The Private Bar, the Public Interest, and Tax Incentives: Monetary Motivation for Action

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Over the last few years, there has been an increasing awareness of the need for legal advocacy in the public interest.[1] Yet, with both government agencies and public interest law firms working full time, there simply remain far too few people to meet the demand. Further, there are indications that the number of firms devoted solely to representation of the public interest is at a peak, with little chance of continued growth.[2]

Some writers have suggested that the private bar should become more responsive to the problems of the environment, urban blight, the poor, racial minorities, and other areas affecting the public interest.[3] To this the response has often been that while many in the private sector would be willing to help, the cost of any significant *pro bono* contribution would be prohibitive since most private attorneys would be forced to turn down paying clients in order to serve in the public interest. A tax incentive for the contributions of private lawyers may be the stimulus needed to promote involvement of the private bar in such endeavors.* While not generally affording the attorney a net cost saving,[4] a tax incentive might operate to minimize the amount of fees forgone as a result of increased involvement in work *pro bono publico.*

It is the purpose of the following discussion to analyze the desirability of a tax incentive to induce private lawyers to provide public interest legal assistance. An attempt will be made to assess the probable effect of the tax incentive and to compare the advantages and disadvantages of the tax incentive vis-à-vis direct government expenditures.

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1. *See* Cahn & Cahn, *Power to the People or the Profession—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Halpern & Cunningham, *Reflections On The New Public Interest Law: Theory and Practice At The Center For Law And Social Policy*, 59 GEO. L. REV. 1095 (1971); Note, *Structuring The Public Service Efforts Of Private Law Firms*, 84 HARV. L. REV. 410 (1970).
2. Cahn & Cahn, *supra* note 1, at 1007.
3. *See generally* Brennan, *Responsibilities of the Legal Profession*, 54 A.B.A.J. 121 (1968).

* Although the idea of using a tax incentive to stimulate the gratuitous services of various professional groups is not unique, the writer has found no in depth study of the benefits of the incentive for *pro bono* legal activities of private lawyers.

4. *See* note 46 *infra.*

The tax incentive is a governmental tool designed to stimulate a desired response through preferred tax treatment.[5] Although it has been proposed as a solution for practically every monetary malady of modern society,[6] the tax incentive has been subject to recent criticism from some eminent tax authorities.[7] The Treasury Department has historically fought tax incentive legislation, and the chairman of the House Ways and Means Committee has noted that tax incentives are "riding a crest of popularity" and has characterized them as a form of "backdoor spending" which is "very often wasted."[8]

An argument frequently raised in opposition to the use of the tax incentive is that taxing power should not be used as an instrument of social policy, but only as a method of raising revenue for the government.[9] The proponents of this viewpoint see direct federal expenditures as a more desirable method of government support for social goals.[10] The federal taxing mechanism has frequently been used, however, to achieve social goals.[11] Modern tax theory takes for granted that tax laws may have an impact beyond simple revenue raising:[12]

> Raising revenue is never unmixed with other considerations of public welfare; revenue itself is desirable largely for its "regulatory" effect on private spending. It is inevitable that every tax will have some directive effect on economic life. The line between regulatory and other effects of taxation is thus a difficult one to draw in practice.[13]

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5. *Compare* Aaron, *Inventory of Existing Tax Incentives—Federal*, in TAX INSTITUTE OF AMERICA, TAX INCENTIVES 39, 40 (1971) (tax incentives denote any provision or proposed amendment to the federal code which "alters resource allocation as to improve economic efficiency"), *with* Slater, *Tax Incentives of State and Local Governments*, in TAX INSTITUTE OF AMERICA, TAX INCENTIVES 51 (1971) ("Any tax exemption or tax preference . . . would seem to qualify as an incentive if it effects economic decisions or leads to actions that would not have otherwise occurred.").

6. Surrey, *Federal Tax Institute of New England*, in T. HUNTER, THE TAX CLIMATE FOR PHILANTHROPY 52 (1968) ("[A]ll you need to learn what's wrong with America is to read the tax bills in Congress. Wherever you see a tax proposal, that's where the action is.").

7. *See generally* Surrey, *Tax Incentive as a Device for Implementing Government Policy: A Comparison With Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

8. T. HUNTER, *supra* note 6, at 33.

9. JOINT COMMITTEE ON THE ECONOMIC REPORT, THE FEDERAL REVENUE SYSTEM: FACTS AND PROBLEMS, 84th Cong., 1st Sess., at 10 (Joint Comm. Print 1956). *See also* R. BLOUGH, THE FEDERAL TAXING PROCESS 420 (1952).

10. *See generally* Surrey, *supra* note 7.

11. Goldman, *Income Tax Incentives For Political Contributions: A Study of the 1963 Proposals*, 11 U.C.L.A.L. REV. 212, 214 (1964): "The use of tax incentive lgislation for economic and social purposes, rather than for the purpose of raising revenue, is not a recent development." *See also* R. BLOUGH, *supra* note 9, at 422.

12. T. HUNTER, *supra* note 6, at 32.

13. R. BLOUGH, *supra* note 9, at 421. *See* J. PECHMAN, FEDERAL TAX POLICY 5 (rev. ed. 1971): "Taxation—the means by which a government implements decisions to transfer resources from the private to the public sector—is a major instrument of social and economic policy. It has two goals: to distribute the costs of government fairly . . . and to promote economic growth, stability, and efficiency."

Thus, there has been no blanket rule either for or against the use of tax incentives for the achievement of non-revenue goals.[14] In assessing the desirability of the incentive in a particular case the inquiry should be three-fold: (1) whether the desired effect warrants government support; (2) whether a tax incentive will promote the desired effect; and (3) whether a tax incentive will be more effective than direct government expenditures.[15]

DESIRABILITY OF GOVERNMENT SUPPORT

Government stimulation of public interest legal activity has already begun in some areas. In the last decade, the federal government has made a concentrated effort to provide free legal representation to those individuals deemed "disadvantaged."[16] Examples of government programs to provide legal assistance for the public include OEO legal services, various legal aid and public defender programs, and consumer fraud divisions such as are found within the Federal Trade Commission and the Food and Drug Administration. Recently, in an effort to include all groups whose aims coincide with the public interest,[17] the federal government has granted tax-exempt status to public interest law firms under section 501(c)(3) of the *Internal Revenue Code of 1954*.[18]

14. Stone, *Tax Incentives as a Solution to Urban Problems,* 10 WM. & MARY L. REV. 647, 650 (1969).

15. "The desire to achieve a particular regulatory effect . . . may constitute a reason, perhaps the major one, for adopting a tax proposal. Policy makers, in reaching a decision on the tax proposal, must then weigh the desirability of the regulatory effect against the objections that may be interposed." R. BLOUGH, *supra* note 9, at 420.

