

**THE ECONOMICS OF REPRESENTING THE POOR:
DEBUNKING THE ASSUMPTIONS BEHIND POSNER'S "FREE
LAWYER" PROBLEM**

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I. Abstract & Introduction

While it is generally accepted that “there are economic arguments for governmental efforts to reduce [the] gross inequality (in a wealthy society) that we call poverty,” how those efforts are shaped remains a fruitful topic for scholarly debate.¹ Judge Richard Posner avers, for instance, that the Legal Services Corporation² “may

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¹ Richard Posner, *Economic Analysis of Law* 476 (2003)

² See http://www.lsc.gov/welcome/wel_who.htm: The Legal Services Corporation (LSC) is a private, non-profit corporation established by Congress to seek and ensure equal access to justice under the law for all Americans by providing civil legal assistance to those who otherwise would be unable to afford it. LSC was created in 1974 with bipartisan congressional sponsorship and the support of the Nixon administration, and is funded through congressional appropriation. LSC is headed by an 11-member Board of Directors appointed by the President and confirmed by the Senate. By law, the Board is bipartisan: no more than six members may be of the same political party. LSC does not provide legal services directly. Rather, it provides grants to independent local programs selected through a system of competition. In 2002, LSC funds 179 local programs. Together they serve every county and congressional district in the nation, as well as the U.S. territories. Special service areas also address the distinctive needs of Native Americans and migrant farm workers. Local programs are governed by their own Boards of Directors, which set priorities and determine the types of cases that will be handled by the program, subject to restrictions set by Congress. A majority of each local Board is appointed by local bar associations. One-third of each local Board is composed of client representatives appointed by client groups. Each Board hires its own Executive Director, who in turn hires the program staff. Programs may supplement their LSC grants with additional funds from state and local governments,

actually prevent many poor people from achieving their most efficient pattern of consumption.”³ The logic behind this reasoning is because “the lawyer is free, they [the poor] will use him unless the value of his services exceeds the (often slight) value of their time in dealing with him.”⁴ Therefore, the social costs exceed the social benefits and the end result is economic waste.⁵ Judge Posner favors an alternative system that gives the eligible recipient an unrestricted cash transfer in lieu of funding the current Legal Services Corporation.⁶ This cash transfer could be used for legal services or other essentials the recipient may value more highly (e.g., food, housing, medicine, education, etc).⁷ This theory, however, relies upon several problematic assumptions. What follows is an analysis and discussion of these assumptions leading to the conclusion that--as a practical matter-- the unrestricted cash transfer is not currently a feasible substitute for the Legal Services Corporation. However, there are ways in which the unrestricted cash transfer theory could benefit the current system of delivering legal services to the poor and lower middle class.

II. The Unrestricted Cash Transfer Theory In Focus

In his treatise, Economic Analysis of Law, judge Richard Posner devotes a chapter to the issue of poverty.⁸ Our focus here is specifically on section 16.5 regarding the delivery of civil legal aid to the poor in America. A key passage from this section explains the unrestricted cash transfer theory:

[T]he Legal Services Corporation, provides free legal assistance to the poor in civil matters. This method of helping the poor may actually prevent many poor people from achieving their most efficient pattern of consumption. Since government funds for the poor are unavailable for other programs of poor relief, the costs to the poor person being entitled to \$100 in legal services may be the benefit he would have derived from receiving \$100 of some other good or service or in cash. Many poor people may be able to get along well enough without a lawyer, either because they are fortunate enough not to encounter legal problems or because they are clever

IOLTA (Interest on Lawyer Trust Accounts) programs, other federal agencies, bar associations, United Way and other charitable organizations, foundations and corporations, and individual donors. They further leverage federal funds by involving private attorneys in the delivery of legal services for the poor, mostly through volunteer pro bono work.

³ Posner, *supra* note 1, at 480.

⁴ Posner, *supra* note 1, at 481.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Posner, *supra* note 1, at 467-488.

enough to cope with them unaided by a lawyer. But since the lawyer is free, they will use him unless the value of his services exceeds the (often slight) value of their time in dealing with them . . . The waste involved in using a lawyer when the social costs exceeded their social benefit would be avoided if poor people were given \$100 cash instead of a free lawyer. Problems of consumer information and consumer competence to one side, they would use the \$100 to hire a lawyer rather than to buy food, medicine, education, or housing only when the value of the legal services to them was at least \$100⁹

This analysis, in theory, aptly describes an efficiency problem related to the Legal Services Corporation. The assumptions upon which this analysis is based, however, simply do not square with reality of civil legal services in America today.

