LAWYERS' CHOICE: A THEORETICAL APPRAISAL OF LITIGATION INVESTMENT DECISIONS

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This article explores economic determinants of lawyer behavior which in turn shape basic decisions affecting their clients in such areas as whether to file litigation, how much discovery to employ, whether to accept a settlement offer, and the like. Three methods of compensating lawyers are identified: fee-for-service, contingent-fee, and third-party payment. It is hypothesized that each of these methods creates very different configurations of economic incentives, some of which conflict with the best interests of clients. The possibilities for maximizing various of these economic goals are discussed along with the limits—economic and noneconomic—on such behavior. Finally, the article suggests some potential applications of this analysis for public policy and further research.

Once a dispute reaches a law office it ceases to be the sole property of the disputants. From then on, the disputants' preferences may not determine decisions on such questions as whether to litigate and what settlement terms to accept. Lawyers' expertise and their monopoly of the litigation machinery gives them considerable power over litigation decisions.

In recent years, economists have sought to explain litigation behavior. Their models assume that decisions are made by rational disputants maximizing their own economic interests. In this hypothetical world, each litigant considers the costs and probable outcomes of further litigation steps and

* This article went through an unusually lengthy period of gestation. Some of the basic concepts were sketched in a working paper prepared in 1973 for National Science Foundation Grant GS-33823, "Social-Economic Impact of Legal Practice." Others were spelled out in a memorandum prepared in 1978 during the early stages of the Civil Litigation Research Project. These notions were drawn together and amplified in a paper presented at the May, 1979 meeting of the Law and Society Association. Along the way, various versions have been scrutinized by Neil Komesar, Richard Lempert, Richard Markovitz, Victor Rosenblum, David Trubek, and most of the Civil Litigation Research Project staff. The article has profited immensely from their criticism and suggestions, but I remain responsible for residual errors. The opinions and conclusions expressed in this article are solely my own and not of the U.S. Department of Justice or the National Science Foundation.

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weighs them against economic benefits obtainable without further proceedings (Posner, 1973; Landes and Posner, 1979; Posner, 1977). If, therefore, we had information about costs, expected outcomes, and disputants' risk preferences, we should be able to predict the frequency and terms of settlements as well as anticipate which cases will go to trial.[1]

The world, however, is more complex. One might want to question a basic feature of this theoretical construct—the assumption that individuals (and even organizations) behave as rational economic beings when they get into litigation contests. But even if one accepts this postulate, it is impossible to analyze litigation decisions without taking into account the factors influencing lawyers' decisions. Most litigation decisions are made, or substantially influenced, by lawyers. Therefore, even within the constraints of the economic maximization postulate, a model that fails to consider lawyer motivations is inadequate.

It could be argued that the existing economic models do take the lawyer into account, not because lawyer motivations are specified in their equations, but because lawyers merely do what clients want or would want if they understood what is at stake. If lawyer behavior is exactly what a rational, fully informed client would want it to be, omission of the lawyer should not affect the predictive value of an economic model.

Accepting the postulate that both disputants and lawyers are rational maximizers, this article seeks to demonstrate that for this very reason, the decisions that *lawyers* make in litigation deviate significantly from what fully informed clients would have preferred. It shows, therefore, that lawyer motivations must be separately specified if we are to predict litigation investment decisions accurately.

The argument is theoretical, not empirical. The article models lawyer resource allocation decisions. It focuses on the economic incentives affecting lawyers when they decide whether and how much of their time to invest in a given dispute or discrete litigation event (i.e., to depose witness "x," to go to trial, etc.).[2] Because fee structure is a crucial

[1] In essence, this model indicates that either side will (or should) accept any offer which is more favorable than what could be obtained from the court after deducting all the costs associated with litigating the dispute including the costs of waiting in queue for the court to get to the case. The basic thesis and its elaborations are presented in Posner (1973), Landes and Posner (1979), and Posner (1977).

[2] It is beyond the scope of this article to discuss the intentional and unintentional reward systems a law firm or legal services plan may create (deliberately or inadvertently) that will influence individual lawyers within the

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determinant of lawyer choice, the analysis deals separately with three types of lawyers, depending on the source and type of payment they receive—fee for service, contingent fee, and third-party payment. For each of these situations, alternative models of lawyer choice are presented, and the most likely decisional criteria are identified. These models focus on the lawyer's economic incentives; at a later point the article briefly analyzes some possible noneconomic motivations—professional satisfaction, societal contribution, game psychology, ethical standards—which may temper the lawyer's purely financial considerations.

The analysis suggests several conclusions. For profit maximization reasons, fee-for-service lawyers will tend to charge *more* time to a given piece of litigation than a rational, fully informed client would prefer. Contingent-fee lawyers, on the other hand, generally maximize their profits by investing *less* time than a rational, fully informed client would like. In either instance, clients will obtain a less than optimal return on the fees paid to their lawyers. Third-party-payment lawyers, it is argued, invest more *or* less than rational, fully informed clients would want were they paying the fees directly, depending on the criteria established by the government agencies or insurance funds which pay these lawyers. Alternative third-party criteria, including "private market" standards and maximization of returns to individual clients, the total caseload, or some broader constituency, are presented and their likely effects described. In the final section, some empirical tests and policy implications of various lawyer choice models are suggested.

I. THE FEE-FOR-SERVICE PAYMENT SYSTEM

I begin by analyzing the motivations and choice processes of lawyers who charge clients on an hourly or per-task basis. Fee-for-service lawyers form the largest segment of the legal profession. The benefit-cost implications[3] of their litigation

organization to allocate their time in certain ways. Winning the hand of the senior partner's ugly daughter (or son) may be the real route to high status and income within the firm and preoccupy the time of most associates of the opposite (or same) gender. Rather, in this article we are concerned primarily with what may rationally influence the organization itself to strive toward maximization of certain goals. In the case of sole practitioners and perhaps small partnerships, these issues may be identical.

[3] For the purposes of this article, I am sidestepping the issue of what is included in the terms "cost" and "benefit." Cost may well embrace social and psychological costs as well as economic ones. ("I'll take your offer of $10,000 even though I know I can get $15,000 at a trial that would only cost $2,000 because testifying would be traumatic for my client.") But clearly the direct

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decisions are most visible: each event (another deposition, trial) is an additional direct cost to the client and usually will be reflected in billings. With appropriate modifications, the model of fee-for-service lawyer choice can be adapted to analyze the decisions of lawyers paid by contingent fees or third parties.

The "Alter-Ego" Fee-for-Service Lawyer

In this section, I assume that the fee-for-service lawyer is motivated exclusively by a desire to be as helpful as possible to his or her present client. Using this assumption, we can generate a set of decisional criteria which a rational lawyer, acting as alter ego for the client, would employ in making litigation decisions that create costs for clients. In the following sections, I relax the assumption that the lawyer acts solely as the client's alter ego, introducing more realistic assumptions of lawyer motivation which restructure the expected pattern of lawyer decisions and thus of client costs.

What happens if the lawyer acts as an alter ego of the client with professional expertise in assessing costs, probabilities, and outcomes? If the lawyer is rational and has complete information, he or she will invest additional resources (i.e., costs to litigant) in a given case until *maximum net benefits* are achieved for the client.[4]

The term "maximum net benefits" describes the point in the litigation at which the difference between total expected benefits and total costs reaches its maximum. This can also be defined as the point where expected marginal benefits equal marginal cost. Benefits are referred to as "expected" because any potential benefits must be discounted by the probability that they will be received. Thus, if there is a 75 percent probability of obtaining $1,000, the "expected benefits" are $750. Any contemplated future benefits also must be discounted to reflect the present value of future income. The $750 that could be expected after a trial two or three years away clearly is not

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economic costs (lawyer's fee, stenographer's deposition charges, etc.) are a very large element of cost and usually the most visible to the lawyer in making his decisions. Likewise, in virtually all disputes, noneconomic benefits are at stake (i.e., satisfaction of "winning") and in many instances, the benefits are entirely nonmonetary (i.e., child custody).

[4] Lawyers adhering to this alter-ego model presumably would not cause deviations from the outcomes predicted by the economic analyses of Landes, Posner, and others. See note 1 *supra*. It may be that lawyer motivations are excluded from their equations because they are assumed to be the only actors in the legal-economic world who do not seek to further their own interests.

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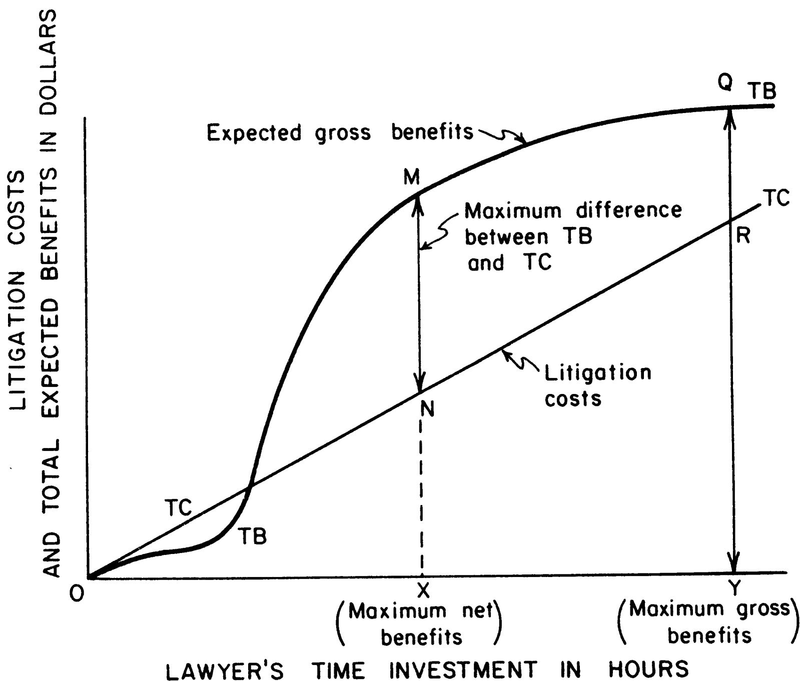
worth as much as $750 that could be picked up from an opponent this very afternoon.

The opportunity for maximum expected *net* benefits in a case, taking probabilities and present values into account, may occur very early—perhaps immediately after the client's first visit and an initial telephone call by the lawyer to the other party. In other cases, expected *net* benefits will not reach their zenith until after full trial and appeal. Figures 1 and 2 are simplified graphs illustrating the concept of maximum net benefits in the litigation context. Figure 1 is based on the assumption that each hour the attorney invests in a case (measured by the total cost curve TC) improves the probable level of client benefits (measured by the total benefits curve TB). The crucial feature of Figure 1 is the relationship between TC and TB. Total costs increase at a steady rate. Expected total benefits from a given level of cost, however, rise steeply and then begin to level off. This feature of the TB curve reflects the fact that cumulative time investments in litigation activity—e.g., investigation, negotiation, trial—gradually become less productive. Ultimately, the expected total benefit

Figure 1. Clients of Fee-for-Service Lawyers: Total Costs and Benefits



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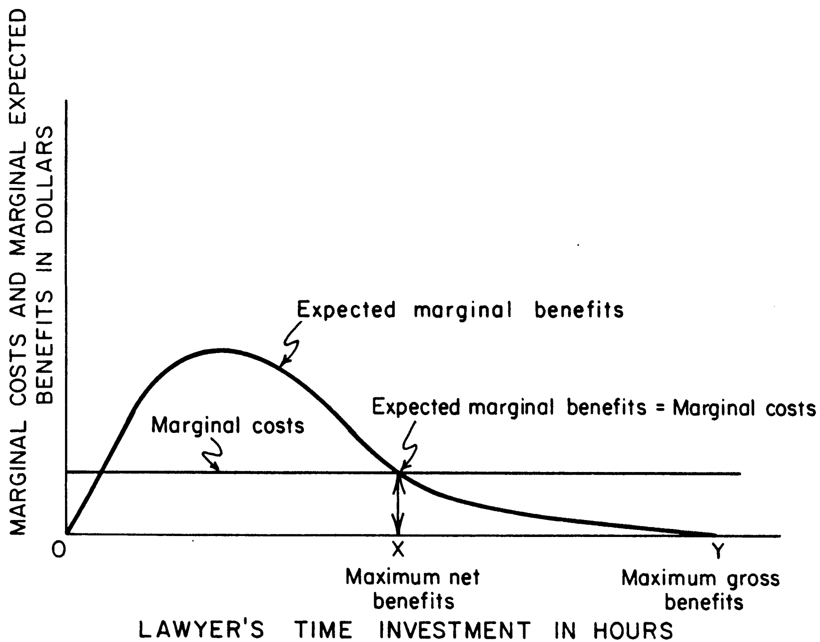
curve levels off completely at Q. This is the point at which further investments of attorney time will not increase the probability of greater benefits for the client.

