January 1994

The Lawyer's Duty of Public Service: More Than Charity

Tigran W. Eldred
_The Legal Aid Society - Criminal Appeals Bureau_

Thomas Schoenherr
_Fordham University School of Law_

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I. INTRODUCTION

The question of whether lawyers have an ethical duty to perform public service—and, in particular, whether the obligation requires that a percentage of time be devoted to providing free legal services to the poor—has a disjointed and uneven history. Leaders of the bar, es-

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* Staff Attorney, The Legal Aid Society—Criminal Appeals Bureau; B.A. 1986, Georgetown University; J.D. 1990, Fordham University School of Law. I wish to thank Lauris P. Wren for her invaluable editorial assistance.

** Public Interest Coordinator, Public Interest Resource Center, Fordham University School of Law; B.A. 1983, State University of New York at Binghamton.

1. In this article, the duty of lawyers to provide free legal advice is limited to civil, as opposed to criminal, legal services. Although the arguments in favor of a duty to represent the poor in the civil and criminal context are similar, the question of indigent criminal defense has been a matter of federal constitutional law since Gideon v. Wainwright, 372 U.S. 335 (1963), and its progeny, thus taking the matter outside the general discussion of wheth-
pousing various and often conflicting views of morality, compassion, *noblesse oblige*, and individual autonomy, have contributed to this state of affairs, creating a complicated web of vague ideals that today jeopardizes the legal profession’s sense of its own public obligations. On the one hand, the legal profession remains dedicated to the traditional view that public service is a matter of personal charity, to be performed at the discretion of the individual attorney. And yet, despite the prevalence of this dominant notion, an undercurrent of thought rejects the relativistic approach to public service, arguing instead that lawyers have a professional responsibility to help assure that legal services are available to all, including those who cannot afford to purchase representation on the open market. The *Code of Professional Responsibility* and the *Model Rules of Professional Conduct* reflect both notions of public service, sending mixed signals to members of the bar as to whether their professional duties include the obligation to render free legal services to those in need. By failing to articulate a vision of legal ethics that resolves the question of whether there is a professional duty of public service, the legal profession has contributed to the legal system’s inability to distribute legal services to those in need.

By exploring the contradictory visions of public service and analyzing the palpable justifications for the lawyer’s duty to serve, this article seeks to articulate a clearer foundation for the lawyer’s societal obligations, one that unequivocally includes the duty to provide free legal services to those in need. Part II briefly reviews the nature and extent of the crisis in legal services for the poor, recognizing that, for the most part, access to the system of justice is foreclosed to the nation’s poor. Part III addresses the profession’s competing views of public service, noting that, despite efforts to resolve this confusion, today’s ethical rules remain very unclear about whether a lawyer has a professional duty to perform public service as a condition to membership to the bar. The implications of the current state of affairs is addressed in Part IV, which notes that, despite the frequent calls for public service, very few lawyers actually engage in *pro bono* practice for the poor. The demand for mandatory pro bono programs to redress lawyers, as a matter of professional responsibility, should help satisfy the civil legal needs of the poor.
the deficiency in pro bono activity is also discussed. Finally, Part V argues that lawyers do possess a fundamental duty of public service, which emanates from the monopoly that the bar retains over the provision and distribution of legal services. In coming to this conclusion, this section argues that the legitimacy of the system of justice depends upon the legal profession recognizing that lawyers have a fundamental duty to perform legal services for those who are too poor to retain private counsel. In addition, this section reviews the implications of this conclusion for the profession as a whole, individual attorneys, and legal educators.

II. THE CRISIS IN LEGAL SERVICES FOR THE POOR

At the end of the nineteenth century, the first legal aid organizations were established to meet the legal needs of narrowly defined social groups, such as newly freed blacks, immigrants, children, and women. These benevolent associations, organized through charitable contributions of money and service, expanded in the early part of the twentieth century—by 1919, in fact, forty-one cities had legal aid societies, with a staff of approximately two hundred full- and part-time attorneys, and an aggregate budget of nearly $190,000. Of these, however, only one—the Kansas City Bureau—was organized as a municipal office and received public funding. The remainder depended exclusively upon the charitable contributions of professional talent and financial support. This trend continued through the 1950s, when the prevailing political climate heightened fear against socialization of legal services for the poor. By 1960, two hundred legal aid offices

2. The first of these organizations, such as the New York German Society (1876) and the Woman's Club of Chicago (1886), developed to address the specific needs of their target populations. See SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 18 (1990). The first true legal aid society, with neither ethnic nor gender requirements, was the Chicago Ethical Culture Society, which opened in 1888. Id.

3. See id.


5. See id.

6. See LAWRENCE, supra note 2, at 19. The fear of socializing legal services was
operated with a total staff of 132 full-time attorneys. Unfortunately, these charitable contributions were insufficient to meet the legal needs of the poor, as less than 1 percent of the nation's 39 million poor people in 1960 received legal assistance from legal aid societies. In 1965, legal aid became a national priority through the federal government's creation of the Legal Services Program (LSP), which funded initiatives in hundreds of communities throughout the country to help meet the vast array of the poor's legal needs. By 1967, for example, LSP issued $40 million in grants to more than three hundred agencies in over 210 communities, demonstrating for the first time that the federal government recognized that an important method in fighting poverty was to provide the nation's poor with access to essential legal services. By 1971, the aggregate amount of funding had increased to $61 million, which allowed 2,500 full-time staff attorneys in 934 legal services offices to handle over 1 million cases annually. The expansion in services continued through the 1970s, and by 1981, the Legal Services Corporation (LSC)—which had been created in 1974 to replace LSP—was budgeted at $321 million. By the 19s, however, LSC had fallen out of favor with the Reagan administration, which drastically slashed the corporation's budget to $241 million in 1982, and appointed directors who were hostile to LSC's very existence. 

7. See id.
8. See id. at 20.
9. See id at 28. As conceived by LSP's first director, Clinton Bamberger, the program's mission was "to provide the means within the democratic process for the law and lawyers to release the bonds which imprison people in poverty, to marshal the forces of law to combat the causes and effects of poverty." Id.
10. See id. at 28-29.
11. For an excellent account of the creation of LSC, see EARL JOHNSON, JUSTICE AND REFORM ix-xxiii (1978); see also Warren E. George, Development of the Legal Services Corporation, 61 CORNELL L. REV. 681 (1976). LSC's goal was to guarantee the availability of two lawyers per ten thousand poor people, a goal which was met in 1980, before substantial budget cuts required a cut back in services. See DAVID LUBAN, LAWYERING AND JUSTICE: AN ETHICAL STUDY 241 (1988). Even after reaching its goal, however, LSC never pretended that it could provide the poor with the same access to lawyers that is available for those who are able to afford private counsel. Id. (noting that the national average is one lawyer for every 470 people).
12. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, § 16.7.3, at 938-39 (1986);
The effect of these financial cutbacks has been devastating: as reported by one research group in 1983, sixty-one LSC-funded programs reported a loss of thirty percent of their staff attorneys, many of whom were the most experienced attorneys. Moreover, LSC reported a twenty-five percent decline in the number of legal services offices operating nationwide. Although support for legal services has been restored in recent years, funding still lags well behind the pre-1982 levels.

Unfortunately, despite the federal government’s efforts to meet the legal needs of the poor, today there exists what often has been described as a “crisis of unmet legal needs.” Although quantifying the

see also Ronald H. Silverman, Conceiving a Lawyer’s Legal Duty to the Poor, 19 Hofstra L. Rev. 885, 972 n.163 (1991).

13. See Luban, supra note 11, at 242 (citing a report by the Washington Council of Lawyers entitled Report on the Status of Legal Services for the Poor iii-iv, v (November 1983)).

14. Id. The full effect of the financial cutbacks in LSC funding as reported by the Washington Council of Lawyers is as follows:

Overall, programs lost 30 percent of their staff attorneys. 37.7 percent of the programs reported losing their more experienced attorneys. Of the fifty programs that tried to replace attorneys who left, forty-one responded that their efforts had been substantially impaired . . . and 52 percent reported they have been unable to replace their experienced attorneys at all. By 1983, LSC reported a reduction of 25 percent in the number of offices. The survey confirms that 85 percent of the programs in the sample had to close full- or part-time offices because of reduced funding. Thirty-four percent of the programs reported that these clients [i., “clients no longer served because of their office closings”] are now “virtually unable to get free legal aid.”

Id. Moreover, as Luban points out, 80% of the survey’s respondents reduced their caseloads, and more than 80% of the programs had to reject between five hundred and four thousand clients. Id. The net effect of these reductions has been devastating. For example, 27 LSC programs, with an affected population of over 4 million people, no longer handle divorces; six programs, with an affected population of over 1.1 million people, no longer handle cases of child abuse and neglect; and 11 programs, with an affected population of over 1.6 million people, no longer handle child custody and visitation cases. Id.

15. In 1990, the LSC budget was $316 million, which, when factored for the rate of inflation, is still significantly less than 1981 levels. See Harry T. Edwards, A Lawyer’s Duty to Serve the Public Good, 65 N.Y.U. L. Rev. 1148, 1153 n.25 (1990).

