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# The Challenges of Calculating the Benefits of Providing Access to Legal Services

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# THE CHALLENGES OF CALCULATING THE BENEFITS OF PROVIDING ACCESS TO LEGAL SERVICES

*J.J. Prescott\**

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## INTRODUCTION

Many academics, public interest lawyers, and politicians consider it a platitude to say that public authorities underfund civil legal services for the poor.<sup>1</sup> Others have argued for years that the public provision of legal services is, almost by definition, wasteful and possibly counterproductive.<sup>2</sup> This disconnect has its roots in deep disagreements about the role of government in the lives of its citizens. But the confusion between these camps in their policy debates stems more directly from the use of amorphous terms that have multiple meanings and are thus opaque rather than helpful. Specifically, because words like "underfund" and "need" have different meanings to different people in different contexts, discussions over the proper approach to evaluating the advantages and disadvantages of publicly funding legal services have become muddled.

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\* University of Michigan Law School. Thanks to my colleagues at the University of Michigan for helpful comments and conversations.

1. For recent evidence of the practical need for greater civil legal access funding, see Keith L. Alexander, *Poorer D.C. Residents Lacking Legal Services: Report Suggests Area Firms Offer Help*, WASH. POST, Oct. 8, 2008, at B1.

2. See, e.g., Ted Frank, *The Trouble with the Civil Gideon Movement*, LIABILITY OUTLOOK (Am. Enter. Inst. for Pub. Pol'y Research, Washington, D.C.), Aug. 7, 2008, at 1-2, available at [http://www.aei.org/publications/filter.all,pubID.28441/pub\\_detail.asp](http://www.aei.org/publications/filter.all,pubID.28441/pub_detail.asp).

To proponents of expanding legal services, underfunding happens when people in need of legal services cannot access these services because there are too few low-cost lawyers available.<sup>3</sup> “Underfunded” is thus taken to mean simply that a person “would benefit from” the greater availability of free or subsidized legal aid. To opponents of the public provision of such services, however, programs that misalign incentives or that lead to the misuse of taxpayer money or knock-on costs elsewhere in the legal system are, at the end of the day, *necessarily* “wasteful” and “counterproductive” and should be reduced in size or eliminated, second-best arguments notwithstanding.<sup>4</sup> The advantage of both of these approaches to thinking about the problem is that they are easy to apply.

From a policymaker’s perspective, however, these strategies are unhelpful. Public resources are limited, and so the fact that people are “in need” or “would benefit from” additional funding is not sufficient to justify a shift in the allocation of public monies toward legal aid.<sup>5</sup> After all, applying the same analysis to other public services, we would of course learn that there are plenty of other people and institutions (e.g., the homeless, the educational system, community health centers, etc.) that are “in need” of scarce resources.<sup>6</sup> At the same time, expanding government involvement in the

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3. Alternatively, underfunding might occur when there is “unequal access” to the justice system. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2d ed. 2007) [hereinafter LSC, JUSTICE GAP]. For “unequal access” to occur, there must be someone “in need” of a lawyer *and* it must be the case that someone similarly situated, but with the necessary financial resources, would find it worthwhile to hire a lawyer. People can often benefit from a lawyer’s advice but, even if financially able, may still be unwilling to pay for that advice, perhaps because they are reasonably certain of the right path or the costs of making a mistake are low.

4. Second-best theory asserts that, under certain conditions, two “wrongs” can be better than just one “wrong”: if the first-best arrangement of rules is not possible because of some deep, unavoidable market failure, the next best arrangement may involve multiple departures from the first-best arrangement, rather than just the one unavoidable failure.

5. See Robert H. Frank, *Why is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913, 914 (2000) (“Scarcity is a simple fact of the human condition. To have more of one good thing, we must settle for less of another. Claiming that different values are incommensurable simply hinders clear thinking about difficult trade-offs.”). For a discussion of priority setting and rationing in the legal aid context, see generally Richard Moorhead, *Legal Aid in the Eye of a Storm: Rationing, Contracting, and a New Institutionalism*, 25 J.L. SOC’Y 365 (1998).

6. I assume throughout that there are good reasons for government interventions in these areas—that the market alone will not allocate resources efficiently and that the social benefits of providing these services at least at low levels are very substantial. In Part V, I suggest that the public provision of legal services to low-income individuals may be welfare enhancing, even if the market does not provide these services on its own. I focus on individual services (as opposed to reform efforts and large class actions), but legal services pro-

provision of legal services certainly *can* lead to real improvements in social welfare, even if certain market incentives are dulled and agency and administrative costs are all but guaranteed, when we face any of a raft of possible market failures or have specific distributional preferences.

Accordingly, policymakers require something more than these imprecise all-or-nothing rules (“any” benefit or “unnecessarily” costly) to make optimal allocation decisions. Welfare economics suggests a possible, albeit controversial, approach: calculate the net benefits of a government-funded legal services program and compare those benefits to the net benefits that would be generated by other public programs or by leaving the resources in private hands.<sup>7</sup> If the legal services program produces more net benefits than other options, it should be expanded. If not, the program’s funding should be cut or, potentially, eliminated.<sup>8</sup>

In this invited essay, I explore how policymakers and other public-interested actors have empirically calculated the *benefits* of providing low-income access to legal services in the past, and how they might improve upon existing methods going forward. Specifically, I review, criticize, and try to build on two major civil justice needs studies, one published by the Legal Services Corporation in 2005 (reissued in 2007) and the other by the American Bar Association in 1994.<sup>9</sup> Because I do not intend these criticisms of the LSC and ABA studies to suggest that legal services programs ought to be reduced in size (in fact, an improved study could provide strong *and reliable* evidence favoring greater funding of such services), I also briefly criticize assertions that the public provision of services is *necessarily* counterproductive.

Welfare economics and, in particular, cost-benefit analysis provide the framework for my discussion, although many find these approaches unsa-

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vided to a few individuals can lead to positive systemic change, making legal services a public good requiring a subsidy. See DEBORAH L. RHODE, ACCESS TO JUSTICE 11 (2004) (“[L]aw is a public good. Protecting legal rights often has value beyond what those rights are worth to any single client.”).

7. Doing so may improve decision making, but even economists believe that it “is neither necessary nor sufficient for designing sensible public policy.” KENNETH J. ARROW ET AL., AM. ENTER. INST. FOR PUB. POL’Y RESEARCH, BENEFIT-COST ANALYSIS IN ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION: A STATEMENT OF PRINCIPLES 1 (1996) [hereinafter ARROW, PRINCIPLES].

8. Importantly, this analysis can indicate the direction change should take—expand or contract—but not necessarily show by *how much*. It would be wrong to assume that there is a linear relationship between money invested and net benefits. To be done appropriately, separate comparisons should be conducted at all funding levels under consideration.

9. LSC, JUSTICE GAP, *supra* note 3; CONSORTIUM ON LEGAL SERVS. & THE PUB., AM. BAR ASS’N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994) [hereinafter ABA, LEGAL NEEDS].

tisfactory on both ethical and methodological grounds.<sup>10</sup> Even granting the seriousness of these objections for purposes of argument, it would be difficult for critics to gainsay the *relevance* of cost-benefit analysis to many policymakers considering increasing, reducing, or eliminating the funding for legal services programs. More importantly, while justice or some other fundamental value may, in the views of many, *require* expanding legal aid to satisfy indigent needs whatever the “costs” and “benefits,” assessing *how much* we are willing to sacrifice to satisfy this moral imperative can only deepen our understanding of the importance of this value.

This paper proceeds in five parts. First, I briefly explain the optimal approach to allocating public funds from a welfare economics perspective. Second, I introduce the challenges of valuing “benefits” in the context of the public provision of legal services. Third, I summarize and critique existing attempts to quantify the benefits of and need for legal services funding.<sup>11</sup> Fourth, I briefly, but critically, assess the arguments on the other side of the legal services debate, where commentators regularly rely on anecdotes and empirically unverified assumptions to argue for reducing the public provision of legal services.<sup>12</sup> Finally, I describe the basic methods that cost-benefit analysis employs to crack the difficult nut of measuring the value of publicly provided services generally, and I sketch a few ideas for how a researcher might design and conduct a study using these ideas to

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10. I do not rehash these important debates. For discussions of the moral assumptions and foundational principles underlying cost-benefit analysis, see LARRY LOHMANN, *COST-BENEFIT ANALYSIS: WHOSE INTEREST, WHOSE RATIONALITY?* (1997); Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998); Matthew D. Adler & Eric A. Posner, *Cost-Benefit Analysis: Legal, Economic, and Philosophical Perspectives*, 29 J. LEGAL STUD. 837 (2000); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999) [hereinafter Adler & Posner, *Rethinking CBA*]; Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique (with Replies)*, AEI J. ON GOV'T & SOC'Y REG., Jan.-Feb. 1981; Peter Railton, *Costs and Benefits of Cost-Benefit Analysis*, 1 PROC. BIENNIAL MEETINGS PHIL. SCI. ASS'N 261 (1982); Richard O. Zerbe, Jr., *Ethical Benefit-Cost Analysis* (unpublished manuscript, on file with the Fordham Urban Law Journal).

11. I am brief in my review of attempts to justify expanding legal services. Scholarship goes back a long way. See, e.g., Guvenç G. Alpander & Jordan I. Kobritz, *Prepaid Legal Services: An Emerging Fringe Benefit*, 31 INDUS. & LAB. REL. REV. 172, 173-75 (1978); Emery A. Brownell, *Availability of Low Cost Legal Services*, 287 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 121-22 (1953); cf. F. Raymond Marks, *Some Research Perspectives for Looking at Legal Need and Legal Services Delivery Systems: Old Forms or New?*, 11 LAW & SOC'Y REV. 191 (1976).

12. See RHODE, *supra* note 6, at 26 (“The basis for this diagnosis [that legal services generate more harm than good] is largely anecdotal. . . . The public gets anecdotal glimpses of atypical cases without a sense of their overall significance.”) (citation omitted).

measure (at least some of) the benefits of providing access to legal services to low-income individuals.

### I. "OPTIMAL" ALLOCATION OF PUBLIC RESOURCES

In a perfect world, according to welfare economists, policymakers would make funding allocation decisions by employing a cost-benefit approach that fully captured all relevant costs and benefits of funding all *possible* public enterprises.<sup>13</sup> For a given pot of money, these calculations would yield an allocation that maximized society's total net benefit by arranging funding so that the marginal net benefit for each enterprise was the same. If this marginal-net-benefit-generated-per-dollar-spent (i.e., the return on public investment) was significantly higher than private lending markets demanded for private investments, one could argue that, under certain conditions, government should increase its investments by raising additional tax revenue.<sup>14</sup>

It makes practical sense to speak of net benefits in monetary rather than utility terms. This is very unfortunate in a way, because if costs and benefits were denominated in utility terms, distributional issues would become significantly less important: under normal conditions, an allocation that equalized the marginal utility of government spending across individuals would be optimal, so more money and programs would, as a general matter, be directed toward those with less. Unfortunately, a utility metric is unworkable in practice because marginal utility is tough to measure in anything other than monetary terms.

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13. A policymaker should consider not just the scale but also the nature of a public project. We would, for example, like to evaluate all possible means of providing low-income individuals access to the civil justice system, and not simply whether we should increase our investment in a "staff attorney" approach. There are other models (e.g., *judicare*, *pro bono* programs, etc.) and implementation approaches to consider. See, e.g., Heribert A. Hirte, *Access to the Courts for Indigent Persons: A Comparative Analysis of the Legal Framework in the United Kingdom, United States and Germany*, 40 INT'L & COMP. L.Q. 91 (1991); see also Samuel Jan Brakel, *Styles of Delivery of Legal Services to the Poor: A Review Article*, 2 AM. B. FOUND. RES. J. 219 (1977) (reviewing TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (Mauro Cappelletti, James Gordley & Earl Johnson, Jr. eds., 1975)); cf. Maaïke De Langen & Maurits Barendrecht, *Legal Empowerment of the Poor: Innovating Access to Justice*, in THE STATE OF ACCESS: SUCCESS AND FAILURE OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES 250-71 (Jorrit de Jong & Gowher Rizvi eds., 2008).

14. For an introduction to the foundational assumptions of cost-benefit analysis, see generally ANTHONY E. BOARDMAN ET AL., COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE 26-33 (3d ed. 2006). See also EDWARD M. GRAMLICH, A GUIDE TO BENEFIT-COST ANALYSIS 30-45 (2d ed. 1990); John D. Blum, Ann Damsgaard & Paul R. Sullivan, *Cost-Benefit Analysis*, 33 PROC. ACAD. POL. SCI. 137 (1980).

Maximizing wealth (i.e., conducting cost-benefit analysis in monetary terms), on the other hand, can *exacerbate* distributional concerns. For example, if a program serving the rich generated more net benefits (in dollar terms) than a program serving the poor, cost-benefit analysis would support funding the rich program as the more efficient option because it maximizes overall wealth, even if the wealth generated by the program were to wind up entirely in rich hands.<sup>15</sup>

A corollary of making a wealth maximizing choice, however, is that there must always be enough new wealth for the beneficiary group to (at least) fully compensate any group that suffers from the decision.<sup>16</sup> In other words, in the context of an allocation decision, efficient decisions are those that can, *with redistribution occurring elsewhere*, make everyone better off. This means we *may* be able to ignore distributional concerns when focusing on a particular reform or public project regardless of the metric we use to measure benefits, as long as allocation decisions are complemented by a separate policy or policies designed to “undo” any distributional losses.<sup>17</sup>

If we knew what the final wealth-maximizing allocation looked like in the perfect world described above, we could be precise: legal services would be underfunded if they received less public support than the perfect-world allocation would dictate. But we do not live in such a world—and getting there would cost too much and require too much guesswork. So, as a practical matter, we have to come up with a more tractable approach to making allocation decisions.