Figure 1 indicates that the alter-ego lawyer will invest *OX* in time in this litigation. That is, the lawyer will spend time until he reaches point N on the TC curve. This is the point at which there is the maximum difference between the TB and TC curves. Note that the time investment at *OX* is significantly lower than the amount invested (*OY*) if the lawyer were to spend time until point Q were reached on the expected benefits curve—i.e., the point of maximum gross benefits. But as Figure 1 makes clear, net benefits for the client are higher at *OX*, since MN>QR.

Figure 2 merely plots the expected *marginal* benefit and *marginal* cost curves that correspond with the total cost and expected benefit experiences portrayed in the simplified hypothetical of Figure 1. The expected marginal benefit curve crosses the marginal cost line at the same point where the expected total benefit and total cost lines reach their maximum separation. This is where *net* benefits reach their maximum. Similarly, expected *marginal* benefits equal 0 when the

Figure 2. Clients of Fee-for-Service Lawyers: Marginal Costs and Benefits



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expected *total* benefit curve first becomes absolutely horizontal.

Discontinuity, Risk, and Uncertainty

Of course, these smooth curves of traditional economic graphs do not accurately represent the realities of the litigation scenario. Litigation investments tend to occur in bursts. Typically, lawyers will decide to spend enough time to appraise the case and enter into first-stage negotiations. Then, depending on the offer made by the opposition, they will weigh the desirability of a second quantum of investment, e.g., by determining what a significant investment in formal discovery might do to settlement or verdict prospects. And when that second burst of costs has been incurred, lawyers may negotiate again. New offers made by the opposition will be weighed against the costs and benefits of yet another major investment of resources—the preparation and conduct of a trial. Therefore, a lawyer attempting to maximize net benefits for a client actually is choosing between several expected net benefit "peaks" and selecting the one in which the expected benefit curve surpasses the cost line by the greatest margin. In one case the point of maximum expected net benefits might well correspond to the offers which can be anticipated during negotiations after the discovery phase, but before the investment in trial preparation. Yet in the next case, the litigant might logically proceed to trial since the third "peak" of expected net benefit surpasses the earlier ones. Of course, at any time along the way, the opponent may make an offer the litigant can't refuse (or at least shouldn't) because the actual *net* benefits offered exceed the expected *net* benefits of going all the way to trial.

Not only are actual decisions made about discontinuous investment quanta; they are also made under conditions of risk and uncertainty. During litigation, lawyers operate in a world of imperfect information and probability estimation: the maximum expected net benefit target is easier to state than it is to hit. A full analysis of actual decisions and decisional criteria would require consideration of a substantial literature (see, e.g., Menges, 1974: 124-204; Raiffa, 1968; Grayson, 1960; Luce and Raiffa, 1957; Von Neumann and Morgenstern, 1953). While such an analysis lies beyond the scope of this article, we can suggest some of the factors that alter-ego, if not all, lawyers have to weigh. These factors include:

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1. Previously incurred costs, which the lawyer can know with considerable precision.
2. An estimate of the cost of proceeding with the contemplated litigation event—a specific deposition, interrogatories, a pretrial motion, etc.
3. An estimate of the expected increment in benefits this step will produce, usually reflected as an increase in the probability of achieving some level of benefits. For example, the lawyer may calculate that deposing the defendant will give a 50 percent chance of raising from 60 percent to 80 percent the chances of obtaining $100,000. Detailed analysis would yield a full schedule of probabilities at both levels and with respect to different benefit amounts, etc.
4. An estimate of the costs of future anticipated litigation events and the likelihood that they will be necessary. The attorney cannot treat any litigation decision in isolation, but must view it as a step in the march toward the target of maximum net benefits. This estimate must include not only the investments the lawyer would choose to make, but a reasonable forecast of investments that will be compelled by the actions of opposing counsel—such as the opposition's decision to appeal.
5. An estimate of the impact of probable future investments by the opponent on the estimated benefit curves of the attorney's client. The lawyer's contemplated investment may compel or encourage the opponent to take steps that will modify or even reduce the client's expected benefits.
6. An estimate of the benefits obtainable if the lawyer decides not to take the contemplated step. At the time of a firm settlement offer from the other side, the lawyer has a 100 percent probability of obtaining the deal offered and, typically, lesser probabilities of obtaining a somewhat better deal without further effort as well as probabilities of obtaining a much better deal through further efforts.
7. Estimates of the probable costs, benefits, etc., of alternative next steps, i.e., hiring investigators rather than sending interrogatories to obtain essentially the same information *or* doing something to obtain completely different information *or* conducting legal

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research to develop a more sophisticated legal position, etc.

When fully worked out, this model might well describe how rational lawyers *ought* to make various litigation decisions. Perhaps in a very rough sense, it even describes how some lawyers who are particularly devoted to their clients' interests and naturally analytical in their decision making processes approach these decisions. But I think the maze of interdependent probability judgments to be made is so intimidating and inherently imponderable that it would lead even those lawyers committed single-mindedly to their clients' best interests to a different and simpler set of criteria. At best, some lawyers may perceive in vague terms most of the above considerations and in a largely nonquantitative way grope to make decisions that will approach the target of maximum net benefit for the client.

Alternative Assumptions: The Lawyer as Profit Maximizer

More realistic than the alter-ego configuration is an assumption that, in general, fee-for-service and contingent-fee lawyers are in the *business* of practicing law. The lawyer, like the corner grocer, is *not merely* the alter ego of the client. The corner grocer is not committed to sell customers tomatoes at the lowest price consistent with a modest profit, but at the highest price (and the greatest profit) consistent with customers continuing to buy the tomatoes. Like other business people, the lawyer's primary goal is to maximize his or her personal profits, not the client's net benefits. Although this view departs from the idealized image of the lawyer as a professional selflessly subordinating his or her own self-interest completely to that of the client, still, it is one which finds considerable support in the literature (Rosenthal, 1974; Carlin, 1962; 1966).

Introducing this alternative, more realistic, assumption about lawyer motives will lead to different predictions about lawyer decisions and thus client costs. Under some conditions, lawyer profit motives will tend to push resource investments (hence litigants' costs) beyond the point where client's marginal cost equals client's expected marginal benefit. Under others, they will tend to hold such investments below that mark. For purposes of this article, the former is termed "overinvestment" and the latter, "underinvestment." In either instance, the client will fail to realize his or her maximum net benefits in the case—in the first situation because costs will be

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"excessive," and in the second because the lawyer will not have spent enough time to achieve an optimal settlement or judgment.[5]

If fee-for-service lawyers are motivated to maximize *their* profits, they ordinarily will devote more time to a case than would the hypothetical alter-ego attorney. Fee-for-service firms maximize profits by expanding the total number of hours billed. A firm will secure maximum profits if it bills all the time of its members. Moreover, in the medium and long run, law firms can increase their profits by expanding in size, especially if this expansion involves hiring young associates at "wholesale" prices and selling their time at "retail." Therefore, the purely profit-maximizing firm will seek to invest that amount of time which fully employs both its existing capacity and any profitable additions of low-cost associates. These motivations will cause a purely profit-maximizing firm to expand and bill clients for time beyond the point where the marginal cost of lawyer time equals expected marginal benefits for the client. Thus, firms will overinvest their time until they reach "full capacity" or are constrained by market forces or professional sanctions.

Contrary to this conclusion, it might be contended that a firm will not invest its capacity in client A's case beyond the point where mc = emb, since when this point is reached the firm can shift its resources to client B, in whose case marginal cost is still below expected marginal client benefits. But there are various possible explanations for why overinvestment in client A's case is a valid profit-maximization strategy. One is that many law firms cannot attract sufficient law business at prevailing fee levels to use their total capacity if they only invest in each case until they have maximized net benefits for the clients. In a free market situation, they presumably would follow the strategy of lowering fees to attract more clients. But, because of imperfections in the legal service market, and the difficulty of policing litigation decisions, another option is available: to devote additional time (and bill the attendant cost) to the cases they do attract. And these law firms, because of tradition or otherwise, choose the latter option.

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[5] A lawyer who accepts a settlement of $10,000 after expending $2,000 of his time when he has a reasonable expectation that with the expenditure of another $5,000 he could obtain $25,000 has underinvested. In contrast, a lawyer who turns down a settlement of $10,000 after expending $2,000 of time in order to invest another $5,000 with a reasonable expectation of raising the recovery to $12,000 through that additional effort, has overinvested.

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A more radical possibility is that given the prevailing fee levels, the limited pool of clients who can afford their services, and like considerations, the profession as a whole sustains its present size only because most lawyers invest beyond mc = emb in the average case or at least in most cases where the clients' resources permit. Even if only a minority of lawyers actually initiate overinvestments, their opponents normally will be compelled to respond in kind. The result will still be a situation where marginal costs exceed marginal benefits in the average case (and thus in the aggregate).

Even firms which have a full roster of cases cannot be expected to shift from client A to client B merely because marginal costs now exceed marginal expected benefits in client A's case. While such a shift would benefit the client, it only lowers the firm's profits. The firm can always expand its capacity. As long as the firm can charge extra time to A (and ultimately to B), it has no profit-related motive to make a shift to B when it has reached mc = mb for A. Moreover, charging A for more hours rather than shifting to a *new* client B can be more profitable, given the "front end," nonbillable cost associated with attracting and starting a new case. Each case, in effect, may have its own cost curve for the law firm unrelated to the hourly fees billed to the client. This cost curve would decline over the hours devoted to the case as the "front-end" costs of attracting the case, opening the file, etc. became a lesser percentage of the law firm's investment in the case. If true, this would mean that additional hours invested in a given case would be more profitable to the firm than earlier hours invested in that same case (or in a prospective new case). Therefore, the profit-maximizing firm will seek to bill as much time as possible to existing cases and obtain as many new cases as it can, charging *all* clients for time beyond the point where an alter-ego lawyer would stop investing client resources.

Will Market Forces Constrain the Profit-Maximizing Lawyer?

Some might object that lawyers, like corner grocers, are constrained by market forces, and that lawyers who overinvested beyond the point where marginal costs equal expected marginal benefits would soon lose out to those who generally produced maximum net benefits for their clients. However, it is difficult to imagine a market less perfect than that for lawyer services, especially in the litigation field. It is characterized by restricted entry, limited price competition, a

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nonstandard "product," consumer ignorance, and frequently by consumer indifference (or at least lack of involvement in vital decisions).[6]

Lawyers hold a state-guaranteed monopoly over access to the courts, the primary means of resolving serious disputes. Not only is this access a monopoly of the legal profession, but in the United States, at least, it is a self-regulated monopoly. Bar associations control entry to the profession. They set the standards, administer the examinations, and certify the law schools.

Moreover, while in some other countries the courts or the executive branch review the fees in each case,[7] in the United States the profession itself ordinarily is in charge of the compensation issues. Until recent Supreme Court decisions,[8] many local bar associations even fixed the minimum price structure through "minimum fee schedules."[9] On the other hand, the organized bar did not impose any limit on the maximum fees lawyers might charge. They also prohibited advertising by individual lawyers (including advertising about fees) until the Supreme Court ruled that this practice violated the First Amendment.[10] Even now, price competition is not favored by most bar associations. With the exception of a relative handful of well-advertised legal clinics, the legal services market does not yet exhibit the symptoms of full and open competition.