16. An example of the federal government's efforts to aid the disadvantaged is the tax-exempt status of organizations working in their behalf. This status allows the contributor of funds to deduct the full amount of the contribution from his taxable income. INT. REV. CODE OF 1954, §§ 170, 501(c)(3). *See also Hearings On Tax Exemptions Affecting Poverty Programs Before the Subcomm. on Employment, Manpower and Poverty of the Senate Comm. On Labor and Public Welfare,* 91st Cong., 2d Sess. 57 (1970) (statement of Randolph W. Thrower, Commissioner of Internal Revenue Service) [hereinafter cited as *1970 Hearings*].

> A review of the activities of organizations recognized in the past as being "exclusively charitable" in providing legal representation for others will indicate that they have provided legal assistance to the disadvantaged in our society. It has been a minority of our people who have, through these charitable undertakings, been extended privileges otherwise available only to the majority. They have been the poor, the underprivileged, the victims of racial discrimination and those denied the benefit of human and civil rights.

1970 Hearings at 59.

17. The term "public interest" is one with varied meanings. The Internal Revenue Service has distinguished the " 'public interest' law firm organized to initiate, stimulate, and handle litigation broadly in the public interest" from the "familiar legal aid group which provides representation to specifically identified persons or groups such as poor and underprivileged people" who are traditionally recognized as objects of charity. IRS News Release No. 1078, November 12, 1970, *1970 Hearings, supra* note 16, at 9. There is no requirement, however, that a majority of people agree with the position of the firm or that the position be correct. *1970 Hearings, supra* note 16, at 60-61.

18. Recently, the Internal Revenue Service granted public interest law firms

Despite government efforts, much remains to be done. Government agencies have not proven adequate in meeting the task of providing legal representation for all those who need it, nor have private efforts significantly reduced the need.[19] Although some large firms have been reported donating their services *pro bono*,[20] most have not chosen to pursue a significant amount of public interest work. One writer reports that there is over $500 million worth of work to be done in the poverty area alone.[21] The result is that more manpower is needed for the public interest to be truly represented.[22]

Although some young attorneys are refusing the monetary advantages offered by the large private firms and instead are joining the ranks of government agencies and public interest law firms,[23] such interest is likely to be short-lived.[24] The income incentive of private practice is simply too attractive to young lawyers. Government agencies and public interest law firms have not succeeded in remaining competitive with the private firms on a starting salary basis, and opportunities for income advancement in the private sector are significantly

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tax-exempt status similar to that traditionally granted organizations working on behalf of the disadvantaged. *See* Rev. Proc. 71-39, INT. REV. BULL. No. 48, at 30-31 (1971).

19. Woodard, *Private Law Firms and Services for The Poor*, 28 LEG. AID BRIEF. 171 (1970). Even government efforts to provide legal assistance to the disadvantaged have fallen far short of its goal. Ashman & Woodard, *Private Law Firms Serve the Poor*, 56 A.B.A.J. 106 (1970).

20. N.Y. Times, June 22, 1968, at 14, col. 3.

21. Ashman & Woodard, *supra* note 19, at 566. For a discussion of firms whose main involvement is public interest law, see Halpern & Cunningham, *supra* note 1.

22. Ashman & Woodard, *supra* note 19, at 172.

23. Halpern & Cunningham, *supra* note 1, at 1102. The authors indicate two reasons for the dramatic shift toward public interest law: (a) young lawyers have become more aware of the need for bureaucratic and corporate reform, and (b) the public interest law field offers some of the most challenging litigation in contemporary practice. *Id.* Serving as sources of inspiration for public interest lawyers are a growing number of critics of the American corporate state. *See generally* A. BERLE, POWER (1969); A. BERLE, POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY (1959); A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1967); J. ELLUL, THE TECHNOLOGICAL SOCIETY (1964); J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967); M. HARRINGTON, THE OTHER AMERICA (1962); H. MARCUSE, ONE-DIMENSIONAL MAN (1964); W. WHYTE, THE ORGANIZATION MAN (1956).

24. The increase in public interest activity has been attributed largely to "limited, short-term foundation largesse." Cahn & Cahn, *supra* note 1, at 1007. Other factors contributing to the short-term growth of public interest law firms include:

> [T]he phenomenal growth of the poverty law field, from $5 million in 1964 to $58 million in 1970, and moving rapidly toward $90 million within the next year or so; the increased congressional backlash against government programs which underwrite quasi political organizing efforts of the poor and the disenfranchised; the war in Viet Nam with its concomitant incentive to stay in law school and to enlist in the VISTA lawyers program; the new tax legislation with its ominous ambiguity regarding organizations which appear to bear the stamp of social activism; and the increased racial polarity of our nation which has made the services of fewer and fewer white professionals acceptable to ethnic minorities.

Id. at 1007 n.7.

greater.[25] The tendency in the present system is therefore for those who work exclusively in the public interest to stay only a short time.[26]

Once the young attorney has entered the realm of private practice, his chances of offering significant contributions in the *pro bono* area are greatly reduced. Most private firms today have more than enough paying business to completely occupy their manpower.[27] The result is that neither the attorney employed by a law firm nor the lawyer who is engaged in independent practice can afford to participate significantly in the realm of public interest activity. The former is usually left to pursue such activity in his spare time,[28] while the latter must forgo the income which he would have received had he taken a paying client instead. As one writer has stated: "For young attorneys, participation in *pro bono* work would mean forgoing income at the time they are earning least, in the early years of practice. This cost would deter many from participating in the program even if they wanted to."[29] The conflict between high salaries and public interest work clearly prevents many private lawyers from contributing significantly to the solution of public interest problems.

Tax benefits for legal activity in the public interest have been directed mainly toward the attorney who wishes to work full time in the public interest,[30] either for the government or for a public interest law firm. No monetary incentive has been provided for the attorney or firm whose main interest is a private practice, but who might be interested in providing some public interest services.[31] Stimulation of

25. For starting salaries of federal government career attorneys, see AMERICAN BAR ASS'N, FEDERAL GOVERNMENT LEGAL CAREER OPPORTUNITIES 8 (1971).

26. Ashman & Woodard, *supra* note 19, at 172.

27. *See* Note, *supra* note 1, at 412.

28. For disadvantages of the "spare time" plan for public interest contributions of private law firms, see *id.* at 419 n.26.

29. *Id.* at 412. The indications are that many young attorneys have an interest in *pro bono* activity. The results of one study indicate that 85 percent of all students desire to participate in "non-remunerative public service work during their careers" and about 65 percent indicate that public service opportunities would be an important factor in their choice of jobs. *Id.* at 410 n.3.

