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Eligibility for Legal Aid: Whom to Help When Unable to Help All

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I. INTRODUCTION

In the face of needs and claims which far outstrip the funds and personnel required to meet them, social agencies always have had to decide how to distribute their inadequate resources in ways which satisfy their sense, if not their criteria, of distributive justice. Organized legal aid programs have not been spared these difficult decisions and, as other agencies, have sought to devise more or less formal methods for determining the eligibility of candidates for aid.[1] The least formal methods have been based upon unstated and highly discretionary criteria—open to caprice, arbitrariness, and personal as well as class bias. Even the more formal, stated, and sometimes written criteria have achieved only modest clarity and fairness.

Irregularly, and while learning how difficult it is to be clear and consistently fair in these matters, the providers of free or reduced-cost legal aid have tried to disburse their resources effectively. In doing so, however, they inevitably face some traditional and still puzzling moral dilemmas which entail both loose-jointed but prevalent cultural convictions and those more disciplined and reflective judgments concerning the standards of distributive fairness. Not unlike other areas involving the disbursement of resources, legal aid agencies have had to take stands, however formal, on the comparative weight to be assigned to the needs, merits, and social contributions of potential recipients. They have had to ask whether

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[1]This Article, it should be noted, is concerned with *microallocation* problems. It does not consider the *macroallocation* problem of determining how much of society's resources should be allocated to legal aid vis-a-vis, *e.g.*, education, housing, or medical care. Rather, the inquiry is about fairness in the allocation of those resources which have been assigned to the area of legal aid.

"first-come, first-served" is the fairest principle or whether certain persons or cases are "more worthy" than others. In settling these and related questions, they have also had to consider the amount of attention that should be paid to the potential "social contribution"of the petitioner, or, for that matter, to the convictions and interests of the public and professional colleagues.

With a full measure of sympathy, born of analogous experiences with household and university resources, and humbled by professional efforts to understand notions and principles of distributive justice, I propose an exploration of these dilemmas from the viewpoint of social ethics. Intending to contribute to the quest for clarity and equity in the expression and application of eligibility criteria, the following considerations are offered to stimulate public discussion of which human values and principles of justice ought to be overriding and normative in matters of this sort. Acknowledging in advance that the pluralistic character of our society makes agreement in these matters most difficult, and that decisions about distributions tend to be made rather as compromises arising from the clash of competing interests, this Article, nevertheless, hopes to advance fairness in policy making which, while respecting plural rights and freedoms, requires also that the decisions and actions made in that setting become increasingly more principled and rationally justifiable. Regrettably, the question of how to distribute fairly often is reduced to questions which ask *who* is to decide how to distribute. Valid though they are, these questions lead inevitably to debates about authority and power—all of which may produce more heat than light and which cannot be fully resolved without principles for guiding distribution, irrespective of who the distributors are. Even the most vigilant efforts to keep principles uppermost in one's considerations may, however, become derailed in ways which attend to irrelevant or invidious differences in the people to be served.

Wishing to keep considerable distance between the approach proffered in this Article and those which seek to address these matters authoritatively with exact and absolute determinations of right and wrong, the problems will be considered as follows. After recounting the kinds of eligibility criteria commonly employed in the distribution of legal aid, an inquiry will be made about which criteria best respect the most widely accepted requirements of distributive fairness in the comparative treatment of individuals. In order to answer this question, it will be necessary to test the justifiability of the moral claims and warrants entailed in these criteria, and, in particular, the stands they imply concerning the priority of the conventional ways of comparing individuals—in terms of need, desert (or worth), and social contribution. These inquiries

shall lead to still further, and perhaps more fundamental, judgments which are involved less obviously, but nonetheless importantly, in the articulation and application of eligibility criteria. Reference is made here to judgments about the nature and goals of American society and to other critical assumptions in eligibility standards as well as to the legal, economic, and ethical theories mustered in their support. Thus, some conclusions will be reached with respect to the ways in which these standards can mirror and serve to advance dominant cultural and professional convictions. Thus too, the manner by which loyalities to and preferences for certain dominant cultural and professional values impede progress toward more principled and rationally justifiable decisions in the recurring dilemma of whom to help when not all can be helped will be considered.

II. Discretion, Judge Bridlegoose, and Due Process

A. Private and Unorganized Legal Aid

It is not always easy to determine how the private and unorganized bar decides either to take or to reject a case if a client is in need of legal assistance, but unable to pay for the services desired. The all too few studies of this matter testify to a lack of formal and written criteria for the provision of personal and private legal aid.[2] They also demonstrate what seems inevitable—an irregular and inconsistent use of ad hoc criteria, with a maximum of discretionary power in the hands of the provider.[3] Furthermore, as one such study revealed, the actions and attitudes of the private bar indicate that private attorneys often are simply unaware of the eligibility criteria used in organized and publicly-funded efforts such

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[2]*See* Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. Rev. 381 (1965); Lochner, *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 Law & Soc'y Rev. 431 (1975); Maddi & Merrill, The Private Practicing Bar and Legal Services for Low-Income People (1971) (available from American Bar Foundation, 1155 E. 60th Street, Chicago, Ill. 60637).

[3]*See* Lochner, *supra* note 2, at 462-65. In analyzing the results of the study, the author stated with respect to indigent or partially indigent clients who were referred to the attorney by intermediaries:

> Lawyers take NF/LF [no fee or low fee] clients in return, most typically, for hoped-for future legal business. They also take such clients to please a friend or crony or to satisfy feelings of obligation towards neighborhoods or ethnic communities. Intermediaries perform their tasks in exchange for the political or other support of NF/LF clients and expect to provide some rewards to the lawyer if the client is unlikely to be able or willing to do so. And, finally, though clients accept free legal services they pay for them in terms of the business they may bring in, or the favors they may do, for both lawyers and intermediaries. The rewards are not just economic, they are also social, political, fraternal and psychological.

Id. at 463.

as that of the Legal Services Organizations.[4] This study concluded that the private bar is inclined to individualize rather than organize solutions to the problem of inaccessible legal aid and that, while continuing to believe that everyone is entitled to equal protection and its prerequisite in equal access, the private bar does little to translate this belief systematically into any particular form of organized aid.[5]

This phenomenon is partially explained by the fact that these lawyers are not accountable either to public review or to boards of directors as found in organized but private agencies. Should one believe that lawyers are accountable, nonetheless, to some professional set of standards or held liable under the disciplinary rules of bar associations, one only needs to examine briefly the ethical considerations and disciplinary regulations of canon two of the Code of Professional Responsibility.[6] This canon promotes an ambiguous and nonenforceable ideal of benevolence and leaves the nature and standards of the alleged obligation to make legal services fully available so indeterminate and subject to individual interpretation as to be an ineffectual guide.[7] Furthermore, the content and style of the Code on this matter is an outgrowth of the American tradition of voluntary benevolence, *i.e.*, almsgiving[8]—a tradition appealed to and led about as far as it might be taken by Reginald Heber Smith, the primogenitor of the legal aid movement in this century.[9] Finally, as Eric Schnapper noted:

> 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.[10]

Thus, unaccountable to any effective and determinate set of standards and review, either from within or from without the profession, private lawyers are on their own in the determination of

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[4]Maddi & Merrill, *supra* note 2, at 21.

[5]*Id.* at 20.

[6]ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, EC 2-16, EC 2-25 (1978 version) [hereinafter cited as ABA CODE]. The Code has no disciplinary rule which corresponds to the obligation to make legal services fully available.

[7]*See* Smurl, *In The Public Interest: The Precedents and Standards of a Lawyer's Public Responsibility*, 11 IND. L. REV. 797, 817-25 (1978).

[8]*Id.* at 801-11.

[9]*See generally* R. SMITH, JUSTICE AND THE POOR 145-49 (1924).

[10]TIME, Apr. 10, 1978, at 56, 59 (emphasis added).

moral puzzles for which conventional, familial, social, and religious training normally will have rendered them as ill prepared as has their professional preparation in law school. Since there are no professional or organized forms of testing their judgments in this matter, it seems inevitable that their standards will be prone to a certain degree of arbitrariness as well as personal and class biases. Even the most virtuous and benevolent of lawyers will experience some difficulty in forging a consistently clear and equitable set of standards by which he may help make legal services fully available. At the end of the spectrum, however, stand others little inclined to virtue and animated by less than benevolent goals. These lawyers may emulate the practice of Rabelais' Judge Bridlegoose who awarded his sentences and judgments "by the lot, chance, and throw of the dice."[11] Perhaps too, they disagree with what seems incontrovertible—namely, that the decision to have no policy is itself a policy decision, and, in this case, a policy of maximum discretion in determining who among the indigent will be given access to the enfranchising power of our legal system. Finally, whatever be the standards and supporting warrants of the private bar, it appears they perforce will remain private and cannot, therefore, be included in the kind of public moral discourse envisioned as a major goal in this present study.