Another characteristic of the legal services market is the uniqueness and complexity of the "product." Unlike tomatoes but like medical services, legal work is nonstandardized: legal services lack the interchangeability ordinarily deemed essential to a competitive market (Feldstein, 1979: 406-410; Samuelson, 1973: 482-488). Legal services are extraordinarily difficult for consumers to evaluate. Most of the time the average citizen does not understand the litigation process, tactical options, or likely costs.[11]

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[6] The legal services market demonstrates many of the characteristics deemed to render health services an uncompetitive market (Feldstein, 1979: 163-165, 328-334, 406-415).

[7] In England the courts, through a master, appraise the reasonable fees in each case (Cappelletti *et al.*, 1975: 155). In Germany, the executive branch establishes the fee schedule for the legal profession (Cappelletti, 1975: 48-50).

[8] See *Goldfarb* v. *Virginia State Bar* (1975).

[9] Some interesting data about minimum fee schedules (including a survey of levels prevailing in the late 1960's) can be found in American Bar Association (1970).

[10] *Bates* v. *Arizona State Bar* (1977).

[11] A recent study (Rosenthal, 1974) indicates that individual clients can sometimes—and to their profit—monitor their lawyer's performance. However,

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There is anecdotal evidence that even sizeable corporations experience difficulty in policing litigation activity by outside law firms. Apparently, the traditional practice in many corporations has been to leave the law firms alone, allowing them to conduct the litigation and charge fees as they deem appropriate. For instance, one corporate lawyer interviewed for the Civil Litigation Research Project reported that his law firm submits a one-line bill annually to one of its clients, a medium-sized business enterprise, merely reciting "for services performed during the past year: $985,000." Even if the organizations are disposed to police their outside counsel's investment decisions closely, they will find it difficult to limit the lawyers in charge of the litigation to the target of maximum net client benefits. Litigation investment decisions have to be made so frequently that almost constant monitoring would be involved. Most overinvestments can be excused in retrospect as honest miscalculations or bad luck. And the cost of this monitoring should not be overlooked. Fairly experienced (and thus expensive) "in-house" attorneys would have to spend a great deal of time gaining detailed information about the case, the litigation events, strategies, and possible options if they were to make reasoned judgments about the desirability of the outside lawyer's proposed or past investment decisions.[12]

What are the limits on billing time to a case? There must be a point where further charges are counterproductive even to pure profit maximization. I speculate that this boundary is reached when the benefit-cost ratio, although no longer optimal, is still deemed minimally acceptable by the client.[13] In the case of one-shot clients, this may approach but not enter

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this may work better in whipping recalcitrant lawyers into doing more than in restraining overzealous ones from doing too much.

[12] There is some evidence suggesting that "in-house" corporate lawyers enjoy a lower status than the outside counsel they would be seeking to supervise. Presumably this factor too could hinder intensive and hardnosed evaluation of past litigation decisions by outside counsel (Slovak, 1980).

[13] It should be noted that different cases present very different ranges of potential benefit-cost ratios. As a general rule, "big stakes cases" involve enormous benefit-cost ratios—higher by factors of ten or twenty or more as compared with run-of-the-mill cases. This probably means these big cases are particularly insensitive to substantial overinvestments of time. When millions are at stake, the client is unlikely to care that the lawyer billed $100,000 rather than $10,000 worth of time on the case. Because of the high benefit-cost ratios involved in the litigation, virtually any legal fee appears to be a better investment of the client's money than could be obtained in the stock market, real estate speculation, etc. Thus, "the minimally acceptable benefit-cost ratio" may be much, much lower than the "maximum net benefit" level. Moreover, in these big stakes cases, there is so much to gain from even rather marginal or speculative increases in the probability of success and so much at risk from failing to explore every last possibility that there is a further incentive (and, a cynic might add, a good excuse) to make an overinvestment of time as a safety margin. Where a knowledgeable client approves or would endorse the

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the zone where they will refuse to pay or complain to the bar association. (I doubt that many lawyers, if any, deliberately pursue cases this far. But we may not be able to exclude it as a hypothesis without research.) In the instance of continuing (or potentially repeat) clients, the minimally acceptable benefit-cost ratio might be one which would induce them to come back to the lawyer with additional business. This inevitably would be closer to "maximum net client benefits" than the one-shot client would obtain. But, given client ignorance and lack of client involvement in investment decisions, lawyers probably need not aim at or approach the narrower target very closely in order to achieve enough client satisfaction to gain return business.[14]

I do not mean to suggest that all fee-for-service lawyers deliberately pursue a policy of billing "as much as the traffic will bear" to every case. There obviously are ethical, moral, and professional considerations that factor into these decisions. Rather, I am suggesting that, given the imperfect market for lawyers' litigation services, the near impossibility of client policing of investment decisions, and the ease with which a law firm can expand its capacity, this is a viable profit-maximization strategy, and one that is pursued within the limits outlined.

Investing Time for Future Lawyer Profits: Business Generation, Skill Development, and Credibility Building

In some situations, we must look beyond the specific case to explain a lawyer's decision to invest time. Considerations of long-term profit maximization can lead a lawyer to spend time on a case beyond that needed to secure maximum net benefits for the client in question. This additional time may help the lawyer generate future business, enhance legal skills, and build credibility as a litigator, and thus represents investment by the lawyer in future profit-making capacity. In some cases, a lawyer will charge these costs to the client in the case at hand, even if the costs will only benefit the lawyer and/or future

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speculative litigation investment it is not, of course, an overinvestment as defined in this article.

[14] The separation of ownership and management typical in the corporate world may compound this situation. At least while the stakes-cost ratios of a litigation exceed other "investment" opportunities by a substantial margin, management need not be over-concerned that stockholders will object that the manager failed to hold outside counsel to *maximum* net benefits or anything close to that target.

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clients. If this can be done, perhaps because these charges, even though not of real net benefit to the client, do not exceed the minimally acceptable cost-benefit ratio that sets the boundaries of the lawyer's billing ability, such costs will represent an "overinvestment" of client funds.[15] Even if the lawyer absorbs the extra costs involved, we must look to profit motives to explain observed expenditures that exceed the levels an hypothetical alter ego lawyer would have selected.

A case can offer an opportunity to entice additional billable hours of work to the lawyer or law firm in the future, either from the same client or from new clients. To make a favorable impression on a new client who is a potential source of considerable further legal business, a lawyer may devote more hours to a case than is reasonable to achieve maximum net benefits. (As this is one of those situations in which a lawyer is likely to bill fewer hours than he or she actually expends, the client may be better off *in this case* than if the lawyer had targeted for maximum net benefits.) Similarly, if the particular case is sufficiently notorious (either in the public arena or within a select community of potential clients) to attract new business, or promises a breakthrough in the law creating a new class of litigation (i.e., *Marvin* v. *Marvin*), the lawyer has reason to invest more time than would be justified by the implications of this specific case for this particular client.

Resource overinvestment in the individual case may also occur when fee-for-service lawyers seek to enhance their ability to raise hourly rates in the future. Some cases offer an opportunity to develop or greatly enhance more lucrative skills. In other situations lawyers gain in personal economic terms from carrying the case beyond the point where mc = emb. A lawyer might be tempted, for instance, to turn down a settlement offer that would yield the client maximum net benfits in order to pursue a case to trial. The trial verdict might well exceed the settlement offer and hence increase the client's gross benefits, yet, because of the cost of trial, reduce the net benefits. But meanwhile, the attorney will have acquired new learning or skills which will allow him or her to charge future

[15] A special situation arises where a lawyer is building knowledge, skills or credibility for the future benefit *of the client* represented in a particular case. Then the lawyer has good justification for billing overinvestments to that client. This is especially common where the lawyer represents only a small number of clients in a repetitive type of litigation against a large number of individual opponents, e.g., a lawyer serving loan companies in debt collection actions. Any credibility-building overinvestments which that lawyer makes in particular cases should inure to the long-range benefit of those loan companies, and the lawyer quite appropriately can bill them to the client.

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clients a higher hourly rate. The effect on the client in the specific case depends on billing decisions.

Lawyers can also overinvest in individual cases to lower their costs in future cases. To gain credibility with opponents (generate fear), lawyers might invest far beyond the point where mc = emb and, in fact, to the extent that these investments inflict additional costs on opponents, they may well go beyond emb = 0. The result, presumably, is greater profits for the lawyer (i.e., more clients and higher fees) or higher net benefits ratios (i.e., same benefits at less cost) for clients in future cases or both. At the extreme, some lawyers pursue this strategy with such vigor that if other lawyers face them as opposing counsel, they will either dismiss their cases (if only modest stakes are involved), or offer to settle on ridiculous terms: "If he's in the case you face a blizzard of interrogatories, motions, depositions, etc., so you might as well give up. You can't afford to fight him."[16]

Whatever the motive for overinvestment in a specific case, and whether or not lawyers bill their clients for the extra hours, the opposing litigants feel the impact. As mentioned earlier, expected benefit curves are interdependent. Not infrequently, one side's overinvestment will virtually compel the opposition to spend more on the litigation than they otherwise would. Even if lawyer A totally absorbs the cost of his or her decision to spend time on a case beyond the point that yields maximum net benefits for A's client, the opposing attorney (B) will have no reason to "eat" the extra costs that result. Therefore, B's client will pay for costs that result from A's decision to overinvest.

Motives to Underinvest

Intentional underinvestment probably is a much less common phenomenon among fee-for-service lawyers than its opposite. Underinvestment, of course, refers to situations where lawyers stop short of the point where marginal costs equal expected marginal benefits to the client, while knowing

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[16] In the long run, this extreme credibility-building strategy may only be feasible where certain conditions are met. The amount of time invested in the type of case must be a critical determinant of success. Otherwise, the lawyer's willingness to overinvest will not dissuade opponents from remaining in the contest. Furthermore, the lawyer must not face the same opponent in any significant number of cases. Otherwise, that opponent will have his or her own economic reasons for "calling the bluff" in enough cases to make overinvestment no longer viable. For similar reasons, the assortment of opposing lawyers must lack the information or the common interest or the resources to develop a concerted strategy against the credibility-building lawyer.

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or strongly suspecting they are doing so. Nearly all the economic considerations militate against underinvestment. The lawyer's profits are reduced rather than increased, as is the client's economic return. Thus, ordinarily at this stage there is no conflict between the best interests of client and lawyer: both have incentives to push for further investment in the case.

In certain situations, however, underinvestment may be a predictable pattern of conduct. One is the risk-aversive client. Here the alter-ego lawyer, at least, will respect the client's preference not to invest to the point where mc = emb, instead accepting a certain and reasonable return that comes relatively early in the proceedings. It is thought, for example, that low income leads to risk aversion. With little disposable income to spend or invest in anything, the poor are loathe to take chances with the few dollars they do have. Confronted with a choice between a settlement offer of $1,000 at a point in the litigation where they have paid $200 in legal fees, a person of modest means might accept the $800 net profit rather than invest another $600 to go to trial, even if there is an 80 percent chance of winning $3,000 (an expected net benefit of roughly $1,600) at that trial.[17]

Of course, lawyers who fail to maximize net benefits for risk-aversive clients are not truly underinvesting. They are not being drawn away from that target by personal considerations, economic or otherwise. Instead, out of deference to the client's desires, this lawyer is investing less than the risk-neutral, fully informed "rational client" would. On the other hand, where it is the lawyer rather than the client who is risk aversive, we are closer to a true underinvestment. This sort of underinvestment may be especially difficult to detect. Ordinarily, the lawyer's risk aversiveness is reflected in his or her assessment of the probabilities of different outcomes. Hence, the expected benefit curves (at least the subjective ones) would conform to the lawyer's expectations. And the lawyer actually might be investing to the point where mc = emb, assuming his or her assessments were valid. Only by measuring the risk aversive

[17] This risk aversiveness may be phrased as an inability to "afford" the additional legal fees. One could argue that plaintiffs could afford to pay the additional fees out of the proceeds of the litigation, and defendants could pay them out of gross benefits (which are really savings). But less affluent litigants often are unable or unwilling to incur the risks inherent in striving for maximum expected benefits. They cannot afford to take a chance there won't be any birds "in the bush" even when the odds are 8 to 1 a pair can be found there. A study of the English "payment-into-court" system (Zander, 1975) tends to confirm that modest-income individuals behave in this risk-aversive manner when confronted with settlement versus trial decisions.