III. Assumption 1: Legal Services Are Readily Available to the Poor

The existence of the Legal Service Corporation—and its government funding—does not always equate to a lawyer being freely available to the poor across America. The statement that “since the lawyer is free, they [the poor] will use him unless the value of his services exceeds the (often slight) value of their time” assumes an accessible and available lawyer is awaiting new clients. This is not the case. Free legal services are relatively scarce in America. Professor David Luban explores the facts related to the funding of legal services for the poor and the availability of legal services, effectively debunking “[o]ne of America’s persistent myths . . . that the rich get richer, the poor get lawyers and the middle class gets squeezed.”¹⁰ Professor Luban writes:

In fact, of the 100 billion spent on legal services in the United States each year, less than 1 percent goes to delivering civil legal services to low income Americans. About 5,000 legal-aid lawyers in the country serve 50 million Americans who qualify for free legal services The numbers add up to one civil legal-aid lawyer for about 10,000 low income clients—compared to one private lawyer for about 240 middle—and upper-income clients. To put the numbers in perspective, the American Bar Association found that in 1992 about half of low income households confronted a legal problem. That’s roughly 5,000 cases a year for each lawyer—100 a week, 20 a day. The numbers mean that most people who can’t afford a lawyer don’t have a prayer of getting one for free.¹¹

In light of these facts and figures, Posner’s initial assumption about the

⁹ Posner, *supra* note 1, at 481

¹⁰ David Luban, *Four Ways the Law Keeps Poor People from Getting Heard in Court*, 2002-JUN Legal Aff. 54, 54.

¹¹ *Id.*

availability of “free legal assistance to the poor in civil matters” is not entirely correct.¹² The logistical factors alone—one legal aid lawyer per 10,000 poor in America—make it clear that “most people who can’t afford a lawyer can’t get one.”¹³ But the ratio of legal aid lawyers to potential clients is just one barrier the poor face in obtaining legal services. Geography, physical limitations, language, and education level can also act as barriers. Rural areas may not have a nearby legal aid office or even public transportation. The disabled and elderly can face physical and mental challenges in obtaining legal assistance. Those without sufficient language skills may not be able to access services where interpreters are limited. Still, others may simply lack the education or knowledge to enable them to realize their rights and the availability of the legal assistance. That lawyers are readily available to the poor is indeed a myth. This threshold assumption is important to address because if a “free lawyer” were standing by waiting for every poor person in America, the end results Posner theorizes (inefficiency and waste) could be more prevalent. The limited access the poor have to free lawyers is not highlighted to imply the Legal Services Corporation is ineffectual, but rather to point out the reality of the landscape surrounding legal services to the poor in America today.¹⁴

IV. Assumption 2: Legal Services Lawyers Can Serve One and All & the Client’s Convenience is Determinative

The poor also face significant legal restrictions on their access to free attorneys. As a result, cases and clients are screened very closely. Given the logistical and the legal restrictions, only a fraction of people who walk into a legal aid office have a lawyer accept and pursue their case. Lawyers affiliated with the Legal Services Corporation cannot use federal funds to take on certain issues or represent certain types of clients.¹⁵ Many prospective clients have a type of civil claim or problem that the office cannot handle. Some don’t meet income guidelines. Many have claims that are *de minimus* or just generalized grievances inappropriate for the legal system. In fact, *because* the legal services are free, clients and cases must be screened extremely

¹² Posner *supra* note 1, at 443.

¹³ Luban *supra* note 10, at 54

¹⁴ Whether privatization would give greater access and more efficient service is probably a moot topic due the costs of the unrestricted cash transfer; the author has projected costs of an unrestricted cash transfer in section VII.

¹⁵ See, e.g., David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia and Oregon Describe The Costs*, 17 YLLPR 337 (1998); See generally, J. Dwight Yoder, *Justice or Injustice for the Poor?: A Look at he Constitutionality of Congressional Restrictions on Legal Services*, 6 Wm. & Mary Bill Rts. J. 827 (1998).

closely.¹⁶ These legal restrictions further dismantle the notion that legal aid attorneys freely open their doors to any case or client. Combined with the logistical factors (1 Legal Service attorney per every 10,000 poor in America), the legal restrictions further ensure that only the most meritorious and pressing claims receive a lawyer's attention. Therefore, the assertion that whether a potential client receives legal services is determined by the convenience to the client ("since the lawyer is free, they [the poor] will use him unless the value of his services exceeds the (often slight) value of their time in dealing with them . . .") is flawed.¹⁷ The client's convenience often has less bearing on whether legal services are provided than logistical or legal factors.