B. Private but Organized Legal Aid

Turning to private *but organized* forms of legal aid, one finds a very different situation in which, for several different reasons, the criteria of eligibility have had to be more explicit and more susceptible to scrutiny either by boards of directors or by national associations. In 1967, Lee Silverstein reported and analyzed the results of a major study of legal aid organizations.[12] Although this study must be somewhat outdated, it is the most recent major study of such organizations and will provide at least a beginning for consideration of patterns and dilemmas in the formulation of eligibility standards. Silverstein surveyed 275 private but organized legal aid organizations and found that, contrary to the recommended standard of the National Legal Aid and Defender Association (NLADA), agencies should have explicit and published standards of eligibility,[13] fifteen

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[11]E. RABELAIS, GARANTUA AND PANTAGRUEL, *reprinted in* 24 GREAT BOOKS OF THE WESTERN WORLD 206 (1952).

[12]*See* Silverstein, *Eligibility for Free Legal Services in Civil Cases*, 44 J. URB. L. 549 (1967). The surveys, conducted in 1966 and 1967 and including virtually all active legal aid offices, were financed by the Office of Economic Opportunity and conducted by the American Bar Foundation in cooperation with the National Legal Aid and Defender Association. *Id.* at 549.

[13]Nat'l Legal Aid & Defender Ass'n, Standard 3 (adopted Nov. 19, 1965), *reprinted in* 24 LEGAL AID BRIEF CASE 61, 62 (1965). The standard provides in relevant

percent of the agencies questioned had no written rules on the matter.[14] Among these latter agencies, some appeared to have well-defined but unwritten policies. Others apparently had neither written nor clearly articulated policies[15] and, one should think, were consequently prey to pitfalls similar to those of the private bar—namely, arbitrariness and bias. Furthermore, despite the liberalizing tendencies attributed to the impact of the federal Legal Services Program[16] upon private agencies, Silverstein found that some of the private agencies surveyed had unreasonably restrictive rules of financial eligibility or unnecessarily narrow restrictions on the subject-matter of cases to be accepted by those agencies.[17]

Eligibility criteria serve, of course, as screening devices. They help agencies determine who will be helped when inevitably limited resources make it difficult, if not impossible, to help all. They are designed most commonly to "screen out" members of the military or members of other special groups for whom services are available elsewhere.[18] In addition, at least in privately-funded agencies, residency tests are employed to limit service primarily to those residing within the area from which the funding has been generated—such as United Fund campaign areas.[19] The primary focus of this discussion, however, will be on the financial and subject-matter tests because they directly involve a host of puzzles in comparative justice.

The test for financial eligibility is intended expressly to allocate limited resources to the more indigent and to determine need on the basis of ability to pay. Silverstein uncovered two types of eligibility tests: a gross and largely subjective interpretation of whether a client might be able to afford a private lawyer, and another more objective test employing quantifiable methods of determining one's ability to pay, by comparing, for example, income and necessary ex-

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part: "The agency should establish, publish, and follow standards and procedures for determining the eligibility of applicants taking into consideration all relevant factors such as income, assets, obligations, size and health of family, recent or imminent unemployment, and the nature of the problem to be handled." *Id.* The NLADA is the contemporary counterpart of the organization of legal aid societies begun and fostered by Reginald Heber Smith.

[14]Silverstein, *supra* note 12, at 549-50 n.3. Silverstein noted that the incidence of agencies lacking explicit policies was especially high in agencies staffed by volunteers. *Id.* at 549.

[15]*Id.* at 540-50 n.3.

[16]The Legal Services Program is discussed at notes 26-40 *infra* and accompanying text.

[17]Silverstein, *supra* note 12, at 549-50.

[18]*Id.* at 553.

[19]*Id.*

penditures.[20] Judging the latter more satisfactory than the former, Silverstein unearthed even in the more objective test dubious and inconsistent standards—quantifiable, but potentially unfair nonetheless. For example, nearly a third of the offices using the more objective test employed indices of poverty below generally accepted standards such as those of the Bureau of Labor Statistics, or they used formulae which had the effect of discriminating against families by beginning calculations with the financial obligations of one individual and then adding increments for one's spouse and other dependents.[21]

The subject-matter test entails potentially still more difficult puzzles in so far as it seeks to minimize the impact which free services might have upon the private bar and its economic market.[22] In seeking to harmonize several potentially competitive interests, subject-matter tests prohibit the agency from accepting certain kinds of cases, such as the "hands-off" policy Silverstein uncovered in some agencies' handling of divorce cases.[23] Subject-matter tests are not concerned with the needs or financial capabilities of potential clients; rather, they are a pragmatic device—arising perhaps from pragmatic perceptions of necessity—to limit services and allocate resources more efficiently. Questions about their fairness, however, inevitably must be raised, as must the questions which ask whether these tests create possibilities either for discriminatory judgments about certain classes of persons or for undue pressure from political, social, and professional interest groups.

C. Organized and Public Legal Aid[24]

Before considering more fully whether these criteria respect the requirements of distributive justice, this account of the contemporary uses of eligibility criteria in legal aid shall be completed by considering data drawn from the more public and more liberally conceived criteria of Legal Services Organizations (LSO). The most up-

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[20]*Id.* at 552. *See also* Gardiner & Young, *How Does Your Office Determine Eligibility?*, 17 LEGAL AID BRIEF CASE 72 (1958).

[21]Silverstein, *supra* note 12, at 567-68. The author concluded: "For single persons, nearly all the legal aid eligibility rules reported are at or above the poverty line . . . . For a family of four, however, the eligibility rules of a high proportion of legal aid offices are so stringent that they exclude many families who are considered poor . . . ." *Id.* at 567.

[22]*Id.* at 551, 583.

[23]*Id.* at 572.

[24]"Organized and public" here is restricted to civil cases, although part of the discussion applies as well to public defender and criminal systems of legal aid. One should also note that Silverstein earlier had studied and reported on legal aid for criminal cases. *See* L. SILVERSTEIN, DEFENSE OF THE POOR (1965).

to-date national picture of the criteria used by LSOs comes from Earl Johnson, Jr., the former national director of the earlier counterpart organization, the Legal Services Program (LSP) of the Office of Economic Opportunity (OEO). In 1974, Johnson recounted the formative years of the LSP and considered some of the difficulties encountered in elaborating and applying eligibility criteria.[25] Noting that the LSP, by statute and philosophy, was confined to the lowest income strata, Johnson accounted not only for the prominence of the financial test in OEO eligibility criteria, but also for some of the special problems encountered in articulating and applying this test.[26] These difficulties included, at one end, a perception by the private bar that the levels of eligibility were set too high and were thus a threat to private practice in some places.[27] At the other end—that of the client or consumer—Johnson recounted two cognate and more aggravating problems OEO experienced with eligibility tests. One was the discovery that 112 million people were either "near-poor" or of moderate means but, in either case, were unable to acquire needed legal services.[28] Too rich to pass the OEO financial test, they were also too poor to pass the "tests" of private practitioners. Johnson and others uncovered the other problem in a network of cognate social and economic disabilities afflicting the poor. In brief, they discovered that the poor often pay more for necessary goods and services, that a host of factors other than salaries affect their income,[29] and that eligibility rules concerning residency,[30] as well as the notorious substitute-parent rules,[31] have the effect of excluding the poor from a fair share of goods and services specifically designed to help alleviate their plight.

These problems anticipate considerations to be discussed later. They are noted here in support of the proposition made earlier—that eligibility rules commonly employ residency and group-membership tests and most commonly rely upon financial and subject-matter tests in determining whom to help. Whereas Johnson's comments of 1974 focused primarily on the financial test,

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[25]E. JOHNSON, JUSTICE AND REFORM (1974).

[26]*Id.* at 100, 236.

[27]*Id.* at 95-99.

[28]*Id.* at 236.

[29]*See* D. CAPLOVITZ, THE POOR PAY MORE (1963).

[30]*See* E. JOHNSON, *supra* note 25, at 203, 346 n.98.

[31]Typically, substitute-parent rules denied welfare assistance to children if their mother cohabited with a man even though he had no obligation under state law to provide support. The validity of such provisions has, however, been successfully challenged. *See* King v. Smith, 392 U.S. 309 (1967) (holding the Alabama substitute-parent rule invalid under 42 U.S.C. §§ 601-609 (1976) (which deals with the Aid to Families with Dependent Children Program). *See also* E. JOHNSON, *supra* note 25, at 203, 346 n.97.

a year later he concentrated upon the puzzles involved in subject-matter tests, or better still, the implications of the fact that subject-matter tests are not often expressed, but are invoked and applied implicitly in the way caseloads are handled.[32] Consider first the most obvious subject-matter test, embedded in the enabling legislation of the 1974 Legal Services Corporation Act,[33] which not only reshaped the administrative handling of LSPs, but also added some subject-matter limitations by proscribing the acceptance of desegregation[34] and abortion cases.[35] Johnson found the constitutionality of these limitations doubtful,[36] but one might also question, as will be done in the next section of this Article, whether they sufficiently respect the requirements of distributive justice.

