

# LEGAL ETHICS IN AN ADVERSARY SYSTEM: THE PERSISTENT QUESTIONS

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It is a particular pleasure to be among so many friends and distinguished colleagues, and to have an occasion to honor one of the founding fathers of our field. As many of you doubtless noted, my title is a variation on two of Professor Freedman's earliest and widely influential works.<sup>1</sup> This event is a fitting occasion for reflection on what has changed and what has remained the same during the last four decades since the first of these works appeared. A brief keynote address cannot, of course, chronicle the evolution of the entire field of legal ethics. But it does provide an opportunity to trace several themes that have been central to contemporary debates and to Professor Freedman's own contributions: autonomy, access, and accountability. First, what is the role of client autonomy in the adversary system, and how does it compare with other values? Second, what are the challenges of practicing in a system that enshrines equal access to justice in principle, but violates it routinely in practice? And finally, how do we ensure an appropriate measure of public accountability for professional conduct?

Let me begin with a personal reminiscence, which may cheer some who toil in this specialty and occasionally wonder whether it ever makes a difference. When I was in law school at Yale in the late 1970s, Professor Freedman came to debate Geoffrey Hazard on the subject of much of his early work: the tension between lawyers' responsibilities to their clients and to the pursuit of truth. Even at this distance of three decades, I can still recall this dialogue as a pivotal moment in my own career. I remember thinking: "This is really interesting. Why haven't we been talking about it in law school?" Yale at the time taught legal ethics by the pervasive method, and as in so many institutions, this kind of extracurricular event was as pervasive as it got. That debate helped steer me down the path that ends up here. I have no doubt that Professor

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1. *See generally* MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) [hereinafter *FREEDMAN, ADVERSARY SYSTEM*]; Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *MICH. L. REV.* 1469 (1966).

Freedman's work has touched many in this field in similar ways, and I am grateful for this public occasion to say how much his contributions have meant, personally and professionally to us all.

### I. AUTONOMY: CLIENT LOYALTY AND COMPETING VALUES

One of the most central issues in legal ethics has always been the importance of client autonomy and the responsibilities it imposes on lawyers. Professor Freedman, early on, staked out one of the strongest defenses of this value, and of attorneys' unqualified loyalty to client interests. In essence, his position has been that attorneys are morally accountable "for the decision to accept a particular client or cause" and for counseling the client "regarding the moral aspects of the representation."<sup>2</sup> But, according to Freedman, once a lawyer "chooses to represent a client, . . . it would be immoral as well as unprofessional for the lawyer, either by concealment or coercion, to deprive the client of lawful rights that the client elects to pursue . . ."<sup>3</sup> The rationale is that respect for individual dignity and autonomy is a defining feature of a free society, and of an adversarial system of justice that protects the society's core values.<sup>4</sup> On this view, which is reflected and reinforced by bar ethical codes, the best way to protect individual rights and pursue truth is through a clash of opposing advocates, who represent their clients' interests as their clients perceive them. As Freedman summarizes the argument:

The adversary system thereby gives both form and substance to the humanitarian ideal of the dignity of the individual. The central concern of a system of professional ethics, therefore, should be to strengthen the role of the lawyer in enhancing individual human dignity within the adversary system of justice.<sup>5</sup>

This obligation "to serve the undivided interests of individual clients" is not, of course, without qualification.<sup>6</sup> Much of the contemporary debate on legal ethics within the American bar in general and the professional responsibility community in particular has been over how to define the exceptions. Over the last quarter century, the primary trend, both in theory and in practice, has been toward greater qualification of client loyalty, but the results have been uneven and often

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2. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 87 (2d ed. 2002).

3. *Id.*

4. *See id.* at 20-21.

5. *Id.* at 49.

6. *Id.* at 10.

unsatisfying to both supporters and opponents of the trend. In some areas, reformers seem to have struck a workable compromise; in others, the controversy is likely to escalate.

At the theoretical level, a growing number of professional responsibility scholars, myself among them, has challenged the priority traditionally given to client autonomy in civil contexts as compared with other ethical concerns. From this perspective, the rationale for unqualified partisanship has force in criminal cases, but on grounds that are not applicable to most other arenas of legal practice. “Individuals whose lives, liberty, and reputation are at risk” have special need of “an advocate without competing loyalties.”<sup>7</sup> Constitutional protections of due process and prohibitions on governmental abuse would mean little without a lawyer prepared to assert them. The prospect of a vigorous defense provides necessary incentives for law enforcement officials to respect individual rights and to investigate facts thoroughly. Providing uncompromised advocacy for all defendants, including those who are guilty, is a crucial means of protecting those who are not.<sup>8</sup>

The justifications for such advocacy are much weaker in civil cases. Legal philosophers such as David Luban have noted that promoting client autonomy does not have intrinsic value. Its importance rests on the other values that it fosters, such as personal initiative and social responsibility.<sup>9</sup> If a particular client’s objective does little to advance such values or does so only at much greater cost to third parties, then unqualified loyalty lacks moral justification. That is especially likely when the client is not an individual, but a profit-driven organization, and the victims *are* individuals whose health, safety, and autonomy are inadequately represented. On this view, client trust, autonomy, and confidentiality are entitled to weight, but they must be balanced against other equally important concerns. Lawyers also have responsibilities to prevent unnecessary harm to third parties, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which this system depends.<sup>10</sup>

Influential early writing on legal ethics focused on several areas

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7. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 54 (2000) [hereinafter RHODE, JUSTICE].

8. See *id.* at 55; see also David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762-66 (1993) (arguing that unqualified advocacy is more justifiable in criminal than civil contexts).

9. See David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1037-41 (1990); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 639; see also JOSEPH RAZ, THE MORALITY OF FREEDOM 381 (1986).

10. For a fuller elaboration of this view, see RHODE, JUSTICE, *supra* note 7, at 57, 6-7.

where those values have been in conflict: clients' perjury, fraud, and other socially injurious misconduct. At issue have been competing concerns: the need to preserve sufficient trust and candor in lawyer-client relationships to ensure effective representation, and the need to promote sufficient commitments to truth, fairness, and concern for third parties to ensure an effective legal system.

Dilemmas involving client perjury no longer provoke much controversy, largely because the Model Rules of Professional Conduct have struck a pragmatic compromise. Rule 3.3 prohibits offering "evidence that the lawyer knows to be false" and requires "reasonable remedial measures" if the lawyer "comes to know of [the] falsity" of material evidence that he or she has offered.<sup>11</sup> This approach offers something for everyone; it symbolically affirms one of the competing values—truth—without seriously impairing the other—client trust. Lawyers who reject the Rule's symbolic priorities can largely ignore its practical requirements.<sup>12</sup> They can operate with such a restrictive definition of knowledge that the remedial obligation never kicks in. The Comment to the Rule makes this "epistemological demurrer" even more attractive by explaining that a "reasonable belief that evidence is false does not preclude its presentation" and that "doubts about . . . veracity" should be resolved in favor of the client.<sup>13</sup> Although the Comment adds that lawyers "cannot ignore an obvious falsehood," prudent practitioners can generally avoid bumping into one.<sup>14</sup> Given the difficulties of proving actual knowledge of perjury, lawyers have run little risk of sanctions for giving clients the benefit of some very large doubts.

Whether this is the best available compromise of competing principles is an open question.<sup>15</sup> Some commentators have suggested that a better accommodation would be to follow the practice of other countries that allow criminal defendants to make unsworn statements in their own defense. But it is by no means clear how much would be

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11. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2004).

12. In one poll, forty-one percent of attorneys believed that informing a court of clients' perjury would violate those clients' rights to effective assistance of counsel. Lauren Rubenstein Reskin, *How Lawyers Vote on Tough Ethical Dilemmas*, ABA J., Feb. 1986, at 42.

13. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 8 (2004). For a critical view of the "epistemological demurrer"—lawyers' asserted inability ever to "know" the truth—see Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 618-20 (1985), and FREEDMAN, ADVERSARY SYSTEM, *supra* note 1, at 51-58.

14. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 8 (2004). For a classic treatment of the techniques, see KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 103-23 (1985).

