

## In the Public Interest: The Precedents and Standards of a Lawyer's Public Responsibility

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Even the most casual observer of the legal profession quickly becomes impressed with the extent and depth of the changes which have begun to occur in the American bar during the last decade. The 1977 Supreme Court decision<sup>1</sup> allowing advertising of legal services and the impact it has already had on the structure and functioning of the bar is but one, in a significant series of changes which have occurred in response to a publicly-perceived need for a fairer distribution of legal services.

As an observer who is a social ethicist, I have been intrigued by the reasons offered for these changes—especially by the reasons supporting claims that the profession has a moral obligation to make legal services fully available. With often stirring rhetoric, but sometimes confused explanations of public responsibility, the more institutionalized forms of legal practice in America—government and corporate lawyers, large private firms, and the bar associations<sup>2</sup>— have sought to assure first the poor, and increasingly those of moderate income as well, that legal services will be much more accessible to them. In this effort, the profession has helped create some new patterns of delivery, which are supported by reasons as little understood as they are discussed.<sup>3</sup> This Article will seek to remedy some of that neglect by giving extended attention to the rationales behind changing patterns in the delivery of legal services.

Despite the progress already made and developments anticipated through plans now only in the experimental stage, a number of practical and theoretical problems remain unresolved, but in such a way that a steady and continuous progress depends upon their resolution. The policies and practices necessary to finance and regulate newly-developing patterns of delivery are surely some of the most challenging practical considerations. High on the list of

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<sup>1</sup>Bates v. State Bar, 433 U.S. 350 (1977) (5-4 decision).

<sup>2</sup>Private practitioners are probably less influential on the social and institutional shape of the profession.

<sup>3</sup>See M. SCHWARTZ, *LAW AND THE AMERICAN FUTURE* 9 (1976).

theoretical issues with great practical significance—especially in the formulation of policy—are social-ethical considerations concerning the nature and requirement of fairness in the distribution of the benefits and burdens of legal services if they are to be made fully available to the public.

As an ethicist observer of both the changes wrought in legal services since the mid-1960's and the explanations offered for them, I am puzzled by what I apprehend as some confusing and not always logically justifiable judgments concerning the meaning and application of one of the legal profession's "important functions[:] to assist in making legal services fully available."<sup>4</sup> Whether that function is to be considered an obligation, and whether it involves an appeal to distributive justice are questions not always answered clearly. There are few clear answers to questions regarding the subject of this putative obligation. Even if this question is answered clearly, there remains some ambiguity concerning its logical warrants. To the degree that ambiguity and unclear reasoning prevails in the answers to such questions, I believe that the progress already made, as well as that which is anticipated in the delivery of legal services, perforce will be impaired—especially since the policies that are to guide delivery practices depend in large part upon reasonably clear answers to the questions posed above. Assuming, then, that there is an important, albeit not always effective, connection between having answers to such questions and the policies and practices developed to deliver legal services, this Article will seek to explore analytically some judgments about the nature of the obligation to make legal services "fully available."

In this Article, I propose consideration of some traditional and precedent-setting moral judgments that have animated the profession's efforts to assure that legal services will be available. One such judgment alleges an obligation to be benevolent and to do works of charity or almsgiving. It encourages the cultivation of internal states—dispositions and intentions—but fails to state a rule of action. Thus, the subject of this obligation will not always be clear about what is precisely required. In addition to this intuitive judgment there is another which assumes that, by working zealously for the interests of the individual client, lawyers are thereby serving the public interest or that the gains made for the individual will transfer automatically to the common good. Finally, Canon 2 of the American Bar Association Code of Professional Responsibility will

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<sup>4</sup>ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-1 (1977 version) [hereinafter cited as ABA CODE].

be analyzed in order to determine how the above judgments continue in force.

Two recent facts related to the provision of legal services in the last decade serve as proximate boundaries in an historically important symbiosis of values shared by the leadership of the legal profession and those persons whose declarations about the key values in American culture have been given normative status. One is the fact that, while legal aid in various voluntary and associational forms dates back to the late 19th century and gained momentum in the early part of this century, organized and stable efforts to provide legal services for those persons who needed aid but were unable to pay for it did not reach meaningful levels until 1965. Before the creation of the Legal Services Program under the auspices of the Office of Economic Opportunity, the history of legal aid was largely a story of voluntarism or elective benevolence, ad libitum, and depended upon the irregular stirrings of altruistic motivations. The continuing significance of that record must be recalled in order to grasp the source of the paradox that what the American Bar Association today refers to as an "important function[:] to assist in making legal services fully available"<sup>5</sup>— others argue is a much more determinate kind of "imperative" (either moral or constitutional).<sup>6</sup>

The other bracketing fact is the recent publication of a national survey entitled *The Legal Needs of the Public*.<sup>7</sup> A joint undertaking of the American Bar Association and the American Bar Foundation, but funded as well by five other agencies, the survey has been one of the most expensive, thoroughgoing, and perhaps the last need-study of its kind.<sup>8</sup> Surveys, occasioned by a governmentally-supported desire to identify and to meet better the needs of the poor, expanded to include information about those persons with above-poverty or mid-level incomes.<sup>9</sup> They now seem to be concluding with a study which seeks to obtain a representative sampling of need across a very broad economic spectrum.<sup>10</sup>

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<sup>5</sup>*Id.*

<sup>6</sup>See, e.g., Anderson, *Indigents' Right to Appointed Counsel in Civil Litigation*, 66 GEO. L.J. 113 (1977).

<sup>7</sup>B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* (1977).

<sup>8</sup>See RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, *THE ROLE OF RESEARCH IN THE DELIVERY OF LEGAL SERVICES, WORKING PAPERS AND CONFERENCE PROCEEDINGS* 217 (1976) [hereinafter cited as *ROLE OF RESEARCH*].

<sup>9</sup>B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* (1970). Christensen's judgment is that very few "people of modest means really see the practice of law as a 'noncommercial' enterprise, or that they would be especially shocked or alienated by advertising or solicitation by lawyers." *Id.* at 152-53, cited in *Bates v. State Bar*, 433 U.S. at 369.

<sup>10</sup>See B. CURRAN, *supra* note 7, at 70-74.

While granting that these surveys enlarged the data base and that the most recent study is, methodologically speaking, much more sophisticated than its predecessors, critics still point to certain seriously defective assumptions operative in all such need-studies.<sup>11</sup> Leaving discussion of those flaws to persons more skilled in the techniques of the social sciences, I draw attention to some controlling assumptions which are more directly related to social ethical concerns. In particular, I should like to highlight the surveys' assumptions that past use of legal services and client-centered perceptions of need ought to be normative in determining the kinds of services needed. According to one writer, until these assumptions are challenged and new goals, priorities, and methods are established for the study of needs, surveys of the problem of legal services will be dominated by a "flat, static view of but one part of an extremely complex network of political, economic and social institutions which, in the final analysis, tend to determine our view of conflict, injury and redress, and either validate or invalidate individual or group isolation."<sup>12</sup>

Because the surveys generally do not question traditional assumptions about the ways in which legal services are organized and distributed, they tend to suggest incremental, rather than radical changes.<sup>13</sup> Therefore, these studies leave unexamined potentially crucial flaws in the system of rules, the institutions designed to apply them, and the capabilities of people who seek to use them.<sup>14</sup> Left unattended as well are issues such as the quality and effectiveness of the services provided,<sup>15</sup> bar-imposed impediments to new forms of public responsibility, static definitions of property and property rights, and the meaning and application of notions of social justice—a term which includes, but is not limited to, questions about how fairly to redistribute wealth and power in this society.<sup>16</sup>

There is obviously a great deal to be considered in the area of legal aid. In this Article I shall consider only three interrelated social ethical judgments which have animated the legal profession's expressed desire to honor constitutional commitments to "due process" and "equal protection of the laws" through legal services. The

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<sup>11</sup>See, e.g., *ROLE OF RESEARCH*, *supra* note 8, at 217.

<sup>12</sup>Marks, *Some research perspectives for looking at legal need and legal delivery systems: old forms or new?*, in *ROLE OF RESEARCH*, *supra* note 8, at 34.

<sup>13</sup>*Id.*

<sup>14</sup>Galanter, *Delivering legality: some proposals for the direction of research*, in *ROLE OF RESEARCH*, *supra* note 8, at 68.

<sup>15</sup>Carlson, *Measuring the quality of legal services: an idea whose time has not come*, in *ROLE OF RESEARCH*, *supra* note 8, at 145.

<sup>16</sup>See Brickman, *Preface*, *supra* note 8, at viii; Marks, *supra* note 12, at 47-48.

three judgments concern: (1) The elective, voluntary and benevolent character of the pro bono requirement; (2) the causal connection between litigation in the adversary system and the achievement of social justice; and (3) the ethical considerations which form a part of Canon 2 of the Code. While not exhaustive, and while not fully attentive to the more specifically political and economic dimensions in these judgments, this selection of certain ethically interesting ambiguities can serve at least to draw attention to such matters and to suggest further consideration by others more conversant with those areas.