In addition to these most obvious subject-matter tests, Johnson pointed out subtle ways in which allocation decisions become, in effect, subject-matter tests and also tend to reflect the economic, political, and professional pressures which can be brought to bear upon the provision of free legal services. First, there are implications in the decision not to decide. In the absence of a policy, the allocation of time and personnel to the scores of divorce cases referred from welfare departments had the effect of not permitting lawyers to challenge statutes which made the filing of a divorce a prerequisite to welfare.[37] Second, under the ABA Code of Professional Responsibility, lawyers are forbidden to accept employment with legal aid offices which do anything more than set *broad policies* and assure there will be no interference in the lawyer-client relationship.[38] Thus, operating under "ethical" constraints and following the principle of local decision-making and control implicit in the administrative framework, LSO offices labor under an ambiguity in the application of eligibility criteria.[39] Although the power to establish and to supervise the application of these guidelines rests officially in

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[32]Johnson, *Further Variations and the Prospect of Some Future Themes*, in TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 133, 220-32 (1975).

[33]Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. § 2996 (1976)).

[34]42 U.S.C. § 2996f(b)(7) (1976).

[35]*Id.* § 2996f(b)(8).

[36]Johnson, *supra* note 32, at 223 n.174.

[37]*See* Silver, *Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URB. L. 217, 225 (1968). .

[38]ABA CODE, EC 5-24 (1978 version) provides in pertinent part: "Various types of legal aid offices are administered by boards . . . composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client . . . ."

[39]*See* E. JOHNSON, *supra* note 25, at 166-84.

the board of directors, the force of the Code and the traditional sense of a professional's autonomy to which it appeals have the effect of giving the staff director and attorneys considerable discretionary power.[40] LSO criteria, consequently, are more explicit or publicly accountable, but also continue to reflect dominant attitudes of the private bar which favor individualized and discretionary activity in the distribution of legal aid. One cannot avoid noticing the irony in the fact that the attempts to organize legal aid along the lines of due process continue to rely heavily upon individualized discretion and the dubious example of Judge Bridlegoose.

III. Treating Individuals Singly and Comparatively

Several different and potentially conflicting values are evident in the preceding account of the tests applied in the distribution of free legal services in civil cases. These criteria promote more than the moral values of equality. They also serve to uphold, in many cases, nonmoral professional values as evidenced by the ample discretionary power granted to the distributors of legal aid. Also, they are often designed in ways which seek to safeguard either economic and market values or prevalent social and political convictions in the community. Finally, because they are devices for distributing limited resources, eligibility criteria pay more than average attention to the nonmoral ideal of efficiency.

In *Equality and Efficiency: The Big Tradeoff*,[41] Arthur Okun drew attention to the ways in which moral and nonmoral values conflict in economic and policy decisions. Reviewing the effect this conflict has on similar procedures in the field of legal aid, Earl Johnson noted that the policies of Legal Services Organizations include certain oddities, traceable to unsuccessful attempts to reconcile the values of efficiency and equality—such as the odd consequence that the most efficient distributions sometimes supply the least service or at least entail undesirable restrictions in the range of services offered and, thus, fail to meet needs equitably.[42] As in so many other areas of public life, the pressing question in legal aid is which value ought to have priority—efficiency or equality. This manner of phrasing the question does not mean to suggest that the decision about priority is always a choice of "either-or"; rather, it appears to be more in the category of "both-and." Nor does it intend to suggest that once made, the priority decision and its formulation ought to become absolute, inflexible, and unexceptionable. Nonetheless, from

[40] *See* Johnson, *supra* note 32, at 223-24.

[41] A. Okun, Equality and Efficiency: The Big Tradeoff (1975).

[42] *See* Cappelletti & Johnson, *Toward Equal Justice Revisited: Two Responses to a Review*, 1977 Am. B. Foundation Research J. 943, 949-52.

a moral point of view, and assuming that a person has reasons for and a commitment to being moral, moral values ought always to override nonmoral values. Efficiency, as a nonmoral value, ought to be overridden in almost every conflict by moral values, such as fairness in the distribution of benefits and burdens. Since fairness is not the only moral value, in some cases efficiency and other nonmoral values may override considerations of fairness—as when, and for moral reasons or in pursuit of moral values other than justice, such as honesty and integrity, nonmoral values may be given priority over fairness. Nonetheless, in both the rule and the possible exceptions to it, one ought to have some general criteria by which to guide decision and action in these affairs. If considerations of fairness and equality are ascendant to all other considerations, then one must have some fairly explicit and soundly supported moral criteria of the sort traditionally associated with distributive justice.

Commenting on analogous dilemmas faced in the distribution of medical care, David Mechanic observed that the social effects of maldistributed health care have always been monstrous, and that the resources for these services always have been and likely will remain limited and relatively inadequate.[43] Faced with a seemingly inevitable rationing of resources, the appropriate moral questions, according to Mechanic, are how to make the rationing process more equitable, more explicit, and more decisively controlled by general guidelines.[44] Mechanic has suggested a procedure by which public agencies, including many legal aid offices, might achieve more morally justifiable criteria eligibility. Mechanic's requirement that they be more explicit and public satisfies several important social and ethical requirements. The more *public* eligibility criteria are, the less likely they will remain highly discretionary. Public scrutiny, by raising the questions "who is to decide" and "by what authority," will serve to make the criteria increasingly more *explicit* and also to encourage the agencies to declare more openly whatever moral convictions may be guiding, however unconsciously, policies of distribution. As public and explicit, they not only would invite criticism and reformulation; they would also promote the kind of open, free, and public discussion of moral values necessary for the well-being of a pluralistic society committed to uphold the most valued qualities of human life.

No amount of publicity and explicitness will satisfy still another requirement suggested by Mechanic, and one upon which the public envisioned above inevitably will insist—that eligibility criteria be

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[43]Mechanic, *Rationing Health Care: Public Policy and the Medical Marketplace*, HASTINGS CENTER REP., Feb. 1976, at 34-37.

[44]*Id.* at 36.

guided decisively by more general guidelines. Whatever Mechanic may have intended, I take this to include perforce some general and universal propositions about what is normatively human—to wit, moral criteria. Although they are not necessarily more general or universal than many nonmoral criteria such as cost-benefit ratios and other general canons of efficiency, moral criteria are general judgments of moral obligation; characteristically they are principles of beneficence and justice.[45] Moral criteria, therefore, not only meet Mechanic's requirement of generality; they also, because of their characteristic superiority over other comparably general criteria, ought to override and to be more decisive than other general but less normative human criteria.

We must now determine which moral criteria are most relevant to the allocation dilemmas addressed by eligibility rules. Principles of beneficence—as, for example, in the general principles requiring that one help others and avoid harming them—are general and pertinent enough, but insufficiently decisive in matters of allocation. Although the principles of beneficence guide actions which promote the good and avoid harm and give rise to other more specific and prima facie rules concerned typically with honesty, keeping promises, and respecting rights, they do not explain "how one is to distribute goods and evils;" they only advise one "to produce the one and prevent the other."[46] Athough the prima facie rules of beneficence are relevant to many of the person-to-person encounters entailed in the distribution of legal aid, they are insufficient for guiding the policy which precedes and structures those encounters. Although well-suited to guide decision, action, and policy in the treatment of individuals, these rules are especially ill-suited to guide these same matters when the issue is the *comparative treatment of individuals*. The difference between treating individuals fairly but *singly* and treating them fairly and *comparatively* is critical, since allocation problems involve much more than conventionally perceived one-to-one relationships between the lawyer and the client. For interpersonal exchanges and interactions, the principles of beneficence are eminently relevant and effective guides.[47] Nonetheless, when occurring in the context of agencies distributing limited resources, these professional interactions are shaped in advance by the decisions made by other persons and by the policies which embody the judgments of those other persons. These judgments, because they

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[45]*See* W. FRANKENA, ETHICS 43-52 (2d ed. 1973).

[46]*Id.* at 48.

[47]*See, e.g.*, ABA CODE, *supra* note 6, EC 5-24. *See also*, Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976).

concern allocations and determinations of how to distribute among many what is sufficient only for a few, must inevitably entail considerations of the comparative treatment of individuals and, unless they are to be completely arbitrary, an equally inevitable appeal to some standard of comparative or distributive justice.