30. *But see* Scholenberg & Weinberg, *The Role of Judicare in the American Legal System*, 54 A.B.A.J. 1000 (1968). The authors describe a relatively new concept in government support for the poor. The federal Judicare program is designed to reimburse private attorneys for time spent in representing indigent clients. The program has been marginally successful in four states: Wisconsin, Montana, California, and Connecticut. *Id.* at 1001. The indigent is allowed to pick his own attorney, and the government requires that for the attorney to receive the stipend, he must treat the indigent as a paying client. *Id.* Consistent with other direct government expenditures, Judicare has been known for its high administrative costs, which have averaged about one-third of the entire program. *Id. See also* Voahees, *The OEO Legal Services Program*, 53 A.B.A.J. 23, 26-27 (1967).

31. Although the government allows public interest law firms to maintain tax exempt status under INT. REV. CODE OF 1954, § 501(c)(3), private firms are not given monetary incentives to do public interest work. As a result, attorneys wishing to do more public interest work than the firm is willing to subsidize may have to leave the firm. Note, *supra* note 1, at 412.

private efforts in the public interest area would be merely an expansion of the existing government policy which allows tax benefits to public interest law firms. Such stimulation would also result in significant advantages over the traditional public interest law firm.

Mobilization of the resources of private attorneys would not only increase the number of attorneys available to serve in the public interest, but would also bring to public interest law the particular training and talent of the private lawyer. As public interest law has broadened its scope from poverty and civil rights cases to include the problems of the general public, the legal problems have also broadened. It is no longer the case that a good poverty lawyer or an attorney with a few years training in the public defender's office can cope with all of the various issues affecting his client. Today's public interest advocate must be equipped to fight the large private interests on their own ground. It is essential for him to be acquainted with the intricacies of a variety of legal areas.[32] Public interest attorneys, however, seldom have expertise in the needed areas of economic development, antitrust, tax law, municipal and metropolitan financing, communications law, and corporate law.[33] Involvement of private firms would provide a ready source of expertise in these areas.[34]

The involvement of private attorneys in public interest problems would also create a better attorney-client relationship. The traditional relationship between the attorney and his client is often sadly lacking in the public interest setting for several reasons. First, the public interest lawyer may never develop a close relationship with his client or the client's problems because of an overburdening case load.[35] This problem is most evident in legal aid[36] and public defender's offices[37] where the attorneys are required to handle the cases of all those who

32. *See* Boasberg, *The Private Practice of Urban Law,* CASE W. RES. L. REV. 323, 324-25 (1969).

33. Cahn & Cahn, *supra* note 1, at 1031-32; Boasberg, *The Urban Crisis: What Role for the Lawyer,* 27 LEG. AID BRIEF. 207 (1969). Mr. Boasberg also cites constitutional issues as areas where legal services attorneys lack expertise. Close scrutiny, however, does not bear out this proposition. In the area of the constitution and welfare payments, for example, legal services attorneys have been largely responsible for some of the leading decisions in recent years. Some recent cases fought by legal service attorneys include: Goldberg v. Kelly, 397 U.S. 280 (1970) (Columbia Center on Social Welfare Policy of Law, National Institute for Education in Law and Poverty); Wheeler v. Montgomery, 397 U.S. 280 (1970) (San Francisco Neighborhood Legal Assistance Foundation, Columbia Center On Social Welfare Policy & Law, Roger Baldwin Foundation of the American Civil Liberties Union, Morrisania Neighborhood Legal Services, Legal Aid Society of New York, Alameda Legal Aid Society); Shapiro v. Thompson, 394 U.S. 618 (1969) (Connecticut Civil Liberties Union, Columbia Center On Social Welfare Policy & Law, 13 legal services offices); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (San Francisco Neighborhood Legal Assistance Foundation).

34. Cahn & Cahn, *supra* note 1, at 1032.

35. Boasberg, *supra* note 35, at 334.

36. *Id.*

37. Sudnow, *The Public Defender,* in SOCIETY AND THE LEGAL ORDER 389 (R. Schwartz & J. Skolnick ed. 1970).

meet the requirements for assistance.[38] As a result, meetings with clients tend to be infrequent and, when they do occur, they are likely to be brief, with little follow-up or individual attention given to the client's problem.[39] Conversely, even with a moderately heavy case load, the private attorney has the power to reduce the number of cases he handles, leaving himself adequate time to prepare the cases accepted. With a tax incentive designed to reflect hourly contributions,[40] the private attorney should be encouraged to devote more of his time to *pro bono* clients.

The attorney-client relationship in the public interest setting is further aggravated by the particular nature of the lawyer's commitment. Many public service attorneys feel freer to disregard the traditional attorney-client relationship in favor of a "higher ideal" or a "nobler cause."[41] An example of this phenomenon would be the situation in which a lawyer for a local environmental conservation group brings an action on behalf of a local farmer against a nearby copper smelter for pollution which has allegedly damaged the farmer's crops. The smelter offers an out-of-court settlement which would be acceptable to the farmer, but the lawyer objects because a court decision is needed as precedent for future actions. The question then becomes whether the lawyer should choose the *cause* or the *client.* In many cases the public interest lawyer will feel that he can, with impunity, impose his own will and convictions on the client.[42] Private lawyers, on the other hand, tend to be less "cause oriented" and more inclined to view the problems from the standpoint of helping the individual client.[43] Hence, the client's wishes are more apt to be fully expressed by the private attorney.

The influx of private attorneys to the public interest scheme would also achieve administrative advantages. As opposed to a small legal aid organization or a community-based public interest law firm, most private firms are structured to deal with the problems of accounting, work assignments, training techniques and other administrative matters.[44]

38. Skolnick, *In Defense of Public Defenders,* in SOCIETY AND THE LEGAL ORDER, *supra* note 37, at 421-22.

39. *Id.* at 392 ("[T]he first interview is often the only interview.").

40. Such an incentive would require record keeping by the attorney so as to justify his hourly expenditure of time on any particular *pro bono* case.

41. Cahn & Cahn, *supra* note 1, at 1041.

42. *Id.* at 1042. *See also* Skolnick, *supra* note 38, at 423.

43. Skolnick, *supra* note 38, at 423-24.

44. Cahn & Cahn, *supra* note 1, at 1031-37.

> Legal services programs generally are not characterized by the kind of tight administrative management and the necessity to justify one's expenditure of time (for billing purposes) that characterizes private practice. Public interest law firms might do well to emulate the techniques of office management, time keeping, training techniques, and administrative discipline which determine both survival and profit margins in private practice.

