MANDATORY PRO BONO: AN ATTACK ON THE CONSTITUTION

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Several state judicial and political leaders have seriously discussed requiring all lawyers within their jurisdictions to perform annually a certain amount of legal work for the poor "pro bono publico,"¹ that is, for the good of the public and without pay. These discussions have even included proposals that law students be subject to this mandatory pro bono requirement.² Although momentum appears to be building in support of some type of pro bono requirement, no state or jurisdiction has yet adopted such a plan.

While mandatory pro bono proposals may differ in detail, they all have in common the requirement that attorneys do pro bono work as a condition of practicing law.³ Most limit, in some fashion, the pro bono work requirement to legal work done for poor people. The final report issued by the Committee to Improve the Availability of Legal Services, chaired by Victor Marrero (hereinafter "Marrero Committee"), to the Chief Judge of the State of New York⁴ is typical of such plans, and this paper will examine it as a prototype of mandatory pro bono proposals. This article will summarize the Marrero Committee's proposal, examine its rationale and discuss the authority

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1. For example, a Maryland gubernatorial committee proposed that each of Maryland's lawyers be required to provide pro bono service. See Torry, Md. Bar Campaign Urges Members to Volunteer Legal Services, Washington Post, Oct. 17, 1989, at B8, col. 1.

In addition to Maryland and New York, Hawaii and North Dakota have also considered, but have not yet implemented, mandatory pro bono programs. See Bar, The AmLaw Pro Bono Rating: Doers And Talkers, THE AMERICAN LAWYER 51, 54 (July/Aug. 1990). The Texas Bar Association is also debating a pro bono requirement. See Herring, Isn't It Time for Mandatory Pro Bono?: Plan Would Help Bar's Image—and Meet Needs of the Poor, TEXAS LAWYER, Aug. 13, 1990, at 18.

2. See The American Jurist, Nov. 1990, p. 15. (proposal of Ralph Nader and "Law Students for Pro Bono").

3. See supra note 1.

of the Chief Judge of the New York Court of Appeals to implement such a proposal. This paper concludes that the Marrero Committee’s proposed plan is constitutionally infirm and cannot fulfill the goals of the Marrero Committee.

The Marrero Committee’s mandatory pro bono proposal differs significantly from the practice in some jurisdictions of occasional uncompensated appointments of attorneys in cases where the client has a constitutional right to representation. Mandatory appointments of that type will not be the focal point of this paper. Cases dealing with mandatory appointments will be discussed only as they relate to the Marrero Committee’s proposal.

The Marrero Committee’s report calls for a comprehensive plan that requires nearly all attorneys admitted to practice law in New York State, and who are actively practicing law, to fulfill obligations under the plan. Such a comprehensive plan has never been adopted by any state or jurisdiction and would constitute a radical change in the obligations owed by attorneys, which might have an impact far beyond the legal profession.

I. THE MARRERO COMMITTEE PROPOSAL FOR MANDATORY PRO BONO

The Marrero Committee was appointed by Sol Wachtler, Chief Judge of the New York Court of Appeals. Chief Judge Wachtler directed the Committee to submit a plan for increased provision for legal services for the poor. However, in giving the Committee that objective, Wachtler pointed the Committee in the direction of mandatory pro bono by telling it that, as part of its plan, it could consider


6. Most of the criticism of comprehensive mandatory pro bono as typified by the Marrero Committee proposal would also apply to compelled uncompensated appointments in individual cases even when the client has a constitutional right to an attorney. However, in the case of individual appointments the interest of the state would be stronger, especially where the client has a constitutional right to an attorney. The court has the opportunity to evaluate each appointment on an individual basis and balance the competing interests of the state, the client, and the attorney. Each of those elements might affect the balance of constitutional rights in a way different than the balance in a comprehensive mandatory pro bono program.

7. See MARRERO REPORT, supra note 4, at 780-82.
the feasibility of mandatory pro bono. When the Committee issued its preliminary report in June, 1989, the mandatory pro bono proposal was the centerpiece of its plan.

The preliminary report, containing the mandatory pro bono proposal, received some support, but more typically it was met with objections from the organized bar, interested organizations and individual citizens. In addition to the criticism leveled at the report, the New York State Bar Association initiated, as a positive response to the Marrero Committee report, a broad program to promote voluntary pro bono activities as an alternative to the Marrero Committee proposal.

On April 30, 1990, the Committee issued its final report. The final report was essentially a rehash of the preliminary report with a few minor changes and comments responding to some of the critics of the preliminary report. Rather than immediately implementing the mandatory pro bono proposal, Chief Judge Wachtler put the Marrero Committee proposal on "hold" for two years in order to give the New York State Bar Association voluntary pro bono plan a chance to work. However, Judge Wachtler stated that if at the end of the two-year trial period the voluntary plan had not succeeded, he would consider imposing a mandatory pro bono requirement at that time. Thus, the Marrero Committee proposal may never be implemented by

8. Id. at 852-53, Appendix A.
9. Comments on the Preliminary Marrero Report were published by the Committee to Improve the Availability of Legal Services [hereinafter Marrero Report Comments]. Several New York Bar Associations urged that a voluntary pro bono plan be utilized in lieu of mandatory pro bono. See Marrero Report Comments (Oct.-Nov. 1989) (among these were the Nassau County Women's Bar Association, the Suffolk County Bar Association, the Nassau County Bar Association and the Queens County Bar Association). Some comments were also made in support of mandatory pro bono. See id. (the Bar Association of the City of New York came out in favor of the proposed plan).
10. See id. Comments opposing the proposal were submitted by such diverse groups as Legal Action for Animals and the Washington Legal Foundation. But see Comments of Volunteers of Legal Service, Inc. (supporting the proposal).
11. For example, Robert MacCrate, President of the New York Bar Foundation, presented testimony as an individual and not on behalf of any organization, and David McGugher, a non-attorney, provided oral testimony to the Commission urging a solution that would draw upon the services of non-lawyers to meet the needs of the poor. See id.
13. See Sack, Chief Judge Presses Lawyers on Legal Work for the Poor, N.Y. Times, May 2, 1990, at B1, col. 5. (reporting that the Chief Judge decided not to force mandatory pro bono program for two years and give the State Bar Association until 1992 to meet voluntarily the need for legal services for the poor).
14. Id.
the Chief Judge. However, even if it is not implemented, it should be examined, since it is a prototype of mandatory pro bono proposals that are likely to be proposed in other parts of the country. The Marrero Committee proposal calls for the Chief Judge of New York State to promulgate and implement new standards and administrative policies that would require that pro bono services be performed by attorneys admitted to practice before the courts of New York, with certain limited exceptions. In addition, the proposal calls for the appointment of more attorneys in civil cases.

Attorneys would be required to perform a minimum of forty (40) hours of qualifying services during each two-year registration period. Qualifying services would include the following:

1. Professional services rendered in civil matters, and in those criminal matters for which there is no government obligation to provide funds for legal representation, to persons who are financially unable to compensate counsel.
2. Activities related to improvement of the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services, to poor persons.
3. Professional services to charitable, religious, civic and educational organizations in matters which are designed predominately to address the needs of poor persons.

The Committee proposes that the obligation under the plan can be satisfied by the personal provision of services or by one of two alternative procedures. The first alternative procedure allows groups of attorneys (firms, bar associations or groups formed for that purpose) to pool their resources and substitute the pro bono work done by one attorney to satisfy the obligations of the other attorneys in the group. The other alternative is available to solo practitioners and firms with ten or fewer attorneys. Those from this category can contribute to an approved legal aid organization, or similar program, a payment of $50 for each pro bono hour of qualifying service not performed.

The Committee provides no concrete criteria to determine who

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15. Attorneys can request an exemption, but such requests are limited to illness or other extraordinary circumstances. See Marrero Report, supra note 4, at 797.
16. See id. at 792.
17. Id. at 792-95.
18. See id. at 798.
19. See id. at 799-802.
qualifies as a "poor" person and thus qualifies as a recipient of the mandated pro bono work.\textsuperscript{20} Even more surprisingly, in light of the Committee’s claim that there is a "crisis" of unmet legal needs of the poor, the Committee’s scope of qualifying services would include pro bono representation of poor persons "even in cases involving issues that do not disproportionately affect the poor per se."\textsuperscript{21}

\section*{II. The Marrero Committee’s Justification for Mandatory Pro Bono Is Based on Ideology and Not on Genuine Evidence of "Unmet Legal Needs" of the Poor.}

In some jurisdictions, attorneys have accepted compulsory appointment in specific cases (generally criminal cases).\textsuperscript{22} Furthermore, there is a strong tradition in the legal community of attorneys contributing services to both the poor and charitable organizations on a pro bono basis. However, the Committee was unable to point to any jurisdictions—past or present—that require mandatory pro bono as a condition of practicing law.\textsuperscript{23} In recommending a mandatory pro bono requirement for New York attorneys, the Marrero Committee has taken a dramatic step.

What is the basis of the Marrero Committee’s call for a radical change in the obligations of attorneys to perform pro bono services? The Committee’s report is premised on the assumption that there is growing poverty in New York,\textsuperscript{24} that the problems of the poor are intertwined with the legal system,\textsuperscript{25} that the solution is additional legal aid for the poor\textsuperscript{26} and, finally, that the public will not support such funding; therefore, members of the legal profession must satisfy the Committee’s perceived need for greater legal services for the

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\item 20. See id. at 792-93.
\item 21. Id.
\item 22. See supra note 5 and accompanying text.
\item 23. The Committee mistakenly claims that mandatory pro bono exists in Orange County, Florida. Mandatory pro bono as a condition of practicing law does not exist in that jurisdiction. What Orange County does have is a successful \textit{voluntary} program. Members of the voluntary local bar require pro bono service as a condition of membership. See Marin-Rosa & Stepter, \textit{Orange County—Mandatory Pro Bono in a Voluntary Bar Association}, Fla. B.J. 21 (Dec. 1985). Since membership in the bar is voluntary and the practice of law is not conditioned upon membership in the bar or pro bono service, any attorney can avoid such service and no constitutional rights are implicated. See id.
\item 24. See \textit{MARRERO REPORT, supra} note 4, at 772-73.
\item 25. See id. at 774.
\item 26. See id. at 775.
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However, as discussed below, most of these assumptions are questionable, and the solution of mandatory pro bono does not provide any lasting solutions to the problems of the poor.