Eligibility rules settle certain matters in advance of the individual practitioner's dealings with a client. They provide the agency's answers to questions of which clients and what kinds of cases are to be taken by the agency. In short, eligibility criteria entail comparative judgments and appeals to those principles of justice which are called distributive. They cannot, therefore, be evaluated adequately by testing their conformity to principles of justice designed to guide exchanges between persons (commutative justice),[48] much less by testing how well they respect the principles of beneficence. Despite the proclivity of some prevalent American moral intuitions to convert eligibility discussions to considerations of only one-to-one relations of contractual fidelity or personal and professional integrity,[49] one must insist resolutely that eligibility criteria be addressed first, foremost, and recurrently by considerations of comparative or distributive justice.

Having resolved that comparative justice is the appropriate arena for the consideration of eligibility criteria, further determinations must be made with respect to the selection of appropriate and relevant rules of comparative justice. Some may argue for rules of randomness—lottery or "first-come, first-served" types of rules. Others may suggest that the only formal and most truly justifiable rule is a general one stating the kind of impartiality which equality requires—namely, that "similars be treated similarly." Both of these suggestions offer little more than procedures and set forth rules which require only fair play. If treating individuals comparatively and fairly requires only that one play fair procedurally, either of these two proposals would suffice, but would serve also to justify almost any duly established or legitimate rule of eligibility—irrespective of its moral justifiability. Comparative justice, however, requires that fairness in the comparative treatment of individuals depends critically and finally upon the material content assigned to the terms "similar" and "dissimilar." Purely formal rules of randomness and impartiality are insufficiently concrete and leave too much still to be determined. Granting that they may be rules of fairness, it is not entirely clear that they are fair rules—a matter which can be settled only if one declares which particular

[48]Commutative or exchange type justice is sometimes called either contractual or compensatory.

[49]*See* Fried, *supra* note 47. *See generally* Smurl, *supra* note 7, at 811-17.

similarities or dissimilarities are relevant and determinative. There are, after all, ways of assuring that one's friends, relatives, and colleagues come first in line or are more similar to what one has in mind but leaves unstated. Just as the purely discretionary systems of distributing legal aid, without the benefit of explicit criteria, open wide the door to perhaps unwelcome but nonetheless unavoidable arbitrariness and bias, the purely procedural and merely formal rules of randomness and impartiality leave more than ample room for the exercise of favoritism and other forms of bias. Furthermore, and as Judge Bridlegoose observed: "[O]ftentimes, in judicial proceedings, the formalities utterly destroy the materialities and substances of the causes and matters agitated . . . ."[50]

If comparative justice and its standards are to be more than a chimera and are to do more than disguise injustice, its principles must be more substantive, concrete, and material. They must declare specifically the ways in which the individuals to be served are, comparatively speaking, either similar or dissimilar. Furthermore, and as will be seen presently, the more material and substantive the principles of comparative justice, the more they require that relevant, operative, but sometimes unstated and unjustifiable comparisons of people be made explicit. For instance, if those seeking free legal aid are to be treated similarly, then one must determine in which ways these people or their cases are either alike or different. In making these determinations, it is not enough simply to declare that people are either most alike or most different in financial, social, or other terms. These declarations must themselves be justified by appeal to some more general standard such as one of the traditional norms which declare that people ought to be compared and treated comparatively on one of the following bases: needs, deserts, or social contributions.

Against this background, one might inquire which of these more general standards are employed in conventional eligibility tests, and additionally which are the fairest for this particular endeavor. As noted earlier, beyond initial screenings for residency and possible coverage by other group services, the most prevalent eligibility tests are those which consider financial and subject-matter questions.[51] Financial tests make needs a central and guiding standard and can be said to respect, therefore, one conventional and materially concrete criterion of comparative justice, stated axiomatically in the formula "to each according to his need" or in the counterpart maxim "from each according to his ability." While financial tests must be constantly scrutinzed to insure the accuracy and currency

[50]F. RABELAIS *supra* note 11, at 206.

[51]*See* notes 20-23, 26, 33-35 *supra* and accompanying text.

of the empirical data used to estimate degrees of financial ability to pay, they are readily justifiable from a moral point of view. Assuming empirical validity, financial criteria respect the formal principle of impartiality and, in addition, do so by embodying this principle in a materially substantive criterion. Financial eligibility tests are ways of determining need and assuring that people of similar need will be treated similarly. Furthermore, they imply respect for the moral belief that people are equal in worth and dignity.

Financial tests are not, however, without problems. As Lee Silverstein noted, if they employ formulae which discriminate against those who are similar in need but who are married with dependents, they may not sufficiently respect the principle of impartiality.[52] This problem arises if spouses and dependents are calculated only incrementally; *i.e.*, as mere increments of financial responsibility beyond those of the wage earner whose financial obligations are the only ones to be taken with full seriousness and weighted properly.[53] Such criteria provide, in effect, that the financial capacity of the married person is most similar to that of the single person, and that spouses and dependents diminish that capacity only incrementally. This approach has the effect of declaring a parity where there is none, or making the truly dissimilar appear to be alike. In this, as in other subtle ways, irrelevant differences between people can be introduced in financial tests and their seemingly innocuous income tables. If this occurs, these tests must be judged to be less than fully respectful of the requirements of comparative or distributive justice.

Subject-matter tests are even more problematic and are much more likely places in which to find irrelevant and sometimes invidious comparisons of candidates for legal aid. In fact, unlike financial tests, they are more likely to default in the fairness comparative justice requires and to do so in their initial and overt purposes, as opposed to the seemingly unintended but unfair consequences of overtly fair financial tests. The subject-matter tests which discriminate between civil and criminal cases cannot be criticized, since free assistance is available for both, albeit from different agencies. These tests seem to represent a morally justifiable effort to

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[52]*See* Silverstein, *supra* note 12, at 567-86. The author stated with respect to this method of determining eligibility:

> [M]any eligibility rules, although not intended to do so, discriminate against potential legal aid clients who are members of families as against single, unrelated individuals . . . . It is surely odd that family units should be disfavored *vis-a-vis* unattached individuals whose legal difficulties, whatever they may be, do not also affect spouses and children.

Id. at 568.

[53]*See id.* at 555-68.

divide efficiently what are fundamentally fair but necessarily distinct kinds of assistance. One should, however, take issue with tests which exclude certain socially controversial issues on the one hand, or, on the other hand, cases for which the private bar has staked proprietary claims in order to safeguard its economic markets. The latter measures would be highly questionable if designed only to preserve the private sector's monopoly on highly lucrative legal practice. Barring such aggrandizement, economic protectionism can sometimes be a morally justifiable way of assuring the maintenance of the economic base of the profession and in such a way that it motivates the existing bar or attracts new members. Both of these latter functions assure a stable foundation from which professionals may advance more securely toward the goal of making legal services fully available.

By way of contrast with these potentially justifiable forms of economic protectionism, the former subject-matter tests, which exclude controversial cases, are not so easily justified on moral grounds. These tests are based upon blatantly unfair and discriminatory judgments about people or are tantamount to using morally unjustifiable forms of coercion in order to achieve the social goals of the majority. Consider initially some more readily obvious examples of discriminatory bias—those which differentiate treatment on racial, ethnic, sexual, and religious grounds. One might agree readily that these factors ought to be irrelevant in determining a person's eligibility for legal aid and that, if an agency excluded cases dealing with violations of civil rights for racial or religious reasons, the agency's eligibility rules would be unfair and would fail to respect the rule of impartiality.

Consider further, however, some subject-matter tests, the moral justifiability of which one is less likely to demonstrate readily. The two most common tests in this category, which have been used rather widely, excluded or severely limited divorce and bankruptcy cases. Although Brownell in his 1951 study had identified a most restrictive policy with respect to the acceptance of divorce cases,[54] Silverstein found a more relaxed but still partially restrictive policy on divorce cases as late as 1966.[55] Of the 159 NLADA offices surveyed, 21 simply would not handle divorce cases.[56] Eighty offices had restrictive policies, such as: (1) Accepting only a limited number of cases, (2) accepting only cases recommended by social agencies, courts, and attorneys, (3) imposing a "social test" which sought to calculate anticipated benefits or harms to the family or the com-

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[54]E. BROWNELL, LEGAL AID IN THE UNITED STATES 72-74 (1951).

[55]Silverstein, *supra* note 12, at 572-81.

