

IMPERFECT DUTY: LAWYERS' OBLIGATION TO FOSTER ACCESS TO JUSTICE

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Access to justice is an integral component of the legal system. However, the question of upon whose shoulders the obligation of ensuring this access should fall has been widely debated. In particular, do lawyers, as part of the legal profession, have a special obligation to foster access to justice?

In this article, the author explores the legitimacy of various arguments with respect to whether lawyers should carry this obligation to a greater extent than other members of society. The author begins by critiquing the traditional arguments related to imposing such an obligation on lawyers — for instance, the refined monopoly arguments. She then goes on to critically consider an alternative argument: that imperfections in the market for legal services justify the existence of a special obligation for lawyers. An examination of the limitations of this justification follows. Overall, the author concludes that while the arguments arising from imperfections in the legal market offer the best justification for seeing lawyers have a special obligation to ensure access to justice, the claims from the argument are modest ones, and any policy response in furtherance of such an obligation should be similarly modest.

L'accès à la justice est un élément intégral du système judiciaire. Cependant, la question de déterminer sur quelles épaules devrait reposer cette obligation a fait couler beaucoup d'encre. Tout particulièrement, les avocats n'ont-ils pas, dans le cadre de leur profession, une obligation spéciale de faciliter l'accès à la justice ?

Dans cet article, l'auteure explore la légitimité de divers arguments ç savoir si les avocats devraient ou non assumer cette obligation dans une plus grande mesure que les autres membres de la société. L'auteure commence par faire la critique des arguments traditionnels relatifs à l'imposition de cette obligation aux avocats, par exemple, les observations sophistiquées relatives au monopole. Elle examine ensuite un autre argument, notamment le fait que les imperfections sur le marché des services juridiques justifient une obligation spéciale de la part des avocats. L'examen des restrictions de cette justification est donnée ensuite. Dans l'ensemble, l'auteure conclut qu'alors que les arguments découlant des imperfections du marché juridique présentent une meilleure justification pour les avocats de veiller à l'accès à la justice, les revendications à cet égard sont modestes et toute politique en réponse à cette obligation devrait être tout aussi modeste.

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I. INTRODUCTION

Do lawyers have a moral obligation to foster access to justice? In particular, does a lawyer have an obligation to foster access to justice which extends beyond that which exists for society as a whole, and which has priority over other services aimed towards the public interest that a lawyer could provide?

Rules governing the ethics of Canadian lawyers are premised upon the existence of this duty. While noting the lawyer's freedom to decide whom to represent,¹ the rules assert a general obligation for each lawyer to contribute to the availability of legal services. Typical is the commentary to Chapter 1, Rule 4 of the Law Society of Alberta's (LSA) *Code of Professional Conduct*:

The right of every person to legal counsel creates a corresponding obligation on the part of society and the profession to supply legal representation. Such representation must be available in fact, and not merely in theory, or the right to counsel is meaningless.

Members of society with the most pressing need for legal services often encounter difficulty in obtaining representation because of economic or social disadvantages. Lawyers should be willing to assist such persons through participating in legal aid programs, accommodating requests by the court to represent parties appearing before the court, and reducing or waiving fees in appropriate circumstances.

A lawyer should be slow to decline to act for a disadvantaged client unless the refusal has substantial ethical justification.²

The general commentary to Chapter 1 of the *LSA Code* further states that:

¹ See Law Society of Alberta (LSA), *Code of Professional Conduct*, online: LSA <<http://www.lawsociety.alberta.com/files/Code.pdf>> c. 14, g. 1 [*LSA Code*]: "[A] lawyer has no general duty to agree to act in a particular case." See also Canadian Bar Association (CBA), *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 2006) c. 14, cmt. 6 [*Canadian Code*]; Law Society of Manitoba, *Code of Professional Conduct*, online: Law Society of Manitoba <http://www.lawsociety.mb.ca/code_and_rules/code_contents_eng.htm> c. 14, cmt. 6 [*Manitoba Code*]; The Law Society of Newfoundland & Labrador, *Code of Professional Conduct*, online: The Law Society of Newfoundland & Labrador <<http://www.lawsociety.nf.ca/code/code.asp>> c. 14, cmt. 6 [*Newfoundland & Labrador Code*]; Law Society of Prince Edward Island, *Code of Professional Conduct*, online: Law Society of Prince Edward Island <http://www.lspei.pe.ca/pdf/code_of_professional_conduct_CBA1987.pdf> c. 14, cmt. 6 [*P.E.I. Code*]; Nova Scotia Barristers' Society, *Legal Ethics Handbook*, online: Nova Scotia Barristers' Society <http://nsbs.org/legalethics/Handbook_AmendedOct2007.pdf> c. 15, cmt. 15.4 [*Nova Scotia Handbook*]; The Law Society of Saskatchewan, *Code of Professional Conduct*, online: The Law Society of Saskatchewan <<http://www.lawsociety.sk.ca/newlook/Publications/Code2001/CodeCompleteNov03.pdf>> c. 14, cmt. 5 [*Saskatchewan Code*]: "The lawyer has a general right to decline particular employment." See also The Law Society of Upper Canada (LSUC), *Rules of Professional Conduct*, online: The LSUC <<http://www.lsuc.on.ca/media/rpc.pdf>> r. 3, cmt. 3.01 [*Upper Canada Rules*]: "The lawyer has a general right to decline a particular representation." See also Law Society of New Brunswick, *Code of Professional Conduct*, online: Law Society of New Brunswick <http://www.law.society-barreau.nb.ca/assets/documents/Code_of_professional_conduct_March_2006.pdf> c. 4, cmt. 17 [*New Brunswick Code*]: "Save where the court orders otherwise, the lawyer may decline to act for a person requesting legal advice or any other professional legal service" [footnotes omitted]. See also Barreau du Québec, *Code of Ethics of Advocates*, R.R.Q., 1981, c. B-1, r. 1, s. 3.05.01 [*Quebec Code of Ethics*]: "The advocate may accept or refuse to provide his professional services."

² *LSA Code, ibid.*, c. 1, r. 4, cmt. 4. See also *Canadian Code, ibid.*, c. 14; *Manitoba Code, ibid.*, c. 14; *Newfoundland & Labrador Code, ibid.*, c. 14; *P.E.I. Code, ibid.*, c. 14; *Nova Scotia Handbook, ibid.*, c. 15; *Saskatchewan Code, ibid.*, c. 14; *Upper Canada Rules, ibid.*, r. 3.01; The Law Society of British Columbia (LSBC), *Professional Conduct Handbook*, online: LSBC <http://www.lawsociety.bc.ca/publications_forms/handbook/handbook_toc.html> c. 1, r. 3.

The Legal Profession Act provides that no person other than a lawyer is authorized to practise law.

As a consequence of this position of privilege, lawyers have certain enhanced responsibilities to society. The first is to ensure that competent and high-quality legal services are readily available at reasonable cost to those who require them. Lawyers also have an obligation to ensure that legal services are generally available to those that require them, and have an obligation to support legal aid plans and referral services, and to act on a *pro bono* basis in appropriate cases.³

The duty has also been acknowledged in the *pro bono* initiatives recently undertaken by some of the provincial law societies. The LSA's Pro Bono Committee justified its involvement in fostering and developing *pro bono* activities in part on the basis of this special obligation.⁴ Notably, it also defined *pro bono* broadly but only as encompassing activities with a legal aspect.⁵ Volunteerism in general was not viewed as within the *pro bono* mandate.

Finally, numerous academics, particularly in the United States, have argued in favour of lawyers being subject to some form of mandatory scheme — whether in the form of a *pro bono* service obligation, a special tax, or some combination thereof — to foster access to justice.⁶ While they vary in identification of the origins of a special obligation for lawyers, these commentators all see the obligation as an existing one which gives rise to a particular duty for lawyers to fulfill.⁷

There is also, though, considerable resistance to the idea that lawyers have a special obligation to foster access to justice. Even the above sources do not provide an unqualified endorsement of its existence. Thus, the requirement in the rules that lawyers foster access to justice is aspirational rather than enforced, and those Canadian law societies that have undertaken *pro bono* initiatives have been quick to reject the idea that *pro bono* be mandatory.⁸ Further, every attempt to introduce widespread mandatory *pro bono* programs

³ *LSA Code*, *supra* note 1, c. 1, g. 1. See also *Canadian Code*, *supra* note 1, c. 14, cmt. 5; *Manitoba Code*, *supra* note 1, c. 14, cmt. 5; *Newfoundland & Labrador Code*, *supra* note 1, c. 14, cmt. 5; *P.E.I. Code*, *supra* note 1, c. 14, cmt. 5; *Nova Scotia Handbook*, *supra* note 1, c. 15, cmt. 15.3; *Saskatchewan Code*, *supra* note 1, c. 14, cmt. 4; *Upper Canada Rules*, *supra* note 1, r. 3, cmt. 3.01.

⁴ The Committee also appears to have been impressed by the role of *pro bono* in resisting challenges to the profession's self-regulating status and in enhancing the profession's reputation. See LSA, *Pro Bono Publico – For the Public Good: Report of the Pro Bono Committee* (April 2003) (Chair: Perry Mack), online: LSA <<http://www.lawsocietyalberta.com/files/reports/probono03.pdf>> [*Pro Bono Publico*].

⁵ *Ibid.* at 4-8. See also Joint Committee of the LSBC and the CBA (B.C. Branch), *Pro Bono Publico – Lawyers Serving the Public Good in British Columbia* (2002), online: LSBC <http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/ProBono_02-06.pdf> [*Pro Bono Publico BC*]. For the purpose of the *pro bono* survey, the Committee defined *pro bono* as “legal services for persons of limited means or not-for-profit organizations, without expectation of a fee” (at 10). While the Committee did not adopt one particular definition of *pro bono*, they agreed that *pro bono* does not include non-legal community service work. See also *Pro Bono Law Ontario* (PBLO), online: PBLO <<http://www.pblo.org>> [*Pro Bono Law Ontario*], which is the major *pro bono* initiative in Ontario that is also focused on providing legal services to persons of limited means.

⁶ In Canada, the argument in favour of mandatory *pro bono* has been made most cogently by Richard Devlin: see Richard Devlin, “Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession” (2002) 25 Dal. L.J. 335.

⁷ See the discussion in Part II, below, for greater detail about the nature of the justifications offered in support of mandatory *pro bono*.

⁸ See *Pro Bono Publico*, *supra* note 4. Although, it should be noted that the reason for the rejection of mandatory *pro bono* by the Committee was that participation in the voluntary program would make a mandatory proposal unnecessary. The British Columbia Pro Bono Initiative Committee also rejected the idea of mandatory *pro bono* and outlined a plan for encouraging voluntary *pro bono* participation: *Pro Bono Publico BC*, *supra* note 5 at 13.

in the U.S. has failed,⁹ and numerous academics and other commentators have asserted strong conceptual objections to a mandatory obligation. These commentators reject the idea that lawyers have an obligation to foster access to justice which is greater than that of society as a whole, suggesting instead that societal problems demand societal solutions. They also reject the position that lawyers' public service duties must centre on legal services rather than on other needs of the less fortunate.¹⁰

Building on the work of scholars in the U.S., and Richard Devlin here in Canada,¹¹ this article explores the conceptual question of the duty to foster access to justice in the Canadian context. It considers whether there is any basis for asserting that lawyers, more than other Canadians, have an obligation to foster access to justice, and whether it is morally required for lawyers to foster access to justice in priority to engaging in other activities oriented towards the public interest. Further, it considers the policy alternatives which follow from such an obligation, to the extent that it can be established.

Part II reviews the traditional arguments offered in favour of the special obligation of lawyers to foster access to justice. It concludes that none of the traditional arguments offered in support of this obligation are especially convincing; they suffer from a variety of issues related to weak or problematic characterizations of lawyers' role in society.