15. See Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1939-40 (1988); Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 550 (1988).

gained by moving in that direction or by enacting reforms that would either strengthen or relax the obligations of lawyers. Whatever the formal ethical rules, clients who intend to commit perjury will have ample incentives to conceal it from attorneys. And attorneys whose livelihood depends upon a trusting relationship with clients have ample incentives to avoid knowledge requiring disclosure of their duplicity. Moreover, in a system in which the vast majority of criminal cases end in guilty pleas, and in which many defendants who do go to trial have other reasons to avoid testifying, a change in ethical rules on perjury may have limited practical effect. To be sure, modifying ethical responsibilities could have some impact on how attorneys counsel clients and how clients assess the value of proceeding to trial and taking the stand. But as the subsequent discussion notes, the most fundamental problems concerning client representation in the current criminal justice system involve the inadequate resources and incentives for indigent defense. Tinkering with largely unenforceable perjury rules pales in comparison.

By contrast, other issues of client misconduct have provoked continuing controversy and no stable, widely accepted compromises. The American Bar Association's first Code of Professional Responsibility (1969), and its initial version of the Model Rules of Professional Conduct (1983), took a highly protective view of client confidences, even in the face of substantial third party injuries. Exceptions to the confidentiality obligations were quite limited. Both documents required disclosure to prevent client perjury or other fraud on a tribunal.<sup>16</sup> The Code permitted disclosure only in one additional circumstance: to enable lawyers to establish their own claims in a controversy with a client, including efforts to collect a fee. The Model Rules added only one further exception: to prevent the client from committing a criminal act that would result in imminent death or substantial bodily harm.<sup>17</sup> In other circumstances, involving non-criminal acts or serious financial injuries, attorneys' only recourse was to withdraw from representation and to disavow prior statements that might assist misconduct. In the case of organizational clients, lawyers could also refer serious legal violations to the organization's highest authority.<sup>18</sup>

From the profession's perspective, these rules held obvious appeal. They gave lawyers maximum scope to protect their own interests and

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16. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2004); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B) (1969).

17. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

18. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004).

those of paying clients. From a societal perspective, however, the norms made little sense. If a less self-interested decision maker than the bar had been responsible for adopting confidentiality rules, it seems inconceivable that the ABA's formulations would have been the result. Would anyone other than judges have required disclosure to prevent a fraud on a court but not to save a life? Would anyone outside the bar have permitted disclosures to help lawyers collect a modest fee but not to prevent a massive health or financial disaster?<sup>19</sup>

Defenders of those rules often claimed that further limitations on confidentiality would impair representation by causing clients to withhold inculcating information. It is, however, not self-evident why those individuals deserve maximum protection at the expense of more innocent third parties whose physical or financial well-being depends on disclosure.<sup>20</sup> Moreover:

Historical, cross-cultural, and cross-professional data make clear that practitioners have long provided assistance on confidential matters without the sweeping freedom from disclosure obligations that the American bar has now obtained. Businesses routinely channeled compromising information to attorneys before courts recognized a corporate privilege, and most European countries manage without one now.<sup>21</sup>

These difficulties in the bar's initial confidentiality standards have not escaped attention. Over the last two decades, evidence of lawyers' complicity in major health, safety, and financial scandals has fueled continuing reform efforts.<sup>22</sup> By the turn of the twenty-first century, most states had adopted exceptions to confidentiality protections beyond those codified in the ABA's Model Rules.<sup>23</sup> In 2002, the ABA itself modified those rules to expand lawyers' discretion to disclose compromising

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19. FREEDMAN & SMITH, *supra* note 2, at 148-49; RHODE, JUSTICE, *supra* note 7, at 109; Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1-2 (1998).

20. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1142 (1988).

21. RHODE, JUSTICE, *supra* note 7, at 111.

22. Examples included the marketing of products such as asbestos, cigarettes, and the Dalkon Shield, and financial disasters such as the collapse of savings and loan associations and Enron. *See id.* at 108-09; *see also* DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 146, 255-63 (4th ed. 2004); Deborah L. Rhode & Paul Patton, *Lawyers, Ethics, and Enron*, in *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS* 625 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) [hereinafter Rhode & Patton, *Enron*]; William H. Simon, *The Kaye-Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 243-44 (1998).

23. For a compilation of state standards, see ATT'YS' LIAB. ASSURANCE SOC'Y, INC., *Ethics Rules on Client Confidences*, reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 2004 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 144-55 (2004).

information. Most significantly, attorneys are now permitted to reveal confidences necessary to prevent reasonably certain “death or substantial bodily injury” even if no criminal act is involved.<sup>24</sup> They may also act to prevent, mitigate, or rectify client crimes or frauds reasonably certain to result in financial injuries where their own services have been used.<sup>25</sup>

Yet the ABA, and the vast majority of state bars, have declined to impose any mandatory disclosure obligations. Moreover, lawyers representing organizations are permitted to reveal confidences or report to the highest authority only in circumstances involving legal violations reasonably certain to result in substantial injury to the organization, where the organization’s best interest would be served by disclosure.<sup>26</sup> No responsibilities to third parties are acknowledged.<sup>27</sup>

That omission prompted Congress, in the aftermath of Enron, to fill at least part of the gap. The Sarbanes-Oxley Act of 2002 authorized the Securities and Exchange Commission (“SEC”) to require lawyers representing securities issuers to report material violations of the law to supervisory officials within the organization. If these individuals fail to take appropriate remedial action, lawyers are now obligated to notify the organization’s board of directors or designated board committee.<sup>28</sup> In promulgating regulations under that Act, the SEC considered requiring lawyers to disclose possible legal violations to the Commission if the board failed to take effective action, but, in the face of overwhelming bar opposition, the proposal was withdrawn.<sup>29</sup>

Whether these new requirements go too far or not far enough has generated a cottage industry of commentary. And at this juncture, we lack empirical evidence to adequately evaluate competing claims. What

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24. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2004).

25. *See id.* at R. 1.16.

26. *Id.* at R. 1.13.

27. For discussion of the indifference to third-party concerns in organizational contexts, see Monroe H. Freedman, *The “Corporate Watch Dogs” That Can’t Bark: How the New ABA Ethical Rules Protect Corporate Fraud*, 8 UDC/DCSL L. REV. 225, 228 (2004).

28. Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (2003); 17 C.F.R. § 205.3 (2005).

29. One version of the noisy withdrawal rule appears at Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8150, Exchange Act Release No. 46,868, Investment Company Act Release No. 25,829, 67 Fed. Reg. 71,670, 71,704 (proposed Dec. 2, 2002). For discussion of opposition, see Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8186, Exchange Act Release No. 47,282, Investment Company Act Release No. 25,920, 68 Fed. Reg. 6324, 6325 (proposed Feb. 6, 2003). For the second version of the proposal, see *id.* at 6328-29. The final rule does permit an attorney to make a noisy withdrawal to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors. 17 C.F.R. § 205.3(d)(2)(i) (2005). Many state confidentiality rules prohibit disclosure under such circumstances, and the issue of whether federal regulations preempt state ethical codes is now under dispute.

little data are available concerning mandatory disclosure requirements in state ethical codes suggest that such obligations are rarely invoked or enforced in any publicly visible way.<sup>30</sup> SEC requirements are likely to have more bite, but how effective they will prove in practice remains open to question.<sup>31</sup> The organized bar, however, seems intent on researching only one side of the debate. The chair of a newly appointed ABA Task Force on the Attorney-Client Privilege describes its mission as collecting evidence that recent curtailment of confidentiality protections are not in the best interests of corporations or the public.<sup>32</sup>

That response raises a broader issue about the evolution of rules governing advocacy and the process for their formulation. Recent history leaves little doubt that the public has paid a substantial price for the ethic of undivided client allegiance.<sup>33</sup> A growing constituency both within and outside the profession is demanding that lawyers assume greater responsibility for the welfare of parties other than clients.<sup>34</sup> If attorneys are unprepared to accept that responsibility, others are likely to impose it on them. Despite intense opposition from the organized bar, Congress passed the Sarbanes-Oxley Act with only three dissenting votes.<sup>35</sup> If the

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30. See RHODE, JUSTICE, *supra* note 7, at 113.