[56]*Id.* at 574, 580-81.

munity, (4) restricting cases to defendants and excluding plaintiffs, and (5) accepting both while maintaining different eligibility rules for each.[57] Only 58 offices had minimal or no restrictions.[58]

Silverstein's analysis of the findings in this study suggests that these restrictions stemmed from several causes including budget inadequacies and were more likely to be found in offices relying upon volunteer as opposed to salaried attorneys.[59] He also found, however, that eligibility rules reflected community attitudes toward certain people and thus toward the role legal aid might play in helping those people: "Some attorneys candidly assert that a divorce is a luxury, thereby implying that none of the poor, or only the most 'deserving' ones, should be entitled to get a divorce through legal aid."[60] Such an attitude, and the eligibility rules which reflect and honor it, is aristocratic from at least one point of view. From another point of view, it smacks of patronizing welfare paternalism. From still another point of view—that of social ethics—it entails an appeal to one particular and dubiously relevant embodiment of the rule of impartiality; namely, the one expressed in the axiom "to each according to his merits or deserts." Called the meritarian standard of distributive justice and resting upon a judgment that people are to be likened in terms of what they merit or deserve,[61] it is a helpful and relevant criterion for determining prizes, some aspects of wages, and other matters where merit is an unquestionably fair consideration. It is not entirely clear, however, that such considerations are fair without question or altogether appropriate in the determination of eligibility for free legal services.

In fact, a most persuasive argument can be presented that meritarian tests are not normally applicable in the distribution of these services. As in the above assertions of some lawyers, they frequently entail aristocratic attitudes and patterns of patronizing welfare paternalism. More importantly, however, they fail to respect sufficiently the requirements of the moral belief at the root of the rule of impartiality—that equal regard is owed to every human precisely because he is human. Furthermore, and since they perhaps imply judgments that the indigent are needy because they are insufficiently industrious or that they do not need the "luxuries"[62] other

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[57]*Id.* at 574-79, 581.

[58]*Id.* at 579-81.

[59]*Id.* at 581.

[60]*Id.* at 574.

[61]*See* W. FRANKENA, *supra* note 45, at 49.

[62]In addition to its "no divorce" policy, the St. Louis office in the Silverstein study expressly categorized television sets and automobiles as being "luxury" items and, consequently, placed certain restrictions on accepting cases involving these items. Silverstein, *supra* note 12, at 583.

people find necessary, eligibility rules which exclude or restrict the acceptance of divorce cases tend to err in several other respects. From a moral point of view, they err by trying to fashion a criterion of distributive justice from what many believe to be the virtues of married life; namely, fidelity and permanency. Assuming that these virtues are relevant considerations in criteria of distributive justice, they could be justified only if there were a prior and equal distribution of the conditions for achieving these virtues.[63] There is, however, little reason to believe that such equality of opportunity has existed for the indigent who, by definition, are disadvantaged. Thus, an aristocratic appeal to a meritarian standard of comparative justice in these cases violates the moral requirements of equal regard and comparatively fair treatment and is tantamount to socially compulsive patterns called "coercion to virtue" which will be considered in the next section.

Another subject-matter test with similarily important moral implications is one which restricts agencies' acceptance of cases involving bankruptcy. These tests respond in part to pressures from the interests of local business and commerce—those with a stake in getting as much as possible from debtors and with more than average power to affect the funding sources of organized legal aid which often depends upon the collections made through United Funds.[64] Through these and other effective measures, social pressure and community norms can exert considerable influence on legal services.[65] These are not only questionable social and political tactics; they also imply some morally unjustifiable allocation policies.

Policies which exclude or restrict bankruptcy cases entail a judgment that people are to be compared and treated in terms of their social contributions—here interpreted as economic accountability. While such a criterion makes sense in the distribution of some goods and services and has been employed, though questionably, in the allocation of other scarce resources,[66] it does not make sense in every context and can entail, in some settings at least, quite irrelevant and very unfair comparisons.

The indigent may not have had an equal opportunity to make the necessary social contribution. They are "coerced" to pay by restrictions on their access to bankruptcy proceedings. By implica-

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[63]*See* W. FRANKENA, *supra* note 45, at 50.

[64]H. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES 130, 149 n.45 (1975) (citing Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381, 415 (1965)).

[65]*See generally* H. STUMPF, *supra* note 64.

[66]*See, e.g.*, Note, *Scarce Medical Resources*, 69 COLUM. L. REV. 620, 658 (1969) (discussing the methods of the selection committee of the Seattle Artifical Kidney Center).

tion, they are being compared *not* to those who, having sufficient funds to pay for the proceedings, declare bankruptcy and from whom creditors are not likely to receive any more of the anticipated "social contribution" than they would from the indigent. Rather, they are being compared to those who are unable to pay for and thus to claim bankruptcy; those who must struggle to contribute whatever they can and from whom creditors may seek to squeeze at least some social contribution. In other words, the poor can be coerced into being fiscally accountable, and thus will be constrained to become poorer still, while those more financially able can have prior debts canceled and will be given an opportunity to begin again with a clean slate. The indigent are not less needy; they are simply more vulnerable to coercion. The wealthier do not necessarily make a greater social contribution; they are simply more able to escape being constrained to do so. When seen in this light, the comparison between these two groups of people—a comparison entailed or at least possible in bankruptcy restrictions—is more than irrelevant. It also entails an unfair and unwarranted suggestion that the indigent, who are less able to make the contribution expected but can be pressured into doing so, are truly comparable to their opposites. Thus, eligibility rules which honor and perpetuate this social ruse fail to respect sufficiently the requirements of equal regard and equality of treatment which form the substantive basis of the formal principle of impartiality—the requirement that "similars be treated similarly."

People needing free legal assistance are most similar in that they are indigent, not in their deserts (as implied in the divorce rules), and not in their social contributions (as implied in the bankruptcy rules). If comparative treatment be based upon need, then the financial test respects best the requirements of distributive or comparative justice. Limitations in the resources available to meet those needs require on occasion, however, that additional screening devices be adopted. These tests should conform as well as possible to the general moral criteria for fairness in distributions, but divorce and bankruptcy restrictions fall short of the conformity required. Furthermore, all subject-matter tests risk giving priority to nonmoral considerations—such as social, political, economic, and professional concerns. In this regard, they overturn the rule that moral considerations are overriding and ought to have priority in such conficts. Despite this reversal of the proper ordering of values, subject-matter tests are procedurally fair and appear to be morally plausible. Hence, in the following and concluding section of this Article, we shall consider some reasons why so few Americans become morally outraged about distributions which, while playing according to the rules, are nonetheless substantially unfair.

IV. Assessing the Nature and Power of Prevalent Cultural Convictions and Social Institutions

A. Introduction

The preceding sections have sought to demonstrate that, if eligibility decisions are to be more than merely arbitrary or discretionary and are to be relatively fair, they ought to be measured against and guided by the criteria of comparative or distributive justice. They also have sought to suggest that, of the several alternative standards, those which are equalitarian are more relevant and morally justifiable in the determination of eligibility for free legal service—than, standards of merit or desert and of social contribution. Also, this Article has noted that these eligibility decisions and the judgments about which criteria should guide them depend upon assumptions about the nature and value of people and the institutional arrangements of interpersonal social life.

Throughout, I have tried to scrutinize in the light of moral considerations matters which, because of the force of prevalent convictions and social institutions, are not often examined in this fashion. Reference is made here to the credibility some mistaken or at least morally questionable judgments acquire because they mirror or promote prevalent cultural convictions and existing institutional arrangements. Enjoying a presumption of validity which owes more to their prevalence than to their demonstrability, these judgments often override the more general considerations which moral questions try to raise. Although we can assume that lawyers generally have reasons for being moral, we must acknowledge that they also have professional commitments and practiced ways of plying their trade which can serve to override considerations of whether a particular policy, practice, or allied conviction is morally justifiable. Furthermore, for some attorneys at least, lawyers' ethics or ethics in the practice of law is a matter to be worked out rather exclusively in the terms and under the conditions of the prevalent convictions and procedures of the profession; in other words, without attending sufficiently to the more general obligations they may have as humans or individuals apart from their profession. Finally, because of the myriad ways in which law penetrates many other aspects of life, the social, political, and economic convictions of American culture and its dominant institutions provide sets of allied and equally forceful beliefs which also can override moral reasons.

Thus, what has been considered up to this point in terms of moral justifiability, must now be considered from the vantage point of professional, cultural, and theoretical convictions which either obscure moral questions or give moral force and prima facie plausibility to eligibility policies and decisions which are morally

dubious. While not intending to invest some dubious judgments with still further plausibility by attending to them too seriously, I hasten to note that the purpose here is to map out sets of convictions which stand in need of further critical testing before they can be used to argue for a particular position or policy.

Preferring to attribute these mistaken judgments to inattention or insufficient reflection rather than to malice or mischief, I shall propose some ways in which they may be reconsidered. In this effort, I join others who call for more extensive and more critical considerations of the same judgments,[67] but in such a way that attention is focused on the ways in which they foster a public and professional sense of justice which is only ostensibly, but not always demonstrably, fair. Furthermore, because of their prevalence and the persuasive power they have accumulated, one cannot be overly optimistic about our capacities for making consistently fair judgments or policies in the matter of eligibility for free legal services. While acknowledging that questionable senses and criteria of justice are not easily revised, much less readily eradicable, truer and fairer judgments may be gained if mistakes are detected and not repeated. Mistakes are one thing. Their replication and institutionalization are quite another. They are a particularly powerful social force for aggravating harms and unfair treatments if they derive their plausibility from uncritically or insufficiently examined moral beliefs, some of which are more prejudicial than reasonable.

