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Rights and Duties: The Ethical Obligation to Serve the Poor

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RIGHTS AND DUTIES: THE ETHICAL OBLIGATION TO SERVE THE POOR

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I. Introduction

This Essay explains why lawyers have an ethical obligation to provide pro bono legal services to the poor. Most lawyers addressing this issue rely on the various state codes, the ABA Model Code or judicial decisions to explain the nature of this professional obligation. This approach misconstrues the foundation and force of ethical obligations which do not derive simply from doctrinal interpretations of professional codes or courts of law. Using the tools of normative philosophy, this Essay will demonstrate how this ethical obligation arises based on the status and role of the legal profession in American society and, indeed, the profession's own ethical foundations.

Like many of the traditions of the legal profession, the idea of public service is commonly invoked for disparate and sometimes contradictory purposes. The notion of serving the public good, something larger than private self-interest, is at the root of legal practice, and yet many lawyers have little idea of what it means or what it requires them to do. Like such abstract principles as patriotism and original intent, public service appears to function more like a Rorschach of the individual psyche than as a useful guide to professional behavior. According to some lawyers, public service entails nothing more than serving the public's stake in justice by zealously serving their client's interest. Other lawyers, by contrast, regard their public service obligation as an injunction to serve the needs of the poor or to defend unpopular causes that are otherwise unlikely to gain adequate representation.

In fact, both ideas of public service faithfully represent as-

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pects of the lawyer's professional ethical obligations. Indeed, rather than representing inconsistent visions of the legal profession, both are actually part of a larger conception of the lawyer's role. The same principles that require lawyers to serve their client's interest, keep their confidences, treat them with candor and work diligently on their behalf, create a role for lawyers that obligates them to serve the poor, unpopular and under-served causes. Skepticism about this latter obligation could be motivated by commercial self-interest. It is equally likely, however, that the different ethical principles that justify the lawyer's role in the system of justice have not been made explicit. Because of this lack of clarity, it is not clear that the arguments supporting the profession's more cherished privileges, such as self-regulation, also generate obligations to provide pro bono services. This Essay will flesh out the principles and describe why, taken together, they impose upon the legal profession an ethical obligation to serve the poor.[1]

This Essay is, in some respects, agnostic about the definition of public service. There are numerous defensible conceptions of public service, although not all of them necessarily trigger a professional ethical obligation. Some people view the legal professional obligation as limited to pro bono service to the poor. Others regard the needs of justice, and hence, the professional responsibility of lawyers in a much broader sense. This expansive definition includes such professional endeavors as the representation of unpopular causes and non-profit community organizations as well as efforts to improve the administration of justice or achieve law reform. While this broad definition reflects a commendable concern for some important social goals, the basic professional obligation discussed here will be the one to serve the poor. Some lawyers may, and perhaps should, endeavor to engage in the full spectrum of public service. However, this Essay demonstrates that, at the very least, lawyers' professional obligation requires lawyers to serve the poor.

II. The Legal Profession: Its Purpose and Privileges

In 1975, the American Bar Association House of Delegates considered and amended a resolution recognizing a professional

1. *See generally* THE LAW FIRM AND THE PUBLIC GOOD (Robert A. Katzmann ed., 1995) (discussing different conceptions of the public good and the ways in which a lawyer might serve it).

obligation to provide public interest legal services to poor clients at no, or substantially reduced, fees.[2] The amendment changed the proposal to state that attorneys have a professional responsibility to serve the poor, rather than an obligation or professional duty to serve the poor.[3] The largely negative response to this proposed resolution could be categorized in one of two ways. The first objection focused on the mandatory and, in some views, coercive nature of the proposal, claiming that it was inconsistent with lawyers' professional autonomy. The second objection concerned the injustice of placing the burden to serve the poor primarily on lawyers. Although those who raised the second objection usually conceded that the poor needed, and perhaps even had a right to legal services, most felt it was a social obligation that would be unjust to foist on the legal profession alone. They argued that poor people are denied many important things, including food, shelter and transportation. Yet this denial does not entail any obligation on the part of farmers, grocers, real estate developers, building contractors or taxi drivers to donate their services. Thus, why should lawyers be uniquely required to give away their stock-in-trade?[4]

Together, these two arguments constitute the main objections to any notion of professional obligation to serve the poor. While neither is frivolous, the first can be disposed of more easily than the second. But before doing so, it is important to consider two elemental questions. First, what is it that makes lawyers professionals, and hence, different in some ways from grocers, contractors and taxi drivers? Second, why does this difference create a professional obligation to serve the public?

A. The Idea of a Professional Ethic

Before proceeding to these important questions it is neces-

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2. *See* 100 Annual Report of the American Bar Association 684 (1975) (providing the recommendation of the Special Committee on Public Interest Practice, as amended and approved by the House of Delegates).

3. *See id.*

4. The ABA House of Delegates eventually passed a resolution asserting the "responsibility" of lawyers to provide pro bono services but eliminating any mandatory duty to do so. *See id.* After further debate and revisions this "voluntary responsibility" was incorporated into Rule 6.1 of the *Model Rules of Professional Conduct.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1998) [hereinafter MODEL RULES]. It is unclear from the language to whom this responsibility is owed, but even if they were identified there could be no remedy. Because Rule 6.1 is viewed as voluntary, there is nothing in the Disciplinary Rules to enforce it. For a discussion of the logical foundation of "voluntary" ethical responsibilities, see *infra* Part II.E.

sary to address a broader, more fundamental one: Why do we have legal professional ethics? That is, why do we have a system of ethics for the legal profession that is different in any way from the moral principles that guide the rest of our lives? The idea of a "local" moral code, specific to the legal profession, contradicts most of the prevailing moral theories of western civilization regarding a universal morality that applies to everyone based upon some conception of moral truth.[5] This is certainly true of religious morality, but it is also true of the moral theories that are identified with the American constitutional structure of justice. Immanuel Kant, for example, thought that the answer to the question, "What ought I to do" must be answered by the question, "What ought all rational beings do?"[6] Similarly, John Stuart Mill thought that all behavior ought to be guided by the principle of utility.[7] Everyone pursuing his or her self-interest would create the greatest average happiness for society as a whole.[8]

How can we justify exemptions from some general theory of morality? This dilemma is resolved by the concept of role differentiated behavior.[9] People enter into relationships with each other that, when routinized over time, give rise to expectations about how these individuals ought to behave. When these relationships are generalized throughout society, they create societal expectations about how people in a certain role should act. Perhaps the classic example of role differentiation is parenthood.[10] In becoming a parent, one's moral universe is altered. The calculus of respect society expects a parent to show towards people changes. Rather than showing equal concern towards everyone, parents are expected, and in some cases obligated, to show special concern towards their own children.

Likewise, the attitude one has towards fellow members of society is often defined by this role differentiation. Judges, for example, are expected to show equal concern towards each litigant, while the lawyer is expected to show greater zeal for his or her

5. For a discussion of the structure of role morality, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 128-47 (1988).