V. Assumption 3: Rendering Free Legal Services to the Poor Results in Waste & Frivolous Claims

That there is "waste involved in using a lawyer when the social costs exceed . . . [the] social benefit" is true, but the statement is not generally applicable to poverty law today.¹⁸ Normally, the costs of legal services limit access to only those who most value them. However, with Legal Services, clients do not pay, so the normal checks and balances of the market place do not apply. In the absence of legal fees, it stands to reason that an attorney might be employed in a wasteful manner—such as a minor (perhaps trivial) matter or in litigation where the subject matter involved is worth far less than the costs of litigation.¹⁹ To address these concerns, Judge Posner favors unrestricted cash transfers and offers that: "the private sector may be more adept at screening out bad claims than lawyers paid by the government, not only because principal-agent incentives are better aligned in the private sector but also because potential litigants are less likely to bring dubious suits if they must pay for a lawyer out of their own pockets."²⁰ But, ironically, just the opposite may also be the case. For example, it is quite plausible to imagine a large, private law firm that, because it is a for-profit entity, cares as much or more about a client's ability to pay as the

¹⁶ Admittedly, the client who gets free legal services does not take into account the cost-benefit calculus that legal representation might entail. However, the scarcity of the free lawyer and the congressional restrictions on Legal Services funded entities acts as a proxy for the cost benefit calculus that exists in private transactions for legal services.

¹⁷ Posner, *supra* note 1, at 481.

¹⁸ *Id.*

¹⁹ The author uses "minor" and "trivial" as opposed to "frivolous" to indicate a technically viable legal claim that may not warrant the time and resources necessary to pursue it. This is opposed to the frivolous claim that has no merit and which could result in disciplinary actions against the lawyer.

²⁰ Posner, *supra* note 1, at 481.

ultimate merits of the case. A borderline case or one brought on principal for nominal damages would likely stand a much greater chance of being litigated in a private law firm (especially if the client were a large corporation with a limitless ability to pay) than it would in a overcrowded legal aid office.²¹ What Judge Posner calls “bad cases” are probably at least as likely to be crowded out of a legal aid office as in a private law firm.²² So the potential for economic waste, it could be argued, are not any greater than in other private legal transactions. Granted, the risks for the client (with a free lawyer) are low and he or she may be eager to pursue litigation. But, again, the scarcity of legal aid lawyers and the vast number of clients and claims forces even “free lawyers” to closely screen cases; this scarcity and screening, in turn, mitigates the potential for economic waste. Also, there may be additional social benefit in the specter of a “free lawyer” for the poor. Judge Posner does acknowledge the potential deterrent effect a free lawyer for the poor can have on those who would otherwise take advantage of them. To the extent (although difficult to measure) this deterrence ensures compliance with the law and prevents litigation, the free lawyer may even be seen as promoting efficiency and providing a net social benefit.

VI. Assumption 4: Legal Aids Lawyers Do All the Work

Lawyers working in organizations under the LSC umbrella frequently use pro-se clinics, and these clinics prompt clients to invest much more of their own time and resources into litigation. The assumption that “the lawyer is free” and the poor “will use him unless the value of his services exceeds the (often slight) value of their time in dealing with them” is again called into question.²³ The pro-se clinic has altered the role of lawyer from personal advocate to guide, so in many ways the client does not have a “free lawyer” so much as a legal educator. These clinics usually involve an attorney giving a group of potential litigants a lesson and demonstration regarding the legal process related to a specific problem (e.g., landlord-tenant law, divorce, etc.). The lawyer will give the client information, forms, and legal resources in order to handle the case.²⁴ The pro-se clinic shifts a majority of the burden related to litigation (including appearances, document preparation and filing) onto the litigant. Lawyers

²¹ Granted, a litigant may pursue litigation that costs far more than it nets in direct damages in hopes of an aggregate deterrent effect. For example, the recording industry is currently pursuing cases from defendants who have downloaded music unlawfully that clearly cost far more to pursue than the economic damages gleaned from the defendants. The net gain, however, for the industry may be far greater if it can alter damaging consumer behavior.

²² *Id.*

²³ Posner, *supra* note 1, at 481.

²⁴ The author has participated in and observed the pro se clinic in action repeatedly as a volunteer attorney.

can also utilize economies of scale by delivering a lesson and guidance to a consolidated group of litigants rather than meeting and explaining the law to each one. This is an extremely efficient use of the lawyer's time, and the amount of time and effort the clinics requires of litigants helps ensure that they are earnest and highly value the legal guidance. As courts across the country become more and more approachable to the pro-se client, the trend towards these clinics should increase and further limit the theoretical problems associated with the free lawyer.