16. See Committee to Improve the Availability of Legal Services, Final Report to the Chief Judge of the State of New York 15 (April 1990) [hereinafter Marrero Committee Report] (“The scope and dimensions of the crisis of poverty and the gap between legal needs and legal services associated with them are matters of common
extent of the crisis is difficult, there is almost universal acceptance that the poor have been denied needed legal services. One survey by the ABA, for example, has concluded that no more than twenty percent of poor people's legal needs are being addressed.\textsuperscript{17} Given that most people living in poverty encounter legal difficulties on a regular basis,\textsuperscript{18} it is not surprising that, on a national scale, the aggregate unmet legal needs of poor Americans are staggering. Extrapolating existing data, a leading commentator has concluded that, "very conservatively," the

experience and are confirmed by information, studies, documentation and statistical evidence that put the size and importance of the crisis beyond reasonable doubts.	extsuperscript{16} The full Marrero Committee Report is reprinted in Victor Marrero, Committee to Improve the Availability of Legal Services—Final Report to the Chief Judge of the State of New York, 19 Hofstra L. Rev. 755 (1991).

The Marrero Committee Report, named after the committee's chairman, was initiated at the request of the Chief Judge of New York State to find the best method to meet the legal needs of the New York's poor. The Committee's final report, issued after months of hearings on the matter, recommended that "all lawyers admitted to practice and registered as attorneys in New York [should] be required to provide a minimum of 40 hours of qualifying pro bono legal services every two years." \textit{Id.} at 9-10. In the face of strong opposition by the organized bar, however, the Committee's recommendations were initially delayed and ultimately rejected. See Steven Wechsler, \textit{Attorneys' Attitudes Toward Mandatory Pro Bono}, 41 Syracuse L. Rev. 909, 909-10 n.2 (1990). Nevertheless, the Marrero Committee Report serves as a benchmark for any discussion relating to the merits of mandatory pro bono initiatives, as well as the question of whether lawyers possess a professional responsibility to engage in public service.

\textsuperscript{17} See American Bar Association Consortium on Legal Services and the Public, 1990 Directory of Private Bar Involvement Programs 146-47 (May 1990); Jill Chaifetz, \textit{The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School}, 45 Stan. L. Rev. 1695 (1993). In New York State, an exhaustive study found that in 1988 the poor of the state faced nearly three million civil legal problems without legal help. Moreover, the study found that no more than 14% of the poor's overall need for legal assistance was being met. See New York State Bar Association Committee on Legal Aid, New York Legal Needs Study: Final Report (December 1993) [hereinafter New York Legal Needs Study].

\textsuperscript{18} Seventeen studies from 1977 to 1987 reveal that families that live below the poverty line have an annual rate of unmet legal needs between 1.0 and 5.5 per household. See Massachusetts Legal Services Corporation, Massachusetts Legal Services Plan for Action (1987), reprinted in Oversight Hearing on the Legal Services Corporation: Hearing Before the Subcommittee on Administrative Law & Government Relations of the House Committee on the Judiciary, 101st Cong., 1st Sess. 274, 283 (1989). Another survey of nine studies found that each poor person encounters between one to two legal problems per year. See Sophia M. Deseran, Note, \textit{The Pro Bono Debate and Suggestions for a Workable Program}, 38 Clev. St. L. Rev. 617, 636-37 (1990).
amount of unmet legal needs of the poor nationwide is *twenty million* hours per year.\textsuperscript{19} The legal problems for which the poor can find no representation fall into various categories; for example, in New York State, the most frequently reported legal troubles include housing issues, public benefits problems, health care concerns, consumer and utility problems, discrimination and employment matters, and family issues.\textsuperscript{20} Given current poverty trends, the legal needs of the poor can only be expected to escalate.\textsuperscript{21}

To describe the problem simply as a quantitative matter, however, is to understate the true gravity of the legal services crisis. To those living in poverty, the margin of survival is precariously narrow. Often, one significant adverse legal result, such as the termination of public benefits, can be the difference between survival and disaster. In New York City, for example, over a quarter of the families entering the city’s shelter system cited eviction by their landlords as the cause of their homelessness.\textsuperscript{22} It is not surprising that in New York City Housing Court, 80-90\% of landlords have counsel, whereas tenants are represented by an attorney no more than 15\% of the time.\textsuperscript{23} Significantly, when tenants are represented by counsel, eviction rarely occurs.\textsuperscript{24} The conclusion is inescapable: legal counsel is an essential

\begin{footnotesize}
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\item See Luban, supra note 11, at 241.
\item See New York Legal Needs Study, supra note 17, at 20. The statistical breakdown of reported legal problems is as follows: Housing - 34\%; Public Benefits - 22\%; Health Care - 15\%; Consumer - 15\%; Utility - 13\%; Discrimination - 11\%; Employment - 10\%; School - 9\%; Family Law - 8\%.
\item See Silverman, supra note 12, at 959-71. According to Professor Silverman, there is a direct relationship between the trends in poverty and the increased demand for legal needs of the poor, citing, for example, that the crack epidemic in the 1980s has substantially increased the number of family law matters, such as child abuse and neglect proceedings, that are adjudicated in New York City’s Family Court. See id. at 965. Moreover, the expansion in legal rights, such as the recognition of the right to due process in public benefits termination or suspension hearings after Goldberg v. Kelly, 397 U.S. 254 (1970), has substantially increased the demand by the poor for legal resources. Id. at 964-65.
\item See Marrero Committee Report, supra note 16, at 16-17 (citing the Association of the Bar of the City of New York, Committee on Legal Assistance, Housing Court Pro Bono Project: Report on the Project, Parts I and II (June and Nov. 1988)).
\item See id.
\item See id. at 17. According to the Marrero Committee, “the mere presence of counsel for the tenant shifts the balance in the Housing Court and significantly enhances poor
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\end{footnotesize}
resource to prevent homelessness, a calamity not only for those who no longer have homes, but also for society as a whole, which must finance public shelters. This example of the devastating personal and societal consequences of inadequate access to legal services is representative of the results of the crisis in legal services in general. Viewed in this light, the failure of the poor to receive needed legal services can only be considered catastrophic.

III. THE LAWYER’S AMBIGUOUS “DUTY” OF PUBLIC SERVICE

Despite the desperate need by the poor for legal services, the legal profession has displayed consistent confusion over whether lawyers have an ethical duty to render free legal services to those who cannot afford to pay for legal counsel. Throughout American legal history, the dominant view has been that lawyers are not obliged, as a matter of professional responsibility, to provide legal services free of charge to those in need. Rather, the legal culture in this country has understood pro bono work to be an act of personal charity, to be per-

litigants’ chances of retaining access to their homes and avoiding homelessness.” Id.

25. Id.


The ABCNY Report, issued in response to the call by the American Bar Association for state and local bar associations to assist in meeting the legal needs of the poor, recommended that every member of the bar be required, as a condition of membership, to provide 30-50 hours of pro bono services per year. Id. at 5. According to the report, this obligation could be fulfilled by the performance of various types of service, including those dedicated to the administration of justice, poverty law, civil rights, public rights, charitable organization representation, or the support of pro bono legal services. Id. at 13-16. These categories are a slight variation of those set forth by the ABA House of Delegates in 1975. See infra note 67 and accompanying text.

In 1980, the Executive Committee of the Association of the Bar of the City of New York rejected the Special Committee’s recommendations, and instead voted that the ABA adopt “an ethical mandate for public service that would be enforced through self-evaluation and not disciplinary process.” See 36 Record of N.Y.C.B.A. 9-11 (1981); see also David L. Shapiro, The Enigma of the Lawyer’s Duty to Serve, 55 N.Y.U. L. Rev. 735, 736-37 & n.8 (1980).

27. “Pro Bono work,” “public interest legal work,” and “public service” are slightly different ways to express the same notion—legal services rendered at no fee, or substantially
formed at the discretion of the individual attorney.28 According to this view, the imposition of a pro bono duty would violate the discretionary ideal of public service, the virtue of which depends upon the fact that such service is propelled by the lawyer’s individual conscience, rather than forced compulsion.29 Of course, there have been exceptions to this rule, the most notable being the long history of courts appointing counsel to represent indigent clients in pending civil matters.30 Notwithstanding the judiciary’s unique perspective on the lawyer’s professional responsibilities, however, the profession as a whole has been unwilling to accept the notion of a professional duty to serve, and instead has viewed legal counsel similar any other scarce resource—to be purchased in the marketplace by those who are able to pay.31 As a leading commentator of legal ethics has pointed out, with reduced fee, on behalf of a client who is unable to purchase needed legal services on the open market.

28. See, e.g., F. RAYMOND MARKS, THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY 9 (1972) (“The pro bono outlook is lofty; the term has a patrician sense which seems to go beyond its Latin quality. In this sense the lawyer sees himself working for his society. He is called by a higher duty; his work is voluntary; and it is noble.”).

29. A concise statement of this view is found in the remarks by Jack David, who dissented from the ABCNY Report. See ABCNY REPORT, supra note 26, at 37-41.