6. *See* IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS (Bobbs-Merrill 1949).

7. *See generally* JOHN STUART MILL, UTILITARIANISM (Parker, Son & Bourn 1863).

8. *See id.*

9. *See* Richard Wasserstrom, *Lawyers as Professional: Some Moral Issues*, 5 HUM. RTS. 1, 3 (1975-76).

10. *See id.* at 4.

own client. In assuming a role such as a parent, judge or lawyer, one takes on special responsibilities that alter the moral reckoning one can make about people who enter that role.[11]

Once a certain role is assumed, one's role-based responsibility often becomes correlated with role-based privileges. The holder of such a privilege is entitled to act in a certain way or to be treated in a particular way that creates obligations on the part of others. The obligation of others to respect a privilege reduces their rights and scope of freedom. For instance, when firemen turn on their sirens to get to a fire, they are entitled to violate the speed limit and ignore red lights. While motorists and pedestrians generally have a legal and moral right for others to obey the speed limit and stop at traffic lights, that right is limited by the entitlement of fire fighters to speed to a fire. This entitlement creates an obligation for others to accommodate their passage.

Society only grants these privileges for a social purpose. We permit firemen to drive fast because we want them to arrive expeditiously at the scene of a fire. The contingent foundation of role privileges upon the performance of role responsibilities makes them revocable for dereliction or abuses of privilege. Society would hardly tolerate a fire engine running through red lights to rush a pizza back to the station before it got cold. The role privilege is directly correlated with role duties. If the fire department spent too much time fund raising for charity balls at the expense of fire prevention, or caused an inordinate number of accidents rushing to fires, the cost of the role privileges would outweigh the benefits.

The idea of particular versus universal moral obligations can pose difficult problems when they conflict, but otherwise there is nothing unusual or alarming about assigning obligations based on someone's social role. When these relationships are freely entered into, no one can complain about the obligations that accompany them. People are unlikely to view a husband's complaint about the burdens of fidelity sympathetically given the voluntary nature of the commitment. Indeed, most lawyers are actually quite comfortable with the particular demands of role-morality even when it requires them to violate the dictates of universal morality. The general justification for following the norms of the legal profession

11. *See generally* ALAN GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 34 (1980) (arguing that judges, prosecutors and other law enforcement officials "have a moral duty to accept these institutional obligations even at the expense of seemingly more important moral rights of others").

when they conflict with common morality is that doing so serves some other social value that is highly prized. So too, for example, a physician may sometimes lie to a patient about an illness if telling the truth would endanger his or her health.

The role-morality of professional behavior occasionally requires each professional to pursue his or her own assigned social goal at the expense of other goals and, indeed, general morality. The social goal assigned to lawyers is, of course, to promote justice. Within the context of the adversary system, this role-morality entails some peculiar behavior that is clearly inconsistent with common morality. For instance, under the ethical norms of the legal profession, a lawyer is supposed to protect the legal interests of the client zealously. In a criminal trial this means that a lawyer must keep confidential a client's admission of guilt. Under common morality, if the same client told an ordinary citizen of his or her crime, that person would plausibly be under a moral duty to report it to the police. This is one of the many direct conflicts between the common morality of the ordinary citizen and the role-morality of the practicing lawyer.

To the ordinary citizen, the role-morality of the legal profession casts it and its practitioners in disrepute.[12] Unlike most people who judge the moral goals of a person before deciding whether or not to assist in his or her aims, the role-morality of lawyers instructs them to ignore these factors and consider only whether the person has any legal rights to be asserted or defended. The standard conception of the lawyer's role is that, within the confines of the law and professional behavior, one must increase the likelihood that the client will prevail. That the client's moral position is unsavory is irrelevant so long as he has a legal claim to pursue. *Zabella v. Pakel*[13] demonstrates this concept. In this case, the role-morality of the lawyer required him to help defeat a debt claim against his wealthy client by asserting the statute of limitations as a defense. Although the lawyer could have believed that his client misled the plaintiff, an old friend and former employee, by promising to pay the debt at a future time, the lawyer still had a duty to assert the defense on behalf of his client.[14]

The standard conception of law operates under a principle of

12. *See generally* Wasserstrom, *supra* note 9, at 2 (stating that an attorney's world is often amoral and sometimes immoral).

13. 242 F.2d 452 (7th Cir. 1957).

14. *See id.* at 455.

non-accountability.[15] The result is that a lawyer is not held accountable for the moral failures of the client. This is possible because the lawyer's role is to serve justice, which is accomplished by ensuring that people have the opportunity to assert their legal rights in court. This larger social value justifies a criminal defense lawyer putting a prevaricating client on the stand or discrediting a truthful witness.[16] Some lawyers might find their assigned role-morality to be repugnant. However, these lawyers would never be excused from their professional obligations simply because they fell more heavily on members of the legal profession. Indeed, it is precisely because of the lawyer's social role that the obligations fall only on him.

Charles Fried, the former solicitor general, has attempted to defend the detached moral position of the legal professional while also denying any professional obligation to donate voluntary services.[17] Fried defends the particularistic ethics of legal professionals based on their social role of defending rights and promoting justice.[18] He analogizes the role of a lawyer to that of a friend.[19] The lawyer is obligated to help the friend in certain ways even though the lawyer may disagree with that friend's goals. A lawyer representing a corrupt client still acts morally, according to Fried, because the lawyer's professional purpose is to preserve and ex-

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15. *See* LUBAN, *supra* note 5, at 7 (citing Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978)). *See generally* GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 77-125 (4th ed. 1854) (outlining the requirements and importance of a lawyer's fidelity to his or her client even when the client's interests conflict with the lawyer's own sense of morality).

16. *See* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 48-49 (1975) (noting that vigorous cross-examination of mistaken or even truthful witnesses is necessary to represent clients best).

17. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1079 (1976) ("If there are really not enough lawyers to care for the needs of the poor, then it is grossly unfair to conscript the legal profession to fill those needs."). *But see* Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 64 (1980) (proposing that the Code of Professional Responsibility's "present conception of the lawyer's role ... must be abandoned, to be replaced by a conception that better allows the lawyer to bring his full moral sensibilities to play in his professional role").

18. *See generally* Fried, *supra* note 17, at 1088 ("It would be absurd to contend that the lawyer must abstain from giving advice that takes account of the client's moral duties and his presumed desire to fulfill them. Indeed, in these situations the lawyer experiences the very special satisfaction of assisting the client not only to realize his autonomy within the law, but also to realize his status as a moral being.").

19. *See id.* at 1067.

press the autonomy of his or her client in the legal system.[20] That is, if the client has any rights to assert, the professional duty of the lawyer is to promote the due process of everyone by bringing these claims on the client's behalf. Although the lawyer may reject the client's goals, rights are violated and a wrong occurs when an individual refrains from pursuing a lawful claim due to ignorance or misinformation about the law.

