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Shadow Markets for Legal Services: Beyond the Community-Based Approach

Andrea Christensen Luby

At the Liman Colloquium on the Future of Legal Services, practitioners, scholars, and judges frequently urged poverty lawyers to be responsive to the needs of the client-communities they serve. The need to listen to how poor communities characterize their legal needs cannot be overemphasized, especially in this era of shrinking resources for legal services. After all, legal services lawyers decide which cases to accept, and how much time to spend on them.

This Paper will argue, however, that merely listening to clients before making these allocation decisions is insufficient. It will propose, instead, that legal services agencies go beyond this community-based approach by actually sharing the power to distribute legal services with the clients they serve.

Part I will describe the need to involve poor clients in decisions about how legal services are allocated. Rationing by lawyers alone is problematic. When deciding which cases to accept, lawyers lack specific information about the importance of resolving a legal problem to a particular applicant. When allocating services between various clients, lawyers are torn between their duty to individual clients and their responsibility to serve an entire community. Because lawyers control how their time is allocated, clients are also subordinated. Unlike private clients, who pay

† J.D., 1998, Yale Law School. This note truly has been a collaborative effort. The author wishes to thank Professor Dennis Curtis for his supervision. She would also like to thank Susan Feathers, Julia Greenfield, Alison Hirschel, Pat Kaplan, Jack London, Felix Lopez, Joseph Luby, Judith Resnik, Bob Sable, and others at the Liman Colloquium for their thoughtful comments. Finally, a special thanks to those practitioners whose “hackles” were raised by the idea of putting a price on legal services to the poor, for tolerating a law student’s critique of their valuable work.


3. See 42 C.F.R. § 1620.3 (1997) (requiring legal services agencies to consult with “eligible clients” and employees in establishing priorities).
their lawyers money in exchange for representation, poor clients are reduced to accepting legal services as charity. 4 Their lawyers, because they provide their services for free, may feel justified in being less responsive to their clients than private attorneys would.

Part II of this Paper will describe how clients respond to rationing by lawyers. To encourage their representatives to work harder on their cases or take the time to listen to them, poor clients may try to pay their lawyers with “money substitutes”: making the lawyer feel important; becoming the lawyer’s friend; appealing to the lawyer’s political beliefs; or demonstrating commitment to the representation, for example. When lawyers respond to these “payments,” however, their allocation decisions may be arbitrary, because the client who is most adept at getting her lawyer’s attention may not be the one with the most important case.

Part III of this Paper will propose that inventing better money-substitutes could solve these problems by creating shadow markets. A shadow market re-creates market incentives when consumers cannot afford to pay the full price for the services they receive by requiring clients to bear some part of the cost. Shadow markets would have two main advantages. First, they could encourage clients to prioritize their legal needs. If poor people had to pay something for legal representation, they would have the incentive to decide which of their legal needs merited the cost of obtaining a lawyer; similarly, they could decide whether costly legal options, such as appeals, were worth pursuing. This prioritizing would minimize the inter-client conflict that legal services lawyers currently experience. Second, shadow markets could promote equality in attorney-client relationships. If poor clients paid something for their representation, they might feel more entitled to hold their lawyers accountable. Similarly, lawyers might feel a greater obligation to respond to their clients’ wishes.

I. HOW RATIONING BY LAWYERS AFFECTS LEGAL SERVICES DELIVERY

The “angst of poverty law practice” 5 is that lawyers are torn between their obligation to the poor community and their duty to provide zealous representation to each individual client. This dual role of lawyer and rationer places poverty lawyers in a very difficult situation. They are asked to choose who will be clients and what level of services they will receive, while also providing zealous and loyal representation to each client.

4. See 45 C.F.R. § 1642.6 (1997) (limiting circumstances in which legal services lawyers may accept reimbursement).
5. See Paul Tremblay, Toward a Community-Based Ethic for Legal Services Practice, 37 UCLA L. REV. 1101, 1109 (1990).
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These dual obligations to individuals and to the poor community as a whole are in constant conflict. This Part of the Paper will describe three ways that lawyer control over rationing creates problems: (A) in choosing which cases to accept; (B) in allocating resources among current clients; and (C) in making decisions with clients.

A. Accepting Cases

Legal services attorneys prioritize the legal needs of the communities they serve and reject cases that do not conform to those standards. This process is called “gatekeeping,” and it is somewhat problematic. Consider the following example.

Metropolitan Legal Aid (MLA) decided to focus its resources on ending racial discrimination in public housing. It chose this priority after consulting with community agencies and after studying housing patterns in the city. To reform the public housing system, it decided that its lawyers who practiced housing law would only accept new housing cases raising racial discrimination issues. Furthermore, clients had to promise not to accept assignments to segregated projects, as a condition of representation.

During an intake meeting, MLA’s attorneys discussed an application from a woman named Ann. She called because her landlord was refusing to fix her air conditioner. Ann’s case, however, was rejected because it raised no issue of discrimination in public housing.

By prioritizing housing discrimination cases, MLA was trying to maximize the effect of its limited resources. MLA attorneys discussed many applications at each weekly intake meeting, but they could only accept a few of them. Because they functioned as “lawyers of last resort” for the poor community, they tried to accept the most important cases.

Rejecting Ann’s case is troubling, however. Such decisions have been criticized, especially by Marshall Breger, as violating the ideal that everyone should have equal access to the justice system. Breger argued that legal services lawyers had no right to ration representation.