The Committee states in its report that poverty is increasing and that there is a "crisis of unmet civil legal needs." Yet, no hard evidence is offered to support the Committee's view that poverty and the distress of the poor are increasing. Many people would dispute that claim. The Committee supports its claim with little more than the rhetorical flourish that

the indicia of distress—homelessness, domestic violence, hunger, disease, crime, public dependency—are evident as street facts visible on any short walk in any city in the State. That distress has mounted before our very eyes over recent years, a commonplace observation that is documented by all the available statistics.

The conflicting claims as to whether poverty is increasing or decreasing nationwide or in New York State can be endlessly debated, but even if poverty and the distress of the poor are increasing, there is no necessary connection between an increase in poverty and the need for increased legal services. The poor may need material resources other than "legal services." The needs of the poor may not be material at all—some social scientists have argued the needs of the poor may be other than material resources and that increased public benefit programs hurt the poor.

Beyond the committee's "short walk in any city" methodology, the Committee also cites the results of the New York Legal Needs Study (hereinafter "Legal Needs Study"), prepared by the New York State Bar Association Committee on Legal Aid, to support its

27. See id. at 779-80.
28. See id. at 771.
29. See, e.g., How "Poor" are America's Poor?, Heritage Foundation Reports, No. 791 (Backgrounder, Sept. 21, 1990) (stating that the Census Bureau "dramatically understates the living standards [and income] of low income Americans.").
30. MARRERO REPORT, supra note 4, at 772.
31. See generally C. MURRAY, LOSING GROUND (1984) (arguing that the poor will benefit most from the elimination of welfare programs and the development of a program that would convert a large portion of the younger generation of "hardcore" unemployed into steady workers making a living wage); G. GILDER, WEALTH AND POVERTY (1981) (arguing that most means-tested programs designed exclusively for the poor simply promote the value of being poor and thus perpetuate poverty; we must eliminate the value of being poor by eliminating handouts.)
claim of a crisis of unmet legal needs of the poor. The Legal Needs Study found, through a telephone survey, that the low-income households interviewed had an average of 2.46 non-criminal legal problems per household per year for which they had no help. The survey was, however, fundamentally flawed in that it did not distinguish between legal problems that individuals thought they had and legal problems that attorneys could realistically do something about. The survey did not produce any genuine evidence that there are significant unmet legal needs of the poor for which attorneys could provide meaningful assistance, and the Marrero Committee offered no additional evidence to bolster the credibility of the survey. Furthermore, a result similar to that of the New York State Bar Survey could probably be duplicated if a study was made of the near poor and the lower middle class. Among those above the poverty line, it is likely that there are large numbers of individuals who have consumer, family, landlord-tenant and some public benefit problems for which they cannot afford legal services. That is because, in a world of limited resources, individuals make, often unconsciously, a cost-benefit analysis whenever they spend their money. Individual consumers often decide that some other good or service may be more valuable to them than legal services. In that sense, the poor are no different from the rest of society. If given the option, the poor might very well prefer a cash payment in lieu of legal services. It is not at all certain that the poor place as a high a value on legal service as does the Committee.

The one concrete example given in the Committee's report concerning legal needs of the poor involves the Housing Court. The Committee cited a 1988 report produced by the Association for the Bar of the City of New York Committee on Legal Assistance, titled the Housing Court Pro Bono Project: Report of the Project. That

34. For example, many consumers whose toaster or walkman breaks down believe that they have a problem that a lawyer could solve by suing the manufacturer; however, it is likely than many such consumer problems are best left out of the courts.
36. See, e.g., AMERICAN BAR ASSOCIATION, CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENT OF THE UNMET LEGAL NEEDS OF THE POOR AND THE PUBLIC GENERALLY, 33-34 (1989) (indicating that 28.3% of those subject to the survey of households at or below 125% of poverty did not seek legal services because they thought it was too expensive).
37. See MARRERO REPORT, supra note 4, at 772 n.9.
report concludes that "pro bono counsel did not offer a large scale, long range solution to the problem of tenant unrepresentation in the Housing Court." Although the Housing Court Report does say that conscripting all licensed attorneys into a pro bono effort for the Housing Court might be a solution, the needs of the poor in the Housing Court still would not be met by the Marrero Committee’s mandatory pro bono plan, since not every attorney conscripted by the Marrero Committee would be in Housing Court.

If unrepresented tenants are at a serious disadvantage in Housing Court when facing landlords represented by attorneys, one solution might be to reform the Housing Court. The Housing Court Report points out that attorneys who lack experience in Housing Court are themselves often handicapped in attempting to litigate in that forum. The Housing Court Report offers several suggestions for Housing Court reforms that might be adopted as alternative solutions to mandatory pro bono and that might better assist tenants in Housing Court.

Another report prepared by the Association of the Bar of City of New York, Committee on Legal Assistance, although not discussed by the Marrero Committee, is cited by it as authority for its claims concerning the legal needs of the poor. That report gave a qualified endorsement of mandatory pro bono appointments to be used only as

38. Association of the Bar of the City of New York, Committee on Legal Assistance, Housing Court Pro Bono Project: Report on the Project, Parts I and II, at 8 (June & Nov. 1988) [hereinafter Housing Court Report].

39. Id. at 6, n. 7 (quoting LaGuardia v. Cavanaugh, 53 N.Y.2d 67, 440 N.Y.S.2d 586 (1981)).

40. Furthermore, the Committee’s underlying assumption that the landlords are the “rich” and the tenants are the “poor” is not necessarily the case. One economist who has studied this problem has written, “[I]n fact, individual tenants frequently have incomes which are higher than their landlord’s, and, to our knowledge, no body of evidence exists which indicates that on average tenants have significantly lower incomes.” See R. Ault, The Presumed Advantages and Real Disadvantages of Rent Control, reprinted in W. Block, Rent Control: Myths & Realities (1981).

41. See Marrero Report, supra note 4, at 772, n.9 (citing the Association of the Bar of the City of New York, Committee on Legal Assistance, Report on the Availability of Matrimonial Representation for the Poor and the Feasibility of Mandatory Pro Bono Representation in Matrimonial Matters in New York City, reprinted in 44 Rec. of the Ass’n of the Bar of the City of New York 159 (1989) [hereinafter Matrimonial Report].
a last resort if attempts to obtain volunteers are unsuccessful. However, the Matrimonial Report also highlighted some problems with mandatory pro bono—such as the fact that clients have no financial incentive to minimize litigation, even where settlement is the most appropriate course. The authors of the Matrimonial Report also pointed out that they favored voluntary pro bono panels where practical.

Perhaps most importantly, the authors of the Matrimonial Report point out that

[The judicial system could also do much to reduce the need for lawyers in certain divorce cases, or at least to reduce the paperwork required to get a divorce. The number of filings and other documents required in New York exceeds that required in many other states, which have obviously found it possible to provide their citizens with easier access to the divorce process.]

As the authors of the Matrimonial Report point out, the long term solution to unmet legal needs of the poor in this area may be simplification of the matrimonial courts so that more citizens can appear pro se in matrimonial courts on simple and uncomplicated matters. The reform of the matrimonial courts would be a solution that would have its greatest beneficial impact upon the poor but would assist all citizens.

The Marrero Committee, in its final report, responded to criticism made of the preliminary report's claim of a "crisis" in unmet legal needs of the poor. As part of that response, the Committee in the final report stated:

A justice system that celebrates truth, that legitimizes fairness, that exalts principles of equality and human worth cannot, overtly or by neglect, engage in empty promises towards vast numbers of its citizens, particularly the neediest, without undermining the confidence of all citizens and the very values upon which it stands. In the Committee's sense of the word, this threat represents the legal "crisis" with which we, as lawyers, are primarily concerned.

This argument of the Marrero Committee, that the justice system promises more than it delivers with respect to the poor, is little more

42. See Matrimonial Report, supra note 41, at 172.
43. See id. at 171.
44. See id. at 172.
45. Id. at 171-72.
46. See id.
47. MARRERO REPORT, supra note 4, at 779.
than a utopian lament that the judicial system is not perfect. The Committee implies that everyone is entitled to an attorney. While the Sixth Amendment guarantees counsel in many criminal cases, there is no right to counsel in most civil cases. There is no guarantee, express or implied, in the constitutions of the United States or New York State, that everyone who thinks that they have a need for an attorney will have one appointed. The logical extension of the Committee’s claim would be that every citizen is entitled to free counsel in civil litigation. Such a theory, if implemented, would require a sort of “socialized medicine” for the legal profession.

Finally, the Committee plan itself would not, even if fully implemented, change the system, which Chief Judge Wachtler and the Committee characterized as one “which allows vast disparities in access to justice based on the ability to pay.” Wealthy individuals and wealthy corporations will still be able to hire the best attorneys that they can afford. While some poor individuals may benefit from the program, the middle class, the lower middle class and the near poor will still be limited by their ability to pay for legal services. If there is a problem as described by the Marrero Committee with access to justice based on wealth, then the Committee’s solution is not really any solution at all.

In summary, the Committee plan is based on unsubstantiated assumptions about the poor and their needs. Further research is needed to determine what the actual legal needs of the poor are and how those needs can best be met. The empirical evidence offered by the Committee in the Housing Court Report refutes its claim that a mandatory pro bono program can satisfy the legal needs of the poor.

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48. See id. at 771 (stating that the poor’s “needs for legal services are not in any sense optional but rather deal with access to essentials of life: shelter, minimum levels of income and entitlement, unemployment compensation, disability allowance, child support, education, matrimonial relief, and health care.”).

49. See Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that the right to counsel is not governed by the classification of the offense); In re Gault, 387 U.S. 1 (1967) (holding that in juvenile delinquency proceedings, the child and parents must be advised of the right to be represented by counsel and of the fact that if they cannot afford counsel, the court shall appoint counsel to represent the child); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the right to counsel of indigent defendants in a criminal proceeding is fundamental to a fair trial).

50. See Lassiter v. Department of Social Serv. 452 U.S. 18 (1981) (holding that the right to counsel in a civil trial arises only if an indigent defendant is in danger of being deprived of his physical liberty.)

51. MARRERO REPORT, supra note 4, at 775.

52. See supra note 38.
The Committee program, if hastily implemented, may delay the adoption of reforms that would better serve the real needs of the poor. The Committee offers no credible evidence to support the claim that the unmet legal needs of the poor have reached such epidemic proportions so as to justify drafting practicing attorneys as foot soldiers in a war on poverty.