Fried gives a fairly persuasive justification for the particularistic morality imposed on a lawyer as a result of the role assigned to his or her profession. Because of the duty to promote justice and to ensure that people's rights are protected, sometimes lawyers must associate themselves with people and causes that repel them and take actions that, in a different context, would be immoral.[21] Fried, however, abandons this role-morality when he confronts the idea of serving the needy.[22] He forsakes the lawyer's professional obligation to promote due process, contending that it is society's duty to protect the poor.[23] He justifies this inconsistency on the basis of preserving lawyers' autonomy, but his defense of this principle is unsatisfactory. He tells us that, just as autonomy allows a person to choose a profession, it also leaves people inside the profession the freedom to organize their practice according to their own inclination.[24] However, the choices people make constrain their freedom, and Fried fails to recognize that those choosing to practice law are required to follow the obligations imposed on the profession by its role morality.

Fried's argument misses its mark. The lawyer's claim to autonomy is derived from the need to serve the public interest. If the constraints of the adversary system suggested that less autonomy were more appropriate, the legal profession would have no more claim to autonomy than an oil company would have if it requested freedom from environmental regulations. Since the lawyer's professional autonomy is defensible only as long as it serves the public interest, to permit the legal profession to use its tradition of independence as a lever against the client's interest would turn the principle on its head.

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20. *See id.* at 1074.

21. *See id.* at 1082-87 (discussing the difficult situation where, although a lawyer must act against her personal integrity, she encounters no legal or professional sanctions for doing so).

22. *See id.* at 1079.

23. *See id.* ("[T]he duty to the client who cannot afford representation is initially a duty of society, not of the individual lawyer.").

24. *See id.* at 1078.

Does the autonomy to decline service to needy clients further the public interest? Autonomy enables lawyers to distance themselves from causes they detest. Some people argue that just as no one would choose a friend whose goals they reject, lawyers should not have to represent clients whose values they abhor. However, this argument is contrary to the code of professional conduct. Many lawyers throughout history, including Fried himself,[25] have defended the representation of unsavory clients on the principle that anyone who has rights to vindicate deserves legal counsel despite their moral failures. Indeed, the *Model Rules of Professional Conduct* explicitly disassociates a lawyer from the moral views of his or her client[26] specifically so people with unpopular positions and causes can gain access to lawyers in our legal system. For lawyers to raise this issue with respect to the obligation to serve the poor, while vigorously defending the right to represent disagreeable paying clients, implies that they might be willing to associate themselves with unsavory causes only if the price is right. That insinuation is completely contrary to the lawyer's professional responsibility.[27]

It should now be clear that role differentiation accords specific privileges and imposes correlative responsibilities that thereby alter the ethical standard for people in that role. To appreciate the specific ethical responsibilities of attorneys, it is necessary to consider the role they play in advancing the goals of the profession, of professionalism generally and of society as a whole. Understanding the way in which these responsibilities bridge the different goals will help clarify their scope and content.

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25. *See id.* at 1080 ("If the legal system is itself sensitive to moral claims, sensitive to the rights of individuals, it must at times allow that autonomy to be exercised in ways that do not further the public interest.").

26. Rule 1.2(b) of the *Model Rules of Professional Conduct* states: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES, *supra* note 4, Rule 1.2(b) (1998). For a full discussion of the ways in which unpopular causes have gone unrepresented in our legal system, see JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976). *See generally* LAWYERS' ETHICS vii (Allan Gerson ed. 1980) ("This book hopes to provide a clearer understanding of the role of lawyers in America today and of some of the major ethical problems they must confront.").

27. *See generally* Michael D. Bayles, *A Problem of Clean Hands: Refusal to Provide Professional Services*, 5 SOC. THEORY & PRAC. 165, 166 (1979); Michael Davis, *The Right to Refuse a Case*, ETHICS AND THE LEGAL PROFESSION 441, 454 (1986) (commenting that a lawyer's sole act of supplying legal services, even in a just system of law, is not sufficient to counterbalance the "bad" that the profession allows him to do).

B. Professionalism and Responsibility

What is a professional, and what attributes distinguish this status from other groups? While no uniform definition of professionalism exists, it is necessary to identify some salient features to understand what ethical standards should pertain to it.

One characteristic of professionalism is money.[28] Since the advent of the world's oldest profession, the idea of professionalism has embraced the notion of pay for services rendered. This element of professionalism survives intact in our present distinction between amateurs and professionals. For example, a professional golfer, unlike an amateur, is paid for his or her performance. While some may regard this distinction as the crux of professionalism, this trait fails to capture the full scope of the concept. Indeed, standing alone, the idea of making money appears closer to the idea of commercialism than professionalism.

The extensive training required to practice in the field illustrates another important attribute of professionalism. However, training is insufficient to justify professional status since chess champions must also train for extended periods, and they have no right to exclude or certify others before they can play. The intellectual component of the social practice is another aspect of professionalism.[29] This generalization is also over-inclusive because poetry involves intellectual rigor while poets do not generally enjoy professional status. Another common, and perhaps cardinal, trait of professionalism is credentialing. Lawyers and doctors, for example, must receive a license to practice. This requirement excludes any uncertified person from engaging in the professional practice. In addition, the authority of professional memberships to organize and regulate themselves constitutes a considerable area of sovereignty.[30] This independence is further augmented by the autonomy of its membership over its own work.

The parameters of a professional's autonomy certainly include the discretion of the professional to judge how the service ought to be provided.[31] When the boundaries of this autonomy are

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28. *See* Bernard Barber, *Some Problems in the Sociology of the Professions*, 92 DAEDULUS 647, 673 (1963).

29. *See* Bayles, *supra* note 27, at 7.

30. *See* Barber, *supra* note 28, at 679.

31. The importance of this type of autonomy as a feature of professionalism is highlighted by the strongly negative reaction of doctors and patients alike to the practice of HMO administrators telling doctors how to treat patients based on resources rather than medical criteria. For a discussion regarding the concept of a profession, see Barber, *supra* note 28, at 669-88.

extended, things become more ambiguous. While no one would presume to tell a kidney specialist how to conduct a dialysis or an architect how to design a building, society often imposes constraints on whether resources ought to be allocated to kidney diseases or whether any more skyscrapers may disfigure the skyline. This permissible constraint suggests something important about the nature and role of professions: they are designed and organized to serve some vital social interest. It seems unnecessary to state this explicitly, since the need for such things as health care and legal representation seems so obvious that no one would deny their value. But it is important to focus on this to appreciate the trade-off societies make in order to meet these social needs most effectively.

Society delegates the activities of professionals to specific groups. Indeed, not only does society entrust responsibilities to a specific group, society also provides that group with significant monopoly control over the parameters of the services and membership in its ranks.[32] The state further aids this group by making it a crime to practice certain professions without a license.[33] Hence, any member of society who wants to enjoy a crucial social service such as health care or legal representation must seek the assistance of the state designated group. In addition to serving basic social values and enjoying a monopoly right to do so, professions are also self-regulating. This autonomy is anomolous. Unlike other types of monopolistic organizations that are tolerated in the United States, professions have not been subjected to public control. Monopolies such as public utilities that also provide essential public services invite strict government regulation.