MLA could respond to this argument by noting that without some form of rationing, its services would be allocated inefficiently. Because

7. See, e.g., Tremblay, supra note 5, at 1110.
8. This example is modified from Gary Bellow & Jeanne Kettleson, From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice, 58 B.U. L. Rev. 337, 343-44 (1978).
9. Tremblay, supra note 5, at 1138.
11. See id.
MLA lacks the resources to accept every case, a queuing system would result if lawyers were not allowed to discriminate between applicants based on the merits of their cases. Also, some applicants seek representation for cases that are relatively unimportant, such as leaky faucets that their landlords refuse to fix; others have issues for which there is no legal remedy, such as being fired solely for being late to work. Providing representation in such cases while forcing others to wait would waste scarce resources. Furthermore, by concentrating its resources on housing discrimination, MLA hopes to cause a systemic change that would help more people than just its individual clients. Because MLA exists to serve the poor community, effecting this change may be more important than protecting the rights of any individual applicant.

If efficiency is to justify rejecting some individuals' cases, then MLA should strive to create the most efficient gatekeeping system it can. MLA's system involved attorneys consulting with community leaders. Both sources of information about a community's needs are important, but incomplete. Lawyers, for example, have the ability to monitor the law and set priorities that could push the law in a good direction for the poor as a whole. This is what MLA tried to do by focusing on racial discrimination in public housing. Lawyers also have the capacity to judge the legal merits of potential cases; some issues are more easily redressed by the law than others.

Attorneys cannot satisfactorily set priorities on their own, however, because they are somewhat removed from the communities they serve: "The interests of the poor are complex and variegated. To assume the right to take steps on their behalf is paternalistic. It is not obvious that middle class lawyers who make these decisions on behalf of poor people are well qualified to do so." In part because lawyers tend to be separated from their clients by class and race, agencies like MLA lack the ability to measure completely the importance of the various legal needs of the poor community.

Lawyers also have interests that may keep them from being responsive to changes in a community's legal needs. They have incentives to keep agency priorities the same, so that they can continue to do work that they understand and enjoy, rather than taking on new tasks. While

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12. See David Luban, Lawyers and Justice 309 (1988) (arguing that a queuing system is "too crazy to be fair" because resources are not directed toward the most important cases).
15. See Douglas Besharov, An Agenda for Legal Reform, in Legal Services for the Poor: Time for Reform 5 (Douglas Besharov ed., 1990) [hereinafter, Legal Services for
this expertise has benefits, because specialist lawyers could handle more cases than generalists, it also creates inertia. For gatekeeping to be justifiable, agency priorities would need to be responsive to changes in community needs.

MLA could assert that its triage system is justified because it consults with the community activists on its board before setting its priorities, and that these representatives speak for the needs of individuals like Ann.\textsuperscript{16} This is more or less the approach recommended by supporters of community-based lawyering.\textsuperscript{17} While these community members undoubtedly bring a useful perspective that helps MLA set its priorities, they would necessarily lack the diversity of the group of individual clients who call each week seeking services.\textsuperscript{18}

Although a community may be something more than a collection of individuals,\textsuperscript{19} individuals are certainly a part of any community. A truly “community-based” system, then, would also consider the interests of individuals like Ann. Individuals experiencing legal problems have special information about the importance of their needs that lawyers and community leaders lack; they know how the legal issue is affecting their lives and how much they want it resolved. An issue that dramatically affects a client’s life may not always fit within an agency’s priority system. For instance, imagine that Ann’s broken air conditioner case was important to her because her child was chronically ill and extremely sensitive to heat. What seemed like a categorically trivial problem, a broken appliance, could be a health-threatening problem in her case. To maximize efficiency, then, an agency should consider such subjective importance in deciding when to accept a case that might not fit squarely within its priorities.

Of course, just asking an applicant with a legal problem what the priorities of an agency should be would be of little use. Most would be expected to say that whatever problems they are experiencing should be the highest priority. Because legal services are free, all an agency like MLA would really know was that these issues they were worth the effort of ap-

\textsuperscript{16.} See Tremblay, supra note 5, at 1146 (stating that community participation in setting priorities is usually achieved by “the use of an advisory board of citizens who care about and are familiar with the plight of the poor in their community”).

\textsuperscript{17.} See Brescia et al., supra note 1.

\textsuperscript{18.} See Tremblay, supra note 5, at 1148 (arguing that lawyers should also consult with individual clients in setting priorities).

\textsuperscript{19.} See Thomas M. Meenagan, Community Delineation: Alternative Methods and Problems, 56 SOC. & SOC. RES. 345 (1972).
plying for services. Furthermore, asking applicants to tell "sob stories" about their problems might not reveal all of the people with important problems, because some people are just better at communicating their needs than others. If potential applicants knew that they would have to pay something for representation, however, their willingness to do so would be a true measure of their commitment to their cases.

B. Post-Acceptance Triage

Scarcity does not end once a an applicant is accepted as a client. Tremblay named the rationing of legal services among existing clients "post-acceptance triage."20 Legal services clients have no reason to limit the amount of work they demand from their attorneys, because they receive free services. Economists have labeled the phenomenon of seeking more of a good when it is free "moral hazard."21 This label, however, is somewhat misleading, because seeking more of a free service "is not a result of moral perfidy, but of rational economic behavior."22 For example, most people would eat more at an all-you-can-eat buffet than at a restaurant where items were individually priced.23 This behavior does not make them bad people, just rational economic actors. For the same reason, applicants for free representation tend to demand lots of services. Legal services agencies, on the other hand, work with a fixed budget. For these reasons, if agencies provided “full service” representation to its clients, a few clients could consume all of the lawyers’ time, forcing the agency to reject future applicants for services.24 Because legal services are free, lawyers must limit the amount of representation they provide to each client.