Some of the more questionable judgments highlighted previously were those which attributed greater value to autonomy and discretion than to public accountability, those which ranked efficiency and procedural fairness higher than equality and substantive justice, others which erred by requiring virtue as a prerequisite for access to the administrative processes of legal justice, and those finally which failed to acknowlege the different requirements in treating individuals singly and in treating them comparatively. The following discussion will attend to three distinct but interrelated sets of considerations which give credibility and moral force to judgments which, while hardly justifiable in general moral terms, enjoy, nonetheless, the force of morality. These judgments and their corresponding credibility are properly termed de facto convictions. This terminology does not, however, suggest that all de facto convictions are by that very fact wrong. Rather, the purpose is to emphasize that they are just de facto and to challenge the assumption that they can be treated as if they were de jure simply because they are

[67] *See, e.g.*, Gorovitz & Miller, *Professional Responsibility in the Law* (1977) (reporting the recommendations of the summer 1977 Institute on Law and Ethics held by the Council for Philosophical Studies).

prevalent. Common sense can be erroneous as well as correct, and because the institutionalization of its errors can make for powerful social blind spots,[68] the license authorizing these convictions will be temporarily revoked, thereby permitting inquiry about whether they are indeed as demonstrable as they are made to appear.

B. Considerations Which Tend to Support and Sustain Seemingly Arbitrary and Purely Discretionary Procedures in Matters of Elibigility

Behavior which at first glance appears to be merely arbitrary or purely and self-interestedly discretionary may, in fact, be a result of lawyers' observance of professional standards. Codes of professional responsibility, sometimes called "codes of ethics," are in fact and viewed by some as necessarily at odds with more general and commonly shared judgments of morality. Thus, when challenged with charges of what, from a general and public view of things, seems to be immoral, professionals may be inclined to respond that it may be necessary to be immoral in order to perform effectively the tasks for which lawyers' services are engaged. We must inquire more fully and ask whether lawyers and other professionals can and must be allowed actions which otherwise are considered morally impermissible. In pursuing this inquiry, we might ask further whether the practice of law contains elements which might evoke and sustain a judgment that lawyers can, indeed must, diverge from common moral standards.

One potential source of convictions which might serve to exempt the lawyer from otherwise universal moral standards stems from an inevitable but sometimes overweening concern with the values peculiar to and characteristic of the profession, especially with values associated with social roles and the actions deemed necessary in the fulfillment of those functions.[69] Thus preoccupied with the needs of the profession, the standards and codes of the professional may mirror only imperfectly more general and public values and

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[68]The power of these blind spots is evidenced in the tendency to commit the informal logical fallacy of *argumentum ad populum*, missing the point to be proved and appealing to the beliefs of the community as evidence. Logicians traditionally account for this penchant in discourse in terms of loyalties, passions, and prejudices. *See* 3 THE ENCYCLOPEDIA OF PHILOSOPHY 176-78 (P. Edwards ed. 1967). It is also evidenced in moral theories accounting for the relationship between prevalent cultural beliefs and formal moral principles. *See* J. RAWLS, A THEORY OF JUSTICE 20-22, 48-51 (1971). *See also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 155, 164 (1977); Smurl, *supra* note 7, at 825-28.

[69]*See* MacRae, *Professions and Social Sciences as Sources of Public Values*, 58 SOUNDINGS 3, 13-14 (1977).

may tend to insulate the profession from criticism based on these latter values.

As noted earlier, this situation owes less to mischief or malice than to inattention to the implications of preoccupation with characteristic professional values. Hence, in order to account for the sources of morally dubious judgments as well as to draw greater attention to the repercussions of certain professional convictions, certain problematic judgments, which stem from training in and the skillful practice of conflictual and competitive advocacy in an adversarial system, should be considered. Principal among the premises of such a system are convictions which provide the possibility of arbitrary, prejudicial, and self-interested eligibility decisions. Reference is made in particular to the important premise which evokes and sustains a commitment to represent zealously the interests of a client over against those of the opposing side, and which requires as well the keeping of a client's confidences and is sustained by immunity from revealing "privileged communications"—all in the interest of enhancing a client's competitive advantage in litigation.

These commitments inevitably come into conflict with other professional, not to mention other human, commitments. Even within the terms of the Code of Professional Responsibility, there are conflicting obligations such as those which require an attorney to act as an officer of the court and, thus, to aid in the search for the truth while simultaneously guarding the interests of but one party in the dispute.[70] As an officer of the court, the attorney may be required to perform in ways inimical to the client's interest and, as one disciplinary rule dictates, the lawyer might be required to disclose, in the course of a trial, "[l]egal authority in the controlling jurisdiction known to him to be *directly adverse to the position of his client* and which is not disclosed by opposing counsel."[71] Practically speaking, however, and as every lawyer knows—and this is the point about preoccupation with adversarial techniques and its values—there are ways to circumvent such requirements. In fact, there are opportunities for finding these ways within the Code itself, and for justifying the overweening importance of zealous advocacy even if it is in conflict with more common and public values such as the truth sought in judicial proceedings. Finally, because of the force of the professional ethos created by the adversary system, a means to avoid the requirements meant to preserve the common good more than likely will be sought and found—largely because these requirements are hard for professionals to accept because of instincts or intuitions generated by and necessary for success in adversarial conflict.

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[70] *Compare, e.g.*, ABA CODE, *supra* note 6, DR 7-102, 7-106(B) *with id.*, DR 7-101.

[71] *Id.*, DR 7-106(B)(1) (emphasis added).

Central to the conflict of obligations just cited is the overriding importance attached to participant control of the adversarial process. Allied significantly to and sustained by a common law tradition of protecting individual rights over interference from or control by governments and social systems, this value finds itself allied as well to cognate, fortifying, and widely prevalent social, political, and economic values. It is linked not only to values inherent in the Constitution and the tenets of liberalism, but also with freedom of speech in the market place of ideas which Justice Holmes extolled as the competitive and, therefore, the best test of truth.[72] In the very metaphor invoked by Holmes, one can observe another source of cognate and justifying convictions to support participant control over the process—namely, in the analogies implicitly drawn between the competitive relationship of litigants and the relationships between parties in free and competitive economic enterprises.[73]

It is relatively easy to see how the withholding of information and perhaps even the distortion of truth in an effort to enhance the competitive advantage of a client can be found intelligible, indeed compatible with other, more general, societal values. While no more morally justifiable than the values from which it draws its specious warrants, this professional policy and its allied practices appear to be necessary contraventions of that which is otherwise deemed morally impermissible. Thus, the legal professional can become allied implicitly with the theory that the general good is promoted best through the free pursuit of competing individual or group interests and by whatever means are available to enhance one's competitive advantage.[74] Relying on these sorts of considerations, and upon the presumptions created by their widespread and institutionalized character, it would not be difficult to find reasons to justify high levels of discretionary and seemingly arbitrary control by the professional participant in the process of determining whom to help when not all can be helped in the giving of legal aid. In this fashion, considerations arise which conspire to transform the question of what would constitute a fair distribution of free legal services into questions about what will assure the advantage of the professional, or what will exempt professionals from the reasonable requirement that the criteria of distribution be made explicit, general, and public.

Other potential candidates in this "conspiracy" of considerations also tend to override the requirements of distributive justice and tend to count as more important than reasons of fairness. While a

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[72]Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[73]*See* MacRae, *supra* note 70, at 11.

[74]*See id.* at 3.

careful consideration of these "candidates" is beyond the scope of this Article, they can at least be noted, thereby pointing to the need for future analysis. Principally, these "candidates" are the more formal theories of legal justice which may serve to justify discretion and arbitrariness in allocation policies—the positivist and realist theories of justice.[75] From a positivist view of justice, allocation policies would be "fair" or "just" simply because they assign procedures for allocating legal aid. Just as what is merely statutory might be considered just, that which is merely procedural may also be considered fair. It is the policy and, from a positivist view of things, is therefore fair.[76] Similarly, a theory of legal realism, if consistent with its traditional interpretations of precedent and the social bases of "judge-made law," gives greater discretionary power to judges[77] and, by extension of the theory, to all who subscribe to such logic in the administration of legal aid.