Professionals claim that, due to the intellectual training and autonomous judgment required for their practices, no one else would be qualified to control or discipline the membership or to set the conditions of practice. This argument has largely been accepted. Nevertheless, these combined features of a professional entity—serving basic social values, having a monopoly, and self-regulation—can have deeply adverse effects on society and the quality of human life. The state tolerates this powerful and profitable coalition because doing so serves the larger interests of soci-

32. *See* Bayles, *supra* note 27, at 11.

33. *See, e.g.*, GA. CODE ANN. § 43-9-19 (1998) (practicing chiropractor without a license is guilty of a felony); KAN. STAT. ANN. § 74-7001 (1997) (finding the practice of technical professionals without licenses unlawful); KY. REV. STAT. ANN. § 524.130(1) (Michie 1996) (practicing law without a license is unlawful).

ety. However, these monopolies are the state's creation, made for society's benefit, not for the benefit of professional practitioners. If they fail to serve society's interest, as society defines it, they undermine the justification for their special privileges.

Now we can see why the initial conception of a profession as an organization designated to make money offended our sensitivities. This free market notion fails to convey the image that lawyers perceive of themselves. More importantly, professionalism entails social responsibilities that purely commercial enterprises do not require. The prior discussion has suggested the origin of this responsibility, which can now be distilled to roughly three steps. The first stage consists of a claim to *maximal competence*, in which practitioners within a favored group, by virtue of their knowledge and skill, claim to speak for the whole group.[34] Those outside the group lack the special knowledge necessary to judge this competence, which leads to public acceptance of the profession's claim to select, certify and judge members of this class.[35]

In the second stage, professionals must give something in return for the autonomy granted by society to pursue its important social purpose. This results in a *public commitment* by the professionals to use their skills to realize the important social value inherent in their social practice.[36] Hence, lawyers must commit themselves to use their special knowledge and skills in the adversarial system, which is vital to the achievement of justice, in a manner that achieves that important social goal.

The recognition of this responsibility has been articulated for as long as lawyers have been organizing themselves into professional associations. At the first meeting of the New York City Bar Association, Samuel Tilden warned against viewing law simply as another way of making money and noted that the reasons for organizing into a professional body were to elevate the organization's standards and to serve a higher public good.[37] This warning recognizes that the legal profession is more than a commercial enterprise engaged in trade. The American Bar Association's *Model Rules of Professional Conduct* reiterate this professional commitment to the higher goal of justice, stating: "Lawyers play a vital role in the preservation of society. The fulfillment of this role re-

34. *See* KENNETH KIPNIS, LEGAL ETHICS 8 (1986).

35. *See id.*

36. *See id.*

37. *See* F. RAYMOND MARKS ET AL., THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY 13 (1972).

quires an understanding by lawyers of their relationship to our legal system."[38]

The upshot of the claim to maximal competence and the commitment to public service results in the third stage of professionalization: the exclusive *reliance by society* on licensed attorneys as the overseers of the justice system.[39] If lawyers are seen as the most qualified to ensure the correct functioning of the judicial system, and if they are committed to using their skills in the public interest, then society will entrust them with exclusive control over the system. Here the profession gains in both autonomy and exclusivity. It takes control of selecting and accrediting candidates, and promulgating and enforcing ethical standards.[40] Concurrently, the unauthorized practice of law by outsiders becomes a criminal offense.[41] In short, the profession becomes an unregulated legal monopoly with respect to legal services.[42] The indispensable relationship between professional autonomy and public service is explicitly acknowledged in the preamble to the *Model Rules of Professional Conduct*:

> To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.[43]

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the rules of professional conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the

38. MODEL RULES, *supra* note 4, Preamble (1998).
39. *See* KIPNIS, *supra* note 34, at 9.
40. *See id.* at 10.
41. *See id.*
42. *See id.*
43. MODEL RULES, *supra* note 4, Preamble (1998).

profession and the public interest which it serves.[44]

The preamble to the professional code essentially unites the concept of professionalism with the idea of responsibility in order to fulfill the social goals that justify its privileged existence. While the confluence of professionalism and responsibility is fairly clear, we need to focus on the legal profession's function to flesh out what that responsibility is and why it might extend to serving the poor.

C. Lawyers and Justice in the Adversarial System

The business of the legal profession is justice. That notion is explicit in the profession's ethical codes and implicit in most rhetoric that lawyers and others employ concerning the profession. While lawyers themselves do not actually dispense justice, they are a key instrument in the legal system by which justice is delivered. It is important to consider how justice is dispensed in our society so we can determine what effects this might have on the legal profession.

In the United States, most private goods are dispensed by the free market. These goods are distributed according to peoples' preferences for a certain item, as measured by the price they are willing to pay for it. Other goods are distributed by the state for various reasons. Often these are public goods that the state feels most people want and need but would otherwise be distributed inefficiently without some public role. Other goods are distributed not according to people's preferences or their right to enjoy them, but based on someone else's duty to provide them. For example, parents have a duty to care for their children, including, when necessary, to seek health care for them, not because children have some claim on the state for good health, but rather because, in becoming parents, they assumed a responsibility to provide the care.

We must ask what sort of good is justice and whether the way it is delivered creates some sort of duty for anyone to provide it. Perhaps the most fundamental moral premise of our legal system is equality before the law.[45] This guarantee means that the same

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44. *See id.*

45. Although this principle is enshrined in the U.S. Constitution in the Fifth and Fourteenth Amendments, our commitment to this value precedes even constitutional recognition in that it is part of our conception of law itself. *See generally* RONALD DWORKIN, LAW'S EMPIRE 382 (1986) ("The Constitution does insist that each jurisdiction accept the abstract egalitarian principle that people must be treated as equals, and therefore that each respect *some* plausible conception of equality in each of its decisions ...").

rules apply to all persons equally regardless of their status. For such a guarantee to be meaningful, however, all persons who are to have the law equally applied to them must have equal access to the system applying it. The opportunity for litigants to enter and utilize the legal system is a precondition to allowing judges to objectively apply the law before them. Hence, the promise of equality before the law depends on the nature and function of the legal system.