A simplistic substitute approach would analyze each project separately and ask only whether additional funding would generate “any” benefits. The advantage of this type of rule, as noted in the introduction, is that it is easy to apply. We can be fairly unconcerned about details. We can generally ignore minor benefits and costs and mismeasure important ones because these mistakes very rarely matter. On the other hand, mistakes do not matter only because the “any benefit” criterion will almost always indicate that more money is merited. More funding will rarely hurt intended

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15. Cf. Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 359 (2004).

16. See GRAMLICH, *supra* note 14, at 30-33; Joseph Persky, *Cost-Benefit Analysis and the Classical Creed*, 15 J. ECON. PERSP. 199 (2001).

17. This is a big “as long as,” but one on which I do not focus in this paper because it is a general issue with cost-benefit analysis. See, e.g., Frank, *supra* note 5, at 916-17, 921-27; Richard A. Posner, *Cost-Benefit Analysis: Definitions, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1153-56 (2000). Although this is the “standard” defense, many commentators reject it. See Adler & Posner, *Rethinking CBA*, *supra* note 10, at 187-94.

beneficiaries or any third parties who happen to be affected. This is not always true—too many cooks can spoil the broth—but, for all intents and purposes, the rule is just about useless as an allocation rule.

A better method would be to ask whether, at a minimum, the “net” benefit of a public investment exceeds zero. Even better still would be to require that the net benefit of a project surpass the return the private market for capital would demand.<sup>18</sup> By taxing people, the government removes funds that would otherwise be directed by the capital markets to their “best” private use. Therefore, if the benefits generated by the public services at the margin do not exceed the value of private projects waiting in the wings,<sup>19</sup> one concerned with maximizing the total size of the pie would argue against additional funding.<sup>20</sup> The money could be better used elsewhere (and then redistributed, if necessary). Refunding it to taxpayers would be better policy, according to welfare economics, than putting additional funds toward this particular investment.

This approach to allocation, too, is far from perfect. It will fail when the net benefits of the public service in question exceed the return demanded by private capital markets but not the benefits that would be created by

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18. Taxation generates dead weight loss if those taxed alter their behavior in response to the tax. See GRAMLICH, *supra* note 14, at 48-51. Assuming that public funds come from the taxation of labor, we would want to account for this dead weight loss in making our allocation decisions. Assuming that some market failure (a public goods problem, for example) keeps private markets from providing the public services in question, for some level of at least some possible public services, the net benefit generated will exceed the market rate of return *plus* the deadweight loss caused by the required taxation. See BOARDMAN ET AL., *supra* note 14, at 103-06.

19. This assumes that the costs and benefits of private projects are fully internalized by borrowers. If not, we might want to impose an appropriate Pigovian tax.

20. Again, thinking about the problem this way explicitly ignores distributional concerns. But policymakers obviously care not just about the total size of the pie but how that pie is divided. See, e.g., ARROW, *PRINCIPLES*, *supra* note 7, at 6 (“Principle 7: While benefit-cost analysis should focus primarily on the overall relationship between benefits and costs, a good benefit-cost analysis will identify important distributional consequences of a policy.”); GRAMLICH, *supra* note 14, at 229 (“Politicians have to make decisions that create gainers and losers. . . . It should be a routine requirement of benefit-cost analysis that all distributions of gains and losses for various groups be shown.”). We can (partially) deal with this hitch in two ways. First, we can explicitly value distributional outcomes in monetary terms and treat improvements as a social benefit. See GRAMLICH, *supra* note 14, at 115-31; Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 J. LEGAL STUD. 1105, 1135-41 (2000) [hereinafter Adler & Posner, *Implementing CBA*]. Second, we can focus solely on maximizing total wealth in the allocation of services funding and compensate relatively worse off individuals by explicitly redistributing. See Frank, *supra* note 5, at 916-17; *supra* text accompanying nn.14-17.

some *other* public investment.<sup>21</sup> Welfare economics would counsel that we compare the net benefits of increasing access to legal services, say, not only to the net benefits that could be generated by private actors but also to all other potential projects to which the government might put the money. In fact, if the marginal net benefit of an additional dollar is significantly lower for certain other projects (say, “bridges to nowhere” in progress somewhere), our comparison would indicate that we should reallocate funds from those projects toward fostering greater access. Of course, this exercise is informationally demanding to say the least, but would bring us closer to the perfect-world allocation.

## II. IDENTIFYING AND MEASURING BENEFITS (AND COSTS) OF LEGAL SERVICES PROGRAMS

The important take-away from the above discussion is that properly calculating the approximate net benefits of any governmental program is essential to the allocation problem faced by policymakers. With the exception of the “any benefit” rule, where we can probably get by with guesswork, taking the time to measure the costs and benefits of a project as accurately as possible has real payoffs in terms of the efficient use of limited resources.

This conclusion, however, begs two important questions. First, what *are* the costs and benefits created by a publicly subsidized legal services program? Second, how do we go about *valuing* these costs and benefits?

Answering these questions is, unfortunately, non-trivial, which may account for the failure of many proponents of expanding legal aid programs to move past the “in need” or “any benefit” sorts of decision rules, and the unwillingness of many opponents of publicly provided legal access to move beyond anecdotes.<sup>22</sup> In this essay, I attempt to explore these two

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21. Critics of using legal services approaches—e.g., government-funded staff attorneys who work only on civil legal aid matters—often take this approach, by maintaining that there are alternative ways to provide better access to justice to disadvantaged individuals at lower cost. These arguments are important, but ultimately empirical in nature, and we would be better served by methods (rather than rhetoric) to determine the net benefit differences, if any, between various possible legal aid approaches.

22. Once we have a handle on the answers to these questions, policymakers will still be required to make judgments about which costs and benefits to “weigh” and whether to value the costs and benefits of various affected parties (participants and nonparticipants) equally. For a discussion of whose benefits ought to be included in the calculus, see William N. Trumbull, *Who Has Standing in Cost-Benefit Analysis?*, 9 J. POL’Y ANALYSIS & MGMT. 201 (1990) and, for a brief treatment, Part V below. Consider, for example, whether any new costs borne by legal wrongdoers ought to receive the same weight as costs imposed on

questions but not answer them. By describing a few of the obvious costs and benefits of a legal services program (leaving room open for future additions to the list), and then providing either an *explicit* assumption or a measurement method that can get us to a final “net benefit” number, I hope to prompt future researchers to catalogue the costs and benefits of these programs fully and to develop further measurement approaches.

To characterize the relevant costs and benefits of legal services programs, it is necessary first to think about what we hope improved access to the civil justice system would achieve. There are at least three categories of goals: (1) supplying solutions to the legal problems of low-income individuals (resolution/compensation) when they occur, (2) reducing the number of legal problems faced by low-income individuals in the first place (planning/deterrence), and (3) providing low-income individuals with the knowledge that they have access to legal advice and representation should they need it (freedom/insurance).<sup>23</sup>

Put differently, proponents of legal services believe that if low-income individuals have access to legal representation and advice, any legal issue (e.g., adoption) or dispute (e.g., employment discrimination) can be handled more effectively and at significantly lower personal cost, and therefore be resolved in a more satisfactory way. If the provision of low-cost legal services will lead to legal issues being resolved differently *ex post* (in terms of outcome or cost), then we should also expect there to be *ex ante* behavioral consequences as well. First, for those issues that involve a legal dispute, the *other* party’s behavior may change in anticipation of the fact that low-income individuals can secure representation and/or legal advice. In the case of a wrongdoer, for example, we may see deterrence of wrongful behavior.<sup>24</sup> In other cases, we may see more caretaking. Second, we should see low-income individuals taking greater advantage of their previously unenforceable legal entitlements (e.g., applying for a job with an employer with a reputation for discrimination), at least if they are aware of the low-cost legal services available to them. Third, even if a low-income

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clients who have been wronged. Simple rules (e.g., “ignore wrongdoer costs and benefits”) make cost-benefit calculations easier but only at the risk of making them less accurate.

23. In addition to providing insurance benefits (the cognitive benefit of reduced risk of an insoluble legal difficulty) and freedom benefits (the gains of freedom of action made possible by insurance), low-income legal services may provide dignitary benefits—simply knowing that one may rely on competent representation, like those who are better situated do, may have value. Indeed, having rights *with* representation may be considered an important part of being a valued and full citizen. See RHODE, *supra* note 6, at 9. Legal aid programs may target all of these (e.g., law reform through lobbying or class action lawsuits) to the chagrin of their opponents.

24. See *id.* at 11.

individual never makes “use” of low-cost services in his lifetime and does not change his behavior, there may be a benefit to him simply in knowing that, had a legal issue emerged, help would have been available.<sup>25</sup>

All of these behavioral and psychological changes have costs and benefits. Moreover, conditional on the existence of a dispute, a “better” resolution (if it involves a damages award) may be thought just a transfer and not a new benefit at all. It thus bears repeating that *measuring* and *adding together* all of these costs and benefits is no easy feat. Still, in certain contexts and under particular market conditions, it may be possible to get acceptably close to quantifying the relevant costs and benefits accurately (particularly, costs) or at least improve upon existing measures used to evaluate the value of a program.

To see where we can make progress, I start with how we might measure costs. Fortunately, for many of a government program’s direct costs, valuation turns out to be somewhat tractable if we assume that the relevant markets for goods, labor, and office space are competitive, and that the government program in question is relatively small.<sup>26</sup> If these assumptions are correct, then we can use easily ascertained market indicators (i.e., prices), as opposed to difficult-to-estimate demand and supply schedules, to calculate many of the values we need to know.<sup>27</sup> Most of the direct costs of a legal services program can be handled in this way because such programs require competitively provided inputs.

To see this, note that legal services programs, funded by the government to provide free legal advice and other services to low-income individuals, function like many other white collar service jobs. Legal services programs will have to have office space, and will have to hire lawyers and staff. The office will need desks, computers, office supplies, and access to legal documents. Many of these goods and services are distributed through competitive markets or the equivalent.<sup>28</sup> Moreover, providers have signifi-

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25. We could go further and explore whether this sort of insurance would cause moral hazard—for example, by leading low-income individuals to do less than they might otherwise do to avoid disputes at low cost. The effects of moral hazard in insurance contexts are well known and make the net benefits of any program that much more difficult to measure properly.

26. Monopolies and unions exist, and governments provide many inputs to projects. As a consequence, for many government programs that are big or are important consumers of particular goods, the cost valuation becomes more difficult. See BOARDMAN ET AL., *supra* note 14, at 80-81.

27. See *id.* at 94-95; GRAMLICH, *supra* note 14, at 225-27.

28. This is an approximation. Paper and pens are competitively provided, but lawyers may not be. Lawyers, as a group, have market power, but public interest lawyers do not seem, in general, to be demanding excessive rents, although this is conjecture on my part.

cant flexibility in how to organize production—hold up costs seem unlikely to be a serious concern. Therefore, to estimate the social costs of these inputs, we need only examine their prices and quantities—in other words, the program’s budget.<sup>29</sup>

There are other “indirect” costs that are more demanding to assess, however. Presumably the provision of advice leads, at least on occasion, to changes in a client’s legal strategy. This may increase costs on the other side of the transaction, assuming there is another “side” that can change its litigation or negotiating behavior in response to the client’s new approach. For example, in a housing dispute, a tenant who receives legal advice might give up (lowering costs on the other side) or might employ a new strategy, causing the landlord to either give up (lowering costs) or fight harder (raising costs). In theory, however, if we can identify these input costs, we can price them—the landlord may use an attorney who charges an hourly rate in a competitive legal environment, for example.

A change in an opponent’s litigation approach is one thing, but what about underlying changes in an opponent’s primary behavior in *anticipation* of possible litigation? In the landlord hypothetical, a full accounting of the costs and benefits of the provision of legal services would take into account the behavioral changes induced by the fact that low-income individuals now have access to low-cost lawyers. This might mean that we *never see* the hypothesized litigation—instead, the landlord might anticipate the outcome (e.g., if he tries to evict, the tenant will obtain representation, fight the eviction, and win) and so choose a path that the landlord would *not* have traveled had he not faced a tenant with legal counsel. Alternatively, perhaps the landlord invests in writing a better lease agreement, so that he can eventually succeed at evicting the client, but now at higher cost.<sup>30</sup>

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There are barriers to entry (law school and possibly overly exacting licensing exams), but it is unclear whether those barriers bind in the legal services setting in a way that allows public interest lawyers to demand supra-competitive salaries. Still, many reformers have suggested increasing the number of ways that low-income individuals can meet their legal needs *other* than by using a lawyer, or at least other than by using a lawyer in a traditional way. See, e.g., RHODE, *supra* note 6, at 79-102.

29. GRAMLICH, *supra* note 14, at 227 (“[The valuing the costs] step is normally easier than valuing the gains. For most projects, even including human investment projects, these costs are simply budget costs, or are well-estimated by budget costs.”). For a relevant example, see LEGAL SERVS. CORP., FISCAL YEAR 2009 BUDGET REQUEST 3, A-9 (2008) [hereinafter LSC, 2009 BUDGET REQUEST], which includes line items such as personnel costs, communications, printing and reproduction, and travel.