Legal services agencies who engage in “post-acceptance triage,” however, are subject to criticism for infringing ethical rules. The Model Rules of Professional Conduct require attorneys to represent their clients zealously and to defer to their clients' wishes on important decisions like whether to settle a case.25 This zeal may be compromised when attorneys consider not only whether a legal option would help a client but also whether the time spent pursuing that option would be better spent on

20. See Tremblay, supra note 5, at 1120.
22. Id.
23. This example is from Stephen R. Cox, Price Mechanisms and Legal Services, in LEGAL SERVICES FOR THE POOR, supra note 15, at 237.
24. See Tremblay, supra note 5, at 1115.
25. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."); id. at Rule 1.3, cmt. 1 ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").
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someone else’s case.\textsuperscript{26} Allowing the needs of other clients to adversely affect a representation also implicates conflict of interest rules.\textsuperscript{27} The comment to Model Rule 1.7 states that “[l]oyalty to a client is . . . impaired when a lawyer cannot recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.”\textsuperscript{28}

Legal services agencies could try to reconcile their ethical obligations and their duty as the “lawyers of last resort” by obtaining their clients’ consent to receive only minimally adequate representation.\textsuperscript{29} Clients may waive a conflict of interest by consent after consultation; similarly, clients may consent to limited representation.\textsuperscript{30} Thus, for example, a client could agree that her legal services lawyer would only try to resolve her problem through informal negotiations, rather than litigation.

Consent in the legal services context, however, is problematic.\textsuperscript{31} Unlike a private client, the legal services client cannot hire another lawyer if she is unhappy with her representation. No matter how carefully a well-meaning legal services lawyer asks a client if it would be okay for the lawyer to provide limited representation, the client may perceive the request as a “take it or leave it” proposition.\textsuperscript{32} Because of her disempowered position, a legal services client may be unable to consent to such limitations.\textsuperscript{33} Furthermore, it may be unethical for the lawyer to accept the case even if the client consents if the representation would suffer because of a conflict among all of the lawyer’s clients. A lawyer can only represent a client in such a conflict situation if she “reasonably believes the representation will not be adversely affected.”\textsuperscript{34}

\textsuperscript{26} See Bellow & Kettleson, \textit{supra} note 8, at 356-57.
\textsuperscript{27} See Model Rules of Professional Conduct Rule 1.7(b) (1995) (“A lawyer shall not represent a client if the representation may be materially limited by the lawyer’s responsibilities to another client . . . unless (1) the lawyer reasonably believes the representation will not be adversely affected and (2) the client consents after consultation.”).
\textsuperscript{28} Id. at cmt. 4.
\textsuperscript{29} See Tremblay, \textit{supra} note 5, at 1102.
\textsuperscript{30} See Rule 1.7(b), \textit{supra} note 27; Model Rules of Professional Conduct Rule 1.2(c) (1995) (“A lawyer may limit the objectives of representation if the client consents after representation.”).
\textsuperscript{31} For further discussion of this point, see Tremblay, \textit{supra} note 5, at 1117-24.
\textsuperscript{33} See Jeanne Kettleson, \textit{Caseload Control}, 34 NLADA BRIEFCASE 111, 113 (1997) (noting that consent is problematic in the legal services context and concluding that legal services should aspire to provide more than minimal representation); \textit{see also} Tremblay, \textit{supra} note 5, at 1122 (acknowledging that lawyer control of resource allocation “leaves the client less powerful than a paying client [and] much of the true sense of informed consent is lost”).
\textsuperscript{34} Model Rules of Professional Conduct, Rule 1.7(b)(1) (1995); \textit{see also} Bellow & Kettleson, \textit{supra} note 8, at 358-59 (making the same argument).
Because they provide free representation, legal services agencies face an irreconcilable conflict between the ethical rules and their duty to meet the legal needs of an entire community. As legal scholar Paul Tremblay has noted, “The legal services lawyer frequently finds herself in an existential corner: her professional role calls for allegiance to the individual above all, but her institutional role demands that she hold back, make choices and impose limits.” The need to make triage decisions places legal services lawyers in an impossible situation: they are always conflicted because they must make value judgments about their clients’ cases to decide how to spend their limited time.

C. Lawyer Domination

The dual role of legal services lawyers, as both providers and rationers of legal services, also encourages these lawyers to dominate their clients. Poor clients are too often overpowered by lawyers who are too busy to listen to them. According to Ann Southworth’s empirical study of lawyer-client relationships in various practice settings:

Legal services lawyers reported that they played substantial roles in defining clients’ interests and selecting strategies, and that they did so because their clients had no idea what to do and because clients had few or no alternatives to the ones their lawyer recommended. In fifteen of the fifty-four matters described by legal services lawyers, the lawyers reported that they selected the strategy without participation by the client or with very little participation. In thirty of the remaining matters, the lawyers reported that they played a significant role in helping clients identify strategies and select among them.

(Recall that the ethical rules require attorneys to consult with clients about strategies).

The Southworth study found that legal services lawyers were more dominating than private attorneys. Several legal services attorneys cited resource constraints as the reason for making strategic decisions themselves. Some also explained that the time they could spend describing options to clients would be better spent working on other clients’ cases. Because legal services lawyers ration their own services, they tend to dominate their clients in order to serve more people.