For better or for worse, the United States has committed itself to an adversarial system of adjudication. Most lawyers feel this is a wise choice.[46] Notwithstanding its many virtues, this system of adjudication imposes certain burdens. In order to recognize these burdens, we must recall why we have a system of adjudication at all. In the abstract, its purpose is to secure justice, but what does that mean in practice? The answer depends upon one's conception of justice in the abstract. Among various categories, the American adversarial system appears to be an example of imperfect procedural justice.[47] That is to say, there is a clearly identifiable result that we want to achieve, but the mechanisms for attaining that result are imperfect. In all instances, we want trial litigation to convict parties who are actually guilty and to exonerate innocent parties. The adversarial system creates certain procedures to secure this end, such as distributing the burden of proof to prosecutors and plaintiffs, and requiring parties to litigation to come forth with their own evidence. Nevertheless, the adversarial system is an imperfect form of justice because it is unable to guarantee that those entitled to a certain result actually receive it. Despite its limitations, this system is thought to work sufficiently well that, given the inability to develop any better system, people accept the results as the best approximation of justice. This acquiescence is predicated on the assumption that the system's purpose and effect is to make it as likely as possible that the jury's finding of fact and the judge's declaration of the parties' rights will be as

46. For a discussion of the wisdom of this commitment, see LUBAN, *supra* note 5, at 50-103.

47. For a more detailed discussion of imperfect procedural justice as well as other forms of justice such as perfect procedural and pure procedural justice, see JOHN RAWLS, A THEORY OF JUSTICE 84-86 (1971). Under a system of pure procedural justice, there is no independent criterion for the right result, but there is a fair procedure which, if followed, will lead to a fair outcome, whatever it is. *See id.* at 86. Under a system of perfect procedural justice, there is not only an independent criterion for a fair result, but also a procedure which can be devised to give the desired result. *See id.* at 85.

accurate as possible and will be accepted by the litigants as such.

For any system of adjudication to merit our respect, it must meet the abstract goal of equality before the law. In light of this, the protection the legal system affords for some must be made available to all. This imposes two criteria on any legal system. First, all citizens ought to know the extent of their rights and obligations. This information must be accessible to everybody regardless of their status. Second, all people with legal rights should be able to exercise them. Legal rights without legal remedies reflect a breakdown in the legal system. This malfunction, and the injustice it inflicts, is compounded when these rights are selectively available to some people because of their economic status.

One aspect of the adversarial system that is both attractive and problematic is the burden the system places on the parties to bring, investigate, prepare and present their own cases. The complexity of the legal system necessitates the representation of parties by competent people trained to do so. In the United States, this means members of the legal profession. Any party without a lawyer will be at a serious disadvantage in presenting a credible case. When this occurs, the judicial system may actually perpetrate an injustice. If this occurs frequently, the system cannot claim to be even nearly just.

The adversarial system is only an imperfect form of justice if the incorrect results it produces are a consequence of inherent procedural limitations that produce unintended mistakes. For example, there will always be people who lie, and it will not always be posible for the adversarial procedures to ensure that the trier of fact can discern who is telling the truth. However, if the adversarial procedures of justice are not even available to some people who have suffered legal wrongs, then the mistakes cannot be said to result from imperfect procedures but from non-application of imperfect procedures. The victims of this non-application are not simply the litigants, or potential litigants, whose legal rights are not vindicated when, in fact, they are entitled that they be so. Perhaps more importantly, society's interest in achieving imperfect procedural justice is defeated because it still wants people who, in fact, have legal claims to have them recognized at law.

This non-application of imperfect procedures jeopardizes the adversarial system's claim to any sort of justice. One might argue that this incomplete access produces an instance of pure procedural justice because people put their faith in the fairness of the procedure alone. Apart from the wisdom of placing any faith in

such incomplete procedures, the adversarial system cannot qualify for pure procedural justice because there is agreement on the just end result: that courts in fact decide for those people who in fact are entitled to prevail according to existing law. So the result cannot hinge purely on procedure.

One remedy for the present disparity in levels of legal representation is to reduce the need for legal counsel. This can be accomplished by simplifying the legal system to such a level that, together with programs of mass education, anyone would be able to learn the law and represent himself in the judicial system. Unfortunately, this solution is impractical in a modern industrial state where the complexity of the law reflects the nature of society.

Another solution to the problem of unequal access to the adversarial system is to replace the system with a different manner of adjudication. One option used in various civil law forums is the inquisitorial system.[48] Under this system of adjudication, judges take more responsibility for preparing and presenting the case and for other burdens normally placed on the parties or their lawyers in the adversarial system.[49] This system eliminates some of the injustices imposed by unequal legal representation. Nevertheless, this system, too, has major drawbacks, such as sometimes excessively relying on the government's ability to restrain itself and to look out for the interests of all sides. This difficult burden is often insurmountable when the government is itself party to the case. In this respect, the *Model Rules of Professional Conduct's* claim that abuses of legal authority by the government are more readily kept in check by an independent profession is persuasive.[50] While this is a good argument against an inquisitorial system of adjudication, it is also an indictment of uneven representation in an adversarial system because it results in the non-application or misapplication of even the admittedly imperfect procedures. If an independent legal profession is necessary to check government excess in some cases, it is necessary to prevent overreaching in all circumstances, including situations in which the party cannot afford counsel to actually participate in the adversarial system. In all circumstances, the harm to the unrepresented party under-

48. For a discussion of the inquisitorial system, see LUBAN, *supra* note 5, at 93-103.

49. *See id.*

50. *See* MODEL RULES, *supra* note 4, Preamble (1998); *see also infra* text accompanying note 55.

mines the legitimacy of the adversarial system.[51]

Other solutions to the problem of unequal representation before the law might include deregulation, or rather, deprofessionalization. Just as shoemakers and aluminum siding salesmen can promote their wares without invitation or accreditation, so too could "lay" attorneys sell their services on the basis of *caveat emptor*. This group of pettifoggers would not be a profession and so would have no obligation to serve the poor. In this situation law really would be a business, but it would also be accessible to a much wider group of people. Breaking the legal profession's monopoly on the delivery of services would cause prices to plummet. Unfortunately, the average quality of legal services would also plunge. But although the quality of such service would be wildly uneven, it would perhaps be no worse for those people who now go without representation altogether.

This solution does not appeal, however, to skilled professionals with a monopoly on legal services who argue that poor people would be exposed to charlatons and imcompetents. Yet any advantage afforded by the present system can be justified only if people who would otherwise be in a worse position if represented by "lay" lawyers actually get the benefit of a skilled professional. If the present system forces indigent individuals to forego representation entirely when contesting people with access to skilled attorneys, then the poor are worse off under the present system than under one where nobody has access to skilled legal counsel or they are represented by only semi-competent attorneys.

Although a deregulated system would lower the standards of legal representation, that consequence might equalize access to the adversarial system of adjudication. To the extent this reinforces equality before the law, it might enhance the legitimacy of the adversarial system. Lowering the standards for everyone in order to achieve equality is not an attractive option, and is indeed one of the more powerful objections to programs based on *absolute* equality. Nevertheless, the idea of *formal* equality before the law is a fundamental component of our legal system, and hence, of our conception of justice.[52] If the present system defeats this basic goal, creating universal access might be the better alternative.

The good being distributed by the American legal system,

51. *See generally* LUBAN, *supra* note 5, at 50-103 (discussing the American adversary system and its role in promoting or impeding justice).

52. *See* DWORKIN, *supra* note 45, at 382.

however, is justice, not refrigerators or widgets. Arguments of inefficiency, while not irrelevant, are not as crucial as they would be in the distribution of private goods. Equality is key in the distribution of justice even if the cost is lower levels of efficiency. If the legal profession finds this choice unacceptable, it must address the problem of unequal access to skilled representation, since equal opportunity for justice is the standard by which society judges the virtue of the present system.

