of collective benefit:* ELSI ought to prefer cases that are likely to affect the lives of a larger group of poor people over cases that promise benefit only to the actual represented client.⁷² The norm of efficiency again justifies this principle, which seeks to use the limited goods of the program in a more widely effective way. This maxim is nearly self-evident, but it may often conflict with the principle of legal success, as more deeply transformative legal work will tend to be more speculative. That conflict serves as the basis of later discussion, for it represents one of the central tensions in legal services case selection: that between quicker, surer work and longer-term, more speculative projects.⁷³

70. This principle also comes from Winslow's list. See *id.* at 73-76.

71. The principle of conservation is justified notwithstanding the rampant critique of legal services lawyers for routinized service in response to caseload pressures. See Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA Briefcase 106, 108 (1977); Feldman, *Political Lessons*, *supra* note 19, at 1536-39. In their pioneering study of the work practices of legal services lawyers, Carrie Menkel-Meadow and Robert G. Meadow reported that an average task for a legal aid lawyer took 26 minutes, and that a quarter of the tasks were completed in less than 5 minutes. See Carrie Menkel-Meadow & Robert G. Meadow, *Resource Allocation in Legal Services: The Limits of Rationality in Attorney Decisions* 5 (1981) (unpublished manuscript, on file with the author).

The routinization critique chastises lawyers for spending so little time on discrete tasks, even if it recognizes some of the bureaucratic pressures underlying the phenomenon. But the critique does not defeat the conservation principle. The critique implies that, and only has force if, the work demands more time than the lawyers allocate it. The "5 minute task" critique cannot mean that a lawyer should spend 10 minutes on a task that can be completed in half the time. The conservation principle assumes adequate and responsible work, and holds that cases needing less of that product for a given result deserve priority over those requiring more.

72. For an example of a conventional legal services experience where this factor ought to play significant weight, see the discussion of the Failing and May hypotheticals. Failing & May, *supra* note 42, at 26-32.

73. See *infra* notes 40-63 and accompanying text.

This principle also implies a necessary corollary. Not only ought ELSI prefer cases which maximize benefits over its constituent base, but it also ought to reject cases which undercut community interests.⁷⁴ This maxim not only influences which prospective clients ELSI ought to accept, but it also may limit the advocacy permitted by ELSI staff on behalf of any already-accepted client. In this respect ELSI's broader mandate favoring collective interests serves as a kind of "positional conflict" of interest operating as a constraint on its advocacy strategies.⁷⁵

- *The principle of attending to the most serious legal matters:* Some legal matters are apparently more "serious" than others. The term "serious" is not self-defining, but it is fair to understand it as reflecting the level of pain, discomfort, or harm associated with the legal matter if left unresolved. This axiom holds that ELSI ought to seek to reduce pain and harm at the greatest rate possible consistent with its other commitments. Among those legal matters satisfying the "legal success" maxim above (in that their likelihood of resolution may increase substantially with the aid of the ELSI staff), some will create more discomfort for its victims than others, and ELSI ought to prefer the former to the latter. Marshall Breger's recognition of a priority for "emergency" cases exemplifies this principle.⁷⁶

This maxim will obviously play an important role in any legal services case selection, and may be applied presumptively, if imperfectly, to "types" of legal matters. For example, by and large the specter of eviction and resulting homelessness is more serious than the specter of a bad credit rating, even though the latter problem can present great difficulties for a consumer. Therefore, eviction cases can be preferred to credit rating matters.⁷⁷ Within categories, though, there may exist wide ranges of potential harm. One family facing homelessness may have a place to which to move or resources to find suitable replace-

74. I argued this point in Tremblay, *Community-Based Ethic*, *supra* note 42, at 1139-41.

75. See *id.* at 1140. For a comprehensive discussion of the positional conflicts doctrine, see John S. Dzienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457 (1993). Peter Margulies has developed a "contextual approach" to positional conflicts in poverty law settings. See Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 Fordham L. Rev. 2339 (1999).

76. See Breger, *supra* note 1, at 354-55; *supra* notes 61-63 and accompanying text.

77. This example can be developed in a way that demonstrates the ambiguity of the seriousness factor. At least viscerally, if not in a more considered way, evictions are plainly more serious than credit rating disputes—having a bad credit rating is not as life, health, or safety-endangering as homelessness. A bad credit rating, however, could lead a family to be denied affordable housing or a mortgage, so that the credit problem is itself the cause of homelessness. Using broad categories does not permit this fine level of distinction, and, therefore, this principle will often be trumped by the need for efficiency in case selection. The distorting tendencies of the "rescue mission," see *infra* Part IV.B., further justify the institutional use of broader categories instead of case-by-case determinations.

ment housing, while another family facing eviction will have to live in a car. If an applicant screener knows of these differences, then he is entitled to prefer the latter applicant to the former.

- *The principle favoring long-term benefit over short-term relief:* The goal of efficiency of resource use suggests this next maxim. Given two otherwise equally worthy cases, ELSI ought to prefer a case that will effect a longer-lasting change over one offering short-term relief. If nothing else, this principle tends to reduce the universe of legal matters to be faced in the future and may be deemed a subset of the "seriousness" criterion above. Consider an eviction matter in which the tenant has been brought to court for non-payment of rent and her monthly disability benefit is less than the contract rent for the apartment where she lives. Even if the applicable law permits some defense to the landlord's claim now, the likelihood is substantial that this tenant will be the subject of another similar action in a month or two. The long-term benefit maxim would suggest that this case should have a lower priority than an eviction case in which ELSI could assist a tenant to remain in her apartment for an indefinite period of time.⁷⁸

3. The Excluded Criteria

There are some factors that ELSI ought not include in its screening and weighing process, despite their visceral attractiveness. Such factors include the following:

- *The principle of relative poverty:* One might think that one significant factor in ELSI's decisionmaking would be the depth of income or resource deprivation—in other words, the level of poverty—of a prospective client. Upon reflection, though, this factor cannot serve as a privileging one except to the extent that the client's poverty serves as a basis for one of the permissible factors identified above. It is true that those persons who can afford to hire, or otherwise have access to, private counsel for their legal matters must be screened out in an absolute way by ELSI.⁷⁹ It may also be true that, purely as an administrative convenience and bureaucratic classifica-

78. Once again, this shallow example can be developed in a way that makes the former case entitled to greater weight because of additional factors. The possibilities include the following: the tenant could come to ELSI in February, and since the prospect of homelessness in the winter is a far greater danger than homelessness in the spring, a defense now might have important health and safety benefits to her (application of the seriousness maxim); or the landlord in question might be a repeat and notorious player within ELSI's community which would suggest that ELSI expend greater attention to encourage him to better maintain his buildings (application of the collective benefit maxim).

79. All funding schemes for legal services programs impose such a restriction, for quite obvious reasons. See, e.g., 42 U.S.C. § 2996f(b)(1) (1994) (stating that no funds made available by LSC under this subchapter may be used to provide legal assistance with respect to any fee-generating case); 45 C.F.R. § 1609 (1998) (discussing Legal Services Corporation income limits).

tion scheme, ELSI's income guidelines will perforce screen out many other applicants who cannot afford counsel but whose income or resources exceed the level chosen by the program or its funding sources.⁸⁰ Nothing argued here is intended to preclude such screening mechanisms.

But among the population of prospective clients who meet the program's income and resource guidelines, there is no reason to favor those who have the least income purely for that reason. Often the factors listed above will serve to account for that disparity, but not always. A family with no income and no source of survival who has been denied a subsistence welfare benefit will no doubt qualify as a high priority for most programs, but does so not because of the income as such but because of the "seriousness" maxim. We saw earlier, by contrast, how a tenant with income too low to afford the rent at an apartment might be a lower priority for ELSI's services in defending an eviction than a tenant who, because of greater income, is not likely to face repeated eviction.⁸¹

Put another way, there is no definitional reason why a poorer family should be expected to benefit from the legal services provided by ELSI in a more productive way than a comparable family, still poor, but with greater income. Recent arguments about the same issue directed to allocating scarce public housing opportunities might arrive at different conclusions, but the difference lies in the nature of public housing slots when compared to legal services.⁸² The provision of free or subsidized housing to a family will *always* be an enrichment and a benefit, in a fairly uniform way, and serves directly to increase that family's income by the value of the subsidy. The provision of legal services to a poor family has no comparable uniformity of benefit. Thus, the maxims and principles listed above serve as a far more reliable basis for choice than would the level of income of the applicant.

One might suspect that an additional supporting argument for not privileging lower income applicants is one that values work and self-sufficiency over receipt of public benefits (following from an assumption, not entirely illusory, that among legal services applicants it will be the "working poor" who have greater income and the "non-working poor" who have less).⁸³ As the next discussion shows, that argument is not intended here, nor does it seem a principled one.

80. Cf. Houseman, *A Commentary*, *supra* note 33, at 1708 n.142 (discussing the arguments that the working poor may be equally deserving as the current clients of legal services).

81. See *supra* note 78 and accompanying text.

82. For a discussion of the controversy surrounding the federal government's efforts to "integrate" public housing by encouraging higher-income families to replace lower-income families, see Ruben Franco, *From Welfare to Work in New York City Public Housing*, 22 Fordham Urb. L.J. 1197, 1203-05 (1995).

83. See *id.*

- *The principle of "social worth"*: Some medical triage analysts have argued that scarce medical resources might fairly be allocated on the basis of a form of merit which we shall call here "social worth."⁸⁴ Under such a maxim, if it were to apply, then clients deemed more deserving as the result of some personal qualities or character would warrant some privilege in the selection process. The argument is that clients who are hard-working, or dedicated to raising a family in an honorable way, or honest, or cooperative, or the like should receive some reward for that character by having a greater-than-otherwise chance of receiving the scarce and valuable ELSI services. One defender of this preference, the philosopher Nicholas Rescher, cites both utilitarian and egalitarian reasons for its inclusion.⁸⁵ For the former, he suggests a "potential future-contributions factor," justifying the privilege as an "invest[ment]" which can expect a "return" in the future.⁸⁶ For the latter, Rescher identified what he calls the "past services-rendered factor," rewarding people for past good deeds.⁸⁷ Applying the Rescher analysis to the legal services context, one might justify a social worth privilege as a just reward for those clients who have overcome the greatest adversity, as well as an incentive for other persons to come "up from poverty."⁸⁸

The suggestion here is that such a factor should not play a part in ELSI's selection process. The reasons may seem immediately and viscerally apparent, but in fact they are not without some difficulty. A common objection to the social worth criterion is that it is hard to agree upon the definition of the quality serving as the preference.⁸⁹ That objection is not persuasive here, however. The qualities just identified above—working, supporting a family, honesty, cooperativeness—are not necessarily any more slippery or ambiguous than the other factors that ELSI must apply in deciding which cases to include and which to exclude. It is also true, one strongly suspects, that many

84. See, e.g., Winslow, *supra* note 42, at 81 ("[T]he basic aim of this approach has been to seek the good of society by favoring those judged most valuable and disfavoring those judged least valuable (or most detrimental)."). Winslow relies on the arguments of Basson, *supra* note 42, at 313-33; Fletcher, *supra* note 41, at 1085-91; and Rescher, *supra* note 42, at 178-79.

85. See Rescher, *supra* note 42, at 178-79.

86. *Id.* at 178.

87. *Id.* at 179. As Rescher puts it, "It would be morally indefensible of society in effect to say: 'Never mind about services you rendered yesterday—it is only the services to be rendered tomorrow that will count with us today.'" *Id.*

88. During the early 1990s, the Anti-Poverty Project of the Mandel Legal Aid Clinic at the University of Chicago Law School instituted a campaign to assist clients to move "up from poverty." Students in that project worked with each client to create a discrete plan to develop means for an adequate source of income. The program, which no longer operates because of a cessation of funding, has been described as a great success. See Telephone Interview with Gary Palm, Director, Mandel Legal Aid Clinic (Jan. 11, 1999).

89. See Childress, *supra* note 42, at 344-47.

of these qualities—most notably honesty and cooperativeness—in fact are used regularly within intake contexts for clients whose applicable qualities are known to the programs' screeners.

Nor is it obvious that making moral judgments about the character of individuals is, or should be, a suspect endeavor. The recent revival of republican⁹⁰ and Aristotelian⁹¹ thought within law and ethics stresses the importance of virtues and character as central to a recognition of "the good."⁹² That literature supports the dual propositions that good character is identifiable and worthy of recognition.⁹³ It is not a persuasive argument, then, that the social worth factor is an invidious or arbitrary one.

Those sentiments, however, do drive the more compelling reason why social worth should not play any explicit role in ELSI's decision-making. Recognition of character is indeed a good thing, but it is not necessarily a simple thing to accomplish through superficial interactions. The decidedly unacceptable risk of employing a social worth factor is that it cannot be reconciled with a necessarily overly hurried intake process. Without the depth of understanding needed to separate those of good character from those who may be less admirable, the social worth criterion invites the more invidious forms of bias. Persons who are not employed, whose houses are dirty, who are late for appointments, whose children are in trouble at school or with the law, who may not be fully open with the intake screeners—it is easy to conclude that such persons are sloppy, lazy, uncaring, scheming, and

90. See, e.g., Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 Nw. U. L. Rev. 695, 699 (1994) [hereinafter Margulies, *The Mother with Poor Judgment*] (stating that republicanism creates a relationship between students, teachers, and citizens founded on their differences and similarities); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Legal Ethics 241 (1992) (analyzing George Sharswood's role in advocating lawyers' republican pursuit of the community's common good).

91. See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 137 (1981); Martha C. Nussbaum, *The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality*, in *Love's Knowledge* 54, 95 (1990) [hereinafter Nussbaum, *Discernment of Perception*]; see also Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 Colum. L. Rev. 1618, 1625-26 (1996) (noting the resurgence of reliance upon Aristotle in recent legal scholarship).