In rejecting a required pro bono obligation for attorneys in the State of Florida, the Florida Supreme Court put forth just such an argument:

The message to lawyers is thus plainly stated. The proposal before us seeks a mandatory enforcement of these stated ethical considerations. Indeed, we may ask, why all this idealistic talk in the Code of Professional Responsibility without a mandatory enforcement of the provisions? . . . [T]he answer to that question lies within the nature of our free society: we have been loathe to coerce involuntary servitude in all walks of life; we do not forcibly take property without just compensation; we do not mandate acts of charity. We believe that a person’s voluntary service has to come from within the soul of that person.

In re Emergency Delivery of Legal Servs. to the Poor, 432 So. 2d 39, 41 (Fla. 1983) (emphasis added).

30. See Steven B. Rosenfeld, Mandatory Pro Bono: Historical and Constitutional Perspectives, 2 CARDOZO L. REV. 255, 275-79 (1981). The underlying rationale most often put forth by courts in compelling representation is that the conscripted lawyer is an “officer of the court” and that the obligation to accept appointment is a condition of the attorney’s license to practice law. See id. at 279; ABCNY REPORT, supra note 26, at 28-31; but see Shapiro, supra note 26, at 753-62 (tracing the history of court appointed service in this country, and concluding that very few states have actually compelled lawyers to serve without compensation, notwithstanding their status as officers of the court).

31. See Kenneth L. Penegar, The Five Pillars of Professionalism, 49 U. PITT. L. REV.
limited exceptions, "every lawyer is free to accept or reject any client for reasons personal to the lawyer [including] because the client cannot pay the lawyer's demanded fee." 32

Although the prevailing notion of public service is that it is nothing more than an act of charity, there has been an undercurrent within the legal community that views legal services to the poor as a matter of professional responsibility rather than a matter of personal predilection. This minority position has been articulated at various times, perhaps no more eloquently than by George Sharswood, one of legal profession's preeminent ethicists, and the source for many of the modern notions of professional responsibility. 33 In the middle of the nineteenth century, the dominant debate within the legal community concerned whether the practice of law should be conceived as a profession that expresses certain ideals, or simply as a business, with few, if any, ethical constraints. 34 According to Sharswood, the notion of a lawyer as pure adversary, whose only interest is to advance his client's interests, is anathema to the lawyer's social responsibilities. Instead, Sharswood embraced what Professor Pierce has described as a "repub-


32. WOLFRAM, supra note 12, at 573. Professor Wolfram notes two exceptions: the obligation to accept court appointment and the obligation not to refuse a client solely because he is unpopular. Id.

33. The preface to the MODEL RULES OF PROFESSIONAL CONDUCT (1983) make particular mention of Sharswood as the source of many of the notions of professional responsibility contained in the CANONS OF PROFESSIONAL ETHICS (1908), which, as Professor Hazard makes clear, serve as the basis for "the content of the legal profession's narrative and core ethical rules." Geoffrey C. Hazard, The Future of Legal Ethics, 100 YALE L.J. 1239, 1249 (1991). For an excellent essay exploring the influence and importance of George Sharswood on modern notions of legal ethics, see Russel G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 GEO. J. LEGAL ETHICS 241 (1992).

34. See Pearce, supra note 33, at 249. The debate over whether a lawyer is an independent moral agent, making ethical determinations about the validity of differing courses of legal action, or simply as a "hired gun," whose primary concern is the advancement of his client's interests, rages just as fiercely today. Compare William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083 (1988) (arguing that, in contrast to the notion of pure adversariness, lawyers should exercise independent moral judgment in advancing their clients' interests) with Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060 (1976) (arguing that the lawyer should be viewed as an amoral agent, whose sole responsibility is to represent his client zealously within the bounds of the law).
lican vision" of legal ethics: that the lawyer's primary obligation is to serve the public good rather than private interest, even when the community's interests conflict with those of either the client or the lawyer.\textsuperscript{35} This ideal reflects the notion that the lawyer, as a member of the virtuous elite, is in a better position than most to reflect on society's needs, and thus, is the best person to guide society's actions.\textsuperscript{36}

Sharswood's conception of the virtuous lawyer has different implications for the lawyer's professional obligations, depending upon whether there is conflict between the lawyer's adversarial role and the common good. For example, according to Sharswood, if a paying client sought representation, the lawyer's republican role would require him to consider, in the first instance, whether the public good would be advanced by such representation.\textsuperscript{37} Even if representation is advisable, the lawyer must nonetheless consider the public good in advancing his clients interests, and circumscribe tactics that, although beneficial to the client, would nonetheless be damaging to societal inter-

\textsuperscript{35} See Pearce, supra note 33, at 241. Sharswood himself did not conceive of legal ethics as "republican" in the classical sense, although his views of the lawyer's obligation to pursue the common good, even at the expense of personal self-interest, certainly fit this categorization. Id. According to classical republican thought, the exclusive goal of government is to foster the common or public good. See Gordon S. Wood, The Creation of the American Republic, 1776-1787 53-65 (1969). Accordingly, the individual's obligation is to be virtuous; that is, to submerge his own private interests to the needs of the general public. Id. at 65-75; see also Pearce, supra note 33, at 250; Frank I. Michelman, The Supreme Court 1985 Term, Forward: Traces of Self-Government, 100 Harv. L. Rev. 4, 18 (1986).

\textsuperscript{36} See Pearce, supra note 33, at 252. The idea that lawyers are members of a virtuous club, most capable of determining society's interests, derived from the nineteenth century conception that lawyers, unlike the merchant class, were "somehow free of the marketplace, are less selfish and interested and therefore better equipped for political leadership and disinterested decision-making." Gordon S. Wood, The Radicalism of the American Revolution 254 (1991); see also Pearce, supra note 33, at 250-54 (discussing the republican role of lawyers). This ideal of the virtuous lawyer is arguably no longer applicable in the modern world, where the typical lawyer is subject to the same pressures of the marketplace as others in the business world.

\textsuperscript{37} See Pearce, supra note 33 at, 263-64. Professor Simon argues that today lawyers must similarly determine whether accepting representation will advance normative values, rather than merely enhancing private interest. See also Simon, supra note 34.
ests. Sharswood argued, however, that certain duties never conflict with the lawyer's adversarial role, and thus need not be balanced against the competing client interests. Foremost amongst these duties would be what we today would describe as the attorney's pro bono obligation. In the criminal context, Sharswood noted that an attorney has an ethical obligation to accept court appointment to represent an indigent defendant. In the civil context, the lawyer's republican role requires that he represent those unable to afford the services of an attorney. As Sharswood stated: "the time will never come . . . when a poor man with an honest cause, though without fee, cannot obtain the services of honorable counsel, in the prosecution or defense of his rights."

Sharswood's views regarding the lawyer's public duties serve as a backdrop for other prominent visionaries who have considered public service as a professional responsibility, rather than a matter of mere personal charity. Perhaps the strongest proponent of such a duty was Reginald Haber Smith, whose influential 1923 work, Justice and the Poor, extolled the virtue of public service, including servicing the legal needs of the poor. According to Smith, the bar's duty to provide free legal services to those in need derived from various sources, including a lawyer's role as a minister of justice as well as an officer of the court. Moreover, Smith argued that the accepted standards of professional ethics, including the 1908 ABA Canons, articulated a vision of public service. Other notable and influential members of the bar who have argued in favor of a duty for public service include

38. See Pearce, supra note 33, at 263-64.
39. See id. Sharswood described these duties as the duty to the impartial administration of justice, which in the 19th Century included the duty of a lawyer never to sue his client for fees, nor to engage in a contingency fee arrangement. Id.
40. See id at 263. This ethical obligation found explicit expression in the CANONS OF PROFESSIONAL ETHICS (1908). See also infra note 49 and accompanying text.
41. Pearce, supra note 33, at 263.
42. REGINALD HABER SMITH, JUSTICE AND THE POOR 233 (1923).
43. See Smurl, supra note 4, at 804 n.28.
44. See id. Smith also noted that the lawyer should want to be a public servant in order to avoid being perceived as a "rascal" whose only interest is financial gain by non-lawyers. See id. at 805 (quoting REGINALD HABER SMITH, THE OPPORTUNITY IS YOURS 1-5 (1953)).
Emery Brownell, whose 1951 study of the legal needs of the poor urged lawyers to accept their public service responsibility, and Harri-son Tweed, who argued that the only way to prevent government regulation of the bar was for the profession itself to render legal aid to those in need. Tweed also argued that assistance to the poor would keep people off the relief roles and would build a better public image for the bar.

The tension between the differing notions of public service is evident in the profession’s statements about its ethical responsibilities, which have articulated ambiguous and conflicting notions about the lawyer’s role in servicing the needs of the poor. As early as 1908, when the ABA put forth its original Canons of Professional Ethics, the bar has conceived of the lawyers’ duties as extending beyond simply advancing their clients’ private interests. ABA Canon 4, for example, stated the general proposition that “a lawyer assigned as counsel for an indigent prisoner ought not ask to be excused for any trivial reason.” Moreover, under ABA Canon 29, each lawyer had the responsibility of maintaining the profession’s dignity, improving the law, and also improving “the administration of justice.” Certainly, these pronouncements did little to advance the notion that a lawyer was obliged to render free legal service to those in need. In fact, this concept would have been contrary to the prevailing notions of professional responsibility of the time. Nevertheless, the Canons suggested that certain, albeit limited, forms of service were included within the duties to be performed by members of the profession.