Id. at 1032.

As a result, government expenditures in support of the *pro bono* work of private firms may be more economical than those funding public interest firms. The greater influx of private attorneys working in the public interest should also result in a carryover of many of the administrative techniques and methods used in private practice.

A final advantage to the encouragement of private attorneys to perform public interest work would be increased cooperation between the public and private segments of the bar. For more than a quarter of a century, scholars and lawyers have noted the failure of the American bar to discharge its obligations to many groups and individuals in need of legal services.[45] In 1965, the American Bar Association House of Delegates adopted a resolution stressing the bar's obligation to provide such services.[46] Yet today, the profession is dangerously fragmented into public and private segments, with neither understanding the problems of the other. Mr. Justice Brennan has identified the problem:

> [T]his . . . leads to a narrow parochialism among practicing lawyers, and deprives the firm of the broader horizon all its lawyers would acquire through closer contact with the public service and the public interest. It also deprives the firm, in many cases, of talent and skills greater than those the lawyer in question would have developed had he stayed with the firm. In certain fields of law—for example, litigation—it seems clear that the young lawyer can obtain better training and more responsible experience at a certain stage of his career in the government than in private practice.[47]

In addition to fostering parochialism, fragmentation forces the young lawyer to choose between a career devoted solely to the public interest or one as a private attorney with little chance to significantly effect public interest matters.[48] Stimulating the *pro bono* activities of private lawyers could, through the advantages mentioned above, bring to the public interest area a new plethora of skills and resources sadly needed in the battle for equal representation. Before considering the catalytic effect of a tax incentive on the involvement of private lawyers in the public interest sphere, it is important to note that, if adopted, such a proposal would not generally operate to effect a net cost saving to the participating attorney. Rather, it would merely decrease the cost of making the particular contribution of his services.[49]

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45. *See* Clark & Corsvet, *The Lawyer and the Public: An A.A.L.S. Survey*, 47 YALE L.J. 1272 (1938); *Legal Aid: Opportunity or Octopus? A Seminar on Legal Services for the Poor*, 23 WASH. & LEE L. REV. 235, 241 (1966) (remarks of Mr. McCalpin).

46. The resolution is reprinted in 51 A.B.A.J. 551 (1965). For an analysis of the resolution see McCalpin, *The Bar Faces Forward*, 51 A.B.A.J. 548 (1965).

47. Brennan, *supra* note 3, at 125.

48. Boasberg, *supra* note 32, at 332.

49. *Cf.* Note, *Economic Incentives for Pollution Abatement: Applying Theory to Practice*, 12 ARIZ. L. REV. 511, 519 (1970). One example of the effect of a tax incentive is this:

EFFICACY OF A TAX INCENTIVE

In light of the recency of the notion of a tax incentive as a vehicle for stimulating *pro bono* activities by private practitioners,[50] statistical projections of its probable effect are not yet available. Although attorneys have evinced a desire to pursue more public interest work,[51] it remains to be seen whether a tax incentive would promote the desired activity. The inquiry need not, however, be reduced to mere speculation. An indication of the effects of such a plan might be obtained by studying the effects of tax incentives for donations to charitable organizations.[52] Although not strictly analogous since a tax incentive for public interest legal assistance involves the rendering of a service rather than a transfer of monies, an analysis of the charitable donations deduction may be helpful in view of the fact that the main problem with stimulating more *pro bono* activity by the private bar has been the lack of a generated fee.[53]

It has been estimated that charitable contributions in this country now exceed $15 billion annually; a five-fold increase since World War II.[54] Yet many question the value of allowing a deduction for such contributions.[55] Although Congress has reaffirmed its decision to allow deductions for charitable contributions on several occasions, there has been a definite lack of research concerning the effect of the deduction.[56]

Two reasons have been cited for the failure of charitable contributions to accurately reflect the incentive of the deduction. First, it is claimed that much of the reported contribution total is ficticious.

> It is a reasonable guess that from one-fourth to one-sixth of all contributions reported on tax returns are fictitious. In dollar amounts, the charitable deduction contribution figure was inflated by overreporting by perhaps $1.2 to $1.9 of the $7.5 billion to contributions listed on itemized returns of 1962. Assuming the effective marginal tax rate to have been roughly

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> A $100 cash gift by an individual in the 70 percent bracket . . . is equivalent to an expenditure by the Federal government of $70, *with a net cost to the donor of $30.* But if a 25 percent bracket taxpayer gives $100 to the same college, the government will only bear $25 of the cost of the gift. And an individual who does not itemize his deductions may be assuming the full burden of his $100 gift. [Emphasis added.]

McDaniel, *Federal Financial Assistance to Charity: An Alternative to the Tax Deduction*, 55 MASS. L.Q. 243 (1970).

50. For a discussion of the application of a tax incentive to a particular matter of public interest, that of pollution abatement, see Note, *supra* note 49, at 517-21.

51. *See* note 29 *supra.*

52. Donations to such organizations are tax deductible by the donor pursuant to section 170(c) provided that the recipient organization is one recognized under section 501(c)(3) of the Code.

53. *See* text accompanying notes 22-29 *supra.*

54. Taussig, *Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions,* 20 NAT. TAX J. 1 (1967).

55. J. PECHMAN, *supra* note 13, at 82.

56. Taussig, *supra* note 54, at 2.

> one-third, the government appears to have spent close to a half-million dollars in subsidizing non-existent gifts to charity. . . . This problem by itself constitutes a powerful argument against the present tax law.[57]

Second, it is claimed that many taxpayers would contribute regardless of the deduction, so that the incentive is likely to be claimed by many who would have given anyway.[58] Even recognizing these problems, however, tax experts tend to agree that the charitable contribution tax deduction provides a definite incentive.[59] Such incentive affects the decision to contribute, the amount contributed, and the recipient of the gift. There are two reasons for the incentive effect: deductibility lowers the net cost of the gift, and it increases the after-gift disposable income.[60]

The significance of the incentive can best be seen through various examples. Early in 1963, the Internal Revenue Service revoked the charitable status of the Fellowship of Reconciliation, a religious pacifist group headquartered in Nyack, New York.[61] After tax-exempt status was restored in mid-1964, a spokesman for the organization reported that because of the loss of his organization's tax-exempt status, "we know of some substantial gifts we lost."[62] In June of 1966, the Internal Revenue Service questioned the tax exempt status of the Sierra Club, an organization which, according to its official *Bulletin,* is "devoted to the study and protection of national scenic resources."[63] In December 1966 the Sierra Club issued a statement in response to the revocation of the Club's qualification for deductible charitable contributions. It stated that in the 16-month period following the Internal Revenue Service announcement of its intention to reassess the organization's tax

57. M. Taussig, The Charitable Contribution Deduction in the Federal Income Tax 34 (unpublished doctoral dissertation at Massachusetts Institute of Technology, 1965).