In sum, theoretical as well as practical reasons, some professional, some cultural, incline attorneys to become discretionary in legal aid procedures. The following statement by J.H. Skolnick, although directed to the system of law enforcement, may also be applicable to allocation and access policies in the administration of justice:

> The legal order is popularly envisioned as the most formally normative of all social organizations because it contains a codified and carefully interpreted body of rules. But, in practice, it continues to be a *highly discretionary order* at every level, mediated by subtle, sometimes unarticulated, yet discernible norms held by actors in the system.[78]

C. Considerations Which Favor Procedural Over Substantive Fairness and Efficiency Over Equality in Screening Candidates

The legal aid movement, in both its private and in its publicly organized forms, bears witness to the conviction that every citizen is entitled to a day in court, irrespective of his ability to pay. Unfortunately, however, the resources necessary to assure either that the indigent will be represented or that the quality of the representation will be on a par with that of the opposing party are not always available. Thus, the fundamental and recurring scarcity of resources creates serious dilemmas, necessitates a strategy for screening candidates, and brings to the fore considerations which, because of

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[75]*See* 4 THE ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 68, at 418-21.

[76]*Id.* at 419.

[77]*Id.* at 420-21.

[78]J. SKOLNICK, JUSTICE WITHOUT TRIAL, at iii (2d ed. 1975) (emphasis added).

their hold on the profession and our culture, may override substantive fairness and equality, or at least may set presumptions which serve to do the same.

The most commonly used eligibility rules demonstrate that lawyers, as most Americans, are commited heavily to the nonmoral value of efficiency in the use of resources.[79] Even the subject-matter tests discussed earlier, which serve several kinds of community goals, have as one of their principal purposes the efficient distribution of limited legal aid resources. Nonetheless, since there are different economic models of efficiency, the effort to achieve efficient results may also entail efforts to disown some of the results achieved.

Cost-benefit ratios and cost effectiveness measures are two of the most common instruments for calculating efficiency in the distributions of economic resources. Cost-benefit ratios typically measure quantifiable outcomes; for example, the numbers of clients served, as compared with the inputs or the quantities of resources expended in the process. Thus, they entail a commitment to the theory that the more served for the least amount is the most efficient, best system, and overlook considerations of which kinds of cases are either included or excluded. Cost effectiveness measures are concerned with how best to apply inevitably limited resources effectively in an effort to eradicate the causes of social injustice, rather than simply palliating their symptoms. Cost effectiveness considerations might prompt efforts for legislative reform and preference for precedent-setting cases rather than favoring headcounts of the numbers of clients served. An attachment to headcount efficiency may provide, therefore, a way of paradoxically disowning the results achieved—that is, to the extent the clients are represented in a system which is substantively unfair.

That a commitment to efficiency may lead to such odd consequences is partially due to its linkage with presumptions favoring procedural forms of seeking justice in American civilization and its legal profession. Ordinary people know full well the differences between form and substance, procedures and results. Yet, because of the nature of our legal system and the ways in which its licensed practitioners are introduced to and skilled in its techniques, lawyers are apt not only to confuse what the layman so readily observes, but are also accustomed to attempting to persuade laymen that fair play is all the system can assure, thereby blurring the fact that the advantages of the players are not always equal.

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[79]*See, e.g.*, Johnson, *supra* note 32, at 224 n.179. *See also* TIME, Sept. 25, 1978, at 59 (reporting the Yankelovich survey on California's Proposition 13).

One's day in court may become a mere procedural formality and a chimera of justice if one of the opponents has access to superior legal resources or if the conflict must be resolved under the terms and conditions set by fundamentally unfair laws or rules of procedure. Thus, a fair share of access to basic social opportunities or a fair opportunity to redress wrongs may be foreclosed by a prior and overriding commitment to only fair play under sometimes unfair game plans and rules.

Herein appears a curious and puzzling paradox. While committed to achieving results through the use of eligibility standards, the results in sight are nonmoral, efficient, and potentially purely procedural. Phrased differently, the efforts and expenditures prompted by moral convictions, embedded in constitutional assurances of equal protection, can, in striving to achieve moral ends, employ standards which are, in the final analysis, counterproductive. Through effective but facile and morally dubious weddings of convictions between the legal and the economic order, people can be guaranteed only the kinds of equal protection which comport with canons of efficiency and the formalities of fair play. Furthermore, since both of these orders are highly formal, technologically sophisticated, and frequently arcane for all but the professional jurist and economist, they acquire a sort of specious public validity and can be immune to challenges about the disparity between their values and those which are more general and public.

Convinced perhaps that legal conflicts are the sorts of human affairs in which no procedure can be found to guarantee results which always will meet the standards of substantive justice, the legal profession is hampered in its efforts to make legal counsel fully available. In approximating justice, and perhaps in settling too quickly the question of how much more nearly it can be achieved, attorneys can begin to extoll form over substance and can be persuaded too readily to equate the requirements of procedural due process with due justice or fairness. Fortified by judgments about the benefits anticipated from competitive adversarial advocacy and allied with similarly competitive economic and political models, one might be tempted to justify that which is only partially justifiable and to excuse the unpardonable or to disown the results achieved but creditable to "the system." This interlocking of professional and other cultural convictions can shortcircuit potential charges of unfairness. It can shield that which is merely de facto from penetrating questions. In assuring only efficiency and other nonmoral results, it can contravene the public reasons and expectations for which the system is licensed and sanctioned. Finally, if this is the best approximation of justice possible, the victories are pyrrhic ones indeed.

A rather obvious and distressing example of such a victory appears in cases of legislatively-established welfare rights in which, seemingly, one is entitled to only procedural due process. If, in *Goldberg v. Kelly*,[80] the Supreme Court was forced to define for the first time the precise intent of law in the realm of the welfare state, its decision may be far more conservative, formal, and purely procedural than is perceived commonly by those who applaud its radical or revolutionary character.[81] Relying upon adversarial methods to establish statutory rights and upon judicial procedures of review, the net gains of this decision may be more procedural than substantive. Although the case assures protection from arbitrariness and thus averts some of the problems noted in the preceding section of this Article, it assures only procedural access to the welfare system and, principally, a right only to litigate one's claims.[82] The pyrrhic character of this victory can be seen in two sets of consequences. One is that the funds for the litigation is drawn from the resources allocated to provide welfare benefits, thereby potentially decreasing resources for assistance by expending them to contest entitlements to those resources.[83] A second set of consequences includes temporary suspensions and inevitable delays in the actual receipt of benefits by all of the targeted beneficiaries while the procedures of the program are being contested by one or more of the potential, but now litigating, recipients.[84]

Akin to the pattern of the *Goldberg* decision, the decisions behind eligibility policies in legal aid reflect a bias toward proceduralism. Whether this presumption in favor of due process reflects a conviction that substantive fairness and equal access to legal aid are inevitable and necessary outcomes of procedurally fair criteria is not entirely clear. What is clear, however, is that, in subject-matter tests, at least, standards of eligibility do not always fully respect the requirements of distributive justice. Appearing to conform rather to standards of efficiency and procedural fairness, they both mirror and promote convictions about the overriding importance of economic efficiency and those socio-legal judgments which de-emphasize material differences in results by highlighting the more abstract, formal, and purely procedural aspects. This con-

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[80]397 U.S. 254 (1970).

[81]The Court, however, recognized the limited scope of its decision: "The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits." *Id.* at 260.

[82]*See id.* at 267-71.

[83]*See* Verkuil, *The Search for A Legal Ethic: The Adversary System, Liberalism and Beyond*, 58 SOUNDINGS 54, 62-63 (1977).

[84]*See id.*

clusion does not suggest that procedurally fair rules cannot or do not ever have substantially fair results or that it has no respect whatever for materially sufficient criteria of justice. Rather, it states only that what is procedurally fair does not automatically achieve substantive fairness—and certainly not *because* it is a due process. The conclusion offered is that unmitigated and unconditioned confidence in the ability of rules of fair play to assure substantive fairness is not entirely warranted, and that our respect for it is due more to the prevalence and linking of widespread cultural convictions than to the intrinsic justifiability of the positions they support.

D. Beliefs and Practices Which Prompt Administrators of the Legal System to View Eligibility Questions as Matters Which Necessarily Entail Considerations of Merits and Deserts, Virtue or Vice, and Putative Social Harms

The enforcement of community or conventional morality can occur through administrative policy as well as through legislative and judicial proceedings. The more discretionary the policy, the more likely the possibility that conventional moral beliefs will be normative for, but not always surface in, decisions about eligibility, particularly if people or cases are categorized according to subjects. Subject-matter tests, even in less explicitly discretionary systems of legal aid, are subject to the twin dangers of every socially significant categorization—that they can conceal decisions inimical to certain groups of the populace and that they may entail socially stigmatizing judgments about those groups. Thus, while courting these social risks and while not being fully justifiable on a moral view of allocation policies, subject-matter tests and the prevalent beliefs they tend to favor enjoy a prima facie validity or moral plausibility. Subject-matter tests, because of their dependence upon and the reinforcement they receive from widely held but merely de facto beliefs about the treatment people on welfare "deserve"—such as the belief that people who seek a divorce or bankruptcy are less virtuous or potentially harmful to society and, therefore, less deserving—appear to be sensible discriminations between those well-deserving and those ill-deserving of assistance from relatively limited resources.