In the 1950s, matters became more complicated when the Joint Conference of the American Bar Association and the Association of American Law Schools issued its report on the state of professional responsibility. Returning to the question addressed by Sharswood a

45. See Emory A. Brownell, Legal Aid in the United States (1951).
46. See Johnson, supra note 11, at 9; see also Smurl, supra note 4, at 805.
47. Id.
48. The original thirty-two Canons of Professional Ethics, which were superseded by the adoption of the 1969 Code of Professional Responsibility, were adopted by the American Bar Association in 1908.
49. ABA Canons of Professional Ethics Canon 4 (1936).
50. ABA Canon of Professional Ethics Canon 29 (1936).
century earlier, the Joint Conference noted that its goal was to articulate "a reasoned statement of the lawyer's responsibilities, set in the context of the adversary system."\(^{52}\) The paradox facing the conference was this—how does the profession articulate a sense of a lawyer's public responsibilities, when the lawyer's private interest to advance the client's interest often conflict with community interests? Unlike Sharswood's vision of republican ethics,\(^{53}\) however, the Joint Conference concluded that such conflicts are best resolved by distinguishing between notions of private practice and public service.\(^{54}\) In private practice, the Joint Conference concluded, the lawyer's undivided loyalty is to his client, whose interests must be advanced, within the bounds of the law.\(^{55}\) The Joint Conference noted, however, that the practitioner should work, in his public capacity, to ameliorate the undesirable side-effects produced by the adversarial system.\(^{56}\) In accord with the dominant view of legal ethics, the Joint Conference concluded that acts of public charity should emanate from the "individual conscience," which would allow the practitioner to serve society as well as his clients.\(^{57}\) By separating private practice from public responsibility, the Joint Conference moved towards a new understanding of professional responsibility, one which includes the ideal of public service, but which does not impose an obligation of service on individual members of the bar. This dichotomy between private practice and

\(^{52}\) Joint Conference Report, supra note 51, at 1159.

\(^{53}\) See supra notes 33-41 and accompanying text.

\(^{54}\) See Joint Conference Report, supra note 51, at 1162; Smurl, supra note 4, at 811-15.

\(^{55}\) See Joint Conference Report, supra note 51, at 1162. The conference did not view private zeal as contrary to the notion of the public good, despite the fact that advancing a private client's interests often cause socially undesirable results. Rather, in accordance with the traditional defense of the adversarial system, the Joint Conference concluded that society is best served by a lawyer's zealous pursuit of a client's interests.

\(^{56}\) See id. To exemplify the best method of reconciling private interests and public pursuits, the Joint Conference recalled the experience of Thomas Talfound, an English Barrister, whose advocacy of behalf of his clients produced immoral ends, but who then worked as a member of Parliament to pass legislation to ameliorate the previously immoral law. See id. at 1162; see also Smurl, supra note 4, at 81.

\(^{57}\) Joint Conference Report, supra note 51, at 1162.
public responsibility cannot be underestimated, as it has become the defining characteristic of the Code of Professional Responsibility.\textsuperscript{58}

Taking this notion one step further, in 1969, the ABA adopted the Code of Professional Responsibility, which, at its core, recognizes that the individual lawyer cannot be compelled, absent special circumstances, to provide time or energy to the improvement of the legal system, nor to ensure that the poor have access to legal services.\textsuperscript{59} As set forth in Ethical Consideration 2-26, "a lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client."\textsuperscript{60} Nevertheless, drawing upon the notions of a cooperative and communal society, the Code also expresses an understanding of professional responsibility where lawyers would voluntarily assist in the improvement of the legal system, including helping to ensure that the poor gain access to needed legal services. Following the lead of the 1958 Joint Conference, the Code states in Canon 2 that it is the legal duty of the profession, rather than each individual attorney, to ensure that "legal counsel is available."\textsuperscript{61} Moreover, each lawyer should "assist" the profession in fulfilling this duty.\textsuperscript{62} EC 2-25 sets forth in greater detail these aspirational ideals:

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding

\textsuperscript{58} See infra notes 59-65 and accompanying text.

\textsuperscript{59} See Penegar, supra note 31, at 311.

\textsuperscript{60} MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1980). The Code is divided into three categories: (1) the Canons, which set forth the axiomatic norms of professional responsibility in general terms; (2) the Ethical Considerations, which, as the Preamble to the Code states, are "aspirational in character and represent the objectives toward which every member of the profession should strive"; and (3) the Disciplinary Rules, which "unlike the Ethical Considerations, are mandatory in character [and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Preamble, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). As one distinguished commentator has stated, the Disciplinary Rules, unlike the Canons or Ethical Considerations, are reserved for "those ethical issues [that] are so basic to lawyer's role in our society that "wrong judgments on [them]—or wrong actions involving them—should invoke sanctions." Thomas Ehrlich, Charles M. Miller Lecture—Lawyers and Their Public Responsibilities, 46 Tenn. L. Rev. 713, 716 (1979).

\textsuperscript{61} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1980).

\textsuperscript{62} Id.
experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer.63

Perhaps better than any other single statement put forth by the profession, EC 2-25 encapsulates the confusion surrounding the bar’s view of public service to the poor. As an aspirational ideal, EC 2-25 continues the dominant view that each lawyer must determine for herself whether to engage in pro bono work for the poor, and will not be subject to any form of professional discipline for failing to engage in such charitable practice. By specifically noting that the “responsibility” to provide legal services to the poor “ultimately rests upon the individual lawyer,” EC 2-25 articulates the historical theme that it is each individual lawyer who must make the decision whether to perform charitable acts, rather than for the profession to compel such service as a matter of professional responsibility.64 And yet, by its very language, EC 2-25 is phrased in terms of “obligations” and “responsibilities,” suggesting that perhaps there exists an affirmative duty to serve the poor, rather than merely an aspiration to do so. Is there a pro bono obligation or simply a pro bono suggestion? Does the Code allow a lawyer not to perform any type of public service and still conceive of himself as compliant with his professional duties? If there is a professional duty of public service, what underlying rationale allows the profession to compel such service, or at least to articulate such a duty? The Code’s failure to answer these questions has set in motion a state of affairs that, to this day, has confused the notion of a pro bono obligation.65

64. Id. The ambiguity surrounding the Code’s articulation of the notion of public service is amply demonstrated by the confusion generated by this language. For example, the Marrero Committee Report has interpreted EC 2-25 as meaning that each lawyer has the obligation to assist the legal profession in making legal services available to the poor. See Marrero Committee Report, supra note 16, at 28-29. This interpretation, although laudable in spirit, ignores that fact that EC 2-25 is merely aspirational, and therefore cannot be said to impose a duty, as opposed to mere suggestion, of service.
65. One commentator has noted that, by “failing most of the conventional tests of moral rules and wanting as they are in corresponding mandates, i.e., disciplinary rules, the
This ambiguous notion of public service only became more complicated in 1975, when the ABA House of Delegates passed a resolution to give greater form and content to Canon 2 of the Code. According to the resolution, "it is the basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services," a term that was defined as constituting "service provided without fee or at a substantially reduced fee" in at least one of five categories: Poverty Law, Civil Rights Law, Public Rights Law, Charitable Organization Representation, and Administration of Justice. By

66. See ABCNY REPORT, supra note 26, at 4-5.
67. The full resolution passed by the ABA House of Delegates in August 1975, is as follows:

RESOLVED, that it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services;

FURTHER RESOLVED, That public interest legal service is legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:

1. Poverty law: Legal Services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel.

2. Civil Rights Law: Legal representation involving a right of an individual which society has a special interest in protecting.

3. Public Rights Law: legal representation involving an important right belonging to a significant segment of the public.

4. Charitable Organization Representation: Legal service to charitable, religious, civic, governmental and educational institutions in matters in furtherance of their organizational purpose, where the payment of customary legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

5. Administration of Justice: Activity, whether under bar association auspices, or otherwise, which is designed to increase the availability of legal services, or otherwise improve the administration of justice.

FURTHER RESOLVED, That public interest legal services shall at all times be provided in a manner consistent with the Code of Professional Responsibility and the Code of Judicial Conduct:

FURTHER RESOLVED, That so long as there is a need for public interest legal services, it is incumbent upon the organized bar to assist each lawyer in fulfilling his professional responsibility to provide such services as well as to assist, foster and encourage governmental, charitable and other sources to provide public interest legal services.

