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ZEAL ON BEHALF OF VULNERABLE CLIENTS*

KATHRYN A. SABBETH**

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INTRODUCTION

What is the societal role of lawyers for vulnerable clients? Important literature on lawyering for poor clients explores how lawyers might better support the agency, insights, and values of such clients.¹ Pivoting outward from the internal dynamics between clients

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1. See Anthony V. Alfieri, Essay, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2110–11 (1991) (proposing an “interpretive strategy of retrieving client narratives lost in the lawyer telling of client story”); Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. MIAMI L. REV. 983, 987–93 (1994) (highlighting the importance of attending to discourse, integrating issues of race and gender into individual representation, employing client narratives, facilitating community economic development, and redefining lawyers’ professional roles); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 45–48 (1990) (describing lawyer’s subordination of client’s voice and agency).

and lawyers, another vital inquiry is what lawyers can and should do to promote the interests of their clients in relation to outside forces.² Monroe Freedman and Abbe Smith have suggested that “the central concern of lawyers’ ethics . . . is how far we can ethically go—or how far we should be required to go—to achieve for our clients full and equal rights under law.”³ This Article asks whether the answer should turn on client vulnerability.

Part I lays out the basic terms of the discussion. Part I.A borrows from Martha Fineman’s theory of vulnerability⁴ to make the following three points. First, vulnerability is ubiquitous, rather than unusual, in the human condition. Second, vulnerability varies between people, due largely to social and economic forces. Third, given the commonality and variability of vulnerability, creation of an equal society requires the state to design social structures that acknowledge and correct for the vulnerabilities of the citizenry. Fineman’s vulnerability theory offers a launching pad for conceiving of how the legal system might better acknowledge and account for vulnerability.

Lawyers comprise a fundamental aspect of the legal system,⁵ so an important target for analysis is lawyers’ conduct: to reimagine the legal system is to reimagine the role of lawyers. Part I.B examines the ethic of zeal, one of the fundamental principles of the legal profession. Lawyers balance the role of zealous advocate with those of officer of the court and public citizen. When the obligations of these roles conflict, the standard expectation is for lawyers to prioritize the interests of their clients but stay within the bounds of the law.

Part I.C questions whether the ethic of zeal should be applied evenly in every case. It is generally assumed that lawyers must act as neutral partisans,⁶ exercising the utmost zeal regardless of the client’s

2. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS § 1.05, at 8 (2d ed. 2002) (describing “the client not as ‘this other person, over whom I have power,’ but as ‘this other person whom I have the power to help’ ”); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1100, 1110 (1994) (“[T]he concern with lawyer oppression of clients has increased, while the scale of material and organizational ambitions has declined.”).

3. See FREEDMAN & SMITH, *supra* note 2, § 1.05, at 8.

4. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1–2, 19 (2008).

5. See DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY, at xvii (1988) (“[W]e encounter the legal system in the form of flesh-and-blood human beings For practical purposes, the lawyers are the law.”).

6. See William H. Simon, Commentary, *Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 37.

social position or moral standing, but perhaps the neutral approach deserves reexamination. Substantive equality might be furthered by variability in the exercise of zeal.

To investigate these topics in greater detail, Part II analyzes a specific scenario in which a lawyer assists a client in obtaining welfare benefits to which the client may be “technically ineligible.”⁷ Deborah Rhode, who first described the scenario, proposes that prioritizing the interests of the client above formal law is defensible in part because the client is poor.⁸ Her example provides support for the notion that zeal should vary based on the social position of the client. On the other hand, the standard conception of the lawyer’s role suggests a uniform approach to zeal, and tinkering with that approach could introduce moral judgments that lawyers would prefer to avoid. After considering potential challenges and other perspectives on the variability of zeal, the Article turns to the task of envisioning how increased zeal on behalf of vulnerable clients could further the pursuit of equal justice.

Client vulnerability should influence how lawyers interpret their obligations and ration their efforts. Three key forms of vulnerability justify the use of heightened zeal: (1) the absence of market power to purchase legal representation; (2) the absence of political power to shape law; and (3) the presence of basic human needs. Part III of the Article proposes consideration of these factors and offers an initial sketch of how they might be operationalized. The Article concludes that substantive equality requires consideration of these factors of vulnerability and heightened zeal on behalf of vulnerable clients.