35. Tremblay, supra note 5, at 1109.
36. See id. at 1124 (“The increased powerlessness that inevitably follows from the environment of scarcity ought to trouble those who object to the disempowerment that poor and dependent people suffer in the modern bureaucratic state.”).
39. See Southworth, supra note 37, at 1105.
40. See id. at 1136.
41. See id. at 1137-38.
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While such triage may be one incentive for legal services lawyers to dominate their clients, the fact that legal services clients do not pay for the services they receive may also play a role. One legal services lawyer explained that, "[legal services clients] are getting free legal services, and they’re grateful, and they are happy that someone is pursuing their case for them, and that's sort of it." It is possible that lawyers feel a greater moral obligation to follow the wishes of paying clients than nonpaying ones. The Southworth study found that "[l]awyers who were dependent upon their clients for their salaries generally expressed more deferential views than did lawyers whose payment came from other sources." In the study, two civil rights lawyers who usually represented paying clients said that when they volunteered their services, they felt less need to defer to their clients' preferences, and more freedom to act "like citizens" and make decisions themselves. This example reflects a general finding of the study—that payment affected the amount of control clients exercised in representation relationships. The study did not indicate why this was true. Perhaps lawyers felt less moral obligation to follow the wishes of clients who paid nothing for their services. Another possible explanation is that lawyers providing free representation wanted to be "paid" in the feeling that they were making the world a better place.

Lawyer domination is almost universally maligned, but proposed solutions urging legal services lawyers to defer more to their clients seem to have had little effect. Maybe the good intentions of poverty lawyers cannot completely overcome the structural pressures inherent in providing free representation. This suggests that a solution to the lawyer dominance problem in legal services would need to eliminate rationing by attorneys and recreate the kind of moral obligation lawyers feel to paying clients. Even some form of nominal payment might suffice to instill the lawyer’s sense of obligation to follow the client’s wishes.

42. Id. at 1124.
43. Id.
44. Id. at 1126.
45. See id. at 1126.
46. See Paul Tremblay, Rebellious Lawyering, Regnant Lawyering and Street-Level Bureaucracy, 43 HASTINGS L.J. 947, 970 (1992) (attributing continuance of regnant lawyering to psychological and institutional factors: "Writers have been imploring poverty lawyers to pursue empowerment and collective mobilization for more than twenty years. Yet rebelliousness remains the exception, and not the norm. In my opinion, this is not due to a lack of power or force in the argument for rebelliousness.")
II. HOW POOR CLIENTS USE "MONEY SUBSTITUTES"

The previous Part of this Paper showed that legal services lawyers and their clients are not colleagues.\(^\text{47}\) The lawyers possess skills that their clients need but cannot afford to buy, and exercise a great deal of discretion in deciding how to use those skills on their clients' behalf.\(^\text{48}\) A private client could influence these allocation decisions by paying her attorney additional fees. Legal services clients, lacking the ability to pay their lawyers in money, may attempt to increase their control over the representation by paying their lawyers with "money substitutes." A money substitute is any behavior legal services clients can use to gain more control over their representation. Money substitutes can take the form of positive or negative reinforcement. Consider the following example:

Susan had a fourth grade learning-disabled child. The child, Kathy, had received special education services throughout her schooling, but was still unable to read or perform simple arithmetic. Kathy had been receiving one hour of special education services each day in a resource room, but Susan believed these services were inadequate. Nevertheless, Susan had agreed at the last annual meeting with the school that the services should not be increased. She told her legal services lawyer that she had felt "overwhelmed" by all the experts in the room, and was unable to reject their arguments despite her belief that Kathy needed more help than she was receiving.

The lawyer agreed to try to increase Kathy's services by meeting with the school officials. The lawyer scheduled another meeting at the school and negotiated an additional daily hour of one-on-one tutoring for Kathy. Susan was thrilled. The lawyer attended two other meetings with the school that year and determined that Kathy was making educational progress. The school, furthermore, seemed committed to continuing to provide adequate services for Kathy.

When the lawyer told Susan that she was going to close her file, however, Susan became upset. Susan feared that the school would try to take the extra services away if she went to a meeting without an attorney. Susan feared that she would be unable to "stand up for herself" at the meeting if the attorney were not there. Then Susan started crying and said that Kathy would never learn to read without someone to fight for her.

\(^{47}\) See, e.g., White, supra note 14 (noting that legal services lawyers often differ from their clients by class and race).

Susan used money substitutes throughout her representation. First, Susan told the attorney at the first interview that without legal help she would be unable to obtain the necessary services for Kathy. Later, Susan again emphasized the dire consequences that would occur if the lawyer closed the file. As a result, the attorney will feel guilty if she refuses to attend the next school meeting. (And she will feel guilty if she attends, because of her obligations to other clients). The lawyer accepted the case with the limited goal of obtaining additional educational services for Kathy. With that goal accomplished, the attorney could ethically terminate the representation. Susan, however, wanted to expand the goals of the relationship to include monitoring the continued provision of services, and perhaps even teaching her to advocate more effectively for herself. The lawyer cannot really know how much Susan needs these additional services, because the client would not be required to pay for them. Maybe Susan is acting more helpless than she is, maybe not. In any event, the attorney cannot close the case without paying an emotional cost.