Indeed, one could argue that allocating access to justice as a private good is actually inefficient and produces market failure. If one conceives of the adversarial system as a form of imperfect procedural justice, then when private resource allocation results in the provision of less justice than everyone agrees they want (i.e., legal results that reflect a person's actual legal rights), then that good is being allocated inefficiently. In this respect, justice is a classic public good. It is non-excludable in the sense that if one person's rights are vindicated, everyone benefits by having their interest in living in a just society preserved. Like most public goods, however, this benefit to any given person is less than the cost of providing it. If I hear of potential injustice due to lack of legal representation, the cost of paying for that person's legal counsel normally will far exceed my expected loss from diminished justice. While the "good" of justice would likely exceed the cost to each person of providing the indigent with legal counsel, it will encourage free riders because justice as a good is non-excludable. Hence, the logic of collective action suggests that, left solely to private exchange, the good of justice through the adversarial system will be purchased in inefficient amounts.

As an alternative to deregulation, we could maintain the professional status of lawyers and assign some subset to work for a government agency designated to provide legal services to the poor.[53] This is advantageous because it would recognize and address the necessity for universal legal representation. This solution would also address the complaints of many lawyers that pro bono unfairly burdens them with a responsibility properly carried by the state. Such an argument is based on the notion that if society identifies legal services as an important social value, then soci-

53. One commentator has proposed that lawyers be subject to a draft, much like our children being subject to mandatory education and our young men to military service. *See* MARKS ET AL., *supra* note 37, at 291. These drafted lawyers would work for a government agency exclusively devoted to representing the disadvantaged. *See id.*

ety ought to provide the benefit. While flawed, this is not an entirely frivolous argument. In countries with strong welfare state provisions, professional services such as health care are provided free of charge to the patients, while doctors are still paid for providing the services.[54] It is not self-evident that simply because the needy have a legitimate claim to a service, lawyers, rather than society, ought to provide it.

This rejoinder, although persuasive in some respects, is self-defeating. It is true that western industrialized countries with strong welfare state provisions pay their professionals to treat the needy, but the price these states extract is their professionals' autonomy. In Britain and Sweden doctors do not have to donate their time to the poor because they have become employees of the National Health Service, subject to the control of the Minister of Health, with an attendant sacrifice of professional autonomy.

Lawyers might hesitate before ceding all responsibility to the state, since the price may be their professional autonomy. The most obvious loss to the profession would be the control it must abdicate to its government employer in deciding which cases to bring and how to litigate them. If an independent profession is needed to prevent government excesses when it is a litigant, this is equally so when the government is the employer of the litigators. There is an unfortunate precedent for the government attempting to abolish and then restrict the Legal Services Corporation by dictating what causes of action it can bring and what legal remedies, such as those made through class actions, cannot be asserted.[55] This is just the sort of autonomy that a legal professional would not sacrifice with a paying client and ought not risk through subservience to a government body. Indeed, it is just this autonomy that the *Model Rules of Professional Conduct* pledges itself to protect in its preamble, as a necessary feature of justice in an adversarial system.[56] Any attempt to shift the burden of representing the poor to the government must be reconciled with the profession's compelling ethical arguments to preserve autonomy from government control in its other professional endeavors.

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54. Countries with such a system include France, Great Britain and Sweden.

55. *See, e.g.*, Legal Services Corp. Kept Alive Temporarily, XXXVII CONG. Q. ALMANAC 412, 414 (1981) (explaining Congressional action preventing lawyers from the Legal Services Corporation "from filing any 'class action' suits against local, state or federal governments" in House Bill, and ultimately removing the Legal Services Corporation's authorization to provide legal services to the needy in civil cases).

56. *See* MODEL RULES, *supra* note 4, Preamble (1998).

D. Professional Responsibility and the Adversarial System: The Obligation to Serve the Poor

The argument so far suggests two conclusions: first, that professionalism entails a responsibility to meet the social needs that justifies professional independence and other privileges; second, that the adversarial system of adjudication, which underpins our society's strong interest in justice, only functions when everyone has a lawyer to represent him or her in that system. Some may object to placing this obligation on the entire legal profession when many lawyers never represent clients in any adversarial proceedings. The thrust of this objection is that since many lawyers are not litigators, and hence have no direct contact with the adversarial system of justice, they incur no reciprocal obligation to engage in public service. This objection confuses the source of the obligation, which derives not from the purpose of the profession, justice, but from the benefit that the profession receives. That benefit, the monopoly right to give legal advice, serves all lawyers, regardless of their specialization, since it raises the prices they may charge by excluding competition. Even though a commercial lawyer giving tax advice may never intend to go to court, his or her fees will be higher than if he or she had to compete with tax accountants who are arguably just as competent.

Indeed, litigating lawyers might wonder why transactional lawyers, who do not effectuate the principal mission of the profession by providing access to the court system, enjoy the same benefits that litigating lawyers enjoy. This free-rider effect suggests that non-litigators actually have a greater public service obligation since they receive the economic benefits of the monopoly without providing the compensatory access to justice. This raises the question of whether or not all lawyers should enjoy the same monopoly rights. Certainly the claim for maximal competence is less compelling in areas of legal practice that overlap with various commercial activities.

The scope of this privilege varies in different common law jurisdictions. Some countries permit accountants and bankers to advise on matters that are normally reserved to lawyers in the United States.[57] This matter has been addressed recently in England, where the profession is bifurcated, more or less, into litiga-

57. *See* 16 COMMONWEALTH L. BULL. 555 (1990) (containing the Lord Chancellor's statement on the Courts And Legal Services Bill of 1990).

tors, called barristers, and non-litigators, called solicitors.[58] Although solicitors generally did not appear in court, they enjoyed a monopoly privilege to engage in many activities, such as land conveyancing, which could have been accomplished by other groups.[59] These services often provided the bulk of a solicitor's income.[60] Nevertheless, this privilege has recently been narrowed so that, for example, banks may now perform some of the conveyancing services formerly provided exclusively by lawyers.[61]

Non-litigating lawyers might respond that their activities do advance the cause of justice since, even though they do not represent clients in court, they advise them about legal issues which further their legal rights. The claim that non-litigating lawyers help serve justice by acting at the penumbra of the adversarial system is compelling. Nevertheless, it also suggests that, as part of this larger system, they assume the obligations of the profession. This does not mean that transactional lawyers must fulfill their obligations by representing indigent clients in the courtroom. Just as monopoly privileges can be justified by non-litigating activities, so too can public service obligations be fulfilled by any of the entire range of legal services lawyers are qualified to provide.