I. SHOULD VULNERABILITY INFLUENCE ZEAL?

A. *The Vulnerability Consideration*

Imagine that our legal system were structured to acknowledge and account for the vulnerabilities of the persons within it. Martha Fineman has articulated a theory that assists with undertaking this thought experiment.⁹ She highlights the inescapability of vulnerability in the human condition and the essential function of social institutions

7. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 77 (2000).

8. *Id.* at 77–80.

9. See Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* 13, 13 (Martha Albertson Fineman & Anna Grear eds., 2013) [hereinafter *VULNERABILITY*]; Fineman, *supra* note 4, at 1.

shaping and responding to it.¹⁰ Fineman interprets vulnerability not as the condition of certain populations but as a universal condition that is mediated by social institutions.¹¹ She offers an ambitious theory that not only frames vulnerable subjects in physical and social contexts, but also suggests that consideration of vulnerability is fundamental to the pursuit of substantive equality.¹²

The following three aspects of Fineman's vulnerability theory will be relevant. First, Fineman identifies vulnerability as a universal, rather than unusual, aspect of the human condition:

[T]he concept of vulnerability is sometimes used to define groups of fledgling or stigmatized subjects, designated as "populations." . . . In contrast, I want to claim the term "vulnerable" for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility.¹³

Fineman views universal vulnerability as stemming from our physical "embodiment" and the fact that we are all at constant risk of harm due to the potential for disease or conditions of our physical environment.¹⁴

Second, vulnerabilities range from person to person, due not only to physical differences but also to economic and social factors. Vulnerability "is greatly influenced by the quality and quantity of resources we possess or can command."¹⁵ Although vulnerability cannot be eradicated, "society can and does mediate, compensate, and lessen our vulnerability through programs, institutions, and structures."¹⁶ Society's institutions produce, or fail to produce, social, political, and economic resilience, conferring privilege and disadvantage.¹⁷

Third, the public bears a responsibility to build social institutions in consideration of vulnerability and how different social structures influence it.¹⁸ Specifically, a formal approach to equality should give way to a theory of substantive equality in which the state takes

10. Fineman, *supra* note 4, at 1–2.

11. *See id.* at 8–10.

12. *Id.* at 19–22.

13. *Id.* at 8; *see also* Fineman, *supra* note 9, at 20–21 (explaining that vulnerability is universal and constant).

14. Fineman, *supra* note 4, at 9–10.

15. *Id.* at 10.

16. *Id.*

17. Fineman, *supra* note 9, at 24.

18. Fineman, *supra* note 4, at 10, 12–13.

significant responsibility for the condition in which it finds and leaves all of its subjects.¹⁹

Fineman contrasts her notion of the “vulnerable subject” with what she views as the “autonomous and independent subject asserted in the liberal tradition.”²⁰ She describes the liberal subject as “indispensable to the prevailing ideologies of autonomy, self-sufficiency, and personal responsibility, through which society is conceived as constituted by self-interested individuals with the capacity to manipulate and manage their independently acquired and overlapping resources.”²¹ Challenging this image, she argues that “autonomy is not a naturally occurring characteristic of the human condition, but a product of social policy.”²² Consideration of the vulnerable subject, as opposed to the liberal subject, therefore leads to a substantive, rather than formal, approach to equality.²³

A substantive approach to equality carries significant implications for how best to design legal and social institutions.²⁴ This approach “concentrates on the structures our society has and will establish to manage our common vulnerabilities” and increases the state’s responsibilities with respect to people’s vulnerabilities.²⁵ Fineman suggests “imagin[ing] responsive structures whereby state involvement actually empowers a vulnerable subject.”²⁶

This challenge prompts the inquiry of how the legal system might better empower vulnerable subjects. As lawyers comprise a fundamental aspect of the legal system,²⁷ an important target for analysis is lawyers’ conduct. One of the fundamental principles of lawyering is the ethic of zeal.

B. *The Ethic of Zeal*

A lawyer balances the roles of zealous advocate, officer of the court, and public citizen. In the face of competing duties, lawyers

19. *Id.* at 19–22.