58. R. BLOUGH, *supra* note 9, at 423:

> Tax exemptions also lack precision and as a result are likely to be wasteful of public funds. Some of the exemption goes to taxpayers who are induced thereby to perform socially desirable activities. But . . . part [of the exemption] is likely to go to taxpayers who need no inducement to perform the service. . . . [This] represent[s] a waste of public funds . . . .

59. *See* T. HUNTER, *supra* note 6, at 35; Sugarman, *Charitable Giving Developments in Tax Planning and Policy,* 39 TAXES 1027, 1028 (1961); Weithorn, *"Tax Simplification"—Grave Threat to the Charitable Contribution Deduction: The Problem and a Proposed Solution,* 1967 DUKE L.J. 943, 953.

60. Taussig, *supra* note 54, at 3. For an exaplanation of how the tax incentive lowers the cost of the gift, see note 52 *supra.* It naturally follows that the less the donor must pay for the gift, the greater will be his after-gift disposable income.

61. The Fellowship of Reconciliation lost its tax-exempt status because of a ruling by the Internal Revenue Service that the pursuit of peace, which was the major goal of the group, was a *political* and not a *religious* goal. N.Y. Times, June 25, 1964, at 13, col. 1.

62. T. HUNTER, *supra* note 6, at 50, *citing* N.Y. Times, June 25, 1964, at 13, col. 1.

63. T. HUNTER, *supra* note 6, at 50.

exempt status, it had been deprived of an estimated $125,000 in contributions.[64] The tax deduction, as indicated by these examples, does have a considerable impact on charitable contributions. Without it, many of the private religious, educational and charitable organizations in America would be encountering serious financial difficulties.[65] There is every reason to believe that such an incentive would have as substantial an effect on private *pro bono* activities as it does on private monetary contributions. The desire of private attorneys to provide services in the public interest is well documented.[66] It seems reasonable to assume that one would be as likely to donate legal services, as would be the case with an incentive for *pro bono* activities, as he would be to donate money that he has already earned by the performance of such legal services.

TAX INCENTIVE VERSUS DIRECT EXPENDITURES

Although the tax incentive does stimulate substantial donations, it does so at the expense of the federal government. For example, funds which are donated to organizations classified as tax exempt are deducted from the donor's adjusted gross income in arriving at his taxable income, thereby reducing his total tax liability. This effect has prompted many to regard the tax exemption as nothing more than a direct government expenditure channeled through the tax mechanism.[67] The subsidy view may best be examined by example. Suppose that a man in the 50 percent tax bracket donates $1,000 to a tax-exempt group. He will pay the federal government $500 less than if he had not made the gift. His portion of the $1,000 gift is therefore only $500. Since the government allows itself to be deprived of the other $500, many look upon the government share as a subsidy.[68]

It has also been argued that the tax incentive has a great potential for waste because of fictitious reporting[69] and the allowance of incentives for work which would have been undertaken anyway.[70] Either or both of these problems, however, might also characterize a system of direct government funding. The temptation to divert grant funds to private projects of the recipient firm would no doubt be great,[71] and there is no guarantee that grant money would not be given for work

64. N.Y. Times, Dec. 21, 1966, at 27, col. 3.
65. T. HUNTER, *supra* note 6, at xix.
66. *See* note 29 *supra.*
67. *See generally* Surrey, *supra* note 7. Such a view has prompted Professor Morgan of the University of Michigan to evaluate the tax incentive as equal to, but no better than, the direct government grant. T. HUNTER, *supra* note 6, at 52.
68. T. HUNTER, *supra* note 6, at 40.
69. *See* text accompanying notes 56-57 *supra.*
70. *See* text accompanying note 58 *supra.*
71. For an analysis of waste in direct government expenditure programs of public housing and Medicaid, *see* The Wall Street Journal, January 18, 1972, at 12, col. 1.

previously planned. Moreover, the tax incentive offers two administrative advantages over the direct subsidy. First, utilization of the tax incentive involves less administration than would the direct grant.[72] Second, the tax incentive would have broader application as it could reach attorneys willing to donate varying amounts of time for public interest work.[73]

The most significant advantage inherent in the utilization of the tax incentive is the lack of direct government control. The expenditure mechanism with the greatest government control may generally be the most desirable for financing government operations, but such is not the case with encouraging advocacy in the public interest. In defending the indigent and other public interest clients, it is essential that the attorney be insulated from political influence. One notion behind stimulation of public interest advocacy should be protection of the public from the traditionally powerful private interest groups which have considerable influence at all levels of government.[74] For the government to make ideological distinctions as to which groups are "socially desirable" would defeat the purpose of the public interest concept.[75] The political implications of the tax incentive versus the direct government subsidy have been posited as follows:

> If the regulatory tax measure takes the form of a special exemption, the alternative is usually a subsidy paid out of the treasury. The tax exemption is, in effect, a subsidy that never passes through the treasury. But the two types of subsidy have different political implications. Payments from the treasury are scrutinized with much greater care than are tax exemptions, and they are subject to reconsideration annually. Limitations and controls are more likely to be imposed as part of a subsidy plan than as part of a tax exemption.[76]

The advantage of the incentive, then, is that it is not subject to direct political control by the federal government. That is not to say, however, that fashioning an incentive in the form of a tax benefit will guarantee a total lack of government control. Some control is necessary to prevent an erosion of the tax base, and the Internal Revenue Service, through its authority to enforce the tax laws, will be in a position to

72. TAX INSTITUTE OF AMERICA, *supra* note 5, at 71. An example of the high administrative costs associated with direct subsidy programs is the federal Judicare program. *See* note 30 *supra.*

73. The advantage of the tax incentive in this area is that the private attorney wishing to participate in the program to a limited extent is stimulated by the incentive. There is no requirement that he commit himself to a certain number of hours of work or that he qualify for funding as with the direct grant. The tax incentive attaches automatically. *But see* text accompanying note 98 *infra* for a discussion of a tax floor on claims which, if utilized as a safeguard against spurious deductions, would minimize this advantage.

74. *See* Note, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835, 845-49 (1971).

75. *See 1970 Hearings*, at 18.

76. R. BLOUGH, *supra* note 9, at 423.

challenge the claim of any attorney thought to be abusing the incentive.[77] The utilization of the tax mechanism allows greater political freedom than the direct government subsidy while still providing the degree of government control necessary to adequately enforce the tax laws.