30. If this sort of outcome were common, this flaw in the substantive protections afforded tenants would seriously reduce the value of legal services. If it is possible for landlords (or others) to re-arrange their transactions (at a cost) to ensure success in future litigation, then legal services programs would just generate more costs in the form of “avoidance”

Again, in theory, we can price some of these costs. If the landlord hires a lawyer to redraft his lease, we can add that to total costs of the legal services program. If the landlord will spend two additional hours trying to derail or defeat possible future litigation (regardless whether any litigation arises), we can price that too—by estimating the value of the landlord's time using his wage (or some related method).<sup>31</sup> But if the landlord is made worse off in some other fashion (e.g., tenants who fight back just irritate landlords), we have fewer options. One possibility would be to ignore costs that are imposed on wrongdoers. But what about those intangible costs that are imposed on landlords by tenants who are, objectively, in the wrong? Here, we would need to use a more complicated (and less reliable) method for valuing non-market costs.<sup>32</sup>

Thus, many of the costs of a legal services program are difficult to calculate, and the above discussion captures just the tip of the iceberg. For instance, if courts or other non-competitively priced government services are complements to legal services or to the behavioral changes of clients or non-clients, we must incorporate the cost to the government (rather than the price charged, if any) of the additional services employed (e.g., courts and judges). Still, because most direct inputs into a legal aid program can be (roughly) accounted for by using the budget expenditures of the program and of those individuals directly affected by the provision of those services, we can make progress at estimating costs. At the very least, we can calculate a lower bound that benefits *must* exceed.

Calculating the *benefits* of a legal services program is even more taxing than trying to get a grip on the costs. Above, I described how, in a competitive market, we can use prices to estimate the opportunity cost of using a resource to provide these services. A similar argument *appears* to apply when thinking about benefits. Consider any monetary benefits produced by a program for a client in a dispute—for example, a damages award, a fine reduction, or a change in a payment schedule. These may be the most significant “benefits” generated for low-income clients by legal services pro-

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with few, if any, benefits (especially once low-income individuals recognize they cannot win). Most likely, some landlords will find it too costly to avoid all litigation and so will behave “better.”

31. One could think of these kinds of costs as attributable to the underlying right granted to low-income individuals, rather than as costs attributable to legal services programs. Both rights and representation are necessary for a low-income individual to benefit from legal services. Without any rights or freedoms, a legal services program would be trivially inexpensive.

32. Specifically, we could employ either contingent valuation survey methods or measures that rely on behavior to measure non-monetary *costs* imposed on potential defendants and others, *see infra* Part V, but doing so is unlikely to be as straightforward.

grams. Because these benefits are denominated in dollars, they seem, at first glance, easy to take into account and aggregate.

The problem, however, is that many monetary benefits are simply transfers—they are not *new* value. For every winner there must be a loser, and so we require an additional assumption to go further. For instance, we could simplify this problem by assuming that money in the hands of a wrongdoer is worth nothing.<sup>33</sup> Of course, this cannot be quite right, because the wrongdoer will enjoy his wealth by buying goods from others, generating producer surplus (i.e., benefits) elsewhere.<sup>34</sup> There will also be situations where a client's "success" is unmerited—probabilistically, we know mistakes will occur, and we should account for them. In general, policymakers will be required to make normative judgments about how much weight society will put on these market-measured benefits and costs, at least if we want to incorporate those values into our calculations. Cost-benefit analysis has nothing to say about these weighting decisions.

Caveats aside, measuring the costs of competitively-produced inputs and valuing monetary benefits is, in theory, straightforward, at least if policymakers make any required judgments on how to value transfers, whose costs and benefits matter, etc.<sup>35</sup> But that leaves the tough part—valuing the other benefits (and costs) created by the program that are unrelated to ex post monetary (or at least countable) outcomes.<sup>36</sup>

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33. Frank, *supra* note 5, at 914; *see also* Trumbull, *supra* note 22, at 210-12 (discussing whether and how to value the gains from criminal activity, which is analogous to the wrongdoer in the example I describe).

34. For the reverse argument—that the government provision of legal services will generate positive spillover effects for the rest of the economy—see Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid 3-5* (Nov. 10, 2009) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1503009](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503009)).

35. *Cf.* LSC, 2009 BUDGET REQUEST, *supra* note 29, at 12. I have been unable to locate a legal services organization that reports success in terms of monetary awards or other transfers received by its low-income clients. Other government organizations, like the Equal Employment Opportunity Commission ("EEOC"), do report such information. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2009, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>. For many areas of service (e.g., family disputes), damage awards may be rare, possibly skewing policymakers' evaluations. In any event, the size and regularity of awards can be recorded and analyzed in future studies were policymakers to require it.

36. For a recent summary of more easily measurable benefits, see generally Abel & Vignola, *supra* note 34. Abel and Vignola describe many studies that seek to measure the benefits of particular legal aid programs in numerical terms—the number of additional food stamp recipients or the number of avoided domestic violence incidents, for example. These studies often use available price information to estimate some of a program's benefits in dollar terms in order to make comparisons to the program's costs possible. If legal services

For the remainder of this essay, I concentrate on attempts to measure *non-monetary benefits* produced by legal services programs.<sup>37</sup> Valuing non-market and non-monetary outcomes is where cost-benefit methodologists have focused their attention, and a number of (admittedly imperfect) approaches now exist to value them.<sup>38</sup> In Part V, I discuss these approaches generally and sketch out how they might be applied to legal services. But it may help to provide two simple examples of the basic problem of valuing benefits, ones that abstract away from the other valuing methods described above.

Imagine an individual who had received food stamps for some period of time, but who was recently declared ineligible. The individual cannot de-

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are thought to prevent a specific harm such as the commission of a crime, and that harm creates or entails measurable costs (e.g., detention costs, legal costs, etc.), then the program can be described as creating benefits by allowing these funds to be reallocated to their next best use. Of course, those benefits and costs that cannot be counted or measured are usually ignored.

37. There may be important costs to legal services programs that will be neglected by focusing only on the budgets of the programs themselves, of complementary government programs, and of other litigants. See *infra* Part IV. Critics of publicly provided legal services have argued that these programs have increased welfare dependency, made public housing unworkable, and so on. See Kenneth F. Boehm, *The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary*, 17 ST. LOUIS U. PUB. L. REV. 321 (1998). Standard social science program evaluation methods could be used to determine whether, for example, expanded access to legal aid leads to more crime, more drug use, more teen pregnancy, and more broken homes. If evidence of such a causal relationship exists, policymakers can try to monetize these costs (perhaps in terms of the costs of the solutions to these new problems) and add them to the total to be balanced against the benefits of legal aid. See Abel & Vignola, *supra* note 34. There are also likely to be unanticipated costs. The difficulty is to demonstrate the relationship of the government program in question to these costs. So far, the argument has largely consisted of anecdote. Legal aid programs may also lead to *less* crime, *less* homelessness, etc. These benefits may also be measurable using program evaluation methods. See Abel & Vignola, *supra* note 34, for a description of recent research focusing on benefits. Of particular interest in this vein are studies that use random assignment approaches—essentially, certain potential clients are randomly selected to receive assistance while other potential clients are refused—to measure consequences. See Abel & Vignola, *supra* note 34, at 10-11. Where conditions are appropriate, careful studies are likely to generate reliable estimates, but only of those consequences the researchers seek to measure, and comparing benefits to costs will still require monetization.

38. If we measure willingness-to-pay (“WTP”), see *infra* Part V, it is important to remember that WTP will reflect the fact that, in some states of the world, clients might receive monetary awards or other value when they otherwise would not have. This generates a double-counting problem. We do not want to make some valuation decision for a damages award (a transfer) and then *add that* to our estimated WTP. We also cannot just ignore the transfer, unless we take into account the WTP of the loser. Often, however, legal services provide support for a legal transaction that generates only “new value” (e.g., an adoption) without creating an offsetting loss.

termine by himself whether the decision was correct under applicable regulations, and cannot afford a lawyer. The individual seeks out a free legal services provider where a lawyer evaluates his case and determines that, in fact, the individual *is* no longer eligible. There is value to the service, but how do we value it?

Next, consider a different individual who receives a notice in the mail stating that the rules determining eligibility for food stamps have changed. The individual does not know whether those rules affect his eligibility, but he is aware that he cannot afford a lawyer if his food stamps do not show up the next month. Fortunately, the individual knows that there are free legal services that will help him if he finds himself in need. Much like insurance, this knowledge in and of itself has value. But, again, how do we value it?

These scenarios fit into the structure above. Legal services programs have ex post and ex ante goals. Ex post benefits occur when a program improves the outcome of a dispute or facilitates a transaction. In these two examples, this important benefit is absent by construction. But, the provision of legal services also generates a host of ex ante benefits—by improving the lives and opportunities of low-income individuals, either by allowing them to take advantage of their previously unenforceable or unaffordable legal rights, by improving the behavior of others in ways that inure to their benefit, or simply by giving them insurance value,<sup>39</sup> even if representation is never needed.<sup>40</sup>

In the abstract, we can capture all of these benefits by figuring out how much value all Americans would place on the existence, size, and orientation of a low-income legal services program. A slightly different means would be to ascertain the value of a program to all covered low-income

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39. Legal insurance is sold in the market and is therefore a valuable product that, in theory, can be understood by people worried about legal incidents. Cf. Teresa Lantigua Peterson, *Legal Insurance Catching on with Companies*, TAMPA BAY BUS. J., Dec. 4, 1998, available at <http://tampabay.bizjournals.com/tampabay/stories/1998/12/07/focus3.html?page=1> ("Many small business owners who need a lawyer but can't afford one have another option: Legal insurance. It works much like an HMO giving businesses access to a network of attorneys who agree to provide services for free or discounted rates in exchange for a steady stream of business.").

40. Some of these benefits will turn on how many low-income individuals *know* about the legal services program. If someone has no idea that free legal services are available to her, she can still benefit even if only a small number of individuals are aware because that small group may be enough to reduce, say, discrimination against all low-income individuals. But, she will not benefit from ex post awards (adjusted for transfers), the freedom that comes with knowing certain rights are protected, or even from the insurance value provided. Thus, *awareness* of any program will dramatically change the benefits calculations.

Americans, although because we are not evaluating the entire population, we would have to discount the resulting transfers that might flow to low-income individuals from other groups.<sup>41</sup> Individuals will of course vary in how much they value legal services, but any valuation should include *all* of the ex ante and ex post benefits described above assuming that low-income individuals understand what the program will provide and can think carefully about their potential needs for legal assistance and the likely effects of the program on the behavior of others. After all, an individual thinking carefully about receiving free health care would recognize that, with some probability, he or she might never need it, that it might be useless (say, for an incurable disease), or that it might be extremely valuable.<sup>42</sup>

So how do we translate this abstract idea of figuring out how much low-income individuals would value the public provision of legal services to something operational? It turns out that this kind of problem is not new.<sup>43</sup> We see it in many other contexts.<sup>44</sup> How do we value the benefits of a national park? How do we determine how much someone values six months of pain-free life? Researchers have worked out many different ways to get at the answers to these questions, but despite the extensive experience that policymakers have with cost-benefit analysis, for some reason, relatively

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41. This would also exclude the direct and indirect benefits enjoyed by the rest of the population. See *infra* Part V. Direct benefits might include reduced crime, less blight, and a host of other social improvements directly experienced by all citizens (in different amounts). As for indirect benefits, many well-off Americans would derive benefit from knowing that low-income Americans have access to the justice system. See Paul R. Portney, *The Contingent Valuation Debate*, 8 J. ECON. PERSP. 3, 4-5 (1994) ("[Passive use value] is the value that individuals may attach to the mere knowledge that rare and diverse species, unique natural environments, or other 'goods' exist, even if these individuals do not contemplate ever making active use of or benefiting in a more direct way from them."). Some research indicates that four-fifths of Americans already believe that low-income individuals have a right to civil representation, see RHODE, *supra* note 6, at 4, which may mean that some are "benefiting" from an access program that does not exist. If true, then the marginal benefit of expanding access would be lower than otherwise, were we to include these outsider benefits. In addition, if non-low-income individuals, on average, sustain costs as a consequence of such a program (and these are not accounted for elsewhere, for example, by treating the program's tax-funded budget as a cost), these people should be included.

42. Numerous cognitive and behavioral biases likely interfere with people's assessment of the value of health insurance. For example, people are over-optimistic about their chances of avoiding disease. See, e.g., Neil D. Weinstein, *Unrealistic Optimism About Susceptibility to Health Problems*, 5 J. BEHAV. MED. 441 (1982). This bias might cause people to undervalue health insurance. Optimism bias may also lead to the undervaluation of public legal services.

43. For an early survey of cost-benefit analysis and the challenges its use poses, see A.R. Prest & R. Turvey, *Cost-Benefit Analysis: A Survey*, 75 ECON. J. 683 (1965).

44. See, e.g., *id.* at 706-28 (discussing the application of cost-benefit analysis to water projects, transportation projects, land usage, health, and education).

little effort has been devoted to measuring these sorts of benefits in the legal services context.

That is not to say nothing has been done. Some progress has been made in trying to evaluate how many people are “in need” of legal services, and I describe some of that work in the next part of this essay. But, the number of people “in need” is not an accurate assessment of the non-market benefits that would be produced by expanding such programs. As a consequence, new methods and new attention must be directed toward the question of how much value is produced from legal services programs.