Part III then explores an alternative theory in favour of such obligations, rooted in the imperfections commonly associated with the market for legal services. Specifically, it considers the argument that those imperfections provide an "economic windfall" to lawyers which results in individuals being "largely priced out of the market."¹² It concludes that this alternative theory, while providing a better justification for seeing lawyers as having a special obligation, does so only in a highly qualified form. While the imperfections in the marketplace for legal services are straightforward to identify, it is much more difficult to establish their impact. It seems plausible that some lawyers are extracting economic rents, but it is not clear that all lawyers are doing so, how great those rents are, or the extent to which they have impeded access to justice. As such, it is possible, but by no means certain, that lawyers, as a group, have achieved economic rents, have contributed to the unavailability of justice, and are consequently under a greater obligation than other Canadians to rectify that unavailability.

Finally, Part IV considers the policy options which flow from this alternative justification. It suggests that any policy response to this modestly justifiable obligation must be equally modest in its impact on those upon whom it is imposed.

⁹ Some smaller scale mandatory pro bono projects exist. For a summary of the current situation on pro bono activities in the United States, see Deborah L. Rhode, "Pro Bono in Principle and in Practice" (2005) 26 Hamline J. Pub. L. & Pol'y 315 at 323-25 [Rhode, "Pro Bono"].

¹⁰ Omar J. Arcia, "Objections, Administrative Difficulties and Alternatives to Mandatory Pro Bono Legal Services in Florida" (1995) 22 Fla. St. U.L. Rev. 771 at 782. See also Part II, below.

¹¹ See *supra* note 6.

¹² Gillian K. Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98 Mich. L. Rev. 953 at 956, 982.

II. THE TRADITIONAL ARGUMENTS IN FAVOUR OF THE SPECIAL OBLIGATION OF LAWYERS

As noted, lawyers' obligation to undertake pro bono work¹³ has been the subject of significant professional and academic controversy, particularly in the U.S.¹⁴ Central to this controversy is the existence (or not) of a special obligation on the part of lawyers to facilitate access to justice. While the arguments in favour of and against mandatory pro bono go well beyond this question,¹⁵ almost every commentator who considers mandatory pro bono takes a position on it. Drawing on this literature, this section reviews and critiques the traditional arguments offered in support of lawyers' "special responsibility to provide legal assistance to the poor."¹⁶

The most common argument advanced for lawyers' special obligation, and the one expressly referenced in the *LSA Code*,¹⁷ starts from the "monopoly" granted to lawyers to provide legal services. In its simple form, this argument points to the "government-sanctioned monopoly status" of lawyers which grants to them "significant anticompetitive economic advantage."¹⁸ At points, including at the very outset of the American debate with the 1972 publication of the American Bar Foundation's *The Lawyer, the Public, and Professional Responsibility*, the position of lawyers has been analogized to that of the public utility granted a monopoly and, consequentially, placed under a universal service obligation to customers.¹⁹

The issue with this simple form of the monopoly argument, however, is obvious, and has been pointed out by numerous critics: with thousands of lawyers available for hire —

¹³ Scott L. Cummings, "The Politics of Pro Bono" (2004) 52 *UCLA L. Rev.* 1 at 4 [footnotes omitted] defined as: "a professional duty, discharged outside the normal course of billable practice, to provide free services to persons of limited means or to clients seeking to advance the public interest." A somewhat different, and broader, definition is offered by the LSA in *Pro Bono Publico*, *supra* note 4 at 8.

¹⁴ For a general history of the debate over mandatory pro bono, see Ronald H. Silverman, "Conceiving a Lawyer's Legal Duty to the Poor" (1991) 19 *Hofstra L. Rev.* 885.

¹⁵ Questions arise with respect to the effectiveness of pro bono programs: the competence of lawyers to deliver them; the effect of the "reluctant advocate" on the quality of the legal services provided; the constitutionality of such programs as violating freedom of association, as illegal takings and as forced labour; the positive moral/motivational effect on lawyers from the programs; and the positive effect of mandatory program's elimination of problems with voluntary programs such as the "free rider." For a summary of the arguments on either side, see Reed Elizabeth Loder, "Tending the Generous Heart: Mandatory Pro Bono and Moral Development" (2001) 14 *Geo. J. Legal Ethics* 459.

¹⁶ Roger C. Cramton, "Mandatory Pro Bono" (1991) 19 *Hofstra L. Rev.* 1113 at 1126.

¹⁷ *Supra* note 1, c. 1, g. 1.

¹⁸ Michael Millemann, "Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question" (1990) 49 *Md. L. Rev.* 18 at 73-74. See also Devlin, *supra* note 6; Howard A. Matalon, "The Civil Indigent's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate Pro Bono Publico" (1991) 71 *B.U.L. Rev.* 545 at 563: "equal justice, a core value of the court, is jeopardized through the judicial system's perpetuation of the legal monopoly and by its refusal to mandate representation for the indigent." See also Deborah L. Rhode, "Cultures of Commitment: Pro Bono for Lawyers and Law Students" (1999) 67 *Fordham L. Rev.* 2415 at 2419 [Rhode, "Cultures"]; "[i]n the United States, attorneys have a much more extensive and exclusive right to provide legal assistance than attorneys in other countries." See also the *LSA Code*, *supra* note 1, c. 1, g.1.

¹⁹ F. Raymond Marks, with Kirk Leswing & Barbara A. Fortinsky, *The Lawyer, The Public, and Professional Responsibility* (Chicago: American Bar Foundation, 1972) at 288-93. See also Judith L. Maute, "Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations" (2002) 77 *Tul. L. Rev.* 91 at 153-54.

according to the 2001 Census, there were 64,445 lawyers and Quebec notaries in Canada,²⁰ and in 2006 there were approximately 3000 law school graduates²¹ — lawyers are not a monopoly in an economic sense. Simply put, the legal profession has a monopoly, but individual lawyers do not. Since the competition in the market for legal services operates primarily at the individual level, the profession's monopoly does not result in the enjoyment of monopoly rents by individual lawyers. There are more than sufficient numbers of lawyers to ensure that, absent other forms of market failure,²² the price for legal services will be set by properly operating competitive forces.²³ It should be noted in this respect that after admittance to law school, the barriers to entering the Canadian profession are relatively insignificant. Unlike some American jurisdictions, for example New York and California, no Canadian province has high failure rates on its bar examinations.²⁴ It is true that obtaining an articling position can be difficult for some students; however, the availability of such positions is set by the market, and not by the law societies.

In essence, lawyers are no different from pharmacists, dentists, speech therapists, physiotherapists, accountants, or any other licensed practitioner who has educational and licensing requirements after the satisfaction of which they compete for clients. Lawyers have none of the attributes of the natural monopoly associated with increasing returns to scale such as subadditivity (in which having more than one participant in a market decreases the efficiency of delivering the service in question) and capital intensiveness (in which entering the market is costly because it requires very significant capital investment — for example, construction of a pipeline).²⁵ Absent some other form of market failure, lawyers will be subject to competitive forces and will earn no more than is warranted by their “human capital: knowledge, skill, education, experience, reputation, discretion and good judgment.”²⁶ The attempt to ensure that consumers are protected from charlatans asserting knowledge of

²⁰ For 2001 census data, see Statistics Canada, 2001 Census of Canada (1 March 2007), online: Statistics Canada <<http://www12.statcan.ca/english/census01/Products/standard/themes/RetrieveProductTable.cfm?Temporal=2001&PID=60358&APATH=3&GID=431515&METH=1&PTYPE=55440&THEME=46&FOCUS=0&AID=0&PLACENAME=0&PROVINCE=0&SEARCH=0&GC=99&GK=NA&VID=0&VNAMEE=&VNAMEF=&FL=0&RL=0&FREE=0>>.

²¹ Based on admission levels and assumed 95 percent graduation/completion rates at the Canadian common law and civil law schools. To derive this number, the author obtained admissions data from the website of each Canadian law school and calculated graduation rates based on the assumed 95 percent completion rate.

²² The argument that there are market imperfections, and that those imperfections may justify a special obligation on the legal profession, is discussed in Part III, below.

²³ In Devlin, *supra* note 6, he counters this response to the monopoly argument by noting that even if there is competition for legal services, “this has not kept the cost of legal services down” (at 367). With respect, the mere fact of high prices does not indicate the extraction of economic rents. Lawyers may earn high incomes because of their skill, training, and acceptance of market risk. To demonstrate that economic rents are being extracted, there must be *some* demonstration of market failure. High prices may indicate the need for distributive public policy but they do not, in and of themselves, indicate improper economic gains to be repaid.

²⁴ The LSUC, for example, reports that less than 2 percent of candidates with an LL.B./J.D. fail to be admitted to the Bar as a result of failing the licensing examinations: E-mail from Roman Woloszczuk, Registrar, Office of the Registrar, Professional Development and Competence, 10 July 2007. Similar failure rates exist in British Columbia: Telephone conversation with Adam Whitconde, Head of Information, LSBC, 19 July 2007.

²⁵ It is of course true that becoming a lawyer requires a degree of capital investment. However, the investment is not at the level where it meaningfully reduces participants seeking to enter and successfully entering the market. This is in contrast to the typical natural monopoly — a pipeline or transmission facility — where the level of capital required to be invested does create such a disincentive to market entry.

²⁶ Steven Lubet & Cathryn Stewart, “A ‘Public Assets’ Theory of Lawyers’ Pro Bono Obligations” (1997) 145 U. Pa. L. Rev. 1245 at 1249 [footnotes omitted].

the law “does not warrant a decision to place a special burden on lawyers to meet the legal needs of the poor.”²⁷

Further, to the extent that anticompetitive regulations protect the profession more than the consumer, for example, the historical restrictions on advertising, then those regulations should be eliminated. There is no particular logic to allowing those undesirable anticompetitive regulations to subsist and then compensating for them through placing special financial or service obligations on lawyers.²⁸

Finally, the analogy drawn to public utilities is highly problematic. Even accepting the possibility of such an analogy — which is doubtful for the reasons just suggested — it does not demonstrate the need for lawyers to subsidize access to justice. A utility has a universal service obligation, but the obligation exists only with respect to those customers who can pay its rates. And its rates are determined by the utility’s cost of service, including its right to a profit reflective of its market risk, not by the ability of consumers to pay. Indeed, Canadian courts have taken the position that a utility’s right to such compensation is absolute and cannot be undermined by consideration of customers’ ability to pay.²⁹ Some utility customers may be, and have historically been, required to cross-subsidize the rates of other customers, but the utility retains its right to recover its costs. Thus, even if lawyers were equivalent to a public utility, that would only mean that they were required to serve consumers who could pay their cost-based rates, not that they were required to serve consumers for free or to subsidize a subset of consumers.

²⁷ Charles Silver & Frank B. Cross, “What’s Not to Like About Being a Lawyer?”, Book Review of *Lawyer: A Life of Counsel and Controversy* by Arthur L. Liman (2000) 109 Yale L.J. 1443 at 1492. In a different context, Gillian Hadfield has argued that the nature of the required human capital — the difficulty of legal reasoning and of learning how to apply that reasoning in practice — creates a “natural” monopoly in law and contributes to the market imperfections of the legal profession. Hadfield, *supra* note 12 at 984-92. It creates a situation where “demand exceeds supply, all sources of supply have been exhausted, and the resource is consequently priced as high as it can be – extracting the entire (expected) surplus (or more) derived from its use” (Hadfield, *supra* note 12 at 992). While in general, the author is greatly indebted to Hadfield’s analysis of the legal services market, they part company on this point. First, while legal reasoning is no doubt complicated, and applying legal reasoning in practical circumstances requires a whole additional set of skills and training, it is not obviously more complicated or difficult to apply in practice than engineering, economics, physics, or any number of endeavours with an intellectual component. Second, even if it is complicated in that respect, there are still a significant number of individuals who have the necessary skills. Canadian law schools, unlike their American counterparts, are not widely stratified. The admission standards of all Canadian schools require a high degree of LSAT performance (above the 75th percentile for September 2007 admissions) and a high average GPA (above 3.4 for September 2007 admissions). “Admissions data from Canadian law schools” (2006/07) [unpublished, archived at University of Alberta, Faculty of Law, Alice Woolley]. As a consequence, it is plausible to assert that most Canadian law school graduates have the necessary intellectual skills to perform legal tasks at the required level. Not all may obtain the necessary training, but the availability of that training should be set by market forces. Absent some other problem (and Hadfield *does* convincingly articulate other problems) supply should rise to meet the demand. And if it is the other problems which are impairing that from occurring, then those other problems are what is economically relevant. Finally, even if Hadfield is correct and only a portion of law graduates have the ability to function at a high level, then why are the other less capable lawyers not available for hire cheaply? If quality is hard to come by, then why is low quality help not available at a low price?