ADMINISTRATION

A justification for the use of a tax incentive for public interest activity of private attorneys can be complete only if such a proposal is proved sound from an administrative perspective. Realizing the immense enforcement task at hand, Congress would be reluctant to adopt the incentive unless assured of its practicality. Such threshold questions arise as whether services should ever be deductible, whether a proper method of valuation of services can be formulated, whether problems of padding can be effectively minimized, whether the incentive should be administered as a credit or a deduction, and whether large firms can be encouraged to donate the time of their associates in the public interest.

Deductibility of Services

Critical to the implementation of a tax incentive for public interest legal activity is whether services should ever be deductible. The problem is particularly acute as services are not generally deductible even when donated to a tax exempt organization.[78] A tax incentive for *pro bono* assistance could not be claimed under section 170(c) of the code,[79] but would require special legislation. Nevertheless, an exploration of the reasons underlying the current ban on deductions for services under that section is helpful in order to establish the workability of such a deduction.

Two reasons are implicit in recent decisions upholding the nondeductibility of services under section 170. First, compared with property and money, it is more difficult to affix a value to services. This becomes apparent through a consideration of several examples. In *Korda v. Commissioner*[80] the petitioner, employed as a waiter, claimed a tax deduction of $1,500 for gratuitous research work done in connection with trade relations between the United States and Hungary. The Tax Court denied the deduction, noting the current regulation that "[n]o deduction is allowed for the contribution of services."[81] In *Fox*

77. Goldman, *supra* note 11, at 249 n.212.
78. Treas. Reg. § 1.170-2(a)(2); Off. Dec. 712, 2 CUM. BULL. No. 3, at 188 (1920).
79. INT. REV. CODE OF 1954, § 170(c) allows a deduction for contributions to those groups which have obtained tax-exempt status under section 501(c)(3) of the code. Since a deduction for public interest work would be based on a contribution to an organization with a much broader constituency, it will require new legislation.
80. 40 P-H TAX CT. MEM. 929 (1971).
81. *Id.*

v. Commissioner,[82] the Tax Court denied a deduction of $9,000 claimed by a policeman who, in his spare time, had published articles in various scientific journals reporting the results of his experiments. The court found that although the articles may have represented a valuable contribution to scientific knowledge, "the record does not suggest the fair market value, if any, of the claimed contribution."[83]

In both examples, valuation of the services rendered would create a considerable, if not insurmountable, problem. Problems with valuation cannot stand as a blanket reason for the rejection of all service deduction claims, however, for there are many cases in which a service can be easily valued. Typical is the case of a newspaper which donated space to an organization meeting the requirements of section 170(c) of the Code. Although the cost of newspaper space is easily valued, the claim of a deduction by the newspaper was denied because it was not a gift of property or money.[84]

Although it may appear that a newspaper giving free space to a tax-exempt organization has divested itself of a part of its net worth because of the limited amount of advertising available in a newspaper, the Service chose not to view the situation in this manner. The Service's decision might have been due to the fact that there was no showing on the part of the newspaper that it would be required to turn down paying advertisers in order to make space for the donated ad. This would lead to the conclusion that the newspaper did not give up anything through the donation.[85] The rationale behind such a case seems to be that for the gift to be deductible, the donor must either donate money or divest himself of a part of his net worth. That is to say, he must give up something that is of value. Similarly, the Internal Revenue Service has ruled that the donation of blood is not deductible because it is not a divestiture of a tangible asset.[86]

It is submitted that the rationale behind denial of charitable deductions for services should not be applied to *pro bono* legal services donated by private attorneys. Although the valuation of services is often difficult, such is not the case with legal services. An attorney's services are constantly valued as part of his daily routine. Bar association maximums[87] and charges for similar services can be used as guides for the amount of the deduction, and with proper safeguards valuation should present no problem. Moreover, the services of an attorney represent his future worth. For each hour that an attorney spends in the public

82. 32 P-H TAX CT. MEM. 1407 (1963), *aff'd on rehearing*, 37 P-H TAX CT. MEM. 839 (1968).
83. *Id.*
84. Rev. Rul. 57-462, 1957-2 CUM. BULL. 157.
85. *Id.*
86. Rev. Rul. 162, 1953-2 CUM. BULL. 127.
87. *See, e.g.*, PIMA COUNTY BAR ASS'N, FEE SCHEDULE (1970).

interest, he thereby loses an opportunity to work for a fee-generating client. In this sense, the private attorney who donates his time in the public interest has clearly given up something of value. Viewed in this manner, a lawyer's services are more fungible than services generally and should present no greater problem than is currently presented with the valuation of property.

Valuation

The most common method of valuation presently is by the *fair market value* of the item donated. Fair market value has been defined as "the price at which property would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or sell and both being reasonably informed as to all relevant facts."[88] Although the fair market value standard has been applied primarily to the valuation of property,[89] with some modifications it would also seem workable in affixing the value of *pro bono* legal services of private attorneys.

The primary problem with allowing the private attorney to claim the fair market value of his services is the temptation for attorneys to pad their expenditures of time so as to receive a larger tax benefit than that to which they are entitled. The result of such padding would be two-fold: it would create an immense enforcement problem for the Internal Revenue Service, and it would mean an erosion of the tax base. The problem is not insurmountable, however, as several modifications of the fair market value standard might be used to curtail padding. First, published lists might be used as a method of ascertaining a maximum allowable claim for *pro bono* legal services. Bar associations publish suggested hourly rates that could be used to provide the hourly maximum,[90] and the total claim could be subject to a reasonableness test imposed by the Internal Revenue Service. The reasonableness test is currently used by the Service for deductions of ordinary business expenses under section 162.[91] The burden of proof is on the taxpayer so that unless the reasonableness of the deduction is proven by him when challenged, a deduction will be disallowed for the unreasonable portion of the claim.

To illustrate, suppose that a private attorney spent 8 hours in defense of an indigent client on charges of drunken driving. If the county bar association maximum hourly rate was $60, the attorney could claim

88. Treas. Reg. § 1.170-1(c)(1) (1972).
89. *See* INT. REV. CODE OF 1954, §§ 111(b), 113(a)(2)&(14), 114(b)(2), 130A(b)&(d), 170(e).
90. *See* PIMA COUNTY BAR ASS'N, *supra* note 87.
91. Botany Worsted Mills v. United States, 278 U.S. 282 (1929); Treas. Reg. § 1.162-7(a). *See generally* 4A J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 25.68, at 276-80 (1966).

a value for services rendered of $480. If the Service felt that the amount was unreasonable, it could reduce the claim to a lower figure. The taxpayer could then either accept the lower valuation or appeal to the courts, accepting the burden of establishing that the full $480 was reasonable. Recognizing that some padding is inevitable, this method of valuation is likely to prevent the overzealous attorney from claiming an incentive based on an unreasonable amount of hours spent on the *pro bono* project.