FURTHER RESOLVED, That the appropriate officials, committees or sections of the American Bar Association are instructed to proceed with the development of
using obligatory language, the resolution would seem to have set forth a professional responsibility, instead of a mere suggestion of, public service. This notion, however, is undermined by the very nature of the resolution itself, which was meant only to expand upon the Code's declaration of professional responsibilities, and not to alter its basic structure. Because EC 2-25 is aspirational in character, and the 1975 Resolution does not change this fundamental notion, public service remains, in the end, a matter of individual conscience, notwithstanding the more commanding language. Nevertheless, the stronger language of the resolution suggested that the ABA was moving in the direction of establishing an outright duty, as opposed to a mere guideline, of public service.

The movement towards the creation of an obligation of public service picked up momentum in 1979, when the ABA Commission on Professional Standards began to draft a new set of rules of professional conduct. The Kutak Commission, as it was known, first proposed a new rule on public service—one that, for the first time, would establish that each member of the bar, as a condition of membership, be required to perform a quantity of pro bono service. A revised draft circulated in January 1980 dropped the specific hourly requirement, but nonetheless, maintained the obligation of pro bono service and added a requirement that each member of the bar would have to "make an annual report of such service to appropriate regulatory authority." If proposals to carry out the interest and purpose of the forgoing resolutions.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1986).

68. In 1977, the ABA added yet more substance to the meaning of EC 2-25 when the Special Committee on Public Interest Practice published a report, which recommended that each state and local bar association, inter alia, adopt specific guidelines to quantify each lawyer's expected public interest practice. See Rosenfeld, supra note 30, at 261.

69. This proposed rule, which only received limited circulation, recommended that each attorney be required to perform forty hours of pro bono work a year, or the financial equivalent thereof. See Shapiro, supra note 26, at 736 & n.5.

70. The full text of the proposed rule is:

A lawyer shall render unpaid public interest legal service. A lawyer may discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of limited means or to public service groups or organizations. A lawyer shall make an annual report concerning such service to appropriate regulatory authority.
adopted, this rule would have fundamentally altered the nature of the profession's conception of public service, making it a responsibility, as opposed to a mere aspiration, that each lawyer provide free legal services. However, due to strong resistance from the members of the bar, many of whom were willing to abandon the Model Rules project rather than accept the notion of a public service obligation, the proposed rule was never adopted. Rather, the Kutak Commission returned to the completely voluntary model set forth in the Code of Professional Responsibility:

A Lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or at a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

As adopted in 1983, Model Rule 6.1 and its official commentary failed to clarify the ambiguity that has surrounded the profession's understanding of public service. Like the Code, Model Rule 6.1 established that, from a viewpoint of professional responsibility, a lawyer is not required to perform public service; rather, as with the Code, the decision whether to engage in pro bono service "ultimately rests" with the individual attorney, whose failure to perform such service is not to be enforced through "disciplinary process." And yet, as the comment to the original rule stated, the policy of the ABA, as established by the House of Delegates in 1975, is that it is "the basic responsibility of each lawyer engaged in the practice of law to provide public

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73. Model Rule 6.1 has been recently amended to reflect an aspiration that each lawyer provide fifty hours of pro bono service a year. See infra notes 86-90 and accompanying text.

interest legal services." The reason for this conclusion, the comment stated, is that "[t]he rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means." This language certainly implies that lawyers have a greater role in society than merely, from a sense of altruism, volunteering their services as a matter of personal conviction. And yet, by its very terms, the original version of Model Rule 6.1 perpetuated the notion that *pro bono* work is a matter of personal conviction, not to be imposed, and instead only to be encouraged. One wonders how the Kutak Commission could settle on such notion of legal ethics, when the availability of legal services is so "imperative," especially for persons "of modest and limited means."

In 1986, the vexing question of whether there is a fundamental duty of public service became even more complicated when the ABA's Commission on Professionalism, which had been convened to study the decline in professionalism in the bar over the last thirty years, concluded that "the practice of law 'in the spirit of public service' can and ought to be the hallmark of the legal profession." According to the Commission, *pro bono* services are "a moral obligation on the part of the individual attorney." The basis for this statement, the Commission concluded, derived from the "lawyer's exclusive franchise to practice law and his vital role in the administration of justice." Such a statement represents a fundamentally different notion of legal ethics than the traditional view—that public service is a matter of mere charity—and, in fact, touches on the very essence of why lawyers should

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75. *Id.*
76. *Id.*
77. *Id.*
80. *Id.* at 298 (emphasis added).
81. *Id.* at 299 (quoting Whitney North Seymour's 1968 Benjamin N. Cardozo Lecture).
be considered to have a basic duty of public service. And yet, the Commission interjected a degree of ambiguity into its own understanding of lawyers' duties by noting that it was not recommending a "mandatory pro bono commitment" because, inter alia, "it would be antithetical to the tenets of public service to have to conscript lawyers." This refrain sounds very much like the more traditional approach to public service, which views pro bono efforts as a matter of charity that emanates from the conscience of each individual attorney. Additionally, although the Commission set forth numerous recommendations to improve professionalism in the legal community, the Commission made no recommendations to alter the profession's basic understanding, as set forth in the governing rules of professional conduct, that public service is ultimately an inspirational ideal, not to be imposed as a matter of basic professional responsibility. As a result, a fair reading of the Commission's conclusions still leads to the inescapable conclusion that the ABA, despite strong rhetoric to the contrary, has yet to accept the notion that lawyers have a fundamental duty to perform public service on behalf of the poor.

In 1993, the ABA House of Delegates approved an amended version of Model Rule 6.1 that only adds to the confusion surrounding the profession's understanding of public service. Renamed "Volun-

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82. See infra notes 97-115 and accompanying text.
83. 112 F.R.D. at 298.
84. See supra notes 48-76 and accompanying text.
85. The new Rule 6.1 reads:
A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
   (1) persons of limited means or
   (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
(b) provide any additional services through:
   (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would otherwise be inappropriate;
tary Pro Bono Publico Service,” the rule now explicitly states that “a lawyer should aspire to render at least (50) hours” of pro bono legal services per year. By couching this yearly goal in aspirational terms, and explicitly referring to public service as “voluntary,” the rule reinforces the notion that public service is a discretionary ideal, that, although important, is not a matter of basic professional duty. To buttress this point, the official comment to amended Rule 6.1 states that, as with the original rule, the rule is “not intended to be enforced through the disciplinary process.” And yet, the comment to the amended rule repeats the language first set forth in the Code, that “every lawyer, regardless of professional prominence or professional work load, had a responsibility to provide legal services to those unable to pay.” Moreover, the official comment unambiguously states that “[b]ecause the provision of pro bono services is a professional responsibilities, it is the individual ethical commitment of each lawyer.” Such commanding language certainly implies that public service is not merely discretionary; rather, any lawyer who fails to fulfill the duty, as opposed to mere aspiration, of public service would be in violation of the ethical mandates of the profession. Because there are no penalties for a breach of the duty of public service, however, the Model Rules set forth a very confusing understanding of pro bono services that, in the end, leaves unclear whether public service can be said to be a professional responsibility that must be performed by every member of the profession.

In sum, the American legal profession has not yet embraced the concept that lawyers owe a duty, as opposed to mere aspiration, of public service. Although there has been an undercurrent of sentiment

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or
(3) participation in activities for improving the law, the legal system or the legal profession.
In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

86. Id. (emphasis added).
87. Id.
88. Id. cmt.; see supra note 63 and accompanying text.
favoring an established obligation of public service, the dominant view of pro bono activity has been, and continues to be, that public service is an act of charity, which is not to be compelled as a matter of basic professional responsibility. The question is whether this dominant view should continue to flourish given the desperate needs of the poor for legal services, and the cogent and forceful arguments favoring a fundamental duty by lawyers to help assure that all members of society have access to needed legal resources.

IV. THE FAILURE OF THE VOLUNTARY PRO BONO SYSTEM

Because the legal profession has been unwilling to impose a duty of public service, the availability of legal resources for the poor continues to depend, in large measure, on the willingness of lawyers to perform pro bono services for those who cannot pay for them. Unfortunately, the actual participation of lawyers in pro bono activities has been “disappointingly low.” According to recent surveys, approximately eighty percent of the bar engages in no form of pro bono activity on behalf of the poor. By corollary, the vast bulk of legal work for

90. See supra notes 2-25 and accompanying text.
91. See infra notes 103-120 and accompanying text.
92. Wechsler, supra note 16, at 913 (quoting MARRERO COMMITTEE REPORT, supra note 16, at 18); see also Barlow F. Christensen, The Lawyer's Pro Bono Publico Responsibility, 1 AM. B. FOUND. RES. J. 1, 8 (1981) (characterizing lawyer pro bono rates as "a mere token.").
93. See Chaifetz, supra note 17, at 1697 (citing AMERICAN BAR ASSOCIATION CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, 1990 DIRECTORY OF PRIVATE BAR INVOLVEMENT PROGRAMS 146-47 (May 1990)); see also Wechsler, supra note 16, at 913 (noting that “[i]t may be that as few as fifteen to twenty percent of practicing lawyers are actively involved in pro bono representation of the poor.”). Others have estimated that the number of attorneys actively involved in pro bono activities to be no more than ten percent. See MARRERO COMMISSION REPORT, supra note 16, at 99; Valerie Lezin, Bridging the Legal Services Gap, CALIFORNIA LAWYER, Aug. 1986, at 15, 61.