²⁸ See Rob Atkinson, “A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best” (2001) 9 Am. U. J. Gender Soc. Pol’y & L. 129 at 153. For other refutations of the simple monopoly argument, see Jonathan R. Macey, “Mandatory *Pro Bono*: Comfort for the Poor or Welfare for the Rich?” (1992) 77 Cornell L. Rev. 1115; Arcia, *supra* note 10.

²⁹ See *British Columbia Electric Railway Co. Ltd. v. British Columbia (Utilities Commission)*, [1960] S.C.R. 837. Note that the Ontario Energy Board also recently found that it did not have jurisdiction to set rates “using income level as a determinant” (Ontario Energy Board (OEB), Decision EB-2006-0034, “Decision – Rate Affordability Programs” (26 April 2007), online: OEB <http://www.oeb.gov.on.ca/documents/cases/EB-2006-0034/decision_egd_rate_affordability_20070426.pdf> at 5).

Several attempts have been made, however, to refine the monopoly argument and to make it more convincing. The most influential of these is the argument presented by David Luban in his seminal 1988 work, *Lawyers and Justice: An Ethical Study*.³⁰ Luban argues that the moral duty of lawyers to provide pro bono services arises not just from the fact they have a monopoly, but more importantly from what it is they have a monopoly to. The legal system is a construct of the human mind and a creation of the state. It does not, like our need for health or dental care, inhere in the human condition, such that a lawyer's work could be done absent state support. As a consequence, when lawyers are given the exclusive right to access that system, they are also given a special trusteeship role within it. Additionally, as trustees of the legal system, lawyers have an obligation to ensure that its benefits are distributed equally and fairly, and "that no members of the community be excluded from the law."³¹

Other professions are not trustees in this way, because the community isn't the source of their stock in trade; the community's role in other economies is merely regulative. The community plays a constitutive role in creating the substance of the lawyer's livelihood. Hence the pro bono responsibility: it arises because the community creates the law and entrusts its benefits to lawyers and lawyers alone for purposes of distribution.³²

For Luban, the duty of lawyers arises not because of a need for lawyers to disgorge an improper economic benefit, such as monopoly rents, but as a constitutive part of their role in the legal system. Luban's argument is, in this way, conceptually distinct from the monopoly argument, as well as a refinement of it.

Other commentators have refined the monopoly argument by looking at the question of improper benefit, but by defining that benefit differently. Specifically, they have pointed to particular aspects of the rights given to lawyers by the state and argued that those rights — in particular, confidentiality and privilege — are public assets³³ which lawyers sell for profit.

³⁰ David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, N.J.: Princeton University Press, 1988) 267-89 [Luban, *Lawyers and Justice*]. A number of other commentators have relied on Luban's position, as did the Marrero Report in New York, which viewed lawyers as "guardians of our lives, liberties and governing principles" (U.S., Committee to Improve the Availability of Legal Services, *Final Report to the Chief Judge of the State of New York* (April 1990) reprinted in (1991) 19 Hofstra L. Rev. 755 at 782). See e.g. Devlin, *supra* note 6; Millemann, *supra* note 18; Silverman, *supra* note 14; Cynthia R. Watkins, "In Support of a Mandatory Pro Bono Rule for New York State" (1991) 57 Brook. L. Rev. 177; Tigran W. Eldred & Thomas Schoenherr, "The Lawyer's Duty of Public Service: More than Charity?" (1993/94) 96 W. Va. L. Rev. 367; Rhode, "Pro Bono," *supra* note 9; Rhode, "Cultures," *supra* note 18; Deborah L. Rhode, "The Pro Bono Responsibilities of Lawyers and Law Students" (2000) 27 Wm. Mitchell L. Rev. 1201; Michael A. Mogill, "Professing *Pro Bono*: To Walk the Talk" (2001) 15 Notre Dame J.L. Ethics and Pub. Pol'y 5.

³¹ David Luban, "Faculty Pro Bono and the Question of Identity" (1999) 49 J. Legal Educ. 58 at 65 [Luban, "Faculty Pro Bono"].

³² *Ibid.* at 65. Hadfield also argues that the state's monopoly on "coercive dispute resolution" is significant in creating economic rents for lawyers: Hadfield, *supra* note 12 at 992-94.

³³ Lubet & Stewart, *supra* note 26. It should be noted that these "public assets" are not "public goods" in the sense used by economists. A public good is a good that is subject to nonrivalrous consumption (consumption by one person does not leave less for another consumer, so that it is not efficient to stop people from using the good) and by nonexcludability (it is not possible to stop people from consuming the good). Confidentiality and privilege are applied in a highly exclusive fashion, with a whole variety of restrictions on who can "consume" them. Further, considered on a cost-benefit basis, it is likely efficient to restrict the availability or consumption of the goods. At least one economist has directly described access to the courts as rival. See Frances Woolley, "Why Public Goods are a Pedagogical Bad" *Social Science Research Network* (SSRN) (7 June 2006), online: SSRN <<http://ssrn.com/abstract=907381>>. See also Robert Cooter & Thomas Ulen, *Law and Economics*, 4th ed. (Toronto: Pearson Education, 2004). As a consequence, the normal analysis of public goods as causing market failure does not apply here.

Although those rights, or goods, are in general created to benefit consumers, they provide economic rents to lawyers which it is appropriate to require lawyers to redistribute. In particular, it is appropriate to make lawyers redistribute those rents to rectify the impairment of access to justice which their attainment of those rents creates. In sum,

(1) the assets make lawyers' services more valuable to consumers, thus providing a direct monetary benefit to attorneys; (2) use of the assets imposes substantial costs on both the legal system and participants in the system; (3) lawyers are able to shift the costs created by the exploitation of these publicly created commodities; and (4) there is no current effort to recapture any of the rents that accrue to lawyers by virtue of their resale of public assets.³⁴

Additionally, as noted by Devlin, Canadian lawyers have been the beneficiaries of the state-granted economic benefit of subsidized tuition. Those state benefits create a moral claim against the economic returns lawyers earn as a result therefrom.³⁵

These refinements of the simple monopoly theory defuse many of the criticisms noted above. In these versions, the obligations of lawyers arise not from the fact of their monopoly per se, but rather from what it is they have a monopoly to and from the features of that monopoly. It is not simply that lawyers are extracting monopoly rents which they must disgorge; rather, it is the two-fold claim that the role of lawyers within the legal system places them under a special moral or fiduciary-type duty relative to society as a whole, and that lawyers gain economic benefits from certain aspects of their role within that system, which justify holding lawyers especially responsible for ensuring access to justice. As a consequence, these theories are not rebutted simply by pointing out the existence of competitive forces within the market for legal services and the low probability of monopoly rents being extracted in these circumstances.

There are nonetheless significant issues with these theories. Most fundamentally, Luban's primary characterization of the legal system as a product of the state and as therefore distinct from, for example, the licensing of other professionals providing services not created by the state, is problematic.³⁶ In making his argument, Luban contrasts lawyers to grocers operating with a license on the basis that the lawyer's monopoly is "manufactured by the state" while the grocer's business could exist without the participation of the state.³⁷ At first glance this seems correct: our need for food is absolute and part of our individual humanity; the system of laws is external to any need we have as individuals. As a consequence, a person could sell food to us without state support but could not supply us with legal services. On further examination, though, this distinction seems less clear-cut. While the individual considered alone may have no inherent need for a system of laws, any individual hoping to co-exist in a social order will require rules of social interaction (laws) and a means of dispute resolution: every human society will have these features in some form and people who participate in delivering them. How these important human needs are met by a society — whether the need for the food or the need for a means of peaceful co-existence — will be determined by the particular society in question. It will determine how food sources are distributed and it will

³⁴ Lubet & Stewart, *supra* note 26 at 1264. See also Maute, *supra* note 19.

³⁵ Devlin, *supra* note 6 at 363.

³⁶ The author is indebted for the general thrust of this criticism to Atkinson, *supra* note 28 at 155.

³⁷ Luban, *Lawyers and Justice*, *supra* note 30 at 286.

determine how disputes and other questions of social interaction and formation are resolved. In our society, the licence of the grocer and the licence of the lawyer represent a societal decision as to how to meet an inherent human need. They are inescapably both inherent *and* socially constructed, and in practice no obvious philosophical distinction can be made between them. Moreover, no obvious philosophical distinction can be made between the individuals acting in furtherance of those social responses to an important human need.

It thus seems more accurate to characterize licensed service providers, whatever their particular form, as meeting both important human needs and as benefiting from a particular socially constructed response to those needs. But when characterized in this way, the obvious difference between lawyers and other licensed service providers disappears and so does the justification for the special social obligation of lawyers that goes with it. If lawyers are trustees in distributing law, so too are physicians in distributing health care, dentists in distributing dental care, and even teachers in distributing education.³⁸

Another issue with the refined monopoly arguments is that it is not obvious that the property attributed to lawyers by some of these theories — in particular, confidentiality and privilege — is properly so attributed. It is clear in law that the rights of confidentiality and privilege are the rights of the client, not the rights of the lawyer.³⁹ These rights exist to preserve the dignity of individuals intersecting with the legal system and to ensure that those individuals are able to access the system effectively.⁴⁰ Costs associated with those rights, such as less efficient litigation and higher prices for lawyers, are not rents extracted by lawyers at the expense of consumers. Rather, they are simply the costs associated with those protections, much as the need for regulatory approvals drives up the cost of certain pharmaceuticals.⁴¹ If those costs are unacceptably high, it might be worthwhile to check or amend the regulatory rules which give rise to them, but imposing a tax on lawyers, whether in the form of money or a service obligation, has only a loose logical connection to those costs.

With respect to the social benefit of low tuition fees, these are benefits received by everyone who attends a public post-secondary institution in Canada. If it is appropriate to require a reimbursement for the increased economic returns associated with that education (and it may well be that it is), that argument, again, is not limited to lawyers. Further, low tuition fees may actually have a positive impact on access to justice. As law school tuition rises, graduates might simply be unwilling to take on less remunerative employment. A law

³⁸ In his contribution to this panel, W. Bradley Wendel references this argument and suggests that it is possible to invert my position to “claim that society has a legitimate claim on the goods and services of lawyers, pharmacists and grocers, and indeed anyone whose activities [legitimately] serve important human needs” (W. Bradley Wendel, “Lawyers as Quasi-Public Actors” (2008) 45:5 *Alta. L. Rev.* 83 at 96, n. 61). To the extent that the obligation is placed on anyone whose activities both serve human needs and receive some state right and/or privilege to do so, this inversion is logically coherent. It involves, though, a much more significant shift in social policy than does the limited argument to place a pro bono obligation on lawyers. Whether such a shift is conceptually justifiable goes beyond the scope of this article. And in any event, it does not disrupt my fundamental point that Luban’s distinction between grocers and lawyers is problematic. Luban, *Lawyers and Justice*, *supra* note 30.

³⁹ See e.g. *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 at paras. 17-37; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 at paras. 14-21.

⁴⁰ For an exploration of the confidentiality rules, see Luban, *Lawyers and Justice*, *supra* note 30, 177-234.

⁴¹ *Ibid.*

school graduate with low student debt may be more willing to consider working at a legal clinic than one with debt of close to CDN\$100,000.

Finally, underlying these theories is an assertion of lawyers as “gatekeepers” to the legal system. While it would be difficult to assert that an unrepresented individual can access the legal system as efficiently and effectively as one with legal counsel, it is not true that the absence of a lawyer absolutely precludes access to the system. This is most obviously true when individuals operate under the shadow of the legal system in forming relationships which are as of yet nonconflictual: getting married, starting a business, or buying a car.⁴² But it can also be true in circumstances of legal conflict. Indeed, significant efforts have been made in a variety of forums — for example, at Alberta Small Claims Court and in the Tax Court of Canada’s informal dispute resolution proceedings — to allow people to access the justice system effectively without a lawyer. Undoubtedly, having a lawyer helps, even in those circumstances, but it is not absolutely necessary.