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lawyer's anticipations and decisions against some sort of risk-neutral lawyer standard could one say an underinvestment had occurred.

Realistically, underinvestment as a function of risk aversiveness among lawyers probably is a relatively rare occurrence. Even if a significant subset of fee-for-service lawyers are risk aversive, powerful proft-maximization motives pull them in the direction of greater investments. The profit-maximizing lawyer can spend any amount short of the minimal acceptable net benefit ratio I have described. Therefore, he or she has to be terribly risk aversive to calculate that the prospects of enhancing the client's gross benefits are so slight that further investments will take the case out of the zone defined by those minimally acceptable net benefit ratios.

In certain circumstances, however, profit-maximization motives may lead to underinvestment. A solo practitioner or small firm with a permanent or temporary overload of work and limited flexibility to expand its resources may be compelled to underinvest in some cases in order to make appropriate investments in others. Moreover, members of even the largest law firms probably experience occasional peaks of activity where they cannot do all that should be done in all the cases assigned in the time allotted by court deadlines. In purely profit-maximization terms,[18] a lawyer or law firm seems likely to choose the following types of cases for underinvestment:

Those involving clients who are not apt to become future or continuing clients of the firm.

Those which offer the least opportunity for business generation or credibility building.

These two criteria appear consistent with earlier discussions of maximum net benefit and reasons for overinvestment. When working for continuing or potentially repeat clients, a lawyer has a strong profit motive for investing enough time to closely approximate maximum benefits. And, when a case offers the opportunity to generate new business or build credibility, the lawyer is pulled toward overinvestment, not underinvestment.

II. THE CONTINGENT-FEE PAYMENT SYSTEM

Many lawyers in litigation charge a fee based on a percentage of the amount the client recovers, rather than on

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[18] Underinvestment, of course, also may be prompted by noneconomic motives. For instance, the lawyer may find a case boring or irrelevant to his/her professional stature or satisfaction. These and like influences are discussed briefly at pp. 1436-1440 *infra*.

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the time the lawyer expends on the case. While profit maximization frequently will lead the fee-for-service lawyer to spend more time on a case than is necessary to secure maximum net client benefits, economic incentives under a contingent-fee system may encourage lawyers to spend less time than a rational, fully informed client would have authorized.

What Do Contingent-Fee Lawyers Maximize?

The contingent-fee lawyer invests his or her time to secure a return which equals a stated percentage of the client's actual recovery. The aim of the profit-maximizing contingent-fee lawyer is to get the highest possible return per hour of time spent. Since contingent-fee lawyers normally have, or can attract, a number of cases, they must decide how to allocate limited time among several cases, each seen as potential sources of return. Contingent-fee lawyers gain the most when the ratio between the fees they recover and the opportunity cost of their time is the highest.

For any given case, the contingent-fee lawyer must calculate the expected gross benefits, the percentage which he or she will receive, and the time needed to secure different levels of benefits for the client. This calculation will determine the return on time spent with this case. But the profitability of this investment can only be determined by comparing it with the expected return from spending the same hour on another case.

A simple example will illustrate this principle and its implications for time allocation decisions by contingent-fee lawyers. For simplicity, let us use a flat contingent fee equal to 25 percent of client recovery. (Actual fee structures are more complex, and fee levels vary from jurisdiction to jurisdiction.) Assume that the plaintiff's lawyer, working on a contingent fee, determines that he or she can secure a settlement of $10,000 by spending 5 hours on the client's case. The client will receive a net benefit of $7500, and the lawyer will get $2500 for the time spent. Assume further that in this same case the lawyer believes that spending another 45 hours in discovery and other pretrial preparation will induce the opposing party to increase the offer to $20,000. If the lawyer rejects the first offer and undertakes the additional investment, the client will net $15,000 and the lawyer will get $5,000.

Will the lawyer want to reject the first offer? This depends on the opportunity cost of time. The lawyer earns $500 for each

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hour invested in securing the first offer, but less than $60 per hour to get the higher return. If the lawyer can spend the extra 45 hours working on cases where the return per hour spent exceeds $60, it is in the lawyer's interest to have the client accept the first offer, even though the client's net benefits from the second offer are twice as high as from the first.

What Are the Likely Effects of the Contingent-Fee System?

What effect will the contingent fee have on lawyers' choice in specific cases? Figure 3 helps us see what the issues are. In Figure 3, we use the same curve TB that was employed in Figure 1. This curve measures the total benefit for the client from a given level of lawyer time investment. Curve CF measures the level of contingent fees which the client will pay if these benefits are actually secured. Net client benefits are equal to the difference between TC and CF. It should be noted that net client benefits are at their greatest when the total benefit curve reaches its *highest* point (Q).[19] As long as time expended by the attorney creates some benefit, client benefits increase: under the contingent-fee system the maximum gross benefits are also the point of maximum net client benefits.[20]

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[19] In this simplified model, litigation costs other than the lawyer's fee have been ignored. Contingent-fee contracts often provide that the client must pay the costs of investigations, depositions, transcripts, and expert witness fees, as well as the lawyer's percentage. These added expenses tend to increase the further the case proceeds. Accordingly, contingent-fee clients will not always find their net benefits maximize at precisely the point of maximum gross benefits. A $10,000 offer early in the litigation is better than a $12,000 judgment, if the latter requires depositions, expert witnesses, and the like, which cost the litigant $2,500 above and beyond the contingent fee going to the lawyer. For a detailed analysis of the economics of contingent-fee practice, see Schwartz and Mitchell (1970).

[20] The typical contingent-fee structure does dictate an important qualification to the conclusion that the client's net benefits invariably reach their maximum at the same point where the client's gross benefits are maximized. For convenience of analysis, it has been assumed that the lawyer's contingent fee is set at a uniform percentage of gross benefits irrespective of when the case is resolved. In actuality, a two-level fee structure usually applies. For cases settled without trial, the lawyer receives perhaps 20-33 percent of the gross recovery, depending upon the jurisdiction and local practice. If a trial is required, the fee typically is fixed at some percentage in the 33-50 percent range. This split fee schedule modifies the maximum net benefit-gross benefit calculations somewhat. The cost curve must be dichotomized at the juncture where the higher fee takes effect. On either side of this line of demarcation the client's maximum expected net benefits are achieved at the same time as expected gross benefits. However, in making comparisons between these two sectors, net benefits rather than simply gross benefits must be taken into consideration. When deciding whether the client will achieve maximum benefits by going to trial, for instance, the higher percentage rate of legal fees must be deducted from the expected gross benefits associated with a trial verdict and the resulting expected net benefits compared with the gross expected benefits minus the lesser percentage fee which would apply if the case were settled without trial.

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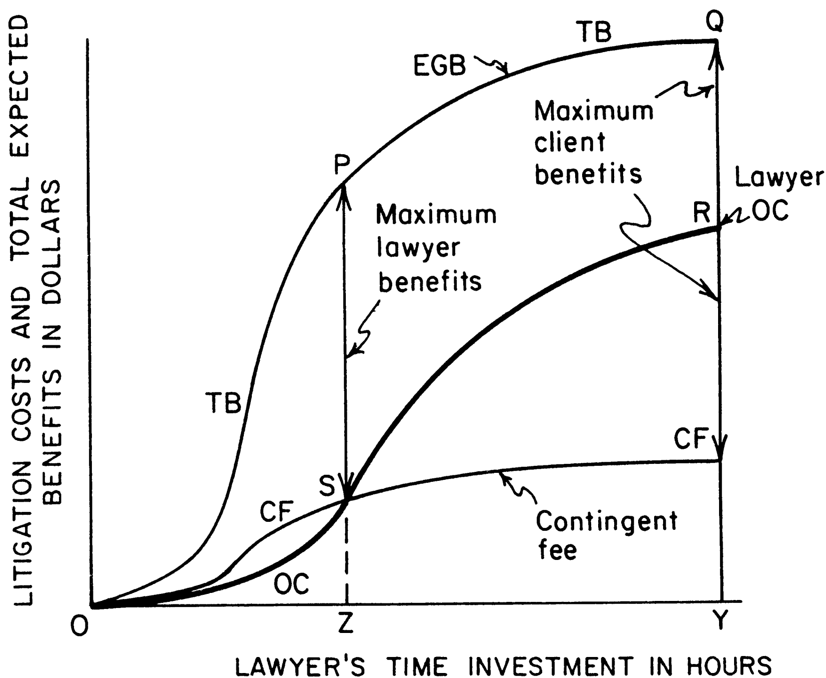
Figure 3 allows us to see the effect of lawyer opportunity cost on litigation decisions. In this figure, the OC curve measures the opportunity cost of the lawyer's time. As the above example suggests, it is likely that the opportunity cost will increase as the amount of time invested in a case increases. Reflecting this, the OC curve initially starts below the CF curve (which indicates the return to the lawyer at a given level of benefits), but at a certain point (S) the OC curve passes the CF curve. At this point, the lawyer will get his maximum net benefits from the case. As we have seen, however, the client would get maximum benefits if the lawyer spent *OY* hours. Figure 3 suggests that past OZ, the more time the lawyer spends on the case, the more he or she sacrifices: this amount is indicated by the difference between the OC and CF curves.

Figure 3. Contingent-Fee Lawyers: Comparing Client and Lawyer Benefits



Section I discussed the amounts of time a hypothetical alter-ego fee-for-service lawyer would invest in a case like this, as well as the amount which we might realistically expect

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profit-maximizing fee-for-service lawyers to devote to a given case. In the contingent-fee situation, the alter-ego notion is a bit strained: as Figure 3 suggests, a contingent-fee lawyer who spent as much time as a rational, informed client would wish at the rates determined by the contingent fee would make substantial financial sacrifices. The investment of time needed to secure maximum net benefits equals the amount which a fee-for-service lawyer would have to spend to secure maximum *gross* client benefits.

While it is obvious that contingent-fee lawyers will not act as alter egos—i.e., they will not spend all the time their clients would ideally like them to—it is not easy to say just how much time they *will* spend. As Figure 3 illustrates, this depends on the relationship between the contingent fee and opportunity cost curves. It is hard to specify these relationships without empirical data. One can assume, however, that the gap will vary from lawyer to lawyer. Various contingent-fee lawyers have very different opportunity cost profiles. One attorney may carry a full roster of very promising cases; another may have only a few rather questionable ones. The first attorney's marginal opportunity costs will be much higher than the second's. The first lawyer must give up more expected benefits (i.e., *larger* fees) from other cases in his or her caseload in order to devote time to a given case. Consequently, if both lawyers were guided solely by profit considerations, the first lawyer would invest less time in the same litigation than would the second. That is, his or her marginal opportunity cost curve would intersect the marginal contingent fee curve earlier and at a significantly higher point. This possibility is illustrated by Figure 4, which shows that if an expert lawyer has a higher opportunity (OC_1) cost than an average attorney's cost curve (OC_2), then the expert lawyer will invest less time (OF instead of OZ) in a given case.[21]

[21] The expected benefit curves for different contingent-fee lawyers also will vary just as their opportunity cost lines do. A skilled, experienced attorney normally can achieve a better result than an average lawyer if both make the same time investment (or the same result with a lesser time investment). Thus, Figure 4 should not be interpreted to mean a client is necessarily better off with a contingent-fee lawyer who has low opportunity costs. True, such a lawyer should be motivated to devote more time to the case. But, in certain circumstances, the client may receive equal or even superior results from what might be seen as a half-hearted effort by an expert attorney. This all depends upon the relationships between the true expected benefit curves and opportunity cost lines of the lawyers being compared. Nonetheless, the central point remains. From the client's perspective, a contingent-fee lawyer, whether an expert or not, is underinvesting so long as further efforts *by that lawyer* could be expected to yield more client benefits.