III. THE CHIEF JUDGE LACKS THE POWER TO IMPLEMENT THE COMMITTEE’S PROPOSED PLAN.

The Committee proposes that the Chief Judge implement the mandatory pro bono plan under several claimed sources of authority. However, none of those sources gives the Chief Judge the authority to implement as far-reaching a scheme as the one proposed by the Committee. The Marrero Committee cites several cases that allow the appointment of counsel. The Committee plan, however, is not merely a plan to encourage the appointment of counsel in individual cases. The Committee is proposing a far more radical plan requiring mandatory pro bono service beyond appointments in specific cases.

The Committee first claims authority for mandatory pro bono from Article 6, § 30 of the New York Constitution. That article, however, merely sets out the authority of the legislature to delegate to a court or the chief administrator of the courts the power to regulate “practice and procedure before them.”

What is proposed by the Committee is certainly not the regulation of practice and procedure in the courts. The Committee plan does not even faintly resemble the types of practice and procedures of the courts that the legislature, the courts, or the chief administrator of the courts have regulated pursuant to Article 6, § 30 in the past.

53. See infra notes 54-82 and accompanying text.
54. See MARRERO REPORT, supra note 4, at 815, n. 52 (citing In re Smiley, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975) (noting that courts have the inherent right and broad discretionary power to assign counsel); In re Farrell, 127 Misc. 2d 350, 486 N.Y.S. 2d 130 (Sup. Ct. 1985) (holding that the court has the inherent power to assign counsel only in a proper case)).
55. N.Y. CONST. art. VI., § 30.
56. MARRERO REPORT, supra note 4, at 815.
The Committee’s proposed plan does, however, mandate activities outside the courtroom by requiring practicing attorneys to either represent indigent individuals or in some other manner fulfill the requirements of the plan outside the courtroom by engaging in activities such as lobbying the legislature, raising funds for legal aid or other charitable organizations or making cash contributions to charitable organizations. The Committee’s proposed plan is not a regulation of the practice and procedure in the courts; it is, instead, a social scheme that looks like a tax levied on attorneys to support the favorite charities of the authors of the Marrero Report. Nowhere in the New York State Constitution is the power to tax delegated to the courts or the chief administrator of courts.

The Committee also states that the courts have an inherent power to assign counsel in appropriate cases. The Committee’s proposal, however, is not limited to the appointment of counsel in appropriate cases. Even if the plan were limited to assignments, the assumption that courts have that inherent power is not correct. Recent scholarship has shown that, historically, courts have not had the inherent power to assign uncompensated counsel. The Committee also cites three cases that provide questionable support for its position that the courts have the inherent authority to assign counsel in appropriate cases. Each of the cases cited by the Committee in its report deals with the appointment of attorneys to specific cases and not with a carte blanche order by the courts that practicing attorneys must provide some monetary payment, legal representation or other services to either indigent individuals or organizations that purport to represent or serve indigent individuals. An examination of the cases cited in the

58. See MARRERO REPORT, supra note 4 at 793-94.
59. See id. at 795-96.
60. See id. at 799.
61. See id. at 792-99 (allowing non-legal activities, such as fund raising on behalf of organizations dedicated to the poor, to meet attorney’s obligations under the plan).
62. See id. at 815.
63. See id. at 796 (fund raising or membership on Board of directors would qualify).
64. See, e.g., Shapiro, The Enigma of the Lawyer’s Duty to Serve, 55 N.Y.U. L. REV. 735 (1980) (stating that neither ancient nor recent history gives evidence of any requirement to provide mandatory public service. In fact, as early as 1969 the Code of Professional Responsibility seemed to have struck the balance between requiring pro bono service and ignoring the need for it; the Code established an ethical aspiration rather than an enforceable obligation.)
66. Mallard, 490 U.S. at 302-05 (holding that 28 U.S.C. 1915(d) does not authorize
Committee’s report indicates that even when those courts have claimed the right to appoint counsel to represent indigent individuals, the courts have not claimed a broad power to order counsel to serve the poor.

The opinion in *In re Smiley*, cited by the Committee in support of its plan, is illustrative of the reluctance of the courts to exercise the power of appointment even in specific cases—much less the wholesale conscription envisioned in the Committee report. In *Smiley*, the Court held that the judiciary does have an inherent right to assign counsel; it cautioned, however, that the assignment of uncompensated counsel, even when done pursuant to statutory authority to satisfy a constitutional right to counsel, should be done on a case-by-case basis. In the instance where counsel is constitutionally required, the court stated that the court should “charge the public purse.”

The second case cited by the Committee in support of its claim concerning the power of courts to assign counsel is *In Re Farrell*. That case, however, held only that the “[c]ourt has the inherent power to assign counsel in a proper case.” Again, it is an enormous leap from an assignment of counsel in a proper case to wholesale conscription of practicing attorneys.

The Committee also claims that language in the majority and minority opinions in *Mallard v. United States District Court* "appears sympathetic to the view that an appropriately drawn rule or statute could articulate and enforce” mandatory assignment of coun-

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federal courts to require an unwilling attorney to represent an indigent in a civil case); *In re Smiley*, 36 N.Y.2d at 437-38, 330 N.E.2d at 57-58, 369 N.Y.S.2d at 91-92 (holding that absent statutory authority, there is no power in the courts to direct appointment of counsel or to require compensation of retained counsel out of public funds for indigent wives in divorce actions); *In re Farrell*, 127 Misc. 2d at 350, 486 N.Y.S.2d at 131 (in a matrimonial action where the defendant sought status as a poor person and assignment of counsel the court held that absent a showing that counsel has a compelling reason to seek to be excused or that assignment of counsel has become unbearable, the assignment of counsel without compensation does not violate an attorney’s constitutional rights.)

68. See MARRERO REPORT, supra note 4, at 815.
70. Id.
72. Id. at 350, 486 N.Y.S.2d at 131 (emphasis added).
While the minority opinion might well be read that way (although even the minority opinion deals with the issue of assignment in specific cases and not with a far-reaching mandatory pro bono plan), there is nothing in the majority opinion that should give comfort to the advocates of a mandatory pro bono program. The *Mallard* Court was presented with a challenge to an attempt by a lower court judge to make a mandatory uncompensated appointment. The *Mallard* Court exercised its traditional discretion in not reaching the Constitutional questions involved since the Court was able to decide the case on statutory grounds. Not a word was said by the majority to indicate that it would look sympathetically on an appropriately drawn rule or statute to enforce compulsory assignment of counsel. In fact, the majority favorably cited an article by Professor Shapiro, *The Enigma of the Lawyer's Duty to Serve*, which takes a negative view toward mandatory pro bono, in dismissing the claim that state courts historically had authority to order uncompensated appointments.

One New York statute permits the courts to assign counsel. That statute provides that courts *may* (not must) assign counsel. One court, in reviewing that statute, pointed out that counsel should not be routinely assigned under the statute and that there should be a meaningful inquiry into the merits of each request for assigned counsel. It is also worth noting that section (d) of the statute authorizes the Court to direct the poor person, if he is successful in the litigation, to pay his counsel for the services rendered. The statute, while a source of authority for the appointment of counsel, has been limited in its application and is not a broad grant of judicial power to

74. MARRERO REPORT, *supra* note 4, at 815, n.52.
75. *See Mallard*, 490 U.S. at 311 (Stevens, J. dissenting).
76. *See id.*, 490 U.S. at 299-300.
77. *See id.*, 490 U.S. at 310.
80. *See N.Y. CIV. PRAC. L. & R. § 1102 (McKinney 1976).*
81. *See id.*
83. *See N.Y. CIV. PRAC. L. & R. § 1102(d) (McKinney 1976).*

"(d) Costs and Fees. A poor person shall not be liable for the payment of any costs or fees unless a recovery by judgment or by settlement is had in his favor in which event the court may direct him to pay out of the recovery all or part of the costs or fees, a reasonable sum for the services and expenses of his attorney and any sum expended by the county or city under subdivision (b)."

*Id.*
create a mandatory pro bono plan.84

Assuming, arguendo, that the courts do have the authority to make appointments in particular civil cases either by virtue of their alleged "inherent authority" or as a result of statutory authorization, there is still no authority for a mandatory pro bono plan for all practicing attorneys in the state. The making of an appointment in a particular case is distinguishable from a mandatory pro bono plan because, in an appointment system, the decision is made on a case-by-case basis where the needs of the client and the rights of the attorney can be weighed and balanced as discussed in Farrell.85 In a particular case, the state may arguably have an interest that might overcome the constitutional rights of the attorney and justify an appointment. In the case of a mandatory pro bono program, there is no such careful balancing of interests.

In a democracy, decisions as to how to utilize the resources that are public rather than private are made by the legislative and executive branches of government.86 The Marrero Committee acknowledges in the Report that the legislative and executive branches of government have not funded legal services for the poor at the level desired by the Committee.87 The Committee's proposal would have the Chief Judge of New York order the confiscation of some of the private funds of attorneys—or some of their time—and treat those resources as public resources to be redistributed. The Committee's plan to have the Chief Judge do what the legislative and executive branches of government have refused to do would result in a usurpation of the democratic process since it would substitute the will of the Chief Judge for the will of people as expressed through democratic institutions. Furthermore as discussed above, the so called "unmet legal needs of people" may be a reflection of the relatively low value that poor people place on legal services vis-a-vis other services and not necessarily a lack of money to purchase an "essential" good.88 Furthermore, it is not only individuals—whether they are poor, middle

85. See supra notes 67 & 74 and accompanying text.
87. See MARRERO REPORT, supra note 4, at 775-76, 814-17.
88. See supra note 36 and accompanying text.
class or wealthy—that have limited resources when making consumer choices in the marketplace; the public sector also has limited resources with which to meet society’s needs. The government funds a host of programs from roads to schools, from national defense to social security and from support of the arts to all of the other programs subsidized by government, including the legal needs of the poor. If the democratic branches of government chose to require attorneys to contribute time or money for a “public” purpose—similar to the Marrero Committee’s requirement—those democratic branches of government might instead choose to direct those funds to other projects.