In New York State, the rate of attorneys who perform pro bono service on behalf of the poor may be higher. The Marrero Review Committee, created by the Chief Judge of New York State to monitor voluntary pro bono activity by practicing attorneys, concluded that, in 1990 and 1991, close to fifty percent of attorneys in the State reported in a self-reporting survey that they contributed approximately forty hours a year to "qualifying pro bono activities," which include (i) free legal services to indigent civil and criminal clients; (ii) free legal services to organizations which "primarily address the needs of the poor": and
the poor is performed by only a very small percentage of practicing attorneys.\footnote{4}

To some, the answer to the vexing problem of unmet legal needs of the poor seems quite clear: if lawyers refuse to volunteer their services, they should be forced to do so through a mandatory pro bono requirement, whereby every lawyer would be compelled, as a condition of bar membership, to perform a set amount of legal services for the poor.\footnote{5} In theory, such programs could significantly contribute to the amount of lawyer hours that are available to serve the legal needs of the poor.\footnote{6} Practically, however, given the active resistance to manda-

\footnote{4}{See Wechsler, supra note 16, at 913; WOLFRAM, supra note 12, at 950; see also Smith, supra note 71, at 729.}

The irony is that, despite the distressingly low number of attorneys who perform public service, members of the bar conceive of themselves as having a responsibility to engage in pro bono activities. A 1985 survey conducted by the ABA, for example, revealed that close to three quarters of attorneys surveyed by the ABA said they believed that "all lawyers do have an obligation to do pro bono" for those in need. See Lauren R. Reskin, Lawyers Fall Short of Self-Imposed Pro Bono Standards, 71 A.B.A. J. 42 (Nov. 1985); see also Wechsler, supra note 16, at 913 & n.14 (noting that 81% of the lawyers surveyed defined pro bono as legal representation of the poor and handicapped). This view of a pro bono "obligation," however, entails only a "self-imposed duty," which allows each lawyer to engage in such representation based on personal predilection and without compulsion. See Reskin, supra note 94, at 45. This view is indistinguishable from the bar's historical approach to the notion of public service, which views public service as a matter of individual conscience rather than collective responsibility. See supra notes 26-91 and accompanying text.

\footnote{5}{The proponents of mandatory pro bono programs are numerous. In addition to the recommendations set forth by the Special Committee on the Lawyer's Pro Bono Obligations of the Association of the Bar of the City of New York, see supra note 26 and the Committee to Improve the Availability of Legal Services, supra note 16, academic support for compelled public service by members of the bar has been strong. See, e.g., Joseph L. Torres & Mildred R. Stansky, In Support of a Mandatory Public Service Obligation, 29 EMORY L.J. 997, 1002 (1980); Smith, supra note 71, at 729; Dean S. Spencer, Mandatory Public Service for Attorneys: A Proposal for the Future, 12 Sw. U. L. REV. 493 (1981); Steven B. Rosenfeld, Mandatory Pro Bono: Historical and Constitutional Perspectives, 2 CARDOZO L. REV. 255 (1981).}

\footnote{6}{For example, one commentator has noted that, in New York State alone, if the recommendations of the Marrero Committee Report were fully implemented, a minimum of 80,000 additional low-income service hours would be generated. See Silverman, supra note}
tory public service, compulsory programs to provide meaningful legal resources to the poor would be very difficult to implement. Moreover, even if instituted, such programs could well meet with active resistance by lawyers who would seek to avoid their pro bono obligation. The net effect could become an enforcement nightmare, where bar associations would be required to expend a disproportionate amount of resources to pursue and then discipline delinquent lawyers who refuse to satisfy the minimum requirements of mandatory service.\textsuperscript{97,98}

97. Resistance to proposed mandatory pro bono initiatives doomed the Kutak Commission's proposal to incorporate mandatory public service into the Model Rules of Professional Responsibility. See \textit{supra} note 71 and accompanying text. Moreover, despite the strength of the recommendations set forth by both the ABCNY Report and the Marrero Committee Report, active resistance from the organized bars prevented the adoption of a mandatory requirement in New York State. See \textit{supra} notes 16-26 and accompanying text.

Professor Wechsler, who has chronicled attorneys' attitudes towards mandatory pro bono initiatives, notes that the level of hostility to such programs is "strong, even venomous." Wechsler, \textit{supra} note 16, at 921. For example, one past president of the ABA has analogized opposition to mandatory pro bono programs to the opposition that would be engendered by a proposal to license attorneys to commit infanticide. Other vituperative remarks that have been made about mandatory pro bono programs include "Big Brother," "the Soviet Union," and "slavery." \textit{Id.} at 921 n.79.

Despite such active resistance, however, small scale mandatory pro bono efforts have been initiated in a number of limited geographic regions. For example, to date, four local bar associations—DuPage County, Ill.; Eau Claire County, Wis.; Orange County, Fla; and Tallahassee, Fla.—have implemented programs to require their members to perform a minimum number of assigned cases per year. In addition, mandatory pro bono programs have been implemented pursuant to court order in El Paso, Texas, and by federal courts in the Eastern District of New York and the Eastern District of Arkansas. Together, these programs affect no more than 7,750 attorneys per year. See Jim Miskiewicz, \textit{Mandatory Pro Bono Won't Disappear}, NAT'L L.J., Mar. 23, 1987, at 1, 8.

98. See ABCNY REPORT, \textit{supra} note 26, at 62-63 (reporting that numerous committees of the Association of the Bar of the City of New York indicated concern over the enforceability of a mandatory pro bono requirement). As one dissenter from the ABCNY Report has noted:

The proposal is impractical because it is unenforceable. A lawyer's violation of a mandatory pro bono obligation will be a "victimless crime." No specific client will have been badly served. There will be no one to complain. A mere reporting mechanism will not cause compliance, and the public's perception of the bar's hypocrisy will be heightened. A complex enforcement mechanism conjures up disturbing images of further government regulation.

Dissenting Statement of Ronald B. Alexander, ABCNY REPORT, \textit{supra} note 26, at 44.
The resistance of the bar to compelled service, however, is not the only obstacle to mandatory programs. Because the legal profession has yet to articulate or to accept a vision of legal ethics that incorporates a basic responsibility of public service, opponents of mandatory service have argued that it would be indefensible to compel lawyers to provide services free of charge, no matter the gravity of the legal services crisis. According to this sentiment, which is often couched in constitutional terms, forcing lawyers to perform free legal services would violate the individual lawyer's autonomy and her right to decide how to distribute her own labor. This view has gained some currency in judicial pronouncements on the matter, although by no means is there a consensus that there is any insurmountable obstacle, constitutional or otherwise, to mandatory pro bono requirements. Ultimately, the op-

99. This position has been put forth most prominently by Professor Charles Fried:
Must the lawyer expend his efforts where they will do the most good, rather than where they will draw the largest fee, provide the most excitement, prove the most flattering to his vanity, whatever? Why must he? If the answer is that he must because it will produce the most good, then we are saying to the lawyer that he is merely a scarce resource. But a person is not a resource. He is not bound to lead his life as if he were managing a business on behalf of an impersonal body of stockholders called human society . . . . If the lawyer is really impressed to serve those admitted social needs, then his independence and discretion disappear, and he does indeed become a public resource cut up and disposed of by the public's needs.

Fried, supra note 24, at 1078-79. For critiques of Professor Fried's sentiments, see, e.g., Edwards, supra note 15 at, 1154-55 (noting that Fried's views—termed the "total commitment model"—"helps explain the decline in public spiritedness" in the legal profession).

100. For authority that deems compelled legal service to be constitutionally infirm, see, e.g., Williamson v. Vardeman, 674 F.2d 1211 (8th Cir. 1982) (holding that counsel's due process rights were violated when ordered to expend funds to defend indigent client); DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987) (explaining that attorneys cannot be compelled to represent criminal clients without just compensation); Cunningham v. Superior Court, 177 Cal. App. 3d 336 (1986) (compelling attorney to represent client in paternity suit violates equal protection clause); People v. Randolph, 219 N.E.2d 337 (Ill. 1966) (requiring court to reimburse and compensate attorneys who were appointed to represent indigent clients for out-of-pocket expenses); Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972); State ex rel. Scott v. Roper, 688 S.W.2d 757 (Mo. 1985) ("[the court] will not compel . . . attorneys to discharge alone a duty which constitutionally is the burden of the state.").

 Courts that have upheld mandatory service include Branch v. Cole, 686 F.2d 264 (5th Cir. 1982) (holding that lawyers are bound to make counsel available to those unable to pay); United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965) (holding that a court
position to compelled public service rests on the same traditional view of legal ethics previously described—that, irrespective of the compelling need of the poor for legal services, lawyers cannot be mandated to donate their labor; instead, according to this view, *pro bono* must remain a matter of individual conscience, to be performed as an act of benevolence and charity, rather than as a matter of professional responsibility.  