### III. PREVIOUS ATTEMPTS TO MEASURE THE VALUE OF EXPANDING LEGAL SERVICES PROGRAMS

In this part, I review two attempts to evaluate the benefits that expanded civil legal services programs would provide.<sup>45</sup> Both are prominent studies that try to assess the “need” for additional publicly provided legal services. By focusing on some rough measure of need, these reports necessarily rely on the “any benefit” approach I describe and criticize above.<sup>46</sup> Specifically, “needs studies” investigate whether additional lawyers and funding would provide “any benefit at all” to low-income individuals. This is accomplished by evaluating how many individuals appear to “need” access to lawyers and legal services, and how many are unable to locate or use such services at present.<sup>47</sup> Crucially, these studies make almost no attempt to *quantify* the benefits of providing representation for common legal problems.<sup>48</sup> We have no idea how much society would benefit from satisfying

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45. ABA, *LEGAL NEEDS*, *supra* note 9; LSC, *JUSTICE GAP*, *supra* note 3. As noted above, there have been other attempts to quantify, or at least to think about quantifying, society’s need for additional legal aid. See Alpander & Kobritz, *supra* note 11, at 173-75 (1978); Brownell, *supra* note 11, at 121-22; *cf.* Marks, *supra* note 11.

46. Although I do not systematically review the many state needs studies that have been conducted, I discuss two of the most prominent national studies, which generally incorporate the conclusions of, and use the same methods as, the state-level studies.

47. There are a number of questionable assumptions and methods used in these studies. I do not address these concerns here. My goal is more general—to show that, from a policymaker’s perspective, the conclusions of these studies may not be particularly helpful even if they perfectly capture social “needs” for legal services.

48. I use the term “almost” because, on occasion, the studies try to assess whether the legal problems faced by low-income individuals are “important” or “extremely important.” LSC, *JUSTICE GAP*, *supra* note 3, at 11-12. Presumably, receiving legal assistance for an “extremely important” legal problem will produce more benefit on average, but not in every situation. If the client faces an “extremely important” legal difficulty with no “solution,” a lawyer might contribute less than when a client faces a less important, but solvable, problem. We can safely say that when a low-income individual feels she needs legal services, the social benefits of providing them to her (leaving costs to one side) will be positive.

these needs or how to compare legal services needs to other needs for government services. But, just as importantly, we also have no reason to think that these benefits are insignificant, as critics of legal services programs often suggest (on the basis of no systematic empirical scholarship). Given the ferocity of the debate surrounding the social utility of legal aid programs, a workable empirical approach to estimating these benefits seems key to moving forward.

Just to be clear, there are many strong arguments, unrelated to costs and benefits, for expanding access to the civil justice system.<sup>49</sup> We might, for example, believe that rights ought to have remedies, and therefore agree that, costs and benefits aside, expanding access until all needs are satisfied is the just and, therefore, best policy.<sup>50</sup> But, if our goal is to treat legal services for low-income individuals as a government program, one that can only be expanded by reducing the size of other presumably valuable government programs (for example, programs providing different services to the same set of beneficiaries) or otherwise productive private sector activity, we must at least evaluate the problem using the currency of costs and benefits. If we do indeed value other types of public benefits (e.g., government-provided health care or education), then existing work documenting “need” cannot make the case that legal services programs should be expanded, at least not without more.

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In June 2007, the Legal Services Corporation issued a revised report titled “Documenting the Justice Gap: The Current and Unmet Civil Legal Needs of Low-Income Americans” (“LSC Report”).<sup>51</sup> The LSC Report, the most current study of its kind, uses three methodologies to study the extent of “need” for low-income legal services, and then relies on its results to argue for the expansion of public funding of legal services for low-income individuals. The report states that “[t]he research and analysis . . . reveal a very serious shortage of civil legal assistance—an urgent justice

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Those benefits may not justify the cost of a lawyer’s time or even the expense of traveling to see a lawyer, however.

49. See Legal Services Corporation Act, 42 U.S.C. § 2996 (1974) (“[F]or many of our citizens, the availability of legal services has reaffirmed faith in our government of laws.”).

50. In fact, the “needs” studies definitely take this road, at least in part. In the Preface of the 2007 version of LSC Report, Helaine M. Barnett, President of the Legal Services Corporation, wrote, “Our nation promises justice for all, not just for those who can afford to pay for it. The ideal may never be fully realized, but America can come closer to it. As Judge Learned Hand said, ‘If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.’” LSC, JUSTICE GAP, *supra* note 3, at preface.

51. *Id.* at 1-19.

gap—in the United States.”<sup>52</sup> Strong words, but proponents of increased legal services funding need more to make their argument. They must also contend that closing this “urgent” gap will produce more net good than closing all the other gaps society faces.

The LSC Report’s first method counts the “number of people currently seeking help from LSC-funded legal aid programs who [could not] be served due to insufficient program resources.”<sup>53</sup> The report concludes:

The Justice Gap Report documents that nationwide, for every person helped by LSC-funded programs, another is turned away. Fifty percent of those actually seeking help are turned away for one primary reason: lack of resources. If anything, this finding is an understatement. Many who are eligible for help never seek it—they do not know they have a legal problem, do not know help is available, or do not know where to go for help.<sup>54</sup>

While these facts are compelling, they provide less guidance to policy-makers than we would like because they do not speak to a number of important questions. The most important are the following two.<sup>55</sup> Of those turned away, what net benefits, if any, would have been generated by their having received counsel? And, in light of those net benefits and the net benefits available through other programs or in the private sector, does expanding legal services availability make sense policy-wise?

We can probably safely assume that individuals who were turned away would have benefited, at least in some small amount, from having seen a lawyer and, if appropriate, from having received legal assistance. After all, the price of the service to someone who is qualified is close to zero.<sup>56</sup> But looking at client benefits rather than *net* social benefits ignores many of the social costs of providing these services—the cost of hiring the lawyers and staff, office space and supplies, among others. These resources could also supply low-income individuals with other benefits, perhaps health care, education, job training, or just cash. If many legal needs are serious but un-

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52. *Id.* at 18.

53. *Id.* at 5.

54. *Id.* at preface.

55. There are others, including whether any of these turned-away individuals procured legal services elsewhere. The report assumes not, because they were financially eligible to receive publicly provided legal services, but there is no way to know whether they found help with another organization, with a pro-bono lawyer, or through friends.

56. If physically getting to a legal services office or communicating with legal services lawyers is difficult, then the cost to clients might be significant. Still, these were individuals who were turned away, so we can assume that they made the trip (or the phone call) because, in expectation, they believed they would be better off for having seen a lawyer.

likely to be affected by the participation of a lawyer, it may well be that the government, by expanding access, would be, in effect, throwing resources away. Thus, the number of individuals turned away at current funding levels cannot answer the “net” benefit question.

The second method employed by the LSC Report is a meta-analysis of a number of state-level surveys that asked samples of low-income individuals whether they had experienced a situation involving a legal issue (by presenting various scenarios to the respondents),<sup>57</sup> whether the problem experienced was “important” to them,<sup>58</sup> whether the respondent understood the legal aspects involved, and whether they had sought or received legal help. As one would expect, the report finds that low-income individuals regularly experience “important” situations involving legal issues, that many respondents did not understand the legal aspects of their problem or did not know that legal aid was available, and that, as a consequence, a large majority of individuals did not seek (or if they did, did not receive) legal assistance.<sup>59</sup>

Methodological concerns aside, these demonstrations of need are *still* not tethered to net benefits. We have no idea if it makes sense, from society’s perspective, to involve lawyers in these situations.<sup>60</sup> In fact, if behavior can reveal respondents’ preferences, the fact that many of these individuals did not seek help (or seek suggestions from others about where or how they might find help) suggests that at least some of the legal issues experienced were in fact minor (despite reports to the contrary) or were successfully resolved by compromise or otherwise without government-provided legal assistance. Of course, many of the respondents would have benefited significantly from having received legal services, but we have no idea how many or by how much. We also have no estimate of the expected

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57. The surveys indicate that most legal problems suffered by low-income individuals fall into the following categories: housing-related (e.g., evictions), consumer-related (e.g., debt-collection), and family-related (e.g., divorce). See LSC, JUSTICE GAP, *supra* note 3, at 11 & n.12. Employment, government benefits, and health care disputes are also common.

58. It is tough to interpret “important” here. At least 90% of respondents with a problem described their situation as “important.” See *id.* at 11.

59. *Id.* at 13-14. Importantly, many respondents reported that legal assistance was not sought because it would not have made a difference in the outcome. The LSC Report intimates that these responses may indicate lack of sophistication on the part of low-income respondents. True, but a plausible alternative is that legal services wound up being unnecessary. Sometimes, the correct legal outcome is obvious, even without a lawyer’s help.

60. One “rough and ready” approach would be to contrast the provision of legal services and other legal resources in the U.S. to what is made available in other similarly situated countries. Using this approach, Gillian Hadfield finds that U.S. investments in legal services are comparatively low. See Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 149 (2010).

costs (in the same document, for comparison purposes) to provide for these needs. Consequently, we cannot determine whether expanding civil legal services to serve the population documented in the report is a good idea, at least not if maximizing net benefits is a criterion of some value.

The final method employed by the LSC Report is the least convincing. The authors count all legal services lawyers in the country and compare the number of legal services lawyers per low-income individual to the number of non-legal services lawyers per non-low-income individual.<sup>61</sup> This exercise demonstrates that, per capita, low-income individuals have many fewer lawyers at their disposal. This exercise not only says nothing about net benefits, it has trouble saying anything about need. Although it may be a safe assumption, the LSC Report itself gives us no reason to think that the sorts of problems low-income and non-low-income individuals face are similar in kind or number. These populations almost certainly require significantly different levels and types of legal resources. This measure may in fact be an *underestimate* of potential net benefits if low-income individuals need many more such resources.<sup>62</sup>

In 1994, more than ten years before the LSC issued its report, the American Bar Association published "Legal Needs and Civil Justice: A Survey of Americans" ("ABA Report"). The ABA Report relies on a survey methodology similar to that used in the state-level studies analyzed in the LSC Report, and similarly seeks to determine the number of legal needs per household,<sup>63</sup> the types of legal needs, and the responses of households to those needs.

The results presented in the ABA Report are broadly similar to those found by the LSC, but the ABA Report's analysis is stronger (although narrower in focus), if for no other reason than its authors appear to understand that, as a category, legal "needs" may not be particularly useful to policy-makers: "The term 'legal need' is used advisedly. . . . [P]eople sometimes find ways of dealing with circumstances they face without turning to a

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61. LSC, JUSTICE GAP, *supra* note 3, at 15-19.

62. This number-of-lawyers measure may be a significant *underestimate* of potential net benefits of expansion if, at equal per capita numbers of lawyers, an additional lawyer directed toward helping low-income individuals would produce more benefits than would another lawyer employed by the average citizen. By using an incorrect measure, proponents of expanding services may be underselling their case.

63. Wisely, the ABA Report collects information from low-income and moderate-income households. By comparing the responses from these two groups (which show some differences, but not many) to various questions, we can explore whether lack of sophistication explains the failure of some low-income individuals to take advantage of publicly provided legal services. See generally ABA, LEGAL NEEDS, *supra* note 9, at 7-8.

lawyer, a mediator, or the courts. These circumstances are still considered 'legal needs' although there is no implication they must . . . be brought to the justice system."<sup>64</sup> One interpretation of this conclusion is that satisfying legal needs does *not* necessarily equate with increasing or maximizing social benefit. In fact, if expanding legal services programs to satisfy all needs precludes providing other services, low-income individuals can be made substantially worse off.

The ABA Report also presents a more detailed picture of why some low-income individuals do not turn to publicly provided legal services. Only 16% of individuals explained that "cost concerns" were the main reasons for not turning to the civil justice system to resolve their problem, while 20% determined that accessing the civil justice system "wouldn't help."<sup>65</sup> The first category suggests need, but the second category is harder to interpret. It may be that the respondents determined, correctly, that a lawyer or the court system would not improve their chances and that settlement of some sort (even concession) was most appropriate. But even more revealing is that 10% did not seek out assistance because it was "not really a problem," 8% because they "left the situation," 7% because they "handled it on their own," 6% because they "took other action," 5% because the "situation resolved," and 4% because it was "not a legal problem."<sup>66</sup> These numbers, without more context, suggest that for many individuals with a "legal need," providing a lawyer or legal advice would have been marginally useful at best, and maybe even counterproductive.<sup>67</sup>

The LSC and ABA Reports are about needs, not about benefits. Both reports are quite explicit that they seek to identify those who are being underserved by existing legal services programs. If the underlying policy goal is to satisfy all civil legal needs, regardless of cost or benefit, then

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64. *Id.* at 8.

65. *Id.* at 21. For a discussion about the apparently limited role of "legal costs" or "income" in explaining these unmet needs (and what it even means to say that a need is "unmet"), see Herbert M. Kritzer, *Examining the Real Demand for Legal Services*, 37 FORDHAM URB. L.J. 255 (2010) and Herbert M. Kritzer, *To Lawyer or Not to Lawyer: Is that the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875 (2008).

66. ABA, LEGAL NEEDS, *supra* note 9, at 21.

67. Importantly, these numbers provide us with no information about whether low-income individuals declined to enter into certain legal relationships *because* they had no means to enforce or understand their agreements or positions. Perhaps low-income individuals had relatively few legal issues for which increased legal access would have been useful precisely *because* these individuals felt they had no recourse to the justice system in the first place. If so, these needs estimates are much *lower* than they would otherwise be in a world where low-income individuals behaved as if they were able to enforce their legal rights.

perhaps these studies have gone far enough.<sup>68</sup> But if they instead seek to justify expanding legal services funding at the cost of other programs and priorities, policymakers may require more. It may be right that we should not skimp on providing equal access to the justice system for all citizens, but it must also be true that equalizing educational and health care opportunities matters. If policymakers must engage in trade-offs, a description of needs is insufficient. We must decide whose needs to satisfy.