Legal services lawyers’ decisions about how to use their time can be influenced by many different types of behavior by clients, according to an empirical study by Carrie Menkel-Meadow and Robert G. Meadow. First, clients can pay their attorneys by giving them interesting or important cases. A case involving complex or novel issues of law can provide welcome relief from the monotony of more routine representations. Legal services lawyers spend more time on cases they find interesting, according to the study. Similarly, a lawyer may spend more time on a high-stakes case, like preventing an eviction, than a smaller case such as a $500 welfare overpayment.

Another effective client behavior is nagging. As Menkel-Meadow and Meadow noted:

As the adage suggests, “The squeaky wheel gets the oil.” The same is true in legal services. . . . Clients who clamor for attention by repeated phone calls or personal visits place the attorney in a defensive position vis-a-vis the client. The attorney feels as if he or she must report case progress.

Nagging can serve a second function as well—demonstrating that a client values a lawyer’s work. Pester ing is only one way that clients can demonstrate this. Clients can also promptly return their attorney’s tele-

49. Id. at 251 (confirming “the centrality of client behavior in resource allocation decisions”).
50. See id. at 244. Of course, academics speculated that this was the case long before empirical proof existed. See, e.g., Bellow, Turning Solutions into Problems: The Legal Aid Experience, 34 NLADA BRIEFCASE 106, 108 (1977).
52. Many attorneys interviewed in the study indicated that “they preferred clients who were feisty and actively willing to pursue their cases.” Id. at 251.
phone calls, show up for appointments on time and bring documents at
the lawyer's suggestion.

Another form of payment is a client's appeal to the attorney's politi-
cal beliefs. The Menkel-Meadow and Meadow study found that
"attorney ideology may have an impact on the planning of resource allo-
cation decisions with clients" and that "[i]n their interviews, the attorneys
nearly uniformly revealed strong political activism and consciousness."

Finally, clients can pay their attorneys in friendship. The study found that
"some attorneys will favor one client over another because of personal
feelings toward their clients."

Disempowered people understand the power of such payments, ac-
cording to feminist psychology. Those who lack the ability to achieve
their ends on their own often try to inspire others to want to help them:
"Women 'get what they want' through indirect, covert influencing tech-
niques, often using the assigned sex-role-appropriate behaviors of help-
lessness, dependency, coyness and appeal to emotions." Perhaps this
could explain Susan's behavior in the example at the beginning of this
discussion. Susan acted helpless and dependent, and this made it difficult
for her attorney to limit her representation.

When legal services are allocated according to client behavior, rather
than case importance, scarce resources are rationed arbitrarily. The client
who calls every day may not have a more important case than a client
who waits patiently for her attorney to telephone, for example.

III. CREATING SHADOW MARKETS FOR LEGAL SERVICES

So far, this Paper has described how the absence of monetary pay-
ment in legal services affects the lawyer-client relationship. This Part will
describe better money substitutes for legal services, with the goal of in-
vventing systems that maximize client autonomy and minimize ethical
problems. It will focus on "shadow markets," systems that mimic market
mechanisms by making clients pay part of the cost of the services they re-
ceive. Section A will describe the comparative advantages of shadow
markets, and Section B will sketch how these systems might be struc-
tured.

53. Id. at 244, 252.
54. Id. at 242.
55. Adrienne J. Smith & Ruth F. Siegel, Feminist Therapy: Redefining Power for the Pow-
erless, in HANDBOOK OF FEMINIST THERAPY: WOMEN'S ISSUES IN PSYCHOTHERAPY 14-15
(Lynne Bravo Rosewater & Lenore E.A. Walker eds., 1985); see also P. Johnson, Women &
Power: Toward a Theory of Effectiveness, 32 J. OF SOC. ISSUES 99, 99 (1976) ("Women have less
access, in reality and in expectations, to concrete resources and competence, leaving them with
indirect, personal and helpless modes of influence.").
A. The Potential of Shadow Markets

1. Increasing Client Control over Triage Decisions

Part I of this Paper showed that lawyers need to involve clients more in the gatekeeping process. It also discussed how lawyers could not ethically provide limited services to poor clients. This Part will describe how shadow markets could solve both problems, by empowering poor clients to triage their own cases to some extent.

To make the gatekeeping process more efficient, shadow markets would enable legal services agencies to use information from lawyers, community leaders, and individual clients to decide which cases to accept. When taking applications for services, agencies could explain the costs of representation to clients. Some clients would decide that solving their problem was not worth the cost. Those who valued the representation more highly would still request services. The agency could then choose among these remaining applicants according to its priority system (developed in consultation with community leaders).\(^5\) In effect, the first round of triage would be performed by applicants themselves, according to their personal priorities. This process would integrate the special knowledge of clients, community leaders and lawyers. As discussed previously,\(^6\) lawyers know how to evaluate the legal merits of cases and to strategize about how to make “good law”; community leaders are able to assess the needs of the community as a whole; and individuals understand how important resolving their particular case is to them. By using all three sources of information, legal services agencies could accept meritorious cases that are important to individual clients and their communities.

Shadow markets could also eliminate the need for post-acceptance triage by eliminating the “moral hazard” problem. If clients paid something for representation, they would have an incentive to limit their demand for costly legal options, such as appeals. To ensure that clients could make informed choices, however, attorneys would need to spend time explaining the costs and benefits of various legal alternatives.

Of course, these advantages assume that legal services clients are capable of accurately assessing the importance of their legal needs to them.