92. See Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. Cal. L. Rev. 885, 908-09 (1996) [hereinafter Feldman, *Codes and Virtues*]; Nussbaum, *Discernment of Perception*, *supra* note 91, at 95.

93. For a discussion of the role of character, see Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 14-17 (1993) [hereinafter Kronman, *Lost Lawyer*]; Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts On Civility, Moral Character, and Professionalism*, 8 St. Thomas L. Rev. 113, 120-39 (1995); Anthony T. Kronman, *Living in the Law*, 54 U. Chi. L. Rev. 835, 857-58 (1987) [Kronman, *Living in the Law*]; Anthony T. Kronman, *Practical Wisdom and Professional Character*, 4 Soc. Phil. & Pol'y 203 (1986) [hereinafter Kronman, *Practical Wisdom*].

so forth.⁹⁴ One could defend a vision of screening in which the sloppy, lazy, uncaring, and scheming are penalized for those qualities, but to do so would require a depth of attention to intake processes that, as we shall see as we proceed, is unrealistic to expect from ELSI or any similar legal services organization.

- *The principle of constituent demand:* A dispassionate and reasoned triage should not be influenced by the level of constituent demand for a certain kind of service. Triage is not, by this thinking, a fundamentally democratic endeavor. The wisdom of this proscription is both self-evident and troublesome. It is self-evident because of the strength of the affirmative principles above. If ELSI's most common request for service was for help with credit-rating matters, or to draft wills, or for slander actions against neighbors, then no triage theory would endorse accepting those matters simply because of that demand. Indeed, a deep historical critique of legal services practice has been its tendency to slip into responsiveness to demand at the expense of a more focused and effective delivery of services.⁹⁵ Our triage principles acknowledge the normative strength of that critique, even if its empirical support may be open to debate.

At the same time, the counsel to resist constituent demand is troublesome. A parallel critique of legal services practice has denounced its lawyer-domination, its insulation from its client community, and its failure to effect adequate community input in its work.⁹⁶ That critique also has impressive normative cachet. This principle seems to encourage more of the same, and is puzzling in that respect. That the principle is in fact justified shows that this dilemma is more apparent than real. Both critiques are sound, but they are not necessarily inconsistent. As we see more fully below, a legal services program must simultaneously respect the needs of its constituents but sometimes resist their demands. The triage and trustee responsibilities compel a program to discern the most serious obstacles to community members enjoying full and autonomous lives. That discernment comes not from polling but rather from understanding the constituency.

94. See Margulies, *The Mother with Poor Judgment*, *supra* note 90, at 706-08 (relating students' reactions to clients).

95. For example, Alan W. Houseman states:

Probably the greatest deficiency of the legal aid societies was that they responded only to uninformed demand—to those who walked into the office—so that large parts of the legal needs of the poor were not addressed while resources were committed to the generally narrow range of legal problems that poor people recognized.

Alan W. Houseman, *Legal Services: Has It Succeeded?*, 1 D.C. L. Rev. 97, 107 (1992) *see also* Bellow, *supra* note 71, at 108 (finding that low client autonomy and limited lawyer inquiries lead to the handling of only those problems that the client presents to the lawyer while ignoring other possible legal difficulties); Feldman, *Political Lessons*, *supra* note 19, at 1534-35 (offering the same critique of current legal services practice).

96. See Abel, *Legal Aid*, *supra* note 21, at 480-81; Feldman, *Political Lessons*, *supra* note 19, at 1544, 1552-56; Houseman, *A Commentary*, *supra* note 33, at 1696-97.

- *The principle of attorney preference or satisfaction:* Once again we confront a prohibited factor which is at once evident but enigmatic. This principle surfaces in the negative list simply because a program must not choose among its clients based upon the personal or political preferences of its lawyers (or other staff, for that matter). That understanding is not controverted. The maxim's puzzling quality ensues from two directions. In one sense the ban is simply incorrect, because staff *must* express preferences *as trustees* for constituents. The ban thus must be understood not to apply to those fiduciary or proxy preferences. But another difficulty is evident, one that cannot just be defined away. Any advocacy organization will be hard-pressed to survive if its advocates are unhappy. By most reports, legal services lawyers are not terribly satisfied in their work,⁹⁷ and that must be a concern for program supporters. Staff satisfaction seems, then, to be an important *affirmative* criterion rather than a proscribed one.

To respond to that concern we ought to make this prohibition a contextual one. As a factor of first resort in choosing cases or causes, attorney preferences must be disallowed. As a tie-breaking factor among competing important matters, though, this factor ought to play an important affirmative role. Encouraging staff satisfaction while addressing the most important needs represents a legitimate goal for any program.

The preceding principles, then, exemplify qualities which ELSI should, or alternatively should not, take into account in its microallocation mission of choosing among individual clients. That discussion begs, though, an important question. Is it fair, or justified, or prudent for ELSI to be choosing among a large number of applicable clients? At one level that answer is obvious: as long as ELSI engages in legal work within the Essex community, it will face these choices and will have to apply criteria like those just discussed. At another level ELSI faces a critical programmatic choice, what we can call the macroallocation choice about the kinds of "legal" work that ELSI will engage in. Alternatives to massive individual case representation exist, of course, and ELSI cannot sidestep struggling with those other options. With that in mind, this project moves to a macro level and considers how ELSI might decide an appropriate mix of service deliveries.

97. See, e.g., Abel, *Legal Aid*, *supra* note 21, at 511 ("[D]aily encounters with deprivation, oppression, and injustice, quickly engenders intense frustration. Legal aid lawyers constantly confront insignificance and failure."); Feldman, *Political Lessons*, *supra* note 19, at 1589-90 (noting that poverty law work leads to "disillusionment," causing poverty lawyers to "readjust their sights downward").

IV. THE MACROALLOCATION LEVEL: PRACTICE VISIONS

A. *A Taxonomy of Practice Visions*

It is not at all apparent that ELSI should simply respond, on a case-by-case basis, to the profuse requests for legal services from poor people living in Essex. The efficiency concerns that so deeply affected the triage principles above compel ELSI to precede its microallocation efforts with broader, *ex ante* screening out of certain types of problems or types of clients. This macroallocation task itself operates at two levels. It would, at one level, track the microallocation topics and favor certain *categories* of individual cases over others, so that, for instance, child custody disputes might be screened into a selection process while credit-rating or name-change matters might be categorically screened out.⁹⁸ This kind of "priority-setting," however, so familiar to neighborhood legal services programs, begs a critical, temporally prior question that I refer to as the second level of the macroallocation task. This second macroallocation charge affects ELSI's mission in a profound way.

Simply put, ELSI must choose the nature of its work. The triage principles assumed a conventional litigation or individual dispute based program, but that is not the only mission available to ELSI. Many legal services critics, in fact, argue that one of the greatest failings of current poverty law institutions is that they assume uncritically that conventional, individual lawyering is the only work that is to be done.⁹⁹ ELSI, as it listens to these critics and explores in fundamental ways how to respond to poverty within Essex, must confront this basic question of its institutional operation.

The debate about the proper use of legal talent by poverty law programs is hardly new. From the inception of organized legal services culture there has been a perceived dichotomy between "service" work and "law reform" or "impact" work.¹⁰⁰ More recently, the "critical lawyering" movement has faulted lawyers working with the poor for ignoring the mobilization possibilities of their work, finding both service and law reform work to be ineffective at any meaningful level.¹⁰¹

98. This kind of substantive-law screening seems to be what the Legal Services Corporation regulations envision in their requirement that recipients establish priorities. See 45 C.F.R. § 1620 (1997).

99. See Feldman, *Political Lessons*, *supra* note 19, at 1537-38.

100. For a summary of that debate, see Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 Mich. L. Rev. 1401, 1404-09 (1995) (reviewing Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* (1993)); Feldman, *Political Lessons*, *supra* note 19, at 1594; Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 Mich. J. Gender & L. 493, 497, 502 (1996) [hereinafter Margulies, *Political Lawyering*].

101. See López, *Rebellious Lawyering*, *supra* note 57, at 7-9. As another poverty law commentator wrote: "When legal aid lawyers do win cases, especially test cases, they may secure only paper victories . . . Yet how could it be otherwise? How could

These arguments have been developed elaborately within the scholarship of progressive lawyering over the past three decades and need not be repeated here.¹⁰² What we must recognize is that several competing models of poverty law practice are available to ELSI. Echoing a famous William Simon article, let us call these models "practice visions."¹⁰³ I identify here four such practice visions and describe each briefly.¹⁰⁴ I then assess whether there are reasons other than unreviewable "emotive" preferences¹⁰⁵ to favor some mix of service delivery over others.

1. *Individual Case Representation ("ICR")*: This category represents what the conventional literature of legal services practice calls "service" cases.¹⁰⁶ For my purposes (and to distinguish this category from the focused case pressure activity listed immediately below), I define ICR as work which is done by advocates *merely because it is beneficial to the individual client*. To say that a program engages in ICR does not imply that the program does without screening, priorities, or other triage functions. Put a different way, ICR does not represent a random, or lottery-based, open intake process where all comers have an equal opportunity for access to an advocate. ICR *could* function in that way, but that seems extremely unlikely. Most, if not all, legal services programs engaged in ICR employ priorities

anyone have expected a few dozen, or even a few thousand, lawyers to effect fundamental social change?" Abel, *Legal Aid*, *supra* note 21, at 601.

102. For an early compendium of critical lawyering literature, see Symposium, *Theoritics of Practice: The Integration of Progressive Thought and Action*, 43 *Hastings L.J.* 717 (1992).

103. See William H. Simon, *Visions of Practice in Legal Thought*, 36 *Stan. L. Rev.* 469 (1984) [hereinafter Simon, *Visions of Practice*]. The phrase "visions of practice" also appears in Houseman, *A Commentary*, *supra* note 33, at 1704.

104. The following list could include a fifth category, that of *interdisciplinary service*. A program might choose to offer integrated services to families, including a mix of legal, educational, therapeutic, and medical services, in lieu of more traditional legal services. A comparable interdisciplinary approach was once suggested by Jean Camper Cahn and Edgar Cahn in their early work in New Haven, but without much success. See Diller, *supra* note 100, at 1406; Feldman, *Political Lessons*, *supra* note 19, at 1576-77. The interdisciplinary approach to treating poverty is experiencing something of a renaissance today. See Sandra A. Waddock, *Educating Holistic Professionals in a World of Wicked Problems*, in *Applied Developmental Science* (forthcoming 1999) (manuscript at 40-41, on file with author).

I have chosen not to include an interdisciplinary model as a fifth choice for legal services programs largely because the model is consistent with the ICR or FCR models, and does not replace the decision by a program about which persons to accept as clients, which is my primary focus here. While in many respects the choice of a legal versus an interdisciplinary approach to poverty work is a form of "case selection" and triage, I opt here to leave that question aside for others to explore.

105. See MacIntyre, *supra* note 91, at 11-12 (defining "emotivism" as the argument that moral matters are not subject to reasoned debate, but depend solely on the subjective preferences of the holders of the moral positions).

106. For discussion of the perceived dichotomy between service work and law reform, see Abel, *Legal Aid*, *supra* note 21, at 487-92; Feldman, *Political Lessons*, *supra* note 19, at 1538 (advocating abolishing the distinction); Margulies, *Political Lawyering*, *supra* note 100, at 496-98.

which cull more critical cases from the larger pool of eligible clients, a process which I address below as fully morally justified.¹⁰⁷ The critical distinguishing characteristic of ICR is its commitment to the well-being of an individual client.¹⁰⁸ ICR most closely captures the operative ethos of a private law firm.

2. *Focused Case Representation ("FCR")*: More sophisticated observers of poverty law practice have objected to the traditional service/impact dualism by recognizing a form of service work which can exemplify much of the perceived benefits of impact work without ignoring the needs of individual clients. They suggest "focused case work" as a more effective use of limited program resources.¹⁰⁹ For my taxonomic purposes, FCR represents service work—that is, individual case work—chosen not merely for the benefit of the individual clients involved, but expressly to confront a particular broader social or legal concern within the program's client community. The distinction between ICR and FCR is that the former permits acceptance of a case in which the only benefit sought is for the individual client, while the latter would not permit acceptance of a case unless that case promised some larger impact on, or connected in a meaningful way to, some broader concern identified as a priority in the office. Examples of FCR might include representation of tenants of only one prominent landlord,¹¹⁰ or advocacy in welfare cases only if the case involved a program that was implemented by the welfare bureaucracy in a particularly troublesome way.¹¹¹

107. See *infra* Part VI.

108. Richard Abel sees legal aid's historical focus on ICR as consistent with a "theory of legitimation." He writes: "Legal aid is an attempt by those who enjoy state power, ownership of capital, and patriarchal domination to convince themselves that those privileges are not being abused through arbitrary action, exploitation, violence, or irresponsibility, and that any abuses are redressed promptly." Abel, *Legal Aid*, *supra* note 21, at 606.

109. See Feldman, *Political Lessons*, *supra* note 19, at 1538 (proposing that "literally every Legal Services case be of service to identified clients and contribute to an attack on situations or practices that disadvantage a larger number of poor persons"). I read Feldman (although there is considerable ambiguity in his proposal) to recommend that service cases which do not have that transformative potential should be screened out (hence the "literally"), thus constituting a form of FCR. He does not assert, nor could he, that every case "literally" can be used in that way. His objections to the randomness of current legal services practice plainly imply a screening of cases, and his criteria would include a case's ability to address larger issues. See Gary Bellow & Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 Geo. L.J. 1633, 1644-50 (1995) (supporting Feldman's suggestion that casework be focused to better foster advocacy of vital issues); Bellow & Kettleson, *supra* note 19, at 343-44 (discussing focus by legal service programs and public interest firms on public housing).

110. See, e.g., Bellow & Charn, *supra* note 109, at 1652-67 (excerpting guidelines of a legal services center working on landlord-tenant disputes); Bellow & Kettleson, *supra* note 19, at 343-44 (discussing public housing cases).