Other arguments have been made to justify the special duty of lawyers to provide pro bono services. Luban and others assert, for example, that through their zealous advocacy on behalf of clients, lawyers impose costs on others, including costs which impair access to justice. Pro bono service is one way in which lawyers can compensate for the costs which they impose:

[I]t is relatively easy to demonstrate that lawyers qua lawyers, both collectively and individually, regularly do damage to other human beings, including poor folks. For example, to the extent that lawyers seek tax preferences for wealthy individual and corporate clients, they are actively engaged in certain redistributive strategies that may diminish public resources otherwise available to the poor and to the middle class... While America’s mighty corporate bar does professional work seemingly far removed from the problems of poor people, such work in the aggregate still plausibly affects the living welfare of many citizens not directly involved in a world of complex business and financial transactions.⁴³

This argument is also problematic. A lawyer who unethically and improperly pursues an aggressive discovery tactic for the purpose of cost escalation impinges upon their opponent’s ability to access the justice system. It does not follow, however, that any lawyer who acts for private, paying clients has made the poor less well off. Indeed, such an assertion violates the entire notion of a liberal capitalist system and its fundamental premise that the generation of wealth will, in a properly regulated economy, spread across the population rather than inhering only in the few. Further, to the extent that the capitalist economy has negative effects on income distribution — and it is not difficult to argue that the effect of “legally regulated market capitalism, for all its manifest virtues, [is that] ... the rich tend to get richer and the poor, poorer”⁴⁴ — it certainly does not follow that lawyers have a special obligation

⁴² Silver & Cross, *supra* note 27 at 1491-92.

⁴³ Silverman, *supra* note 14 at 1017-18 [footnotes omitted]. See also Luban, *Lawyers and Justice*, *supra* note 30 at 287.

⁴⁴ Atkinson, *supra* note 28 at 159. For an interesting recent media discussion of issues related to inequality in the capitalist economy, see also Roger Lowenstein, “The Inequality Conundrum” *New York Times Magazine* (10 June 2007) s. 6, 11; Daniel Gross, “Income Inequality, Writ Larger” *New York Times Magazine* (10 June 2007) s. 3, 7.

to rectify that harm. Anyone who participates in and profits from the capitalist system is equally morally responsible for these wrongs and responsible for rectifying them.⁴⁵

Moreover, to the extent that the ethics of lawyering, and in particular the ethics of zealous advocacy, create negative externalities for others, the logical response should be to take steps to motivate lawyers to avoid that conduct: to internalize the negative externalities which their behaviour creates. Such steps can include imposing personal cost sanctions on lawyers who behave unethically, but do not logically include a pro bono requirement, which is totally unrelated to other behaviours of lawyers and is unlikely to have any material effect upon them. Indeed, it has been argued that such a requirement will make lawyers feel they have done penance for their sins and are absolved “of responsibility for the publicly harmful aspects of their dubious model of private practice.”⁴⁶

Also, not all of the externalities which result from the work of lawyers are negative.⁴⁷ Lawyers, through their creativity and efforts for one client, can create precedents which clarify or improve the legal system to the benefit of many.⁴⁸ The lawyers who argued the landmark case of *Donoghue v. Stevenson*⁴⁹ created a positive benefit for innumerable clients and lawyers who came after them. If externalities are to be considered in assessing lawyers’ obligations, then they must be considered in both their positive and negative forms.

Finally, to the extent that negative externalities are simply a natural consequence of lawyers’ jobs — that they do not arise from the type of client represented or from a particularly zealous form of advocacy⁵⁰ — it is not obvious that those externalities are properly attributed to lawyers themselves. A lawyer who successfully argues that their client should be entitled to a complex procedure may contribute to rendering the justice system more complex and less accessible, but provided their client’s claim is just and their own conduct ethical when assessed against a rigorous standard,⁵¹ then that externality is more logically attributed either to their client, or to society as a whole, rather than to the lawyer himself.

Others argue for a special obligation for lawyers to foster access to justice on the basis either that it has always been part of their professional obligations⁵² — under codes of conduct or as part of their duties as “officers of the court” — or that it exists because the need for the services exists. Under this latter framing, even if the obligation to foster access

⁴⁵ Silver & Cross, *supra* note 27 at 1449-66, provide an eloquent justification for morality of legal work on behalf of private clients pursuing their economic self-interest. See also Atkinson, *supra* note 28 at 159.

⁴⁶ Atkinson, *ibid.* at 160.

⁴⁷ See *infra* note 84 and accompanying text.

⁴⁸ William Bishop, “Regulating the Market for Legal Services in England: Enforced Separation of Function and Restrictions on Forms of Enterprise” (1989) 52 Mod. L. Rev. 326 at 332-33.

⁴⁹ *Donoghue (or McAlister) v. Stevenson*, [1932] A.C. 562 (H.L.).

⁵⁰ See Hadfield, *supra* note 12 at 967-68, where she emphasizes the tendency of lawyers’ advocacy to give rise to this type of externality.

⁵¹ See e.g. *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

⁵² See e.g. Watkins, *supra* note 30; Millemann, *supra* note 18. See also Debra D. Burke, George W. Mechling & James W. Pearce, “Mandatory Pro Bono: Cui Bono?” (1996) 25 Stetson L. Rev. 983 at 992: “it is undisputed that attorneys, as members of the legal profession, owe a duty of public service which embraces the provision of equal access to justice” [emphasis in original].

to justice exists primarily at the societal level, lawyers, as part of society, are uniquely fitted to meet that obligation, and therefore should be required to do so.⁵³

While the assertion that a voluntary commitment to access to justice is an extant part of a lawyer's professional obligation seems unexceptionable, there are several problems with it as a basis for the assertion that lawyers have a duty to foster access to justice. In the first place, that lawyers have been stated to have such an obligation does not mean that they *should* have it.⁵⁴ Further, there is a significant difference between an exhortation to do good deeds and a legally enforceable requirement that one do them. The obligation placed on lawyers by their professional rules is a general exhortation not a specific obligation.⁵⁵ Further, the obligatory functions a lawyer has as an officer of the court do not seem to include, or to have included, an obligation to provide legal services for free.⁵⁶ To the extent, then, that the assertion of the traditional obligation to do pro bono work is based on a claim that there was and is an enforceable obligation to do such work, it seems empirically doubtful.⁵⁷

With respect to need, the mere fact of need may impose an obligation on us all (although it does not even do that, necessarily), but it certainly does not justify imposing a special obligation on lawyers. Lawyers may take on that obligation as an act of virtue or charity, but they have no greater moral obligation to do so than the rest of society. Further, they have no moral obligation to do so in priority to working towards other societal needs; volunteering to serve lunch at a drop-in centre arguably addresses a more pressing social need, and does so more effectively, than representing a single indigent defendant in a civil claim.

That this is the case is not altered by the special suitability of lawyers to meet this need. While it may be practically desirable that a lawyer use his or her skills to the best advantage in serving the public good, that practicality does not logically translate into a moral obligation. It may be, for example, that a lawyer adds more social utility by providing legal services for free to indigent clients than he or she does by volunteering in the classroom at their child's school, but that possibility for increased social utility does not on its own justify a moral duty. Were that the case, the law school graduate with a passion to be an artist, but who would be a good lawyer but not a very good artist, would be violating moral obligations by choosing to pursue their passion.

Traditional arguments thus fail to justify imposing a special obligation on lawyers to foster access to justice. The most convincing are the refined monopoly arguments, but even these

⁵³ See e.g. Mary Coombs, "Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services" (1993) 3 B.U. Pub. Int. L.J. 215; Erika Martin-Doyle, "Massachusetts Rule of Professional Conduct 6.1: One Small, But Needed, Step for Lawyers, an Even Smaller Step for the Commonwealth's Poor" (1999-2000) 9 B.U. Pub. Int. L.J. 53 at 88: "[a]s long as 80% of the poor's legal needs remain unmet, the argument that it is unfair to make attorneys do pro bono work is countered by the question: 'Is it acceptable to let the poor, or anyone, suffer injustice?'" The answer to that question is no." See also Atkinson, *supra* note 28, who advocates for a "good Samaritan" tax to be placed upon lawyers to meet the need.

⁵⁴ Luban, "Faculty Pro Bono," *supra* note 31 at 62: "some traditions are bad ideas overdue to be replaced." This quotation obviously does not apply to this "tradition," but it indicates the underlying point.

⁵⁵ *Ibid.*

⁵⁶ See Cramton, *supra* note 16 at 1134 citing David Shapiro: "[t]o justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there."

⁵⁷ See Cramton, *ibid.*; Lubet & Stewart, *supra* note 26.

have numerous problems related to their conception of the legal system and of the role of lawyers within that system, and to their doubtful assertion that lawyers are earning economic rents as a consequence of their clients' legal rights.

The following section will consider an alternative argument which may provide a stronger justification for the existence of a special obligation on the part of lawyers. Specifically, it will consider whether the imperfections traditionally associated with the market for legal services have resulted in lawyers receiving an "economic windfall"⁵⁸ and individual clients being "priced out of the market."⁵⁹ If so, then it may be possible to argue that those economic results justify the imposition of a special burden on lawyers to rectify the harm that their windfall profits have caused.

III. IMPERFECTIONS IN THE MARKET FOR LEGAL SERVICES

A. WHAT ARE THE IMPERFECTIONS?

In order to be perfectly competitive, an economic market must have five central attributes: (1) numerous buyers and sellers, so that no part of the market can exercise market power; (2) product homogeneity, so that producers are meaningfully competitive with each other; (3) complete information held by all economic actors in the market, so that, for example, demand cannot be manipulated by producers; (4) free entry and exit, so that there is supply and demand responsiveness; and (5) an absence of externalities, so that producers bear the costs of production and consumers bear the costs of consumption.⁶⁰ With the exception of the first criterion — as already noted, there are numerous sellers and buyers of legal services — the market for legal services satisfies none of these criteria.

1. PRODUCT HOMOGENEITY

First, legal services are inherently nonhomogeneous. The services offered by the most intelligent, practical, diligent, and experienced counsel in closing a corporate transaction are not the same as those offered by her less qualified counterpart. The differences relate to the time which is put into a matter; the quality of the legal reasoning brought to bear upon a problem; the prior experience of the lawyer in resolving similar difficulties in the past, perhaps to the point of specialization in the area; the interpersonal skills of the lawyer in dealing with other individuals involved in the issue; and myriad other relevant skills and qualities. An hour of one lawyer's time may have radically different value than an hour of another lawyer's time.

Further, even were one lawyer much like another, the demands placed on lawyers by their clients are not. The needs of a client litigating a contractual dispute are entirely different from the needs of a client doing an initial public offering for a company. And even the needs of a client litigating a contractual dispute may not be the same as those of another client who

⁵⁸ Hadfield, *supra* note 12 at 982.

⁵⁹ *Ibid.* at 956.

⁶⁰ Michael J. Trebilcock, Carolyn J. Tuohy & Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (Toronto: Ontario Ministry of the Attorney General, 1979) at 47 [OLRC Study].

is also litigating a contractual dispute. While not all demands are highly variable — one residential house closing is generally much like another — more often than not what one client needs from his lawyer is quite different from that which is needed by another client.⁶¹

The absence of homogeneity in legal goods is exacerbated by the “winner-takes-all” or “tournament” quality of much legal work.⁶² In many legal contexts, including most obviously litigation, but also to some extent transactional work, the essence of the lawyer’s work is not only to obtain good outcomes, but also to obtain *better* outcomes than those obtained by the lawyer on the other side. In litigation, a lawyer needs to win; in a contract negotiation they need to get the best of the deal; in a purchase, they need to ensure that their clients’ rights and interests are protected relative to the other side. The client thus has a significantly greater stake in the nature of the legal services purchased than does the purchaser of, for example, dental services. As long as a dentist acts within the bounds of professional competence, that will usually be sufficient; he does not need to be better than the dentist down the street. By contrast, a client needs his lawyer not only to be good and competent, but also needs his lawyer to be better and more competent than the lawyer on the other side. Markets with tournament features tend to be associated with price escalation.⁶³

Thus, the “product” of legal work is significantly nonhomogeneous. What one lawyer is capable of providing is inherently dissimilar to that which another lawyer can provide, and what one client needs is inherently dissimilar to what another client needs. Moreover, non-homogeneity is material: the nature of the legal service provided has a significant impact on the client’s ability to achieve her goals.