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56. Empirical research indicates that charging a small fee would reduce, but not eliminate, the need for lawyers to ration services. The RAND Health experiment found that charging a $100 deductible and 25% copayment reduced consumption of medical care by 40%. See JOSEPH P. NEWHOUSE & THE INSURANCE EXPERIMENT GROUP, FREE FOR ALL? LESSONS FROM THE RAND HEALTH INSURANCE EXPERIMENT 243 (1993). Many legal services agencies reject a far higher percentage of applicants. See Willam P. Quigley, The Unmet Civil Legal Needs of the Poor in Louisiana, 19 S.U. L. REV. 273, 282 (finding that Northwest Legal Services in Shreveport rejects 84% of applicants).

57. See supra Part I.A.
In theory, shadow markets should encourage clients to prioritize their legal needs: "Because the clients must incur some out-of-pocket cost, they are encouraged to set priorities among their needs. Thus, scarce resources are directed to the services that recipients consider most important." This outcome is called "allocative efficiency." Economists have extensively debated the use of shadow markets in medical care, and some believe that cost-sharing maximizes allocative efficiency. The idea is that deductibles and copayments inspire consumers to think twice about whether they really need a professional's services.

Not all scholars believe that shadow markets will function this effectively, however. Some argue that legal services clients lack the information or the capacity to prioritize their legal needs, and that lawyers would do a better job of defining priorities for legal services. For this reason, some have argued that professionals, rather than consumers, should make allocative decisions. This argument is particularly strong when applied to clients whose decisionmaking capacity may be impaired, such as battered women or mentally ill clients. Any shadow market system should exempt applicants for services who are unable to assess the importance of their problems in a meaningful way.

Despite these potential problems, shadow markets can encourage most consumers to seek services when (and only when) they need them, according to the RAND Health Experiment. This was a large, publicly funded study of the effects of various copayments and deductibles on health care consumption. It found that cost-sharing reduced consumption of health care services dramatically with no significant adverse impact on participants health compared to those receiving free care. By

58. Besharov, supra note 15, at xvi.
60. For a discussion of the debate among medical economists, see T.R. Marmot et al., Medical Care and Procompetitive Reform, 34 VAND. L. REV. 1003 (1981).
61. See Marion Ein Lewin, Cost Sharing for Medical Services Through Medicaid, in LEGAL SERVICES FOR THE POOR, supra note 15, at 190 (arguing that cost-sharing "reduces unnecessary utilization" of health services). See also Marmot, Boyer & Greenberg, supra note 60, at 1006 (presenting this idea only to question it later).
62. See De Miller, Copayments, Vouchers and Judicare, in LEGAL SERVICES FOR THE POOR, supra note 15, at 204 ("The specter of dissipating scarce resources on less significant matters is simply to real and too disturbing [to be accepted by Congress].").
63. See id. at 203.
64. See id. at 204.
65. This point was suggested to me by Alison Hirschel, who works with elderly clients at the Michigan Protection and Advocacy agency.
66. See generally, William P. Brandon, A Large-Scale Social Science Experiment in Health Finance: Findings, Significance and Value, 30 J. HEALTH POL'Y & L. 1051 (1985).
67. See NEWHOUSE & THE INSURANCE EXPERIMENT GROUP, supra note 56, at 82 (finding a reduction in expenditures); id. at 201 ("no substantial benefits from free care").

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analogy, one would expect cost-sharing for legal services to reduce client demand for services, without adversely affecting their "legal health," because the clients would prioritize their legal needs. In fact, a legal clinic in Chicago that charges reduced fees to low income clients found that their clients were "more likely to approach an attorney with only meritorious cases," and "more likely to be judicious in the use of attorney time when that time is being charged."68

2. Creating Symbolic Equality Between Lawyers and Their Clients

Regardless of the effect of shadow markets on client demand, the symbolic value of clients paying something for legal services could reduce lawyer domination of clients.69 Free legal services create inequality on the symbolic level, as Edgar S. Cahn has noted:

When legal services programs provide assistance to indigent clients without charging for these services, we are unwittingly transmitting a message: "Nothing you have and nothing you can provide is of any value to me, the poverty lawyer." That is not only patronizing; it is wrong and it is self-defeating. It is a strategy more likely to generate frustration and a sense of powerlessness than progress. Helping the poor with legal representation will not work if it does not enable our clients to produce and to contribute. If we are to be true to our commitment to the client community, we must understand that we need them as much as they need us.70

If poor clients paid their lawyers something, they could symbolically recreate the equality between lawyers and private clients and simultaneously assert their self-worth, "changing 'the relationship between lawyer and client, from one of dependency and implicit subordination, to one of reciprocity and mutuality.'"71 Even empirical research demonstrates that payment by clients makes lawyers feel more obligated to treat them as equals.72

Most legal services lawyers, who entered their profession out of a deep-rooted desire to help the poor,73 probably aspire to better relation-