It is surprising that the LSC and ABA Reports, in studying need, make no effort to quantify the benefits legal service providers would have provided, even to those determined to be in need, had these organizations received more funding, much less the benefits that might accrue to society generally from greater levels of investment. In arguing for more support, the reports do implicitly suggest, however, that the ability to access publicly provided legal services would alter outcomes for *at least* these potential clients. But an appropriate benefits measure, as should now be clear, would look to more than just changes in expected outcomes for newly covered clients—benefits would include those changed outcomes (adjusting for transfers), but also crucial *ex ante* consequences, and the indirect and direct effects on non-clients.

The closest legal services organizations come to a more balanced measurement approach are their assessments of *service quality*, which providers do explicitly value.<sup>69</sup> In addition to detailed performance criteria to ensure high quality service,<sup>70</sup> the LSC (and many other legal services institutions) have embarked on targeted programs to improve their quality marks. As a goal, high quality service may be an improvement because it includes much more than just client outcomes—it is also about process and structure.<sup>71</sup> But, while there is overlap between benefit creation and quality

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68. But probably not, because need is still defined too narrowly. *Cf. supra* note 67.

69. Helaine M. Barnett, *Sherman J. Bellwood Memorial Lecture: Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403, 423 (2005) (“Our challenge is to determine how to actually define quality, how to measure quality, and what our role as a funder is in helping to promote and inspire LSC-funded programs to provide the highest quality legal services possible.”).

70. LEGAL SERVS. CORP., PERFORMANCE CRITERIA 1 (2007) (“LSC has statutory responsibility to ensure the provision of economical and effective delivery of legal assistance by Legal Services programs to eligible persons in all parts of the country . . .”); *see also* Legal Services Corporation Act, 42 U.S.C. § 2996 (1974).

71. Michael J. Saks & Alice R. Benedict, *Evaluation and Quality of Assurance of Legal Services: Concepts and Research*, 1 LAW & HUM. BEHAV. 373, 377 (1977) (“In cost-benefit terms, a good outcome to a lawyer may conflict with a client’s goals such as reaching an outcome in a much shorter period of time, or with other costs to the client, in dollars, energy, or so on. Therefore, multiple criteria to evaluate quality must be employed.”).

service in that both care about more than just client outcomes, they are clearly distinct. An institution delivering high quality service may not be worth the candle, and a program with objectively bad service may still produce significant marginal net benefits for society. Thus, in order to argue that expansion of legal services provision is allocationally efficient, a method for measuring the benefits (not quality), specifically those for which there is no market measure, is needed.

#### IV. ASSESSING THE CRITICISMS OF LEGAL SERVICES FUNDING

As with the non-welfarist reasons offered to support expanding the public funding of legal services, many arguments pushed by opponents grow out of distinct values and assumptions, not different empirical *conclusions* about the real-world costs and consequences of legal services. I have nothing to say about these sorts of arguments in this essay, other than that cost-benefit analysis and the measurement issues it involves are irrelevant to the debate unless and until the parties agree that welfare economics is the appropriate way to think about the use of limited government (and social) resources.

Still, *welfarist* critics of the public provision of legal services abound, some of whom have attacked the “need” concept using arguments that are similar in flavor to the ones I offer above.<sup>72</sup> Most conclude, with no empirical evidence—other than cataloguing a number of unexpected costs or negative consequences—that legal aid programs ought to be eliminated or dramatically reduced in size. Making a move similar to the advocates of “need” measures, opponents appear to rely on something like a “needless” or “unnecessary” cost criterion. Just because a program is wasteful or generates unexpected costs, however, does not mean the program should be abandoned. The total benefits of the program may outweigh its (necessary and unnecessary) costs. Indeed, once the benefits of the program are tallied, *expansion* may be the obvious conclusion.

Moreover, in weighing the arguments of the opponents to funding, it is important to be precise about the target they attack. Many “critics of legal

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72. One argument is that “need” is defined endogenously—meaning, whether there is a legal need turns first and foremost on what we define as “legal.” See, e.g., Kenneth F. Boehm & Peter T. Flaherty, *Legal Disservices Corp.*, 74 POL’Y REV., Fall 1995, available at <http://www.hoover.org/publications/policyreview/3563827.html> (noting that the ABA’s needs study “appears defective” because it fails “to distinguish between ‘unmet’ and ‘unrecognized’ legal needs” and arguing later that: “It may be impossible to quantify legal needs in the first place. . . . [L]egal problems are whatever clever lawyers decide to bring forth. Actual needs can only be established by poor people themselves exercising free choice.”).

services” object to the *implementation* of a particular program or type of program, not to the idea of the public provision of legal services generally. For example, there is no end to the line of people who advocate abolishing the LSC.<sup>73</sup> These detractors view the LSC as the worst sort of public bureaucracy,<sup>74</sup> involving wasteful and abusive spending,<sup>75</sup> in part because it contracts with private organizations that it must oversee but which are largely above the law,<sup>76</sup> and inappropriate political lobbying (more on this complaint below). Despite the fact that recent financial crises suggest that these faults are not the exclusive province of public actors, these critics demand oversight and punishment for those who have abused the public trust—in the form of entirely defunding their organization.

But, the truth of these accusations aside, malfeasance of this sort is an argument about the costs of one particular way of delivering legal services. We can imagine a reformed LSC, or some other more efficient way of delivering legal services to the disadvantaged in the form of subsidized or free legal advice. True, opponents might say, but reform has been tried and has failed—the LSC is incorrigible. They might go further by suggesting that, by its very nature, the public provision of legal services will be excessively costly, on many levels. But these arguments speak only to *costs* of the enterprise, just as some proponents of expanded funding speak only to *benefits*. The misapprehension in these attacks, then, is failing to recognize that even jaw-dropping, unbelievably nervy costs (e.g., limousine services) are acceptable if the resulting benefits overwhelm these costs. Furthermore, if these net benefits exceed the net benefits that can be produced by other

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73. Or at least significant reform. See generally LEGAL SERVICES FOR THE POOR (Douglas J. Besharov ed., 1990).

74. For a recent accounting of the LSC’s “fiscal practices, conflicts of interest and general mismanagement,” see LEGAL SERVS. CORP., OFFICE OF THE INSPECTOR GENERAL, REPORT ON CERTAIN FISCAL PRACTICES AT THE LEGAL SERVICES CORPORATION (2006) and its accompanying letter to Congress.

75. See, e.g., Sam Dealey, *Illegal Services on the Hill*, WKLY. STANDARD, Aug. 9, 1999, at 18; Posting of Brandon Arnold, *A Disservice to the Poor*, to Cato@Liberty, <http://www.cato-at-liberty.org/2006/09/29/a-disservice-to-the-poor/> (Sept. 29, 2006, 15:51 EST); Posting of Brandon Arnold, *It Pays to Waste Money*, to Cato@Liberty, <http://www.cato-at-liberty.org/2007/02/02/it-pays-to-waste-money/> (Feb. 2, 2007, 10:31 EST).

76. See, e.g., Kenneth F. Boehm & Peter T. Flaherty, *Why Legal Services Corporation Must Be Abolished*, BACKGROUND, Oct. 19, 1995, available at <http://www.heritage.org/research/legalissues/BG1057.cfm> (“The Legal Services Corporation cannot be reformed because it was designed to avoid external controls. In effect, it takes public funds and transforms them into private funds, immune from the safeguards that govern other federal spending.”); cf. Jeremy Redmon, *Legal Clinic in Virginia Again Under Scrutiny; Service Suspected of Padding Clients*, WASH. TIMES, Apr. 20, 1999, at A1.

public projects,<sup>77</sup> then legal services funding should be expanded—despite the supposed inevitable waste that will follow.

My basic claims are that these determinations are empirical, that they cannot be made by argument or logic alone, and that neither side of the legal services debate has sought to measure and compare *both* the costs and benefits involved in the public provision of legal services. On this score, one could assert that critics of legal services programs fare worse in that they have made no systematic attempt to measure either costs or benefits. Proponents of legal services expansion have at least attempted to demonstrate *some* benefit through their needs studies,<sup>78</sup> although one might complain that telling only one-half of the story is likely to mislead and is not clearly better than no information at all. Either way, it remains unknown whether, if we care principally about net benefits produced by government programs, more or less funding is appropriate.

The argument that the LSC and, by analogy, other legal services organizations are wasteful and “unnecessarily costly” is not the sole argument made against government involvement with legal services to low-income individuals. Opponents of the LSC also claim that legal aid uses tax-payer money to pursue an ideological agenda.<sup>79</sup> Examples include lobbying in favor of or suing on behalf of “illegal immigrants,”<sup>80</sup> “radical feminists,”<sup>81</sup>

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77. This is an important caveat. Many critics of existing arrangements argue that judicial care, pro bono, ADR, non-legal support centers, or other solutions (when properly financed and not crowded out by fully staffed programs) would create more benefits and fewer costs than even an ideal LSC and other “staff attorney” solutions. See, e.g., Boehm & Flaherty, *supra* note 72. There may be merit in these reform ideas, and policymakers should consider options more drastic than just adjusting the funding for existing models.

78. Abel and Vignola catalogue and describe many “cost-benefit” studies that compare program costs to certain measurable benefits, Abel & Vignola, *supra* note 34, but invariably the measured benefits and costs are either underinclusive, overinclusive, or more often both. These studies also often fail to discount (or justify the decision not to discount) transfers between clients and non-clients and between different jurisdictions (e.g., studies that demonstrate the “benefits” of legal aid programs bringing “federal funding into the state,” ignoring the opportunity costs of using the money in one state instead of another). *Id.* at 2.

79. See, e.g., CATO INST., CATO HANDBOOK FOR CONGRESS (105TH CONGRESS), CHAPTER 15: COSTLY AGENCIES, <http://www.cato.org/pubs/handbook/hb105-15.html> (last visited Feb. 26, 2010) (“The LSC distributes tax dollars to local nonprofit organizations to fund free civil legal assistance to those in poverty. Unfortunately, all too often those tax dollars are instead used to fund lobbying and other political advocacy activities. That is an inappropriate use of taxpayer funds. The \$400 million LSC should be abolished.”); Phyllis Schlafly, *Time to Abolish Legal Services Corporation*, EAGLE FORUM, Jan. 29, 1997, <http://www.eagleforum.org/column/1997/jan97/97-01-29.html>.

80. See, e.g., Boehm & Flaherty, *supra* note 76; National Legal and Policy Center, *Taxpayer-Funded Group Sues Americans on Behalf of Aliens . . . Again*, Nov. 14, 2009, <http://archive.nlpc.org/view.asp?action=viewArticle&aid=62> (“LSC-funded lawyers are supposed to help the poor with day-to-day civil legal problems. Instead, they often litigate,

and “racial preferences,”<sup>82</sup> rather than solely servicing “the poor.” The boldest version of this argument asserts that the LSC and other legal services providers are politically and ideologically rotten to their cores and that no amount of reform can remove the taint.<sup>83</sup> But, even if this argument were 100% true,<sup>84</sup> opponents would *still* need to show (or at least assert) that the benefits created by legal aid to the hundreds of thousands of disadvantaged people by LSC-funded organizations does not compensate for the harm produced by the ideological agenda of legal aid organizations.<sup>85</sup>

To be sure, legal aid opponents identify many potential costs that might otherwise go unrecognized in any cost-benefit study. For example, commentators have asserted that legal aid providers have unwittingly promoted welfare dependency, helped to destroy public housing, undermined “the family,” encouraged illegal immigration and racial preferences, and inappropriately helped “criminals.”<sup>86</sup> To the extent that publicly provided legal

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agitate and lobby for left wing social and political causes, including the promotion of illegal immigration.”).

81. See, e.g., Carey Roberts, *Legal Services Corporation Turns Its Back on Men*, IFEMINISTS.COM, May 17, 2006, <http://www.ifeminists.net/introduction/editorials/2006/0517roberts.html> (“The LSC was created for a good purpose: to provide legal services so poor Americans could have their day in court. But while taxpayers and lawmakers looked the other way, the Legal Services Corporation has fallen under the sway of a radical gender ideology.”).

82. See, e.g., Boehm & Flaherty, *supra* note 76, at text accompanying nn.64-65.

83. See, e.g., *id.* at text accompanying nn.3-10 (“Legal Services suffers from an institutionalized ideological bias. . . . Legal services sees itself as a ‘movement’ . . . . According to its founders, its primary mission is not to meet the needs of individual poor people, but to achieve broader social change through ‘law reform.’”); cf. Maggie Gallagher, *The New Serfs*, NAT’L REV., Aug. 5, 1988, at 42 (“‘It’s too lawyer-dominated,’ agrees [Stephen] Elias. ‘Lawyers like to do what interests them. Routine legal work is boring. It’s a lot more fun to do the kind of work that interests you intellectually, like law reform.’”).

84. Many critics have argued that, by behaving politically, the LSC has violated federal law. See James T. Bennett & Thomas J. DiLorenzo, *Poverty, Politics, and Jurisprudence: Illegalities at the Legal Services Corporation*, POL’Y ANALYSIS (Cato Inst., Washington D.C.), Feb. 26, 1985, available at [http://www.cato.org/pub\\_display.php?pub\\_id=915](http://www.cato.org/pub_display.php?pub_id=915). The question whether government entities run amok is tangential to my arguments about costs and benefits. I focus here on the consequences of their actions, not whether (or why) they are “violations.”

85. Of course, some believe that an agenda focused on law reform will generate more benefits, not more costs. See, e.g., Gabe Kaimowitz, *The Legal Services Corporation Has Forgotten Its Mission: It’s Time It Got Back to Basics*, 17 HUM. RTS. 41, 43 (1990) (“But the poor don’t need thousands of lawyers whose boy scout vision would limit legal assistance to the equivalent of helping a little old lady across a crowded street—whether she wants such aid or not. What the poor need are ideas and legal strategies that will stop traffic in legislatures as well as courts, so that the poor can move about freely on their own.”).