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Figure 4. Contingent-Fee Lawyers: Comparing Investments by Average and Expert Attorneys

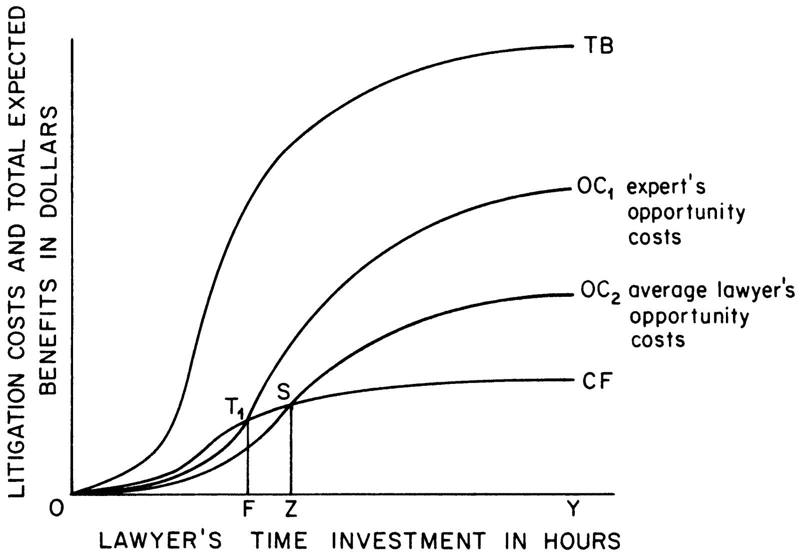
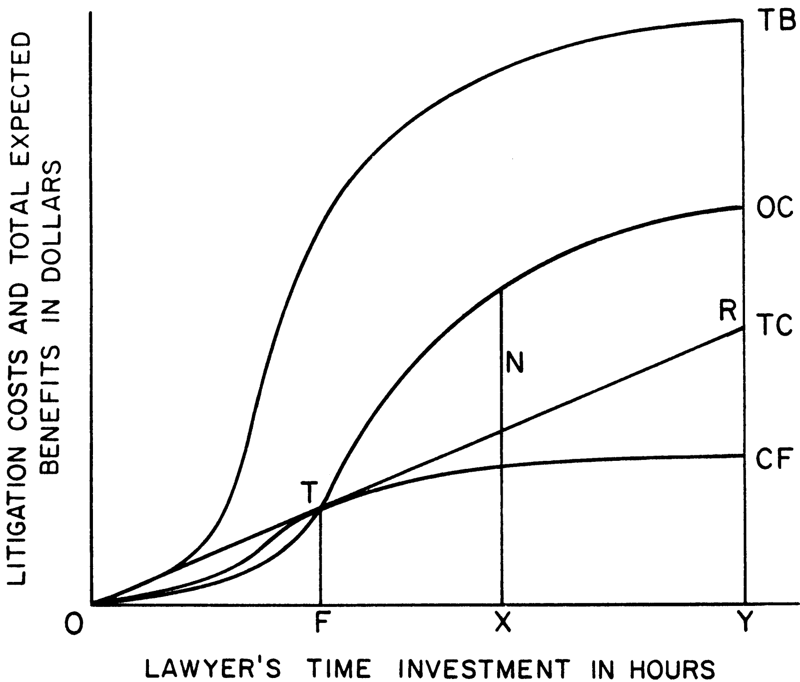


Figure 5. Comparing Investments by Contingent-Fee and Fee-for-Service Lawyers



It is my view that the contingent-fee lawyer will tend to spend less time on a given case than an alter-ego fee-for-service

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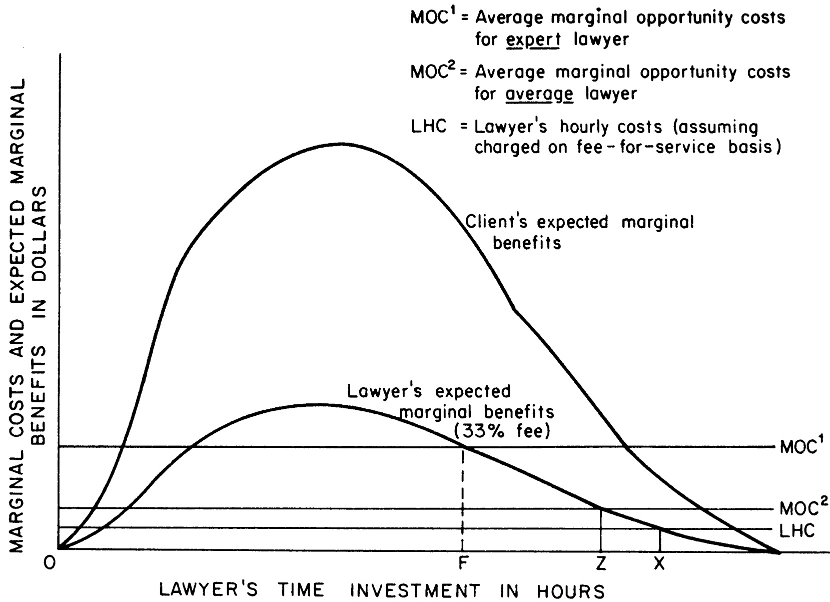
Figure 6. Comparing Investments by Average Contingent Lawyers, Expert Contingent-Fee Lawyers, and Fee-for-Service Lawyers



lawyer would. I reach this conclusion because I believe that the opportunity costs for a contingent-fee lawyer are likely to be higher than the charges that the lawyer would make on an hourly basis. If this is the case, the contingent-fee lawyer will stop investing in a case before the point where marginal costs would equal expected marginal client benefits, if costs were based on hourly charges. This idea is illustrated by Figure 5. Here the TC curve from Figure 1 is superimposed on the contingent fee and opportunity cost curves of Figure 3. The contingent-fee lawyer will stop investing at point T, and will spend OF hours. The alter-ego fee-for-service lawyer will stop at point N, where the difference between the TC and TB curves are at their highest; this is OX-OF hours later than the contingent-fee lawyer's stopping point. The same notion is illustrated by Figure 6. The figure shows that the contingent-fee lawyer's personal expected net marginal benefit can reach zero substantially before an alter-ego fee-for-service lawyer would stop investing in that same case—that is, where the client's expected marginal benefit equals marginal cost.

For the foregoing reasons, it seems likely that contingent-fee lawyers, who are business people, not saints or even alter-egos, will underinvest: they will spend less time on a case than

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is needed to secure maximum net benefits for their clients.[22] Obviously, there are some constraints on this profit-motivated pattern of lawyer investment decisions.[23] Contingent-fee lawyers will be affected by ethical constraints and other noneconomic motives, and these may push toward greater investments. Moreover, there will be some competitive pressures pushing contingent-fee lawyers toward higher levels of investment: under perfect competitive conditions the contingent-fee lawyer would be pressed toward the time investment that would yield maximum net benefits to the client, at least after the financing aspects of the contingent fee are discounted. But competition is imperfect,[24] and noneconomic factors are probably relatively weak, so it is reasonable to assume that the contingent-fee lawyers do not shoot for, let alone reach, the maximum net client benefits target.[25]

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[22] According to the above analysis, many contingent fee lawyers have much to gain from modest settlements very early in the litigation (or at least before they have spent much time on the case). Thus, unless closely monitored and controlled by their clients, these profit-maximizing contingent fee lawyers could be expected to invest rather minimal amounts of time in the typical case. This does not necessarily mean, however, that such lawyers will never delay settlement to the eve of trial. As long as the lengthy wait in queue does not entail substantial time investments on their part, they may be only too happy to hold off serious negotiations until the day of trial, especially if they anticipate their clients will be more willing psychologically to accept a modest settlement at that late stage or perhaps that the opposition will make a better offer at that time than earlier.

[23] Economic self-interest almost inevitably pulls the contingent-fee lawyer in the direction of underinvestment in *the average case*. However, contingent-fee lawyers might occasionally overinvest. They are motivated by all the business generating and credibility building benefits mentioned in Section I. These motives tend toward greater rather than lesser time investments. Additionally, a subset of contingent-fee lawyers may exist who are risk preferrers (or just plain overoptimists and miscalculators). Retroactively, it may be possible to detect a consistent pattern of overinvestments by such lawyers over the aggregate of their cases, not merely a chosen few.

[24] Interestingly, some critics of the contingent-fee system appear to assume that the competitive market insures appropriate investment by fee-for-service lawyers, yet ignore similar market restraints on contingent-fee lawyers. This discriminatory treatment is seen most clearly in a recent article by Carrington (1979). It appears to proceed from a failure to recognize that it is just as possible for fee-for-service lawyers to be overzealous in the sense that they may invest more time and hence charge higher fees than are justified by the gains in expected benefits as it is for contingent-fee lawyers to be underzealous and surrender client benefits that might have been earned with more effort. It is precisely because the legal services market is far from perfect (see pp. 577-580 *supra*) that either fee-for-service or contingent-fee lawyers can deviate appreciably from the target of maximum net benefits for their client.

[25] It might make sense for clients to offer to pay contingent-fee lawyers hourly fees to make additional time investments beyond the point where the *lawyer's* expected marginal benefits = the *lawyer's* marginal costs, in order to reach the point where the client's expected marginal benefits equal marginal cost. Of course, this assumes clients have some notion of what the various cost and benefit probabilities might be. Critics of contingent fees have proposed restructuring the current system in another way to create incentives for

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III. THE THIRD-PARTY PAYMENT SYSTEM

Thus far this article has considered only those lawyers who are paid by the individuals they represent. Legal services lawyers and lawyers paid by prepaid legal insurance plans, the most rapidly growing sectors of the profession, derive their income not from individual clients but from third parties, generally the government or an insurance fund. Fifteen years ago, only about 400 lawyers served the poor in civil cases; today they number over 5,000 (Johnson, 1978; Legal Services Corporation, 1980). Ten years ago only a handful of prepaid plans existed. Now there are 3500 such plans covering several million people (Fretz, 1979).

This trend has significant ramifications. For these lawyers, the individual client ordinarily provides no check on lawyer resource investments. Since services are essentially costless to the client, he or she generally has an incentive to encourage nearly unlimited investments in the particular case. Therefore, under a third-party payment system the organization paying the lawyer's salary or fee is the only source of guidance to lawyers deciding how to allocate time among different clients and cases.

The time allocation problem is influenced considerably by how the third-party-payment lawyers are paid. At present, government-funded programs generally either hire salaried lawyers or pay private attorneys on a fee-for-service basis. Prepaid insurance plans use one of these or a third approach—contracting with a specific law firm or group of law firms to provide the desired service.

Salaried Staff Attorneys for the Poor

In the United States most government-subsidized legal assistance to the poor is delivered through salaried staff attorneys. Funds come primarily from the Federal government but are channeled through grants to nonprofit private corporations in specific communities, and the lawyers are employed by these corporations (Johnson, 1978: 71-102). The current level of federal investment in legal services only provides sufficient legal resources to meet approximately 20-25

adequate investments (Clermont and Corrivan, 1978). They suggest paying hourly fees to successful contingent-fee lawyers supplemented by a bonus keyed to the size of recovery. Would this lead to overinvestment by contingent-fee lawyers, at least in cases where recovery appears nearly certain? Possibly yes, unless the fees were monitored closely by judges sensitive to the economics of the profession.