#### I. "PRO BONO" AS CHARACTER-FORMING ELECTIVE BENEVOLENCE WITH BENEFICIAL SOCIAL CONSEQUENCES

"Pro bono publico" is a slogan or maxim used to express a sense of public responsibility in the practice of law in western civilization. In its usage by members of the American bar, it has been truncated linguistically to "pro bono"—"in behalf of good" (perhaps akin to "doing good") with no substantive content assigned to the verb or the substantive adjective. In this abbreviated form, the formula symbolizes a potential diminution in content as well as form. The nature of the obligation symbolized in this slogan has been transmuted verbally and conceptually to signify almost *any kind* of goodwill gesture in the *general* direction of the community and arising from most *generic and inchoate* senses of altruism. Thus, it is now associated with behaviors that are related very indirectly, if at all, to the specific kind of contributions a legal professional might make toward the common good. For instance, few would find a specifically legal contribution in acts some lawyers have regarded as pro bono work—umpiring Little League or serving on the boards of charitable organizations.<sup>17</sup> Additionally, the obligation to serve the public interest has not always been associated with the characteristic daily activities of "lawyering," but has come to be regarded as an after-hours activity. Thus, it currently means a voluntary, free, but potentially and personally enriching or ennobling experience—and one which is quite apart from the income-generating business of zealously advocating a client's interests.

Some important causal factors and certain allied, though problematic, social ethical judgments leading to this situation can be found in a consideration of the American legal aid movement, which began in the late 19th century. A more complete record of this

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<sup>17</sup>F. MARKS, K. LESWING & B. FORTINSKY, *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* 8-9 (1972) [hereinafter cited as F. MARKS]; E. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 10 (1964).

movement is available in various reliable sources.<sup>18</sup> A thumbnail sketch is given here to create a context for the discussion of the not-fully-supportable ethical judgments entailed in the movement and which continue to influence contemporary considerations of the scope of "pro bono publico."

Originally, there were two protective agencies which restricted legal services to certain categorical groups: the New York German Society established in 1876 to fend off the exploitation of German immigrants, and the Chicago Protective Agency for Women and Children begun in 1886 to seek redress for female victims of seduction and debauchery. The first true legal aid society—one with neither ethnic nor sexual eligibility requirements—was established by the Chicago Ethical Culture Society and was called the Bureau of Justice. With the exception of another such legal aid office opened in Jersey City in 1894, organized service was restricted to two geographical areas by the turn of the century.<sup>19</sup> Legal service agencies expanded slowly into four or five additional major cities by 1909 and rather rapidly to twenty-four other cities between 1909 and 1913. At the end of that period, only one agency was not private, voluntary, and supported by charitable donations of money and professional time. The Kansas City Bureau was the only agency operating as a municipal office and funded with public monies.<sup>20</sup> Although shortly thereafter the Kansas City pattern was emulated by several other cities,<sup>21</sup> this method remained atypical as an organized way of assuring legal aid to indigents. With respect to funding and management, the typical agency was the legal counterpart of the early 20th century charitable hospital and dispensary both of which were attempts to make medical care available on a more organized and predictable basis in urban areas where the initiatives of private practitioners were insufficient to meet health care needs. Although changes in the case of medicine began to occur after the Depression, organized legal aid efforts did not begin to lose their almost complete dependence upon voluntarism and elective benevolence for funding and personnel until the 1960's.

The legal aid movement grew very rapidly between 1914 and 1918 under the diligent leadership of Reginald Heber Smith and achieved a measure of national unity through an organization he

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<sup>18</sup>See, e.g., J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); Cappelletti, *Legal Aid: The Emergence of a Modern Theme*, 24 *STAN. L. REV.* 347 (1971-1972).

<sup>19</sup>R. SMITH, *JUSTICE AND THE POOR*, 134-40 (1924).

<sup>20</sup>*Id.* at 145-47.

<sup>21</sup>In 1919 there were 9 such offices; there were 12 in 1932 and only 5 in 1962. E. JOHNSON, *JUSTICE AND REFORM* 17 (1974).

launched in 1923: The National Association of Legal Aid Organizations, later to be known as the National Legal Aid and Defender Association. But there were very few experiments akin to that of Kansas City. Most of the agencies were known as "departments of organized charities" and were perceived by the bar and the community as institutionalized forms of almsgiving.<sup>22</sup> Like other such organizations which were completely dependent upon voluntary contributions but which were not as crucial to survival as bread and soup lines, the legal aid societies declined during the Depression. This decline continued into the 1950's when, paradoxically, during the McCarthy era, these societies prospered, perhaps due to the atmosphere created therein—namely, the distrust of any sign of "creeping socialism."<sup>23</sup> That they should prosper in such an environment was, in part, a result of a prevalent national preference for traditional American forms of voluntary and associational self-help movements, and, in part, a consequence of the stature and persuasive voice of Roscoe Pound, who maintained that efforts to develop a socialized legal service would be tantamount to making the legal profession into a trade union.<sup>24</sup>

Hence, events conspired to prohibit serious consideration of governmental, especially federal, subsidization of legal aid until the experiment of the Office of Economic Opportunity in the 1960's. Related to, but still somewhat independent of these events and the socio-political forces they entailed, are certain ethical notions and judgments which animated the leadership of the legal aid movement and which were used as grounds for convincing others that a public need existed for which the profession had some responsibility. In its most national, organized, and true form, under the impulses of Smith, the movement was imbued with a sense of compassion for the poor and was animated by Roscoe Pound's definition of a profession as a learned group serving the public interest.<sup>25</sup> This compas-

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<sup>22</sup>R. SMITH, *supra* note 19, at 145-49.

<sup>23</sup>See, e.g., J. AUERBACH, *supra* note 18, at 230-62. See also, E. JOHNSON, *supra* note 21, at 17-18. Johnson maintains that, until 1950, publicly funded legal aid offices, though never very extensive, were still a "respectable alternative." *Id.*

<sup>24</sup>ABA STANDING COMMITTEE ON LEGAL AID WORK PUBLICATIONS (Sept. 1, 1950) (unpublished typescript in Cromwell Library of American Bar Center, Chicago, Ill.). This opposition to "socialized legal service" is reflected in Smith, *Introduction* to E. BROWNELL, *LEGAL AID IN THE UNITED STATES* at xvi-xvii (1951).

<sup>25</sup>R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953) (prepared for and published by the Survey of the Legal Profession) (copyright held by R. Smith). To clarify the Smith-Pound interdependence prior to the 1950's we should consider the following: Pound taught Smith at Harvard and was his consultant on jurisprudential dimensions in the survey of legal aid reported in his 1919 publication of *Justice and the Poor*, in which Smith refers to Pound as a "voice crying in the wilderness." R. SMITH, *supra* note 19, at 7-8 (citing Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REV. 395 (1906)).

sionate idealism may have dulled the sense of urgency for law reform and for the structural changes some believed essential to a more just system of rules and applications. In fact, even Smith exhibited a curious ambiguity in his simultaneous insistence that there was some unfairness in substantive law affecting the poor, but that such law was reasonably sound for the moment. Arguing further that substantive law is impotent finally to safeguard equality unless impartial administration is guaranteed, he urged that the administrative machinery be overhauled and that the movement concentrate on the elimination of such procedural barriers as delays, court costs, and the expense of counsel.<sup>26</sup> Concentrating primarily on the latter barrier and attempting to eliminate it through voluntary and associational donations, Smith was dismayed by the "poor" attitudes as well as the degree of personal, fiscal, and moral support in both the lawyers he tried to enlist and the general public.<sup>27</sup> From the start he encouraged attorneys to acknowledge a duty to the poor, but he did so in more motivational than demonstrable forms of appeal.<sup>28</sup>

The irregular rationality and the ineffectiveness of this approach comes more clearly to the fore both in comments made by Smith and in events surrounding him in the 1950's. In his introduction to Emery Brownell's 1951 study of legal aid needs,<sup>29</sup> Smith noted that these needs were then more critical than ever, especially considering worldwide "tensions and restiveness."<sup>30</sup> In the foreword to the same study, Harrison Tweed maintained that, if not promptly met, these needs would occasion a government "take-over" with predictably undesirable consequences for the autonomous self-regulation of the profession.<sup>31</sup> While Smith continued to give primacy to idealistic motivational appeals, Tweed and Brownell attempted to make the case on much more pragmatic and utilitarian—indeed, even egoistic—grounds. They argued that legal aid agencies, if well sup-

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<sup>26</sup>R. SMITH, *supra* note 19, at 15-16.

<sup>27</sup>*Id.* at 226-39.

<sup>28</sup>Smith sought to ground his case for the lawyer's duty to the poor on the fact that a lawyer is a minister of justice and an agent of the court, but also tried to find support in "accepted standards of ethics," in professional codes including an early 19th century code by David Hoffman. Since Smith cites the following passage, and since it is prototypical of the ambiguities in his motivational appeals to "duty," I cite the entire passage here: "I shall never close my ear or heart because my clients' means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue or be defended; and they shall receive a due portion of my services, cheerfully given." R. SMITH *supra* note 19, at 233.