If the democratic branches of government chose to direct the resources gained from attorneys to helping the poor, why should they not allow indigent individuals to choose their priorities in utilizing those resources? The poor might prefer to spend those resources on better housing rather than on an attorney for housing court. The Marrero Committee’s choice of where to spend those resources may be a well meaning but misdirected funnelling of the limited resources available to help the poor away from those programs that the poor value, as opposed to those that attorneys value. What is at best a power of the Courts to make assignments in specific cases is not authority to impose a mandatory pro bono scheme that lacks the individual case-by-case weighing of interests that an appointment involves. The Chief Judge has no authority to draft attorneys into a private “war on poverty,” and any attempt to do so would be nothing less than judicial usurpation of the powers of the legislature.

IV. THE PLAN WILL INFRINGE ON THE CONSTITUTIONAL RIGHTS OF PRACTICING NEW YORK ATTORNEYS.

A. The Plan will infringe on the rights of practicing attorneys under the First Amendment of the United States Constitution and under Article I, § 8 of the New York State Constitution.

The First Amendment of the United States Constitution and the New York State Constitution provide:


90. U.S. Const. amend. 1. ("Congress shall make no law . . . abridging the freedom of
Article 1, § 8 of the New York Constitution guarantees freedom of speech and association. Litigation is a form of speech and association that is protected by the First Amendment of the U.S. Constitution. This is true regardless of the type of litigation pursued. The right not to be compelled to support speech or associational interests is also protected by the First Amendment.

Compelling an attorney to choose between practicing law and participating in a mandatory pro bono program raises First Amendment issues. An attorney might object to participation in such programs for various political and ideological reasons. It is clear from the testimony and written comments concerning the preliminary report of the Marrero Committee that a large number of attorneys have such objections.

Whenever a First Amendment right is impacted upon by government, the courts must engage in a two-part test to determine if the infringement on the First Amendment can be justified. The first prong of the test is to determine whether the state has a compelling interest that justifies the state intrusion. The Committee not only fails to...

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91. N.Y. CONST. art. 1, § 8. ("Every citizen may freely speak, write, and publish his sentiments on all subjects.")

92. See In re Primus, 436 U.S. 412, 428 (1978) (stating that A.C.L.U. litigation is a form of "political expression" and "political association"); United Transportation Union v. Michigan Bar, 401 U.S. 576, 580 (1971) (holding that an injunction prohibiting a union from "giving or furnishing legal advice to its members" violated the First Amendment); NAACP v. Button, 371 U.S. 415, 429 (1963) (stating that NAACP litigation is a form of "political expression").

93. See, e.g., Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 8 (1964) (holding that group association for litigation concerning workers' tort claims cannot be infringed upon).

94. See Abood v. Detroit Bd. of Education, 431 U.S. 209, 235 (1977) (holding that a public school teacher cannot be forced to contribute to an ideological cause as a condition of employment); Wooley v. Maynard, 430 U.S. 705, 713-715 (1977) (holding that a state may not force an individual to display an ideological message on his private property); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943) (holding that local authorities cannot compel a flag salute or pledge).

95. In testimony following the issuance of the Marrero Committee's preliminary report, the Washington Legal Foundation raised the First Amendment implications of the Committee's mandatory pro bono proposal. While the Marrero Committee's final report provided responses to some of the criticisms of the preliminary report, the Committee did not address the Washington Legal Foundation's First Amendment objections to the proposal. See Marrero Report Comments, supra note 9.

96. See supra notes 9-11 and accompanying text.

provide evidence that the state has a compelling interest in mandatory pro bono, but it also fails to make clear what the Committee believes the state interest is that is promoted by the proposed mandatory pro bono plan. The Committee claims that a mandatory pro bono plan is needed because the legal needs of the poor are not being met. However, the Committee’s plan reaches far beyond providing direct legal services to poor people. In addition to providing legal services, the plan permits the 40 hours of bi-annual service to be performed by working toward improvement in the administration of justice for the poor and by professional service to charitable organizations.98

Included within the rubric of “administration of justice” is “advocating for legislation or appropriations for pertinent court reform, or for allocation of public and private funds to finance additional legal services for the poor.”99 Also covered by the administration of justice section is “fund-raising efforts for or board membership on organizations such as the Legal Aid Society, Volunteers of Legal Service, New York Lawyers for the Public Interest or Community Action for Legal Services.”100 The category of “service to charitable organizations” includes serving on the board of a charitable organization.101

In short, the Committee apparently cannot decide whether the aim of its program is to provide legal services or merely to help the “poor.”

Even if, arguendo, the Chief Judge has the authority to implement a plan for occasional mandatory appointments, he certainly does not have the authority to draft attorneys to lobby for legislation, to raise money for private charities, or to serve on the boards of directors of charitable organizations. The state, through the legislature, has clearly not claimed any interest in mandatory pro bono or in any of those additional activities that the Marrero Committee plan would support. The Committee itself admits that the public is unwilling to fund legal services to the levels that the Committee deems required by the crisis it perceives.102 The members of the Committee, unable to convince the public to adopt the Committee’s view of the need for legal services, are now proposing an end-run around the democratic process in order to have the Chief Judge impose his view of society. Rather than a valid state interest that can be weighed against the

98. See Marrero Report, supra note 4, at 792-95.
99. Id. at 794.
100. Id.
101. See id. at 796.
102. See id. at 775, 779-80, 814-17.
Constitutional rights of attorneys, we will have the private interests of the Committee and the Chief Judge. Thus, the proposed pro bono plan violates the Constitutional rights of attorneys because the state has no interest that would justify the war on poverty proposed by the Committee.

Even if the pro bono plan were limited to providing legal aid to indigent individuals, there still would be no showing of a state interest that would justify the impact upon the First Amendment rights of attorneys. The Committee complains that the government has reduced funding for legal services over the years. Furthermore, the federal government has expressed an interest in limiting through both statute and regulation the types of legal services that may be provided under its programs. Those restrictions demonstrate that, while the federal government has an interest in having government-mandated legal services programs, the federal government also has an interest in limiting the scope of those programs. However, the Committee's proposed plan will likely result in the very funding of lobbying and litigation in which the federal government prohibits recipients of its funds from engaging. That is because the cash contributions and donated services may not be subject to the federal government's restrictions. Those programs might then have the resources to do that which the government has attempted to prevent them from doing.

If the pro bono plan is limited to the provision of services for indigent individuals who have a Constitutional or perhaps even a statutory right to counsel, there may be some rational relation to the legitimate governmental objective sought. But that is not the case with the proposed mandatory pro bono plan. The plan is little more than a tax in kind on attorneys to support the private—not governmental—aim of aiding indigents or charitable organizations by using attorneys' "professional skills." Since the state has no interest in those activities, the Chief Judge cannot infringe on the First Amendment rights of practicing attorneys in order to promote his or the Committee's own charitable causes, no matter how noble those causes

103. See id. at 775.
104. See 42 U.S.C.S. § 2996f (b) (Law. Co-op. 1990) (listing the limitations that must be observed when using funds made available through the Legal Services Corporation).
105. See, e.g., 45 C.F.R. § 1608.3 (1990) (prohibiting the Legal Services Corporation from supporting political goals).
might arguably be.

Assuming, *arguendo*, that the state does have an interest that would justify the infringement on the First Amendment rights of practicing attorneys, the second prong of the test is to determine whether the state has chosen the least restrictive means to implement the program. Has the Committee narrowly tailored its proposed mandatory pro bono plan so as to use the least restrictive means to achieve its goal? Again, the answer here is clearly "no."

If the state interest that provides the justification for the pro bono plan is to provide legal assistance to indigent individuals, then a plan involving court appointments on a case-by-case basis would be less restrictive. The needs of the indigent could be weighed on a case-by-case basis against the competing interests of the state and the appointed attorney. This would satisfy any legitimate governmental goal in a less restrictive manner. However, if the governmental interest is the broader goal of helping the poor beyond their legal needs, then surely attorneys should not be singled out as the financiers and foot soldiers in this new war on poverty.

The proponents of mandatory pro bono can be expected to argue that attorneys' constitutional rights of freedom of association are not implicated because attorneys have agreed to be regulated by the courts as a condition of practicing law. However, it is well established that the government cannot make the exercise of a right or the receipt of a benefit conditional upon association with a particular ideology. For instance, the government cannot compel an individual to display a state motto on a license plate as a condition of driving a car. Nor can the state compel support of a political party as a condition of employment for a government job. Furthermore, the government cannot, absent a compelling state interest, deny a public benefit because an individual has exercised a constitutional right.

107. See Kusper v. Pontikes, 414 U.S. 51, 59 (1973) (stating that even when pursuing a legitimate government interest, a state may not choose a means that unnecessarily restricts a constitutionally protected liberty); Elrod v. Burns, 427 U.S. 347, 362-363 (1976) (stating that the government must "employ means closely drawn to avoid unnecessary abridgement").


110. See Thomas v. Review Board of Indiana, 450 U.S. 707 (1981) (holding that a person cannot be compelled to choose between the exercise of first amendment rights and participation in an otherwise available public program); Sherbert v. Verner, 374 U.S. 398 (1963)
Just as the government cannot make an individual choose between the exercise of a right and the receipt of a benefit, so also a state cannot condition the practice of law upon the surrender of First Amendment rights. An individual cannot, absent a compelling state interest, be required to relinquish his First Amendment rights to speak through advertising in order to practice law.\(^\text{111}\) Nor can an attorney be denied a license to practice law because of the exercise of First Amendment rights.\(^\text{112}\) If the proposed pro bono plan is instituted, it will infringe upon the First Amendment and Article 1, § 8 rights of practicing attorneys. The state has no interest that justifies that infringement, and, even if it did, the proposed plan is not the least restrictive means to achieve any legitimate government interest.

The issue of mandatory pro bono has never been raised in the courts in the context of the First Amendment. However, the issue of mandatory bar dues is analogous to the type of compelled speech and association that has in the past been required in some states with unified or integrated bars. The U.S. Supreme Court first addressed the issue of an attorney’s right of non-association in the context of mandatory bar dues in *Lathrop v. Donohue.*\(^\text{113}\) A plurality of the Court (with strong dissents from Douglas and Black) upheld mandatory bar dues but found that the record did not permit the Court to rule on the constitutionality of certain specific expenditures.\(^\text{114}\) Following *Lathrop,* a number of courts held that mandatory bar dues used for political or ideological purposes may infringe upon the First Amendment rights of objecting attorneys.\(^\text{115}\) The Marrero Committee ignored these cases in its final report.\(^\text{116}\)


\(^{112}\) See Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957) (both of these cases holding that a state cannot deny a person the opportunity to qualify to practice law because of membership in the Communist Party).