86. See Boehm, *supra* note 37; see also Boehm & Flaherty, *supra* note 76; Rael Jean Isaac, *War on the Poor*, NAT’L REV., May 15, 1995, at 32-44.

services are causally responsible for broader social changes, the costs *and benefits* of those alterations should not go ignored. Too often, however, the costs become the exclusive focus of public funding opponents without a full accounting of the resulting improvements.

Even more important, however, is how little thought is generally given to the decision to attribute these “systemic” costs to legal services programs as opposed to some other causally necessary feature of our legal system. Put more directly: why should we count these costs against the good generated by publicly funded legal service providers? Legal aid lawyers do not act in a vacuum. To bring change (good or bad) to the world, legal aid lawyers must use substantive and/or procedural rights afforded to their clients *by some other source of governmental power* (e.g., the Constitution, the common law, a statute, a regulation, etc.).<sup>87</sup>

We can think of legal aid activities falling into two categories. First, legal aid lawyers help individuals pursue valid legal claims, and the pursuit or enforcement of these claims generates costs (and benefits), some of which were unexpected. Consider, for example, lawsuits to enforce welfare rights. Opponents argue that these suits led to the greatly expanded use of benefits and the concomitant dominance of entitlement issues in all fiscal decisions. Assuming these are valid claims, however, such use seems to have been the legislature’s hope. Opponents also suggest that legal aid has led to welfare dependency, which legislatures did *not* intend. Perhaps, but is legal aid lawyering the *cause* of welfare dependency? Or is it the substantive structure of the welfare laws?

To the extent that some “fully enforced” benefits are too “expensive,” that “fully enforced” substantive law entails unanticipated costs, or that “full enforcement” was unexpected, laws can be changed and regulations adjusted.<sup>88</sup> Such transparency seems superior to an arrangement in which laws are *premised* on the inability of some (perhaps the least capable) to assert lawful claims effectively (including those that employ new, but

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87. See RHODE, *supra* note 6, at 108-10.

88. A nice example here is the argument that legal services organizations raise the costs of evicting alleged drug criminals from public housing, thereby effectively “destroying” the housing by allowing drug crime to run rampant. See Boehm & Flaherty, *supra* note 76, at text accompanying nn.40-43. Assuming that the examples provided by opponents are representative (and ignoring the fact that a general rule of providing representation against eviction actions may have significant benefits and may lead to important behavioral changes (e.g., deterrence of abusive behavior by the public housing authorities)), these consequences are significant. Nonetheless, the “destruction” of public housing is equally due to insufficient policing resources, the existence of the Fourth Amendment, and so on. Opponents must make some additional assumption, at least, to lay these costs entirely at the feet of legal services providers.

plausible interpretations of laws). Nonetheless, opponents are right to suggest that strong advocacy might have unexpected consequences, and that these consequences ought to be considered, even if ultimately credited against the substantive guarantees at issue.

The second category of claims that generate knock-on “costs” are suits brought without merit (or the defense against suits with clear merit) simply to raise the costs of the other party and/or to “extort” changes in policy, despite little or no legal basis.<sup>89</sup> To the extent this happens, it ought to be viewed as a cost, as I recognized above when discussing the possibility of the filing of meritless claims. The targets of meritless claims may react in inefficient ways to avoid future suits (e.g., converting a low-income apartment building into condos). The resulting costs in terms of resources and suboptimal behavioral changes may be substantial, although the evidence on this point, to date, appears anecdotal, turning solely on inferences drawn from examples.<sup>90</sup>

Alone, of course, the mere existence of such costs tells us little about whether we ought to expand or reduce the public provision of legal services. After all, we view the public support of the private law system as worthwhile, despite costly strategic behavior on the part of litigants and the regular filing of meritless and harassing litigation. To know whether we come out the same way on legal services provision, we must attempt to *measure* (or at least bound) these costs. We must also calculate the benefits produced by these suits (or, assuming that all programs will involve some meritless litigation, all suits) and make comparisons. These comparisons have not yet been made.

Opponents of legal services appear to assume that legally weak cases or meritless cases are “zero” benefit cases. Such an assumption may appear reasonable, but it would be just an assumption.<sup>91</sup> The fact that a legal aid

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89. See Frank, *supra* note 2, at 3 (“If a dispute over shelter entitles one to a free attorney on the government’s dime, it will be much easier for people to intentionally refuse to pay rent or fight evictions when they violate a lease in ways that threaten other tenants. This will have costs far beyond simply paying for the plaintiff’s attorneys.”).

90. See, e.g., Howard Phillips & Peter Ferrara, *Hidden Costs of the Legal Services Corp.*, WASH. TIMES, Apr. 23, 1995, at B4 (describing many cases that the authors view as meritless or counterproductive).

91. In the civil *Gideon* context (where a right to a lawyer in civil cases would presumably dramatically increase funding to civil legal services), Ted Frank has argued: “We can expect that the flood of meritless criminal defense appeals will be duplicated in the civil context if legal access is costless to both the client and the attorney. A lot of big-firm pro bono work is self-serving or socially counterproductive. There is little evidence that poor people with meritorious civil cases could not be served by the current legal system of legal aid societies and pro bono work by attorneys.” Frank, *supra* note 2, at 2-3. Frank goes on

lawyer pursues a meritless case to force a policy change does not mean that the resulting policy change is not socially preferable. We may favor having experienced and insulated judges or democratically elected officials determine the contours of our substantive legal rights because we believe they are more likely to arrive at the correct answer or because their decisions have more legitimacy in the eyes of many. But, in certain contexts at least, the *source* of the change might well be irrelevant—the only question of consequence may be whether the final bargain is a net improvement.<sup>92</sup>

In fact, having policy advocates who seek “preventative” change and focus on the needs and hopes of the disadvantaged,<sup>93</sup> a group that is poorly represented in electoral politics because its members have difficulty voting or are disenfranchised (e.g., ex-felons), may be a beneficial counterweight to the problems generated by other social or political arrangements. Unfortunately, the methods I explore in the next section are not well suited to capturing the more systemic benefits that may result from a law reform or class action-oriented legal aid agenda, as opposed to the more easily measured individual-level benefits low-income individuals derive from having access to a lawyer.

#### V. IMPROVING THE BENEFITS MEASURE?

I began this essay by making the case that, from a welfare economics perspective, allocation decisions require the accurate measurement of the costs and benefits of government programs. Then, in Part III, I argued that existing studies of legal services have focused, inappropriately, on various measures of “need.” Some have suggested that providing legal access deserves special treatment in our allocation calculations, but if instead legal services ought to be viewed as government programs, funded only to the extent they provide net social benefits at competitive levels, the needs studies are insufficient to make the case. Even if there is something special

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to detail a few cases that appear to be socially wasteful, but despite his claim that two or three examples prove that none of the cases cited is an “outlier,” it makes little sense to evaluate the overall attractiveness of a program or policy only on the basis of its mistakes or poor showings.

92. The beneficial consequences may be many *even if* the claim is meritless. The mere fact that low-income individuals have a group of publicly funded lawyers working zealously on their behalf may lead to a view that the system is more fair and legitimate, which in turn could lead to reduced crime, increased cooperation with the police, neighborhood investment, etc.

93. For a discussion of the historical evolution of this approach to legal aid, see Michael Givel, *Legal Aid to the Poor: What the National Delivery System Has and Has Not Been Doing*, 17 ST. LOUIS U. PUB. L. REV. 369, 370 (1998).

about ensuring access, understanding the sacrifices we make by foregoing a welfarist arrangement will give us greater insight into the specifics and strength of our social priorities.

Either way, we need some means of estimating the *non-monetary* benefits produced by government services. Researchers employing cost-benefit analysis have developed a number of methods to measure such payoffs, using pilot programs, market data, or surveys, for example.<sup>94</sup> Below, I briefly mention a few of these approaches, but I describe in more detail a survey-based technique—the contingent valuation (“CV”) method—that can be used to measure the benefits of services that are rarely traded in markets.<sup>95</sup>

Importantly, I discuss contingent valuation *not* because CV is ideal, but because its application in the legal services context would require the *least change* to the needs-oriented survey approaches that are currently being used by researchers studying the benefits of legal services. In fact, CV suffers from numerous and well-documented biases and other drawbacks, some of which I will mention, but many of which I will not discuss.<sup>96</sup> Moreover, other valuation methods *may* be superior in the particular context of legal services provision. Nevertheless, because these other methods would require either significant outlays of resources or would rest on significant assumptions themselves, I opt to start small.<sup>97</sup>

But, before turning to how a researcher goes about implementing CV, it makes sense to return yet again to what we are trying to measure. At base, we want to know how much a prospective recipient would value the service he might receive if the program were authorized or expanded—not whether he “needs” it, but how much he would benefit from it.<sup>98</sup>

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94. See, e.g., Abel & Vignola, *supra* note 34 (discussing a number of pilot programs and explaining how they are used to study the consequences of certain legal aid approaches).

95. See generally Trudy Ann Cameron, *Contingent Valuation*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

96. For the most comprehensive discussion of the weaknesses of contingent valuation, although the work is now slightly dated, see CONTINGENT VALUATION: A CRITICAL ASSESSMENT (J.A. Hausman ed., 1993).

97. I do not mean to undersell CV generally. There is obviously significant precedent for its use in evaluating all sorts of government programs. See, e.g., Colette M. Escobar, W. Steven Barnett & John E. Kieth, *A Contingent Valuation Approach to Measuring the Benefits of Preschool Education*, 10 EDUC. EVALUATION & POL’Y ANALYSIS 13 (1988); Bernie J. O’Brien et al., *Assessing the Value of a New Pharmaceutical: A Feasibility Study of Contingent Valuation in Managed Care*, 36 MED. CARE 370 (1998).

98. Cost-benefit analysis focuses on making these measurements *ex ante*, i.e., at the time the decision to establish or expand the program is made, not after individuals receive benefits under the program. See Trumbull, *supra* note 22, at 205-06.

The touchstone concept here, drawn from economics (and also not uncontroversial), is termed willingness-to-pay ("WTP"), typically defined as the maximum monetary amount a person would be willing to pay to receive a good or service.<sup>99</sup> If we can calculate WTP for each incremental person affected by the program (participants and those who benefit as non-participants), then we can just add up those individual amounts,<sup>100</sup> and subtract the marginal expenses of providing the service (assuming budgetary costs are fair measures of opportunity costs), and we have a rough and ready estimate.<sup>101</sup>

For goods or services traded in a well-working market, we can estimate WTP by combining the equilibrium price and quantity for a service with at least one other piece of information (for example, a previously estimated demand elasticity or additional equilibrium information) to identify a demand curve for the service directly.<sup>102</sup> The area under the demand curve for the newly served individuals is a measure of consumers' or beneficiaries' WTP (measured in dollars).<sup>103</sup>

We do see legal services trading hands in the market, even for low-income individuals. Therefore, we could attempt to use a "market analogy method" to attribute a WTP to low-income individuals.<sup>104</sup> But, we must be aware that potential recipients may have preferences that are distinct from the general population, and that the services supplied by a legal aid program almost certainly differ from those supplied by the market.<sup>105</sup> In other

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99. See BOARDMAN ET AL., *supra* note 14, at 76. Willingness-to-accept ("WTA") is an attractive alternative concept. I define it and discuss its potential application in the CV context below, where the choice between WTP and WTA in the design of a survey instrument is likely to make a difference in the estimates that result.

100. There are important theoretical limitations to "adding up" individual WTP values to arrive at a social WTP. See *id.*, at 33-35. In addition, we might also consider including the benefits of monetary transfers (i.e., damages), depending on whether the WTP measure includes the prospect of receiving a damages award.

101. This is a very rough description. There are many technical and theoretical concerns and methodological difficulties raised by cost benefit analysis, the WTP measure, and the CV methodology used to calculate it. For example, CV and WTP ideas assume away "uncertain" preferences. See G. Cornelis van Kooten, Emina Krcmar & Erwin H. Bulte, *Preference Uncertainty in Non-Market Valuation: A Fuzzy Approach*, 83 AM. J. AGRIC. ECON. 487 (2001).

102. For examples, see BOARDMAN ET AL., *supra* note 14, at 314-29.

103. See *id.* at 51-69; GRAMLICH, *supra* note 14, at 48-59.

104. See BOARDMAN ET AL., *supra* note 14, at 338-40.

105. In order for the market analogy method to work, we must be looking at roughly the same good or service. Even if we conclude that we are looking at the same service (same type, same quality), "[u]sing the market price would be an appropriate estimate of the value of the publicly provided good [only] if it equals the average amount that users of the publicly provided good would be willing to pay." *Id.* at 338.

words, there is no uniform product called “civil legal access,” although there are insurance programs that could provide a baseline for the valuation of these services.

Alternatively, we might try to estimate WTP using a “trade-off method,” in which we calculate a person’s WTP by what that person is willing to sacrifice to receive the service in question.<sup>106</sup> How far will they drive? How long will they wait? If we assume that new beneficiaries of legal services programs would be similar to existing clients (or some subset of existing clients), we may be able to draw conclusions about the benefits that will emerge from expanded access. The difficulty with this method is that we must also price what these individuals are willing to sacrifice to access the civil justice system. Unfortunately, many low-income individuals do not work and are, in general, budget constrained in their behavior. These are just limitations—time is always valuable—but they may make it significantly more difficult to calculate the appropriate number.