111. See Feldman, *Political Lessons*, *supra* note 19, at 1545 n.37.

3. *Law Reform*: This category is a familiar one to legal services attorneys and scholars. In the mid-1960s, with the emergence of a federal commitment to legal services through OEO, the "law reform" goal of poverty law was prominent,¹¹² and had perhaps its greatest tangible successes in the "test case" campaign of Ed Sparer and others before the Supreme Court over the next decade.¹¹³ While the phrase (and concept) has been subject to some criticism of late,¹¹⁴ it serves an important purpose in this taxonomy and continues to capture a discrete form of lawyering worthy of our attention. For my purposes, impact lawyering means litigation or similar focused advocacy (including legislative or administrative lobbying, for instance) in which broad change is sought to be effected through one case or a small number of related cases. Impact lawyering work consists of carefully crafted and framed advocacy which, if successful, will alter an important legal, political, legislative, or similar reality and will benefit the lives of many poor persons at once. The prototypical impact activities include class action lawsuits, test cases, and focused legislative efforts.¹¹⁵

4. *Mobilization Lawyering*: Recent criticism of poverty law practice has distinguished both service and impact work from a different kind of activity which I choose here to call mobilization lawyering. "Mobilization lawyering," for my purposes in this taxonomy, is activity dedicated to redressing the imbalance in political, economic, and social power between the haves and the have-nots. The concept is best known through the "rebellious lawyering" images of Professor Gerald López,¹¹⁶ and might also be known as "critical lawyering"¹¹⁷

112. See *id.* at 1543-45 (noting the rhetoric and public commitment, but critical of the lower priority that law reform received in practice).

113. See Diller, *supra* note 100, at 1404-17. Ed Sparer's test case strategy—which Martha Davis called the "think tank" approach to poverty litigation—led to a series of momentous Supreme Court decisions, including *King v. Smith*, 392 U.S. 309 (1968) (invalidating "man in the house" rules), *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down residency laws), and *Goldberg v. Kelly*, 397 U.S. 254 (1970) (mandating due process hearings before welfare benefits are terminated).

114. "[F]or over twenty years, the critics of the test-case approach have dominated the literature." Diller, *supra* note 100, at 1411. Much of the criticism to which Diller refers arises within the "rebellious lawyering" scholarship described below. See *infra* notes 116-22 and accompanying text. For a critique of impact lawyering from a service perspective, see Margulies, *Political Lawyering*, *supra* note 100, at 497, 502. Cf. Feldman, *Political Lessons*, *supra* note 19, at 1538 (criticizing legal services lawyers for insufficient attention to "law reform," but dismissive of the traditional program fascination with impact litigation as more important than service).

115. For a thoughtful defense of the ethics of impact lawyering, see Failing & May, *supra* note 42, at 32-33. For a critique of case selection that privileges the larger number over the individual, see Breger, *supra* note 1, at 284-86, 344-52. My description of law reform efforts collapses what Susan Sturm has separated into two classifications, law reform and institutional change. See Sturm, *supra* note 7, at 8-11.

116. See López, *Rebellious Lawyering*, *supra* note 57, at 9; Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 Geo. L.J. 1603, 1608 (1989) [hereinafter López, *Reconceiving Civil Rights Practice*]; Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially*

or "political lawyering."¹¹⁸ While the simplest service case might be seen as rebellious if approached the proper way,¹¹⁹ I choose to employ the term in distinguishing fashion from service or impact cases. For present purposes, a program engages in mobilization lawyering if it eschews traditional forms of representation, such as litigation or legislative advocacy, in favor of political community organization and empowerment. Within academic commentary on lawyering for the poor in the 1980s and 1990s, "rebellious" practice is viewed as the essential component of any legitimate antipoverty campaign.¹²⁰

As I noted at the outset of this taxonomy, a program can opt to engage in any or all of these four activities, but each activity captures a choice about resources that is distinctive, and a rational governing

Subordinated: Anti-Generic Legal Education, 91 W. Va. L. Rev. 305, 358-59 (1989) [hereinafter, López, *Training Future Lawyers*].

117. See Anthony V. Alfieri, *Practicing Community*, 107 Harv. L. Rev. 1747 (1994) (reviewing López, *Rebellious Lawyering*, *supra* note 57); Ruth Buchanan & Louise G. Trubek, *Resistance and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. Rev. L. & Soc. Change 687 (1992); Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. Pub. Int. L.J. 49 (1991); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 Harv. C.R.-C.L. L. Rev. 415, 416 (1996).

118. Margulies, *Political Lawyering*, *supra* note 100, at 493; see also Bellow & Charn, *supra* note 109, at 1647; Feldman, *Political Lessons*, *supra* note 19, at 1609 n.239 (arguing that legal services lawyers possess a duty to engage in "the politics of social change"). Stuart Scheingold uses the term "left-activist lawyering" to capture the same sentiment. See Scheingold, *supra* note 4, at 144 n.2 (defining the term).

119. See López, *Reconceiving Civil Rights Practice*, *supra* note 116 (describing throughout the article a single civil rights lawsuit); Margulies, *Political Lawyering*, *supra* note 100, at 494-95 (discussing domestic violence lawyering and stating that client service work does have political content).

120. Poverty law scholarship over the past two decades expresses an elegant and nearly uniform call for community-based work, and a distaste for traditional forms of representative lawyering practice. See, e.g., Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. Rev. L. & Soc. Change 659, 660-65 (1987-88) [hereinafter Alfieri, *Antinomies*] (arguing that client and community empowerment in addition to law reform litigation serve as the best strategic weapon in continuing the war against poverty); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107, 2118-19 (1991) [hereinafter Alfieri, *Reconstructive Poverty Law Practice*] (intending to understand and rectify the loss of client narratives in lawyer storytelling); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. Rev. L. & Soc. Change 369, 374-75 (1982-83) (presenting an approach to law practice that "overcome[s] the split most radical lawyers currently feel between their politics and their legal work"); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. Miami L. Rev. 1099, 1114 (1994) [hereinafter Simon, *Dark Secret*] (arguing that poverty law scholars have given less attention to the normatively more controversial issues of ethics and political economy that reveal actual and potential conflict and division among poor people); Stephen Wexler, *Practicing Law for Poor People*, 79 Yale L.J. 1049, 1049-50 (1970) (arguing that the traditional model of legal practice for private clients is not what poor people need); Lucie E. White, Goldberg v. Kelly on the Paradox of Lawyering for the Poor, 56 Brook. L. Rev. 861, 861, 886 (1990) (suggesting a practice of lawyering that would cede to clients the power to speak for themselves).

authority for the program needs to confront the distinctive features of each such activity. These four categories are fuzzy, overlapping, and often mingled. For instance, one can argue that a “simple” divorce case—paradigmatically ICR, seemingly—could be political, rebellious, and critical.¹²¹ Additionally, it could have impact on other women with children in the way that FCR or even law reform efforts might contemplate, by its incremental effect on the behavior of courts, opposing lawyers, and therapists.¹²² The categories are necessary and helpful, in that they recognize an *orientation* and a *preference* about kinds of work that are distinct and significant. ICR will tend to be different work from FCR, which will differ from impact litigation and law reform, which will differ from political work. Programs may make choices about the appropriate mix of activity, and the separate visions can help us to understand how those choices might be made.

B. *Developing a Macroallocation Scheme*

1. The “Happenstance Perspective”

Whether it opted to think about it or not, ELSI will engage in some combination of the four practice visions as it serves its community. Any poor person-focused activity that ELSI engages in will, purely by definition, fit into one or more of these categories. Of course, ELSI *should* think about the mix of work that makes the most sense given its mission and goals, but how that endeavor is accomplished is not easily evident. One might assume that ELSI’s actual blend of work will result from one of two distinct fortuities. Let me call this assumption the “happenstance perspective.” As this argument goes, the activity blend will develop either naturally from ELSI’s quotidian, microallocation choices as people show up or are referred to ELSI week after week, or it will develop from the personal or political preferences of those who happen to administer the program at any given time. Either one of these conditions is fortuitous because each one precedes organizational planning.

One might even develop the “happenstance perspective” a step further and assert that there is no further principled way for ELSI to develop its blend of work. This strand of the argument proceeds along these lines: The activity in which the ELSI staff engages is dependent, in a conscious, nonarbitrary way, only on the articulated mission or goal of the program. A program dedicated to “access” will favor ICR and perhaps some FCR; one committed to law reform will display more impact lawyering and legislative advocacy; and one whose aim is empowerment and mobilization will privilege a “rebel-

121. See, e.g., Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 120, at 2119-21 (noting the critical possibilities of a Social Services program).

122. See, e.g., Margulies, *Political Lawyering*, *supra* note 100, at 501 (discussing the various ways lawyers can help female victims of domestic violence).

lions" focus over litigation. Those orientations, this argument proceeds, have no *ex ante* justification or necessity, but are equally valued alternatives subject to the "emotive"¹²³ preferences of whoever decides this sort of thing.¹²⁴ While we have not yet discussed the "who decides" question, that consideration will help us predict which of the equally viable options might be chosen, but adds nothing to the weighing of the options' viability. The "happenstance perspective" then observes that the emotive choice is the *best one can expect* as a counter to randomness—defined as responding to the issues that folks bring to the waiting room—but acknowledges that randomness, even in well-run programs, will always be a powerful orienting force. Indeed, the "random" fact of who asks for help will influence how the decisionmakers choose an appropriate mission, so that the blend of activity can always be connected to the political preferences of the organizers combined with the felt and expressed needs of the visible constituents.

The "happenstance argument" has more strength than one might initially expect, and there is reason to believe that it reflects the actual experience of many legal services organizations today.¹²⁵ It is, though, ultimately incorrect from a normative viewpoint. The argument accepts as a premise that each of the four delivery types is essentially equivalent. The important normative concern is that, once one's mission has introduced a particular vision or a blend of visions, the resulting work be done *well*. The question is whether that premise is correct. We need to explore whether there are ethical criteria by which the choice of practice vision is something other than simply emotive, so that some kinds of work might be preferred morally to other kinds of work. The following subpart takes up that investigation.

2. Normative Criteria for Assessment of the Delivery Schemes

Can one really argue that rebellious lawyering is a morally preferable activity to ICR? On what basis would one craft that argument?¹²⁶

123. See *supra* notes 8-16 and accompanying text.

124. For some empirical support for this claim, see Kilwein, *supra* note 7, at 193 (noting that lawyers were more likely to cite political beliefs as the impetus for cause lawyering).

125. This seems to be the view of Marc Feldman. See Feldman, *Political Lessons*, *supra* note 18, at 1536-37.

126. There is a powerful theme within professional ethics, and within legal ethics in particular, accepting the heterogeneity of moral viewpoints. We have, as William Simon writes, no "thick theory of the good." William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 Md. L. Rev. 213, 225 (1991) [hereinafter Simon, *Mrs. Jones's Case*]. Instead we have competing alternative visions of moral theory, dividing largely along consequentialist and deontological lines. In professional ethics circles, one is invited to compare and contrast the varying theories, without any way of concluding that one is right and the other wrong. See, e.g., Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* 11-27 (2d ed. 1998) (re-

We easily see how difficult this task can be. If there are no such arguments, then the "happenstance perspective" prevails, and the aim of legal services critics would be to assure that the chosen form of practice be done effectively and fit well with the needs of the particular community. Those questions would be entirely concrete and contextual and would not benefit from broader or more distanced assessments.

There are, however, two ways in which one might critique or assess the value of a particular form of practice.¹²⁷ The first is a democratic or autonomy-based method. This ethical assessment suggests that ELSI choose its practice vision with reference to the values expressed by its constituent community. We can defer for now how one measures the community opinion, but the point would be for ELSI to proceed democratically. This proposal invites an ethical standard by which to judge ELSI's work: that is, how well it meets the desires of its community. If that community chose mostly ICR, then, regardless of its political preferences or the issues presented either in the waiting room or through group leaders, ELSI ought to do ICR, and do it well.

This ethical assessment method avoids some of the meta-ethical debates about thick theories of the good, because it develops from a widely-shared conception of client-centeredness, personal autonomy, and democracy.¹²⁸ It fails in this context, however, for it distorts ELSI's "trustee role" and fails to adequately account for the "future generation" concern. To understand each of these objections better, and to see further why democracy and autonomy may not be the appropriate ethical scales by which to judge practice systems, let us turn to the second potential ethical assessment method.

The second way in which one might ethically compare forms of practice is a teleological method suggested by the proponents of virtue ethics. This view relies on the Aristotelian conception of "craft."¹²⁹ For our purposes, the otherwise sophisticated philosophical concept is

viewing moral theories); Mortimer D. Schwartz et al., *Problems in Legal Ethics* 3-26 (4th ed. 1997) (suggesting "tools" for moral decisionmaking through utilitarianism and Kant's categorical imperative). The most common "shared language" for ethical concerns within legal ethics follows not from normative standards but from rules and substantive law. See William H. Simon, *The Trouble with Legal Ethics*, 41 J. Legal Educ. 65, 65-66 (1991).

127. It deserves note that the "ethical critique" of the program's choice of practice visions is not a critique of "lawyers' ethics" as represented by the profession's Model Rules. Those Rules are silent on this question, which instead poses "true" ethical conflict. Cf. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963, 963 & n.2 (1987) (noting that lawyers' ethics seldom relate to the generally accepted sense of morals).