\(^{114}\) See id. at 845; c.f. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233, n. 29 (1977) (stating that, with respect to the constitutionality of compelled fees to a labor union, “*Lathrop* does not provide a clear holding to guide us in adjudicating the constitutional questions here presented.”).

\(^{115}\) See Romany v. Colegio De Abogados De Puerto Rico, 742 F.2d 32 (1st Cir. 1984), on remand, 682 F. Supp. 674 (D.P.R. 1988); Gibson v. Florida Bar, 798 F.2d 1564 (11th Cir. 1986); but see Hollar v. Government of the Virgin Islands, 857 F.2d 163 (3d Cir. 1988); Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988).

\(^{116}\) The Marrero Report, in its discussion of constitutional challenges, does not take the
After the final report was issued, the U.S. Supreme Court issued a decision that might be the death knell of the Marrero Committee's mandatory pro bono proposal—and any other mandatory pro bono schemes that might follow. On June 4, 1990, the Court held in *Keller v. State Bar of California*\(^\text{117}\) that mandatory bar dues implicate the First Amendment rights of attorneys. California, unlike New York, has an "integrated bar" that requires attorneys to join and pay dues to the state bar association as a condition of practicing law.\(^\text{118}\) The State bar association adopted resolutions, filed *amicus curiae* briefs, and lobbied on legislation. Twenty-one members of the bar objected to the mandatory bar dues being used to finance political and ideological causes.\(^\text{119}\) The U.S. Supreme Court, in *Keller*, held that compulsory bar dues cannot be used to advance political or ideological causes.\(^\text{120}\)

While the decision in *Keller* did not deal with mandatory pro bono, it is likely to have a great impact upon any litigation challenging mandatory pro bono. Since *Keller* held that an attorney cannot be compelled to financially support political or ideological causes as a condition of practicing law,\(^\text{121}\) it follows that an attorney cannot be compelled to donate his time and labor for such causes. The only question that remains to be answered is whether the Marrero Committee's mandatory pro bono proposal is the type of "cause" that the U.S. Supreme Court held in *Keller* to be the type that attorneys cannot be compelled to support as a condition of practicing law.\(^\text{122}\)

The limits of what an attorney can be compelled to support and what is prohibited were not precisely drawn in the *Keller* decision.\(^\text{123}\) On the one hand the Court held that

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119. See *Keller*, 110 S. Ct. at 2231.
120. See id. at 2236.
121. See id.
122. See id. at 2236 (holding that the activities germane to the purpose for which compelled association was justified).
123. The lack of precision in line-drawing by the Court in *Keller* is not surprising considering the courts similar lack of precision in the compulsory union fees cases. Since the Court's landmark decision in *Abood* in 1977, the U.S. Supreme Court has revisited that issue in a number of cases without yet providing a definitive answer. See Lehnert v. Ferris Faculty Assn., 59 U.S.L.W. 4544 (May 30, 1991); Communications Workers of America v. Beck, 487 U.S. 735 (1988); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984).
the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State." \(^{124}\)

That standard might appear to give a fairly wide sweep to the types of activities that attorneys can be compelled to support. However, the Court went on to reject the analysis of the California Supreme Court, which used as its chargeability standard: to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." \(^{125}\) The U. S. Supreme Court stated that compulsory bar dues may not be used to finance some of the issues that the California Court's standard permitted. \(^{126}\) In confronting this difficult issue, the U.S. Supreme Court acknowledged that

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\text{[p]}\text{recisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern.}\(^{127}\)
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However, the \textit{Keller} Court did state that the analogy of compulsory dues in the labor union context provides "useful guidelines for determining permissible expenditures" \(^{128}\) in the context of bar dues. The labor union fee case in which the U.S. Supreme Court engaged in the most detailed line-drawing was \textit{Ellis v. Brotherhood of Railway Clerks}. \(^{129}\) While the line-drawing in that case was primarily based upon statutory considerations, \(^{130}\) it is noteworthy that the Court very narrowly restricted the types of activities for which that union could collect dues. \(^{131}\)

Some proponents of a mandatory pro bono plan might argue that mandatory pro bono is not political and hence no First Amendment

\(^{124}\) Keller, 110 S. Ct. at 2236 (citation omitted).
\(^{125}\) Keller v. State Bar of California, 47 Cal. 3d 1152, 1169, 767 P.2d 1020, 1030, 255 Cal. Rptr. 542, 552.
\(^{126}\) See Keller, 110 S. Ct. at 2237.
\(^{127}\) Id.
\(^{128}\) Id. at 2236.
\(^{130}\) See id. at 445-48.
\(^{131}\) See id. at 448-55.
interests are implicated. First of all, it is clear that the underlying premises of the Marrero Committee are ideological. The view that poverty is increasing, that the solution for increased poverty is greater governmental aid, and that the problem justifies the state (or in this case the Chief Judge) in coercing support for that solution is a view of society that is most likely associated with a “liberal” political view and not a “conservative” or “libertarian” view. Furthermore, an attorney may not have to spell out specific “political” or “ideological” objections to compulsory pro bono in order to assert a First Amendment claim. The U.S. Supreme Court has held that in the area of compulsory union dues, objectors do not have to articulate the specific objection, but merely have to make a general objection. Similarly, the U.S. Supreme Court has held that the state is limited by the First Amendment in making inquiries about a person’s beliefs and associations when an individual is applying for admission to practice law. So also, objectors to the compulsory contribution of their time or money to litigation activities through a mandatory pro bono program would not have to specify the nature of their objection in order to trigger their constitutional rights to forgo participation in such a pro bono plan.

Even if the mandatory pro bono plan is considered as some sort of abstract non-political, non-ideological charitable program, the compelled contributions for charity are still prohibited by the First Amendment. Most recently, the New York Court of Appeals used the analogy of a “labor union” dues case to find that the First Amendment prohibits public utilities from using rate-payer funds for charities. Similarly, if mandatory pro bono were considered to be compelled charity, then, according to the holding of the New York

132. See generally MARRERO REPORT, supra note 4 (government-mandated solutions to poverty are typical of liberal policy).

133. The Committee, in a further demonstration of its ideological perspective, in the section of its report dealing with “Societal Goals,” spoke favorably of judicially mandated increases in public benefits. See MARRERO REPORT, supra note 4, at 770-71. From the “conservative” or “libertarian” perspective, Charles Murray, in Losing Ground gives a detailed discussion of the negative effects of further public welfare and similar benefits on the poor. See MURRAY, supra note 31, at 56-68.

134. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977) (stating that “[t]o require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.”).

135. See Baird v. State Bar of Arizona, 401 U.S. 1, 6-7 (1971).

Court of Appeals, such compulsory charitable payments would infringe upon First Amendment rights.

The Committee's proposal to limit contributions made under the monetary contribution option to approved legal service organizations and public interest groups increases the impact upon the First Amendment rights of objecting attorneys. As the Committee pointed out in its Report, the economics of the private sector of the legal profession have made it harder to "attract substantial contributions of pro bono effort." The Committee's plan, by excluding pro bono efforts that serve those other than the poor, will make it even more difficult for other charities (i.e. environmental, First Amendment litigation, pro bono legal services for churches, etc.) to receive pro bono legal assistance. Attorneys who are limited by their resources are, thus, effectively prevented from contributing their pro bono services to the ideological cause or charity of their choice.

Furthermore, since only approved legal service organizations and charities qualify as potential recipients of monetary contributions, the proposal further narrows the range of options. Limitations that exclude legal service organizations, charities or any public interest groups that claim to represent the poor, but are for some reason not "approved," might constitute an attempt to make an impermissible content-based limitation on speech interests.

Disputes are inevitable as to what constitutes pro bono services to the poor. Does legal aid for an indigent minor seeking an abortion constitute pro bono services? What about legal aid for an indigent father seeking to prevent an abortion? If legal services for a poor person seeking more governmental aid constitutes pro bono services, will legal services for an individual seeking to abolish rent control (on the theory that in the long run it harms the poor) qualify

137. See Marrero Report, supra note 4, at 799-800.
138. Id. at 776.
139. One of the groups that provided written comments on the preliminary report was "Legal Action for Animals," which expressed concerns that the mandatory pro bono proposal would make it more difficult for that organization to attract volunteer attorneys and would detract from their own attorneys "pro bono" work. See Marrero Report Comments, supra note 9.
140. See Marrero Report, supra note 4, at 795-96 (discussing types of organizations that would qualify).
141. For example, in comments filed with the Marrero Committee, The Lawyers Committee for Human Rights sought clarification on whether the pro bono work on its refugee project would qualify under the Marrero Commission report to satisfy the mandatory pro bono requirement. See id.
as a valid pro bono service? If all of the above qualify under a mandatory pro bono program, it is likely that any cause will qualify and that the proposal could turn into little more than a windfall for ideological causes. However, if some or none of the above qualify, a mandatory pro bono program could implicate First Amendment problems by engaging in content discrimination.

The pro bono plan also calls upon the Chief Judge to direct the courts to appoint counsel more often.142 Such appointments at least have some statutory basis, and, in the context of criminal cases, there might be an important state interest to be fulfilled in satisfying the Sixth Amendment143 rights of the criminally accused. However, such appointments may create an additional impact upon the speech and associational rights of the appointed attorneys. Forcing the appointed attorney to speak for and associate with particular clients and for particular causes to which the attorney might object might be an even greater infringement on the First Amendment rights of the attorney.

B. The Plan will infringe on the rights of practicing attorneys under the Fifth Amendment of the United States Constitution and Article 1, § 7 of the New York State Constitution.