CV methods are not obviously better than using a “market analogy method” or a “trade-off method” to estimate benefits, but CV is similar in style to the surveys now being used in needs studies throughout the U.S. Instead of asking low-income individuals whether they have experienced a particular need, whether that need was important or very important, and how that need was resolved,<sup>107</sup> one could instead design a survey to quantify, directly, a recipient’s or, even better, a potential recipient’s, willingness-to-pay for access to particular legal services.

But, before sketching the various ways a researcher might go about implementing a contingent valuation study of the benefits of expanding legal access, we need to answer a preliminary, but crucial, question: because, in theory, legal services can be sold in a market to low-income individuals, does the fact that we do not see very many such services provided by the market necessarily indicate that the net social benefits of the government providing these services must be negative? The answer is “no,” for a few distinct reasons.

First, private providers care primarily about profit, not about social benefit. A lawyer’s profit does not include any consumer surplus, i.e., that benefit that cannot be collected through the price demanded. Assuming that private lawyers cannot first-degree price discriminate (and thereby capture all consumer surplus) and that low-income individuals differ significantly

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106. *See id.* at 340.

107. Recall that questions of these types were included in the 1994 ABA Report. *See generally* ABA, *LEGAL NEEDS*, *supra* note 9.

in their valuation of legal services,<sup>108</sup> the fact that providing legal services to low-income populations is not profitable, even in a well-functioning market, tells us something, but not everything, about the net social benefits provided by a potential program.

Second, although low-income individuals might value additional legal services at a level above their marginal social cost, there may be market failures that are particularly acute in the low-income segment of the legal services market. For example, low-income individuals may not have sufficient funds available to pay for the services they value when those services are actually needed, and they may have limited access to financial markets.<sup>109</sup> Additionally, if low-income individuals are relatively unsophisticated consumers of legal services, asymmetric information about the quality of services received or the amount of effort expended by a lawyer may lead these individuals to forego paying for these (potentially less regulated, private) services for fear of getting nothing and, in that case, having no obvious recourse.<sup>110</sup> Finally, access to legal services may be a public good in that at least some of the benefits come in the form of *ex ante* changes in behavior by potential defendants (deterrence), changes which may benefit many more people than just the client or clients bringing suit.<sup>111</sup>

Third, a legal services program may exist in part to accomplish redistributive aims.<sup>112</sup> We could incorporate a social planner's preference for a

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108. First-degree price discrimination occurs when a seller of a good can determine precisely how much a consumer is willing to pay for a good or service. If the seller has that information, which is never the case for all consumers in the real world, he can capture the entire social surplus by setting the price to equal the consumer's WTP. JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 135-37 (1988).

109. See RHODE, *supra* note 6, at 10. In other words, low-income individuals may often be liquidity constrained. At the time of their need for advice or representation, they may not have sufficient savings and may have no ability or time to borrow from a bank or other source of capital, like friends or family members.

110. Lawyers, like doctors, are difficult for clients to monitor effectively, especially if the client has no background in law or no previous experience with the legal issue in question. See, e.g., Jack Oceano, *Four Ways Lawyers Cheat Their Clients*, ASSOCIATED PRESS, June 18, 2007 (citing overbilling, hidden fees, poor advice, etc.).

111. See RHODE, *supra* note 6, at 11. The fact that legal services can be public goods appears, at first blush, to raise difficulties for CV methods, at least if we were to ask a potential client how much he would value *his* having access to a lawyer, because the potential client would not take into account the benefits created for others. The question can be re-framed, however, to inquire about how much value the potential client would place on the existence of a program that would help him and similarly situated individuals with their legal problems. This form of the question would allow him to account for the benefits he might receive from his own use of the services *as well as* from some other individual's efforts that, through no effort on his part, provide the potential client with benefits.

112. Cf. GRAMLICH, *supra* note 14, at 22-25.

more equal distribution of social resources by conceiving of benefits as including a redistributive premium in addition to the recipient's benefit (and the benefits of affected nonparticipants).<sup>113</sup> Alternatively, we could employ a social multiplier of some sort—benefits by low-income individuals would be multiplied by some number greater than one when compared to benefits received by other citizens.<sup>114</sup> Either way, a well-working market would not produce the optimal outcome, given these social preferences. As a result, it should not be surprising that private legal services providers might offer too few services (from society's perspective) or perhaps none at all.

Together, these arguments suggest that we may see the underprovision of legal services to low-income individuals for the same or similar reasons we see the underprovision of parks or other public goods by private actors—market failures can create disconnects between privately optimal behavior and socially optimal arrangements. We may, of course, be able to fix the failures leading to underprovision of legal services by progressive taxation, providing information and education, or regulating lawyers serving low-income populations. These ideas are beyond the scope of this essay. Instead, I take it as a given that the benefits created by legal services programs may be substantial, despite the market failing to make them available at a price low-income individuals can afford.

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A contingent valuation study begins with the identification of a survey population.<sup>115</sup> Are we interested solely in how much low-income individuals value legal services? Possibly, but there are plenty of reasons to think people in general place value on *all* citizens having access to the legal system.<sup>116</sup> In fact, because some view legal access as a right, many who will never qualify to receive legal aid still support its expansion on a rights basis alone.<sup>117</sup> Separately, the indirect effects of providing legal services to low-

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113. See *id.* at 22-25, 229; Adler & Posner, *Implementing CBA*, *supra* note 20, at 1135-41.

114. See GRAMLICH, *supra* note 14, at 115-31.

115. See BOARDMAN ET AL., *supra* note 14, at 370.

116. Of course, all individuals are *potential* legal aid clients—the well-off do fall on hard times. Higher-income respondents should consider this possibility in valuing the program.

117. Measuring these passive benefits will be a difficult (and questionable) aspect of any CV study. See generally Daniel McFadden, *Contingent Valuation and Social Choice*, 76 AM. J. AGRIC. ECON. 689 (1994). Consequently, it might make practical sense just to assume these benefits are zero, or otherwise account for their possibility *ex post*, especially in light of the fact that many Americans already incorrectly believe that low-income Americans have full access to lawyers. See RHODE, *supra* note 6, at 4. For some of the criticisms

income individuals might generate *direct* benefits (and costs) for non-participants if improved legal access has important social consequences—e.g., reduced crime, a more effective workforce, etc.<sup>118</sup> These complexities suggest that a researcher should consider sampling two populations—those who would qualify as clients, and those who are likely only to appreciate the existence of the program or benefit through social change.<sup>119</sup> Sampling both groups would be expensive, but important,<sup>120</sup> given how differently these populations may value more robust legal aid programs.

Next, any CV survey would need to settle on a specific policy proposal *and* determine how to describe or present this proposal to survey respondents.<sup>121</sup> It is important that respondents put a value on the *actual* proposal (or a part of the proposal) and the opportunities and benefits it provides to them, and not on some other plausible set of services. Moreover, the precise framing of the questions turns out to be critical to arriving at reliable estimates.

With respect to *describing* the policy, we could opt for one all-encompassing definition that characterizes the program in the abstract: “A program that provides legal advice and representation to low-income individuals when they face civil legal problems.” The difficulty with this approach is that a vague description may not convey enough information about what the program entails for respondents to answer accurately. We would have little reason to believe that respondents were valuing the same

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of using CV to measure existence value, see generally Peter A. Diamond & Jerry A. Hausman, *On Contingent Valuation Measurement of Nonuse Values*, in *CONTINGENT VALUATION: A CRITICAL ASSESSMENT* (J.A. Hausman ed., 1993).

118. For an example of this possibility, see THE PERRYMAN GROUP, *THE IMPACT OF LEGAL AID SERVICES ON ECONOMIC ACTIVITY IN TEXAS: AN ANALYSIS OF CURRENT EFFORTS AND EXPANSION POTENTIAL* (2009) (arguing that legal aid more than pays for itself by stimulating business activity, which presumably benefits more than just low-income citizens).

119. Legal services lawyers may constitute a third (overlapping) population receiving benefits from expanding legal aid. Here, benefits do not come in the form of receiving a salary. Salaries are an opportunity cost. Rather, public interest lawyers may reap some additional emotional payoff from working for low-income individuals. Such rents, were they to occur in a well-working labor market, would presumably generate a queue for legal aid jobs, which would in turn lead to salary reductions until the marginal legal services lawyer was just indifferent to other opportunities. If the marginal and average lawyer were similar, then these benefits would be, in effect, *already included* in the final tally as lower salary costs.

120. Recall that the ABA Report surveyed both low-income and moderate-income individuals, providing a precedent for a survey-based study that does not focus exclusively on low-income potential clients. See ABA, *LEGAL NEEDS*, *supra* note 9, at foreword.

121. See Portney, *supra* note 41, at 5-6.

thing, much less the right thing,<sup>122</sup> although, on average, they may get it about right. More problematic, as the ABA and LSC Reports make plain, is that many low-income individuals may not understand when they have legal needs or what legal rights they may have when faced with a legal issue. Therefore, an abstract description would probably lead to an *underestimate* (or at least an inaccurate appraisal) of a program's benefits.

Instead, we might ask individuals to value distinct sets of services, perhaps by describing problems regularly faced by low-income individuals and by explaining how legal services might help resolve those problems.<sup>123</sup> Not only might this approach lead to a more accurate assessment of a *general* legal services program by providing respondents with more context and information about the specific services available, but it would also allow us to evaluate the value of expanding the provision of legal services in particular substantive areas. Because legal services typically fall into a number of discrete categories (e.g., landlord/tenant, employment, etc.), we could frame questions to deal with particular concerns, or even present common factual scenarios (e.g., wrongful eviction).<sup>124</sup> Yet another set of questions could highlight the difference between receiving advice or representation in transactional settings relative to adversarial settings.

To be worth their salt, CV studies must also be neutral in their framing of issues. It is one thing to stress benefits to an individual who will subsequently be asked to pay for the service or product he evaluates—we might be able to rely on that individual to scrutinize closely all claims and tradeoffs before making any transaction. But framing and full information are crucial when using a hypothetical survey.<sup>125</sup> By failing to provide the full picture, poorly designed CV studies can generate unreliable results.<sup>126</sup>

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122. See BOARDMAN ET AL., *supra* note 14, at 379-80; see also Henrik Svedsater, *Economic Valuation of the Environment: How Citizens Make Sense of Contingent Valuation Questions*, 79 LAND ECON. 122 (2003).

123. In carrying out a CV study, we could ask each respondent many different questions in many different ways about many different, but very related, services. There is a concern, however, that the order in which the questions are asked and previously given answers will influence the answers respondents provide. See BOARDMAN ET AL., *supra* note 14, at 385. Randomizing the question order for each interview might help, but an ideal study would expand the set of interviewees and essentially conduct a separate study on each proposed service or service feature.

124. Again, previous work demonstrates that taking this approach is feasible: existing needs studies often ask respondents about their experience with dozens of common legal issues. See ABA, LEGAL NEEDS, *supra* note 9 (describing the sixty-seven scenarios presented to each respondent).

125. See Portney, *supra* note 41, at 9.

126. See BOARDMAN ET AL., *supra* note 14, at 380-82.

Consequently, any CV study of expanded legal services provision should be conducted by disinterested researchers. To ensure neutrality, it would be important to stress the personal (if not financial) costs to each prospective client of taking advantage of these services, as well as the benefits of resolving legal problems without the use of lawyers or courts. Researchers should also stress the negative consequences that may follow from resorting to the use of legal services (other than some possibility of losing a dispute or remaining in the status quo), such as loss of reputation and the practical (if illegal) possibility of retaliation. The same neutrality of presentation would also be indispensable in any survey directed toward individuals unlikely to use publicly provided legal services directly.

Researchers interested in using CV methods to study expanding legal services programs would also have to decide whether to frame the program as providing people with a remedy for their "rights" (using a willingness-to-accept approach) or instead as providing low-income individuals with an expanded government "benefit" (using a willingness-to-pay approach).<sup>127</sup> For most yet-to-be-granted government services, WTP seems to be the appropriate measure—there is no sense in which individuals can claim to "own" a benefit not yet in existence. But with legal services programs, one could persuasively argue that low-income individuals have *rights* to make use of law and courts,<sup>128</sup> and therefore the value of interest is how much a person would *accept* to give up those rights by agreeing to limit or eliminate publicly provided access.

Fortunately, by rephrasing a survey's questions, researchers can measure WTA instead of WTP, but this decision should not be taken lightly—these two approaches will likely produce different outcomes. WTP estimates of value are often lower than WTA estimates of value,<sup>129</sup> which would render

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127. Instead of inquiring how much the respondent would offer to "buy" a good or service, WTA surveys assume the respondent already "owns" or "controls" the service and is instead being asked how much he would accept to part with it. See *id.* at 387-88. There is evidence that WTP and WTA estimates tend to converge with experience, but because a CV study would ask a respondent to make an evaluation just once, experience is no solution here. See *id.* at 387 (citing sources). For an example of the trade-offs (and empirical challenges) of using WTA, see Bishwanath Goldar & Smita Misra, *Valuation of Environmental Goods: Correcting for Bias in Contingent Valuation Studies Based on Willingness-to-Pay*, 83 AM. J. AGRIC. ECON. 150 (2001).