Maximum and Minimum Claims

The problem of padding can also be minimized by the establishment of maximum and minimum yearly claims. The benefit of such limitations is to confine each attorney's tax benefit within certain bounds. The establishment of a claims ceiling would prevent an attorney from abusing the *pro bono* activities incentive. Two types of ceilings are in common use. The first type is measured as a percentage of the adjusted gross income of the donor as now applied to donations of charitable contributions under section 170.[92] The problem with the use of the percentage ceiling for public interest legal services is that the effect of the maximum would be counterproductive to the purpose of the incentive. Suppose that with a 30 percent ceiling on claims for *pro bono* services, an attorney earning $10,000 per year wishes to contribute the maximum. Since he must forgo income of approximately $3,000 in order to provide $3,000 worth of services,[93] his earnings will fall to $7,000. This means that he can now only claim $2,100 (30 percent of $7,000) when in fact he contributed $3,000. In short, the more that an attorney contributes, the lower is the base upon which his percentage deduction is figured and therefore the less he can claim.

The second type of ceiling, the establishment of an annual maximum limitation, lends itself much more conveniently to the instant setting. Presently in use for deductions of political contributions,[94] the annual maximum combines the ceiling effect of the percentage deduction with the additional advantage of treating all income groups equally, as the amount of the lawyer's per-year claim is not based on his income. It should be recognized, however, that with a flat maximum, it is important that the level be set high enough to attract financially successful

92. INT. REV. CODE OF 1954, § 170. The ceilings on donations to various types of charities were revised by the Tax Reform Act of 1969. For an analysis of the new ceilings, see Schelling, *Charitable Contributions Under the Tax Reform Act of 1969*, 16 PRAC. LAW. 41 (1970).

93. Although this assumes that the attorney forgoes paying clients in order to donate *pro bono* services, the assumption is valid in most cases in view of the fact that most attorneys have more than enough paying clients to completely occupy their time. *See* text accompanying note 27 *supra*.

94. INT. REV. CODE OF 1954, §§ 41, 218. *See also IRS Issues Campaign Act Rules*, Arizona Daily Star, Feb. 24, 1972, at 2, col. 5.

attorneys. A $1,000 maximum, for example, may entice many low income lawyers, but it is unlikely to attract many of the more successful attorneys who must turn down large fee cases to donate their time.

In addition to a ceiling, a floor or minimum allowable claim could be used to alleviate the problem of padding. As with the ceiling, either a percentage minimum or a flat rate could be imposed. A flat rate minimum would seem preferable as it would apply equally to all attorneys and would be the easiest for the Internal Revenue Service to administer. The advantage of the tax floor is that it would discourage the claimant from submitting false claims that might be too trivial for the Internal Revenue Service to investigate.[95]

With the suggested modifications, there is no reason why the present fair market value system for valuation of property could not be utilized for a tax incentive for the *pro bono* contributions of private attorneys. Although it must be recognized that such safeguards alleviate rather than eliminate the problems of padding, a degree of fictitious reporting will occur with the administration of any tax benefit.[96]

Deduction vs. Credit

Problems of valuation aside, it must be determined whether the tax incentive should be administered in the form of a deduction or a credit. The differences between the two become most important because of their respective effects on attorneys of different income levels.

The tax *deduction* results in a lower taxable income by the amount of the deduction. For example, suppose that a married attorney with an adjusted gross income of $60,000 and exemptions of $1,350 had itemized deductions totalling $13,150. Subtracting the exemptions and deductions from the adjusted gross income would leave the attorney with a taxable income of $45,000.[97] If the attorney were to add an additional deduction of $2,550 for *pro bono* legal services rendered, his taxable income would total $42,450. It is important to notice that the deduction does not allow a net saving in the amount of the deduction, but rather allows a saving of the tax which would normally be assessed on that amount. In the above example, the tax liability of the attorney without the *pro bono* deduction would amount to $14,560 for the year 1971 while the liability with the *pro bono* deduction would total $13,316 —a net saving of $1,244.[98]

95. *President's 1963 Tax Message, Hearings before the House Comm. on Ways and Means*, 88th Cong., 1st Sess., pt. I, at 47-49; T. HUNTER, *supra* note 6, at 79.

96. *See* text accompanying note 59 *supra*.

97. Assuming that the deduction for public interest services is to be itemized, it will be subtracted from adjusted gross income in arriving at taxable income. In order for the donor to take advantage of the deduction, he will have to itemize his deductions instead of declaring the standard deduction. *See* CHOMMIE, FEDERAL INCOME TAXATION § 68, at 153-54 (1968).

98. INT. REV. CODE OF 1954, § 1(a).

The main advantage to the use of the tax deduction is that it provides greater stimulation of the high-income contributor who is usually in a better position to donate time than is the low-income attorney. Conversely, the tax deduction discriminates against the low-income attorney[99] because of the progressive nature of the federal income tax. High income groups are taxed at greater percentages of their taxable incomes than are low income groups, and therefore, the higher the taxable income the larger the saving derived from a deduction.[100] For example, comparing married attorneys with taxable incomes of $60,000, $30,000 and $15,000, an additional deduction of $2,550 would have saved taxes of $1,351, $978 and $638, respectively, for the year 1971.[101]

The tax *credit* provides for a credit against the tax liability of the donor.[102] Consider the example of a married attorney with a taxable income of $15,000. If he were to be allowed an additional tax credit of $1,000, his tax liability would be $2,010 ($3010-$1000).[103] Contrasting this with his tax liability had he declared a deduction ($2372), it is easy to see that the tax credit is more beneficial to the low-income attorney since it affects all income groups in the same fashion.[104]

Presented with a choice between the tax credit and the deduction, one must decide which group to stimulate and which to discourage. Fortunately, however, the choice may be avoided. To best achieve stimulation of the private bar, the choice should be made by the individual attorney. Similar to the recently adopted tax incentive for political contributions,[105] a tax incentive for public interest activity should allow the attorney to claim either a deduction or a credit, whichever is to his greater advantage. The advantage of allowing the individual his choice over the adoption of either the deduction or the credit is the maximum stimulation of the attorney regardless of his tax bracket.[106]

99. T. HUNTER, *supra* note 6, at 106.

100. For a general discussion of the effects of progressive taxation, *see* J. PECHMAN, *supra* note 13, at 50-60.

101. INT. REV. CODE OF 1954, § 1(a).

102. *See* T. HUNTER, *supra* note 6, at 105; J. PECHMAN, *supra* note 13, at 84; Goldman, *supra* note 11, at 218; Taussig, *supra* note 54, at 19.