Given the current crisis of unmet legal needs of the poor, and the failure of lawyers, on the whole, to volunteer their efforts through *pro bono* services, is the bar justified in refusing to accept a duty of public service for its members? Put another way, is the dominant view of legal ethics—that *pro bono* activity is a matter of charity rather than professional responsibility—justified, given today’s crisis in legal services? As argued in the next section, given the unique role that lawyers play in our system of justice, the legal profession must recognize that lawyers have a fundamental duty to help assure that the poor have access to needed legal services.


In 1989, the Supreme Court granted certiorari in *Mallard v. United States Dist. Court*, 490 U.S. 296 (1989), to construe the meaning and scope of 28 U.S.C. § 1915(d), which provided that a court could “request an attorney to represent [a person] unable to employ counsel.” *Id.* at 298. The majority, in a 5-4 opinion, limited its holding to the statutory language at issue, finding that the term “request” did not justify treating the statute as allowing a court to mandate that a lawyer provide free legal representation to an indigent person. Because the holding in *Mallard* is limited to statutory construction, it sheds little light on the Supreme Court’s view as to the constitutionality of mandatory *pro bono* programs.

As supporters of mandatory programs steadfastly maintain, the mandatory *pro bono* initiatives do not run afoul of constitutional or moral limitations. *See, e.g.*, Appendix C, MARRERO COMMITTEE REPORT, *supra* note 16, at 153-62 (detailing the reason why mandatory *pro bono* does not violate the 5th, 13th, or 14th Amendments to the United States Constitution).

101. *See supra* notes 26-32 and accompanying text.
V. THE LAWYER'S DUTY OF PUBLIC SERVICE

A. The Lawyer's Unique Role in Distributing Legal Services

The traditional notion that lawyers do not have an affirmative duty to serve fails to account for the special and unique role that lawyers play in the system of justice. As a leading proponent of a lawyer's duty of service, David Luban points out in his seminal study *Lawyers and Justice: An Ethical Study* that there are compelling reasons why lawyers must accept, as a matter of professional duty, an obligation to help serve those in need. This duty, Luban explains, derives not merely from the poor's needs for legal services, but instead from categorical arguments grounded in the very ideals that legitimate the American polity.

The argument in favor of a duty of public service is based on two postulates, the first being that it is imperative that the poor have access to the legal system. As Luban notes, the essential legitimizing principle of the American legal system is that all people are afforded "equal justice under the law." This ideal implies not only an equality of political right, such as the right to vote, but also "equality of legal right," meaning that each person must have the opportunity to redress legal grievances through the adjudicative process. Because legal rights are meaningless unless they can be enforced, "the
principle of equal access to the legal system is part of our framework of political legitimacy . . . [and] to deny a person legal assistance is to deny her equality before the law, and that to deny someone equality before the law delegitimizes our form of government."\textsuperscript{107}

The second premise Luban puts forth is that meaningful access to the legal system requires the assistance of a lawyer. Model Rule 6.1 acknowledges the essential truth of this conclusion.\textsuperscript{108} In describing what he calls the "necessity claim," Luban notes:

\begin{quote}
It is an obvious fact . . . that all of our legal institutions (except small claims court) are designed to be operated by lawyers and not by laypersons. Laws are written in such a way that they can be interpreted only by lawyers; judicial decisions are crafted so as to be fully intelligible only to the legally trained. Court regulations, court schedules, even courthouse architecture are designed around the needs of the legal profession.\textsuperscript{109}
\end{quote}

There can be little dispute on this matter, as an illustration makes clear. In federal courts throughout the country, indigent \textit{pro se} prisoners pursue legal claims under the federal civil rights statute\textsuperscript{110} for a variety of constitutional deprivations, including the denial of due process in disciplinary hearings and the unauthorized use of excessive force by prison personnel. Invariably, these lawsuits languish on what are known as "pro se lists" until a lawyer either volunteers or otherwise accepts an appointment. Once appointed, the lawyer can achieve what the client cannot—including: conducting pre-trial discovery (drafting meaningful document requests and taking depositions); appearing in

\begin{itemize}
\item \textsuperscript{107} \textit{Id.} at 251. The far reaching implications of an illegitimate form of government are clear: "if the have-nots are excluded from access to the legal system, 'the end whereof to protect and redress the innocent' . . . , their alternative is the law of the streets, of resistance that is entirely rightful." \textit{Id.} at 255 (quoting \textsc{John Locke}, \textsc{Second Treatise of Government, in Two Treatises of Government} § 20 at 322 (Cambridge University Press 1960)).
\item \textsuperscript{108} Rule 6.1 states:
\begin{quote}
The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.
\end{quote}
\textsc{Model Rules of Professional Conduct} Rule 6.1 cmt.
\item \textsuperscript{109} \textsc{Luban}, supra note 11, at 244.
\item \textsuperscript{110} \textit{See} 42 U.S.C. § 1983 (1988).
\end{itemize}
court for motion practice; and using the available technology necessary to advance a legal claim (including the use of word processors, secretarial assistance, and paralegal support). Even assuming that an incarcerated litigant could proceed through discovery and pre-trial proceedings, very few (if any) will have the legal acumen to comprehend the perplexing legal issues of law, and, if trial is warranted, to master the basics of federal civil procedure. In the end, meaningful access to the legal system for a pro se prisoner can only occur after counsel has been appointed. Litigating in federal court may entail some of the more complicated aspects of our legal structure; nevertheless, it goes without saying that virtually all of our legal institutions are designed to be operated by lawyers, and not laypersons. As a result, meaningful access to the legal system unavoidably requires the services of competent counsel.

Given that the legitimacy of the legal system requires that every member of society, including the poor, have access to a lawyer, the remaining question is who must assure that access? Due to the unique and privileged role granted to members of the bar, lawyers have an affirmative obligation to provide the poor with needed legal resources. Lawyers are not artisans; instead, they are professionals who retail in an extremely valuable commodity—"the law"—which must be available to all for the system to retain its legitimacy. And yet, because the state has created a monopoly over legal services, which restricts the practice of law exclusively to licensed attorneys, lawyers alone are in a unique position to meet the legal needs of the poor. In fact,

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111. Some of the more common questions that arise in such federal civil rights actions include the doctrine of qualified immunity of prison personnel and the applicability of the Fourth, Eighth, and Fourteenth Amendments of the Federal Constitution to the prison environment, matters that are difficult even for lawyers to understand, much less master.

112. Although some non-courtroom matters, such as applying for government benefits, can be performed without legal assistance, an attorney is critical in virtually all adjudicative proceedings, such as government benefit termination proceedings, housing court matters, and the like. See Luban, supra note 11, at 244.

113. Id. at 286.

114. Id. The argument that a duty of public service arises from the lawyer's monopoly over legal services has been espoused by numerous scholars and commentators. For example, Judge Harry T. Edwards of the D.C. Circuit Court argues in favor of a lawyer's "positive duty to serve the public good," in part, because of the monopoly that lawyers hold
any layperson who attempts to assist the poor with their legal needs would be punished under unauthorized practice of law statutes.\textsuperscript{115} Given this restriction on the availability of legal resources, lawyers are the only members of society who can help meet the legal needs of poor.\textsuperscript{116} As a result, to maintain the legitimacy of the legal system, each lawyer must help ensure that legal services are available to all, including those who are too poor to pay for them.\textsuperscript{117}

Despite the force of this argument, some have claimed that it is unfair to single lawyers out and burden them with solving the legal needs of the poor. According to this view, the burden of distributing

over access to the legal system. See Edwards, supra note 15, at 1150, 1156-57; see also Ehrlich, supra note 60, at 725:

\begin{quote}
[E]very lawyer is part of the justice system with an obligation to help make that system work. We have a monopoly over legal services, and with the monopoly comes an obligation to serve the public. In my view, the operational consequences of that obligation are a requirement to provide some representation to those who would otherwise be unrepresented.
\end{quote}

The Marrero Committee Report came to the same conclusion:

\begin{quote}
[L]awyers, independent of their ordinary duty as citizens, have a professional responsibility to mobilize their own resources in order to meet the [legal needs of the poor]. This duty flows from the lawyer's role as a professional and an officer of the court and arises particularly from the lawyer's possession of unique training and skills and of the exclusive, publicly granted franchise to practice law. Indeed, no other group is qualified or lawfully entitled to fill the need for legal services.
\end{quote}

MARRERO COMMITTEE REPORT, supra note 16, at 27.