128. See Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103, 1105-11 (1992).

129. See MacIntyre, *supra* note 91, at 191. MacIntyre's use of the concept of craft is far more sophisticated than my treatment and application here. As Mark Kuczewski explains:

actually quite simple and elegant. Virtue ethicists remind us that the true test of "the good" is that which best accomplishes the *telos* or end of the social practice in question.¹³⁰ Virtue ethics departs from traditional deductive, theoretical, or "moral algorithm"-based conceptions of value¹³¹ by looking to the goods internal to social practices.¹³² The virtue ethicists mold these notions of craft, social practices, and internal goods to constitute a communitarian, tradition-driven vision of ethics built on shared views of the good.¹³³ We need not share that vision to adopt some of their insights. For our purposes, we may use their ideas of craft and internal practices in a more limited, if perhaps distorted, way. We can, as our second method of ethical assessment, try to articulate the *telos* of poverty law practice and test whether any of the practice visions better meets that *telos*.

3. The *Telos* of Poverty Law Practice: Constituent Power

Determining the *telos* of legal services practice is a project that deserves far more attention than we can bestow it here. While the task is implicit in most literature about progressive lawyering generally, or legal services lawyers specifically, it is seldom undertaken in an explicit way.¹³⁴ Without engaging the question in the depth it warrants,

On the simplest level, MacIntyre puts forward a concept of practices that is similar to the ancient and medieval crafts in that each one contains intrinsic goods and standards. Practices, the envy of those with Marxist tendencies, are more than mere labor because they are not judged only by the commodity produced. Practices have certain requirements in terms of method and merit.

Mark G. Kuczewski, *Fragmentation and Consensus: Communitarian and Casuist Bioethics* 32 (1997) (footnote omitted).

130. Heidi Li Feldman states: "Because a virtue is teleological—meant to serve a particular end or perform a certain function—the simpler and clearer our understanding of a person's or thing's end or function, the more easily we can specify what constitutes a virtue in that person or thing." Feldman, *Codes and Virtues*, *supra* note 92, at 910.

131. For a critical review of the theoretical wing of applied ethics, see Jonsen & Toulmin, *supra* note 59, at 6-7; John D. Arras, *Principles and Particularity: The Roles of Cases in Bioethics*, 69 *Ind. L.J.* 983, 985-91 (1994).

132. See MacIntyre, *supra* note 91, at 187; see also Stout, *supra* note 63, at 267 ("Internal goods are those that can be realized only by participating in the activity well . . .").

133. See Kuczewski, *supra* note 129, at 32 ("[T]he MacIntyrean understanding of a craft makes capacities and states of character essential components vital to the larger tradition of the craft's history and future. This characterization marks the beginning of the restoration of content to the shadowy, emotivist self.").

134. Richard Abel's comprehensive analysis of legal aid comes closest to such a project. See Abel, *Legal Aid*, *supra* note 21. Abel notes the "painfully obvious [fact] that there is no . . . consensus concerning the criteria by which legal aid programs should be evaluated . . ." *Id.* at 485. In his own review of programs, Abel reflects that dissonance. Compare *id.* at 487 (noting that access to court is the "dominant conception" of legal aid), with *id.* at 494 ("[M]ost legal aid programs see the alleviation of poverty as their mission . . .").

The recent compilation on "cause lawyering" topics might be seen as an example of the task of defining the *telos* of poverty law practice, but it does not address directly

I wish to argue that, regardless of how one views the poverty law enterprise, the *telos* of the enterprise is the *achievement of power* for the program's constituents.¹³⁵

There is no question that legal services programs differ in their explicit mission statements and in their actual practice structures along the lines of the four practice visions. Some programs stress and then perform high-volume ICR, with innovative advice and referral or pro se protocols.¹³⁶ Other programs engage in community organization with some law reform work, but with little ICR or FCR. Regardless of what the administrators or founders say, or what their staff members do, the broad goal is the same: the enhancement of power of their clients.

One might demur: some programs stress "access," and individual client service, to address the "unmet needs" of people without the means to hire their own private lawyers. That view, indeed, has been labeled the "dominant conception" of legal aid.¹³⁷ Those programs are not focused on power, but instead they stress access to justice and equality of representation. Indeed, that is the very debate which has

the question that I pose here. See Cause Lawyering: Political Commitments and Professional Responsibilities (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter Cause Lawyering]. In fact, many of the articles in this impressive anthology assume heterogeneity within progressive lawyering, focusing on that end of the continuum that qualifies as "cause lawyering." See, e.g., Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in Cause Lawyering, *supra*, at 69, 70 [hereinafter Abel, *Speaking Law to Power*] (exploring "how the structure, process, and personnel of legal institutions shape the interaction between law and power"); Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in Cause Lawyering, *supra*, at 31, 33 [hereinafter Menkel-Meadow, *The Causes of Cause Lawyering*] ("Descriptions of cause lawyering raise a host of boundary questions."); Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in Cause Lawyering, *supra*, at 3, 5 ("[C]ause lawyering [is] a protean and heterogeneous enterprise that continues to reinvent itself in confrontations with a vast array of challenges."); Scheingold, *supra* note 4, at 119 (noting that left-activist lawyers "tend to distribute themselves among practice sites according to their own preferences and proclivities").

135. See Abel, *Legal Aid*, *supra* note 21, at 476 (noting the "inherently political nature of legal aid").

136. See, e.g., Houseman, 21st Century, *supra* note 23, at 48 (describing a successful Maryland pro se project).

137. See Abel, *Legal Aid*, *supra* note 21, at 487 ("The image of legal aid as equal access to law (embodied in courts) probably is the dominant conception today." (footnote omitted)). Abel notes the following statement of the Executive Director of the National Legal Aid and Defender Association (NLADA), the most prominent legal services lobbying organization:

What do I mean by a system which provides effective representation? I do not mean assistance with a reallocation of resources in American society. . . . To me the issue remains nothing more than assuring that legal claims are effectively handled and resolved.

Id. at 491 n.87 (quoting Eisenberg, *Legal Assistance to the Poor: The Issues in the '80s*, in Research on Legal Services for the Poor and Disadvantaged: Lessons from the Past and Issues for the Future 55, 59 (B. Garth ed., 1983)).

persisted within legal services for decades—whether to stress power or service.

The demurrer is not a convincing one, if one unpacks both the access mission and the power *telos*. "Access" is not, and frankly cannot be, the end of any legal services program in any substantive way. Access to lawyers, and by extension to courts, is important because it represents a form of power, a capacity to control one's life.¹³⁸ It permits a marginalized client to obtain some benefit that she cannot obtain otherwise. Access is a symbol of power and has no meaningful worth except as such. As one legal aid commentator put it: "It is too late in the day to claim that we are simply talking about whether to supply legal services to the poor as we might talk about providing health services or transportation services. Everyone in the game knows we are talking about access to political power."¹³⁹ The triage discussion above reflected this reality. In that discussion, some access rights were seen as less worthy of ELSI's attention, and those instances are inevitably ones where the power imbalance matters less, or the need for control or for the benefit is less crucial. If access *qua* access were the crucial value at stake, such triage choices would be superfluous.

4. The Trusteeship Function

It seems perfectly plausible to accept that the *telos* of any general, community-based legal services or similar poverty law program is enhancement of power for its constituents. The term "constituents," though, is an ambiguous one. It could refer to those persons who ask ELSI for help. It might instead refer to those persons living within the community who *could* ask for help. More expansively still, it could include the collection of persons within the community who could ask for help *now or in the future*. The latter suggests a commitment to future generations and, if accepted as part of the inherent mandate of a poverty law program, alters the nature of the obligation of the institution.

A moment's reflection shows that only the latter definition can be defended in any rational way. Legal services lawyers assume a commitment to a community of clients in ways not expected of private lawyers.¹⁴⁰ That commitment, which I will call here the "trustee function," includes future generations and not just the poor who might need help today.

138. This fundamental argument has been developed by many, most recently by Richard Abel. See Abel, *Speaking Law to Power*, *supra* note 134, at 93-99.

139. Martin Shapiro, *Access to the Legal System and the Modern Welfare State: American Continuities*, in *Access to Justice and the Welfare State* 273, 292 (M. Cappelletti ed., 1981), *quoted in* Abel, *Legal Aid*, *supra* note 21, at 492 n.91.

140. I have developed this argument, at least preliminarily, elsewhere. See Tremblay, *Community-Based Ethic*, *supra* note 42, at 1129-34.

A lawyer in private practice representing clients for a fee has no such trusteeship duties. An attorney who typically represents insurance companies defending product liability lawsuits ethically could represent a plaintiff in litigation and establish precedent harmful to her prior insurance company clients, as long as she has no current case affected by the ruling and does not exploit secrets of her former insurance clients in doing so.¹⁴¹ She may change the nature of her practice after doing so, as her former client base abandons her, but that is entirely her choice. Her commitment to private practice engenders no duties to further the interests of any group of prospective clients.

A poverty lawyer, by contrast, assumes a distinct duty to further the interests of the community of clients for whom she is the only available lawyer in town.¹⁴² She cannot, as long as she works for the poverty law institution, actively pursue matters which will harm the interests of those remaining constituents. Her commitment to the polity trumps her obligation to any one client in the same fashion as a lawyer's commitment to one private client precludes her from representing another client whose interests conflict with the first.¹⁴³ It is true, of course, that the heterogeneity of interests within a community such as Essex makes this duty not always a clear one, but its complexity or inherent ambiguity does not deny the force of the proposition.¹⁴⁴

The "polity" to whom the poverty law program owes a duty includes, of course, those persons who have not asked for the office's help. The duty, if it is to have any meaning, must extend to all affected poor persons living in the geographical community. There is no rational basis for preferring only those clients who happen to ask for help (or are successful in reaching advocates after the screening process). Indeed, the very idea of forging a duty only to those who have

141. This is basic "positional conflicts" doctrine. See Model Rules of Professional Conduct Rule 1.7 cmt. [9] (1997); Dzienkowski, *supra* note 75, at 460.

142. That duty has been noted by the ABA's ethics committee. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 324 (1970).

143. This is black-letter conflict of interest doctrine. See Model Rules of Professional Conduct Rule 1.7.

144. Let us use an unlikely and exaggerated example to illustrate this point. Poor persons tend to rent rather than own their homes and, therefore, benefit from more generous tenant rights doctrine. It is in the interests of poor communities to have laws and judicial rulings which protect tenants against evictions and guarantee them habitable dwellings. Let us then assume a case in which a legal services client might gain some advantage by arguing that the warranty of habitability violates due process—perhaps the office finds itself representing an elder who has rented space in her home to an abusive tenant. It would be *disloyal* to the organization's remaining clientele for the legal services lawyer in this case to argue the case against the warranty of habitability, even if it would aid in this individual case. For a real example of such a conflict, see Tremblay, *Community-Based Ethic*, *supra* note 42, at 1126 n.91. But see Margulies, *supra* note 74 (developing an argument that such "positional conflicts" may not be as troublesome as I have assumed).

been or are clients is unthinkable, for the then-excluded persons might call tomorrow. The *telos* of the practice can only be coherent if the trustee duty extends to all poor clients.¹⁴⁵

If we accept that broad duty to all members of the community, as we must, then it is similarly arbitrary to limit the beneficiary collectivity to those who are alive today and exclude those who will be born later. Just as there is no rational basis to prefer named clients over unnamed poor persons, there is no justification to privilege present generations over future generations.¹⁴⁶ Much like trustees who owe duties to future beneficiaries, the poverty lawyers must account for the interests of a larger constituency than merely the present clients who might ask for service.

C. *Assessing Telos and Practice Visions: The Role of Speculation and Risk*

The argument thus far has asserted that the proper goal for poverty law practice is empowerment of communities and constituents, and not merely access to courts or lawyers, or meeting the "unmet needs" of the poor. It has also defined the constituents as including not merely today's community members, but tomorrow's as well. If we accept that *telos*, then we might contrast the practice visions and ascertain whether we can identify some insights about which of the competing visions best represents or accomplishes the "internal goods" necessary for this social practice.¹⁴⁷

An initial response seems readily apparent: once we have identified empowerment instead of access as our chosen end, the mobilization vision appears distinctly superior to any of the other three possibilities. The critical lawyering movement thus seems quite right in its suggestions about mobilization and rebelliousness. The work that lawyers engage in with community members ought to privilege the long-term gain over short-term comfort,¹⁴⁸ attend to future generations as much as the immediate demands for help,¹⁴⁹ involve community members in the work as much as possible (downplaying at the same time the expertise and control by the legal staff),¹⁵⁰ and treat

145. See Houseman, *A Commentary*, *supra* note 33, at 1684 (reporting the "first element" of the emerging poverty law movement in the 1970s as "the notion of responsibility to all poor people as a 'client community'").

146. See Luban, *supra* note 42, at 347-51; Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1240-41 (1982).

147. See *supra* notes 129-33 and accompanying text.

148. See Tremblay, *Street-Level Bureaucracy*, *supra* note 64, at 954-55 (calling this "the deferral thesis").

149. But see Feldman, *Political Lessons*, *supra* note 19, at 1535-38 (arguing that Legal Services cases serve identified clients, thereby contributing to an attack on practices that disadvantage a larger number of poor persons).

150. See, e.g., López, *Rebellious Lawyering*, *supra* note 57, at 111-14 (discussing case studies which exemplify the benefit of community involvement); Alfieri, *Antinomies*, *supra* note 120, at 665, 669-71 (same); Lucie E. White, *Mobilization on the Mar-*

mobilization, connection, and organization as more significant goals than winning discrete battles.¹⁵¹ Critical lawyering, importantly, does not preclude individual case work or litigation, even as it downplays both.¹⁵² Some critical lawyering scholars, in fact, see much that can be rebellious in both of those activities.¹⁵³

We seem to have arrived, after this elaborate discursive analysis, exactly where the critical lawyering proponents wish us to be. We might suggest that ELSI depart from the more traditional forms of practice by diminishing the role of individual service and conventional litigation, even the "regnant" forms of law reform litigation,¹⁵⁴ in favor of a more community-organizing and political practice. But, despite the analysis thus far, we cannot yet accept that suggestion for ELSI. We cannot say that the mobilization vision is one that is morally superior than the others. The reason for this doubt relates to the twin concerns of speculativeness and risk.