31. The absence of external whistleblowing requirements and the standard of knowledge for internal reporting obligations have been the subject of particular criticism. The obligation is triggered under circumstances in which "it would be unreasonable . . . for a prudent and competent attorney not to conclude that it is reasonably likely" that a violation has occurred, is occurring, or will occur. 17 C.F.R. § 205.2(e) (2003). For criticism, see Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 754 (2004), and see also Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1104 (2004); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1274-76 (2003); William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. ON REG. 1, 31 (2005) [hereinafter Simon, *Wrongs*]; Simon M. Lorne, *The Perplexity and Perversity of the New Lawyer Conduct Rules*, WALL ST. LAW., June 2003, available at <http://realcorporatelawyer.com/wsl/wsl0603.html>.

For competing concerns about the adverse effects of restricting confidentiality protections, see *Corporate Counsel: ABA Is Urged to Express Opposition to Government Incursions on Privilege*, 21 LWS. MAN. ON PROF. CONDUCT (ABA/BNA) 303 (June 15, 2005).

32. Molly McDonough, *Prove It: Task Force Seeks Evidence That Recent Policies Undermine Attorney-Client Privilege*, ABA J., Apr. 2005, at 60.

33. See sources cited *supra* note 22.

34. See, e.g., David Luban, *Moral Meltdowns*, in MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT AND POLICY 57 (Deborah L. Rhode ed., 2006); John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 363 (2004); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1294-95 (2003); Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 227 (2003); Simon, *Wrongs*, *supra* note 31, at 1-3, 35; *Corporate Counsel: Campos Urges Bond Attorneys to Engage in 'Self-Policing' and 'Preventive Lawyering'*, 21 LWS. MAN. ON PROF. CONDUCT (ABA/BNA) 463, 487 (Sept. 21, 2005).

35. See, e.g., Rhode & Patton, *Enron*, *supra* note 22, at 628.



regulations that the statute authorizes prove inadequate, more stringent requirements are sure to follow. As discussion in Part III makes clear, the bar's own autonomy on issues of governance is subject to growing challenge. If lawyers want to retain some measure of regulatory independence, they need to strike a less self-interested balance of the public, professional, and client interests at stake.

## II. ACCESS TO JUSTICE

Another central challenge of American legal ethics arises from the disjuncture between the adversary system in principle and in practice. The system's underlying premise, that accurate results will emerge from partisan advocacy before a disinterested decision maker, depends on factual assumptions that are out of touch with daily realities. The vast majority of legal representation never receives oversight from an impartial tribunal; little of lawyer's advice, negotiation, drafting, and pretrial work obtains such scrutiny. Moreover, even cases that end up in court seldom resemble the bar's theoretical model of adversarial processes. That model presupposes opponents with roughly equal incentives, information, resources, and capabilities. "But those conditions [may be] more the exception than the rule in a society that tolerates vast disparities in wealth, high litigation costs, and grossly inadequate access to legal assistance."<sup>36</sup> "In law, as in life, the haves generally come out ahead."<sup>37</sup>

Obvious though this point seems, prevailing views of the advocate's role fail to address its implications. According to the Preamble of the ABA Model Rules, "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."<sup>38</sup> What happens when the opposing party is not well represented is a matter that the Rules largely overlook.

The problem of unequal access to justice, and the bar's reluctance to address it, is longstanding. Early codes of ethics were, for the most part, silent on the subject, except for some exhortatory provisions urging attorneys to provide unpaid or reduced-fee assistance to the poor,

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36. RHODE, JUSTICE, *supra* note 7, at 55-56. For discussion of those disparities in criminal contexts, see DEBORAH L. RHODE, ACCESS TO JUSTICE 11-12, 123-24 (2004) [hereinafter RHODE, ACCESS]. For civil contexts, see *id.* at 13-14, 103-06.

37. For a more extended development of this argument, see RHODE, JUSTICE, *supra* note 7, at 56, and Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 149 (1974).

38. MODEL RULES OF PROF'L CONDUCT pmb1. (2004).

particularly the widows and orphans of “brother” lawyers.<sup>39</sup> Until the mid-twentieth century, the bar’s support for subsidized legal services was notable for its absence. The ABA initially opposed government-funded legal aid on the ground that it would pave the way for “socialization” of the profession, and representative surveys found that fewer than ten percent of lawyers contributed to the few available legal assistance programs.<sup>40</sup> Bar support began to increase during the 1960s, but it was largely confined to lobbying for state and federal subsidies. Surveys of lawyers from the 1960s through the 1980s found that only five to fifteen percent of practitioners provided pro bono assistance, and most of the aid went not to the poor but to family, friends, employees, and middle-class organizations.<sup>41</sup> The topic itself was largely ignored by law schools and mainstream legal ethics writing until the last two decades.<sup>42</sup>

For most of its history, not only did the American bar fail to provide significant support for legal aid, it also promulgated anticompetitive ethical rules that inflated the cost and reduced the accessibility of legal services. Restrictions on advertising, solicitation, minimum fees, unauthorized practice, and group legal services all helped to price law out of reach for routine needs of most Americans.<sup>43</sup> Although here again, bar attitudes grew more liberal during the late 1960s and 1970s, it generally took rulings by the courts to prompt significant changes in restrictive ethical rules.<sup>44</sup>

Over the last quarter century, much has changed. The issue of unequal access is on the profession’s agenda. At least three-quarters of the states now have commissions focusing on the issue, and it is a frequent topic of legal ethics commentary and reform efforts.<sup>45</sup> Increases

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39. See MODEL CODE OF PROF’L RESPONSIBILITY EC 2-25 (1980); CANONS OF PROF’L ETHICS Canon 12 (1908).

40. RHODE, ACCESS, *supra* note 36, at 60; JEROLD S. AUERBACH, UNEQUAL JUSTICE 236 (1976).

41. RHODE, ACCESS, *supra* note 36, at 66; RICHARD L. ABEL, AMERICAN LAWYERS 130 (1989); AUERBACH, *supra* note 40, at 282.

42. Although law schools offered clinics, externships and student-run public service activities programs, it was not until the late 1980s that any significant number began to introduce formal pro bono policies and administratively supported programs. See DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 21-22 (2005) [hereinafter RHODE, PRO BONO]. For an example of the lack of coverage of pro bono responsibilities in influential early writing, see generally FREDMAN, ADVERSARY SYSTEM, *supra* note 1.

43. For an overview, see RHODE, ACCESS, *supra* note 36, at 69-76; ABEL, *supra* note 41, at 118; AUERBACH, *supra* note 40, at 41-48.

44. See RHODE, ACCESS, *supra* note 36, at 71-72; RHODE & LUBAN, *supra* note 22, at 729-89.

45. See, e.g., Supporting Partnerships to Expand Access to Justice (“SPAN”), *Twelve Lessons from Successful State Access to Justice Efforts* 1-6 (Mar. 2003) (SPAN Working Paper, on file with author).

in competition, information, and technological innovation have all helped to reduce the costs of legal services and increase individuals' capacity for self-representation. Two-thirds of lawyers now report performing some pro bono work, broadly defined, for the poor or for other bar or charitable organizations.<sup>46</sup>

Yet despite such progress, we remain a considerable distance from the equality in legal representation on which the fairness of the adversary system depends. It is a shameful irony that the nation with the world's highest concentration of lawyers still does so little to make law available to those who need it most. Less than one percent of the nation's expenditures on legal services, about \$2.25 per capita, goes to support civil legal assistance for one-seventh of the population that is poor enough to qualify for assistance.<sup>47</sup> At these funding levels, not much due process is available. Bar estimates consistently find that over four-fifths of the individual legal needs of the poor remain unmet.<sup>48</sup> These estimates do not include the millions of Americans of limited means who are above poverty thresholds, but cannot realistically afford lawyers, or collective problems in areas like educational inequality or the environment.