103. A tax credit is usually figured as a percentage of the amount contributed or spent. For example, if Congress were to adopt a 30 percent tax credit for public interest legal activity, the attorney would value his services the same as if he were computing the deduction. Assuming that upon reaching the valuation, the attorney figured a net worth of the services at $400, he would then be allowed a credit of 30 percent of the valuation, or $120.

104. T. HUNTER, *supra* note 6, at 105: "The tax concession would then be related only to the size of the donation and would not also depend on the income of the taxpayer."

105. The code allows the taxpayer to declare a 50 percent credit for political contributions, up to a maximum of $12.50. INT. REV. CODE OF 1954, § 41. The taxpayer may choose, in lieu of the credit, a deduction in the full amount of the contribution, up to a maximum of $50. INT. REV. CODE OF 1954, § 218.

106. The attorney with an income which places him in a high tax bracket would probably opt for the tax deduction, whereas the attorney in a low tax bracket would be more inclined to use the credit.

Defining The Public Interest

Perhaps the most difficult administrative problem relating to the adoption of the tax incentive for public interest legal activity is to define the public interest. It is easy to see that the public interest will mean something different to each of the attorneys seeking tax relief for services rendered.[107] Not only will attorneys' notions of the public interest differ, but the problem is exacerbated by the fact that, in many instances where attorneys represent opposite sides of the same action, both may validly claim to be operating in the public interest.[108]

One attempt at defining the public interest has been by way of the recently adopted guidelines for the tax-exempt status of public interest law firms under section 501(c)(3) of the *Internal Revenue Code of 1954*.[109] Although the main purpose of the guidelines is to allow the Service to apply an objective standard to the public interest question, serious objections have been raised concerning the workability of the requirement of guideline one that the activity of the law firm be in the public interest.[110] The basic definitional scheme of guideline one is to contrast the *public* interest with *private* interests.[111] The litigation must be "designed to present a position on behalf of the public at large on matters of public interest."[112] Serious problems with this scheme are manifest, however, and the applicability of such a test to the tax incentive mechanism would provide little assistance to the attorney seeking a degree of certainty that his activities will fall within the bounds of the incentive.[113]

Left with the ambiguous public-versus-private distinction, the attorney is forced to provide a service without adequate guidelines by which to decide whether he can claim the incentive. The incentive effect could be severely minimized if attorneys were forced to contribute without at least a partial assurance that their time would be deductible. There are, however, certain types of legal action which generally have been recognized as protecting the public interest. Draw-

107. *See* Note, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835, 838-40 (1971).

108. An example of a controversy in which both sides could claim to represent the public interest would be one involving fluoridation of water. *1970 Hearings*, *supra* note 16, at 27.

109. For a detailed analysis of the guidelines, see Note, *The IRS Man Cometh: Public Interest Law Firms Meet The Tax Collector*, 13 ARIZ. L. REV. 857 (1971).

110. See Note, *supra* note 109, at 862-65.

111. *1970 Hearings*, *supra* note 16, at 18-19: "The guidelines seek to differentiate between those types of actions which are and can be considered in the public interest and of private litigation."

112. *1970 Hearings*, *supra* note 16, at 112.

113. Guideline one utilizes the broad public-versus-private interest dichotomy. When pressed for a more precise distinction between the terms, Commissioner Thrower would reply only that a case involving *substantial financial interests* would generally be characterized as private. *See 1970 Hearings*, *supra* note 16, at 12, 19, 25, 27, 32. As the guidelines themselves recognize, however, there can obviously be private interests which do not involve economic issues. *Id.* at 12.

ing from these recognized categories, Congress could declare general categories of legal action deemed to be in the public interest. Any claim for services within these categories would be automatically approved. Although such a list would only be a prime facie indication of the boundaries of the public interest, the interstices could be filled by allowing the attorney to claim the incentive for any legal activity which he reasonably believes to be in the public interest. Extensive documentation and description of the services could be required, and, if the Service challenged the deduction as not being in the public interest, the burden would be on the claimant to establish the public interest nature of the activity.[114]

It is important to recognize that no system can adequately define in advance all of the areas and types of legal activities in which there is a true public interest. Consequently, although a degree of confusion should be expected with the implementation of the tax incentive, the foregoing suggestions would create a degree of certainty that the attorney would be allowed the incentive for his service.

An Incentive for the Firm

A final problem with the incentive is that of motivating large firms to contribute their resources to the practice of public interest law. In order to allow associates to contribute *pro bono* services, the firm must give them release time from fee cases. This will generally mean a reduction in the income of the firm since it will forgo the added revenue from the fee business that the associate would have handled had he not donated his services. Thus, it follows that in this case, the firm should be allowed to claim the tax incentive.

This could be accomplished by allowing professional corporations to take the deduction instead of the individual attorney. With a partnership, the same end would be accomplished by allowing a partner to claim the incentive up to his interest in the partnership. For example, suppose that *A* and *B* are equal law partners who allow *C* to donate a certain amount of his time to the public interest at the expense of the partnership. The incentive in this case could be claimed by each of the attorneys up to his 50 percent interest in the firm. Allowing the partnership to use the incentive in this manner would provide an added stimulus for large firms to allow associates to provide public interest services because the incentives could be claimed by the partners who are in the higher tax brackets.

Administrative problems will exist with any tax proposal. Under the foregoing scheme, however, the major difficulties with an incentive

114. *Cf.* 4A J. MERTENS, *supra* note 91, at § 25.68, at 278.

can be dealt with and minimized so as to stimulate public interest activity without creating serious administrative problems.

CONCLUSION

If the public interest is to be adequately represented, the private bar must be encouraged to provide more legal assistance. In addition to providing manpower, increased *pro bono* activity by the private bar would make the resources of large private firms more readily available. Other advantages include improvement of the attorney-client relationship, more efficient administration, and the encouragement of cooperation between the public and private segments of the bar.

Tax incentives provide a practical mechanism for the stimulation of such *pro bono* activities. While there has been criticism of the incentive in other contexts, it alone provides a sufficient encouragement while at the same time allowing the political freedom essential to the successful resolution of public problems. Valuation does not present a problem as with many other types of services; floors and ceilings can be used to simplify the task of the Internal Revenue Service, and a reasonableness standard would guard against padding. In addition, the adoption of guidelines for public interest work and the special arrangement for partnership deductions should provide workable solutions to problems which might otherwise frustrate the purpose of the incentive.