128. LSC, JUSTICE GAP, *supra* note 3, at preface.

129. One explanation of this disparity is that individuals may be loss averse, and so may value goods and services they already own *more* than goods and services they can buy. See BOARDMAN ET AL., *supra* note 14, at 383; Elizabeth Hoffman & Matthew L. Spitzer, *Willingness To Pay vs. Willingness To Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59, 88 (1993).

them more conservative in a sense and likely to favor the status quo.<sup>130</sup> On the other hand, even where WTA estimates seem on their face to be more appropriate, WTP estimates typically line up much better with estimates produced by other methods.<sup>131</sup>

Whether either survey approach is *accurate*, however, is a different question, turning on how the survey deals with the potential for *strategic dishonesty* on the part of respondents and the potential *judgment biases* that may influence the answers respondents provide. The primary challenge CV methods are designed to tackle is strategic dishonesty and I discuss CV's potential solutions to that concern below when I describe its techniques. But judgment biases may be just as much of a hazard to accurate assessment, and so it is critical for any researcher to keep them in mind. For example, over-optimism bias (which would tend to reduce *measured* WTP) may be particularly problematic in a survey asking how much someone would value legal advice in the (incorrectly assumed to be very unlikely) case of a divorce, an arrest, or an eviction.

More generally, as in virtually every other decision-making setting, cognitive biases may skew respondent survey answers. Many of the standard biases are present—including (in addition to over-optimism bias) availability bias, conjunction bias, anchoring bias, status quo bias, embedding bias, and probability bias.<sup>132</sup> In the CV context, however, the threat of cognitive biases infecting estimates is even graver than elsewhere. Researchers have demonstrated that the ordering of questions in the survey (ordering or sequencing bias) and the selection of the starting value (starting point bias) may also contort respondent reactions.<sup>133</sup>

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130. The higher WTA measure may be more appropriate in public goods settings because WTP may be downward biased. WTP is a function of income, and income-generating effort may be suboptimal when additional effort does not allow for the purchase of more of the public good. See PHILIP E. GRAVES, *THE SIMPLE ANALYTICS OF THE WTA-WTP DISPARITY FOR PUBLIC GOODS* (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1365510](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1365510).

131. See BOARDMAN ET AL., *supra* note 14, at 380-82.

132. See e.g., *id.* at 379-94; RAYMOND J. KOPP, WERNER W. POMMERHNE & NORBERT SCHWARZ, *DETERMINING THE VALUE OF NON-MARKETED GOODS: ECONOMIC, PSYCHOLOGICAL, AND POLICY RELEVANT ASPECTS OF CONTINGENT VALUATION METHODS* (1997); Peter A. Diamond & Jerry A. Hausman, *Contingent Valuation: Is Some Number Better than No Number?*, 8 J. ECON. PERSP. 45 (1994).

133. See John K. Horowitz, *A New Model of Contingent Valuation*, 75 AM. J. AGRIC. ECON. 1268, 1268 (1993). In dichotomous choice CV surveys, people also seem to answer "yes" too often, but as with other biases, researchers have developed various tools to deal with this concern as well. See R.K. Blamey, J.W. Bennett & M.D. Morrison, *Yea—Saying in Contingent Valuation Surveys*, 75 LAND ECON. 126, 126 (1999).

As a result, a survey designer would need to devote significant energy to constructing the survey so as to reduce or eliminate the influence of these systematic errors. Evidence suggests that these biases *can* be mitigated or at least measured,<sup>134</sup> and some of these concerns seem likely to be less of a problem in the legal services context. For example, biases are often more serious when individuals are asked to value very low probability events with extreme consequences.<sup>135</sup> But the needs studies indicate that low-income individuals regularly encounter legal problems and that these legal problems fall into a fairly standard set of categories.<sup>136</sup> If true, individuals will not struggle to imagine these events. In fact, they may already have had (or know people who have had) intimate experience with the legal issue in question.

Once a population has been selected and framing issues have been resolved, a researcher must choose a contingent valuation method. There are a number of such methods from which to choose,<sup>137</sup> and I will not explore them in detail. At base, each method uses survey questions to learn about how much an individual would be willing to pay for something—in this case, access to legal services. The single most difficult hurdle in contingent valuation is to ensure that individuals report their valuation knowingly and *honestly*. This core worry about dishonesty stems from the survey context. If you ask a low-income individual (who pays very low or no taxes) how much he would value a larger “free” legal services program, he has the incentive to overreport the benefit he expects to receive if he believes his answer might affect the policymaker’s decision.<sup>138</sup>

There are two major categories of contingent valuation studies. The first type, often referred to as direct elicitation, includes open-ended WTP methods, closed-ended iterative methods, and contingent ranking methods. Open-ended approaches, which essentially ask an individual how much she would be willing to pay for a particular service or good, are less common because they are viewed, understandably, as less reliable than most alterna-

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134. See BOARDMAN ET AL., *supra* note 14, at 379-94.

135. See *id.* at 382; see also K.S. Shrader-Frechette, *Economics, Risk-Cost-Benefit Analysis, and the Linearity Assumption*, 1 PROC. BIENNIAL MEETINGS PHIL. OF SCI. ASS’N 217, 218-23 (1982).

136. ABA, *LEGAL NEEDS*, *supra* note 9; LSC, *JUSTICE GAP*, *supra* note 3.

137. For an article comparing some of the different methods, see Kevin J. Boyle & Richard C. Bishop, *Welfare Measurements Using Contingent Valuation: A Comparison of Techniques*, 70 AM. J. AGRIC. ECON. 20, 20-22 (1988).

138. To some extent, this concern is mitigated by including a payment vehicle (how the individual will “pay” for the hypothetical benefit) in the survey, which I discuss below. See also BOARDMAN ET AL., *supra* note 14, at 374, 388-91.

tives. Closed-end iterative approaches start with a value and move away from it, depending on whether the respondent would or would not have paid the initial proposed amount. Finally, contingent ranking methods ask respondents to rank various packages (price and quality/quantity); the resulting ordinal ranking can be used to generate WTP estimates for increments of quality/quantity improvement.<sup>139</sup>

In a closed-end iterative survey, for example, one could imagine asking someone whether he or she would pay \$100 to have access to a free lawyer in case the individual needs to obtain a divorce at any point in the future.<sup>140</sup> If the answer is yes, then the interviewer might raise the amount to \$125 and check with the respondent again. If the answer is no, the interviewer might suggest \$75. The interviewer can record the point at which each respondent switches from yes to no or from no to yes, and then aggregate this information into a market demand curve, from which WTP can be derived.<sup>141</sup> In theory, this approach should capture *all* of the benefits the respondent might obtain from having that lawyer available that I described in Part II—not just the benefit of getting a divorce conditional on needing a divorce, but also the value, if any, to the respondent *now*, of feeling more comfortable entering into marriage in the first place. These indirect benefits—the value that comes from being able to take advantage of the law *ex ante*, knowing that you have access to a lawyer should the need arise—may be substantial.

The next group of CV approaches employs a dichotomous choice method. In these studies, there is neither iteration nor the use of multiple prices. Instead, for each policy, the respondent is asked a single take-it-or-leave-it question: Would you pay \$X for policy Y? The trick is that the researcher will randomly select (within a reasonable range) a price \$X for each respondent. As long as we survey enough individuals, we can combine the answers to generate an aggregate demand curve indicating how

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139. See *id.* at 370-74 (briefly describing all of the above approaches and providing examples of such studies in the end notes).

140. A reader might react that we know individuals systematically underestimate their own likelihood of divorce. As noted in my discussion of judgment biases above, over-optimism can be a significant problem for CV studies. Even if we are unable to remedy this concern through survey design, however, we can still profitably use any results to establish a *lower bound* of the benefits of expanding legal services. If the marginal benefit of expanding the program using this lower bound value exceeds the marginal costs by more than alternative uses, then expansion would be warranted under a welfarist approach.

141. See, e.g., David Brookshire, Berry Ives & William D. Schulze, *The Valuation of Aesthetic Preference*, 3 J. ENVTL. ECON. & MGMT. 325, 325-26 (1976).

many respondents would buy (be “willing to pay”) for each price in a range of prices considered plausible.<sup>142</sup>

Regardless of the precise structure of the survey, the use of a *payment vehicle* in the survey design is usually helpful, if not necessary, to make sure that the costs and benefits of the choice are made salient to the respondent and to avoid encouraging respondents to behave in a strategically dishonest way. The concern is that respondents might assume that reporting a very high WTP will increase the likelihood of receiving new or additional legal services (a benefit), but they will either not contemplate the costs or will assume the costs will be borne by other (higher-income) citizens. Consequently, researchers should not simply ask “how much one would be willing to pay” in the abstract, but should describe the specific method that would be used to collect the amount of money the respondent names (e.g., higher taxes, greater user fees, etc.).<sup>143</sup>

One helpful payment vehicle to consider when evaluating a policy that targets low-income, budget-constrained individuals may be the reduction of other types of *existing* public benefits, given that many of the relevant respondents may lack the income to pay an appropriate deductible and may pay no taxes. For example, an interviewer might ask whether the respondent would be willing to receive fewer food stamps or less housing assistance in exchange for the availability of legal services.<sup>144</sup> One nice aspect of this approach is that it measures the benefits of expanded legal services *in non-monetary terms* (i.e., in terms of reducing *other* publicly provided goods and services that may be linked to important values), which helps makes the ultimately inherent trade-offs involved more explicit.

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The sketch of CV methods above is very brief,<sup>145</sup> but provides a flavor for how these methods might be used to gauge the benefits provided to participants and nonparticipants alike by (more extensive) publicly provided

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142. See BOARDMAN ET AL., *supra* note 14, at 371-74.

143. See *id.* at 374.

144. Cf. Robert J. Johnston, Stephen K. Swallow & Thomas F. Weaver, *Estimating Willingness to Pay and Resource Tradeoffs with Different Payment Mechanisms: An Evaluation of a Funding Guarantee for Watershed Management*, 38 J. ENVTL. ECON. & MGMT. 97, 97-98, 113-14 (1999).

145. There are a number of other issues a researcher would have to consider that I do not discuss. For example, costs and benefits do not just occur in the present—the shape of future streams of costs and benefits, which may differ from the streams of other projects and from each other, have to be taken into account and discounted appropriately.

legal services. CV methods are imperfect,<sup>146</sup> and even if we were to leave estimation methods to one side, there are still drawbacks to using WTP as our only yardstick for thinking about benefits.<sup>147</sup> But this approach generates defensible estimates: ones that courts, legislatures, and regulators have regularly accepted as reasonable.<sup>148</sup> From an allocational efficiency perspective (and if we accept the utility of cost-benefit analysis in decision making), employing contingent valuation would likely be an improvement on, or at a minimum, a complement to, existing approaches that seek to demonstrate need alone.<sup>149</sup>

Still, I do not mean to argue that CV-based benefit estimates ought to *drive* our policy decisions, but only that CV should be considered as a plausible method (along with others) to answering *one question* that matters to policymakers: not whether there are any benefits at all to providing more legal services to low-income individuals (the answer will probably always be yes), but whether there are sufficient benefits produced to justify the expansion of legal services given their costs and the fact that we live in a world of limited resources.

In trying to answer that question, we should of course contrast CV estimates to estimates produced by other plausible approaches based on real-world behavior (e.g., trade-off and market analogy methods, in the right context).<sup>150</sup> In past comparisons, CV methods have performed reasonably well, at least in contexts where the good or service is likely to be used by the person making the valuation, as opposed to passive use or existence value situations. Thus, when used with care, CV can be a useful tool gen-

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146. See generally ARROW ET AL., REPORT OF THE NOAA PANEL ON CONTINGENT VALUATION 9-17 (1993) (on file with author); CONTINGENT VALUATION, *supra* note 96. The set of drawbacks from using CV also include *all* of the concerns that regularly attach to survey methods generally. See BOARDMAN ET AL., *supra* note 14, at 374-76. For example, researchers have to be careful about how they sample and survey respondents.

147. See Frank, *supra* note 5, at 917-19.

148. See, e.g., Portney, *supra* note 41, at 6-10 (discussing the use of CV in litigation).

149. In the nonuse context, however, see Diamond & Hausman, *supra* note 132, at 46 (“[W]e think that these [CV] surveys do not have much information to contribute to informed policy-making. Thus, we conclude that reliance on contingent valuation surveys in either damage assessments or in government decision making is basically misguided.”). A few of their concerns carry over to situations in which clients expect to use the good or service. One response to Diamond and Hausman is that policymakers are already being offered flawed information, so CV studies would still be useful so long as they were less flawed than needs studies.

150. ARROW ET AL., *supra* note 146, at 7-9; Portney, *supra* note 41, at 4.

erally,<sup>151</sup> and may be particularly useful in evaluating the benefits of expanding access to legal services.

### CONCLUSION

In this essay, I make a rough case against the idea that governments should make resource allocation decisions *solely* on the basis of “need” or “unnecessary costs” in the legal services context. After introducing welfare economics’ basic tenets of efficient resource allocation, I suggest that comparing the costs and benefits of expanding a government program can be useful, if only because doing so gives us greater insight into the sacrifices we are willing to make as a society to pursue some other goal (like *full* access to the courts). I then describe the difficult problem of measuring the benefits (and costs) of civil legal services programs aimed at serving low-income communities, and ask whether existing studies of “need” succeed at this task. I conclude that needs studies provide us with some information, but much less than policymakers require, to make informed judgments about the levels of resources we ought to devote to maintaining or expanding legal services. As an alternative, I explore the possibility of using cost-benefit approaches, focusing particularly on contingent valuation ideas, because CV studies rely on survey methods, much like existing needs studies. CV approaches are far from perfect, but they offer the potential to improve our resource allocation decisions in the legal services setting, and are thus deserving of more attention.

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151. A number of sources provide “best practices” and guidance for the use of CV. See, e.g., ANNA ALBERINI & JAMES R. KAHN, HANDBOOK ON CONTINGENT VALUATION (2006); ARROW ET AL., *supra* note 146; Portney, *supra* note 41, at 9 (summarizing the NOAA Panel’s 1993 recommendations).