While the mobilization vision is most committed, in an explicit way, to the goal of engendering power within broad constituencies, it has a profound intrinsic disadvantage: it is enormously speculative.¹⁵⁵ The level of risk involved in mobilization efforts is significantly greater than that involved in any of the other three practice visions. Each of the four practice visions described above, in succession, represents a greater degree of speculativeness and risk. ICR is a relatively low-risk endeavor. The staff of ELSI can predict with a comfortable level of certainty the costs and benefits that might be obtained by asking one lawyer or paralegal to work on one discrete representation matter. For the most part, the benefits of ICR are palpable and immediate.

gins of the Lawsuit: Making Space for Clients to Speak, 16 N.Y.U. Rev. L. & Soc. Change 535, 545-46 (1987-88) [hereinafter White, *Mobilization on the Margins*] (same).

151. See Alfieri, *Antinomies*, *supra* note 120, at 663-65; Gabel & Harris, *supra* note 120, at 370; White, *Mobilization on the Margins*, *supra* note 150, at 537-38.

152. See *supra* notes 116-22 and accompanying text.

153. See Margulies, *Political Lawyering*, *supra* note 100, at 502-12 (applying this theory to domestic violence work); Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 Stan. L. Rev. 213, 225-34 (1993) (reviewing López, *Rebellious Lawyering*, *supra* note 57).

154. See López, *Rebellious Lawyering*, *supra* note 57, at 23-24.

155. Even sympathetic commentators concede this point. See, e.g., Abel, *Legal Aid*, *supra* note 21, at 593 (noting that poor clients "have no labor power to withhold, have been unable to organize politically, and pose no threat to social order"). Houseman states:

The core of this vision—the lawyer as an agent for social change and the program as leading the charge to alter the political economy—rests on a fundamentally flawed view of what is possible to achieve in the courts, agencies, and legislatures. The increasing poverty of many Americans and the widening income gap between rich and poor will not be solved by the activities of legal services lawyers acting through impact or "focused case" representation. Legal services cannot end poverty; nor are the courts going to redistribute wealth.

Houseman, *A Commentary*, *supra* note 33, at 1705 (footnote omitted).

Especially by its triaging methods which employ the principle of legal success,¹⁵⁶ the staff can be confident that its services can lead to some defined, tangible benefit for the chosen client. An eviction can be forestalled and perhaps defeated. Social Security benefits can be won after an administrative hearing. A domestic violence restraining order can be obtained, leading, at least in most cases, to increased security of the woman who fears for her safety.¹⁵⁷

The certainty and immediacy of the ICR vision is directly offset by its short-term quality, its failure to change the political quality of the client's life, and the likelihood that the same individual will return needing the expertise of lawyers for similar assistance in the future.¹⁵⁸ The proceeding two visions, FCR¹⁵⁹ and law reform work,¹⁶⁰ are somewhat more speculative but offer greater rewards. These regnant efforts invite more collective client involvement than ICR tends to do, change the political landscape in a greater way, and decrease the likelihood of repeat client appearances.

At the same time, the staff of ELSI can be less certain that the benefits will be achieved than they are with ICR, and choosing to engage in FCR or law reform work means an explicit choice not to assist some individuals whom the office could help. This is the "tragic view" of poverty law practice.¹⁶¹ When ELSI opts to engage in FCR or law reform work, there are discrete, almost identifiable individuals whose cases will be rejected as a result, and these persons in fact will be evicted, will forego Social Security benefits, will not have domestic violence restraining orders, etc. They will be sacrificed in favor of the

156. See *supra* note 69 and accompanying text.

157. Several commentators have written about the uncertain efficacy of temporary restraining orders. They note that although such orders do provide some protection for victims of domestic violence, they have an inherent enforcement problem. See Andrea Brenneke, *Civil Rights for Battered Women: Axiomatic & Ignored*, 11 Law & Ineq. J. 1, 33-34 (1992); Virginia E. Hench, *When Less Is More—Can Reducing Penalties Reduce Household Violence?*, 19 U. Haw. L. Rev. 37, 44-45 (1997). In addition, although temporary restraining orders enable women to receive police protection, they are relatively ineffective if the batterer is not concerned about the legal consequences of disobeying the order. See Christine A. Picker, *The Intersection of Domestic Violence and Child Abuse: Ethical Considerations and Tort Issues for Attorneys who Represent Battered Women with Abused Children*, 12 St. Louis U. Pub. L. Rev. 69, 75-76 (1993). For a more detailed account of domestic violence law and temporary restraining orders, see Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801 (1993).

158. See Abel, *Legal Aid*, *supra* note 21, at 521-22. Abel points out a further flaw in legal service's affection for ICR: the cases which predominate ICR (especially family matters) "at most effect[] a horizontal or intraclass transfer of resources without altering class differences." *Id.* at 609.

159. See *supra* notes 109-11 and accompanying text.

160. See *supra* notes 112-15 and accompanying text.

161. See Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. Rev. 123, 123 (1992) [hereinafter Tremblay, *Tragic View*].

long-term needs of the community, but with less certainty that those long-term needs will be achieved.

This resulting risk/reward ratio, which incidentally mirrors the same phenomenon as in personal investing,¹⁶² applies to the mobilization vision. If the mobilization advocates are right, political work is far more useful, immediately and in the long run, than ICR, FCR, or law reform. Their arguments imply that the daily skirmishes that engage most legal services lawyers today will tend to be less frequent once power is more equitably distributed. The offsetting consideration, though, is that the likelihood of success is far less certain than with any of the other three visions. Where one can predict the individual victories that ICR achieves, one cannot, in today's political environment, be sanguine about mobilization.

These assessments of risk and speculation cause us to pause before suggesting that ELSI simply accept the mobilization option as its morally preferred practice vision. ELSI, with its trustee duties and commitments to present and future generations, must account for the risk/rewards ratio in its institutional mission. It must find a way to address the needs of its present constituents while not foregoing its *telos* or its commitment to the future.

V. A PROPOSAL FOR THE ESSEX LEGAL SERVICES INSTITUTE

A. *Fiduciary Duty and a Balanced Portfolio*

What if we were to treat ELSI as if it were a fiduciary in the traditional sense, with trustee duties toward competing but not mutually exclusive beneficiaries? That heuristic might suggest a portfolio of practice visions that balance the needs of the here-and-now with those of the future. The trustee analogy suggests that ELSI ought to engage in some combination of the four practice visions as it attends to its differing constituencies.

ELSI's attorneys are, of course, fiduciaries in the direct and ordinary sense for those clients who retain ELSI counsel after the screening process.¹⁶³ Within that agency relationship, the obligations of the lawyer to follow the client's instructions and to serve his best interests

162. See, e.g., Maria O'Brien Hylton, "Socially Responsible" Investing: *Doing Good Versus Doing Well in an Inefficient Market*, 42 Am. U. L. Rev. 1, 13 (1992) (discussing the "risk/return ratio" in investing).

163. See Nathan M. Crystal, *Professional Responsibility: Problems of Practice and the Profession* 2-3 (1996); John T. Noonan, Jr. & Richard W. Painter, *Professional and Personal Responsibilities of the Lawyer* 48-49 (1997). David Luban employs this fundamental aspect of the attorney-client relationship as a baseline with which to contrast the responsibilities of political or activist lawyers, who, Luban argues, sometimes must breach their fiduciary duties to single clients to achieve political ends. See Luban, *supra* note 42, at 324-28. While the present discussion follows much of what Luban advocates in his book, in this instance I am suggesting the fiduciary heuristic as a guiding principle for the relationship between the legal services organization and its constituents.

are plain and uncontroversial.¹⁶⁴ I introduce the fiduciary construct for a different purpose here. Sometimes, a fiduciary owes obligations to several principals, whose interests may not be entirely congruent.¹⁶⁵ A trustee, for instance, may owe duties under a trust instrument to current beneficiaries and remainderpersons.¹⁶⁶ Trustees in this setting are governed by what has come to be known as the "Prudent Investor Act," requiring the trustee to keep the long-term interests of the remainderpersons in mind when investing for the income needs of the current beneficiaries.¹⁶⁷ While common law doctrine accords trustees considerable discretion in striking the balance, a trustee who improperly favors one group of beneficiaries over another violates her fiduciary duty.¹⁶⁸

The fiduciary construct when combined with the risk analysis applied above to the four practice visions permits ELSI to make some reasoned choices about the kind of work that it will choose to do. It cannot, given its responsibilities, engage purely in ICR, even if the demands of its constituent base were such that ICR would fill all available time and use all the resources of the institution (a likely scenario). While ICR does not *waste* the asset in the sense that a remainderperson might complain of a trustee's imprudent investment strategy¹⁶⁹ (for legal resources do not dissipate as a capital asset might), a pure ICR strategy privileges immediate needs over more substantive progress for the larger community.¹⁷⁰ By this reasoning, ELSI must engage in *some* mobilization or similarly political work to meet its more central obligations.

164. See Noonan, Jr. & Painter, *supra* note 163, at 49.

165. See Restatement (Third) of Trusts § 183 (1990) ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.").

166. See *id.* § 232 ("If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.").

167. See John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 Iowa L. Rev. 641, 645-47 (1996).

168. See, e.g., *Jackson v. Truck Drivers' Union Local 42 Health & Welfare Fund*, 933 F. Supp. 1124, 1145 (D. Mass. 1996) (involving a health insurance plan facing a shortfall and stating that the duty of impartiality "prohibits trustees from placing the primary burden of a funding shortfall on a small number of sick beneficiaries").

169. See, e.g., *In re Jane Bradley Uihlein Trust*, 417 N.W.2d 908, 911, 913 (Wis. Ct. App. 1987) (involving remainderpersons who unsuccessfully challenged the trustees' decision "to emphasize the production of ordinary income" through a "change in investment policy [which] altered the percentage of trust assets invested in fixed income from thirty-five percent to seventy percent"); 3A Austin Wakeman Scott & William Franklin Fratcher, *Scott on Trusts* § 232, at 7 (4th ed. 1988) (stating that the trustee may—by the trust instrument—be authorized to purchase property that, because of its wasting character, the trustee would not otherwise be authorized to purchase).

170. See Diller, *supra* note 100, at 1426 ("I agree with the critics that the attainment of political strength provides the best, and perhaps the only, prospect for the lasting and fundamental transformation of poor communities." (citing Stephen Loffredo, *Poverty, Democracy, and Constitutional Law*, 141 U. Pa. L. Rev. 1277, 1323-28 (1993))).

If a pure service vision is not acceptable for these reasons, then a pure "rebellious" vision, which foregoes much present gratification for future gain, breaches the program's "fiduciary" obligations to existing constituents in the same way. The process of coalition-building and political mobilization is speculative, particularly in the 1990s,¹⁷¹ and diverts resources away from what Stephen Ellmann has called "human desperation."¹⁷² As noted earlier, every moment or dollar dedicated to coalition-building and mobilization is one less moment or dollar used for some current legal need, and some client will lose by that choice. The awareness of human desperation compels rejection of a pure mobilization vision.

That argument, though, proves too much. Once ELSI engages in any mobilization at all, it has chosen, consciously and deliberately, to tolerate heightened human desperation, some of which its staff could alleviate through expanded ICR. A stark "human desperation" argument would therefore exclude most mobilization work,¹⁷³ a conclusion which we have already rejected. On the other hand, ELSI's trustee duties impose obligations to existing constituents, which must be balanced against the parallel duties to the health of the larger polity. It seems that the only way for ELSI to accommodate its dual obligation is to insist upon a balance of practice visions as a moral imperative.

ELSI must, by this view, allocate some significant segment of its resources to the alleviation of immediate suffering of current residents. These resources will, most predictably, represent the ICR vision, as lawyers stave off homelessness and paralegals advocate for TANF benefits and SSI awards. Much of this work, though, will include FCR and law reform, as more efficient and productive ways to address the overwhelming and immediate needs. Some of the client service work will also be "rebellious," of course, in the way that the critical lawyering theorists suggest.¹⁷⁴ To the extent that some of the

171. Several commentators have noted the increased difficulty with grass-roots efforts in more conservative times. See, e.g., Abel, *Legal Aid*, *supra* note 21, at 497 (stating that we are far removed from the political era that produced trade unions); Diller, *supra* note 100, at 1418 ("Few contemporary poverty lawyers experience these heady early days of the legal services program.").

172. Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 Colum. L. Rev. 116, 175 (1990) [hereinafter Ellmann, *Lawyering for Justice*] (reviewing David Luban, *Lawyers and Justice: An Ethical Study* (1988)) (arguing that "human desperation" is a more apt term than "urgency" within triage discussions).

173. This follows unless one were to assert the fortuitous argument that a program like ELSI could first attend to existing human desperation and, having addressed the more serious examples of that, then direct its remaining resources to organizing, mobilization, and social change. No commentator has made such an argument, and the experience of legal services programs confirms our skepticism of any such assertion. The fact remains that mobilization is necessary but accepting of desperation. That dilemma is not to be elided.

174. By this I mean that the advocates will, in the course of their service work, stress client participation and responsibility, and emphasize "client voice" in advocacy planning and implementation. See Richard D. Marsico, *Working for Social Change*

rebellious suggestions compromise an efficient campaign to address immediate needs, though, the latter values must hold sway in the service work arena.¹⁷⁵

At the same time, ELSI must accept as a moral imperative the obligation to its *telos* and to future generations and accept this mandate even in the face of tragic human desperation. It must balance its commitment to the alleviation of present needs with a similar commitment to altering the political landscape of the poverty community. These goals do not *conflict* as much as they *compete* for scarce resources.¹⁷⁶ Rather than seeing one vision prevail, it makes much more sense to offer all forms of practice within the administrative structure of ELSI.