Both the Fifth Amendment to the United States Constitution144 and Article 1, § 7 of the New York State Constitution145 prohibit the uncompensated taking of private property for government use. While most Fifth Amendment cases deal with the taking of real property, the Fifth Amendment is not limited to protecting real property interests.146

While a number of courts have held that an attorney's time and services are not a property interest protected by the Fifth Amendment,147 many of the decisions are based on the erroneous assump-

142. See MARRERO REPORT, supra note 4, at 816-17.
143. U.S. CONST. amend VI.
144. See U.S. CONST. amend. V. ("nor shall private property be taken for public use, without just compensation.").
145. See N.Y. CONST. art. I, § 7 ("Private property shall not be taken for public use without just compensation.").
147. See Sparks v. Parker, 368 So. 2d 528 ( Ala. 1979); State v. Rush, 46 N.J. 399, 217
tion that courts have historically had the inherent power to appoint
counsel and that attorneys have historically had the obligation to
accept such appointments. 148 That misreading of history has now
been put to rest by the majority opinion in Mallard v. United States
District Court, which rejected that view. 149

Even among courts that have held that the uncompensated ap-
pointment of an attorney does not amount to an unconstitutional tak-
ing under the Fifth Amendment, many have tempered their opinions
in a manner that should give the proponents of the mandatory pro
bono schemes pause to reconsider. For instance, two courts that de-
clined to declare a system of below-market payments to appointed
attorneys to be unconstitutional nevertheless ordered the payment of
substantial fees to the attorneys involved. 150

Most recent decisions on this issue support the proposition that
an attorney's time and service is property protected by the Fifth
Amendment prohibition on taking. 151 In addition, several state
courts, although unwilling to hold that all mandatory uncompensated
appointments violate the Fifth Amendment, have held that when un-
compensated appointments have a significant impact upon an
attorney's income, the appointment might be an unconstitutional tak-
ing. 152

Recently, the Kansas Supreme Court reviewed all of the major

A 2d 441 (1966); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965).
148. See White Senant v. Yuan, 739 F.2d 160, 163, n. 3 (4th Cir. 1984); Petersen v.
Nodler, 452 F.2d 754 (8th Cir. 1971). See also 28 U.S.C. § 1915(d) (1988); but see United
States v. 30.64 Acres of Land, 791 F.2d 796 (9th Cir. 1986).
district courts to request attorneys to represent indigent civil litigants, it does not permit the
courts to require such representation).
150. See Bias v. State, 568 F.2d 1269 (Okla. 1977); People ex. rel. Conn v. Randolph,
that while the state has an obligation to furnish counsel for an indigent in a criminal case, it
also has an obligation to pay appointed counsel fair compensation, i.e. a rate which is not
"confiscatory"); DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987) (concluding
that Alaska's constitution prevents the state from compelling an attorney to represent an indi-
gen criminal defendant without just compensation); Bradshaw v. Bull, 487 S.W.2d 294 (Ky.
1972) (concluding that court-appointed counsel must be compensated on a reasonable basis);
See also State v. Lynch 796 P.2d 1150 (Okla. 1990) (holding that while the Oklahoma stat-
ute which provides for appointment of counsel by the court is not facially unconstitutional,
the statute provides an "arbitrary and unreasonable rate of compensation for lawyers which
may result in an unconstitutional taking of private property . . . .").
state court cases involving Fifth Amendment objections to the appointment of uncompensated counsel and reduced compensation for appointed counsel. That Court held:

Attorneys make their living through their services. Their services are the means of their livelihood. We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicians to treat the indigent without compensation. When attorneys' services are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good. And certainly when attorneys are required to donate funds out-of-pocket to subsidize a defense for an indigent defendant, the attorneys are deprived of property in the form of money. We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection.

When the attorney is required to advance expense funds out of pocket for an indigent, without full reimbursement, the system violates the Fifth Amendment. Similarly, when an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is genuine and substantial interference with his or her private practice, the system violates the Fifth Amendment. 153

The United States Supreme Court in recent years has begun to pay greater attention to the takings clause of the Fifth Amendment. 154 It is difficult to gauge how the United States Supreme Court might rule on a takings challenge to a mandatory pro bono plan. The decisions of the United States Supreme Court that hold that an attorney has a right to practice law that cannot be taken without due process of law 155 points in the direction that the Court might find the right to practice law to be a property interest protected by the Fifth Amendment of the United States Constitution.

Perhaps of greater significance with respect to a mandatory pro bono plan in New York is the decision of the New York Court of Appeals in Seawall Associates v. City of New York. 156 The New York Court of Appeals held in that case that the constitutional guarantee against uncompensated takings is violated.

when the adjustment of rights for the public good becomes so disproportionate that it can be said that the governmental action is 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'

So also, with respect to mandatory pro bono, it is clear that forcing attorneys to perform pro bono legal services for the poor (assuming, arguendo, that increased legal services is a public good) will be a taking, it is clearly forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole.

C. Mandatory pro bono denies attorneys of the right to due process under the law.

The Fifth and Fourteenth Amendments of the United States Constitution\(^{158}\) and Article 1, Section 6 of the New York State Constitution\(^{159}\) prohibit the taking of property without due process of law.\(^{160}\) While no courts have yet ruled that the appointment of an unwilling attorney to represent an indigent is a violation of the Fifth or Fourteenth Amendment due process provisions, at least two state courts have held that such appointments violate the due process clauses of their state constitutions.

One court in New York has held that the uncompensated appointment of counsel in civil cases violates "the constitutional rights of counsel as protected under the Due Process Clauses of the Fourteenth Amendment to the Federal Constitution and Article 1, Section 6 of this State's Constitution."

Most recently, the Oklahoma Supreme Court held that under Oklahoma's Constitutional due process provision\(^{162}\) an attorney appointed to a criminal case must be afforded the opportunity for a post-appointment hearing to show cause why the appointment should


\(^{158}\) See U.S. CONST. amend. V ("nor be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV. ("nor shall any State deprive any person of life, liberty, or property, without due process of law.").

\(^{159}\) See N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty, or property without due process of law.").

\(^{160}\) See supra notes 153-58.


\(^{162}\) See OKLA. CONST. art. 2, § 7 ("no person shall be deprived of life, liberty, or property without due process of law.").
not be accepted and to challenge the appointment as being without just compensation.\textsuperscript{163}

Due process is the one area where challenges to individual appointments may have more validity than challenges to a broad based pro bono plan. However, the Marrero Committee's proposal, which calls for the arbitrary implementation of the plan by the Chief Judge would, if implemented, almost certainly violate the due process rights of attorneys.

\textbf{D. The Plan will violate the Equal Protection Clause of the United States Constitution.}

The United States Constitution prevents state actors from classifying and treating groups in an unreasonable manner.\textsuperscript{164} While some classifications are permissible, there must be at least a rational relation between a classification and a permissible governmental objective.\textsuperscript{165} As discussed above, it is difficult to pin down exactly the governmental objective of the Marrero Committee's pro bono plan. At best it appears to be a desire to help the poor in some ways that are vaguely related to "the law." There is no rational relation between the legal classification (all practicing attorneys) and that governmental objective. The plan allows fund-raising and membership on the boards of directors of certain organizations as permissible ways for an attorney to fulfill his obligations under the plan.\textsuperscript{166} Yet there are no special skills that attorneys have that make them uniquely situated to raise money or sit on a board of directors. Many non-attorneys could do these jobs as well as, if not better than, conscripted attorneys. The plan allows some attorneys to make monetary contributions and allows members of large firms to pool their time (which is the equivalent of making a cash contribution) to fulfill their obligations under the proposed plan.\textsuperscript{167} Again, any member of society can make a contribution as easily as can attorneys. The primary relationship between attorneys and the proposed pro bono plan is that attorneys are the only class of individuals whom the Marrero Committee believes

\begin{footnotesize}
\begin{enumerate}
\item[163.] \textit{See State v. Lynch, 796 P.2d 1150, 1158 (Okla. 1990).}
\item[164.] \textit{See U.S. Const. amend. XIV, § 1; see e.g., Brown v. Bd. of Educ., 347 U.S. 483 (1954); but see New York City Transit Auth. v. Berzer, 440 U.S. 568 (1979).}
\item[165.] \textit{See F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 416 (1920).}
\item[166.] \textit{See MARRERO REPORT, supra note 4 and accompanying text (describing alternative ways for attorneys to fulfill their pro bono obligations); Marrero Report Comments, supra notes 9-11 and accompanying text.}
\item[167.] \textit{See MARRERO REPORT, supra note 4, at 769.}
\end{enumerate}
\end{footnotesize}
that the Chief Judge of New York has the power to coerce. That classification does not bear a rational relationship to any justifiable governmental objective.

If the plan were more narrowly drawn to require direct legal services by attorneys for individual indigents, then there would be a better argument that the classification bore some rational relationship to a governmental objective. Even if that were the case, the constitutionality of the classification would still be questionable. The Committee admits that the provision of legal services is a duty of society as a whole.\textsuperscript{168} If the duty is society’s, then everyone in society should share the burdens that come with that duty. There is no rational relationship that justifies forcing one class of individuals (in this case, attorneys) to fulfill an obligation that is society’s as a whole.

Furthermore, other professions are not required to take on comparable obligations. Doctors are not required to provide free medical care, dentists free dental care, accountants free financial planning, nor are teachers required to donate their time to educate the poor. The argument that since attorneys are licensed—and thus have a monopoly—they can be compelled to provide services while other professions are not compelled to provide pro bono services ignores the fact that many other occupations—from beauticians to taxi-cab drivers—are also often licensed and have a state-granted monopoly.\textsuperscript{169} At least one court has held that requiring attorneys to provide uncompensated representation is a denial of equal protection of the law.\textsuperscript{170} As the California Supreme Court stated, “[t]o charge the cost of operation of state functions conducted for public benefit to one class of society is arbitrary and violates the basic constitutional guarantee of equal protection of the law.”\textsuperscript{171} If the Committee’s proposed plan is implemented, it will deny attorneys equal protection of law.

In addition, there is a further equal protection problem within the classification “attorneys.” Not all attorneys are treated equally under the Marrero Committee’s pro bono proposal. Some attorneys are

\textsuperscript{168} See id. at 780.  
\textsuperscript{169} See State v. Lynch, 796 P.2d 1150, 1157 (Okla. 1990) (noting that Oklahoma has licensing statutes for thirty-nine professions and/or occupations other than the legal profession, yet none of these statutes require members of those other professions to donate their skills and services to the public).  
\textsuperscript{171} In re Jerald C., 36 Cal. 3d 1, 6, 678 P.2d 917, 919, 201 Cal. Rptr. 342, 344 (1984) (citation omitted).
allowed to buy out of the plan by making monetary contributions or essentially hiring a substitute by "pooling time." Atorneys admitted to practice less than two years are, however, not permitted to "buy out" or "pool" their time. There is no rational relationship between the objective of aiding the poor or providing legal services to the poor and these classifications within the class of attorneys.