2. INFORMATION INSUFFICIENCY AND ASYMMETRY

Second, and certainly most importantly, the market for legal services is notable for the total absence — and actual impossibility — of informational sufficiency and symmetry with and between participants in the market. This arises most obviously from the fact that any person who needs a lawyer — who does not herself have the relevant qualifications and abilities — self-evidently lacks knowledge about what needs to be done to solve her problem. She must rely on the lawyer not only to do the work, but also to tell them what it is that needs to be done and how best to do it. Clients often do not know, for example, whether writing a will should take one hour or five; they depend on the lawyer to provide an honest answer as to which it is and to do no more work than is necessary to get the job done.

This informational asymmetry in the market for legal services leads to “agency costs” (the costs arising from the client’s need to rely on their lawyer as his agent) and to the characterization of legal services as a “credence good” (in which clients depend on lawyers

⁶¹ R.E. Olley, “The future of self-regulation: a consumer economist’s viewpoint” in Philip Slayton & Michael J. Trebilcock, eds., *The Professions and Public Policy* (Toronto: University of Toronto Press, 1978) 77 at 79.

⁶² See Hadfield, *supra* note 12 at 973 for a good explanation of this point. For an explanation of tournament dynamics in a different context of the legal marketplace (the growth of law firms), see Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (Chicago: University of Chicago Press, 1991).

⁶³ For a fascinating discussion of a specific example of this phenomenon, the exponential increase in left tackle salaries in the NFL, see Michael Lewis, *The Blind Side: Evolution of a Game* (New York: W.W. Norton, 2006).

to tell them how much of the good they need). The point is simply that, in general, clients are both relatively and deeply uninformed relative to the lawyer they are retaining: clients know less than their lawyers and what they do not know is significant, going to the essence of the commodity which they are purchasing.⁶⁴

Further, the client's lack of sufficient information is not only relative, it is also absolute. Because legal outcomes are significantly determined by factors outside the control of either the lawyer *or* the client, it may be impossible to determine how much work will be required to resolve a particular problem, or whether even with a great deal of work the problem will be capable of successful resolution. In addition, even after the fact it may be difficult to determine whether an unsuccessful outcome arose from a lack of effort on the part of counsel or from bad luck with respect to the judge, other relevant third parties (a regulator or financial institution), the conduct of other counsel, or numerous other factors. As one commentator asked rhetorically, "[i]f the intrinsic quality of the service does remain unobservable, as there are factors outside the lawyers' control which contribute to the outcome, how does the consumer react? In other words is a good reputation consistent with a long run of bad luck?"⁶⁵ Or, conversely, should a long run of good luck warrant a good reputation?

The information problems are, obviously enough, an issue more for some types of legal work than for others, and more for some types of clients than for others. The greater the homogeneity and simplicity of the work product in question — closing of a real estate transaction or drafting a will — in general, the greater the client's ability to obtain information about what is needed to perform the task.⁶⁶ And even for less homogeneous and more complex legal work, a corporate client, who may have in-house experts, and who is far more likely to be a repeat player in the legal services market, is better able to obtain good information about the quality of the legal services which it is purchasing.⁶⁷ Corporate clients are less likely to be influenced by "spurious" signals of a lawyer's quality such as fancy offices in a prestigious location than are less sophisticated non-repeat players in the legal services market. They are more likely to have accurate information against which to assess the likelihood that they will be provided with competent and sufficient (but not excessive) service.⁶⁸

⁶⁴ For discussions of the informational asymmetry/credence good problem, see Hadfield, *supra* note 12; David Barnhizer, "Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit" (2004) 17 *Geo. J. Legal Ethics* 203; *OLRC Study*, *supra* note 60; Michael J. Trebilcock, "The profession and public policy: the nature of the agenda" in Slayton & Trebilcock, *supra* note 61 at 3; Michael Trebilcock & Lilla Csorgo, "Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective" (2001) 24 *Dal. L.J.* 1 at 15-16; Larry E. Ribstein, "Ethical Rules, Agency Costs, and Law Firm Structure" (1998) 84 *Va. L. Rev.* 1707 at 1709-10; Bishop, *supra* note 48; Jack Ladinsky, "The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients" (1976) 11 *Law & Soc'y Rev.* 207 at 215; Paul Fenn & Alistair McGuire, "The Assessment: The Economics of Legal Reform" (1994) 10:1 *Oxford Review of Economic Policy* 1 at 4-5; Roger Bowles, "The Structure of the Legal Profession in England and Wales" (1994) 10:1 *Oxford Review of Economic Policy* 18.

⁶⁵ Fenn & McGuire, *ibid.* at 7.

⁶⁶ See Hadfield, *supra* note 12 at 976. But see Ribstein, *supra* note 64 at 1713; "[e]ven discrete tasks such as drafting wills may be credence goods because the quality may not be evident until long after the job is done."

⁶⁷ For an empirical review of how corporations exercise this control, see Gerard Hanlon, *Lawyers, the State and the Market: Professionalism Revisited* (London: Macmillan Press, 1999).

⁶⁸ Fenn & McGuire, *supra* note 64 at 7.

However, even sophisticated corporate clients are unable to entirely eradicate the information problem when purchasing legal services. As noted, the absence of information is to some extent absolute: *ex ante* predictions about whether a lawyer will be able to achieve the desired legal result are necessarily uncertain and even *ex post* it may not be clear that a good result flowed from a lawyer's high quality efforts.⁶⁹ Further, given the "unobservable" quality of legal services, even sophisticated clients have to rely on "signals," and particularly status, in deciding whether a lawyer is likely to provide them with high quality service in solving their legal problem.⁷⁰ While far from spurious, signals related to status are also not entirely reliable in indicating the quality of the legal services being purchased.⁷¹ The relationship between status and quality is stochastic: "[n]ot every shift in quality of a given level will be detected, not every detected shift will be communicated to the same number of potential future users, and not every communication between users will occur at the same rate."⁷²

In addition, a lawyer may have attained high status because of past performance, but may not provide quality service consistent with that status because they are now subject to too many demands on their time from a broad client base or may no longer be capable of the same level of performance as they once were. For example, in a well-documented case, Robert Stewart was represented in his initial trial for manslaughter by a lawyer "who had been a formidable leader of the criminal defence bar for many years."⁷³ At the time of Stewart's trial, however, this lawyer was almost certainly suffering "from a degenerative brain disorder"⁷⁴ and, it appears as a consequence, provided highly doubtful legal services for his client.⁷⁵ He arguably made his client's already difficult legal situation considerably worse. Simply put, shifts in quality may not always be reflected in status.

Further, status may be achieved through relationships rather than through actual ability.⁷⁶ Association with a particular firm might lead even sophisticated clients to conclude that lawyers have "quality" which they do not have. A relationship between a corporate client's employee and an individual lawyer may convince that employee of the lawyer's ability, in addition to or in substitution for actual demonstration of it.

Thus, the legal services market is characterized by relative and absolute informational insufficiency. The client knows less than the lawyer, and what they do not know is significant. Further, because quality can only be judged indirectly and imperfectly, obtaining the information relevant for making a rational consumption choice may be impossible.

⁶⁹ *Ibid.*

⁷⁰ In markets characterized by informational uncertainty, consumers typically (and appropriately) rely on "signals" to solve the informational problem. Signals can be spurious, and even where they are not, they are typically an imperfect response.

⁷¹ This discussion on status relies heavily on the excellent discussion of the independent impact of "status" on market outcomes contained in Joel M. Podolny, "A Status-based Model of Market Competition" (1993) 98 *American Journal of Sociology* 829.

⁷² *Ibid.* at 832.

⁷³ *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Ct. J. (Gen. Div.)) at para. 23.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Podolny, *supra* note 71 at 831-32.

3. MARKET ENTRY AND EXIT

These significant market imperfections, arising from the combined effect of the lack of product homogeneity and informational asymmetry, are exacerbated by constraints on market “entry” and “exit.” While the artificial barriers to entry into the profession are, as argued in the previous section, relatively inconsequential in affecting market supply, the time and cost of legal training are such that they create “stickiness” in the market; as demand for legal services goes up or down, there is a limited ability for supply to adjust quickly to that demand shift.⁷⁷ This means that the traditional response to a market’s tournament-like qualities — increased supply to reflect the potential for significant market rewards — is dampened. The growth in the returns of some lawyers, which may arise from the market imperfections, and the market’s tournament-like qualities, do not lead to similarly-disproportionate attempts to participate in the legal market as do, for example, the disproportionate economic success of certain professional athletes.

Further, as noted, consumption decisions in the legal services market are influenced by reputation and status. This means that it is difficult for new firms to enter the market and compete effectively: “*New* firms by definition have no reputation (unless they can capitalize on the reputations of their individual members), and thus they face a barrier to entry.”⁷⁸ A new law firm cannot simply produce an innovative or new product and through that product enter and effectively compete in the market with other law firms.⁷⁹

In addition, although perhaps not best characterized as an “entry” problem, consumers of legal services cannot always respond to the issues of informational asymmetry and product non-homogeneity by declining to purchase legal services, or by costless market exit. The decision to engage a lawyer is almost always motivated by an identified and usually important need for one; whether the client is corporate or individual, the retention of a lawyer is driven by the existence of a problem, the solution of which will benefit from (and may practically require) the assistance of a lawyer.⁸⁰ The services of a lawyer may not be required in order to access the legal system (as noted earlier), and people may rationally decide to suffer a loss rather than incur the expense and risk of retaining a lawyer,⁸¹ but it is also true that for no one is purchasing legal services the equivalent of a trip to the spa: the purchase of legal services is always a necessary evil.

Further, because of sunk costs, a consumer has a limited — or at least only a high-cost — ability to provide market discipline through switching or discontinuing retention. Once a lawyer has been retained, it may be difficult either to switch counsel or to cease to engage counsel altogether. As Gillian Hadfield has cogently explained, sunk costs mean that switching counsel midstream may result in significant cost escalation: “a new lawyer will have to do many things over: develop a relationship with the client and the other parties and

⁷⁷ *OLRC Study*, *supra* note 60 at 48-49.

⁷⁸ *Ibid.* at 49 [emphasis in original]. See also Hadfield, *supra* note 12.

⁷⁹ An exception might be an innovative tax planning structure which the law firm “sells” to clients. However, even the purchase of that structure might be influenced by clients’ perception of the firm’s reputation and ability to design an effective scheme.

⁸⁰ James W. Younger, “Competition policy and the self-regulating professions” in Slayton & Trebilcock, *supra* note 61, 30 at 32.

⁸¹ This response to the imperfections in the market for legal services is noted and discussed in Part III.B, below.

lawyers in the case, learn about the facts, read the relevant case law, think through alternative strategies, and review the history of the case to date.”⁸² In addition, discontinuing the services of counsel may lead to higher net costs than continuing services, even if resolution of the problem has ceased to be financially desirable in light of the legal costs:

Legal expenses billed by the hour (or any other incremental amount, such as in task-based billing) generally have the same type of structure as the sunk cost auction [in which participants will continue to bid even though they are paying more than the value of the good up for auction]. This is particularly true for litigation. Once a legal action is started, it costs money to keep going. In most cases, if you stop participating in the action, you suffer a default judgment against you, losing the entire amount at stake. As with the \$20 auction, at any given point in the litigation, it doesn't matter how much you've already spent on legal fees if the next increment — the cost of going to trial one more day, for example, or responding to one more motion — maintains your chance of winning. And as with the \$20 auction, the amount at stake is no limit to what you may end up spending to keep in the game.⁸³

As a consequence, therefore, there are significant restrictions on a consumer's ability to exercise market discipline by declining to enter, or by exiting, the market for legal services: entry is dictated by need, and once a lawyer has been retained, exit may be costly.