We also have not begun even to quantify, let alone address, the inadequacies in indigent criminal defense. Recent research documents, in dispiriting detail, reveal the vast gap between adversarial premises and daily practices in the criminal justice system. Funds available for indigent defense average one-eighth the amount available for prosecution.<sup>49</sup> Many court-appointed attorneys lack the time, resources, training, or incentives to mount an effective defense. Statutory fees and caseloads are often set at ludicrous levels, which makes trial preparation for most poor clients a statistical impossibility.<sup>50</sup> Over ninety percent of

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46. ABA Standing Comm. on Pro Bono and Pub. Serv., *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers* 4 (Aug. 2005), available at <http://www.abanet.org/legalservices/probono/report.pdf>. The survey used the definition of pro bono in the ABA Model Rule 6.1, and included assistance: to people of limited means or to organizations that address the needs of the poor; activities for improving the legal system or the legal profession through groups such as bar associations or judicial committees; and work for charitable, civic, religious, educational, or other non-profit organizations. *See id.* at 10.

47. *See* RHODE, ACCESS, *supra* note 36, at 106. America spends only about \$2.25 per person on aid, a level one-sixth to one-fifteenth of that of other countries with comparable legal systems, such as Canada, Australia, and Great Britain. *See id.* at 112.

48. *See id.* at 3.

49. *See id.* at 123; *see also* DAVID COLE, NO EQUAL JUSTICE 64, 84 (1999); Douglas McCollum, *The Ghost of Gideon*, AM. LAW., Mar. 2003, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1045793311608>.

50. Hourly rates for out-of-court work are as low as \$20 or \$25, and ceilings of \$1000 or caseloads of five hundred felony matters are common. *See* RHODE, ACCESS, *supra* note 36, at 12; Vivian Berger, *Time for a Real Raise*, NAT'L L.J., Sept 13, 2004, at 27; ABA Standing Comm. on

indigent criminal defendants plead guilty without trial, typically before any significant effort is made to investigate their case.<sup>51</sup>

The profession's response to inadequate representation has itself been demonstrably inadequate. In criminal cases, the standards governing effective assistance of counsel are a national embarrassment; convictions have been upheld where defense lawyers have been asleep, drunk, on drugs, or parking their cars for key portions of the prosecution's case.<sup>52</sup> Even in capital cases, "[d]efendants have been executed despite their [counsel's] lack of any prior trial experience, ignorance of all relevant death penalty precedents, [and] failure to present any mitigating evidence."<sup>53</sup> High costs and unrealistic standards of proof make civil or disciplinary remedies for negligence largely unavailable in criminal contexts, and few states have made efforts to enforce guidelines on effective performance.<sup>54</sup>

In civil contexts, the profession has too often been part of the problem rather than the solution. On issues like procedural simplification, pro se assistance, and non-lawyer services, courts have been insufficiently proactive, and many bar organizations have been actively resistant. In "poor peoples' courts" that handle housing, bankruptcy, small claims, and family matters, parties without lawyers are less the exception than the rule. Yet the system in which these parties operate has been designed by and for lawyers, and neither courts nor bar associations have pressed for reforms that would make it truly accessible to everyone else. Innovative projects are in ample supply, but a majority of surveyed courts have no formal pro se assistance services, and many of the services that are available are inadequate for those who need help most: litigants with limited education, financial resources, and English language skills.<sup>55</sup> Part of the problem lies with judges, who are reluctant to encourage more time-consuming pro se litigation or to antagonize lawyers, whose economic interests are threatened by self-help initiatives and whose support is critical to judges' own effectiveness, election

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Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 7 (Dec. 2004) available at <http://www.indigentdefense.org>.

51. See RHODE, ACCESS, *supra* note 36, at 124.

52. See *id.* at 13, 134-35.

53. *Id.* at 13, 140-41; see also COLE, *supra* note 49, at 87; Stephen B. Bright, *Equal Justice Under Law*, IDEAS FOR AN OPEN SOC'Y (Open Soc'y Inst., New York, N.Y.), Mar. 2003, at 3, available at [http://www.soros.org/resources/articles\\_publications/publications/ideas\\_equaljustice\\_2\\_0030301/ideas\\_promise\\_equal\\_justice.pdf](http://www.soros.org/resources/articles_publications/publications/ideas_equaljustice_2_0030301/ideas_promise_equal_justice.pdf); TEX. DEFENDER SERV., LETHAL INDIFFERENCE, at ix (2002), available at <http://www.texasdefender.org/front.pdf>.

54. See RHODE, ACCESS, *supra* note 36, at 131-36, 143; Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169-70 (2003).

55. See RHODE, ACCESS, *supra* note 36, at 83.

campaigns, and advancement.<sup>56</sup>

Similar considerations have worked against efforts to broaden access through non-lawyer providers of legal services. Almost all scholarly experts and bar commissions that have systematically studied the issue have recommended increased opportunities for qualified non-lawyer assistance; almost all state supreme courts and bar associations have ignored those recommendations.<sup>57</sup> Rather than develop regulatory and licensing systems that would protect consumers from injury, the bar prefers to protect lawyers from competition. Like many of their state and local counterparts, the ABA's governing body has voted to strengthen—not reconsider—sweeping, unauthorized practice prohibitions.<sup>58</sup>

A final area of abdication by courts and bar associations involves pro bono service. Proposed requirements have come and gone, but mainly gone. Bar codes and state supreme courts have adopted only aspirational standards, coupled in a few jurisdictions with voluntary or mandatory reporting systems.<sup>59</sup> Yet most lawyers have failed to meet these standards. Law is the highest earning profession in the country, but the best estimate of the bar's average pro bono contribution is under half-an-hour a week, and half-a-dollar a day.<sup>60</sup> Performance remains pitiful even among the lawyers who could most readily afford to do more. Only about a third of the attorneys in the nation's two hundred largest and most financially successful firms provide at least twenty-five minutes a week of pro bono service.<sup>61</sup>

Progress also remains to be made in law schools. Few issues are

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56. See *id.*; Fisher, *supra* note 31, at 1116; Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 19 (1998).

57. See RHODE, ACCESS, *supra* note 36, at 15, 82-83, 87-89; Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 701 (1996) [hereinafter Rhode, *Nonlawyer Practice*]; Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 233 (1990) [hereinafter Rhode, *Legal Services*]. For other experts, see ABA COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS (1995); Report of the State Bar of California Commission on Legal Technicians (July 1990) [hereinafter California State Bar Commission Report].

58. See Patricia Manson, *Target Unauthorized Practice, ABA Urges*, CHI. DAILY L. BULL., Feb. 14, 2000, at 1.

59. See RHODE, PRO BONO, *supra* note 42, at 15-18.

60. See U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMP. & EARNINGS 251 (2005); see also RHODE, PRO BONO, *supra* note 42, at 20. The recent ABA survey results are not inconsistent with this estimate, given that the average hourly contribution of lawyers who offered pro bono assistance needs to be adjusted for the numbers who did not, and for those whose contributions involved activities such as bar association service or assistance to middle-class charities. See *id.*

61. Aric Press, *Brother, Can You Spare 20 Hours?*, AM. LAW., Sept. 2005, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1125479112416> (noting that only thirty-six percent of lawyers provided twenty hours of assistance in 2004).

more central to the American public and more peripheral to legal education than access to justice. Pro bono service is embraced in principle, but widely ignored in practice, and little discussion of the distribution of services occurs outside of clinics. According to the most recent data from the Association of American Law Schools (AALS), only one-fifth of law schools require pro bono service of students, and many of the obligations are modest: twenty to thirty hours spread over three years.<sup>62</sup> In schools with voluntary programs, AALS survey data suggest that fewer than twenty percent of the students participate, and average time commitments are quite limited.<sup>63</sup> Some student involvement is at token levels and seems intended primarily as resume padding. As an AALS Commission noted, a majority of law students graduate without pro bono legal work as part of their educational experience.<sup>64</sup> Most schools remain a considerable distance from meeting the Commission's recommendation that every institution "make available to all law students at least once during their law school careers a well-supervised law-related pro bono opportunity and either require the students' participation or find ways to attract the great majority of students to volunteer."<sup>65</sup>

The gap between professional ideals and educational priorities emerged clearly in my own recent survey of some three thousand graduates of six law schools with different pro bono policies.<sup>66</sup> One goal of the study was to determine what legal education was doing, or should be doing, to make future practitioners aware of the public's unmet legal needs and the profession's duty to respond. Some survey findings speak for themselves. Only one percent of the sample as a whole reported that pro bono issues received coverage in law school orientation programs or professional responsibility courses.<sup>67</sup> Only three percent of graduates observed visible faculty support for pro bono service.<sup>68</sup> Surely we can, and must, do better. Law schools have unique opportunities and obligations to shape future practitioners' understandings of their

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62. See THE AALS PRO BONO PROJECT, A HANDBOOK ON LAW SCHOOL PRO BONO PROGRAMS 8-9 (2001); see also Cynthia F. Adcock, *Fact Sheet on Law School Pro Bono Programs* (AALS, Feb. 20, 2003) (on file with author).