E. The Plan might violate the rights of practicing attorneys under the Thirteenth Amendment to the United States Constitution.

The Thirteenth Amendment to the Constitution is an area of Constitutional law that is rarely litigated. Most commentators and courts have rejected claims that involuntary court appointments constitute slavery. However, at least one state supreme court has held that to compel an attorney to provide representation without compensation, even under an appointment system, would be "to impose a form of involuntary servitude upon him." Additionally, one federal district court has held that mandatory uncompensated appointments violate the Thirteenth Amendment.

While the issue of involuntary servitude is not the most clear-cut defect of the Marrero Committee's proposal, a court faced with a

172. See Marrero Report, supra note 4, at 769.
173. Id. at 770.
174. The Oklahoma Supreme Court found that its own system of mandatory appointments violated the Oklahoma State Constitution's equal protection provision because the burden of mandatory appointments within the class of attorneys was unevenly distributed. See State v. Lynch, 796 P.2d 1150, 1159, 1168 (Okla. 1990).
175. See U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").
176. See State ex rel. Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987) (holding that since no Kansas attorney, to the best of the court's knowledge, has been imprisoned for failure to accept an appointment, the state law providing for appointment of counsel does not violate the Thirteenth Amendment; State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966) (assuming that the duty to defend the poor is a professional obligation rationally incidental to the right to practice law so that constitutional claims "fall away"); See also Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U.L. Rev. 735, 767-770 (1980) (arguing that a condition of servitude is only within the Thirteenth Amendment's proscription when the individual is subjected to physical restraint or the threat of confinement if he or she refuses to serve).
178. See In re Nine Applications for Appointment of Counsel in Title VII Proceedings, 475 F.Supp. 87, 88 (N.D. Ala. 1979), vacated on other grounds 646 F.2d 203 (5th Cir. 1981) (stating that there was no need to reach constitutional questions in this case because the court could have ruled the appointment "unjust" under the state statute).
challenge to the type of plan proposed by the Committee might not readily dismiss a Thirteenth Amendment question. It could be argued that an attorney can always quit the practice of law, thus avoiding involuntary servitude. However, considering the debt incurred by many new lawyers from the expenses of going to law school, the option to quit the practice of law might not be considered a true option by some courts.

At some point the burden imposed by a mandatory pro bono program might raise the work requirements to the level of involuntary servitude. The Committee’s mandatory pro bono plan, if instituted, might not cross that threshold. However, involuntary servitude is an issue likely to be raised in any challenge to the plan if it is implemented. Furthermore, even if the plan does not violate the letter of the Thirteenth Amendment, it certainly violates the spirit of it.

V. THE PROPOSED PRO BONO PLAN WILL NOT ACCOMPLISH ITS INTENDED GOALS.

A. The Plan might hurt the people whom it is designed to assist.

In studies of laws and regulations, economists often conclude that many laws have unintended consequences and sometimes hurt, rather than help, the intended beneficiaries. This is likely to happen if the Marrero Committee Report is implemented.

For example, in the Marrero Committee’s explanation of why a mandatory pro bono program is needed, the Committee noted that part of the strains that have been placed upon legal service organizations in serving the poor have been brought about, in part, by “the incidence of crack and other forms of drug abuse and the rise in drug related crime.” Yet, as part of the proposed mandatory pro bono plan, the Committee proposes to include as qualifying services “coun-

179. Chicago Tribune, Jan. 20, 1991, at 1 (finding that the new-lawyer indebtedness prevents students from choosing public service career); Legal Times, Dec. 31, 1990, at 10 (reporting that average three year indebtedness for Washington D.C. law students is $37,500); 108 U.S. NEWS & WORLD REP. 76 (1990) (finding, inter alia, that cost of graduate school prohibits public service work); Nat’l L.J., Oct. 22, 1990, at 13 (stating that average loan repayment nationally is $45,000).

180. See Marrero Report Comments, supra note 9 (comments made by F. Garewood; J. Vigdor; A. Lipman; E. O’Connor; M. Stahl; Queens County Bar Association; Nassau County Bar Association; Washington Legal Foundation.

181. H. HAZLITT, ECONOMICS IN ONE LESSON (1946).

182. MARRERO REPORT, supra note 4, at 773.
sel in criminal matters for which no public obligation presently exists to provide funding for assistance of counsel, as for example, in the case of collateral attacks on a conviction or sentence. 183

Realistically, however, the addition of legal assistance in criminal matters where there is no public obligation will, in all likelihood, make law enforcement more difficult and thereby increase further the “incidence of crack and other forms of drug abuse and the rise in drug related crime.” 184 The poor are likely to receive greater benefits if attorneys devoted their pro bono time to providing legal assistance to victims of crime (no matter what their economic status). The poor would also probably be better served if the monetary contributions allowed under the plan were paid to the state to hire more police, prosecutors, and judges and to build more prisons. Those types of expenditures would have a greater impact on stopping drug abuse and the drug related crime that terrorizes the poor 185 than would pro bono efforts on behalf of convicted criminals making collateral attacks on their sentences.

Another unintended consequence of the Committee’s pro bono plan is that the proposal will have the likely result of reducing the number of attorneys who now provide reduced fee legal services to the near poor. Whether it is in the form of the $50-per-hour payments or actual man hours spent on a case, the mandatory pro bono plan acts essentially like a tax. 186 As with all taxes, the producer (in this case the attorney) is likely to pass the cost of the tax on to his consumers (the clients). 187 The result of the plan will be to increase the costs of legal services. For the corporate or wealthy client that cost can be easily absorbed, but for the individual living at the margin working to keep himself above the poverty line, the increased cost may be sufficient to prevent that potential consumer from being able to afford legal services. In addition, those attorneys who currently provide reduced fees for the near poor are less likely to be able to assume that financial burden on top of the mandatory pro bono plan.

Furthermore, the quality of service by lawyer-draftees would be

183. Id. at 793.
184. Id. at 773.
185. See generally, OFFICE OF NAT’L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY (1989).
186. While mandatory pro bono acts like a tax, it most clearly is not a tax since it is levied by the Chief Judge and not the legislature on one discrete class of “tax payers” for the benefit of private individuals and not the public.
questionable. At least one court has questioned whether the rights of an accused defendant is violated when the counsel appointed is uncompensated. In addition, the quality of representation provided by mandatory pro bono might not serve the needs of the client.

B. The mechanics of the Plan will discourage genuine voluntary pro bono assistance to the poor.

The Bar has a long history of providing pro bono legal services to the poor and to charitable groups and organizations. That historical tradition is likely to be endangered by the mandatory pro bono plan proposed by the Committee.

The program will make practicing attorneys bear the burden of providing legal assistance that the Committee, itself, states is properly the responsibility of society as a whole. The Committee scheme bears more relationship to a tax than the type of voluntary services members of the Bar have performed in the past. Imposing a special tax for the benefit of society (or at least one economic class of society) upon one class of individuals (whose class membership is defined by occupation) is a step into the medieval past reminiscent of when rights and obligations were imposed upon guilds rather than upon individuals. Such a feudal system is in stark contrast to the republican form of government where individual citizens have rights and obligations. If the obligation to helping the poor is state-imposed requirement, it is less likely that individual attorneys will feel any personal obligation to do any pro bono work beyond that required.

Furthermore, while attorneys will have this additional obligation to the state as imposed by the pro bono plan, other professionals and laborers are not burdened by such a special tax in-kind. Architects are not required to design homes for the poor, doctors and dentists are not required to provide uncompensated medical care, taxi drivers are not required to provide free transportation, nor are construction union workers required to build housing for the poor. Such an inequitable

189. See MARRERO REPORT, supra note 4, at 770-71.
190. See R. De Roover, Economic Thought: Ancient & Medieval Thought, 4 INT’L ENCYCLOPEDIA OF SOC. SCI. (1968); see also Lucas v. Luis Elec. Power, 466 F.2d 638 (7th Cir. 1972) (en banc).
191. See U.S. CONST. art. IV, § 4; see also A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (H. Deeve trans. 1966).
distribution of society's burdens may lead to feelings of resentment by some attorneys, not only toward the program, but also toward their "pro bono" clients.

By abandoning the long tradition of the legal profession of providing voluntary pro bono service to individuals and turning it into a coerced obligation owed to the state, the Committee plan, if implemented, will likely deal a fatal blow to the noble tradition of public service in which many of the members of the Bar have participated in the past. It is noteworthy that the volunteers in the Housing Court Report, whose report was cited by the Committee as evidence as to why a mandatory program was needed, almost unanimously registered their opposition to a mandatory pro bono requirement. As was reported by the attorneys who worked on the Housing Court Report, "[t]his group of volunteers was committed to volunteerism." Other individuals who have observed voluntary pro bono activities have also suggested that mandatory pro bono might not only fail to aid the poor, but might hurt the poor. The spirit of volunteerism should be encouraged; unfortunately, the Committee's proposed plan will only smother it.

With the burden of the mandatory pro bono service, simple economics will prevent genuine voluntary pro bono service by all but a handful of attorneys. Many worthy charities, churches, and causes—including civil rights and civil liberties—that previously benefited from the voluntary pro bono services of attorneys might not qualify under the Committee's proposed plan. Those causes, churches and organizations may no longer be able to obtain a forceful advocate because they cannot afford representation, and the attorneys who would previously have volunteered their time are now coerced into serving the Committee's or Chief Judge's favorite charity.

The most far reaching and successful pro bono program listed in the Committee's report is the program in Orange County, Florida.

195. See MARRERO REPORT, supra note 4, at 789-97.
196. See Minutes of the Board of Trustees of the Legal Aid Society of The Orange County Bar Association, (Aug. 27, 1988) (discussing the Legal Aid Referral (LAR) policy, which requires all members of the bar to take cases which are referred to them by the Legal Aid Society); See also By-laws of the Orange County Bar Association, art. II (making the refusal to accept LAR cases a ground for termination from the Orange County Bar).
That program is, at its heart, voluntary. Membership in the bar association is voluntary and only those voluntary members are required to participate. The program even refuses to accept most forms of governmental financial support. It is that type of program—a voluntary, nongovernmental program—that best serves the interests of the poor, the Bar, and justice.