B. Division of Labor and "the Rescue Mission"

By integrating its forms of practice in the ways just described, ELSI confronts a substantial risk that present needs will dwarf its commitment to engage in the equally important, and possibly superior, long-

and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?, 1 Clinical L. Rev. 639, 646-50 (1995) (noting tensions in work for social change regarding preservation of client autonomy). See generally Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 Clinical L. Rev. 157 (1994) [hereinafter White, *Collaborative Lawyering*] (describing the "collaborative lawyering" project).

175. Some commentators have noted the compromise between respect for collaboration and the instrumental effectiveness of lawyering strategies. See, e.g., Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 Brook. L. Rev. 889, 891-93 (1995) (noting the recent trend in legal scholarship condemning poverty lawyers for interpreting the client's story into a paradigm dictated by lawyer understanding); Tremblay, *Tragic View*, *supra* note 161, at 134-42 (noting that a commitment to "client voice" can sacrifice instrumental gains for clients, and questioning whether overworked offices ought to accept that sacrifice).

176. I understand the critical lawyering position that conventional litigation undermines collective action. See, e.g., López, *Rebellious Lawyering*, *supra* note 57, at 3 (comparing litigation to other strategies); Alfieri, *Antinomies*, *supra* note 120, at 684-86 ("Poverty lawyers deny the reconciliation of client and community by pressing ahead with individualization until it brings forth routinization."); White, *Mobilization on the Margins*, *supra* note 150, at 542-44 (noting that litigation is an unlikely setting for mobilizing clients because the majority of poor people perceive litigation as an alien setting); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 Wisc. L. Rev. 699, 757 (noting, as a limitation of the litigation-centered approach, that litigants must propose remedies that are coextensive with confined claims resulting in a risk that litigation will co-opt social mobilization). That argument, if true, does not essentially rule out ELSI engaging in both activities simultaneously as part of what I have called the balanced portfolio. The critics accuse conventional lawyering as tending to "negate the poor as an historical class engaged in political struggle, thereby decontextualizing, atomizing, and depoliticizing that struggle," Alfieri, *Antinomies*, *supra* note 120, at 665, but I suspect that these harmful consequences can be minimized if the program which assists poor people in their daily struggles (or at least some of them, some of the time) also is visibly engaged in more overt political work. Only if ELSI were persuaded that the conventional lawyering actively negated the accompanying political work would they be justified in ceasing to "balance" its practice visions as I have described.

term political work. This consequence is apparent for several related reasons. It is reasonable to conjecture that the current poor population in Essex is more interested in regnant solutions to their daily struggles than rebellious ones, by and large.¹⁷⁷ Moreover, lawyers, like most professionals, will tend to succumb to the "rescue mission" in their interactions with those in need.¹⁷⁸ The rescue mission holds that professionals understandably can be distracted and diverted from rationally justified, long-term projects by the intense human impulse to assist those currently in distress. The rescue mission likewise represents a paradox for health care professionals attempting to allocate scarce resources in a defensible and efficient way.¹⁷⁹ Some bioethicists defend the moral force of the rescue mission,¹⁸⁰ but if the analysis above is sound, then any implication from that defense that the rescue mission must trump mobilization concerns is wrong.¹⁸¹ The rescue mission is powerful, but its force is not necessarily one to be respected.

An earlier discussion of the rescue mission suggested an institutional "division of labor" as one precaution against rescue tendencies prevailing within street-level practice.¹⁸² That idea suggests measures that ELSI might implement to meet its trustee responsibilities to both its visible and its less-visible constituents. The division of labor con-

177. See, e.g., Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 Hastings L.J. 971, 987 (1992) (questioning whether poor clients would prefer to use their lawyers' services in the ways suggested by the critical view). Some of the critical view proponents who concede this fact attribute this preference to a form of false consciousness. See, e.g., Simon, *Dark Secret*, *supra* note 120, at 1107-08 (noting that poor people are more likely to have conflicting notions of their interests than the more advantaged groups of society); Simon, *Visions of Practice*, *supra* note 103, at 483-84 (noting that the manner in which the lawyer structured his deposition affected the goals of the client).

178. See Tremblay, *Street-Level Bureaucracy*, *supra* note 64, at 964-65. Carrie Menkel-Meadow reminds us that "cause lawyers" engage in public spirited work because of their "rescue" commitments. See Menkel-Meadow, *The Causes of Cause Lawyering*, *supra* note 134, at 37-42 (comparing cause lawyers to "rescuers" in assessing their motivations).

179. See, e.g., Edmund D. Pellegrino & David C. Thomasma, *A Philosophical Basis of Medical Practice* 243 (1981) (stating that there is an inescapable immediacy about the call for help by a sick person that overshadows remote social needs); James F. Childress, *Priorities in the Allocation of Health Care Resources*, in *Justice and Health Care* 139, 144 (Earl Shelp ed., 1981) (same). The Childress article is discussed in Tremblay, *Street-Level Bureaucracy*, *supra* note 64, at 964-65.

180. See, e.g., Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice* 217 (1970) ("[S]urely it is odd to symbolize our concern for human life by actually doing less than we might to save life."), *quoted in* Tremblay, *Street-Level Bureaucracy*, *supra* note 64, at 965; Lawrence Becker, *The Neglect of Virtue*, 85 *Ethics* 110, 118 (1975) ("[W]e have rationally defensible worries about the sort of moral character represented by people who propose to stand pat and let present victims die for the sake of future possibilities.").

181. See *supra* notes 12-13 and accompanying text.

182. Tremblay, *Street-Level Bureaucracy*, *supra* note 64, at 967-69 (borrowing the phrase "moral division of labor" from Robert M. Veatch, *Justice in Health Care: The Contribution of Edmund Pellegrino*, 15 *J. Med. & Phil.* 269, 274 (1990)).

cept directs that staff who are responding to current needs have diminished accountability for mobilization work. Conversely, the structure would insulate the community-development staff from the daily influx of prospective clients and their stories of injustice, violence, and desperation.

A compartmentalized ELSI benefits from firm and centralized institutional structures. A program committed to resisting the natural propensity for random service activity must find ways to insulate those who perform the professional work from those who hear the stories off the streets, and to ensure that an appropriate segment of the program's resources is dedicated to the long view, regardless of the level of immediate demand.¹⁸³

A brief example demonstrates the need for the interoffice divisions. Here is the setting: one of ELSI's intake workers, Monica Mendoza, has just completed a meeting with a woman, Josephine Damon, who came to ELSI in great distress, seeking legal assistance. Josephine has lived with a man, Louis Hamilton, for the past six years. The couple has a three year old daughter, Aleah. Louis has a drug and alcohol problem which has worsened in recent months after he was laid off from his job. Last night Louis brutally beat Josephine with his fists, left the house in a rage, taking Aleah with him. Josephine suspects that Louis has gone to his parents' home in a neighboring state. She beseeches the intake worker for some legal help in returning Aleah to her, by obtaining a custody order to keep Louis from taking Aleah again and a restraining order to keep Louis away from her and from abusing her any further.

Monica, the intake worker, cannot make intake decisions herself. The staff makes all such decisions. ELSI has established that protocol to ease the pressure on Monica, as she herself can easily succumb to the rescue mission. ELSI also correctly believes that since Monica must turn away at least two-thirds of all requests for service, she ought to have some other persons to "blame" as she gives the bad news to the clients. Instead of having to say to a prospective client "I have decided to turn you down," Monica can now say "the staff has informed me that" ¹⁸⁴

183. I assume that most, if not all, successful corporate structures choose a similar allocation of resources, with some employees dedicated to immediate development and sales of the goods the company produces and others permitted to engage in research and development efforts aimed at developing new or improved products. The R&D investment is more uncertain and less immediate in its return, but essential to the long-term success of the corporation.

184. Alan Houseman has denounced "case review systems and intake procedures . . . creat[ing] barriers" between advocates and "clients who need immediate advice, assistance, or referral." Houseman, *A Commentary*, *supra* note 33, at 1694. If his criticism, whose reasoning is not entirely clear, rests upon a concern that programs tend to be too insulated from the experiences of their constituents, then it has obvious merit. If it rests upon a suggestion that advocates participate more directly in the

Monica brings the intake sheet summarizing Josephine's matter to the staff's intake meeting. It is a compelling case by intake standards. The health and safety of Josephine and Aleah are at risk, and because of the interstate factor and the lack of any outstanding custody orders, it will be hard for Josephine to navigate the court system without the help of a lawyer.¹⁸⁵ Today, though, the ICR unit is full. There are no lawyers with any free time to take this new case. All of the unit's attorneys have more-than-acceptably full dockets. At the same time, ELSI has assigned two of its lawyers to work on community organization and client mobilization work. These two attorneys are extremely busy and their charges quite daunting, but their work is, realistically, less deadline-driven. With its focus on grass-roots organizing, careful planning for selected litigation and legislative advocacy, and canvassing Essex's poor population, this unit tends not to be subject to the non-negotiable demands of the litigators in the ICR unit.

Under ELSI's division of labor scheme, Monica cannot ask the community-organizing staff to help Josephine. Instead, Monica must report back to Josephine that she must go without counsel, even if that means that her daughter is gone indefinitely, or even permanently.¹⁸⁶ Under the division of labor principle, Monica cannot make the following plea:

Listen, folks, I understand that Jane, Jared, and Chris have overflowing dockets, and they have judges demanding briefs and depositions coming up and so on and so forth. I see them working too many hours as it is, so I know they can't take this one more case.

screening or intake process, then it runs counter to the rescue mission concerns expressed here.

185. For an extended discussion of the disadvantages suffered by litigants who appear in court without a lawyer, see Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 Cal. L. Rev. 79 (1997). A recent Boston Bar Association Task Force on Unrepresented Litigants has investigated the depth of the pro se problem in that state; their findings, just recently released, confirm one's worst expectations. See Kelly M. Fitzsimmons, *BBA Unveils Report on Pro Se Litigants*, Mass. Law. Wkly., Aug. 24, 1998, at 2 (finding the problem most acute in family and housing courts).

186. It is critical to acknowledge and accept that Josephine will likely suffer serious harm by this choice. We hope, and perhaps rationalize, that Josephine might find a pro bono lawyer to take her case; or that, in light of her emergency, the clerks at the Family Court will assist her in a productive way to obtain relief pro se; or that a lay advocate will assist her in a way reasonably equivalent to the way that ELSI's lawyers would. Cf. Engler, *supra* note 18 (proposing measures by which pro se litigants might obtain meaningful advice from court clerks and others). These hopes are fictions. They are illusions. If they were true, then the tragedy of "unmet needs" would be an overstatement, and a good network of information and referral would be expected to cover all of the truly needy clients turned away from the legal services organizations. Sadly, no such network exists; poor clients suffer without lawyers.

Although it is perhaps true in this individual case, we also cannot take too much solace in the fact that Josephine's crisis can wait a few weeks until one of the ICR lawyers has some free time. To do so would mask the fact that on each and every day the pool of human desperation will exceed the resources of ELSI's ICR staff, and some clients will be turned away irrevocably.

But I really feel for Josephine and Aleah. I worry that Josephine, or even Aleah, might be hurt by Louis if we don't act quickly. I know that Elena and Byron have been working on the grass-roots project, and they are also working far too hard. But can I ask whether they have the same kinds of externally-imposed deadlines that the ICR folks have? It seems to me that they don't, and I'm just asking for one lawyer to take this one case to save a great woman and her baby. It might set their campaign back a month or so, but it's a several-year project, as I understand it. Can I at least *ask* Elena or Byron for this favor?

The answer to Monica must be no, because Josephine's case, as tragic as it is, is not necessarily exceptional within the legal services experience. Permitting Monica's plea means surrendering to the rescue impulse, and ELSI cannot accomplish its purposes if it attends too closely to the human desperation.¹⁸⁷ Like Steven Wexler's evocative, and provocative, tale of the welfare rights organizer who refused to tell a parent about available aid for her disabled child,¹⁸⁸ sometimes the cause requires conduct that otherwise would make one cringe.

C. *The Ethics of Abandonment*

The division of labor principle precludes Monica from lobbying Elena or Byron to postpone some organizational work to assist an immediate crisis. Monica may wish to take a different tack, however, one that accepts the limits and tragedy of the division of labor scheme. How ought ELSI respond to the following new plea from its intake worker?

OK, let me try a different approach here, for I would love to find a way not to say no to Josephine this afternoon. Here's my idea.

187. In this respect I disagree with Stephen Ellmann's argument in response to David Luban. See Ellmann, *Lawyering for Justice*, *supra* note 172, at 174-76. Luban defended a public interest project's FCR decision to work only on public housing matters, excluding all other pleas, however needy. See Luban, *supra* note 42, at 307-08 (using an example first developed by Gary Bellow and Jeanne Kettleson, see Bellow & Kettleson, *supra* note 19, at 343-45). Ellmann argues that "case selection rules 'should not close off the client/applicant's right to plead the special circumstances of his or her case.'" Ellmann, *Lawyering for Justice*, *supra* note 172, at 176 n.128 (quoting Failing & May, *supra* note 42, at 46). Both in my defense of case categories, see *supra* Part III, and in this defense of the division of labor, I rule out such individual pleas as unacceptable capitulation to the rescue tendencies.

188. See Wexler, *supra* note 120, at 1054. Wexler relates the anecdote as follows:

I once found a recipient who worked hard at organizing, and was particularly good in the initial stages of getting to talk to new people. I picked her up at her apartment one morning to go out knocking on doors. While I was there, I saw her child, and I noticed that he seemed to be retarded. Because the boy was too young for school and the family never saw a doctor, the mother had never found out that something was seriously wrong with her son. I didn't tell her. If I had, she would have stopped working at welfare organizing to rush around looking for help for her son. I had some personal problems about doing that, but I'm an organizer, not a social worker.

Id.