63. AALS COMM'N ON PRO BONO & PUB. SERV. OPPORTUNITIES, LEARNING TO SERVE (1999), available at <http://www.aals.org/probono/report2.html> [hereinafter AALS, LEARNING]; see also RHODE, PRO BONO, *supra* note 42, at 24.

64. AALS, LEARNING, *supra* note 63. Although some schools have recently strengthened their pro bono programs, no evidence suggests that voluntary student involvement rates have changed dramatically.

65. *Id.*

66. RHODE, PRO BONO, *supra* note 42, at 125.

67. *Id.* at 162.

68. *Id.*

professional role. We cannot afford, as individuals or institutions, to treat pro bono responsibilities as someone else's responsibility.

### III. ACCOUNTABILITY

If, over the last quarter century, the central challenges of legal ethics in an adversary system have remained unresolved, what can we do to make greater progress over the next quarter century? What stands in the way? The greatest obstacle, and the root of many others, is the lack of accountability. Historically, the American legal profession has enjoyed an exceptional level of independence in its own regulation. It has drafted, adopted, and enforced codes of conduct without any significant participation by non-lawyers.<sup>69</sup> Token lay members have not had the backgrounds, resources, leverage, or ties to consumer organizations that could help create a counterweight to professional dominance.

Professional independence is rooted in courts' assertion of inherent authority to govern those who appear before them. This authority rests on two premises: first, that the judiciary needs such control to ensure the proper administration of justice, and second, that self-regulation preserves the separation of powers and protects the bar from state domination.<sup>70</sup> According to the Preamble of the Model Rules, "[a]n 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."<sup>71</sup>

Yet this independence comes at a cost. The judiciary generally lacks the time, incentives, resources, and managerial expertise to oversee an effective governance structure. As noted earlier, because many judges' reputations, advancement, and reelection depend on the bar's support, they have reason, whether conscious or not, to avoid

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69. Only one non-lawyer served on the commissions that drafted the Code of Professional Responsibility and the Model Rules of Professional Conduct, and on the Ethics 2000 Commission that recommended changes in the Model Rules. See RHODE, JUSTICE, *supra* note 7, at 16, 145-46. Non-lawyers also have only token representation on disciplinary bodies that enforce the rules. See *id.* at 16, 145-46.

70. For overviews and critiques of the inherent power doctrine and self-regulation more generally, see Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures or the Market?*, 37 GA. L. REV. 1167, 1171 (2003); Fisher, *supra* note 31, at 1106-20; Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 210-13 (2002).

71. MODEL RULES OF PROF'L CONDUCT pmb1. cmt. 11 (2004).

undercutting its interests.<sup>72</sup> Moreover, the prevalence of lawyers in the legislative and executive branches has reduced the likelihood that either will press for professional reform, particularly because the public generally has not mobilized around the issue. The result leaves much to be desired. Lawyers are hardly disinterested arbiters of their own standards of conduct. If, as Roscoe Pound once put it, a bar organization is not “the same sort of thing as a retail grocers’ association,” self-regulation brings out more of the similarities than the differences.<sup>73</sup> No vocational group, however well-intentioned, can make unbiased assessments of the public interest on issues that place its own status, reputation, and income directly at risk. The greater an occupation’s autonomy, the greater the risks of tunnel vision.<sup>74</sup> The American legal profession is no exception.

Over the last quarter century, the deficiencies in self-regulation have attracted growing attention. Legislators, administrative agencies, federal courts, and malpractice insurance companies have come to play an increasing role in professional governance. They have supplemented or supplanted bar standards in modest ways that coexist with the judiciary’s inherent governance powers. Academic experts, including many in this symposium, have supported this development through critical examination of the process and results of self-regulation.<sup>75</sup>

What has yet to emerge, however, is a coherent regulatory structure with effective safeguards against both government domination and professional self-interest. The increasing fragmentation of governance authority has produced a patchwork of standards that, from the profession’s vantage, is often confusing and conflicting, and from the public’s vantage, is insufficiently responsive to societal concerns.

Devising an alternative is no small task, but the general direction for reform should be obvious: more structural checks and public accountability are necessary in the governance process. One promising proposal would be to place authority for the development and enforcement of ethical standards in independent national or state regulatory commissions. Such commissions could strike a better balance between professional autonomy and accountability than the current system if their members were selected from diverse constituencies by

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72. See *supra* text accompanying note 56; see also Barton, *supra* note 70, at 1246.

73. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 7 (1953).

74. See RHODE, *JUSTICE*, *supra* note 7, at 19-20, 212. For further discussion, see generally Barton, *supra* note 70; IAN AYRES AND JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

75. The evolution of Monroe Freedman’s work illustrates the trend. Compare FREEDMAN, *ADVERSARY SYSTEM*, *supra* note 1 (lacking any mention of self-regulation), with FREEDMAN & SMITH, *supra* note 2, at 2 (including discussion highly critical of the bar’s autonomy).



diverse legislative, judicial, and executive officials. Consumer regulation experts, public interest organizations, and competing occupations, as well as bar associations, should have representation among those members. Such commissions could have jurisdiction over professional codes in general or in specific areas of expertise.<sup>76</sup>

This regulatory framework could produce standards that are both more protective of the public interest, and that make lawyers more accountable for the consequences of their personal actions and performance of adversarial processes. As I have suggested at greater length elsewhere, a key feature of this framework is context. Ethical standards need to be formulated and interpreted in light of all the societal interests at issue in a particular practice setting.<sup>77</sup> Client trust and confidentiality are entitled to weight, but they must be balanced against other equally important concerns. Lawyers also have responsibilities to prevent unnecessary harm to non-clients, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which that system depends. So, for example, lawyers should be subject to greater disclosure obligations to protect crucial health, safety, and financial interests of third parties. Attorneys who are deciding whether to accept a client, withdraw from representation, or report misconduct also need to assess their actions against a realistic backdrop. They cannot simply retreat into role and assume some idealized model of the adversarial process in which wealth, power, and information are equally distributed, all interests are adequately represented, and contested matters will reach a neutral decision maker.

The profession also must become more accountable for the effectiveness of the justice system and the distribution of legal services. At a minimum, that will entail greater efforts to make assistance available, to expand its forms, and to ensure its quality. One obvious strategy is for courts or bar ethical codes to require that lawyers make modest pro bono contributions of time or money to programs for those of limited means.<sup>78</sup> A less controversial alternative would be to obligate attorneys to report their contributions. Experience to date indicates that such reporting rules have led to modest increases in the resources available to legal services organizations.<sup>79</sup> Further improvements might result if contribution rates were widely publicized, and if clients, colleagues, and job candidates began paying more visible attention to

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76. See RHODE, JUSTICE, *supra* note 7, at 212; Fisher, *supra* note 31, at 1133-44.

77. See RHODE, JUSTICE, *supra* note 7, at 66-80, 113, 213.

78. For an argument supporting such a requirement, see RHODE, PRO BONO, *supra* note 42, at 26-49, 172-73.

79. See *id.* at 167-68.

employers' pro bono records.

Other reform strategies should focus on improving the quality and range of services now available for those of limited means. For indigent criminal defense lawyers, courts and bar associations should enforce minimum performance standards. Judges should be more willing to overturn convictions for ineffective assistance of counsel and to find constitutional violations where statutory fee ceilings and caseload pressures prevent adequate representation.<sup>80</sup> For routine civil matters, Americans deserve more accessible processes, and a wider range of options in law-related assistance. Less protection should be available for the professional monopoly and more for individual consumers. Licensing or certification systems for non-lawyer providers could require basic competence, compliance with ethical standards, and malpractice insurance.<sup>81</sup> More courts could institutionalize reforms that reduce costs, complexities, and injustices resulting from unequal resources. Promising examples include: personal and on-line multilingual help for pro se litigants; simplified forms and proceedings available in community as well as courthouse sites; and less adversarial problem-solving tribunals with expanded social service resources.<sup>82</sup> Equal justice under law is what we pledge on courthouse doors. It should also describe what goes on inside them.