68. CHICAGO LEGAL CLINIC, INC., FEE PHILOSOPHY OF THE CHICAGO LEGAL CLINIC, INC. (1997) (on file with author). The Chicago Legal Clinic, Inc., charges reduced fees averaging between $40 to $60 per hour to clients whose incomes are too high to qualify for free legal services. See Interview with Edward Grossman (Apr. 3, 1998) (on file with author).
69. See supra Section I.C and Part II.
72. See Southworth, supra note 37, at 1148 (“This research lends modest support to the view that giving clients financial control over their relationships with lawyers ... might help improve lawyers' accountability to clients.”); see also ILLINOIS LEGAL NEEDS STUDY, supra note 2, at 60 (finding higher percentage of poor clients who contacted private attorneys were satisfied with their representation than those who contacted legal services lawyers).
73. See Menkel-Meadow & Meadow, supra note 48, at 81 (“In their interviews, the [legal services] attorneys nearly uniformly revealed strong political activism and consciousness.”).
ships with their clients. Ideally, lawyers for the poor would help poor communities solve their own problems, be open to non-legal solutions to problems, be client-centered and client-driven and provide high quality representation efficiently. Legal services lawyers would work with their clients to amplify their voices and form problem-solving partnerships. In a partnership, the benefits and burdens of cooperation are borne by both participants. This equality could be symbolically recreated if clients paid something for the benefits they received from their attorneys. In fact, the Chicago Legal Clinic noted that when a low-income client pays fees, he or she “retains his/her dignity and freedom from dependence on charity [and] has a greater sense of investment in his/her case.”

B. Creating Better Money Substitutes

The previous Section discussed the advantages of “charging clients something” in the abstract. This Section will describe what kind of payments could be used in a shadow market system. Because shadow market systems must be responsive to the needs of each agency’s community of clients, this part will also describe how a hypothetical legal services agency, Metropolitan Legal Aid (MLA), might customize a shadow market to fit its particular situation.

A legal services agency would have great flexibility in designing a shadow markets program, assuming it received LSC’s permission to do so. To encourage clients to prioritize their legal needs, the agency should ensure:

(1) that individual service prices be charged; (2) that those prices reflect in a relative sense the resource costs of the services rendered; (3) that the service prices charged each client vary with his ability to pay; and (4) that in every situation the price charged be of sufficient magnitude to induce the client to evaluate at the margins the value and cost to him of the service required to solve his legal problem.

These features link a client’s desire for legal services (ability and willingness to pay) with the cost of the representation to the agency. Any of several structures can meet these criteria.

First, cost-sharing systems can be structured by charging clients a portion of the cost of their representation on a sliding-fee basis. This design

74. See Houseman, supra note 71, at 1705-06.
75. See Cahn, supra note 70, at 2144-45.
77. CHICAGO LEGAL CLINIC, INC., supra note 68.
78. See 45 C.F.R. § 1642.6 (1997) (limiting the circumstances in which an agency receiving LSC funds can accept reimbursement from clients).
79. Cox, supra note 23, at 239.
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is used by legal services systems in England, Sweden, Norway and Finland. Sweden's system, for example, charges clients a deductible and capped copayment that varies with income. Because even a modest deductible and copayment can have a marked effect on services, these prices should be kept relatively low, in relation to applicants' income.

Cost-sharing systems have drawbacks, though. One administrative difficulty is how to measure clients' income. This problem may not be fatal, however, because legal services agencies already gather financial information about clients to determine their eligibility. A more serious difficulty would be determining the amount that poor clients could afford to pay. One opponent of cost-sharing has argued that legal services clients could not afford any payments at all: "There is no awareness of the impossibility of most legal services clients affording even a nominal $5 or $10 amount, especially when they are asked to subsist on welfare grants pitched at only 50 to 70% of the national OMB poverty line, itself an inadequate amount."

A second way of creating a shadow market is a voucher system. A voucher system avoids the problems of a cost-sharing system, but has some disadvantages of its own. Rather than charging clients money, legal services agencies could distribute vouchers to poor people that could be redeemed for a certain number of hours of legal services from the agency. To determine the number of attorney-hours available for each voucher, the agency could measure how many attorney-hours it could provide and divide that amount by the estimated number of poor people in its service area. Each poor person in the service area would be entitled to one voucher. To create a shadow market, vouchers could be traded or

80. However, these systems differ from the copayment structure proposed here because they use private attorneys to provide legal services to the poor rather than staffed office programs and the poorest clients usually receive free services. See Russell Wallman, Legal Services in England, in LEGAL SERVICES FOR THE POOR, supra note 15, at 194-95 (England); Jon T. Johnson, Nordic Legal Aid, 5 MD. J. CONTEMP. LEGAL ISSUES 301, 313-16 (1994) (Sweden, Norway, and Finland).
81. Johnson, supra note 80, at 313.
82. See NEWHOUSE & THE INSURANCE EXPERIMENT GROUP, supra note 67, at 82.
84. See Douglas J. Besharov, Client Priority Setting, in LEGAL SERVICES FOR THE POOR, supra note 15, at 23 (noting that after extensive searching, he was unable to find information about the financial status of legal services clients).
86. Some scholars have advocated voucher plans allowing poor clients to purchase services from private attorneys. See Cramton, supra note 13, at 591. This note does not advocate that option because a Legal Services Corporation study found that private attorney vouchers were poor mechanisms for delivering legal services. Clients did not know any private lawyers and did not bargain with them for better services. Staffed office programs were much more efficient. See THE DELIVERY SYSTEMS STUDY: A POLICY REPORT TO THE CONGRESS AND PRESIDENT OF THE UNITED STATES iii (1980).
sold by poor people to those who require additional legal services. They could also save vouchers for future use. Thus, the vouchers would become like cash, and would have value to voucher holders.87

Administering a voucher system would impose costs on the agency—from printing the vouchers, to estimating the number and value of them. Distributing the vouchers to the poverty community could also be problematic.88 Also, a client with a severe legal problem might run out of vouchers, even after buying or borrowing them from others. One solution might be to allow such a client to purchase additional vouchers from the agency, but this brings back all the problems of monetary payments.