\begin{itemize}
\item\textsuperscript{115} Thirty-seven jurisdictions have enacted laws that punish the unauthorized practice of law. See Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 STAN. L. REV. 1, 11 (1981).
\item\textsuperscript{116} This argument gains additional force from the fact that the voluntary system pro bono services has wholly failed to meet the legal needs of the poor. See supra notes 92-94 and accompanying text. If lawyers are unwilling to donate their time to legitimize the legal process, then they must be expected to do so as a matter of professional responsibility.
\item\textsuperscript{117} See LUBAN, supra note 11, at 286. The only alternative to this conclusion would be the deregulation of legal services, so that non-lawyers would be allowed to assist the poor with their legal needs. Id. at 244-45 n.20. Arguably, deregulation could assist in meeting the legal needs of the poor. Given the complexity of the law and its procedures, however, it is difficult to imagine a system in which non-lawyers could resolve many of the more difficult legal needs of the poor. Thus, because lawyers would remain essential to the legal process even in a deregulated system, the argument in favor of a duty of service retains its force. Of course, given the extreme unlikelihood that lawyers would ever be willing to forego their professional monopoly, the question whether to deregulate legal services remains, at best, an academic pursuit.
\end{itemize}
legal services to the poor should be borne by society as a whole, rather than by lawyers alone.\textsuperscript{118} The problem with this claim, however, is that it ignores the fact that the monopoly that lawyers retain over legal services confers substantial benefits on lawyers, including granting lawyers the privilege of retailing lucrative legal services at prices that are higher than could be commanded in a deregulated market.\textsuperscript{119} As such, requesting lawyers to expend a percentage of time to assist those in need is nothing more than a fair surcharge for the windfall that accrues from the legal monopoly. Moreover, because access by the poor to legal services is a necessary precondition to the legitimacy of the legal process, lawyers must accept a duty of service, notwithstanding that society has shunned the legal needs of the poor. Any other conclusion would allow lawyers to retail their trade—providing legal services to paying clients—in a legal system that has lost its legitimacy. Although some lawyers would undoubtedly be willing to continue to practice law such an unjust system, fundamental notions of legal ethics require that every lawyer work to maintain the integrity of the legal profession.\textsuperscript{120} As a result, lawyers cannot ignore the legal services crisis, even if society chooses to do so.

In conclusion, for the legal system to be legitimate, society must afford legal services—access to a lawyer—to the poor. Because the monopoly that benefits lawyers limits the poor’s access to the legal system, lawyers have a unique obligation to help legitimize the very system in which they practice. Consequently, all attorneys have a fundamental duty to assist in meeting the legal needs of the poor. This

\textsuperscript{118} Put another way, “it is unfortunate that poor people cannot obtain the services of lawyers, but that is not the fault of the legal system. It is rather the fault, if fault is, of the economic system, which allows poverty to exist.” \textsc{Luban, supra} note 11, at 246; \textit{see also} Fried, supra note 34, at 1079-80 (noting that mandatory pro bono programs are a “tax” on lawyers, who are unfairly singled out to solve society’s problems).

\textsuperscript{119} \textit{See Luban, supra} note 11, at 246-47.

\textsuperscript{120} \textit{See Model Code of Professional Responsibility} Canon 1 (1985) (“A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession”); EC 1-1 (“Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.”); DR 1-102(A)(5) (“A lawyer shall not engage in conduct that is prejudicial to the administration of justice.”); Preamble, \textit{Model Rules of Professional Conduct} (1989) (“As a public citizen, a lawyer should seek improvement in the law, the administration of justice.”).
is not an argument borne of necessity; rather, the duty of public service arises from the very nature of a system that seeks Equal Justice Under Law.

B. Implications of a Duty of Public Service

Several implications result from the notion that lawyers owe an affirmative duty of public service. First and foremost, the rules governing the professional responsibilities of lawyers must be amended to reflect the fact that every lawyer, as a condition of membership, has a professional responsibility to help assure that legal services are available to those in need. The revised rule should unambiguously articulate the notion that every lawyer has the responsibility to engage in pro bono legal activities on behalf of those who cannot afford legal services. This does not necessarily mean that the amended rule should mandate that each lawyer spend a certain number of hours per year providing direct legal services to those in need. Rather, a flexible approach should be adopted to allow each attorney to determine how best to comply with the professional obligation of public service.121 Undoubtedly, some will choose direct legal services; others will make a financial contribution to appropriate legal services organizations; still others may decide to become active in a bar association subcommittee that is devoted to maximizing the poor's access to legal services. Ultimately, the point is not to dictate how the professional service obligation is performed, but rather to articulate a clear rule that will inform each member of the profession that a basic professional responsibility exists to help assure that legal services are available to all.

Second, the bar should make a special effort to help educate lawyers about their public service responsibilities and to help facilitate lawyer pro bono activities. For states that mandate Continuing Legal Education for lawyers, training about public service should become an integral part of the educational process. For states that do not require CLE, special programs should be created to discuss the professional duty of public service. Topics to be covered in such seminars should

121. The ABA Committee on Professionalism agrees with this conclusion. See ABA REPORT ON PROFESSIONALISM, supra note 79, at 797.
include the nature and extent of the duty of service, an overview of
the crisis in legal services for the poor, and training sessions to help
practitioners learn the substantive areas of poverty law, such as hous-
ing law, government benefits law, and the like. Bar associations should
also distribute training materials to all practitioners to help explain the
nature and extent of the professional duty of public service and to sug-
est methods on how to perform the duty.

In addition, law schools must begin teaching students about their
duty of public service as part of the required professional responsibility
curriculum.\textsuperscript{122} As the ABA Commission on Professionalism has stat-
ed, "law schools . . . constitute the greatest opportunity" to instill an
ethic of public service in young lawyers.\textsuperscript{123} To communicate to stu-
dents the importance of the duty of public service, several concrete
modifications to the curriculum should be implemented. First, law
schools should make a concerted effort to expose students to the legal
needs of the poor, so as to sensitize students to the nature and scope
of the legal services problem.\textsuperscript{124} One method to achieve this result
may be to establish a curricular requirement that each student, as a
condition of graduation, is expected to perform a designated amount of
\textit{pro bono} work.\textsuperscript{125} Second, the ethic of public service should not be

\begin{itemize}
  \item \textsuperscript{122} All ABA-accredited law schools are required to provide "instruction in the duties
  and responsibilities of the legal profession." ABA APPROVAL OF LAW
  SCHOOLS—STANDARDS AND RULES OF PROCEDURE Standard 302(a)(iv).
  See ABA REPORT ON PROFESSIONALISM, \textit{supra} note 79, at 266 n.67.
  \item \textsuperscript{123} See ABA REPORT ON PROFESSIONALISM, \textit{supra} note 79, at 266.
  \item \textsuperscript{124} As the Dean of Tulane Law school has noted, "true legal education involves ex-
  posure to the problems of the underclass, the need to sensitize professionals to the worlds
  they usually ignore." John Kramer, \textit{Mandatory Pro Bono at Tulane Law School}, NAPIL

  \item \textsuperscript{125} To date, nine law schools throughout the country mandate that their students fulfill
  a pro bono requirement as a condition of graduation: Florida State University School of
  Law (20-hour requirement), University of Louisville School of Law (30-hour requirement),
  University of Richmond T.C. Williams School of law (20-hour requirement, Stetson Univer-
  sity school of law (10-hour, non-law related, requirement), Tulane Law School (20-hour
  requirement), University of Pennsylvania School of Law (70-hour requirement), Southern
  Methodist University School of Law (30-hour requirement), the Jacob A. Fuchsberg Law
  Center at Touro College (20 hour requirement, need not be law related), and Valparaiso Uni-
  versity School of Law (20-hour requirement). Two other schools, the University of Hawaii
  W.S. Richardson School of Law (60-hour requirement) and Columbia University School of
  Law (40-hour requirement), have announced curricular requirements of pro bono work start-
confined to professional responsibility classes alone, but instead should be taught and discussed pervasively throughout the law school curriculum.  

Third, each law school should offer a variety of different substantive courses and clinical programs related to various aspects of poverty law to increase student exposure to the legal needs of the poor. Courses devoted to the ethical considerations of public interest law would also be very useful in helping law students appreciate their public service responsibilities. Finally, law schools should focus attention on whether there is merit to the charge that the law school experience tends to devalue the importance of public interest law by sending messages to law students that work for the poor is less worthy than work for corporate and business interests. To counter-
act these negative signals, law schools must work to create a more positive atmosphere towards public interest law, so that student desires to engage in pro bono activities are nurtured, and not inhibited.

Finally, establishing a clear duty of public service should relieve some of the pressure surrounding mandatory pro bono initiatives. Hopefully, rates of attorney pro bono activity will significantly improve once lawyers begin to understand that their professional responsibilities include the fundamental duty to perform public service on behalf of the poor. However, if after an appropriate period of time, lawyers continue to ignore their public service responsibilities, then mandatory pro bono programs should be instituted. Although active resistance to such programs is sure to continue, such opposition will be easier to overcome after the profession has clearly articulated a vision of legal ethics that includes a basic duty of public service. Moreover, irrespective of the resistance, however, the bar will be justified in imposing mandatory pro bono requirements to ensure that lawyers fulfill the basic responsibility of public service.

VI. CONCLUSION

Given the crisis in legal services for the poor, the legal profession needs to acknowledge that the basic tenets of the system of justice require that each lawyer accept, as a matter of professional responsibility, the duty to help assure that the poor have access to needed legal services. As such, lawyers can no longer conceive of public service as a matter of mere charity, to be performed at the discretion of each individual lawyer. Once the bar articulates a clear basis for the

duty of service and implements appropriate initiatives to encourage *pro bono* efforts, lawyers must begin to take their public responsibilities seriously. If they do not, alternative methods to secure legal services for the poor, including mandatory *pro bono* programs, should be explored and implemented.