Finally, law schools need to be more accountable for their own efforts, or lack of efforts, concerning professional responsibility. Issues of legal ethics, access to justice, and pro bono service are too often missing or marginal in core curricula.<sup>83</sup> Equally troubling gaps are apparent in research priorities. On key questions involving professional roles, rules, and regulation, our knowledge base is shamefully thin. We are awash in theory and starved for facts. Too much professional responsibility scholarship is data-free doctrinal analysis, the functional equivalent of "geology without the rocks."<sup>84</sup>

Moreover, too little of the work that could be useful in reform efforts is directed toward the public, or to the media that shape popular attitudes and policy agendas. Like other academics, legal ethics scholars

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80. See RHODE, ACCESS, *supra* note 36, at 143. For an example, see *New York County Lawyers' Ass'n v. Pataki*, 727 N.Y.S.2d 851, 853 (N.Y. Sup. Ct. 2001). For similar proposals, see Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 921-23 (2005).

81. See RHODE, ACCESS, *supra* note 36, at 90-91; RHODE, JUSTICE, *supra* note 8, at 137-38.

82. See RHODE, ACCESS, *supra* note 36, at 86.

83. See RHODE, JUSTICE, *supra* note 7, at 201 (providing that part of the reason is that casebooks outside the field of professional responsibility offer little coverage of such issues).

84. The phrase comes from Lawrence Friedman. See PAUL WICE, JUDGES AND LAWYERS: THE HUMAN SIDE OF JUSTICE 16 (1991).

write mainly for each other, and in forms that are not accessible to lay audiences. Partly as a result, most Americans are poorly informed on issues involving regulation of lawyers and access to justice. For example, public opinion surveys reveal widespread misunderstanding about attorneys' disclosure obligations and the quality and accessibility of legal representation for the poor.<sup>85</sup> Yet attempts to educate the public are, for most academics, an unrewarding and unrewarded task. Except for the relatively few scholars with access to the national media, law school professors have inadequate incentives to write for non-legal audiences or to spend significant time assisting journalists who do. It is far safer to produce some deeply theorized but practically irrelevant tome than to risk dismissal as a mere "popularizer." A significant commitment to professional reform will require a corresponding adjustment in academic reward structures. Faculties need more resources, training, and incentives to pursue time-consuming empirical projects and to address broader audiences.

Law schools also need to be more accountable for their pro bono programs. Although ABA accreditation standards require schools to provide appropriate public service opportunities for students and to encourage service by faculty, many institutions neither keep nor disclose specific information concerning participation rates.<sup>86</sup> Such information, or compliance with minimum standards, could be required as part of the accreditation process, or as a condition for AALS membership. Schools that meet the best practice standards could also be given recognition in media surveys and in publications of the AALS, ABA, and public interest organizations. Such practices could include: adequate pro bono policies and resources; integration of materials on access to justice and public service responsibilities in the core curriculum; and requirements by law school placement offices that legal employers provide detailed information about their own pro bono programs and participation rates.

In an academic culture increasingly driven by competitive rankings and economic constraints, it is all too easy for legal educators to lose sight of broader social responsibilities. Law schools cannot be value-neutral on questions of value. One of their most crucial functions is to force focus on the way that legal structures function, or fail to function,

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85. For confidentiality and disclosure obligations, see Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 375 (1989). For perceptions about the poor's right to counsel in civil cases and their ability to find assistance, see RHODE, ACCESS, *supra* note 36, at 4 (noting, for example, that four-fifths of Americans mistakenly believe that indigent civil litigants have a right to representation). For misperceptions about the ability of criminal defendants to get off on technicalities, see ABA, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 66 (1999).

86. See ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE B., STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 302(e) (2005).

for the have-nots. Another is to equip and inspire students to contribute to the public good and to reflect more deeply on what that means in professional contexts. Faculty who teach legal ethics have a particular obligation to prod professional schools to live up to their own professional responsibilities. I am grateful to join part of a symposium reminding us of that role and honoring a colleague whose life reflects our highest ethical traditions.

#### QUESTIONS AND ANSWERS

PROFESSOR SIMON: Thank you very much, Deborah.

PROFESSOR WECHSLER: Steven Wechsler from Syracuse Law School. One of the problems that you mention is what law schools can do. And one of the movements that I think we have seen recently in law schools is to require pro bono of our students. The problem that I have observed here is that we don't require it of lawyers. The ABA has not invoked mandatory pro bono. I am not aware of any other jurisdiction, statewide jurisdiction, that has. And the suggestion when made that law students should be required to do mandatory pro bono is often met with the response that, well, why should we do it—why should we make our students do it if lawyers are only encouraged? And I wondered if you could address that and help us with a way to get law students to do pro bono.

PROFESSOR RHODE: I'm delighted to comment, especially since I have just written a book on the subject, *Pro Bono in Principle and Practice*, out in paperback from Stanford Press.<sup>87</sup> It includes a comprehensive summary of research and results from a survey of some 3000 lawyers who graduated from schools with different types of pro bono programs. What it indicates is that about one-fifth of law schools now require pro bono service by students. Most of the rest have voluntary programs which are estimated to get maybe a third of students to volunteer. So less than half of all law students are actually involved. And even in the schools that require service, the number of hours is often very small: twenty hours, for example, over the course of three years. So some of the volunteering seems more designed for resume-padding than real effective service.

One of the goals of the study that I mentioned in the talk was to discover whether it makes a difference if schools have robust mandatory requirements. Do their graduates, in fact, do more pro bono in the world

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87. See RHODE, PRO BONO, *supra* note 42.

outside, or do workplace constraints really trump what happens in law school? Basically, what I found, which is consistent with most other literature on volunteering, is that having a positive experience with some sort of public interest causes or legal aid during school years does increase people's desire for that kind of experience later in life. But you don't have to have that experience in a pro bono program. And you don't necessarily have it in a law school that has a mandatory program if the program isn't well run and well supported with a wide variety of placement options and good supervision. So my own recommendation for law schools is that they should set up either a mandatory program or a series of volunteer programs and figure out ways to get the vast majority of students to participate.

And I think that there are educational justifications for getting students to be in a clinic or in a pro bono program where they see how the law functions or fails to function for the have-nots. They can learn a particular set of skills, they bump right up against ethical problems, and they have an opportunity to connect the law with life in ways that much of their other classroom work doesn't allow. So I think you can make an independent educational justification for a pro bono requirement, but I don't think it's the requirement that's the essential piece. Some schools with well supported voluntary programs, Yale is one that I studied, have a lot of opportunities, including clinics where law professors are involved, and that approach is highly valuable. Public service in these schools is rewarding and rewarded. You get very high levels of participation. So my goal is to see more schools move in that direction. That's what Stanford is trying to do. But for the vast majority of law schools, we've got quite a distance to go.

It also turns out that having faculty role models is a good thing, which is one reason why the Stanford Ethics Center is setting up a website matching service that is going to make it easier for professional responsibility professors to do pro bono work in their areas of specialty. If students see such work and they hear professors talk about it in class, that really legitimates it. Law faculty need to assume more responsibility for that kind of role modeling even in the absence of requirements for practicing lawyers.

PROFESSOR WECHSLER: Thank you very much, I look forward to the book.

DEAN TWERSKI: Aaron Twerski. In addition to living my life as a law professor, for reasons unbeknownst to me I serve as a guru in our community and I get telephone calls at all hours of the day and night. And the one area that you sort of touched on strikes home and that is the ability to get counsel for people in domestic relations disputes. It is just

awful. People with very serious child custody and divorce problems cannot get counsel. I mean, they call me, I try to do it. There is no place to turn. I recently had a meeting with Nassau County judges with regard to our involvement of our family law program and the L.L.M. program. And I forget the statistics of the number of pro se litigants, but it was horrendous. I mean, it was just a small percentage that were really represented by attorneys. The situation there, it seems to me, is far worse than in the criminal area where at least facially there is some responsibility to do it. I don't know if your experience has shown the same thing, but it's devastating.