It is also worth noting that while the Committee’s plan purports to be designed to help one class of society based on their financial condition, it is likely to fracture the bar into distinct classes based upon individual attorney’s financial condition. Some members of major law firms and wealthy attorneys might wade into the courts to litigate on behalf of individual poor persons. However, the mandatory pro bono plan is structured so as to make it easy for those individual attorneys to avoid direct service to the poor. The large law firms can “pool” the pro bono work, and others can make a monetary contribution in order to avoid providing direct services to the poor. In comparison, the solo practitioner and the small firm that is constantly struggling to stay in the black has no option (short of requesting an exemption) but to provide direct legal services. The contrast between the wealthy attorney fulfilling his obligation under the plan by raising money for a legal aid organization at a black-tie fund raiser and the struggling young attorney being forced to donate twenty hours of his precious time in direct service to the poor makes a mockery of the Committee’s plan.

The Committee’s proposed pro bono plan will do a disservice to both the individuals who previously volunteered their time and the indigent who received quality legal services voluntarily given to them. Furthermore, the legal profession itself will lose another distinguishing characteristic that sets it apart as a profession. In short, by making the provision of legal services for the poor comparable to paying taxes—something that might do some good, but is done only because it is required and is something about which everyone complains—voluntary pro bono activities will be likely to all but disappear in New York and everyone will be the poorer for it.

197. By-laws of the Orange County Bar Association, art. II, § 1; See also supra note 23.
198. See supra note 23 and accompanying text (explaining how the Marrero Committee was mistaken in its conclusion that Orange County’s pro bono provisions are mandatory).
199. See MARRERO REPORT, supra note 4, at 769.
200. Id.
VI. THE PLAN WILL LIKELY SERVE AS A VEHICLE TO FUND AND STAFF IDEOLOGICAL LITIGATION.

The proposed mandatory pro bono plan is structured so that it is likely that the chief beneficiaries of the plan will not be the poor, but will be various approved legal aid societies and charities. Both the monetary contribution option and group service option make it likely that organizations, rather than poor individuals, will receive the bulk of the aid generated by the Marrero Committee proposal.

That portion of the plan which allows solo practitioners and firms with up to ten attorneys to make a cash contribution in lieu of providing actual legal service, will provide a ready pool of money for organizations. When considering the comparative advantages of exercising the monetary option (not being tied down in litigation that could mushroom well beyond the required hours, no potential malpractice problems, no additional overhead expenses, etc.), many solo practitioners and small firms who can afford the monetary option will exercise that option.

According to the Committee's plan, such funds could be donated to "legal services organizations and public interest groups, determined, by reason of their services to poor persons, to be eligible for the lawyers' monetary contribution." There is little discussion in the Committee's report as to how the determination would be made or who would make the determination as to which legal service and public interest groups would be eligible. If the list is restricted, it would, as discussed above, increase the likelihood that the plan would be struck down for its attempt to make content-based restrictions on speech.

If the list of eligible groups is not restricted, it is likely that the monetary contributions will serve as a funding vehicle for legal service programs and public interest groups that have ideological agendas. In *Legal Services Corporation: The Robber Barons of the Poor?*, the ideological agendas of many of the federally funded legal services organizations are set out in some detail. While all of the legal services organizations purport to assist the poor, *The Robber Barons* makes it clear that for many of those organizations

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201. *Id.* at 801.
202. *Id.* at 799-801.
203. *Id.* at 799.
204. *Id.*
their goals are first and foremost ideological.\textsuperscript{205}

In response to the reports of abuses of many legal service organizations and with authority from Congress, the Legal Services Corporation has imposed a number of regulations to attempt to limit some activities of those organizations.\textsuperscript{206} However, since the uses to which the money received through the monetary option may not be restricted by the Legal Services Corporation's regulations,\textsuperscript{207} grantees might use the money to end-run the administrative restrictions and engage in the types of ideological activities that are prohibited by regulation.\textsuperscript{208} The Committee's report sanctions the use of mandatory pro bono to engage in some of those prohibited activities such as legislative lobbying and collateral attacks on criminal convictions.\textsuperscript{209} Those activities are, at best, tangentially related to the needs of the poor and are often contrary to the real needs of the poor.

The special provisions for large firms to pool their hours is also likely to result in a staffing of ideological cause-oriented litigation at the expense of the day-to-day type of legal services that some individual poor people may genuinely need. In \textit{Washington Law Firms' Pro Bono Work: Shortchanging the Poor?},\textsuperscript{210} a study of the pro bono activities of the large Washington, D.C. law firms demonstrated that those firms, while investing a large amount of money in pro bono activities, spend relatively little time in traditional poverty law areas such as landlord-tenant, consumer complaints, and family law.\textsuperscript{211} Instead, much of the pro bono activity was targeted to assist in ideological litigation only tangentially related to the poor.

It is likely that if the pro bono plan is implemented, many New York law firms will direct their mandatory pro bono activities toward high profile "cause" litigation, at the expense of the more mundane areas of law that affect poor people on an individual basis. The pro bono program might provide some check on the scope of ideological cause litigation because of the requirement that approved recipients must serve the poor. Nevertheless, just as federally funded legal services organizations have been able to promote political and ideologi-

\textsuperscript{205} \textit{Id.} at 3-4, 10-13, 93-95.
\textsuperscript{207} 45 C.F.R. § 1610.3 (1990).
\textsuperscript{208} 45 C.F.R. §§ 1608, 1612, 1613, 1615 (1990).
\textsuperscript{209} 45 C.F.R. §§ 1612.3-1612.4, 1615 (prohibiting legislative lobbying and collateral attacks on criminal convictions, respectively).
\textsuperscript{210} Washington Legal Foundation, 1988.
\textsuperscript{211} \textit{Id.} at 1-4, 55-58.
Despite Congressionally mandated restrictions, it is likely that law firms will be able to promote, through their pro bono activity, litigation that benefits causes more than individuals.

A mandatory pro bono program in which Tulane and Loyola University Law students in Louisiana participated demonstrated how a program designed to assist the "traditionally underrepresented" can become a vehicle for ideological causes. The students in that program engaged in legislative advocacy on such programs as campaign finance, capital punishment and lead poisoning. Thus, it may be expected that some legal aid groups or organizations who would be recipients of monetary contributions under the proposed plan will find equally creative ways to promote ideological causes, all in the name of the "poor."

Since the plan as structured will likely benefit groups and organizations rather than indigent individuals, most benefits that poor individuals will receive will result from a new type of bizarre "trickle down" theory. Only time will tell how much, if any, of the money and aid will trickle down to the poor. One thing is certain: the proposal, if implemented, will be a potential gold mine for groups and organizations seeking funding to promote ideological causes.

CONCLUSION

The solution to the problem of meeting the unmet legal needs of the poor lies in volunteerism and deregulation—not more government. The Voluntary Pro Bono Program of the New York State Bar Association is such a solution and should be encouraged. Some voluntary local bar associations might want to explore the Orange County, Florida model. Experimentation and variance based on geographic and economic realities is likely to produce creative solutions to meet the legal needs of the poor.

In addition to promoting voluntary pro bono activities, the Chief Judge, legislators, the organized bar and other interested parties should explore ways in which all citizens can have greater access to legal services. One alternative might be to permit paralegals to per-
form more non-courtroom services, such as the drafting of wills and uncontested divorce agreements.\textsuperscript{216} Expansion of access to small claims court is another alternative that might aid all citizens. The reforms suggested by the \textit{Housing Court Report} and the \textit{Matrimonial Report} should also be explored.

Other economic reforms, not directly related to the practice of law, could also reduce the need for attorneys. For example, the abolition of rent control would lead to a greater availability of housing\textsuperscript{217} and, thus, diminish the amount of landlord-tenant disputes.

Helping the indigent is an important societal goal. For those who believe that poverty is increasing and that the needs of the poor are best met by entitlement programs, mandatory pro bono is an attractive way to circumvent the democratic process and achieve ideological goals. However, for individuals who doubt the claims of the war on poverty or believe that there are solutions short of using the state to compel service or who respect the constitutional rights of those who do not subscribe to the liberal views of the Marrero Committee members, mandatory pro bono is an idea that will be resisted in the courts.

While mandatory pro bono serves the interests of liberal interest groups, it would be a mistake for the liberal proponents of mandatory pro bono to disregard objections raised to the plan as simply the views of “conservatives.” The Honorable Rose Bird, former Chief Justice of the California Supreme Court, was considered one of the most “liberal” jurists of recent years.\textsuperscript{218} Yet she recognized the inherent unfairness of requiring counsel to serve without compensation. In a dissenting opinion she stated:

\begin{quote}
I am also of the view that lawyers should not be forced to represent anyone without adequate compensation. The financial burden engendered by ensuring the constitutionally guaranteed right to counsel should not be placed on the shoulders of lawyers. That burden
\end{quote}

\textsuperscript{216} Duckett, \textit{Benefits, Trials of Becoming Your Own Lawyer}, L.A. Times, May 11, 1990, at 12, col. 1 (part N) (citing a public interest group survey which concluded that allowing paralegals to work without attorney supervision could save legal consumers billions of dollars annually); Chalfie, \textit{Break the Lawyers’ Legal Advice Monopoly}, Newsday, Dec. 3, 1989, at 4 (Ideas) (citing a California legal self-help publisher that claims that using nonlawyer services (such as paralegals) instead of low cost lawyers for just four routine matters (uncomplicated divorces, wills, bankruptcies and business incorporations could save consumers $1.3 billion in legal fees).

\textsuperscript{217} W. Block, \textit{Rent Control: Myths & Realities} (The Fraser Institute ed. 1981).

squarely rests with the state. If an attorney takes on the representation of an indigent, he or she should be properly compensated. As with any other working person, lawyers should be properly compensated for their time and effort. Justice King aptly expressed these sentiments in his concurring opinion in the Court of Appeals [sic]. "No one would dare suggest courts have the authority to order a doctor, dentist or any other professional to provide free services, while at the same time telling them they must personally pay their own overhead charges for that time. No crystal ball is necessary to foresee the public outrage which would erupt if we ordered grocery store owners to give indigent two months of free groceries or automobile dealers to give them two months of free cars. Lawyers in our society are entitled to no greater privileges than the butcher, the baker and the candlestick maker; but they certainly are entitled to no less."219

If the Chief Judge were to implement the Marrero Committee proposal, the judiciary—the traditional defender of civil liberties—would assume the role of leading an assault upon civil liberties.