<sup>29</sup>E. BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951).

<sup>30</sup>Smith, *supra* note 24, at xiv.

<sup>31</sup>Tweed, *Forward* to E. BROWNELL, *LEGAL AID IN THE UNITED STATES*, at iii (1951).

ported and active, would help keep people off the relief rolls; would keep nonpaying clients out of private offices; would offer young attorneys valuable experience, and would help build a better public relations image for the bar.<sup>32</sup> Although Smith exhibited considerable talent and interest in organization and practical affairs,<sup>33</sup> he pressed the case for the support of the legal aid movement in lofty, idealistic and rhetorical terms. This is nowhere clearer, perhaps, than in an appeal to law students in 1953. Relying importantly on religious metaphors, he asked law students to remember that they were to become the *stewards* of people's liberties and properties and urged them to be faithful in the bearing of this *chalice*.<sup>34</sup> Finally, near the end of this somewhat stylized urging, he offered the students reasons to reject the theory that a lawyer might proceed, first, to become financially secure and, then, as a supplement, might become devoted to public service. As a retort to such a "philosophy" he told the young lawyers: "[W]hen you reach that point, the people won't trust you. They'll say 'What has this rascal been doing all his [sic] life, and what is the sudden need for *conversion* and *forgiveness*.'"<sup>35</sup>

Implying, of course, that prodigals are considered less virtuous than good, faithful, and generous stewards, Smith lays bare some characteristic premises in his undaunted idealism. Appealing to what he believed to be the higher-or better and nobler-dimension in humans, he rested his case for public service on the grounds that it could do much to enhance one's self-image and public regard. Thus, just as he invoked Roscoe Pound's idealism in his use of Pound's definition of the professional, so too he appealed to a very particular kind of religiously-grounded moral viewpoint which, I think, was centrally important in his leadership and its continuing influences.

Ethics is usually defined as the systematic and disciplined critical analysis of moral arguments—namely, those cases which people make in support of moral claims, or what is morally to be done or avoided, with justifying reasons given, and which are built upon a set of premises or assumptions. In turning the light of ethics upon what I previously have called in more "everyday" terms ethical notions and judgments in the legal aid movement, I shall try now to use the more precise language given in the definition above. I invite the legal professional to "inhabit" another field of study for a brief time, primarily in order to understand not only how ambiguities might arise but also how they may be resolved in the legal profes-

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<sup>32</sup>See E. JOHNSON, *supra* note 21, at 9.

<sup>33</sup>See Smith, *Law Office Organization* (pts. 1-4) 26 A.B.A. J. 393, 494, 610, 648 (1940).

<sup>34</sup>R. SMITH, *THE OPPORTUNITY IS YOURS* 1-5 (1953).

<sup>35</sup>*Id.* at 4 (emphasis added).

sional's effort to express and justify what Smith called "the lawyer's duty to the poor" and what others have called, still more generically, an obligation to serve the public interest.

Not every statement concerning alleged obligations is, or is intended to be, a moral claim. Some such statements are intended only to communicate a *generic* judgment that "*something* ought to be done" for *some* reason on *any* grounds. Others express a more *specific* judgment which suggests particular reasons and grounds for the obligation, but not all such specific claims are moral. Some are political, social, customary, economic or constitutional. These statements are sometimes called "nonmoral" to distinguish them from more stringently and properly designated moral judgments. There are also some judgments which fall between the moral and the nonmoral—judgments in which the intentions and words of the claimants are not entirely clear or in which both moral and nonmoral statements are mixed, at least in the reasons given to support the claims. For example, some statements urge a moral duty to do something but also contain references to professional, political, economic, or other forms of obligation. Finally, and distinguishable from both nonmoral and semimoral claims, there are those statements which are most specifically and properly moral—namely, those which are not only normative ("ought") but also universalizable and other-regarding claims about what is to be done or avoided. In this more stringent form, moral claims are difficult to make precisely and are found primarily in professional ethical treatises. Unfortunately, however, moral claims are often most inchoate, imprecise, and rhetorical in the urgings of public and political leaders.

With these clarifications in mind, I should like to submit a disclaimer. What follows should not be taken to be a reckless or arrogant reading by an outsider who fails to understand how ordinary language functions or who is unwilling to acknowledge that, even among professional ethicists, there is always some nagging uneasiness about the clarity of their own work, as well as a certainty that even those rare cases of completely unambiguous argument will certainly draw critical rejoinders. Rather, what follows is an attempt to do what ethicists have learned humbly to accept as one of their major contributions in public policy discussions—namely, to press certain kinds of questions upon claimants and their arguments (especially those which either are or appear to be moral), to ask for clarification of the claims, warrants, and grounds of those arguments, and to suggest how better to make a moral case, if indeed such is possible in the issue at hand.

Just as law has its rules for legal rules, so too does ethics have rules for moral rules. Unlike the power which accrues to certain

rule-making decisions in the law—to wit, a power to declare certain laws invalid or illegitimate—there is an absence of similar authority in the field of ethics. More tentatively, but not always without precedents, ethicists must argue for the reasons behind and the applications of their rules for moral rules. Unlike certain legal guides for rule-making, however, these ethical rules are not as highly institutionalized (excepting, perhaps, some very few examples of academic or religious forms of ethics). Thus, ethical rules do not enjoy the same degree of social staying-power and certainty which accrues to the institutions of legal rule-making and application.

Granting some of the major differences cited above, it seems possible, nonetheless, for professionals in law and ethics to address each other from the vantage point of the reasons rather than the power behind the rules for their respective disciplines. It is not unreasonable to hope that we may be able to understand each other and to suggest both possible causes and remedies for errors of fact or judgment in each other's field. With hope so grounded and in light of the preceding set of premises, I propose the following ways of identifying problematic moral claims and assumptions in the traditional and still influential judgments regarding the obligation to public service.

Criteria or action-guides, devised to express what people judge to be morally right or wrong and grounded in a theory of morality, can be classified according to the degree of objectivity they embody. The more demonstrable and determinate the criteria, the more they are independent of the relativities of time, place, and circumstance. They are, thus, more universalizable and debatable on reasonably objective grounds. Such are the moral criteria and theories of *law* (natural, moral, religious, and civil insofar as it entails one of the other three), *utility* (act and rule determinations of harms and benefits) and *formal moral principles* (such as reciprocity and fairness). Less demonstrable, determinate, and, thus, more completely dependent criteria are those found in the moral action-guides and theories of *perfectionism*, *intuitionism*, *naturalism*, and *developmental evolution*. These latter theories tend to emphasize growth, development, attitudes, sentiments, and dispositions. Thus, they are sometimes associated with a theory of morality called "the ethics of virtue," as contrasted with "the ethics of duty" which is more commonly associated with the more determinate and demonstrable criteria.<sup>36</sup>

While these categories are not so hard and fast as to prohibit the presence of each in any one particular argument or moral

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<sup>36</sup>See W. FRANKENA, *ETHICS* 63-65 (2 ed. 1973).

system, most positions tend to be predominantly one or the other. And, while the designations "ethics of virtue/duty" can mislead one to oversimplify some arguments, they provide nonetheless a workable way in which to discuss the classification of criteria explained above in less readily oversimplified terms. With those disclaimers in mind, I should like to acknowledge that, in using these designations in an effort to evaluate the cases made for the pro bono obligation, I subscribe to a theory that the more demonstrable, determinate, and less completely dependent set of criteria called "formal moral principles" are the most defensible theoretically. While acknowledging that formal principles are lacking in the motivational power possible in other more lyrical action guides, I find that they are much more rational and defensible. The "whys" and "wherefores" of this position are not entirely pertinent here, but shall be apparent nonetheless in the following critical analysis.

I recall the salient characteristics of Smith's case for the "lawyer's duty to help the poor." The language is that of a moral claim. It is, at the very least, semimoral and, clearly, is not entirely nonmoral. Furthermore, it is buttressed with reasons which tend to make the claim less truly determinate and demonstrable—to wit, by emphasizing the character-building and personally enriching dividends for the lawyers who donate their services. Thus, a claim which appears on first glance to be in accord with an "ethics of duty" accords better, in its supporting justifications, with an "ethics of virtue." That virtue and not duty is central to Smith's perspective can be seen in his emphasis on notions of fidelity and conversion in the 1953 address to law students, and is still more obvious in the premises upon which he tried to organize the National Association of Legal Aid Organizations. Relying almost completely upon volunteered funds and personal services, the movement under Smith's tutelage relied upon the presence and regularity of impulses of elective benevolence in both legal professionals and in other supporters of the movement. Assuming people could and would choose consistently to assist those in need of legal counsel, he fashioned a strategy to bring this need to people's attention and to appeal to their senses of compassion and fair play. And this strategy had to be able both to stir and to direct the other-regarding impulses of the people he had targeted as "volunteers." One way to prick such sensibilities and movements of the heart is, as Smith seems to have discovered, to note the personal satisfactions and community regard which sometimes accrue to persons acting altruistically. While dividends such as these need not be regarded as entirely egoistic, they are nonetheless somewhat traditional and conventional ingredients in popular views of the rewards attendant upon a life of vir-

tue. Linked to a proverbial biblical wisdom, hallowed, in part, by knowledge of its source and, in part, because of its extensive influence in our culture, this kind of virtue is accompanied by an expectation of a return for the bread cast upon the waters and, thus, is finally egoistic or in one's own best interests.