PROFESSOR RHODE: Well, you are absolutely right and, in fact, the other pivotal event in my own career that sent me down the legal ethics path was working in a legal aid clinic in law school. I was in the family law unit and the clinic did intake one morning a month. If you were a poor person who needed a lawyer and you didn't show up on that one morning, you were out of luck. At the time, the cost of a lawyer in Connecticut for preparing three uncontested divorce forms essentially was what would now be about \$2200, so it was just not plausible for most poor people to hire counsel. And when the legal aid office wanted to put out a kit for the people who could represent themselves, which was some fraction of our low income group, the local bar association said: "We will sue you for unauthorized practice." The supervising lawyer came to me because he had never heard of that doctrine and asked, "Can the bar do that?"

So I went off and did some research and that was my first law review article on the subject. I'm still writing about it thirty years later because the bar still is suing non-lawyers; it's given up the ghost on suing over kits. Now in many family law courts, in about eighty percent of cases, at least one side is unrepresented. Some of these people get form-processing assistance from non-lawyers. A few get it from court-organized programs. A lot more are getting it from online services. But they are all grossly inadequate. A large percentage of really poor people can't use the online help by themselves without assistance. Oftentimes, what little courthouse support is available is not useful for those who lack good English language skills or who aren't computer friendly. So there is just an enormous need that some jurisdictions are really trying to figure out how to meet more effectively. So you are beginning to see more pilot projects in family courts that have in-house pro se assistance programs that will walk people through the process and provide some of the counseling they need. Some have lawyers who offer the service voluntarily, but the matrimonial bar has not been very forthcoming on pro bono assistance because they don't want to get enmeshed in a lot of

non-paying cases. Too many of their own cases turn out to involve more time than they can bill for. So family law is an area where enormously critical needs remain unmet. A related area is domestic violence, which is also involved in many of these divorce cases. Forms for getting a temporary restraining order are just beyond the capacity of many people to complete without assistance, and we have done far too little to make other forms of legal services accessible. So I am glad you flagged the problem and it's an area where I really think the law schools should be pioneering reform efforts.

MR. BEASLEY: My name is John Beasley. I have two questions about structure. And the answer may be: "That's a good question." But the first question is about plea bargaining and access and the ethics of that whole situation; whereas, for example, we have elected district attorneys here in Nassau. And the question, the ethical question I see: if they bring numerous charges higher than perhaps the evidence and they bring the person in and the structure is not geared to really give everyone a trial—if you have any thoughts about that?

And the second question is about the structure of the whole political system, as you referred to—it's almost totally dominated by lawyers. And it goes far beyond what you suggest. It goes to the very level of the political district; the political assembly district has a lawyer. And they control who can register and they get involved with the fights in the court. So the question there of ethics is, I'm going to jump and say: Who is the lawyer representing when he is representing an elected official? Who is the client? And what happens to the ethics as of today when he gets up and he has to answer questions? What does that all mean on a daily basis? That question, of course, is a little large. But in school districts, in the fire department, they all have lawyers and they are all there on—so, thank you.

PROFESSOR RHODE: Both of those are really good and difficult questions. The first problem is what to do about the enormous amount of prosecutorial discretion in a system which provides inadequate representation to the other side. And that's a particular problem in a context where overcharging has been routine. What happens when you don't have defense lawyers able to provide the kind of zealous advocacy and factual investigation necessary to negotiate a plea that's reasonable under the circumstances? And where the prosecutor has political motivations, obviously, the risks of abuse are much higher. I don't think there are any quick fixes. Investing more in indigent criminal defense, providing more oversight to make sure that criminal defense attorneys are, in fact, doing the job, and establishing more accountability structures, are part of the answer. Obviously, trying to figure out ways to

rein in prosecutors is important, too. Some of the most recent research suggests that in a sample of two hundred cases of reported prosecutorial misconduct which was serious enough to warrant reversal on appeal, only one case resulted in any formal sanctions by a bar disciplinary organization. And only two resulted in informal sanctions by the local district attorney's offices that were in charge of those individuals. So figuring out ways to make prosecutors more accountable is, I think, key as well.

On the question of who the lawyer for the public official represents, does the lawyer represent the "public" or the official who is directly implicated by the legal proceeding? That's an issue that requires a highly contextualized inquiry. As a general matter, most government attorneys seem to think that they're representing those officials who are most directly implicated by the dispute. But if they get into a situation in which they think those individuals have committed legal violations or are in other ways misleading the court or disserving their agencies, then I think the lawyer has an obligation to serve the taxpayers who are footing the bill. What that entails is a contextual judgment. You can't make abstract rules that capture it. But I think lawyers for public entities, no less than those for private clients, do have some obligation to think about the broader public interest. That is particularly the case in contexts in which the lawyer is de facto being hired by the public to represent its interests, not those of particular occupants of an elected office.

PROFESSOR APPLEMAN: Hi, I'm Laura Appleman. I'm visiting at Hofstra this year. As someone who very recently left private practice of indigent criminal defense in New York City and moved to the academy, I strongly agree with you that there is a big problem in the representation you get. In fact, another problem you mentioned, I just did a study looking at specifically why in New York City the representation there is so bad. And you sort of think New York City would be a great place, but it's terrible. And I have three main reasons, two of which you talked about.

The first, of course, is just money. There is not enough funding and the lawyers don't want to—the lawyers on the New York bar don't want to pay for any more. Second is both oversight and then lack of training. A lot of appointed defense counsel just really doesn't know what it's doing. But the third point I really looked at was the toothless standards promulgated really by the Supreme Court about what is ineffective assistance of counsel. Because *Strickland*<sup>88</sup> is basically we have this law and it's been interpreted by most courts, including the New York Court

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88. See *Strickland v. Washington*, 466 U.S. 668 (1984).



of Appeals, as something that basically you can sleep through a trial. And so I just don't think this has to be so. In fact, this past week in the Ninth Circuit, the Ninth Circuit found an attorney ineffective assistance using the *Strickland* standard, suddenly resolved that thing, ten to one, suddenly raising the standard. So my question to you is even if the judiciary doesn't have time to do all this oversight, is one way the judiciary could get involved at least with criminal defense is just to really put the teeth back in something like *Strickland*?

PROFESSOR RHODE: Absolutely. And I think you can read in that decision plenty of doctrinal room to impose appropriate standards. Courts could also work with bar association agencies to make sure that they're implementing appropriate oversight mechanisms. Another strategy is for courts to uphold constitutional claims brought on a system-wide basis for failure to provide sufficient funding. Although those suits have generally gone down the tubes, in a few cases that have involved really egregious violations, the courts have found a need for constitutional remedies and the legislature has reluctantly anteed up the necessary funds. Georgia is one state which was forced into a massive overhaul and it still by no means has a perfect system. But it's better, partly because of media exposés of one after another lawyer meeting clients for five minutes or giving out phone numbers where you never could get anything but the answering machine saying that the lawyer was otherwise engaged. So part of the answer is a combination of courts sticking their necks out and a public that is educated and somewhat energized. We can be of help as legal educators with both solutions. We can provide pro bono assistance to legal challenges and we can work with the media to try to get more coverage. Those strategies helped in New York. The [*New York*] *Times* did a good series that encouraged an increase in fees for indigent defense attorneys. But hourly rates are still an embarrassment. Kids selling soda on the beach do better than court-appointed counsel in many jurisdictions. So there is a lot of work still to be done.

PROFESSOR WOLFRAM: I'm Charles Wolfram, Professor Emeritus at Cornell. But the question is, on your first theme of client autonomy, what reform—twenty-five seconds or less—would your rule look like on a lawyer's permissible disclosure of anything troubling in the representation or otherwise?