VII. Assumption 5: Unrestricted Cash Transfers in Lieu of the Legal Services Corporation is Economically Feasible

Replacing the Legal Services Corporation with unrestricted cash transfers is not feasible due to the premium charged for private legal services today. That is, it would cost far more to pay out cash transfers than it would to fund the Legal Services Corporation. The annual budget of the Legal Services Corporation is approximately 340 million, with 318 million going to field programs.²⁵ This amount is insignificant compared to what an unrestricted cash transfer program would cost. There are approximately 50 million eligible legal service recipients in America today.²⁶ Legal fees across the country run the gamut depending on the geographical location, type of legal work and the experience level of the firm or practitioner, but rates of several hundred dollars per hour are not uncommon in metropolitan areas. But even assuming a bargain legal fee rate of \$100 per hour for private lawyers and even assuming most legal problems could be resolved tidily in 20 hours (another very unlikely impossibility), then an unrestricted cash transfer of \$ 2,000 per person (\$100 x 20hrs) would be required. Using these very conservative figures, it would cost at least 100 billion dollars (\$2,000 x 50,000,000) to give every person eligible for legal services in America an unrestricted cash transfer sufficient to hire a private lawyer. That is about 300 times the current Legal Services Corporation Budget annual budget! The unrestricted cash transfer is practically impossible to implement because it would require astronomical funding to be implemented, and even then there is no guarantee that private attorneys would actually take the cases of low-income clients.

²⁵ Legal Services Corporation FY 2004 Appropriation Public Law No. 108—199, 118 Stat. 3 (2004): For payment to the Legal Services Corporation . . . \$338,848,000, of which \$317,471,000 is for basic field programs and required independent audits; \$2,600,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; \$13,300,000 is for management and administration; \$2,977,000 is for client self-help and information technology; and \$2,500,000 is for grants to offset losses due to census adjustments.

²⁶ Luban, *supra* note 10, at 53.

VIII. Assumption 6: Legal Services is a Subsidy Paid Entirely by the Government

Federal funding for the regional groups that deliver legal services to the poor is augmented by a variety of public and private sources. These sources (and altruism in general) are important factors that allow the Legal Services Corporation to leverage federal dollars for optimal efficiency.²⁷ Many Legal Services Corporation funded organizations rely increasingly upon non-LSC funding sources. The National Legal Aid and Defender website provides the following:

The ABA's Standing Committee on Legal Aid and Indigent Defendants provides a state-by-state composite of funding sources available for civil legal representation. This section of the Web site provides viewers with detailed information regarding the primary sources of non-LSC funding that have been developed across the country, including [these appear as links] Interest On Lawyers' Trust Accounts (IOLTA), State Funding, Foundation Grants, Non-LSC Federal Funding, Private Bar Campaigns, [and] Other Funding Sources.²⁸

Clearly, federal dollars are just a baseline starting point for organizations under the LSC umbrella. Moreover, there may be another factor in addition to the non-LSC funding sources that play a crucial role. Salary figures suggest that Legal Services Corporation funded attorneys, themselves, may be a source of internal altruistic support by working at salaries well below market rates. The median starting salary for private practice now exceeds \$100,000 for most major US cities.²⁹ However, the average Legal Services Corporation (LSC) attorney makes less than \$40,000 per year.³⁰ Lawyers in almost any other area of law can expect higher incomes—substantially higher in many cases—than those paid through the Legal Services Corporation. Not surprisingly, only 2.9% of the class of 2001 entered public interest law; 57.8% entered private practice.³¹ By all accounts, the public is getting a bargain for attorneys. We can safely assume there is a strong element of altruism on the part of poverty lawyers who, in part, may be subsidizing legal aid to the poor by working

²⁷ See, e.g., Posner, *supra* note 1, at 476-77. Altruism can also create a free-rider problem where non-donors to a charitable cause get the benefit paid for by donors; moreover, “whenever there are free-rider problems, there is an economic argument for government intervention.”

²⁸ See http://www.nlada.org/Civil/Civil_IOLTA/Civil_IOLTA_Home, last visited Jan 10, 2004.

²⁹ American Bar Association Law School Admissions Council, 2004 Official Guide to ABA-Approved Law Schools 44 (2004)

³⁰ Luban, *supra* note 10, at 54: In 1998, the LSC funded 3,590 attorneys at an average salary below \$40,000.