4. EXTERNALITIES

The final imperfection in the market for legal services relates to externalities. The legal services market is, in general, less subject to issues related to externalities than are other professional markets such as accounting (where third parties rely on the quality of an audit) and engineering (where third parties rely on the quality of the object or process designed).⁸⁴ However, both positive and negative externalities arise in a variety of forms:

The future costs of improperly drawn contracts, wills, trusts, etc. may not be borne exclusively by the clients who purchase the legal services in the first instance. In a more general sense, there are externalities involved in the establishment of sound legal precedents in a system based on common law. The use of publicly funded courts represents a production externality of serious consequence. The list could be extended.⁸⁵

As was discussed in the previous section, because the externalities associated with law are both positive and negative, it is not clear whether they result in legal services being overpriced or underpriced. Also, while externalities may distort the legal services market, it is not clear that they have an impact on the relationship between a particular client and a particular lawyer. That is, a negative externality may make a client or lawyer improperly better off relative to a third party, but it is not obvious that it makes the lawyer better off relative to her client (or vice versa). Thus, while externalities are a noted imperfection in the legal services market, they do not obviously contribute to the possibility that lawyers are achieving economic rents from their clients. Further, because they are positive and negative, it is also not clear that they lead to lawyers receiving economic rents from third parties or that

⁸² Hadfield, *supra* note 12 at 977.

⁸³ *Ibid.* at 981.

⁸⁴ See *OLRC Study*, *supra* note 60 at 57.

⁸⁵ *Ibid.* at 57-58.

the benefit flows from third parties to the lawyers in contradistinction to flowing from third parties to lawyers' clients.

5. SUMMARY

Thus, with the exception of the number of participants, the market for legal services bears almost none of the hallmarks of a perfectly competitive market. Its products are not homogeneous, there is inadequate and asymmetrical information for participants in the marketplace, clients have limited entry and exit responses to those market problems, and there are externalities, both positive and negative, associated with the services which are sold. The question considered in the following section is, do lawyers enjoy economic windfalls as a result of those market imperfections?

B. THE CONSEQUENCES OF MARKET IMPERFECTIONS — CONCEPTUAL

Analysts of the market for legal services, or other markets with similar imperfections, generally see two economic consequences as likely to arise. The first is that the imperfections will result in a diminution in the quality of legal services: “consumers may follow price rather than quality, in an unregulated ‘race to the bottom’”;⁸⁶ the “professional service could be ‘diluted’ to meet a lower price or effectively bilk the client.”⁸⁷ Under this model, consumers do not know that quality is important, believe that quality is guaranteed by the lawyer’s professional qualification, or view price as more significant than quality, perhaps because they “assume the worst” with respect to the quality they are going to receive.⁸⁸ As a consequence, they purchase the cheapest legal services available. As a result, they are vulnerable to those services being of low quality and insufficient to meet their legal needs. Further, and over the profession as a whole, lawyers will be highly competitive with respect to the prices they charge and not especially competitive with respect to the quality. They will attempt to lower their prices regardless of the impact on quality which results.

The second identified possible economic consequence of the imperfections in the market for legal services is that they will lead to price escalation and the extraction of economic rents by the profession.⁸⁹ Consumers who recognize that quality is important — and especially if they recognize that it is disproportionately important because of the winner-takes-all quality of legal services — will prioritize quality over price in making consumption choices. They will be willing to “pay a lot for a little” and will choose the “best” lawyer they can afford, rather than the cheapest lawyer they can find.⁹⁰ Further, the consumer will assess quality based on signals indicative of quality, particularly status, but also other signals which

⁸⁶ Julian Webb, “Turf wars and market control: competition and complexity in the market for legal services” (2004) 11 *International Journal of the Legal Profession* 81 at 88, n. 7.

⁸⁷ Olley, *supra* note 61 at 79.

⁸⁸ Fenn & McGuire, *supra* note 64 at 5.

⁸⁹ This is probably the dominant prediction of those writing about the imperfections in the market for legal services. See Hadfield, *supra* note 12; Barnhizer, *supra* note 64 at 214; *OLRC Study*, *supra* note 60 at 63-64; Younger, *supra* note 80 at 31; Fenn & McGuire, *supra* note 64 at 5.

⁹⁰ Hadfield, *supra* note 12 at 972-73.

can, ironically, include price: a higher priced lawyer is likely to be viewed as higher quality than one who is less expensive.⁹¹

The second economic consequence can occur even where market participants are sophisticated and knowledgeable. In the market for legal services, corporate consumers may be sensitive to costs, and may have better information against which to judge quality, but even they will tend to view outcomes and quality as more important than cost, particularly where the work is “deemed important to the company’s business strategy.”⁹² They will be willing to accept price escalation in a quest for quality. Assume that a corporation is involved in litigation worth CDN\$2 million. Assume that the corporation is skeptical and well-informed, and determines that the top end partner at a local law firm, who bills at \$800 per hour, will only provide a 10 percent quality advantage over a junior partner, who bills at \$400 per hour. Until 500 hours have been spent on the file, it is more cost effective to retain the top lawyer, even though the difference in quality between the two is much smaller than the difference in price.⁹³ And where the amount of money at issue is more significant — in a major corporate acquisition, for example — almost any conceivable difference in fees will be rationally incurred to obtain even a minor improvement in quality.

The ability of lawyers to extract economic rents might also arise from the tendency of agent-controlled markets to lend themselves to differentiation and specialization. Lawyers who can plausibly assert that the services they provide are unique, or highly specialized, can potentially create sub-markets in which competitive forces relative to price are even less pronounced, and economic rent-seeking is heightened.⁹⁴

The final possible economic consequence of the imperfections in the market for legal services, which is not necessarily inconsistent with the first two, is that consumers who have a choice as to whether to enter the market will elect not to do so. Or, to put it slightly differently, consumers will be prepared to suffer a significant degree of loss which could be avoided by retaining a lawyer because they determine that, as ignorant consumers, the cost-benefit of hiring a lawyer is not worth it. A long-term employee who has been wrongfully dismissed might simply seek alternative employment rather than pursue his legal remedies because he is not able to participate effectively in the market for legal services, and his consequent risk of loss in doing so outweighs the certain loss associated with not pursuing his legal remedies. These consumers will not have access to justice not because they cannot afford to pay a lawyer’s fees, but because the uncertainties in the market make participation an economic gamble and therefore undesirable.

At least conceptually, then, the imperfections in the market for legal services provide the opportunity for lawyers to obtain economic windfalls: they have the ability to obtain overcompensation relative to the quality of service they provide, whether that quality is high or low. This could, in turn, impede access to justice, both directly (by making legal services

⁹¹ See Paul Milgrom & John Roberts, “Price and Advertising Signals of Product Quality” (1986) 94 *The Journal of Political Economy* 796; Kyle Bagwell & Michael H. Riordan, “High and Declining Prices Signal Product Quality” (1991) 81 *The American Economic Review* 224.

⁹² Hanlon, *supra* note 67 at 114.

⁹³ Ten percent of 2,000,000 is 200,000 which is equivalent to the cost difference in the lawyers over the first 500 hours.

⁹⁴ *OLRC Study, supra* note 60 at 50; Webb, *supra* note 86 at 96.

unaffordable) and indirectly (by making consumers who are aware of their own ignorance unwilling to participate in the market, even though they have legal claims).

The question is, though, has this occurred? While lawyers may theoretically be able to extract economic rents, is there any reason to believe that they have actually done so?

C. THE CONSEQUENCES OF MARKET IMPERFECTIONS — EMPIRICAL

If the first possibility is correct and there has been a “race to the bottom” in quality and prices, there should be a general decrease or stagnation in lawyers’ earnings over time and also increasing regulatory concern with lawyer incompetence, which could be indicated by, for example, an increase in the amount of negligence and other such claims against lawyers. If the second possibility is correct and lawyers are extracting economic rents due to imperfections in the market for legal services but there has been no “race to the bottom,” then lawyers as a group should be outperforming other market participants. In particular, with the removal of regulatory and other constraints on the participation of lawyers in the market since the 1960s (the removal of fee schedules, reorganization of lawyers into larger firms, the advent of hourly billing, and the removal of restrictions on advertising) it should be expected that on average lawyers today will have enhanced their economic performance relative to those who have not experienced equivalent shifts in regulatory oversight or market imperfections.

To test these hypotheses, I analyzed Canadian census data on the earnings of lawyers from the 1960s through to 2000, both absolutely and in relative terms.⁹⁵ I also quantified the number of reported cases on lawyer negligence and reviewed whether there had been increased regulatory concern with lawyer competence by provincial law societies. Finally, I considered the data offered by Hadfield who specifically argues that the legal services market has experienced price escalation and the extraction of economic rents.

Based on this data, there is very little evidence to support the “race to the bottom” hypothesis. A review of reported judgments on Quicklaw since 1984 indicates a consistent but somewhat increasing number of cases on lawyer negligence, with the overall number of cases being small.⁹⁶ Though it is still possible that overall quality in legal services has declined,⁹⁷ this possibility remains largely theoretical. In addition, while law societies consider competence a general issue of ethical and regulatory importance and have recently

⁹⁵ Income data from the 2006 Census: Statistics Canada, 2006 Census of Population, 97-563-XCB 2006062 (1 April 2008), online: Statistics Canada <<http://www12.statcan.ca/english/census06/data/topics/RetrieveProductTable.cfm?TPL=RETR&ALEVEL=3&APATH=3&CATNO=&DETAIL=0&DIM=&DS=99&FL=0&FREE=0&GAL=0&GC=99&GK=NA&GRP=1&IPS=&METH=0&ORDER=1&PID=94596&PTYPE=88971&RL=0&S=1&ShowAll=No&StartRow=1&SUB=0&Temporal=2006&Theme=81&VID=0&VNAMEE=&VNAMEF=>>>.

⁹⁶ A search of “lawyer negligence” under All Canadian Judgments on Quicklaw yielded only 27 cases since 1984. There were nine reported cases between 1981 and 1990, ten between 1991 and 2000 and eight between 2001 and 2007. A search of “lawyer’s negligence” yielded 54 cases since 1984. Of those, five were between 1984 and 1990, 23 were between 1991 and 2000 and 25 were between 2001 and 2007. A search of “lawyer /4 negligence,” revealed 392 cases but many of these did not relate to negligence by a lawyer.

⁹⁷ It may be, for example, that the race to the bottom is occurring in limited segments of the bar. An audience member at the conference noted anecdotally that in her jurisdiction, real estate conveyancing services are very competitive on price but only minimally or not at all competitive on the quality of the service provided. She posited that in that segment there was an observable race to the bottom.

shown a heightened interest in regulating lawyer competence, there is no evident regulatory or public anxiety about the competence of lawyers.⁹⁸

Further, and importantly, lawyers have not suffered declining or stagnating incomes over this period. In fact, and more consistent with the second hypothesis, lawyers have generally enjoyed growing economic prosperity. When adjusted for inflation, it appears that lawyers have experienced significant economic improvement over time and with the increased opportunity to compete in the market. In 2002 dollars, the average lawyer in 1960 was earning CDN\$71,919. That same average lawyer in 2000 was earning, again in 2002 dollars, \$99,299. Table 1 indicates the earnings of lawyers for each census year as reported in the census. Table 2 indicates the earnings of lawyers for each census year as adjusted to 2002 dollars. Table 3 shows the normalized growth of lawyers' earnings from 1960 to 2002, indicating that their incomes have grown by 38 percent in real terms since 1960.