Look at Jared's caseload. He has told us about that eviction matter which is scheduled for trial next Thursday. His client's landlord has offered a generous cash settlement, and has even dropped the possession claim, but Mrs. Gusterson wants to take her case to the judge. Jared feels frustrated by Mrs. Gusterson's persistence in wishing to litigate the case, but he respects her right to do so—the landlord is not offering *everything* that Mrs. Gusterson might ultimately get at trial, even if it is more than she is likely to see from the judge—and he is therefore preparing for trial.

My suggestion is that Jared withdraw from Mrs. G's case and work instead for Josephine. Think about it—we do *triage* here. Mrs. G's case was critically important when it came in, but by now it is the kind of case that we would turn down if she asked for our help today. (The landlord's concession on possession makes the big difference.) So if we would triage it out if it were a new request, why can't we do so now? Would anyone here argue that Mrs. G's case is more critical than Josephine's? The worst that would happen, it seems to me, is that Mrs. G would wilt and accept the landlord's offer, rather than go to trial *pro se*, and that's not a bad day's work for Jared. Then he's free to work for Josephine.

There is a response to Monica's new plea, is there not? It is an obvious, but not an entirely satisfactory, one. Jared's beginning a relationship with Mrs. Gusterson has irrevocably altered her place in the world of triage. Once ELSI accepts her case, she is no longer subject to the triage process, and ELSI is committed to stay with her case until a proper end to the relationship occurs.¹⁸⁹

There are two perspectives by which to assess Monica's abandonment suggestion. The first is that of the conventional "law of lawyering." The second is more fundamentally ethical. Let us address each briefly.

The law of lawyering seems to bar Jared from acceding to Monica's powerful appeal. Jared may cease representation of Mrs. Gusterson only if she permits the relationship to end, or if Jared encounters some basis covered under Model Rule 1.16 that permits or requires with-

189. This example serves to explain at least one of the reasons why, as many have noted, "legal aid lawyers settle most matters." Abel, *Legal Aid*, *supra* note 21, at 584; see also Bellow, *supra* note 71, at 108 (noting that the vast majority of legal aid cases result in settlement); Feldman, *Political Lessons*, *supra* note 19, at 1532-33 (providing a critical analysis of work done by legal aid attorneys). As Monica describes the experience within ELSI, Jared is no doubt enduring enormous pressure to settle Mrs. Gusterson's case. That pressure will surely affect his interactions with her as he counsels her about trial possibilities. Most counseling ethics sources would plainly chastise Jared if he accedes to those pressures. See, e.g., Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 Geo. L.J. 2665, 2697 (1993) ("In some settings, such as poverty law practice, lawyers' power may be very substantial, resting on the clients' tremendous need for legal services and perhaps buttressed by cultural patterns of race or class."); Simon, *Dark Secret*, *supra* note 120, at 1101-02 (acknowledging that lawyers always influence poor clients). I argue below that Jared's triage and trustee responsibilities may make such pressure justified in this setting.

drawal from representation.¹⁹⁰ Because his client's opting to try a case rather than settle it is not frivolous or unlawful one,¹⁹¹ the choice is entirely hers, and a threat to withdraw if she exercises a certain choice would plainly be deemed oppressive and inappropriate.¹⁹²

On the other hand, the law of lawyering might offer possibilities to ELSI to alter its agreement with clients in the future to permit actions like that suggested by Monica. If some alteration of ELSI's retainer policy would permit the abandonment tactic as a matter of professional responsibility, then we would need to inquire about the ethical propriety of abandoning clients in a more fundamental, moral sense.

Neither the policy changes nor the ethical assessment of the practice can receive the attention here that this question deserves,¹⁹³ but one can conceive of a protocol which contemplates and, on occasion, effects abandonment and which withstands critique from either law or morality. The professional responsibility objection must be addressed first, for ELSI's lawyers presumably do not wish to engage in conduct amounting to malpractice or professional malfeasance.¹⁹⁴ A protocol could escape professional censure only if it included clear notice and advance consent by a client, so that any client disadvantaged by a tragic decision to shift resources would have had notice of that possibility.¹⁹⁵ The resource shift could be limited to cases of extreme emergency; in fact, the ABA's ethics committee has sanctioned resource shifting when a program faces major funding cuts.¹⁹⁶

190. See Model Rules of Professional Conduct Rule 1.16 (1998).

191. Recall, Mrs. Gusterson might obtain more from the trial than her landlord has offered in settlement, even if that prospect is unlikely. Well-established counseling doctrine posits that a lawyer has no right to override a client's choices among several viable options, even if the lawyer would choose a more conservative one. See David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* 284-85, 356-57 (1991); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. Pa. L. Rev. 41, 50 (1979). See generally Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. Rev. 697, 701-07 (1992) (reviewing client counseling in the decision-making process).

192. See Model Rules of Professional Conduct Rule 1.2 (noting that decisions regarding settlement are always for the client).

193. I have once before raised this issue without exploring it in depth. See Tremblay, *Community-Based Ethic*, *supra* note 42, at 1153-55.

194. See *id.* at 1153 n.179 (noting potential malpractice liability for lawyers who withdraw from representation without good cause).

195. Compare the suggestion that legal services attorneys include provisions in retainer agreements to prevent clients from waiving attorneys fees in light of *Evans v. Jeff D.*, 475 U.S. 717, 742-43 (1986) (holding that the Civil Rights Attorney's Fees Act does not preclude judicial enforcement of a settlement requiring a plaintiff's lawyer to waive attorney's fees). See *id.* at 758-66 (Brennan, J., dissenting) (suggesting such provisions and opining that their validity would be a matter of local law). For one ethics opinion supporting such provisions within legal services retainers, see Committee on Prof'l Responsibility and Conduct, State Bar of Cal., Formal Op. 1994-136 (1994).

196. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347, at 142 (1981) (noting the acceptance of extreme emergency cases proper "even if existing clients with less urgent problems could possibly suffer as a consequence").

From the perspective of triage ethics, abandonment has fared poorly as a possible response to crises. In his classic work on the ethics of triage, Gerald Winslow disapproves of shifting resources from within one relationship to a new client/patient.¹⁹⁷ Describing a Philippa Foot story of a physician who promised to give one patient a large dose of a scarce drug and who instead treats five others with the same dosage,¹⁹⁸ Winslow argues that even the collective benefit gained by the resource shift cannot justify the betrayal of trust to the first patient.¹⁹⁹ His arguments about life-saving treatment, though, may not perfectly analogize to the legal services setting. We can imagine two relevant differences between the Foot example and Monica's appeal presented after an appropriate retainer protocol. First, with the protocol in place, the "solemn promise" argument has far less force, for the initial agreement to offer services will have warned the client of this unlikely-but-possible desertion. Second, Monica's appeal chose a case where the original goal of the first client's representation was essentially, albeit not fully, achieved.²⁰⁰ A casuist²⁰¹ would point out that there may be certain circumstances where shifting resources is justified, all things considered, even if by and large it ought to be avoided. The casuist would eschew a firm ban on the resource shift and instead decide in cases of extreme crisis whether the duties owed to the first client outweigh the benefits of helping a new client.²⁰²

197. See Winslow, *supra* note 42, at 75-76. I should note that Winslow's objections are grounded in his understanding of *legal obligation* and thus may be less persuasive. He relies on two familiar authors for his conclusion that the objection to abandonment is "well-established." He first follows Charles Fried in the belief that a triage resource-shifter is "like one who has broken a solemn promise. Faith has been broken." *Id.* at 75 (citing Fried, *supra* note 42, at 244). He also relies on a book by Neil Chayet, now famous in the world of AM radio. See *id.* (citing Neil L. Chayet, *Legal Implications of Emergency Care* 177-95 (1969) (describing abandonment as a breach of a physician's duties)).

198. See Winslow, *supra* note 42, at 75 (citing Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 *Oxford Rev.* 9 (1967)).

199. See *id.* Winslow, who is nothing if not fair in his text's coverage of all spectrums of opinion on the triage debate, offers no examples of philosophers or ethicists supportive of abandonment as justified by efficiency.

200. See *supra* Part V.B-C.

201. See *supra* note 59 and accompanying text (discussing casuistry as a form of ethical assessment).

202. Whatever the merits of formal, nonconsensual desertion of one client in favor of another, ELSI always retains the discretion to talk to affected low-priority clients to ask whether they might agree to forego services in favor of a more needy client in crisis. The staff just may be surprised at the willingness of some clients to help others in greater need. Cf. Menkel-Meadow, *The Causes of Cause Lawyering*, *supra* note 134, at 37-42 (implying that altruism is a more powerful motivation than typically assumed); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 *Notre Dame L. Rev.* 231, 244 (1979) (noting that lawyers frequently underestimate clients' concerns for fairness).

VI. WHO DECIDES

The discussion up to now has sought to identify principles, structures, and protocols that might aid in a reasoned, deliberative allocation of resources among poor people. That discussion has covered the "how" of triage. While those "how" notions are critically important, the "who decides" question is equally significant. Even the best principles, structures, and protocols will not eliminate the need for some exercise of discretion and judgment in doing triage. As the bioethicist Leon Kass has put it, "the question of how to distribute [scarce resources] often gets reduced to who shall decide how to distribute."²⁰³

The "who decides" question, not surprisingly, is a contested one. The critical view tends to support a client or community based process; one that values democracy and capitalizes on the wisdom of the neighborhoods.²⁰⁴ It is very hard to argue against a pluralist, democratic, antipaternal, participatory scheme. Despite that sentiment, the possibility of meaningful democracy within the legal services setting is unlikely. Borrowing from David Luban's trenchant analysis of this question,²⁰⁵ I conclude that ultimate discretion will and should be exercised by the ELSI staff who are informed, of course, by the voices of its constituencies.

The list of possible answers to the "who decides" question is a finite one. Here are the choices:

1. The advocates in ELSI;
2. The staff of ELSI, including advocates;
3. Eligible clients of ELSI, as they exist now;
4. All potential clients of ELSI who live in Essex, including current clients;
5. Representatives of constituent groups within Essex; or
6. The entire population of Essex.

Of course, combinations of these groups might somehow work as well, but let us assess the relative weight we ought to assign to each group on the list.²⁰⁶

203. Leon R. Kass, *The New Biology: What Price Relieving Man's Estate?*, 174 *Science* 779, 782 (1971), *quoted in* Winslow, *supra* note 42, at 62.

204. See Ellmann, *Lawyering for Justice*, *supra* note 172, at 186-87 (stressing the importance of democratic values); Feldman, *Political Lessons*, *supra* note 19, at 1543-45 (criticizing lip service to participation from the client community); Houseman, *A Commentary*, *supra* note 33, at 1687 ("Nor have program officials been willing to let the groups they represent decide how to allocate legal services resources."). The "client voice" strand of critical lawyering is also generally supportive of much more meaningful participation by clients in the work that progressive lawyers do. For a summary of that scholarship, see Kilwein, *supra* note 7, at 186 (comparing the views of Alfieri, Bachmann, López, and White).

205. See Luban, *supra* note 42, at 341-57.

206. My list here omits what may seem a most obvious candidate for the decision-making at issue: the Board of Directors of the legal services organization. Indeed, under LSC regulations it is the governing Board that must oversee priority-setting for

The first thing we must recognize is that, regardless of the ethical or ideological commitments we uncover as we answer the "who decides" question, the actual day-to-day choices about individual client access will *always* be made by some combination of ELSI staff or advocates.²⁰⁷ More accurately, the true "who decides" question is about the broader priorities and practice vision allocation. That realization does not undermine this question, though, for as recent experience with LSC evidences all too powerfully, the broader limitations on case type and client access can have profound influence on *which* individuals are served.²⁰⁸

It seems fair to conclude that the choice of "who decides" will depend on who can best accomplish the purpose of the priority setting. The "deciders," as we may call these persons, will need to be able to evaluate the legal needs of the population, to assess their relative importance as well as any multiplier effects or collective implications, and to be sufficiently independent of judgment to perform the trustee role necessary to avoid favoring certain interests over others. No one group on the above list can easily offer these qualities, but the right collaboration among these groups could perhaps do so. Ultimately, though, if an arbiter is needed to broker differing concerns from differing constituencies, then that role seems best assigned to the office staff. The following discussion shows why this is so.

It may be tempting to consider one of the two client-based options (#3 or #4), but neither of those choices can be defended, and not only because of the complicated logistical difficulties. The "existing clients" group (#3) does not seem adequately representative. Not only have the group's cases been selected already as meritorious (a distorting quality), but each of those clients is also likely to identify her

the organization. See 45 C.F.R. § 1620.3 (1996) ("The governing Board of a recipient [of LSC funds] must adopt procedures for establishing priorities for the use of all its . . . resources . . ."). The omission is intentional. It is common understanding among legal services advocates that a board of directors relies heavily upon the input of the staff in its choices of priorities. Even if that empirical conclusion were questioned, though, it is unlikely that a board would possess independent credibility separate from one of the constituencies listed in the text by which to develop priorities. Even a good faith activist board will rely upon one, or perhaps a combination, of the six groups listed in the text in choosing or developing priorities.

207. One *might* consider a screening committee comprised of consultants from community groups to choose ELSI's clients on a case-by-case basis, but that suggestion seems implausible.

208. See Houseman, *LSC Restrictions*, *supra* note 35, at 291-95. One might suggest that the *funding source* will ultimately, and actually, decide these broader priority questions, making the present inquiry a moot one in many instances. That very well may be true in some selected contexts, but it is not such a prevalent characteristic of poverty law practice to make the question of "who decides" a merely academic one. Even those offices which survive a number of focused grants must decide how to allocate resources within the confines of the focused work. For a further discussion of the distortion caused by funding mandates, see *infra* notes 215-22 and accompanying text.

or his problem as a priority for the office. This is certainly not a weakness or flaw in judgment on the part of those persons, but it is not the most reliable barometer of the needs of the population or their relative intensity.