A third kind of shadow market could be created using “Time Dollars.”89 Time Dollars create a shadow market by allowing poor people to purchase legal services vouchers by donating their services in their communities. For example, a client who worked for ten hours at a homeless shelter might receive a voucher for ten hours of legal services. Actually setting up a Time Dollar system would require the active involvement of several other agencies, however.90

After examining each of these structures, the hypothetical legal services agency, MLA, should combine cost-sharing and non-monetary systems in a way that would best suit the needs of its potential clients. Suppose that after consulting with community groups and current clients, MLA found that many of its clients could not afford a cash payment. It might then choose a modified Time Dollars program with a cost-sharing option.91

If MLA liked the idea of a Time Dollars program, but did not want to invest the resources to set up the network of volunteer organizations that Cahn envisioned working together, it could allow clients to pay for representation in time working for the legal services agency. MLA would need

87. For a fuller description of shadow markets in vouchers, see Ronald H. Silverman, Conceiving a Lawyer's Legal Duty to the Poor, 19 HOFSTRA L. REV. 885, 1102-09 (1991) (applying voucher-market concept to juidicare model of private attorneys representing poor people).
88. Silverman suggested distributing vouchers to those who actually apply for legal assistance, id., but this solution would impair trading in vouchers, because everyone who had a voucher would also want to use it. Another possibility would be to allow people to apply for vouchers at places like welfare agencies, churches and soup kitchens. In either case, getting vouchers to all eligible people would be difficult.
89. The concept of “Time Dollars” was invented by Edgar S. Cahn, the director of Time Dollar, Inc. This note’s discussion of Time Dollars is based on his article, Reinventing Poverty Law, supra note 70.
90. I am indebted to Jack Londen of Morrison & Foerster for this point. He has stated that legal services agencies in California are interested in the Time Dollars concept, but that they are waiting for other agencies to join in a group effort to set up such a system. Interview with Jack Londen, Attorney, Morrison and Foerster (Mar. 11, 1998).
91. Cahn, for example, proposed combining a Time Dollars program with a cost-sharing program, so that clients who required a large amount of legal services would have the option of paying in time or money. See Cahn supra note 70, at 2151-52.
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to carefully consider what time-price would encourage clients to prioritize their legal needs without imposing an undue hardship on them. Recall that studies on shadow markets in health care found that relatively low prices were effective in encouraging clients to prioritize their needs.  

Suppose that MLA decided to preliminarily set this price at one hour of client work for every five hours of representation. It would next need to find ways to use its clients’ services. First, clients could spend time working on their own cases: gathering documents, calling agencies, keeping journals, etc. This would also have the advantage of teaching clients how to be more effective advocates for themselves. Second, clients could work additional hours, if necessary, performing services like fund-raising and outreach for the agency. To use all of this new volunteer time, MLA could set up a “telephone bank” in one of its offices, for example, where clients could make fund-raising calls.

For clients who were unable or unwilling to spend time working for the agency, MLA could offer a cost-sharing option. MLA would want to make its fee scale comparable to the cost of the payment-in-kind system. Suppose that it estimated that a payment of 0.075% of annual income was the equivalent of one hour of work. It could then charge this amount for every five hours of work. For example, a client with an annual income of $8,000 would pay $6 for every five hours of attorney-time. Of course, these charges would need to be adjusted for family size. To ensure that clients with time-consuming cases were not oppressed by the size of these payments, MLA might also want to cap the payments at 3 percent of annual income (or 40 volunteer hours in the payment-in-kind system).

MLA would also want to be flexible in using its shadow market system. For emergency cases, such as evictions, clients should not be required to pay “up front.” Clients should also be offered payment plans, whether they paid in cash or work. Also, MLA might want to make exceptions in various cases. For example, it could decide to waive the fee for a client with an “impact” case that could benefit the entire community. It would also, of course, want to exempt clients who were incapable of prioritizing their needs because of some form of mental disability.

IV. CONCLUSION

Shadow markets have the potential to involve individual community members in selecting cases for services and to give clients control over the level of representation they receive. Client payments could also symbolically promote equality between lawyers and clients.

92. See Newhouse & The Insurance Experiment Group, supra note 67, at 82.
Further study of shadow markets is warranted. Pilot programs would be particularly interesting. The Legal Services Corporation has stated that “[t]he Corporation, legal services programs, clients and the legal profession should concentrate . . . on finding and developing creative local delivery systems.”\textsuperscript{93} Experiments with cost-sharing programs would also be helpful in determining whether the foreseen benefits outweigh the administrative costs.\textsuperscript{94} These benefits should be compared with other mechanisms that encourage clients to prioritize their legal needs, such as client education.\textsuperscript{95} More information about the income of legal services clients would be useful to determine the benefits of cost-sharing in comparison with voucher programs.

In this era of shrinking budgets for legal services programs, shadow markets provide a way to do more with less. Including individual applicants in the process of selecting clients for services would increase efficiency. Also, ending post-acceptance triage and accepting client payments would reduce the problem of lawyers dominating their clients. This potential improvement is worth a try.

\textsuperscript{93} The Delivery Systems Study, \textit{supra} note 86, at iii.

\textsuperscript{94} The Legal Services Corporation has experimented with several delivery systems other than shadow markets in the past. \textit{See id.}

\textsuperscript{95} \textit{See Lewin, supra} note 61, at 193 (suggesting that administrative costs of cost-sharing be considered in the Medicaid context).