I should like to offer a critical appraisal of Smith's case. Reiterating my position that the more demonstrable arguments are the most defensible theoretically, I now single out two ways in which Smith's case must be considered rationally indefensible. First, compassion or love is terminologically and notionally indeterminate. Until a more specific content is assigned the "obligation" to love others, it is inchoate and an expression of an ideal whose approximation is not indicated. Thus, ethicists who promote this ideal—in terms of "love" by those whose grounds are primarily religious, and as "beneficence" by those whose premises are more exclusively philosophical<sup>37</sup>—seek to explain it in the more specific terms of justice. Smith did not make this connection and interpretation; his case rests on an indistinct and indeterminate action-guide. In fact, as contrasted with the term used by some philosophical ethicists, Smith's claims are associated more with the word "benevolence" than with the term "beneficence" with a significant difference between the italicized roots—namely, *willing* and *doing*. A second criticism rests on the premise that, when attempting to assign a specific content to "love" or "beneficence" people generally have recourse to the more determinate notions and criteria of justice. In order to develop a moral argument for an obligation in this fashion, one must distinguish between several different notions of moral justice—namely, justice as reciprocity, as regularity, and as fairness in both exchanges and distributions. Were I to make such a case, I would select the notion of fairness in distributions or distributive justice—as the one most applicable to legal services, and the profession's formal commitment to make them "fully available."

Thus, a major problem in Smith's argument stems from a failure either to distinguish between notions of justice or to use one of them systematically to make his point. If his urgings appeal at all to the moral conceptions and criteria of justice, they do so only implicitly—and then only to some undeveloped notion of justice as reciprocity or fairness in exchanges.<sup>38</sup> These appeals can be inferred

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<sup>37</sup>See G. OUTKA, *AGAPE: AN ETHICAL ANALYSIS* 44-54 (1972).

<sup>38</sup>It is quite possible that in mentioning reciprocity Smith is not giving a justification for a particular duty, but rather is suggesting reasons why one ought to be moral. Rather than using a notion of reciprocal justice (and its principles) to justify a particular claim, he may be making a case for the return expected from being moral. If so, then the reciprocation of "good turns" done to others is what he has in mind, and that

from his arguments that freely donated legal services will yield satisfying personal and social dividends—or, something in exchange for something else. In the inference drawn from Smith's argument is a less relevant and cogent notion upon which to build a case for beneficence as fairness. If we perceive that some common or public set of goods should be distributed, and that everyone, or some professionals in particular, have a duty to see that distribution effected, then it is a mistake to select the notion of justice as reciprocity or that of fairness in exchanges as the conception upon which to make such a case. Even granting, as we must, the cultural persuasiveness of reciprocity notions in the United States, such conceptions are not nearly as applicable as are notions of distributive justice. Thus, Smith's case for the obligation to fairly distribute legal services rests not only upon less rationally demonstrable justifications but also upon a less applicable and less accurate conception of justice.

Fairness to Smith, however, requires some further elaboration of the comment that his notions and justifications are culturally persuasive in America. Even more so than at the present, there was, in Smith's time, a strong predilection for highly motivational and idealistic appeals for charity. As in his argument, most such appeals relied heavily on supporting "reasons" which were more intuitive than demonstrable and which tended to confuse benevolence (good willingness) with beneficence (good action). Thus, Smith's argument would have been conventional and, therefore, more persuasive in the short run among those whose moral sensibilities were akin to his. His argument, however, was culturally relative and *dependent* upon the particular impulses of a particular audience.

That Smith made an argument that fit the conventions of his day is not surprising, but the tenaciousness of such arguments in today's discussions of responsibility for the public interest is somewhat shocking. For example, in a statement entitled "Professional Responsibility," the 1958 Report of the Joint Conference of the American Bar Association and the Association of American Law Schools, the writers reiterate the obligation to make legal services available to all citizens but do so in the traditional terms of sentiment and voluntarism. After suggesting that the mechanisms by which to assure this service are of secondary importance, they maintain, "It is of great importance, however, that the *impulse* to render this service, and the plan for making that impulse effective, should arise within the legal profession itself."<sup>39</sup> This statement not only

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is sometimes given as an answer to the question, "Why be moral?" and not to the question, "How to justify this alleged duty?"

<sup>39</sup>*Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958) (emphasis added).

echoes the sentiments of Smith, but also indicates the tenacity and continuing impact of his perspective and set of premises regarding legal aid. Some reasons for this tenacity are found, in part, in the interdependence of elective benevolence and judgments about the adversary system as well as about the criteria of professional responsibility—two sets of judgments we shall now examine.

## II. "PRO BONO": A BY-PRODUCT OF ADVERSARIAL REPRESENTATION

It may seem paradoxical to suggest that professionals whose daily business requires the skillful and zealous representation of clients in the pursuit of civil justice may, by advancing this cause, simultaneously serve to undermine it—at least in its broader social and political potential. The vigorous promotion of one kind of justice may work against and at times be diametrically opposed to other important and interdependent species of justice.

This paradox may elicit a number of standard retorts which, as I shall demonstrate, neither explain the puzzle nor offer grounds sufficient to resolve it in the future. For example, one might say that lawyers cannot and ought not to work simultaneously on every front in the effort to build a more just society and that no profession ought to be given responsibility for goals to which their specific skills are related only tangentially or indirectly. Lawyers, after all, are neither social workers nor philosophers. As attorneys, they are required only to represent clients by taking one side in a legal conflict and helping that side "win" (and, by so doing, to help preserve clients' confidence in the system, as well as the jobs for which they trained). Thus, one plausible retort is to claim that in order to do the job expected of legal counsel well, the lawyer can ill afford to be looking over his or her shoulder at the effects this zealous advocacy may be creating on other people and institutions. And it seems sensible that some should believe that advocacy is itself for the benefit of the common good or public interest.

Beliefs such as this could and did remain largely tacit in the early and middle years of the legal aid movement: from the 1910's through the 1950's. The assumption that zealous and partisan advocacy of one individual's interests automatically transfers to the public benefit and serves the common interests of all went unchallenged until the 1950's. In 1952, however, members of the Joint Conference on Professional Responsibility found the adversary system to be the major obstacle both in efforts to understand the lawyers' professional responsibility and in the communications they initiated between lawyers and the professional philosophers and theologians

participating in the conference.<sup>40</sup> Conceding the difficulties of explaining the system's benefits to students as well as to colleagues from other disciplines, and acknowledging that lawyers are not generally very "philosophic" about the system, the co-chairmen reported the major conclusion of the conference as a judgment that the "first need was for a reasoned statement of the lawyer's responsibilities, set in the context of the adversary system."<sup>41</sup>

Arguing that "[t]here is a sense in which the lawyer must keep his obligations of public service *distinct* from the involvements of his private practice,"<sup>42</sup> but that the latter can be truly a form of public service, the writers illustrated their thesis first with an example drawn from the life of barrister Thomas Talfourd and then with a catalog of attitudes which they considered characteristic of a truly public orientation in private advocacy. Talfourd helped a client win a suit in a case in which he judged that the law that favored his client's cause was, nonetheless, immoral. Later, as a member of Parliament, he helped secure passage of a statute which revised the previous immoral law. His work as barrister is depicted as one which embodies the characteristics of an enlightened, skillful awareness of the broader public issues and responsibilities facing the profession. Using Talfourd as a model of the kind of private practice which is deemed to be inevitably a form of public service, the writers characterized this practice as one which is animated by a "sense" and "appreciation" of public service as well as by actions which "advance" and "facilitate" rather than "obstruct" the channels of "collaborative effort."<sup>43</sup> These hallmarks are interconnected with affirmations of the importance of the "impulse" to render services to all who need them, and are interrelated with an obligation to represent publicly unpopular clients or causes while asserting that this duty is one of the "highest services a lawyer can render to society."<sup>44</sup>

The explanation of this latter duty as one which rests finally upon a decision of the "individual conscience" but one which is a "clear moral obligation . . . of the legal profession as a whole,"<sup>45</sup> is a very significant and seemingly essential judgment at the heart of the Conference's views of the public value of the adversary system, and is one which will be discussed more fully in the following section. For the moment, however, I should like to appraise critically

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<sup>40</sup>*Id.* at 1159.

<sup>41</sup>*Id.* (The co-chairmen were Lon L. Fuller and John D. Randall.)

<sup>42</sup>*Id.* at 1162 (emphasis added).

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at 1216.

<sup>45</sup>*Id.* at 1217.

some of the moral premises which can be inferred readily from the Joint Conference's interpretation of pro bono as a product of the adversary system.