As the legal profession states in its own model rules of professional conduct, lawyers are the guardians of law.[62] The social goal they are pledged to serve is justice in our adversarial system.[63] Hence, their specific professional duty, among others they may have, is to ensure that everyone has legal representation. This duty is clearly recognized by the profession itself, which states in its *Model Rules of Professional Conduct* that "[a] lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf."[64] Through this and other statements, the collective body responsible for enforcing professional obligations has unequivocally acknowledged the duty to serve the poor. Nevertheless, the large segments of the popula-

58. *See id.*
59. *See id.*
60. *See id.*
61. *See id.*
62. *See* MODEL RULES, *supra* note 4, Preamble (1998).
63. *See id.* (stating that "[a] lawyer is a ... public citizen having special responsibility for the quality of justice").
64. *Id.*

tion who go without legal representation due to lack of funds[65] suggest a failure by the profession to fulfill its ethical duty.

Does this mean that the *Model Rules'* statements are empty rhetoric, platitudes designed to obscure the privileges of a profitable enterprise? This obligation to serve the poor does not derive from any promise made by the legal profession. The duty to serve the poor would exist even if the professional rules did not acknowledge it. Nonetheless, the rules' repeated declarations do have an effect on professional obligation since this frequent assertion, without rebuttal, has created reliance on the part of society that this promise should be fulfilled. This may not be an unenforceable gratuitous promise. Under the equitable doctrine of promissory estoppel, if it is made clear to the legal profession that society has relied to its detriment in return for the profession's promise to fulfill its responsibilities, then a binding obligation could be created. This is the same reliance that describes the social contract that society makes with any professional body. That is, in return for giving lawyers the privilege of an unregulated monopoly, society extracts the pledge that the constitutive goal of that profession will be delivered.[66] These professional benefits are not guaranteed by the Constitution. The government can decide the appropriate trade-off which it will demand in return for its grant. An obvious example is the communications industry. The government grants valuable licenses to radio and television stations in return for the obligation that the stations devote a particular amount of otherwise profitable air time to public service.[67]

The legal profession has similarly received something quite valuable in return for its public service duty. The legal profession has a largely unregulated monopoly on the delivery of legal services. While lack of competition is a great benefit to the monopolist, the absence of a free market is costly to society. Goods delivered by a monopolist are generally delivered more inefficiently—at higher costs and lower quality—than those goods subject to competition. For these and other reasons, monopolies are generally against public policy.[68]

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65. *See* Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 570-71 (1983).

66. *See generally* MARKS ET AL., *supra* note 37, at 273-93 (discussing economic burdens associated with public interest work and the concept that the practice of law is a public utility).

67. *See, e.g.*, 47 U.S.C.A. §§ 307-08 (1998).

68. It would be hard to argue that the legal profession is a natural monopoly in an age when even water and other utility companies are competing for customers.

Sometimes it is necessary to endure monopolies to achieve an important public purpose. The most common state-sanctioned monopolists are public utilities. In return for the benefits conferred on the sanctioned monopoly, society demands performance of the public purpose for which the monopoly was created. One purpose for which public utilities are created is to serve the entire public, even when a purely private corporation might decide that it was not profitable to do so. Nonetheless, public utilities, although regulated, are usually intended to be profit-making institutions. Therefore, the idea that an institution wants to make money is not inconsistent with having obligations that will reduce its capacity to do so.[69]

Lawyers are, of course, free to make money. Their status, however, as a profession is analogous to that of a public utility, with the exception that they have the added benefit of retaining their independence. This autonomy, unique to professional monopolies, increases its public service obligations. Without this reciprocity it would make no sense for society to allocate a valuable monopoly to the legal profession. Society would never grant an electric utility a monopoly if it pledged to serve only wealthy corporations who could afford high rates. Since this exclusive right raises the costs of providing the service, some pledge to reach the entire community must be made. This commitment entails sacrifice on the part of the monopolists because, absent this assurance, society would not tolerate the costs of monopoly. Likewise, lawyers, the self-proclaimed guardians of the law and the public utility in charge of delivering legal services, also must serve the entire community. While a regulated public utility would be required by the appropriate government agency to do this, a professional body is autonomous. This autonomy, far from relieving lawyers of the public service requirement, merely shifts it to the profession's own code of ethics. Because lawyers provide access to justice, their duty translates into working to ensure access to this service. In a system such as ours where only attorneys have authority to provide legal assistance, the legal profession fails to discharge its duty as an unregulated public utility unless it works to provide mechanisms for the delivery of legal services to the poor.

69. *See generally* VALUES IN THE ELECTRIC POWER INDUSTRY (Kenneth Sayre, ed., 1977) (discussing the United State's increased consumption of power).

E. Professional Obligations: Their Nature and Effect

The idea that ethical responsibilities are somehow voluntary is a common misconception prevailing in some parts of the legal profession. This approach appears to divide responsibilities into different species with different degrees of obligation, some voluntary and others mandatory.[70] This conception completely misconstrues the nature of obligation. All obligations, by definition, oblige unless they are overridden by more important duties.[71] Obligations can differ by their source and importance, but their status alone does not impair the duty to discharge them. An obligation entails a duty to act or to refrain from acting.

Sometimes the source of the duty is legal while other times it is moral.[72] Since legal obligations are backed by the force of the state, disobedience incurs the possibility of sanctions. Purely moral obligations do not risk state sanctions, although, from the believer's perspective, the sanctions for disobedience of one's religious obligations are infinitely worse. The lack of state or divine sanctions does not excuse performance of ethical obligations or make them voluntary.

The only justification for violating an obligation arises when a more significant, irreconcilable, obligation or duty trumps it. Sometimes obligations of law clash with moral obligations, and moral and legal obligations of different significance can conflict with each other. When this occurs it may be necessary to violate one obligation in order to fulfill another, more important one. In these circumstances one must weigh the magnitude of each obligation and perform the one of greater importance. That is the only excuse for not fulfilling an obligation. For example, even though one is obliged to keep one's promises, a father's duty to take his injured child to the emergency room overrides his prior promise to go fishing with his neighbor.

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70. *See, e.g.*, MODEL RULES, *supra* note 4, Rule 6.1 (1998) (characterizing ethical responsibility as voluntary).

71. For discussions of the nature of obligation and its relation to law and morality, see STUART HAMPSHIRE, MORALITY AND CONFLICT (1981); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979); Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1 (1985); Philip Soper, *The Moral Value of Law*, 84 MICH. L. REV. 63 (1985).

72. The connection between law and morals is a terribly complex issue in legal philosophy which this paper will not address. For the purposes of the present discussion it is irrelevant whether the law is morally correct since, with regard to the issue of public service, the law and morals do not conflict. For a comprehensive discussion of these issues, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); H.L.A. HART, THE CONCEPT OF LAW (1960).