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percent of the need for such assistance (Legal Services Corporation, 1979). Legal service lawyers thus represent not only a fixed resource but a scarce fixed resource. Each individual staff lawyer is compelled to ration limited time very carefully among actual and potential clients. Each hour devoted to one client's case is an hour taken away from another client's case or from the time the lawyer has available to accept new clients.

Compensated Private Counsel for the Poor

Many European nations compensate members of the private bar on a fee-for-service basis for all work they perform for low-income individuals (see Cappelletti *et al.*, 1975: 27-58; 85-108). This model of delivering legal services to the poor also is used in some areas of the United States at the present time and probably will become more common as a supplement to salaried staff services in future years (Legal Services Corporation, 1980: 3-11). This system presents a quite different allocation problem. As mentioned earlier, staff attorneys represent a fixed resource that can be depended upon to allocate available time (paid for out of government funds) among those expressing a need for government-subsidized legal assistance. True, these staff lawyers may allocate their time imperfectly and, because of a shortage of funds, inevitably leave many prospective clients completely unserved. But at least they are motivated to perform the rationing function themselves. On the contrary, an individual private counsel, paid by the hour or on a per task basis, has an apparent incentive to file every possible action, make every conceivable argument, and spend every available hour of time on the client's case. Earlier it was observed that in a private fee-for-service situation, the client presumably provides some check against excessive resource investment because of the obvious reluctance to pay fees not justified by the probable benefits. But since government-subsidized clients are not paying the lawyer out of their own pockets, they have no particular motive to hold the lawyer's time investment within reasonable bounds.

Prepaid Legal Insurance Plans

Prepaid legal insurance plans present a variety of resource allocation problems, depending upon the method through which the prepaid legal services are delivered to the premium payers. "Staff-attorney" plans provide a specific number of salaried lawyers (ordinarily employed by a nonprofit

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corporation established under the plan); premium payers receive the quantity of services those attorneys can feasibly provide during the premium period. Under this arrangement, the resource allocation problem is closely analogous to that faced by government-subsidized legal services programs with salaried staff.

In the so-called "closed panel" prepaid legal insurance scheme, the insurance plan administrators contract with a limited group of private lawyers who agree to provide all the services required during the premium period for a certain level of compensation. To the extent that this compensation consists of a set total payment (as opposed to merely a reduced fee schedule for specific services rendered on a fee-for-service basis to members of the insurance plan), a different sort of resource allocation situation is created. The premium payers have not bought a specific number of lawyers and a specific quantity of services, but rather all the services they may require during the premium period.

The "closed panel" ordinarily will include a much larger number of lawyers than would be required to provide all the services needed by the premium paying group were the attorneys on that "closed panel" to devote 100 percent of their time to servicing that particular group. That is, these same lawyers may have contracted with other prepaid plans, or they may serve other individual clients on a fee-for-service or contingent-fee basis. From the perspective of the premium paying client group, some resource allocation mechanism seems essential to ensure that they receive a fair allocation of the total time available from the "closed panel" of private lawyers. Otherwise, they may obtain only mediocre results (or worse), because the "closed panel" lawyers invest inadequate quantities of time in the legal problems brought to them by the premium paying group. Conversely, the "closed panel" lawyers require some sort of resource allocation mechanism in order to accurately calculate how much they must demand from the insurance fund as well as to allow them to properly and efficiently allocate their available time among the cases presented by the individual members of the premium paying group.

Under the so-called "open panel" system of delivering prepaid legal services, the plan agrees to compensate any lawyer from the private bar for services rendered to members of the premium paying group. Normally the plan pays these lawyers on a fee-for-service basis. The operators of such a plan

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need some sort of resource allocation mechanism in order to predict the premium levels they should set and to control the lawyers' time investments to insure the predictions are not exceeded. The attorneys' own time commitments to premium payers are more or less open-ended, since some, but not all, of their time will be allocated to such clients and the rest allocated to other clients. But meantime, an inflexible fixed fund, composed of the aggregate premiums paid by the premium payers, has been created; additional premiums cannot be appropriated merely because the insurer underestimated the cost of legal services required. Thus, individual private lawyers are not a fixed resource; only the total fund out of which they and other lawyers are being paid is subject to such resource constraints. Hence, without some express written criteria promulgated by the insurance plan, such lawyers lack the information necessary to allocate their time and also lack the motives of staff or "closed panel" lawyers to do so.

Alternative Resource Allocation Criteria for Third-Party-Payment Lawyers

Managers of government-funded or prepaid legal insurance plans can use a number of rewards and sanctions to encourage third-party-payment lawyers to adhere to certain resource allocation policies. But first they must decide what those policies should be. In this article, four very different formulas are presented and discussed: purist ethical code standard, theoretical private market standard, caseload benefit-maximization standard, and client community benefit-maximization standard. Which of these criteria is applied has very real implications for the client, the client's opponent, the funding source, and others in society.

We begin with preliminary models of four possible resource allocation formulations. One possible formula is a purist application of the legal profession's Code of Professional Responsibility. Some have implied, if not advocated, that government-subsidized and prepaid legal insurance lawyers should expend the last ounce of energy, the last minute of time, and every possible legal strategem reasonably calculated to achieve the client's objective (Bellow, 1967; 1969; 1977; Carrington, 1979), irrespective of the benefits at stake in the proceedings or the cost of the services provided. This proposed criterion, seldom followed in practice, relies heavily upon the Code of Professional Responsibility which admonishes

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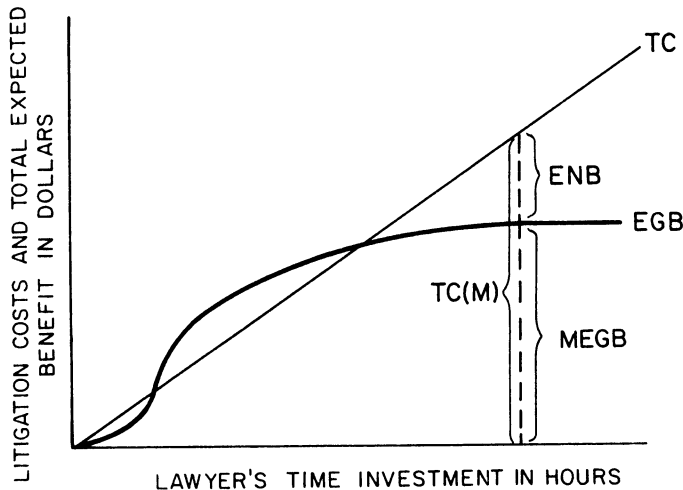
members of the legal profession to utilize every lawful means to achieve any legal objective for a client (American Bar Association, 1977: Canon 7).

Translating this test into benefit-cost terms, the attorney would be expected to devote additional increments of time to each client's case until a further investment of time cannot be expected to yield *any* additional gross benefits for the client. This formulation is portrayed in graphic terms in Figures 7 and 8. As Figure 7 highlights, application of this standard may mean that the total cost of the lawyer's time invested in the case exceeds the gross benefits the client can reasonably expect to attain. Of course, in many cases gross benefits will reach their maximum before the attorney has expended more resources on the case than the client has to gain. Still, even in this situation, a third-party-payment lawyer will be investing more time than a knowledgeable private client would have authorized.[26]

Figure 7. "Purist" Ethical Code Standard Total Costs and Benefits



TC = Total cost line
EGB = Gross expected benefits
MEGB= Maximum expected gross benefits
TC(M)= Total cost of time investment required to generate the maximum gross benefits
ENB = Total expected net benefits (in this case negative benefits)

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26 This purist ethical code standard corresponds to the "altruistic alter-ego contingent-fee" lawyer. Clients served by a contingent-fee lawyer—like those

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Another obvious possible resource allocation formula for third-party-payment lawyers would seek to conform to the theoretical private market model of resource decision making. As will be recalled from earlier discussion (see p. 571), an alter-ego private lawyer and paying client presumably would agree to further investments of the lawyer's time only so long as the expected gain from that increment of time exceeds the incremental fee. Translated into benefit-cost terms, this private market model should produce further investments of lawyer time until the marginal expected benefits of further investments approaches the marginal cost of such investments.

Application of this formula would result in a lesser investment of lawyer time than would the purist application of the Code of Professional Responsibility. The purist lawyer would continue investing until the curve intersected the baseline (= 0) of the graph, while one adhering to the theoretical private market approach would stop when the emb curve intersected the mc line (see Figure 8). The latter level of investment would maximize net benefits for the individual client, as is the goal of the alter-ego fee-for-service lawyer. Thus, to the extent that the government or a prepaid legal insurance plan desires to mimic (or at least approximate) the private market, this second formula is the one that presumably should be applied in allocating attorney resources.

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served by a third-party-payment lawyer—ordinarily are benefited by pursuit of their cases until expected gross benefits are maximized (mb = 0). But the contingent-fee lawyer has personal economic reasons for stopping time investments in the case long before expected *net* benefits are maximized. Consequently, the contingent fee lawyer can be expected to temper the client's interest in maximizing *gross* benefits. On the other hand, a third-party-payment lawyer has no such direct economic motive for curtailing investments and presumably will not do so if committed to a purist interpretation of the ethical code. Carrington (1979) rests his strong preference for judicare (compensated fee-for-service private counsel) on the argument that competition for judicare clients will drive private lawyers to do the best possible job in each case in order to attract more of this business so that the system guarantees zealous representation for low-income litigants. This conclusion appears to ignore the possibilities of over-zealous representation, which in the third-party-payment context could threaten the funding source with bankruptcy. Since the third-party fund is paying the private lawyers' fees, the optimal result for the client is maximum gross benefits, not maximum net benefits. Hence the competition for clients Carrington envisions would lead, logically, to a situation where all lawyers invested in each judicare case until expected marginal benefits reached zero (and possibly kept investing further just as a safety margin). The third-party fund would face fee bills much larger in the aggregate than would have been charged those same litigants had they been able to pay their own individual fees. Accordingly, judicare does not appear to be a panacea that automatically insures appropriate investment in representation paid for by third-party funds.

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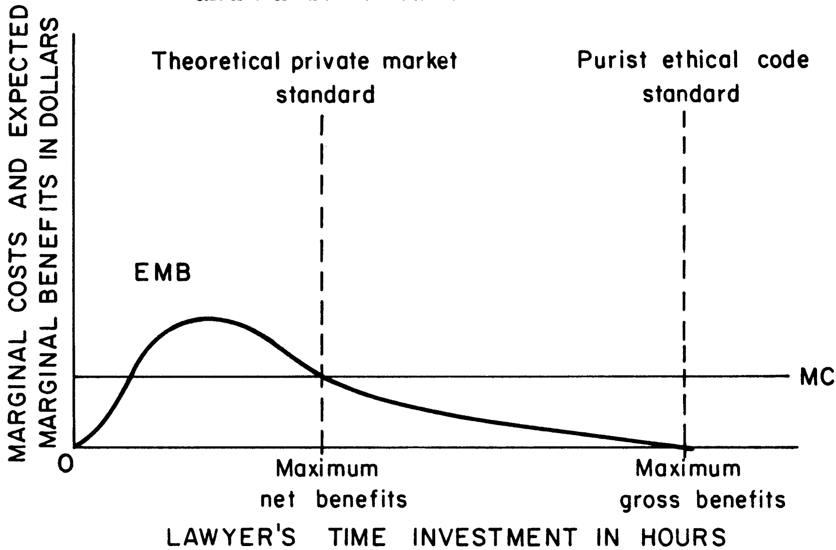
Figure 8. Comparison of Theoretical Private Market Standard and Purist Ethical Code Standard



At the same time, the complexities of the private market explored earlier in this article suggest that the above criterion will mimic the actual behavior of this market more in theory than in practice. In most cases, fee-for-service lawyers have economic motives to overinvest, and contingent-fee lawyers have motives to underinvest. Both are drawn to overinvest or underinvest in selected situations. All of these overinvestments and underinvestments represent deviations from the theoretical private market model of maximizing net benefits. Accordingly, too rigid an imposition of the simple theoretical private market allocation formula described above might unduly constrain the performance of third-party-payment lawyers. This will be a special concern whenever a third-party-payment lawyer confronts a fee-for-service lawyer who is motivated to depart substantially from the alter-ego ideal.