Just as in the case made by Smith, the terms of the argument are highly ambiguous and appeal primarily to intuitions, sentiments, and attitudes. Hallowing the tradition of the "ethics of virtue," the Conference's statements tend to foreclose upon the possibility of gaining the precision necessary for more demonstrable and more completely "independent" moral criteria. Again, just as with Smith, the obligation for public service is made to rest finally upon the decisions of individual lawyers, but in such a way that they are given no specific direction in the form of decision or action-guiding criteria of fair distribution. In fact, they are told, paradoxically, that the representation of unpopular clients or causes is a moral duty of the profession *as a whole*.

Because this latter paradox will be discussed in a later section, I concentrate here on the lack, or at least the apparent absence, of criteria for the fair distribution of legal services. The failure even to mention moral criteria for fairness in these distributions rests in part upon a set of interrelated assumptions. One is that ethical appeals for public service ought to ask only that lawyers do their jobs well, assuming this will redound to the public interest. This assumption entails the implication that the skillful advocacy of one client's interests transfers to outcomes which serve the common good, or, put differently, that when law is well practiced, the public "chips" of zealous advocacy will fall automatically and correctly in the interests of all. A second assumption concerns the nature of ethics and seems to imply that moral action-guides are finally and fundamentally only ideals put before individuals who must decide how "high" they wish to reach. This assumption belies a commitment to a theory of perfectionism and perhaps a purely private conception of morality—implying that there are no social-ethical action-guides which are both publicly debatable and capable of guiding the behavior of social institutions, as policies to be honored in the actions of individual agents. There is yet a third, and perhaps largely tacit, assumption related to the implication of the adversary system that lawyers are free to choose their clients and cases and that they will make these selections on the basis of several interrelated factors—such as the likelihood of winning the case, the economic payoffs, and the public renown anticipated. This tacit assumption, furthermore, is to be inferred from the fact that, when discussing public service in the context of the adversary system, the Joint Conference offers no specific guidelines for fair distribution and employs only aspirational and attitudinal suggestions for individual decisions.

I believe that there must be other, more determinate, and possibly more influential, criteria which function to fill this vacuum, and upon which the individual lawyer might be able to decide and act with a measure of certainty.

We do not have to look very far to discover the possibility that this third and tacit assumption is allied to a set of criteria by which individual lawyers are guided and by which they make decisions on the basis of at least one kind of distributional criteria: minimum fee schedules. As Barlow Christensen suggests, these schedules function to determine both what is "ethically acceptable" and what is "in the public interest."<sup>46</sup> If "ethically acceptable" means customarily acceptable, and "public interest" means that the public has a need for the profession and that it cannot sustain itself unless it occupies a sound economic position, then the function assigned these fee schedules may be built on sound ethical reasoning. If not, the grounds are spurious to say the least. Nonetheless, and this is the main point, where moral criteria for fairness in these distributions seem to be rationally necessary there may be a functional substitute for them—namely, economic criteria. Fixed fees, determined by bar associations at the local and other levels are not moral criteria, unless the "ersatz" is to be equated with the "genuine." Still, they may be perceived as moral or "ethical," co-opting consideration of the more specifically moral criteria of equality and fairness in distributions. Recalling comments regarding the influence of business on the bar and made by Louis D. Brandeis,<sup>47</sup> economic criteria imply more than a narrow vision of professional responsibility, the adversary system, and the means necessary to protect the private bar. They imply as well a first-class confusion about the meaning of "ethical," and ambiguity aggravated by the failure to suggest specific moral criteria for the public service of the private bar, and one which seems to be dictated by a compulsion to defend the adversary system against all odds.

In this connection we must consider still another major factor in the statements of the Joint Conference: the assumption that there is a split, perhaps even a dichotomy, between the *private* and the *public* bars. At least a mental distinction can be seen in a previously cited proposition—"[t]here is a sense in which the lawyer must keep his obligations of *public* service *distinct* from the involvements of his *private* practice."<sup>48</sup> Partaking, perhaps, of a perspective which,

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<sup>46</sup>B. CHRISTENSEN, *supra* note 9, at 56-57.

<sup>47</sup>F. MARKS, *supra* note 17, at 28 n.48 (citing L. BRANDEIS, *BUSINESS—A PROFESSION* 318, 321 (1914)).

<sup>48</sup>*Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162 (1958) (emphasis added).

as mentioned above, maintains a too rigid dichotomy between the personal and the social in ethics, there is an additional and historically very influential source of a similar dichotomy between the social structure and the *ethos*<sup>49</sup> which characterizes the private bar and that which is the hallmark of the public bar.

Such a source can be found readily in the socialization and values historically transmitted by training in the common law tradition. With an emphasis on precedent, and upon what one writer calls the "relentless doctrinal analysis of appellate opinions . . .,"<sup>50</sup> the range and depth of inquiry becomes restricted in the common law tradition, with the results that broader social issues hardly can be considered and professional adaptation to changing social needs or alternative methods of conflict resolution is hampered. In a professional environment which rewards craft over choice and process over purpose, it would not be difficult for the individual lawyer to come to believe that the proper decisions in cases are simply those which the system produces.<sup>51</sup> With little opportunity and increasingly less skill in asking whether or not there might be other rules which are also applicable—moral ones, for instance—or which ought to override the procedural rules of the common law method, the lawyer could become morally myopic. It could become second-nature to disown the results, to become committed to process over substance, and to be animated by the functional equivalent of a rationally justifiable moral system—by an *ethos*, and, in this case, one with almost "religious" or unhesitating faith in the centrality of the common law method in democratic systems of civil justice.<sup>52</sup>

Some maintain that these convictions have animated the *private* bar since 1870, that they are institutionalized in the case method of teaching, but that they also impede the private lawyer's capacity to deal with contemporary social, economic, and political issues.<sup>53</sup> In 1888 and 1905 respectively, Lord Bryce and Louis D. Brandeis targeted this incapacity as one of the major causes in the decline of the public influence of the American bar.<sup>54</sup> However, with the dawn of the era of governmental regulation and dispensation of powers, there also arose a new cadre of specialized professionals—government lawyers—or the beginnings of a "public" bar dedicated to

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<sup>49</sup>*Ethos* is used here to refer to the subtle web of values, meanings, purposes, expectations, obligations, and legitimations which constitute the *operating* norms of a culture or one of its sub-groupings.

<sup>50</sup>J. AUERBACH, *supra* note 18, at 276.

<sup>51</sup>Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 393-94 (1971-1972).

<sup>52</sup>F. MARKS, *supra* note 17, at 27.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* at 27-28.

public service, and "charged" with representing the whole profession's concern with public policy. The private bar did not fail entirely in helping to draft legislation or in conducting investigations and hearings on public matters. But when they did, it was in behalf of the interests of their individual business clients. Similar tasks, done primarily for more common interests, were assigned to the public bar, which, therefore, became more completely responsible for the bulk of the legal profession's activities in public policy discussions and decisions.<sup>55</sup> Thus, the public bar developed a "conscience— or policy-laden" *ethos*, which was competitive with that of the private bar. Applauded by figures like Brandeis, but a source of chagrin for a figure like Abe Fortas, the public bar emerged to focus attention on and to stimulate debate about public interest issues.<sup>56</sup> Nonetheless, and despite its public-interest character, the existence of a public bar separated from the private bar served to obscure the fact that all legal professionals have responsibility for the general welfare. As late as 1967 at a Harvard Law School conference, Justice Brennan stated that a certain amount of "shuttling" between public service and private practice should be encouraged to increase the "cross-fertilization" of each group by the respectively different perspectives and talents they cultivated.<sup>57</sup> This had already begun under the auspices of the Legal Services Program, a program which involved the private sector significantly in the creation and control of its policies and organization—especially through the involvement of the local bar associations.<sup>58</sup> This cross-fertilization has also begun to occur in some quite different and as yet unpredictable ways through the public interest commitments of some private law firms, and in some experimental forms of open-panel group practice.<sup>59</sup> But it is still too early to know whether or not the profession will be able to shed easily the accumulated burden of a somewhat schizophrenic split between the public and private bars, their differing social structure and *ethos*. Clearly such a move will be most dif-

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<sup>55</sup>*Id.* at 25-26.

<sup>56</sup>Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 1002 (1970); F. MARKS, *supra* note 17, at 34.

<sup>57</sup>Brennan, *The Responsibilities of the Legal Profession*, in THE PATH OF THE LAW FROM 1967, 96-97 (A. Sutherland ed. 1968).

<sup>58</sup>F. MARKS, *supra* note 17, at 42.

<sup>59</sup>"Open-panel" refers to experiments in which members of group plans may select lawyers other than those regularly employed by the group. If the latter were the only alternative, the designation would be "closed-panel." "Unpredictable" in this same statement refers to a judgment that, with respect to funding and organization as well as the causes of their beginnings in private firms, the future of "public interest" members, and departments, is really quite uncertain.

difficult, if not impossible, without simultaneous revisions in related judgments about pro bono as an elective benevolence or as an inevitable outcome in the adversary system. If changes in these judgments are, indeed, essential, I suspect many will conclude that the gravity of the situation is such that the changes cannot be effected without dramatic and far-reaching, and undesirable consequences on the public shape and functions of lawyering.