The use of the entire potential client population (#4) seems superior in that regard, for the distortion and interest-driven factors just described would tend to be more diffused and minimized. That group offers a broader perspective in two ways: less distortion of the legal needs and a larger pool from which to gain input. That relative advantage notwithstanding, I suspect that most observers would reject the following proposition:

Client selection criteria will be determined by a vote of all individuals living in the catchment area with incomes below 125% of the poverty level.

Two considerations compel rejection of this proposal: one grounded in logistics, and a second resulting from the trustee mission. The logistics obstacle is so readily apparent that no commentator has ever suggested a direct plebiscite.

As Luban has shown, though, the objection is not based solely on the difficulty in getting people to vote, or learning the results. Even if we could know, using some amazing new technology, the preferences of all of the low-income residents of Essex, we could not advise ELSI that its discretion is bounded by that collective opinion. Consistent with the triage principle discussed above that disallowed a privilege for popular demand,²⁰⁹ ELSI should not allocate its resources on a macro level on that basis.

Were it not for the trustee duty, we might come to a different answer. Luban argues that the "own mistakes" principle might apply, permitting clients to allocate their goods in any way they choose once they understand the risks and benefits of the choices.²¹⁰ Even then, however, the values of "representative democracy" might lead ELSI to care for a minority of the population over the express wishes of the greater number.²¹¹ ELSI must represent not only a large and difficult-to-poll class, but one with potential intergenerational conflict. In that case the argument that ELSI must cede decisionmaking to present residents is hard, if not impossible, to square with ELSI's fiduciary duty.

The reluctance to endorse community-controlled triage is not dependent on an empirical conclusion that the present generation would

209. See *supra* notes 95-96 and accompanying text.

210. Luban, *supra* note 42, at 344-47.

211. See *id.* at 351-54. Luban reminds us that the "own-mistakes" principle works best with direct delegation by a small group of principals. In larger contexts direct delegation is replaced by "interest representation." There, the value on which the "own-mistakes" principle rests (that people can choose to relinquish benefits if they so choose) cannot easily be applied. See *id.*

always favor present interests and thus privilege the short view.²¹² It rests instead on the realization that only ELSI can determine whether any stated wishes express the proper fiduciary responsibility. If the constituent opinion expresses, in ELSI's view, an appropriate concern for "those needs which have the greatest effect on the whole client population,"²¹³ then ELSI is obligated to support that expressed sentiment, and will do so. But if ELSI, in its exercise of discretion and judgment, disagrees with the popular sentiment, then it must demur. It is peculiar to suggest that ELSI do anything else. As David Luban puts it,

It is not that those theories [supporting representative decisionmaking] have any special claim to credibility. The point is rather that the lawyers must make a decision that cannot be deferred to someone else. In such circumstances, it would be completely perverse for them to choose to pursue any goal, any world, except the one they regard as the best one.²¹⁴

If ELSI cannot defer its fiduciary responsibility to its constituent class as a whole, it also cannot delegate its responsibility to community groups in any formal way. Groups may serve as a critical proxy for constituent sentiment, and are therefore invaluable to ELSI as it discerns community needs and interests. But groups are never entirely representative and may suffer from their own distortions.

This discussion leads to the ineluctable conclusion that the preferable choice for deciding both macroallocation and microallocation matters remains with the staff of ELSI.²¹⁵ ELSI cannot perform this mission responsibly unless it thoroughly understands the needs, values, and demands of its constituent groups or individual members of the poor in the city. This conclusion is thus not dismissive of the persistent criticism that legal services offices are terribly isolated from their communities. If that is in fact true, then those offices are delinquent in their responsibilities as trustees and fiduciaries.

VII. THE MONEY-CHASE DISTORTIONS

Up to now we have assumed an important premise: that ELSI has unfettered discretion, within the broad umbrella of performing advocacy work for its disadvantaged constituencies, in its use of its available funding. That assumption permitted a "nearly-best-world" view

212. See Letter from Lonnie A. Powers, Executive Director, Massachusetts Legal Assistance Corporation, to author (June 19, 1998) (on file with author) (noting that studies of client choices in the priority-setting context show that "[c]lients have on the whole tended to differentiate between their own needs and those needs which have the greatest effect on the whole client population.").

213. *Id.*

214. Luban, *supra* note 42, at 353.

215. For apparent reasons, the staff as a whole ought to be preferred to the advocates at ELSI, who presumably have more narrow professional interests than the broader staff membership.

and from there a cleaner understanding of the ethical interests at stake.

It is an understatement to acknowledge that most legal services programs will not satisfy that premise. Programs providing advocacy services to the poor will never have enough money, and the funds they do have will come from sources that will have imposed some constraints on their use. This reality runs the risk of making all of the preceding inquiry superfluous or moot. The answer to how one "does triage" might simply be that one does it in the way that the grantmakers require.

Of course, that reply is not correct. Programs will still choose among pools of prospective clients regardless of their priority schemes or areas of concentration. The triage assessment will still be needed. But the funding restrictions raise one distinct question which deserves our attention here: whether there would ever be a reason for a program to refuse more money, even if restricted in its purposes. In other words, in the world of scarce advocacy resources, is more money always better than less?

The response to that question turns on the ripple effect of the new funding on the remainder of the office's operations. We might describe the answer through a formula: If the new funding permits the institution to perform as much of its priority work as it did in the past, the funding is justified; but if the level of priority work is reduced by virtue the new funding (even if total service is increased), the wisdom of the new grant is doubtful.

Consider the following uncontroversial example: let us assume ELSI is engaged in an appropriate combination of activity, triaging at the ICR level while separately working to organize local neighborhoods and to develop long-range campaigns involving housing development and improvement of welfare office practices. Many clients are turned away each day because the program's overall funding is inadequate, but ELSI is comfortable with the allocation of its capital. The state legislature then appropriates funds for domestic violence advocacy (perhaps in response to lobbying done in part through ELSI). ELSI is invited to apply for a Battered Women's Legal Assistance Project ("BWLAP") grant to supplement its existing funding.²¹⁶

If the new BWLAP funding simply added resources to ELSI's inventory and either augmented the ongoing domestic violence work or permitted ELSI to shift some money from domestic violence work to, for example, welfare cases, then it is easy to say that seeking the funds presents no conflict for ELSI. With the facts hypothesized in this way, we see how the "more money" choice can be an extraordinarily easy one.

216. The Massachusetts legislature enacted this kind of legislation in 1993. See John D. Welch, *Beyond 209A: Long-Term Security*, Mass. Law. Wkly., Feb. 20, 1995, at 11.

Of course, the preceding example is not the one that would trouble ELSI's administrators. Two variations will demonstrate more uncomfortable dilemmas. Consider a second example. We begin with the same starting place, with ELSI doing an appropriate package of work in Essex, but not nearly enough to meet the need. The program then learns that a Title III-B Older Americans Act grant has opened for competition.²¹⁷ The grant would provide \$100,000 to ELSI, but require that the organization perform much work which it does not now perform, including advice and referral to all seniors living within Essex, regardless of income.²¹⁸ The new funding would cover about two-thirds of the cost of administering the program, and the mix of cases accepted by ELSI would change as more elder law matters arrived. Some staff now engaged in other work would have to switch to elder work, but ELSI would have new staff funded by the Title III-B grant. The total advocacy budget of ELSI will have increased significantly, but the mix of work will be altered in a noticeable way.

Before we discuss the conflicts suggested by the elder grant opportunity, let us put forth a third example, the second one with discomfiting ramifications. In this example (contrary to the original description at the beginning of this Article),²¹⁹ ELSI is a recipient of Legal Services Corporation funding. The year is 1996. New legislation has just been passed in Congress adding more stringent restrictions on the use of LSC funding.²²⁰ Most worrisome are two new restrictions accompanying any receipt of LSC funds: one that taints all other funding within ELSI if any LSC money is received;²²¹ a second that eliminates ELSI's right to claim or receive attorney's fees in appropriate successful cases.²²² Continuing as an LSC recipient will require ELSI to discontinue much of its legislative advocacy, its repre-

217. See Older Americans Act of 1965, Pub. L. No. 89-73, § 301, 79 Stat. 218, 220-21 (1965) (current version at 42 U.S.C. § 3021-3030r (1994)).

218. Recipients of OAA funds are barred from employing strict income guidelines in its choice of clients to serve. See 45 C.F.R. § 1321.71(d) (1997). The OAA requires recipients instead to target those with the greatest social and economic need. See 42 U.S.C. § 3002(29)-(30) (1994).

219. See *supra* notes 33-37 and accompanying text.

220. See Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA), Pub. L. No. 104-134, 110 Stat. 1321, 1321-22 (1996).

221. See Pub. L. No. 105-119, 111 Stat. 2440, 2510 (1997) (amending Pub. L. No. 104-134 § 504(a), 110 Stat. 1321, 1321-53 (1996)). Under prior versions of the LSC statutes, only the federal LSC funds were subject to the Congressional restrictions. See Houseman, *LSC Restrictions supra* note 35, at 294.

222. See Pub. L. No. 105-119 § 502(a), 111 Stat. 2440, 2510 (1997) (amending Pub. L. No. 104-134 § 504(a)(13), 110 Stat. 1321, 1321-55 (1996)). Under federal and state fee-shifting statutes, prevailing parties may collect fees from the opposing side in litigation. See, e.g., 42 U.S.C. § 1988(b) (1994) (civil rights actions). Even though legal services attorneys do not charge their clients fees, courts have construed the fee-shifting statutes to permit those lawyers to recover fees just as in the private arena. See *Shadis v. Beal*, 685 F.2d 824, 830 (3d Cir. 1982); *Copeland v. Marshall*, 641 F.2d 880, 898-900 (D.C. Cir. 1980) (en banc).

sensation of undocumented immigrants, its litigation against the welfare department, and will affect its tenant advocacy by stripping ELSI lawyers of the right to claim attorney's fees from law-breaking landlords. At the same time, the LSC funds will provide ELSI with the opportunity to continue a massive amount of ICR and some FCR and law reform for its citizen clients.²²³

These two latter examples offer a preliminary if unambiguous answer to the question posed above. More money is *not* always better than less money, even when resources are scarce. In deciding whether to apply for and then accept the Title III-B funds, ELSI must assess the effect of the distortion in its case mix caused by the new responsibility entailed by the grant. The critical question for ELSI is whether its pool of priority cases will have been diluted. From the description we have, that may or may not be the case.²²⁴ If the dilution results, it is difficult to justify accepting the new grant, even if (as is likely) the representation of near-priority cases increased significantly.²²⁵

The LSC example invites a similar analysis. If the choice ELSI faces is to stop its work or to continue with the LSC restrictions, then the answer is an easy one. If, like the elder grant example, accepting the LSC money means a dilution of priority work when compared to rejecting the federal money (although this seems unlikely), then ELSI is hard pressed to defend accepting the funds. The most plausible solution, and the one arrived at in most communities, is to create separate service institutions, one that can receive the LSC money and engage in only the "allowed" work, and another to operate with unrestricted funds, and both serving the population of Essex.²²⁶

223. For a discussion of the new restrictions, see Alan W. Houseman, *Legal Representation and Advocacy Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 31 Clearinghouse Rev. 932 (1997). For a review of the constitutionality of the restrictions, see Benjamin L. Liebman, *Recent Legislation: Constitutional Law—Congress Imposes New Restrictions on Use of Funds by the Legal Services Corporation*, 110 Harv. L. Rev. 1346, 1347-51 (1997).

224. ELSI would have to crunch numbers to assess whether its mission to address the more needy has been affected negatively. The elder grant scheme calls for ELSI to shift casehandlers from, say, ICR to the elder unit, which implies fewer ICR cases than ELSI thought appropriate before. But if the ICR staff represented elders before (an almost certain assumption), those matters will now be served by the elder unit, freeing up ICR staff to handle more younger clients than before, with no loss in the elder priority cases. The elder grant in this way may be a win-win proposition.

225. This choice by ELSI recalls the "innumerate ethics" debate that introduced the triage discussion above. See *supra* notes 39-62 and accompanying text. The dilution scenario means that staff will represent fewer priority cases but many more non-priority cases. (The new grant funds ensure, we can assume, that the total client numbers will increase). The philosophers might suggest a hypothetical in which a physician can give life-saving doses of a drug to five persons, or cure migraine headaches for twenty. The triage principles developed above seem to favor saving the lives of few over relieving headaches for many.

226. This has become the norm in many jurisdictions since Congress imposed more burdensome restrictions on LSC funding. See Houseman, 21st Century, *supra* note 23, at 13-14.

CONCLUSION

The past decade has seen a significant amount of commentary about the work that poverty lawyers do. This commentary has usually been critical and, at times, unkindly so. Despite this abundance of scrutiny, we still do not comprehend well enough how to make sense, politically and ethically, of the landscape of legal services. This effort joins the collection of advice and critique and adds, I hope, at least incrementally to the necessary understanding.

I have tried here to treat triage in a rational, ends-focused fashion. I have suggested a number of principles that should apply, and some which should not, when an office chooses among large numbers of discrete cases. I have also proposed that legal services programs not merely process those large numbers of discrete cases, but combine service work with other visions, most importantly that of mobilization. I argue that the mobilization effort is necessary even when it means clear harm to identifiable persons, and I have suggested institutional division of labor to permit making that tragic but essential trade-off.

I finally have concluded, reluctantly but confidently, that legal services staff members, as fiduciaries for a broad constituency, must exercise their trustee discretion directly. They cannot delegate or defer that responsibility to their constituents or stakeholder groups within the community.

If I am wrong in my conclusions, it is likely because my underlying premises, those about psychology, political forecast, and group dynamics, are incorrect. Those premises are, in any event, contested. Since many of those assumptions involve matters of an empirical nature, there is some hope that, as scholars and practitioners continue the dialogue about triage, essential data needed to resolve the contested questions will be forthcoming. Meanwhile, we encourage those good-faith lawyers and administrators to operate from their best judgments, all things considered. It is the most we can ask.