Although they are related to and potentially illuminating for this present discussion, the inquiry here is not primarily concerned with the general moral and philosophical questions raised by attempts to enforce community morality through legal means—namely, questions which ask whether law is an appropriate instrument for such aims, whether some areas of human conduct are in principle beyond legal sanction, and, finally, whether this is the proper

business of government. While setting aside a general discussion of these larger questions, it is apparent nonetheless that, as in the preceding section, this Article is concerned about them and seeks to address some aspects of them—but in more concrete terms and in the context of problems of eligibility. In these matters, we need to be concerned with tracking and evaluating the ways in which, and notwithstanding the answers to questions of principle, appeals to policy tend to function pragmatically as answers to the larger questions. Whatever one's general and principled stand on the enforcement of community morality—and in particular on the role of government in merely assuring freedoms and equal protection—it is quite possible that particular policies may contravene those principles and find as allies in this contravention, the professional and cultural convictions which offer specious support for that which seems otherwise unjustifiable. Among potential candidates of beliefs which may prompt administrators of law to judge that the merits, virtues, and social harmfulness of indigents are relevant, perhaps even decisive, considerations are some judgments at the heart of the common law tradition and some presumptions set by the systems of criminal justice and welfare.

The intellectual habits fostered by training in and through the practice of law are acknowledged widely as reasons for a certain professional myopia regarding broader social issues. They can also establish, however, prejudicial beliefs, or at least presumptions, which tend to favor existing and merely de facto convictions concerning *who* as well as *what* are either well-deserving or ill-deserving of public approval, legal sanction, and eventually free legal assistance. In its tacit ratification of judge-made law and the candor that implies about the social sources of court decision, the common law's tradition of relentlessly pursuing precedent and principle serves both to blunt legal imagination and to warrant as de jure what are merely prevalent cultural beliefs. Whereas moral inquiry takes these beliefs seriously, but then raises the critical questions which may serve to undermine their plausibility, legal reasoning may have available theoretical reasons and some practical procedures which serve in circular fashion to warrant conclusions by appealing to the sources from which they arose in the first place.

So habituated, professionals may be little inclined to ask which considerations *ought* to count and may be prone to ask rather exclusively which considerations *do* count. This point is made vividly in the rhetorical question: "Who can oppose giving less consideration to the slothful and lustful?" Indigent or not, by association with popular convictions about personally and socially harmful vices, those seeking help with bankruptcy or divorce can come to be regarded as ill-deserving. Considerations of need can be overturned,

if at all attended, and may give way to considerations of deserts or merits.

The Handler-Hollingsworth study detailed some of the ways in which this phenomenon can appear.[85] Studying certain nineteenth century, and perhaps still influential, criteria of welfare eligibility, the study concluded that these standards were based on a distinction between the poor and paupers, characterized respectively as indigent and morally degenerate, judging that the former were victims of fate while the latter were morally blameworthy.[86] This distinction and its supporting justifications became the basis for differential welfare treatment and provided a rationale for policies which sought either to deter or to penalize the deviant.[87] Given the strength of cultural traditions and widely accepted practices in the treatment of social deviants, it is not unreasonable to suppose that some analogous forms of thought are still influential and that they supply convenient justifications for restricting equality of opportunity and treatment, as well as for intervening in the affairs of and limiting the liberty of those stigmatized as deviant. Nor is it difficult to imagine that administrators might be inclined to attach overriding significance to considerations concerning the kinds of persons who need legal aid and regarding the kinds of putative harms society may be required to sustain if its deviants remain unchecked—indeed, are aided and abetted in using the system in legalized ways (for example, in litigation) which some may view as contributing to their delinquency.

Just as the welfare system and the gate-keeping done for it by the legal profession tend to import into their deliberations prevalent convictions about morally praiseworthy and blameworthy persons and then to differentiate treatments on that basis, so too does the criminal justice system. Whereas the deterrence and penalizing employed in the welfare system are more often, but not exclusively, psychological, their counterparts in the criminal justice system are more overtly and intentionally corporal or physical and, in some cases, capital. Setting aside these obvious differences, similar notions and common applications of principles can be found and identified in both of these social systems and in their allied and gatekeeping legal system.

Imputing liability and arguing for punishments deserved inevitably entail sizeable conceptual and normative puzzles about which more confusion than clarity prevails. A convenient and com-

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[85] J. HANDLER & E. HOLLINGSWORTH, THE "DESERVING POOR" (1971).

[86] *Id.* at 17-20.

[87] *See id. See also* J. GRAHAM, THE ENEMIES OF THE POOR 88-92 (1970); Silverstein, *supra* note 12, at 574; TIME, *supra* note 79.

mon method of avoiding these difficulties is to invoke certain preferred notions, maxims, and informal arguments, which, if culturally pervasive and if simultaneously legitimated by social systems such as the legal order, can become persuasive despite their ambiguity and indemonstrability. The terms and conditions set upon moral experience by virtue of being American do indeed set presumptions favoring liberty, but in some curious and not always consistent ways. While guaranteeing political rights favoring freedom from interference, Americans find good reasons, nonetheless, to limit liberty, particularly if potential conflicts with the rights of others or harms forthcoming to one's self or to society are perceived.

The most frequently invoked grounds for limiting liberty or for coercing compliance with convention are the prevention of harm to self, the prevention of harm to others and, in the extreme, the prevention or punishment of sin.[88] That harms are not always nor readily distinguished from that which simply fails to meet social wants or, for that matter, from that which merely offends prevalent sensibilities does not seem to deter confident and assertive declarations that certain behavior is clearly detrimental to society. That personal liability and the voluntariness required for moral blameworthiness cannot always be clearly determined in the face of other environmental factors does not seem sufficiently to slow the enthusiasm for finding a culprit, indeed a scapegoat, even at the risk of blaming the victim. The fact that "therapy," whether rehabilitative or deterrent, may, in fact, be a penalty or, if sufficiently stigmatized, a punishment[89] does not forestall effectively the occasional social impulse to make some people pay heavily for their failures as well as for the verifiable harms they inflict upon others.

Setting aside the temptation to consider here the possibility of a social pathology associated with these inclinations, a more modest point is asserted. These inclinations appear in and become normative at times in subject-matter tests of eligibility for legal aid and draw support from allied considerations in the welfare and criminal justice systems. The important point is not simply that these inclinations exist and tend to shape certain kinds of decisions and policies in those three systems. The point is that, when they are employed or appealed to in matters of legal-aid eligibility, they seem more plausible than they really are and manage to escape critical scrutiny *because* they fit comfortably in the web of alliances the common law tradition establishes with other social judgments of worth, merit,

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[88]J. FEINBERG, SOCIAL PHILOSOPHY 33 (1973). *See also* J. GUSTAFSON, PROTESTANT AND ROMAN CATHOLIC ETHICS 15-19 (1978) (discussing the possible Calvinistic overtones in "banning" offenders and imposing penalties on them).

[89]J. FEINBERG, DOING AND DESERVING 96-98 (1970).

and virtue. Thus, appealing to principles which themselves owe their authority to conventional beliefs, the justifications for considering judgments of this sort as a basis for making distinctions between people seeking legal aid can be warranted in a somewhat circular fashion. Furthermore, and leaving unattended for the moment other possible grounds for criticizing such a move, positions which make these sorts of appeals seem to err by subordinating right and wrong to the moral beliefs people happen to have—and in a rather systematic and socially interdependent fashion.[90]

V. Conclusion

This Article's close reading of eligibility rules, their implications and their alliance with social, political, and economic convictions has sought both to analyze their moral justification and to open avenues for continued critical reflection. It is difficult not to be impressed, however, with the formidable and inertial mass of interlocking power and value they represent. Although not always intellectually consistent and systematic, the bundle of presumptions favoring discretion, proceduralism, efficiency, and private codes of professional conduct has a pragmatic and functionally useful social coherence, and one which is sufficiently durable and supple to withstand anything less than a sustained critical reflection about its premises. Nonetheless, and hoping that the power of the de facto is not sufficient to paralyze one's sense of hope and efforts to progressively improve the legal system, I shall confess this hope and a commitment to these efforts as the premises upon which this inquiry began and from which it looks forward to increased collaboration with others who would move steadily in the direction of more nearly approximating the ideals of justice and liberty for all.

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[90] *See* Lyons, Book Review, 87 Yale L. Rev. 415, 435 (1977) (reviewing R. Dworkin, *supra* note 68).