### III. "PRO BONO" IN CANNON TWO

The following comment by Andrew L. Kaufman helps explain the considerable attention I gave to the Joint Conference in the preceding section. The statement also creates a setting in which to grasp more firmly my appraisal of the bar's judgments of public service and the public interest as found in the Code.

The Statement of the Joint Conference on Professional Responsibility of the Association of American Law Schools and the American Bar Association . . . is offered as an institutional view of the lawyer's role in the legal system. If one were vilifying it, one might call it the "establishment" view. If one were lauding it, one might call it a statement representing a consensus of the views of progressive leaders of the profession about its highest ideals. However one characterizes it, the Statement *is often looked to* when professional ideals are sought or questioned, and it is also useful as a foil against which to test one's own thoughts.<sup>60</sup>

Kaufman helps set the stage for the declaration of a set of premises which will guide the following critical analysis of Canon 2. My analysis presupposes that the Code is a product of the hopes and fears of a nationally influential cadre of leaders in the American bar. But, differing somewhat from the laudatory view mentioned above as one possible interpretation, I do not assume that this leadership is necessarily progressive, at least not entirely and unambiguously so. I further presuppose that the ideas of Lon L. Fuller and Henry S. Drinker have greatly influenced the leadership and that their views were incorporated in the Code.

I also assume that, irrespective of whose thoughts it incorporates, the Code is an imperfect mirror of what *all* lawyers hold to be morally binding. And this I believe for two reasons. First, the Code is not binding on all lawyers unless ratified by state bar

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<sup>60</sup>A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 1 (1976) (emphasis added).

associations.<sup>61</sup> Second, even if ratified in its entirety, there is always a measure of selectivity and inconsistency in local interpretations and applications of the disciplinary regulations. In fact, it would appear that only a select set of the most flagrant violations results in disbarment. In the recently quoted view of Eric Schnapper:

One searches in vain for a lawyer disciplined for failing to give free legal service to the indigent, for failing to disclose legal precedent contrary to his clients' interests, for misrepresenting facts to judges, juries or opposing counsel, or for using political office or connections to attract clients, although the frequency of these occurrences is common knowledge.<sup>62</sup>

Finally, in what follows, I assume that, irrespective of whose thoughts it incorporates and whose interests it promotes and the degree of adherence which local bars accord it, the Code is designed and used as the major and formal educational tool both for the teaching and for the sanctioning of a professional *ethos*. Hence, the Code merits careful and critical attention, and, in particular, scrutiny of the moral ideals (ethical considerations) and the disciplinary rules with which the bar seeks to enforce a certain minimum achievement of professional standards. Because the subject of this Article is the profession's institutional understanding of the pro bono requirement, I shall focus critically upon the reasons why the Code's Canon 2 may lead logically and inevitably to one of the inconsistencies Schnapper underscores—namely, the vanity of searching for an instance in which a lawyer is disciplined for failing to make legal services available to one who needs but cannot afford them.

Certain terms and conditions are imposed upon the Code's interpretation of pro bono—by virtue of historically influential thought patterns and by commitments to elective benevolence and to the adversary system as the principal instruments by which to assure adequate service of the public interest. Some of the still-influential ideas and values of the profession's historical past are tantamount to being shibboleths or social atavisms. The preference for explaining public obligations in terms of traditional notions of elective benevolence and the adversary system are clearly examples of just such an ideological residue. But so too are the Code's conceptions of

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<sup>61</sup>*Id.* at 29. Note that there is "Some evidence that a counter-bar association is emerging to perform the central function of brokering professional responsibility. The Chicago Council of Lawyers typifies such a counter-bar." F. MARKS, *supra* note 17, at 147.

<sup>62</sup>TIME, Apr. 10, 1978, at 56, 59.

ethics and what is "ethical" in the considerations which precede each set of disciplinary rules. In other words, there are limitations set by the very notions essential to the structure of the Code—that is, some general and guiding principles which run through the entire Code.

Invoking clarifications and precisions suggested earlier in this Article, I should like now to discuss several mistaken, or at least highly ambiguous, moral notions which form in the structural glue of the Code. In preparing the new Code, adopted in 1969, the Committee sought to include areas previously omitted or only partially treated, to clarify editorially some previous statements, to add new propositions with which to address the peculiarities of modern society, and to provide more practical and effective sanctions than were available previously.<sup>63</sup> It divided the Code into *Canons* (axiomatic norms), *ethical considerations* (ideals or goals which are "aspirational in character") and *disciplinary rules* (mandatory minimum standards of duty).<sup>64</sup> In reaching toward its objectives and in so dividing the contents of the Code, however, the Committee created a number of potentially serious confusions. It identified the "ethical" with the "aspirational," the idealistic, or the "ethics of virtue." Similarly, it equated "duty" with "disciplinary rules" and, therein, risked a double subordinate ambiguity. Determinate obligations are confused with statutory rules, thus, blurring an important distinction between law and morality; they also confuse custom and morality and tend to equate the profession's traditional, conventional and customary *ethos* with rationally justifiable moral rules. Seeming to pay little or no attention to professional ethicists' explanations of the rules for moral rules ("ethics"), the Committee improved the form and content of the 1908 Code, but simultaneously undermined the content of the new version by failing to substantially incorporate the efforts of contemporary ethical scholarship to clarify necessary distinctions between law, etiquette, morality, and ethics.

The Code's confusion of moral and nonmoral action-guides is aggravated by a still more puzzling theory of morality which distinguishes aspiration and duty rather stringently and becomes the structural skeleton to be fleshed out in ethical considerations and disciplinary rules. The preface declares that the committee "relied heavily upon the monumental *Legal Ethics . . .* of Henry S. Drinker, who served with great distinction for nine years as Chairman of the Committee on Professional Ethics (known in his day as the Committee on Professional Ethics and Grievances) of the

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<sup>63</sup>ABA CODE, *Preface* at i (1977 version).

<sup>64</sup>*Id.*, at *Preliminary Statement* at 1.

American Bar Association.”<sup>65</sup> Careful scrutiny of Drinker’s book, however, reveals nothing comparable to the Committee’s theory of morality.<sup>66</sup> Drinker’s primary contributions seem to have been his useful and abundant catalogue of American Bar Association “Opinions” on ethical problems in professional conduct and in his correlation of these opinions with the 1908 Canons which provide a comprehensive and systematic record of the revisions that changing social and cultural conditions had prompted between 1908 and 1953.<sup>67</sup> This realization of Drinker’s contribution created some curiosity about the source of the moral theory and was preface to an hypothesis which emerges from two interrelated sets of facts. First, the footnotes to the Code demonstrate that the Committee relied heavily upon the Statement of the Joint Conference on Professional Responsibility. This Statement is cited, for example, in three of twelve footnotes for the Preamble-Preliminary Statement which establishes the focus of the Code, and is cited four times in support of Canon 2’s ethical considerations.<sup>68</sup> Second, if we recall that Lon L. Fuller was one of the co-chairmen of that conference and that the concluding peroration of the Statement appeals for more than understanding—namely, for “a sense of attachment to something larger . . . habitual vision of greatness”<sup>69</sup>—we can infer that Fuller’s perspectives influenced the drafting of the 1969 Code. The most persuasive piece of evidence in support of such an inference is Fuller’s 1964 publication *The Morality of Law*. First published in the year of the drafting committee’s preliminary deliberations, this book elaborates the very same theory found in the structural standpoint of the Code—a morality of aspiration as distinguished from one of duty.<sup>70</sup> Therein Fuller maintained that duty embodied the basic minimum and the most obvious demands of social life.<sup>71</sup> By contrast, he portrayed aspiration as the way of perfection, excellence, or the form of morality calling for the fullest realization of human powers.<sup>72</sup> Considering the morality of duty as one which entails prohibitory and somewhat inflexible but enforceable action-guides, he maintained that the morality of aspiration embodies affirmative, more pliable but nonenforceable guides and is, therefore, more completely subjec-

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<sup>65</sup>*Id.*, *Preface* at i.

<sup>66</sup>See H. DRINKER, *LEGAL ETHICS* (1953).

<sup>67</sup>*E.g.*, *id.* at 257-59 (on advertising and solicitation).

<sup>68</sup>ABA CODE, *Preamble & Preliminary Statement*, n.n.3, 4, 7, EC 2-1 n.4, EC 2-25 n.40, EC 2-27 n.45, EC 2-30 n.51 (1977 version).

<sup>69</sup>See A. KAUFMAN, *supra* note 60, at 28.

<sup>70</sup>L. FULLER, *THE MORALITY OF LAW* 3-32 (2d ed. 1969).

<sup>71</sup>*Id.* at 5-6.

<sup>72</sup>*Id.* at 5, 6.

tive and intuitive,<sup>73</sup> *i.e.*, it is less determinate and demonstrable and is more completely dependent upon variables.