PROFESSOR RHODE: Well, I can't really do it in twenty-five seconds, Charles. So I'm going to just fight the question. But you still get credit for doing what we were enjoined to do at the beginning, which is to ask the right question. I spend a chapter in a book I wrote called, *In the Interests of Justice*, on exactly these kinds of issues—"hard cases" I

called them.<sup>89</sup> And I think they require contextual judgments. Lawyers have to balance clients' legitimate confidentiality needs against competing values. I would like a rule that would capture a wider range of considerations regarding harm to third parties. For example, I would give lawyers discretion to disclose to prevent serious, imminent risks to third parties. That would help take into account cases like those involving Dalkon Shields and asbestos. It's clear that lawyers in those cases knew about product safety violations that the public needed to be aware of. I would also impose more mandatory disclosure obligations. Right now, exceptions to confidentiality rules in most jurisdictions don't go far enough to protect innocent third parties. One reason is that lawyers are terribly worried about civil liability. I'm less concerned. I think juries would sort out pretty quickly what is in the public interest in terms of lawyers' disclosure obligations. So I would be prepared to live with a little bit more accountability for the profession. And certainly, we could use a few small moves in that direction. Sarbanes-Oxley is a nudge in the right direction, but I don't think the standard I read earlier is going to prove adequate. That rule wouldn't even have dealt with lawyers in Enron, which is what the legislation was designed to deal with.

PROFESSOR DERSHOWITZ: My question follows up on that you pointed to the dichotomy between the TV image of guilty people being freed on technicalities and what you call the real-time image, I guess, of innocent defendants being convicted. My job and the job of criminal defense attorneys is mostly to increase the former; that is, to get guilty people acquitted on technicalities or on any other ethical or legal basis possible. And that very often conflicts with third-party interests, the interest of victims, the interest of witnesses, the interest of police, the interest in faith in the system. It's difficult enough to teach students and young lawyers to do everything they can zealously, consistently with ethics, to win for their guilty clients. That's so counterintuitive. It's so hard. Don't you add a level of confusion when you ask them also to take into account third-party or public interests? Doesn't that inherently provide an excuse for mediocrity or laziness? I have heard so many bad lawyers defend their lack of zealotry on the ground: "I was just protecting the third-party." How do you avoid sending that mixed message?

PROFESSOR RHODE: Well, I'm one of these people who believe that civil and criminal cases are different and that part of our job is to educate both our students and the public to understand the difference.

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89. See RHODE, JUSTICE, *supra* note 7.

When lawyers are representing criminal defendants whose lives, liberty and reputation are at risk, the lawyers' obligation is to make sure the system works whether or not the defendants are guilty or innocent. In a system like ours, which relies on plea bargains, it's important that the cases that go to trial ensure that law enforcement agencies do their job properly within constitutional limits. If you don't have lawyers holding police and prosecutors to that standard, making them provide proof beyond a reasonable doubt, adhere to the rules of evidence and respect constitutional safeguards, then you won't have a system which convicts only the guilty. So there is a systemic justification for criminal defense lawyers' zealous advocacy and a principle on which you can fault lawyers for failing in that obligation. We need to teach about those lawyers who don't want to go to sleazy bars to look for witnesses because after all, they think their clients are guilty. You can't run an effective criminal justice system that way. But I don't think lawyers for civil defendants should have the same latitude and be able to fall back on the same justification for unqualified advocacy. So that's how I draw the line. And I think that's a distinction you can educate the public about. You can get them to think about what they would want for themselves or their loved ones if they were accused of the crime. And it's not necessarily what they would want for the maker of the Dalkon Shield. So that's my goal. I think your own work has done a very good job of educating the public about why we need zealous criminal defense attorneys. Unfortunately, I think too many Americans believe there are too many like you who are out there which, alas, there aren't enough of.

MS. RINGLER: I'm Robyn Ringler. I was fortunate enough to be a former student of Professor Freedman and Dean Twerski. I graduated from Hofstra in 1987. I want to talk about access to lawyers in the family court and matrimonial, domestic violence and custody cases. I wonder if you ever consider the factor of fear by regular lawyers. I'm coming to this from the point of view of being just a plain old lawyer in civil litigation who has never stepped foot in a family court before, and who has heard that matrimonial cases, custody cases, domestic violence cases are very difficult, kind of scary. And I did recently finish a CLE course in representing domestic violence victims, so I am going to start taking part in that as a pro bono project up in Albany, where I live. But I think that fear maybe needs to be studied, people who really aren't familiar with that type of law. Maybe the way they got me drawn in is they, the women running this group put out literature and promised to be there for questions, promised to back you up. They provided malpractice insurance. They gave you a free CLE all-day, wonderful seminar, free books. It was all under a grant. But I think fear is an issue.

PROFESSOR RHODE: You know, your example points to exactly what we need more of. And we can do it in the law schools, too. My own school just set up a pro bono domestic violence clinic. We brought in trainers, we provided workshops, we got people on-call to answer questions. New York actually has a wonderful support service for volunteers, Pro Bono Net, which is on the web.<sup>90</sup> If you're a subscribing member and you're doing pro bono work in a number of areas including matrimonial law, you get electronic access to huge resources. There are chat boards. You can post questions. You get answers. There are places you can call. Although factual situations in these cases can be complex, oftentimes what the parties need legally is not rocket science. You can easily train people to complete these forms. You can train them in the matrimonial cases. It's not the legal, technical aspects that are really what make the cases hard.

MS. RINGLER: But the thing is to get the word out there to other attorneys in different areas that you will be supported and it's not as hard as you might think.

PROFESSOR RHODE: Yes, and that's what bar associations should be doing, God love them, and I wish there were more of them doing it. So you have got a good project going. We as legal academics can also do more to spread the word. Any time I am asked to do a CLE program, I say, "Can I talk about pro bono?" which is typically not the subject that they want. But when I speak on pro bono opportunities, I always get sign-ups at the end. And so nudging lawyers every chance we get to is key.

PROFESSOR POWELL: Professor Rhode, Deborah, I would like to give you an opportunity to say something about that—well, at least to expand on that, to the lady's suggestion, that we perhaps would be better off if we had a different way of organizing the regulation of lawyers. Presently we have a model which is essentially a national forum sponsored by the ABA or some other such entity. They come up with a model rule. They invite everybody who has even a brief idea to come in and participate in it. And then whatever comes out of that is presented as a model to all the jurisdictions. And then you go through the process again from top to bottom with debate and everybody brought in to participate. You seem to be suggesting, or at least I think I heard you clearly suggesting, that a different kind of model might work. And I'm trying to figure out what that other model is likely to get us. It seems to me that if you have more democratization of the regulation, that you are at least likely to get some sentiments that are reflected by the general

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90. See <http://www.probono.net/>.

population. Fees would, of course, be lower, but you would have a dampening down on controversial issues as they affect gays and minorities. You would have an obligation for the profession to take on more responsibility for protecting the poor, lower taxes, put the obligation on lawyers to provide representation in these various areas, things like that. Is that a good thing?

PROFESSOR RHODE: Well, first of all, let me be clear. I don't believe democratizing the drafting process is what we want: we should not have rules adopted by plebiscite. But neither is it enough just to let the public have a few opportunities for comments on rules that will be adopted by the ABA House of Delegates, which is all lawyers. There was only one non-lawyer on each of the ABA commissions that did the drafting of the two most recent model ethical codes. And then these codes were adopted by state judiciaries, which again means former lawyers regulating lawyers. So there is not much public involvement in the process. In California, some of us were invited to submit legislation for an alternative regulatory structure after a huge scandal involving bar disciplinary processes. What we proposed was an expert commission with appointed members by different groups: the speaker of the state legislature, the governor, the bar association, and so forth. The group would be broadly representative, and it would include consumer regulation experts. It would also have law professors and members of competing professions like accountants. So the notion was that you would have a broader base than the organized bar to make recommendations on what the ethical rules and the enforcement structures would look like. I still think that that would get you to a better place than the current regulatory system. And you know, it might result in some of the things that you pointed out that don't seem to me to be self-evidently wrong, like a tax on legal fees to support legal services. Given most lawyers' income levels, if you make that tax progressive enough, I'm not against it. But I do recognize that you don't want to just throw all issues about ethical rules to the masses because they don't have the expertise to make informed judgments about how the governance system should run.

PROFESSOR POWELL: Well, I do need to add a footnote that that California system that you describe came about in part because the governor was mad at the legal profession and wanted to do some things that basically defame it.

PROFESSOR RHODE: What I described came in response to an earlier scandal. That governor's efforts didn't result in our proposal. And you are right, he was pretty self-interested and nothing good came of his recommendation. So thank you very much. [Applause]