Table 1. Annual Earnings for Lawyers and Selected Professions (Unadjusted)

| | Lawyers | Accountants | Architects | Engineers | Doctors | Dentists | Veterinarians |
|------|---------|-------------|------------|-----------|---------|----------|---------------|
| 1960 | 11,147 | 6,813 | 8,880 | 7,629 | 14,510 | 12,690 | 8,577 |
| 1970 | 19,263 | 9,271 | 14,152 | 11,291 | 25,308 | 21,181 | 14,559 |
| 1980 | 35,006 | 22,181 | 24,915 | 27,167 | 52,832 | 52,384 | 27,639 |
| 1985 | 51,183 | 29,762 | 32,072 | 35,274 | 78,663 | 70,256 | 30,527 |
| 1990 | 69,121 | 37,382 | 43,032 | 44,816 | 95,728 | 86,623 | 45,193 |
| 1995 | 80,811 | 50,281 | 43,707 | 50,281 | 113,324 | 101,973 | 53,976 |
| 2000 | 94,731 | 54,749 | 52,592 | 52,955 | 119,704 | 108,034 | 56,102 |

Table 2. Annual Earnings for Lawyers and Selected Professions in 2002 Canadian Dollars

| | Lawyers | Accountants | Architects | Engineers | Doctors | Dentists | Veterinarians |
|------|---------|-------------|------------|-----------|---------|----------|---------------|
| 1960 | 71,919 | 43,955 | 57,290 | 49,219 | 93,616 | 81,871 | 55,335 |
| 1970 | 94,893 | 45,671 | 69,715 | 55,623 | 124,670 | 104,339 | 71,721 |
| 1980 | 79,559 | 50,410 | 56,624 | 61,744 | 120,072 | 119,054 | 62,816 |
| 1985 | 81,243 | 47,241 | 50,908 | 55,990 | 124,862 | 111,517 | 48,456 |
| 1990 | 88,165 | 47,681 | 54,888 | 57,163 | 122,102 | 110,489 | 57,644 |
| 1995 | 92,250 | 57,398 | 49,894 | 57,398 | 129,366 | 116,408 | 61,616 |
| 2000 | 99,299 | 57,389 | 55,128 | 55,508 | 125,476 | 113,243 | 58,807 |

⁹⁸ As reported by Gavin MacKenzie at this conference, the LSUC has recently expanded its financial audit program to include spot audits of lawyer competence. The LSA informally indicated that it may follow Ontario's lead in this area. Additionally, both the LSBC and the LSUC have released recent reports on lawyer competence; however, these reports have focused exclusively on continuing lawyer education: see The LSBC, *Lawyer Education Task Force — First Interim Report*, 2004, online: LSBC <http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/LawyerEd_2004.pdf>; The LSUC, *Annual Report: Ensuring Lawyer Competence*, 2006, online: The LSUC, <http://www.lsuc.on.ca/media/arep_competence_06.pdf>.

Table 3. Change in Annual Earnings for Lawyers and Selected Professions in 2002 Canadian Dollars Normalized to 1960

| | Lawyers | Accountants | Architects | Engineers | Doctors | Dentists | Veterinarians |
|------|---------|-------------|------------|-----------|---------|----------|---------------|
| 1960 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 |
| 1970 | 1.32 | 1.04 | 1.22 | 1.13 | 1.33 | 1.27 | 1.30 |
| 1980 | 1.11 | 1.15 | 0.99 | 1.25 | 1.28 | 1.45 | 1.14 |
| 1985 | 1.13 | 1.07 | 0.89 | 1.14 | 1.33 | 1.36 | 0.88 |
| 1990 | 1.23 | 1.08 | 0.96 | 1.16 | 1.30 | 1.35 | 1.04 |
| 1995 | 1.28 | 1.31 | 0.87 | 1.17 | 1.38 | 1.42 | 1.11 |
| 2000 | 1.38 | 1.31 | 0.96 | 1.13 | 1.34 | 1.38 | 1.06 |

Considered on its own, this data might suggest that lawyers are benefiting from price escalation and the extraction of economic rents. Other data to support this conclusion includes the evidence and fairly wide consensus that lawyers can, and do, engage in unethical billing of their clients in which they bill time that provides little value to their clients and in which they bill for work that was never done.⁹⁹ The absence of effective market discipline on price may explain why unethical billing persists, and the existence of unethical billing may suggest a particular means used by lawyers to extract economic rents.

This conclusion is also consistent with data relied upon by Hadfield, and her assessment of the consequences of the imperfections in the market for legal services. Hadfield offers data related to the overall growth in the legal services market in the U.S., the inflation and high cost of litigation, the inflation of hourly rates, the lack of legal services available to individuals relative to corporations, and the general increased dedication of legal resources to the corporate sphere.¹⁰⁰

All of this data is, however, highly problematic for proving that lawyers are extracting economic rents. Consider first Hadfield's data, and in particular her observation that corporations receive a disproportionate share of legal services. This may be true, but it does not in itself indicate market failures giving rise to economic rents. Even with perfect competition, a greater proportion of economic activity will be dedicated to those in the economy who have the greatest resources. For example, in the current Calgary building boom, enormous construction is taking place on office towers and in large-scale property development, while individual home owners have difficulty finding a contractor. That fact does not demonstrate imperfections in the construction market. Likewise, that corporations receive a disproportionate share of lawyers' efforts does not in and of itself demonstrate market failure, or that lawyers are extracting economic rents.

Hadfield also notes the high costs of litigation; however, she provides no relative data. Are the costs higher than they used to be? Are the costs high relative to accessing a hospital or other public service? How can we measure whether those costs are attributable to market imperfections here or to other factors, such as the high level of human capital required to

⁹⁹ In the Canadian context, see Alice Woolley, "Time for Change: Unethical Hourly Billing in the Canadian Profession and What Should be Done About It" (2004) 83 Can. Bar Rev. 859.

¹⁰⁰ Hadfield, *supra* note 12.

conduct litigation effectively? Similar questions arise with Hadfield's assertion of the increasing hourly rates of lawyers. The data she provides in support of this assertion is very limited: the footnote supporting this claim refers only to a survey of lawyers published in the *Texas Lawyer*.¹⁰¹ It provides no breakdown of, for example, which rates of lawyers are increasing, or how those increases relate to broader inflationary or other economic trends in the relevant period.

The new information offered here is also problematic for asserting lawyers' enjoyment of an economic windfall. While there is evidence that unethical billing takes place, it is impossible to determine its extent, both in terms of its economic impact and the number of lawyers engaging in it. Further, to the extent unethical billing occurs, it, like the unethical conduct which leads to negative externalities, cries out for a direct response; it does not support an overall obligation on lawyers to "do good" in other ways. It is incoherent to use a wrong done by some to argue for a general and particular moral obligation placed on everyone to rectify the harm (diminished access to justice) to which that wrong has contributed.

Further, when considered more closely, the census data raises as many questions as it answers in terms of providing conclusive evidence of lawyers' disproportionate economic gains. While lawyers' earnings have improved in absolute economic terms since 1960, so have those of almost every other Canadian profession and occupation including accountants, doctors, dentists, teachers, and veterinarians. Table 1 indicates the earnings in a variety of professional occupations as reported in each census year. Table 2 indicates those earnings adjusted to 2002 dollars; Table 3 indicates the normalized growth in each of these professions since 1960. The earnings of each occupation in 2002 dollars and in terms of normalized growth are also indicated in Figures 1 and 2.

As these tables and figures indicate, not every profession has done equally well, and some professions have fared economically worse than lawyers since 1960 (both engineers and architects, for example). However, based on these numbers, it is difficult to argue that lawyers have enjoyed especially favourable economic performance relative to others with similarly high levels of human capital.

In recent years, lawyers, along with other professionals, have outperformed some occupational groups whose work requires less human capital, such as barbers and hairdressers.¹⁰² Tables 4 and 5 provide a comparison between the earnings of lawyers and a selection of less skilled occupations since 1960, and Table 6 shows the normalized growth of each of these occupation groups.

¹⁰¹ *Ibid.* at 958, n. 18. Note as well that when Hadfield states that corporations are hiring auditors to monitor legal bills, she gives only one example of this practice (at 958, n. 17).

¹⁰² For a general discussion of growing income inequality in recent years in Canada, see Marc Frenette, David Green & Garnett Picot, *Rising income inequality amid the economic recovery of the 1990s: An exploration of three data sources*, online: UBC Department of Economics <<http://www.econ.ubc.ca/green/ineqnov.pdf>>.

insert Figure 1 (75% reduction) landscape orientation

insert Figure 2 (75% reduction) landscape orientation

Table 4. Annual Earnings of Lawyers and Selected Occupations (Unadjusted)

| | Lawyers | Service Station | Waiters/ | Barbers/ | Armed Forces | Carpenters |
|------|---------|-----------------|----------|----------|--------------|------------|
| 1960 | 11,147 | 2,210 | 1,282 | 2,535 | 4,638 | 3,085 |
| 1970 | 19,263 | 2,370 | 1,679 | 3,338 | 6,044 | 5,299 |
| 1980 | 35,006 | 4,089 | 3,894 | 8,406 | 13,899 | 12,914 |
| 1985 | 51,183 | 5,766 | 5,331 | 10,654 | 21,245 | 15,661 |
| 1990 | 69,121 | 7,350 | 7,265 | 14,483 | 28,126 | 21,595 |
| 1995 | 80,811 | 8,786 | 9,264 | 15,434 | 32,148 | 22,361 |
| 2000 | 94,731 | 8,675 | 10,843 | 17,390 | 36,128 | 26,619 |

Table 5. Annual Earnings of Lawyers and Selected Occupations in 2002 Canadian Dollars

| | Lawyers | Service Station Attendants | Waiters/ Waitresses | Barbers/ Hairdressers | Armed Forces | Carpenters |
|------|---------|-------------------------------|------------------------|--------------------------|--------------|------------|
| 1960 | 71,919 | 14,258 | 8,268 | 16,358 | 29,921 | 19,903 |
| 1970 | 94,893 | 11,674 | 8,270 | 16,445 | 29,774 | 26,103 |
| 1980 | 79,559 | 9,293 | 8,850 | 19,105 | 31,588 | 29,349 |
| 1985 | 81,243 | 9,152 | 8,462 | 16,911 | 33,722 | 24,859 |
| 1990 | 88,165 | 9,375 | 9,267 | 18,473 | 35,875 | 27,545 |
| 1995 | 92,250 | 10,030 | 10,575 | 17,619 | 36,699 | 25,526 |
| 2000 | 99,299 | 9,093 | 11,366 | 18,229 | 37,870 | 27,903 |

Table 6. Change in Annual Earnings for Lawyers and Selected Occupations in 2002 Canadian Dollars Normalized to 1960

| | Lawyers | Service Station Attendants | Waiters/ Waitresses | Barbers/ Hairdressers | Armed Forces | Carpenters |
|------|---------|-------------------------------|------------------------|--------------------------|--------------|------------|
| 1960 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 |
| 1970 | 1.32 | 0.82 | 1.00 | 1.01 | 1.00 | 1.31 |
| 1980 | 1.11 | 0.65 | 1.07 | 1.17 | 1.06 | 1.47 |
| 1985 | 1.13 | 0.64 | 1.02 | 1.03 | 1.13 | 1.25 |
| 1990 | 1.23 | 0.66 | 1.12 | 1.13 | 1.20 | 1.38 |
| 1995 | 1.28 | 0.70 | 1.28 | 1.08 | 1.23 | 1.28 |
| 2000 | 1.38 | 0.64 | 1.37 | 1.11 | 1.27 | 1.40 |

These occupations are also represented on Figures 3 and 4.

insert Figure 3 (75% reduction) landscape orientation

insert Figure 4 (75% reduction) landscape orientation

This data indicates that, at least since 1985, lawyers have enjoyed greater relative economic prosperity than some unskilled occupational groups. This latter period of relatively greater growth in the professional sector is consistent with broader economic trends in the period,¹⁰³ and does not in itself prove that lawyers are extracting economic rents. As a whole over the past 20 years, those in the top sector of the North American economy have had increasing gains while those in the bottom sector of the economy have stagnated. This census data may indicate that lawyers and other professionals have performed consistently with this trend (although it does not even do that, conclusively), but it does not indicate that lawyers in particular have had disproportionate economic returns.