I have indicated earlier some of my reasons for judging that dependent moral criteria are less justifiable than others; I shall, therefore, now forego all but the briefest comment on Fuller's theory and shall focus, rather, upon how this theory gives structural coherence to a host of ambiguous and unjustifiable claims in Canon 2, the public interest canon. In addition to critical comments made earlier regarding indeterminacy in aspirational, perfectionist and intuitionist forms of ethics, I supplement those comments here by indicating some further problems in Fuller's theory, particularly its tendency to skew Canon 2's account of the lawyer's public responsibilities. In particular, I note the unsatisfactory character of a distinction between maximums and minimums in morality especially when they are correlated with aspiration and duty—as if excellence and virtue may not be considered duties, or conversely, as if a person cannot aspire to the fulfillment of moral duties. Furthermore, the equation of aspiration with positive obligations and of duties with negative prohibitions misses the fact that ordinary usage most often confines duty to an affirmative action and that philosophers rightly distinguish between moral duties and moral prohibitions. Finally, excellence and its corresponding ideals ought not to be restricted solely to the guidance of *personal* ways of life as implied by a morality of aspiration. They can and should apply as well to *social* ends such as justice, equality, peace and so forth.<sup>74</sup>

Because of the Committee's preference for the theory of morality articulated in the Preamble-Preliminary Statement, and because it used this theory to structure the content of Canon 2, the Code's judgments about professional obligations to serve the public interest partake of all the ethical problems embodied in the prefatory general theory. For example, Canon 2's disciplinary rules carry forward traditional forms of etiquette concerning professional notices, letterheads and offices, solicitation, and the recently-amended section on publicity.<sup>75</sup> These are not properly called "moral duties." They may well be obligatory for the professional, but they are decidedly nonmoral and have only the most tenuous connection to the Canon's ethical considerations which, according to the Code's Preliminary Statement, "constitute a body of principles upon which the lawyer can rely for guidance in many specific situations."<sup>76</sup>

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<sup>73</sup>*Id.* at 30-31.

<sup>74</sup>See a similar assessment in Summers, *Professor Fuller on Morality and Law*, in MORE ESSAYS IN LEGAL PHILOSOPHY 104-10 (R. Summers ed. 1971).

<sup>75</sup>ABA CODE, DRs 2-101 to 104 (1977 version). DR 2-101 has been revised substantially due to the decision in *Bates*.

<sup>76</sup>ABA CODE, *Preliminary Statement* at 1 (1977 version).

The disciplinary rules guide professional activity by means of mandatory standards the violation of which risks disciplinary sanctions, but they fail to mention, much less sanction, a mandated minimum for the public service set forth in the "principles" mentioned above. Hence, discipline of a lawyer for failing to make legal services fully available is unlikely. Consequently, the public service obligation rests completely upon the "principles" set forth in the "ethical considerations." Thus, the nature of those principles and their potential for effectively guiding professional activity toward greater public responsibility must be questioned.

The maxim in Canon 2 contends: "[A] lawyer should *assist the legal profession* in fulfilling *its duty* to make legal counsel available."<sup>77</sup> I grant that the ethical considerations following this maxim seek to expand upon this obligation and maintain that it entails helping to educate people to recognize legal problems and to select lawyers intelligently as well as the duty of professionals to represent socially unpopular clients and causes. Nonetheless, the availability mentioned in the Canon is associated principally and recurrently with the business of "making legal services fully available"<sup>78</sup> to "persons unable to pay reasonable fees."<sup>79</sup> Having made all of these points, however, the Canon modifies the initial maxim to read: "The basic responsibility for providing legal services for those unable to pay *ultimately* rests upon the individual lawyer . . . ."<sup>80</sup>

To grasp the implications of this transmutation—from assisting the profession in its responsibility to accepting what is fundamentally a personal obligation—two things should be recalled. First, no disciplinary rules correspond to this ethical consideration; thus, in accordance with the moral theory structuring the Code, there are no mandatory and minimum *duties*, *i.e.*, transgression is not subject to sanctions. Second, the Code's ethical considerations are "aspirational," and the obligation to help the indigent is sandwiched between statements reminding lawyers, on the one hand, that this need has been met historically by means of donated services and, on the other hand, that such benevolence is often not sufficient and must be supplemented with organized efforts to which lawyers should lend support—but only if they are "proper" and if participation in them upholds "the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients."<sup>81</sup>

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<sup>77</sup>*Id.*, Canon 2.

<sup>78</sup>*Id.*, EC 2-1.

<sup>79</sup>*Id.*, EC 2-25.

<sup>80</sup>*Id.* (emphasis added).

<sup>81</sup>*Id.*, EC 2-33.

The lawyer is given a very confusing and somewhat contradictory set of standards to follow in pursuit of public responsibility. The profession is said to have a duty in the fulfillment of which the lawyer must assist, but only and finally by striving for personal virtue in benevolent altruism which is called "one of the most rewarding experiences in the life of a lawyer."<sup>82</sup> Precisely how or why the individual lawyer is a representative of the whole profession in accepting or refusing any particular opportunity to be benevolent is not clear. Should a particular lawyer or group of them find this kind of altruism not very "rewarding" finally, then the major and consequence-based form of justification for the duty alleged is undermined by contradictory empirical evidence. Should cooperation with agencies which regularly provide free or reduced-fee legal services appear to conflict with the very indefinite or indeterminate traits of independence and integrity—and such conflicts would not be hard to imagine when the traits are so relative—then the latter and characteristic virtues are to have priority over the putative public need. Indeterminacy in locating the subject and the grounds of the obligation is coupled with a corresponding indefiniteness in the characterization of ideal traits which are to take precedent over public service obligations. Thus, the ethical considerations are little more than prayerful suggestions, optatives rather than imperatives. They are by no means prescriptive and, in their indeterminacy, are surely not universalizable or generalizable. Failing most of the conventional tests of moral rules and wanting as they are in corresponding mandates, *i.e.*, disciplinary rules, the "standards" of Canon 2 are little more than pious platitudes. This is not surprising in view of the historically important and still influential precedents of the profession's conceptions of public service.

Having previously discussed Smith, Pound, and Fuller as precedent-setting figures, I mention here only one other, the authority whose voice is acknowledged in the preface to the Code: Henry S. Drinker. In his book's very brief remarks about public service, Drinker recalled Pound's definition of a profession—characterized among other things by a dedication to the public interest—and he invoked tradition as a support for the public obligation and concluded that this is "[a] duty . . . of which the emolument is a by-product, and in which one may attain the highest eminence without making much money."<sup>83</sup>

After Drinker's 1953 rhetorical appeal supporting the 1908 Canon 4 which upheld a duty toward the indigent, a series of events

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<sup>82</sup>*Id.*, EC 2-25.

<sup>83</sup>H. DRINKER, *supra* note 66, at 5.

and movements in the 1960's pressured the bar to remove obstacles to equal opportunity and to make the legal redress of violated rights more accessible to people "closed out" by the system.<sup>84</sup> Thus, greatly expanded and updated in form and content, Canon 2 of the 1969 Code was launched in response to rapidly occurring and highly charged social, political, and cultural changes. It has been buffeted about in the 1970's and was central to a series of challenges to the adversary system coming from experimental public interest law practice and zealous class-action advocacy, and has been the principal casualty of the storm which preceded a series of four amendments to the Code—one every year since 1974, with the most recent being the 1977 Supreme Court decision on advertising.<sup>85</sup> And, by virtue of related and continuing tensions in these areas, Canon 2 promises to be at the center of any number of socially and professionally threatening squalls for some time to come. One very good reason for this supposition is to be found in the very difficult dilemma at the heart of the recent decision concerning advertising of legal services. The disciplinary rules on "Publicity in General" and their supporting ethical considerations had, prior to amendment, prohibited all but the most circumspect advertising of legal talents and services, restraining competition from customary forms of open-market business and trade.<sup>86</sup> Prior to the 1977 amended version of the 1969 Code, Canon 2 maintained that this traditional ban was "rooted in the public interest"—oddly enough the only place this interest is mentioned in the entire Canon—and claimed that competitive advertising would impair public confidence in the legal system as well as undermine the uniqueness of the lawyer-client relationship.<sup>87</sup> Disputing this reasoning in its decision, the majority of the Supreme Court held that it was anachronistic to believe that the profession was somehow above trade and a free-market economy.<sup>88</sup> The Court, thus, landed a major blow against a long-standing and very pliable interpretation of Roscoe Pound's definition of a profession; the public interest component of the definition had been interpreted in such a way that it meant in effect aristocratic and elitist self-service fortified by an array of rules of etiquette which served anything but the public welfare.

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<sup>84</sup>See, e.g., J. AUERBACH, *supra* note 18, at 263-306; H. STUMPF, *COMMUNITY POLITICS AND LEGAL SERVICES: THE OTHER SIDE OF THE LAW* (1975).

<sup>85</sup>See ABA CODE, *Preface* at ii.

<sup>86</sup>*Id.*, ECs 2-9, 2-10, DR 2-101 (1975 version).