Lawyers have no obligations that clash with their professional ethical obligation to make sure that the adversarial system delivers justice equally. While lawyers may honorably profit from their profession, there is no professional duty, no legal duty, no religious duty, and no moral duty to make the maximal amount of money one is capable of earning. Indeed, there is no duty that conflicts with their professional obligation to serve the poor. Since this obligation has not been overridden by more important duties or obligations, lawyers ethically *must* discharge this professional obligation.[73]

This confusion over the nature and status of ethical obligations has been reinforced by the unfortunate nomenclature and categorization utilized in various legal codes of professional responsibility. For example, the 1969 ABA *Model Code of Professional Responsibility* divided obligations into those that were mandatory, and hence exposed an attorney to disciplinary actions for failure to obey, and those which were merely ethical, and hence were just goals towards which the profession should, but need not, aim.[74] The former were called *Disciplinary Rules* while the latter were just *Ethical Considerations*.[75] This distinction is fallacious because it implies that we can have obligations that are voluntary. Indeed, the notion of voluntary obligations is an oxymoron.[76] The Code's distinction essentially denies that ethical considerations are professional obligations. It is uncertain whether the profession has the authority to make this determination. Although the profession's rhetoric reinforces its public service duty, the obligation to fulfill it stems from the nature of professionalism and the adversarial system in the United States.

The professional obligation to serve the poor has also been recognized in various state and federal decisions.[77] Some lawyers deny this, noting that the right to counsel recognized in *Gideon v. Wainwright*[78] has not been extended to indigent parties in civil

73. *See* Michael Davis, *The Moral Authority of a Professional Code, in* Nomos 29 AUTHORITY REVISITED 302, 302-37 (J. Roland Pennock & John Chapman eds., 1987) (discussing the moral basis of the professional code of ethics).

74. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

75. *See id.*

76. While one can take on ethical obligations voluntarily, as when someone promises to do something, once they are assumed one does not have the discretion to disobey them unless they are trumped by higher obligations.

77. *See, e.g.*, Mallard v. U.S. Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 310 (1989) (stating, in dicta, that lawyers have an ethical obligation to serve the poor).

78. 372 U.S. 335 (1963) (holding that an indigent defendant in a criminal prosecution has a right to counsel).

cases. This objection confuses a party's right to counsel with the powers of the judiciary and the duties of the lawyer. While parties may have no individual legal right to counsel in civil cases, this does not mean that a lawyer does not have an ethical duty to serve the poor or that a judge does not have the power to enforce it. Because ethical obligations, as we now understand, are mandatory unless trumped by more important ethical obligations, lawyers must ensure that everyone has access to the adversarial system of justice.

To whom is this duty owed? There are several candidates who might be the beneficiary of this obligation. Some might say the duty is owed, in the first instance, to the court as the body that administers the judicial system through which justice is achieved. Unfortunately, the power of the court to enforce this duty has recently been questioned in *Mallard v. U.S. District Court for the Southern District of Iowa*,[79] where the Supreme Court decided that 28 U.S.C. § 1915(d) did not permit a federal court to command a reluctant attorney to represent a poor litigant in a civil case.[80] Yet, despite the Court's unwillingness to construe the power to request as the power to compel, it reaffirmed that, apart from this statute, the ethical obligation of attorneys to volunteer their time to serve the poor remained manifest.[81] Moreover, the court left open the question of whether the federal courts have inherent power to compel lawyers to meet their obligation. The court refrained from considering this issue since the district court below had not invoked such authority.[82]

Even if the federal courts could not enforce the professional obligation to serve the poor, lawyers would still not be excused from discharging their own responsibilities. Otherwise one would have to believe that only those duties backed by sanctions are mandatory. This is not the case. While the likelihood that an obligation will be executed may be enhanced when it is backed by

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prosecution has a right to counsel).

79. 490 U.S. 296 (1989).

80. *See id.* at 296. The relevant section of the statute states: "[t]he court may request an attorney to represent any person unable to employ counsel ... ." 28 U.S.C.A. § 1915(d) (1998).

81. *See Mallard*, 490 U.S. at 308.

82. *See id.* Other jurisdictions have recognized an inherent discretionary power for the court to appoint counsel to the indigent and a concomitant obligation of lawyers to accept such assignment based on their professional ethical obligations. *But see In re* Smiley, 330 N.E.2d 53, 55 (N.Y. 1975) ("[T]here is no power in the courts to direct the provision of counsel or to require the compensation of retained counsel for the indigent wives [in divorce actions] out of public funds.").

sanctions, the authority of that obligation is independent of such measures. The lack of rigorous sanctions may explain why so many lawyers are tempted to evade their professional obligations to serve the poor. This is especially regrettable in light of the legal profession's self-proclaimed status as guardians of the law. Nothing would so undermine the rule of law as the belief that one's obligation to obey is contingent upon the probability of enforcement. A commitment to the rule of law means that one obeys it for its own sake and not simply because one is afraid of sanctions. Lawyers ought to know this better than anyone and thus should not need sanctions to motivate compliance with their professional ethical obligations.

Notwithstanding the duty owed to the court, society as a whole can claim to be the beneficiary of the professional duty to serve the poor. It can make this claim in return for the monopoly privilege conferred on the legal profession and because our system of adjudication, over which lawyers claim guardianship, could not otherwise be considered just. So long as lawyers continue to defend the adversarial system and their exclusive access to it, they must seek to make that system work for everyone, including those who cannot afford representation. Equal justice is a more fundamental principle in the American system of justice than representation by a professional body of private lawyers. Although the legal profession can plausibly claim to enhance equal protection in many ways, there is no doubt that, in one very important manner, the existing arrangement is an obstacle to justice. The need for money to hire a lawyer in the present system indisputably prevents a large segment of the population from vindicating its legal rights.[83] This injustice is a direct consequence of the present structure for the distribution of legal services. If we must sacrifice either equal protection under the law or an unregulated legal monopoly, equality before the law should be the more important ideal. These two principles could easily be reconciled if the legal profession fulfilled its obligation to serve the poor.[84]

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83. *See* Bok, *supra* note 65, at 570-71.

84. *But cf.* Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990); David Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980) (suggesting that no obligation of volunteer work should be imposed on the bar and that lawyers' contributions should mainly derive from ethical duty).

III. Conclusion

Professionals do not have a right to practice. The practice of law, as with any professional monopoly, is a privilege conferred by the state on those groups who serve its interests in a manner it chooses. Lawyers are given the privileges of their profession because they promote the larger social value of justice. The fundamental premise of justice in American society consists in equality before the law. This requires every person to have the same rights under the law and an equal opportunity to assert them. The legal profession's promotion of this social value justifies its privileges and its particularistic ethical behavior. It is inconsistent to simultaneously maintain all of the following propositions: that lawyers ought to have monopoly control over the provision of legal services; that lawyers are necessary in order for people to receive appropriate representation of their legal rights; that lawyers have a professional obligation to promote justice in return for their monopoly privilege; and that lawyers have no professional duty to serve the poor.

The argument that lawyers ought not be obligated to donate what other groups need is not without merit. However, all professionals, including lawyers, have particular role-related obligations to perform in return for the privilege of maintaining a monopoly control of a public good. Each monopoly is tolerated to the extent that it successfully promotes its designated social good. Whether or not other people, including society at large, may also have an obligation to provide the poor with legal service does not discharge the obligation of attorneys to fulfill their own professional responsibilities.