³¹ American Bar Association Law School Admissions Council, 2004 Official Guide to ABA-Approved Law Schools 44 (2004)

at below market salaries. Many private attorneys and law professors also work pro-bono for Legal Services funded organization. It is clear that the federal government does not cover the entire costs of civil legal aid to the poor in America. Rather the federal government dollars are matched in a variety of tangibles and intangible ways. Ironically, Judge Posner favors “ a program of government matching grants to charities” in some contexts.³² And this is what regional LSC organizations are doing when they leverage their LSC dollars. Without a doubt, their nonprofit status and affiliation with the LSC give these organizations credibility and viability with private donors. It is almost inconceivable that private and public donors would direct altruism towards a for-profit privatized legal service provider (e.g., those delivering services under the unrestricted cash transfer system). Hence federal funding of Legal Services may not only be practical necessity but financially prudent because of the accretion of donated time and money the Legal Services Corporation funded entities generate.

IX. Assumption 7: The Poor Can Successfully Navigate the Social Services Maze

Eligible recipients of many social programs need extensive knowledge of various areas of law to obtain (and retain) benefits or vindicate rights. Or, as is often the case, the poor need access to someone with extensive knowledge of the law (i.e., an LSC funded lawyer). Consider that in an average Social Security disability benefits case, a recipient who is denied benefits and seeks to mount an appeal would need to understand a variety of things. First, the denied recipient should have good reading, thinking, and social skills to even understand that the Social Security Administration has denied the benefits, the agency's reasons and the procedures for an appeal. If the Social Security correspondence is understood, the denied recipient can then proceed to look at the relevant statutes; the regulations promulgated by the agency itself; the agency's own interpretive memoranda or decisions; and the federal case law at the various levels (district, circuit, and Supreme Court) related to the agency. Of course, the applicant will also need to understand how all these authorities interrelate; which are binding or merely persuasive; which trump others; what is a holding and mere dicta in a judicial opinion; what is out of date and current law. Also, the applicant should understand the basics of Administrative Law and Constitutional Law. In short, the recipient probably needs basic legal education and training. In fact, even experienced lawyers rely heavily on practitioner manuals, their own experience, and their colleagues to navigate the complex waters of any federal agency. In almost any common area of poverty law—consumer protection, landlord tenant, family, etc.—the average pro-se litigant stands little chance of comprehending the legal aspects of

³² Posner, *supra* note 1, at 479

their case. Legal assistance is an implied pre-requisite for the poor to navigate the legal mazes that exist today in our social welfare system. Our social programs have little meaning if the intended recipients can't access or retain the benefits allocated to them by law. Therefore, the federal government has some responsibility to ensure eligible recipients can access benefits. The need for legal assistance can be viewed as an external cost of our complex regulatory framework, a cost of which the government ought to bear at least in part. Otherwise, the compliance costs would fall on the intended recipients--those least able to shoulder them. Federal and state governments should either simplify their highly legalized and intricate programs and procedures or continue support for their LSC funded organizations.

X. Conclusion: Tailoring the Theory to Better Fit the Reality

The unrestricted cash transfer is not a feasible alternative for the Legal Services Corporation. But the theoretical premise underlying Judge Posner's theory behind the unrestricted cash transfer could be used to improve on the existing system of administering legal services to the poor. The most applicable idea from the cash transfer is that a completely "free lawyer" can be problematic because it may not allocate services to those who value them the highest. Taking that idea a step further, one could easily conceive of a sliding scale for payment for legal services performed by LSC funded organizations. If we consider a sliding scale fee payment for *all* clients, the free lawyer problem would be entirely eliminated. In most cases, even the most indigent clients receive some form of cash payments. A percentage of that monthly income could be the required fee (e.g., 5-10% of monthly gross income). Those with absolutely no source of hard currency could complete a set number of hours of volunteer work and provide documentation in exchange for legal services. As a result only those willing to expend scarce hard currency or significant time and energy could be given legal assistance. This theory could also help the lower middle class and working poor who exceed the current income requirements for eligibility yet are priced out of the market for private legal services. Moreover, the small fees might be an additional funding source for organizations, allowing them to further increase and improve their services to the poor. It could be a very advantageous and economically efficient transactional structure that would improve the delivery of services to the poor.

Finally, the value of overlaying law with theories from other disciplines is that it allows theorists and policy makers to hold the patterns we use in social sciences or humanities up against our legal system and seek out what applies. The strength of interdisciplinary approaches to law is this flexibility to continually question and determine which theories best fit, which don't fit, and which could fit with some

adjustments. With regards to the Legal Services Corporation and the unrestricted cash transfer, there is not even a rough fit that would allow the latter to replace the former. However, general economic problems related to the “free lawyer” highlighted in the unrestricted cash transfer theory could be addressed through a sliding scale payment regime that might better suit existing system and serve the poor, especially working poor, in a more efficient and dignified manner.