<sup>87</sup>*Id.*, EC 2-9.

<sup>88</sup>*Bates v. State Bar*, 433 U.S. at 368-69 (citing B. CHRISTENSEN, *supra* note 9, at 152-53).

The full impact of the Court's decision cannot be estimated for sometime. In particular, it would be reckless to suggest that the encouragement of a business *ethos* in the legal profession would illumine the blind spots or eradicate the errors in a traditional *ethos* grounded more in custom and convention than in rationally justifiable moral arguments for fairness in the distributions as well as the exchanges of professional services. What has not been true in the business world is not likely to become true in a business-minded legal profession. Nonetheless, as Raymond F. Marks has suggested, it is paradoxical but logical that:

[I]t was when the bar acted more like a trade association than a profession [with the adoption of minimum-fee schedules] that it was forced for the first time formally to take cognizance of the problems of making services available to some by means other than a market-model for distribution of these services.<sup>89</sup>

#### IV. THE "IS-UGHT" MAZE

Canon 2 has become the repository of the profession's traditional and ambiguous judgments about the obligation to serve the public interest and, therefore, a potential target of dissatisfaction with those judgments. As a repository of traditional conceptions, it is a microcosm of the cultural lag identified by participants in the most recent joint meeting of the American Bar Association and the American Assembly.<sup>90</sup> This disparity between inherited norms and the present realities is encouraged by certain habits of legal institutions: their orientation toward the past through dependence upon precedent, previous legislative enactments and judicial interpretations. Furthermore, as our pre-eminent system of social symbols, the law tends to reinforce cultural beliefs which have proven to be dissonant with contemporary experience. For example, the law can become a pedagogue for the beliefs, attitudes and values of adversarial conflict and others which are incompatible with the reality of an interdependent, vulnerable and technological world.

One of the causes of "cultural lag," is to be found in what Julius Stone has discussed as an assumption that *de facto* beliefs are conclusive of what ought to be.<sup>91</sup> Called by moral philosophers the naturalistic or "is-ought" fallacy, this assumption is a culturally obstinate way of proceeding from assertions of what is to claims about what ought to be. Thus, what merely happens to be the cur-

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<sup>89</sup>F. MARKS, *supra* note 17, at 16.

<sup>90</sup>M. SCHWARTZ, *supra* note 3, at vii.

<sup>91</sup>J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 546 (1966).

rent or traditional set of convictions about what is moral can come to be expressed and defended formally as moral principles supported by moral theory. In this fashion, the axioms which a culture or a profession uses to resolve intellectual and moral puzzles and the not-always-morally-justifiable maxims by which we seek to guide social behavior can acquire a somewhat specious intellectual respectability.

Clearly, circumspection and selectivity are in order for those persons who would trade the less-fully-thoughtful and customary standards of a professional *ethos* for more formal philosophies of law and morality. Having already suggested some reasons why the ethical theories of Drinker and Fuller leave much to be desired, I should like, further, to indicate why even the more recent offerings of thinkers like Ronald Dworkin and John Rawls may not resolve fully the is-ought dilemma and why, therefore, their positions may aggravate, rather than relieve, the cultural lag hallowed by the Code and by all who use it as their moral pedagogue.

In his critique of the "ruling theory of law," *i.e.*, contemporary positivist and utilitarian theories, Dworkin reaffirms the common law tradition of rights claimed over and against, but importantly also as prior to, the state and its legislative enactments.<sup>92</sup> Although H.L.A. Hart's "most powerful contemporary version of positivism"<sup>93</sup> is his major target, Dworkin is critically attentive to other recently repopularized forms of Edmund Burke's theory emphasizing the customary or conventional and promoting trust in the established notions and values of our culture.<sup>94</sup> He rightly assails the reasoning in these two theories which would aggravate the confusion of *de facto* beliefs and normative legal and moral judgments, but unhappily not on that basis. Drawing upon Rawls' technique of "reflective equilibrium,"<sup>95</sup> Dworkin seeks to account for the relationship between prevalent cultural beliefs and formal moral principles. While he has elsewhere differed from Rawls—notably on the matter of a hypothetical social contract and on the priority to be assigned either liberty or equality<sup>96</sup>—he here adopts a technique which overlooks the liabilities inherent in conventional beliefs and social axioms. In the following view of the function of moral philosophy, and then mediating Rawls' views, Dworkin establishes a structural and formal philosophical method for investing some not fully justifiable convictions with the warrant of a formal system—thereby also

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<sup>92</sup>R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

<sup>93</sup>*Id.* at xi.

<sup>94</sup>*Id.* at x.

<sup>95</sup>J. RAWLS, *A THEORY OF JUSTICE* 20-22, 48-51 (1971).

<sup>96</sup>R. DWORKIN, *supra* note 92, at 150-54, 272-78.

potentially and geometrically increasing the disparity between inherited values and the judgments necessary to confront contemporary realities.

It is the task of moral philosophy, according to the technique of equilibrium, to provide a structure of principles that supports these immediate convictions [moral beliefs such as those concerning the injustice of slavery] about which we are more or less secure, with two goals in mind. First, this structure of principles must explain the convictions by showing the underlying assumptions they reflect; second, it must provide guidance in those cases about which we have either no convictions or weak and contradictory convictions. If we are unsure, for example, whether economic institutions that allow great disparity of wealth are unjust, we may turn to the principles that explain our confident convictions, and then apply these to that difficult issue.<sup>97</sup>

Because some of these convictions express judgments about rights prior to legislation or over and against the state, this technique helps advance Dworkin's thesis of taking rights seriously. And because equilibrium requires a series of "back and forth adjustments," now accommodating principles to convictions and again adjusting conversely,<sup>98</sup> there is little likelihood that customary or conventional judgments will reign supreme over more rationally justifiable convictions. With the possible exception of his explanation of "the right to treatment as an equal,"<sup>99</sup> Dworkin's reliance on Rawls' technique sets the stage for an unwitting justification of what are merely *de facto* beliefs or preferences. Even after granting the critical potential in the seesaw movement of the equilibrium technique, there remain some nagging doubts about public and professional willingness to call into question some beliefs to which are allied very strong interests of a political, economic and personal sort. Furthermore, and in addition to the conative and retentive powers of preferences, loyalties, and interests, there is another source of obstinacy in cultural beliefs. Although Rawls emphasizes the importance of deeply-held moral beliefs,<sup>100</sup> there is always the chance that they may be mistaken. They can be the consequence of oversight as well as insight,<sup>101</sup> the products of a false consciousness

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<sup>97</sup>*Id.* at 155.

<sup>98</sup>*Id.* at 164.

<sup>99</sup>*Id.* at 273.

<sup>100</sup>See Rawls, *The Independence of Moral Theory*, in 48 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION 5-22 (1975).

<sup>101</sup>See B. LONERGAN, *INSIGHT* xi, xiv (1958) (on flights from understanding); *id.* at 419-20 (on common sense's encouragement of judgment while discouraging understanding).

as well as its opposite. Irrespective of the depths of their roots or the pervasiveness of their branches, immediate convictions are not always correct. Thus, while differing somewhat from David Lyons' critical review of Dworkin's thesis, and while not sharing Lyons' utilitarian standpoint, I agree with the following: "Right and wrong are not subordinate in any systematic way to the moral beliefs that people happen to have," and that such a subordination is implied in Dworkin's thesis.<sup>102</sup>

Neither Dworkin nor Rawls indicates a clear and direct path through the "is-ought" maze. They make decidedly valuable progress beyond Hart's positivism and the repopularized conventionalism of Burke. They also make telling critical points in opposition to perfectionist and intuitionist moral theories, and they advance a persuasive case for basing moral obligations on duties or rights rather than, as do utilitarians, on goals. Nonetheless, and as noted above, there remains at least one way in which this progress can be undermined—namely, by a less than fully thoughtful and critical acceptance of the community's current crop of moral beliefs.

If this Article has accomplished its objectives, it has demonstrated the conceptual and other liabilities inherent in the adoption and canonization of prevalent convictions about the public responsibilities of the legal profession. I have pointed up the historical and precedent-setting sources of pro bono as elective benevolence, its correlation with convictions that the adversary system's pursuit of one person's interests is necessarily in the interests of the collective, and the hallowing of both these convictions in Canon 2 of the Code.

There are other seemingly intractable alliances of cultural and professional beliefs to be considered at another time—namely, convictions about the "deserving poor" and about the public value of "procedural equality." Finally, and drawing upon the conclusions of this Article's more analytical and critical discussion, I hope to develop soon some constructive proposals for the creative reconception of public service and social justice, as well as offer suggestions for the modification of the adversary system and some ideas about how the quality of legal services must be allied more stringently to considerations of their accessibility. This Article serves only to introduce considerations which are preliminary but necessary to an improved understanding of a very complex, but very important set of issues facing the American bar and the public it is licensed to assist in the pursuit of increasingly greater approximations of the ideal of justice.

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<sup>102</sup>Lyons, Book Review, 87 YALE L. REV. 415, 435 (1977).