A third basic resource allocation formula flows from the desire to maximize the productivity of a fixed resource, whether that resource is the specific number of hours a staff attorney has available to devote to client representation or the fixed sum of money which the government or prepaid legal insurance scheme has available to buy lawyer time from private attorneys for service to a given client group. To illustrate, salaried staff attorneys working in a legal services office represent a fixed resource with only a certain number of hours each month to allocate among a large number of clients.

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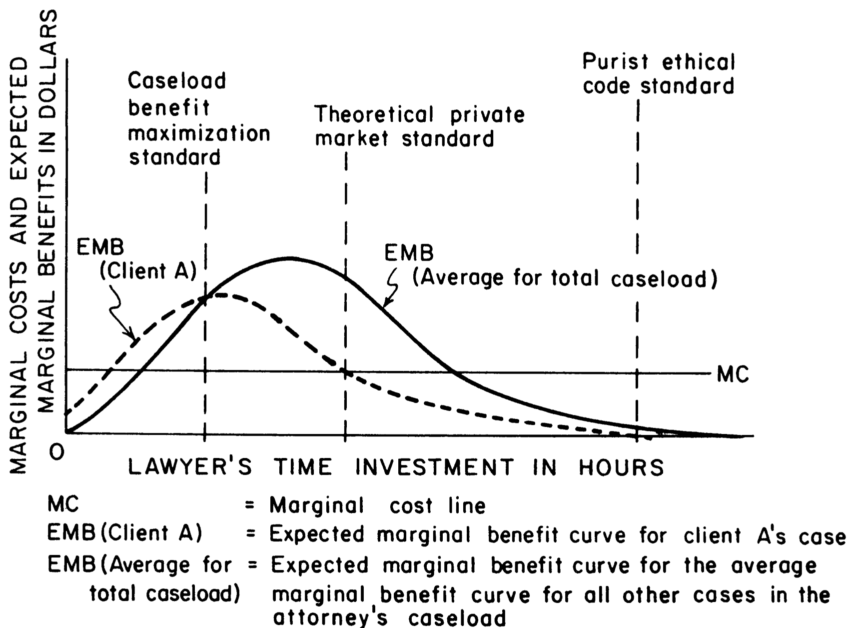
Instead of attempting to maximize the marginal expected benefits for each individual client (as they would do under the private market formula) the staff lawyers may seek to maximize aggregate benefits for all the clients represented during a given period of time. Essentially this means that a given staff lawyer would only invest additional time in each client's case until the point where the gain from a further investment in that case remained as large as the gain which could be achieved by investing that same increment of time in another client's case.

In most circumstances, the desire to maximize aggregate benefits over a caseload translates into the following allocation formula: the lawyer will invest time in client A's case until the marginal benefit of the next incremental investment in that action declines to the point that it equals the marginal benefit of an incremental investment in client B's case. And the lawyer will make incremental investments in client B's case until the point where the marginal benefit from a further investment in that case equals the marginal benefit of an incremental investment in client C's case, and so on. This formula is illustrated in Figure 9.

Figure 9. Caseload Benefit-Maximization Standard



Assuming a staff attorney applies this test to all clients, he or she will arrive at an average marginal benefit for the total caseload. Any new client will be allocated increments of the

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lawyer's time only if and until the marginal expected benefit from a further investment in that particular case equals the average marginal expected benefit for the remainder of the attorney's caseload. Figure 9 reflects this phenomenon merely by substituting average marginal expected benefit of the lawyer's total caseload for the marginal expected benefit curve of client B. Since the average net expected benefit for the total caseload may be substantially higher than the marginal cost of the lawyer's services, application of this latter formula often will result in lesser investments of time in a given client's case than a rational private client would pay a private attorney to devote to a like case. In other words, a staff attorney committed to maximizing the total benefits across an entire caseload often will find it necessary to stop short of investing time in each individual case up to the point where marginal benefits equal marginal costs for that individual client.

The caseload benefit-maximization criterion has implications for which cases will be accepted as well as how much time will be devoted to those the lawyer decides to undertake. Presumably a lawyer would determine during the initial interview with the client whether the case is likely to involve sufficient marginal expected benefits at some time during its development to exceed the average marginal benefit threshold. If not, the case would be rejected.

A fourth resource allocation formula expands still further the population whose benefits the lawyer seeks to maximize. Instead of serving the individual client or even the total caseload, the attorney may take into consideration a larger community of nonclients who may be touched by the outcome in a given case. Third-party-payment lawyers may define potential beneficiaries rather narrowly to include only those who might become clients in the future—for instance, a Fresno legal services office limiting benefit-cost horizons to the poor people in Fresno or lawyers in union Local 39's prepaid plan only considering the impact on the members of Local 39. Or they may visualize the community as embracing all people who are similarly situated to a particular client and might profit in some way from a decision favorable to that client.

Occasionally these "external" benefits (in the sense that they are external to the individual client or the lawyer's caseload) are an especially important ingredient in the resource allocation formula. In some instances, the individual client's case is a potential vehicle for pursuing a legal action which might confer benefits on hundreds or thousands of other

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similarly situated individuals. The typical example is a so-called test case, which ordinarily requires a very substantial investment of lawyer resources at the trial level and several levels of appeal. Frequently such test cases involve only one named individual client, and the stakes in the particular case may be only a few dollars. Yet, the consequences of a favorable decision may be measured in millions of dollars worth of benefits for thousands of other individuals who are not parties to the specific law suit.

A more usual and less dramatic example of benefits external to the specific client is the potential deterrence value of overinvestments or even a willingness to overinvest in the specific case. (By overinvestment I again merely mean to describe the expenditure of more time on a given case than would be justified by the expected value of benefits for the individual client.) If, for instance, a legal services agency or a prepaid plan establishes a reputation for a willingness to overinvest in individual cases, opposing lawyers may offer more generous settlement terms in all or nearly all future cases. It is these benefits external to the client being represented that justify the overinvestment in this specific case. This is akin to the credibility building motivation for overinvestments by fee-for-service lawyers mentioned earlier. But with these fee-for-service lawyers, the motive usually is higher fees in future cases rather than (or possibly in addition to) increased net benefits for future clients.

Benefits external to the specific client may also result from conduct shaping effects which accompany overinvestment or willingness to overinvest in certain cases. This behavior by third-party-payment lawyers may cause a commercial enterprise or industry to reform practices that harm the client community generally in order to reduce the number of disputes it might have to litigate. Thus, specific overinvestments in individual cases may lead to better products or services for an entire client community. This is particularly crucial where the harm to each individual is slight enough that any client who hired a lawyer to deal with his or her grievance would be overinvesting.

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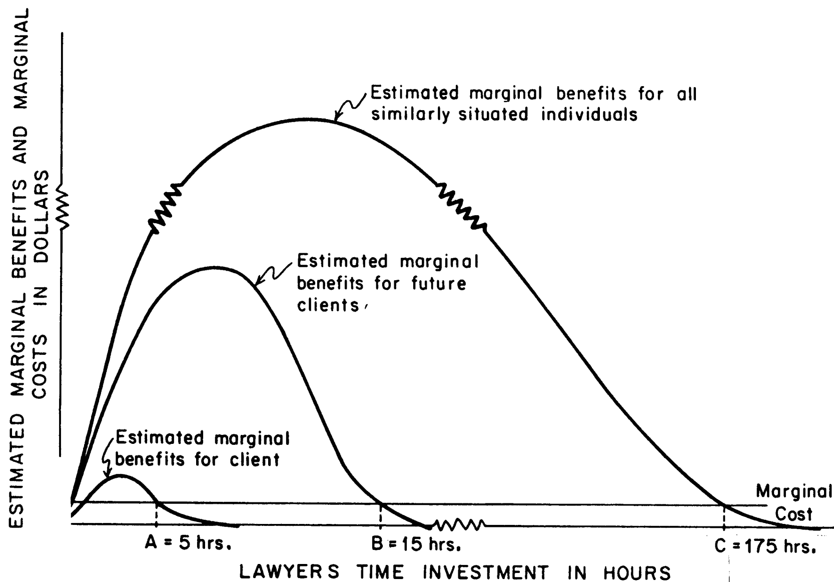
Figure 10. Client Community Benefit Maximization Standard



This fourth resource allocation formula is illustrated in figure 10. As shown, lawyers who only took into consideration the expected value of benefits accruing to the individual client would invest five hours in this case (point A on graph). But if they considered the expected value for future clients as well, these lawyers would be willing to invest up to fifteen hours (point B on graph). And if they visualized all the potential beneficiaries—other customers of this store who are not eligible for the program's services or all welfare recipients in this state who would be affected by this test case, etc.—the lawyer would devote as much as 175 hours to the case (point C on graph).

IV. NON-ECONOMIC INFLUENCES ON LAWYER RESOURCE INVESTMENT DECISIONS

Lawyers are more (and less) than rational economic beings. Economic considerations may pull attorneys in certain directions depending, as I have theorized, upon the source and method of their payment. Simultaneously, however, to lesser or greater degrees, many lawyers will be pulled in other directions (or further along the same path) by other forces. For some members of the profession, in fact, other considerations may overwhelm the economic motives. In a sense, such lawyers are committed to an alternative model of resource allocation. Under this model, time investment (and billing) decisions are made without regard for the economic

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interest of the attorney (or the client) but according to other criteria. Economic gains earned for the lawyer or client are mere by-products of the pursuit of other rewards deemed more important by the attorney.

More commonly, these other motives co-exist with the economic. For many lawyers they represent not an alternative resource allocation model but rather influences that modify somewhat the decisions generated by the basic economic model. Thus some fee-for-service attorneys may invest more—or less—than profit-maximization criteria would have dictated because of how much—or how little—the case appealed to their professional satisfaction motives. Similarly, some contingent-fee lawyers may underinvest to a greater or lesser extent in certain cases depending upon how interesting they find the subject matter of these disputes. And no matter what allocation formula a third-party fund—government or prepaid insurance—may have articulated for the lawyers it pays, the fund managers can expect some attorneys to deviate substantially, at least in some cases, because of competing psychological factors.

Detailed discussion of noneconomic influences is beyond the scope of this essay. Merely to suggest the range and without purporting to be exhaustive, I will mention four: professional satisfaction, societal contribution, game psychology, and ethical considerations. How much any of these affect specific resource allocation decisions depends upon the psychological profile of the lawyer involved,[27] the facts of the particular case, and sometimes the nature of the client.

Professional Satisfaction

Whether they regard the practice of law as a science, an art, or a craft, many lawyers take pride in a job well done. And they take special pride in a difficult or interesting job well done. A lawyer for whom professional satisfaction is an important consideration might well spend far more time refining a brief, for instance, than could be justified by the economic goal of maximizing the client's net economic benefits.

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[27] One might hypothesize (or at least speculate) that different payment systems tend to attract lawyers with different value systems—both in the significance they ascribe to economic considerations and the competing psychological motives they consider most important. Merely to illustrate, the contingent fee practice may attract a disproportionate number of game players; the fee-for-service system may appeal to those who place a high value on professional satisfaction; and third-party payment lawyers may turn out to value money less and societal contributions more, on the average, than either of the groups.

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The first or second draft may have been amply persuasive, but the tenth is a "work of art"—costly for the client but immensely satisfying to the lawyer.

The motive for such overinvestment of time is the psychological payoff from producing the best possible product. Of course, that overinvestment, if billed to the client, may simultaneously contribute to greater profits; but that is not necessarily the prime motive for the lawyer making the resource allocation decision. Moreover, in the context of a contingent-fee system or third-party-payment system, the desire to do the job well does not ordinarily increase costs for the client served. Instead the professional satisfaction motive may serve to mitigate an economic motive to underinvest in such cases.