The average numbers in the census data also provide a very limited picture of lawyers' economic performance and may provide a distorted impression as to who has experienced economic gains. In particular, it is likely that the economic gains indicated by the average have been disproportionately enjoyed by a small number of the profession.¹⁰⁴ This is suggested by a breakdown and analysis of the 1995 census data on lawyers.¹⁰⁵ That data shows that in 1995 there were significant disparities within the profession, with men on average earning significantly more than women and self-employed lawyers (which should include law firm partners) earning significantly more than those who were employees. And even this disparity may be understated since some "stars" within the profession may be disproportionately skewing the numbers upward. If this is the case, it may be that *some* lawyers are extracting economic rents or are enjoying an economic windfall, but that not all lawyers are doing so. As a consequence, the census data does little to justify the imposition of a universal moral obligation on lawyers to rectify the inadequate access to justice to which that rent extraction contributes.¹⁰⁶

What about the third, "opt out" possibility? There does seem to be some evidence that individuals are simply opting out of the legal services market. The data provided by Hadfield is, I would argue, more consistent with this economic response than with the extraction of economic rents. Individuals may not access legal services because they cannot afford them, but they may also not do so because they recognize the imperfections in the market, and particularly the inability to control legal outcomes even with effective legal counsel; they simply elect to operate under the shadow of, but not within, the adversarial mechanisms of the legal system. They may also be taking advantage of the structural attempts which have been made to permit effective access to coercive dispute resolution even without the benefit of a lawyer. Even this possibility is, though, largely speculative.

In sum, then, the market for legal services has numerous imperfections, and how lawyers could benefit from those imperfections can be conceptually tracked. However, the empirical evidence does not clearly demonstrate that lawyers as a whole have exploited these market imperfections. Canadian lawyers are on average economically successful and are more

¹⁰³ See *ibid.*; Gross, *supra* note 44.

¹⁰⁴ See Harry W. Arthurs & Robert Kreklewich, "Law, Legal Institutions, and the Legal Profession in the New Economy" (1996) 34 Osgoode Hall L.J. 1.

¹⁰⁵ Abdul Rashid, "Earnings of lawyers" (2000) Perspectives 11, online: Statistics Canada <<http://www.statcan.ca/english/studies/75-001/archive/e-pdf/e-0012.pdf>>.

¹⁰⁶ Also, if only some lawyers are extracting rents it is not obvious that their doing so will impair access to justice. Because those lawyers who are not earning economic rents should, if there are sufficient entrants into the market, be sufficient to meet demand.

economically successful now than they were in 1960, 1970, 1980, or 1990. But the economic sources of that success, and its economic impact on access to justice, are opaque. Further, it is a success shared with many other participants in the Canadian economy.

The following section will consider the impact of this conclusion on the “special obligation” of lawyers and on the establishment of public policy with respect to the role of lawyers in fostering access to justice.

IV. POLICY RESPONSES TO LAWYERS’ OBLIGATIONS

The previous section established that it is possible that lawyers are extracting economic rents due to the significant imperfections in the market for legal services, but that there is only limited evidence to demonstrate that this is the case and some reason to believe that, across the profession as a whole, it is not the case. This possibility, when combined with the limitations in the justifications traditionally offered for the special obligation of lawyers to foster access to justice, means that this obligation, if it exists at all, can at this time only be weakly justified. The need for action towards the public good can be morally justified for every member for society, but there has yet to be articulated any unambiguous support for the position that lawyers have an obligation to foster access to justice in priority to other service in the public good, and that they have that obligation to a greater extent than anyone else.

This absence of unambiguous support makes specific policy responses in furtherance of this obligation difficult to justify. Lawyers as a whole, and particularly lawyers who can make a plausible case that they do not extract economic rents (who work for the federal or provincial governments, for example), can make a strong argument that imposition of a specific service obligation, or a specific fee, is unwarranted and unfair. An abstract harm, which as yet has little empirically demonstrable existence, hardly provides the basis for the extraction of a service or fee. If a lawyer wants to spend her time working on other public causes she believes in, there seems little basis for forcing her to reallocate that time towards the furtherance of access to justice.

This difficulty is heightened by the significant complexity of articulating appropriate public policy responses to even strongly-assertable moral obligations and market failures. As Michael Trebilcock and others have noted, regulation and government intervention in the market is difficult to design effectively and can have unwarranted costs and inefficiencies:

Regulation itself is costly and can introduce new inefficiencies of its own making. In evaluating policy options it is clear that we must consider *net* impacts rather than simply the achievement of primary objectives. If a market failure exists we must evaluate the magnitude of the “costs” this creates and weigh these against the costs of administering a regulatory remedy. Moreover, we must be sensitive to the unsought inefficiencies that can be generated by the intervention *per se* and weigh the costs of these against the increases in economic welfare achieved by regulation.¹⁰⁷

¹⁰⁷ *OLRC Study, supra* note 60 at 46.

Where it is difficult to document the extent and cost of market failures, it becomes equally difficult to justify undertaking the costs and inefficiencies associated with regulation to eliminate the costs associated with those failures.

As an example of the difficulty of this public policy challenge, consider the attempts by the Government of British Columbia to fund legal aid through the imposition of a 7 percent social services tax on lawyers' fees.¹⁰⁸ While stated to be directed towards enhancing access to justice, the application of the tax in certain cases has been notably regressive and has had the opposite effect of that intended. As detailed in Dugald Christie's challenge of the tax's constitutionality, the tax as applied to practitioners who represented significantly disadvantaged populations was such as to make their practices unsustainable. The tax is, conceptually, a tax on clients, but it is payable as soon as a client has been invoiced, not at the point that the invoice is paid. This is presumably done to ensure that there is not widespread tax evasion by clients through the non-payment of their bills. But the effect of this policy on Christie was to drive him out of practice as he was sandwiched between government demands he could not meet and clients who could not pay.¹⁰⁹ Its effect, in other words, was to take away the resource of a lawyer, like Christie, from clients who will otherwise go unrepresented. It is doubtful that anyone designing this tax intended it to have this effect, but it did so nonetheless, and it demonstrates the difficulty of designing specific tax or fee programs to meet particular social needs.

It is true of course that the response to the conceptual possibility that lawyers are enjoying economic rents could be quite modest. In Ontario, lawyers used to pay a small fee to support legal aid.¹¹⁰ The payment of such a fee is unlikely to unduly burden even a lawyer with a modestly profitable practice, and could potentially generate material amounts of revenue when applied to all legal practitioners. The justification for this fee in the imperfections of the market for legal services may be sufficient to warrant its modest impact.

An appropriately modest response may also be found in the voluntary pro bono programs currently being undertaken by various provincial law societies, including the LSA. The difficulty with these programs, however, is that their effectiveness is doubtful. Lawyers have traditionally been relatively unwilling to participate in pro bono activities focused on access to justice, and their failure to do so is not especially difficult to understand. Participation in such activities is irrational: a few hours of time is unlikely to make any significant impact, and the lawyer who does contribute will always be aware that in a voluntary program other lawyers will be "free riding" on her efforts. As noted by Ronald Silverman,

[p]erhaps members of the bar can be persuaded that they have a duty to resist the free-rider mentality because it threatens organized voluntary pro bono programs. Nonetheless, I doubt it. Most smart lawyers, given a choice between a wishful form of costly charity and rational least-cost inaction, are likely to choose the latter

¹⁰⁸ This was the stated intention of the tax. Since the revenues went into the general revenue fund, it is not entirely clear whether the tax has been used for this purpose.

¹⁰⁹ *Christie v. British Columbia (Attorney General)*, 2005 BCSC 122, (2005), 250 D.L.R. (4th) 728 at para. 39.

¹¹⁰ In 1998, this fee was CDN\$119. See The LSUC, "LSUC votes for independent administration of legal aid," online: The LSUC <<http://www.lsuc.on.ca>>.

sooner or later, particularly as they mature in professional terms and as the opportunity costs of volunteering inevitably increase.¹¹¹

In addition, and ironically, the greater the social need, the more likely a person considering pro bono work is to react this way: where a problem is significant, it is even more obvious that individual efforts to resolve it will be inconsequential and therefore not worth doing.

Another significant issue with the voluntary pro bono programs which have recently been put forward is that in at least some cases they are not strongly oriented toward the access to justice problem. In Alberta, for example, the orientation is only towards the charitable nature of the activity. A lawyer who represents indigent clients for a reduced fee or who takes on legal aid files is not defined as engaged in pro bono activities because the representation is not purely charitable, whereas a lawyer who provides legal advice for free to a private school is within the definition.¹¹² There is, in other words, no requirement that the activities in question be directed at access to justice issues. Therefore, as a response to the special obligation of lawyers to foster access to justice, the program may be of limited utility.¹¹³

In general, a modest fee is preferable to a voluntary pro bono program. A modest fee does not have the same issues of the “free rider,” and when passed on to an existing effective program like legal aid, is likely to make a more significant difference to the social problem toward which it is oriented.

V. CONCLUSION

For many Canadians, legal services are unavailable. Legal aid is granted only in highly limited circumstances, both in terms of the nature of the legal problems which it will fund and in terms of the low income needed to qualify. The time of a lawyer may be needed by many individuals but may be unaffordable.

The question of whose obligation it is to meet this need is of both political and moral significance. This article has attempted to consider the legitimacy of attempts to place the obligation to do so on lawyers, ahead of other members of society, and ahead of other public needs which lawyers could meet. To date, no wholly satisfactory justifications have been

¹¹¹ Silverman, *supra* note 14 at 990.

¹¹² *Pro Bono Publico*, *supra* note 4 at 4-6.

¹¹³ See also *Pro Bono Law Ontario*, *supra* note 5: *Pro Bono Law Ontario* also defines pro bono as including only free legal services. There is some evidence, however, that this is not the case in every jurisdiction. See *Pro Bono Publico BC*, *supra* note 5 at 2 where it suggests that services delivered at substantially reduced rates are an important part of pro bono work in British Columbia. See also *Pro Bono Publico BC*, *supra* note 5 at 10 where the definition that the Committee adopts does not necessarily exclude this type of work. See also The Canadian Bar Association, *Pro Bono*, online: CBA <<http://www.cba.org/CBA/groups/probono>>; “*pro bono* means to voluntarily contribute part of [the lawyer’s] time without charge or at substantially reduced rates, to establish or preserve the rights of disadvantaged individuals; and to provide legal services to assist organizations who represent the interests of, or who work on behalf of, members of the community of limited means or other public interest organizations, or for the improvement of laws or the legal system.” See also The Australian Law Reform Commission, *Report of the National Pro Bono Task Force to the Commonwealth Attorney-General* (Sydney: Australian Law Reform Commission, 2001) 4, where the definition of pro bono also expressly includes work done at a substantially reduced fee. But even in these instances, work which has nothing to do with access to justice per se is recognized and fostered as within the pro bono mandate.

offered for placing this special obligation on lawyers. The traditional arguments include lawyers' monopoly on access to the justice system, their role as a "trustee" in the justice system, the exclusive rights of lawyers to hold client secrets in confidence, the harm which legal work does to third parties, tradition, and the need for pro bono services. None of these arguments is especially convincing when subjected to closer scrutiny; most tend to provide more support for a general societal obligation to foster access to justice — and particularly for such an obligation to be placed on all economically privileged members of society — than for an obligation on lawyers in particular.

A different argument, based on the numerous imperfections in the market for legal services, appears to have more promise: it suggests a significant possibility that lawyers are enjoying economic rents, are thereby contributing to the insufficient access to justice, and have some special obligation to remedy that insufficiency. However, even this justification is weak, is not supported by much empirical evidence, and in particular, is not supported by evidence about the extent of lawyers' economic rents or who is receiving them.

As a result, policy initiatives to place additional obligations on lawyers can only be justified in modest form. A modest fee placed on practising lawyers and directed toward legal aid is justifiable; a mandatory pro bono program in which lawyers are personally required to contribute their time, or an equivalent monetary amount, toward increasing access to justice is not. Further, even if empirical evidence demonstrating that lawyers are extracting economic rents can be obtained, any more ambitious policy response must be carefully tailored to ensure that it does not have regressive consequences.

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