Professional satisfaction may cause time overinvestments in cases which present especially unique and interesting legal (or factual) questions, those which are in fields unfamiliar to the lawyer (giving him or her the opportunity to engage in additional study), and those which potentially can enhance the lawyer's esteem in the professional community because of their visibility. On the other hand, in certain circumstances a lawyer's professional image may lead to lesser investments than might be suggested by the economics of the case. Lawyers may experience reduced professional satisfaction because certain cases are boring, routine, simple, or inconsequential. At a minimum, lawyers perceive such cases as under-utilizing their knowledge and skills. They may even feel that a less talented or educated person could handle the representation just as well. In any event, lawyers for whom job satisfaction is an important consideration are apt to spend as little time as possible on cases they feel do not merit their professional expertise, even if they fail to achieve all the net benefits clients might have received if the litigation had been pursued more vigorously.

Societal Contribution

Some lawyers may have been attracted to the profession principally because of the opportunities to shape and improve society. Whether viewed as altruistic or power-hungry—or something in between—the behavior of such lawyers cannot be predicted on the basis of economic motives alone. Moreover, in the right circumstances, the desire to achieve some societal impact can seize many lawyers whose professional lives ordinarily are governed by more mundane considerations. It

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may be articulated as a chance to leave one's imprint in the law books or to improve the lot of destitute orphans (or wealthy corporations). Whatever the reason, the anticipated effect is gross overinvestment in what might otherwise be viewed as rather modest cases. If truly moved by the desire to impact society, fee-for-service and contingent-fee lawyers may not bill clients enough of the overinvestment to even meet their expenses. And third-party-payment lawyers whose funding source favors a theoretical private market or caseload benefit-maximization standard may ignore both official criteria and the career incentives which encourage adherence to the funding source's choice.

Game Psychology

Sometimes lawyers have an almost irrational desire to win (or at least not lose) that can lead them to overinvest in all (or some) cases. I am not speaking of rational game theory; I refer to that subset of trial lawyers who are drawn to the profession not so much to become rich, to feel they have excelled as legal craftsmen, or to make a difference in society, but to fulfill an urge to engage in competition and win. Moreover, an even larger subset may experience this noneconomic competitive urge as an undercurrent that sometimes rises to determine certain investment decisions.

This motive may be exhibited in several ways. Such lawyers probably are more likely to make investments that maximize their chances of satisfying some personal concept of winning rather than achieving maximum net benefits for their clients. Individual lawyers may have different concepts of winning, of course. For some, it may be satisfied only by going through a trial (or at least some discrete litigation event that compels the other side to capitulate). Others may measure victory as the highest return, in terms of gross benefits for the client. With that focus, the lawyer would turn down reasonable settlement offers in order to achieve a marginally higher trial verdict no matter what the cost of trial.

Ethical Standards and Constraints

From the first day of law school, aspiring lawyers are urged to consider themselves not as business persons but as members of a profession. The ethical standards of that profession, in turn, admonish its members to subordinate their own interests—and sometimes even those of the larger society—to the desires of the particular client being

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represented. The lawyer is expected to use every legal method to achieve any legitimate goal of the client (ABA, 1970). And there is language in the profession's published code supporting the conclusion that clients are to be in control of the major decisions (ABA, 1970). In the ideal situation, evidently, the lawyer merely spells out the options in the litigation and follows the client's choice.[28]

If all lawyers adhered religiously to both the spirit and the letter of the profession's ethical standards, profit-maximization motives would disappear. Overinvestment and underinvestment would become rare. For, the idealized professional role articulated in the code seems very close to the alter-ego fee-for-service lawyer posited earlier in this article. Maximizing clients' net benefits presumably is just another way of expressing the ethically correct goal of all legal representation. Realistically, however, the profession's ethical code as presently framed and enforced, does not effectively compel alter-ego behavior. Most of the provisions relevant to resource allocation are so-called ethical considerations rather than disciplinary rules. As such, they are essentially hortatory. Consequently, except for egregious underinvestment usually involving an obvious failure to assert a client's legal rights, sanctions are unavailable to ensure adequate investment by contingent-fee lawyers. The code is even less satisfactory for the overinvestment problem. There is a great deal of language urging lawyers to be vigorous in their representation (which ordinarily means investing more and more time in their cases), but none to suggest they should restrain their vigor when the marginal costs of further investments exceed the marginal expected benefits from those investments. Under the current code, it is extremely difficult to criticize (to say nothing of discipline) a fee-for-service lawyer for overinvesting in a case.

Despite shortcomings in its charter, the legal profession's alter-ego ideal has some influence on many lawyers. They have been socialized through law school and beyond to see themselves primarily as instruments of their clients' will. At the extreme, there may exist lawyers whose primary identification is with their clients' success (that is, maximum net benefits), no matter what that means for their own profits or personal satisfactions. Possibly more important, many

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[28] Several observers have expressed doubt that this ideal of client control over litigation investment decisions is realized in practice (Carrington, 1979: 1298 and sources cited therein.) And another has documented lawyers' tendency to dominate this decision making process (Rosenthal, 1974).

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others may take the notion of alter-ego professionalism seriously enough to temper their investment decisions. Thus, they will overinvest or underinvest to a lesser extent than what they could get away with and what would maximize their own profits or satisfactions because of a conscious or subconscious desire to be something more than a business person.

V. POSSIBLE IMPLICATIONS FOR POLICY AND RESEARCH

In future work, I hope to refine these resource allocation models, perhaps identify others, and consider their implications. Still, even at this early stage several theoretical and practical uses appear:

(1) At the outset, the foregoing analysis suggests two hypotheses which may be tested by the Civil Litigation Research Project (CLRP) data. CLRP data permit us to relate the extent of client control over the attorney with the amount of investment in a case. Each CLRP attorney interview produced data on the extent of client participation in decisions, the actual amount at stake in the case, the legal fees charged, and the hours expended by the attorneys. I anticipate that close monitoring by clients would cause fee-for-service lawyers to spend less time than they would for passive clients, while closely watched contingent-fee lawyers would spend more. To test this, CLRP researchers can correlate the extent of client control, on the one hand, and the ratio of time investments to stakes, on the other. If the above hypothesis is correct, CLRP should find that more client participation results in lower ratios of time to stakes for fee-for-service attorneys. Conversely, the data for contingent-fee attorneys should show that more monitoring leads to higher time/stakes ratios.[29]

(2) At a theoretical level, models of settlement negotiations which implicitly assume that lawyers operate as alter egos of their clients (see, e.g., Posner, 1973; Landes and Posner, 1979) may be misleading in the average case and are certainly inaccurate in many typical situations. In effect, if they are to accurately portray economically rational conduct, a very significant "L" (for lawyer) factor may have to be

[29] It will be extremely difficult, and perhaps impossible, to identify underinvestments by contingent-fee lawyers, since few of them maintain detailed records of their actual time investments in specific cases. These lawyers do not bill on an hourly basis and thus do not have the same necessity to maintain accurate time records as fee-for-service lawyers. Thus, I have some doubts the investment data collected from contingent-fee lawyers will be of sufficient precision or validity to allow the calculations needed to confirm or refute the second hypothesis.

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introduced into their equations. And that "L" factor, in turn, may have to be broken down into constituent elements reflecting the differing motivations of lawyers paid in different ways. Fruitful comparisons may then be possible as to interaction among opposing lawyers: fee-for-service *versus* contingent-fee, contingent-fee *versus* contingent-fee, fee-for-service *versus* third-party-payment, etc.

(3) Reform measures directed at reshaping lawyers' incentives may prove more effective than those aimed at disputant behavior. Once a goal is set—early reasonable settlement offers, for instance—consideration should be given to how legal fees might be restructured to contribute to instead of defeating that goal.[30]

(4) Through an understanding of how different fee arrangements create incentives for overinvestment or underinvestment, clients may be able to make better informed choices among the fee-for-service and contingent-fee options. Improved understanding of attorney incentives also may assist clients to better monitor their lawyers' performance. At least the client can know when the lawyer will be tempted to overinvest or underinvest or to bill to the client some investment that actually benefits the lawyer more than anyone else (i.e., credibility building, professional satisfaction).

(5) This sort of analysis may prove helpful to the managers of government-funded or prepaid legal services plans. It exposes the effects of different resource allocation criteria used either explicitly or implicitly by plan attorneys.[31]

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[30] See, for example, the suggestion discussed in note 24 *supra*.

[31] How third-party-payment attorneys choose to allocate their time has serious implications for others besides the fund itself. The individual clients represented, for instance, have reason to prefer the purist ethical code standard which means their lawyers would invest until emb = 0. From their perspective, the caseload benefit maximum standard is least desirable, since ordinarily their attorneys would stop devoting time to their cases long before emb = mc. On the other hand, litigants opposing third-party-payment lawyers might be severely disadvantaged if the third-party fund favored the purist ethical code standard. They could be compelled to pay for overinvestments by their own fee-for-service lawyers or risk being disadvantaged in the litigation contest.

Prospective clients of a third-party legal service fund also have a stake in the allocation practices of its lawyers. Their chances of being turned away entirely are increased if third-party-payment lawyers apply the purist ethical code standard (and to a lesser extent by the theoretical private market standard), since existing cases will take up more time. Yet, once accepted for service by plan attorneys, those same clients stand to gain from the more generous criteria.

I have explored some other complications of resource allocation criteria for third-party-payment lawyers in Cappelletti *et al.* (1975: 184-195; 208-266), especially as they impact nonclients. But, as hinted above, a complete analysis of who is affected and how, would be a much more ambitious undertaking. It might, however, provide some guidance to managers striving to design appropriate criteria for the lawyers paid out of their fund.

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Beyond that, the analysis may assist fund managers to choose allocation goals and to design verbal formulas implementing those goals.

(6) Appreciation of these resource allocation alternatives may give guidance to social scientists endeavoring to evaluate the performance of lawyers, however those lawyers are compensated. For instance, one must be alert to the danger of labeling representation as high quality when it actually constitutes overinvestment that reduces a client's net recovery.

(7) This sort of analysis may have something to say to courts hearing legal malpractice cases or bar committees considering alleged violations of ethical standards, especially those arising out of representation provided by third-party-payment lawyers. What is the appropriate standard against which to judge their work? Merely because a rational fee-for-service lawyer would send interrogatories or conduct depositions in a given case does not necessarily mean a third-party-payment lawyer who neglected to do so is guilty of malpractice. That lawyer may merely have been adhering to caseload benefit-maximization criteria laid down by a funding source (unless, of course, a court is prepared to rule that imposition of such an allocation formula constitutes inherent malpractice on the part of the legal services or prepaid plan).

VI. CONCLUSION

This article is admittedly preliminary and exploratory. It has sought to identify and describe several of the more significant resource allocation models and influences which may guide different lawyers in deciding how much time to devote to which clients and which cases.[32] The source and method of attorney compensation was viewed as the major line of demarcation between models, since these factors largely shape the economic incentives. Yet some psychological influences which undoubtedly transcend all categories also were identified. Lawyers for whom these motivations are strong will probably invest additional time in certain cases no matter who pays them in what way. Third-party-payment lawyers have a lesser personal economic stake in how much time they invest in any given case. They can apply any of a number of alternative criteria. Which of these they in fact

[32] While this essay was in press, I came across a recent article which also deals with the same general topic of resource allocation by lawyers (see Nagel, 1980). Readers may wish to compare the Nagel analysis with mine, since it treats some of the same issues, although from a different perspective.

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employ (if any) is likely to depend upon the policies of the government agency or insurance fund supplying their income. The choice has significant implications not only for the clients served but for others in society.

Finally, the article briefly surveyed some of the possible implications of this analysis for public policy and future research. At the present level of sophistication, the inquiry into attorney resource allocation criteria cannot provide conclusive answers for the questions raised in any of the suggested applications. But for the time being, it may be enough if this preliminary analysis triggers some recognition of the significance of the phenomenon and a more systematic approach in wrestling with these problems.

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