20. See Fineman, *supra* note 4, at 2; see also Martha Albertson Fineman & Anna Grear, *Introduction: Vulnerability As Heuristic—An Invitation to Future Exploration*, in *VULNERABILITY*, *supra* note 9, at 1, 2, 4 (describing “the mythical (and equality destructive) autonomous liberal subject of neoliberal rhetoric” and “the rational, property-owning actor at the heart of classic liberalism”).

21. Fineman, *supra* note 4, at 10.

22. *Id.* at 23.

23. See *id.* at 2–4.

24. See Fineman & Grear, *supra* note 20, at 2.

25. See Fineman, *supra* note 4, at 1–2.

26. *Id.* at 19.

27. See LUBAN, *supra* note 5, at xviii.

traditionally prioritize the role of zealous advocate within the bounds of the law and governing disciplinary rules.²⁸ Scholars have debated whether and to what extent zeal on behalf of clients should trump concern for third parties. Below is a brief exploration of the ethic of zeal.

Zeal refers to the dedication with which the lawyer pursues her client's interests.²⁹ The ethic of zeal is one of abiding tenacity and loyalty. The famous quotation from Lord Henry Broughman instructs:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.³⁰

This portrait of the lawyer depicts a zealous partisan whose devotion to her client supersedes all other social obligations.³¹ In Monroe Freedman's most famous and most controversial depiction of the lawyer as a zealous advocate,³² he concludes that in some cases it is proper for a lawyer to cross examine for purposes of discrediting the credibility of a witness who the lawyer knows to be telling the truth; put a witness on the stand who the lawyer knows will commit perjury; and give a client legal advice that the lawyer believes will tempt the client to commit perjury.³³ Freedman acknowledges that many lawyers find clever ways to avoid coming to terms with these situations when they arise; they shield themselves from knowledge³⁴ or withdraw.³⁵ Freedman argues, however, that lawyers should confront these dilemmas directly and acknowledge when other ethical

28. See Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 771–72 (2006).

29. See FREEDMAN & SMITH, *supra* note 2, § 4.1, at 79.

30. *Id.* at 79–80 (quoting 2 TRIAL OF QUEEN CAROLINE 3 (James Cockcroft & Co. ed., 1874)).

31. See, e.g., MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975).

32. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

33. *Id.* at 1475, 1477–78, 1480–82.

34. *Id.* at 1472.

35. *Id.* at 1475–76.

obligations must give way to the ethic of zeal.³⁶ Although Freedman's interpretation of the ethic of zeal may appear extreme, to a large degree he spells out a standard conception codified in professional ethics rules and exemplified by lawyers' conduct across the country.³⁷

The justifications for prioritizing zeal on behalf of clients are as deep-seated as justifications for the adversary system itself. The adversary system's structure embodies constitutional values—protection of individual dignity, pursuit of truth through the expression of diverse perspectives, and promotion of democratic government³⁸—and constitutional rights that lawyers could jeopardize if they subordinated zeal to other social goals. Beyond sacrificing individual clients' procedural and substantive rights, this could arguably thwart the functioning of the legal system.³⁹

Untrammelled zeal does, however, present drawbacks. Scholars like William Simon,⁴⁰ David Luban,⁴¹ and Deborah Rhode⁴² have argued convincingly that lawyers' obligations to third parties, both individuals and society at large, should receive greater recognition. If lawyers take "superaggressive"⁴³ zeal too far, it might result in social harms.⁴⁴ These could include negative effects on truth-seeking, disregard for and damage to third parties, and diminished respect for lawyers and the legal system.⁴⁵ As Simon has highlighted, the zealous partisan "will employ means on behalf of his client which he would not consider proper in a non-professional context . . . [such as] deception, obfuscation, or delay."⁴⁶ Without commitment to a shared set of rules about truth-telling, there can be no atmosphere of respect

36. *Id.* at 1469, 1482. Serving as a zealous advocate does not necessarily require litigating every issue, but rather shaping one's actions with promotion of the client's interests as the primary goal. See Nicole Martorano Van Cleve, *Reinterpreting the Zealous Advocate: Multiple Intermediate Roles of the Criminal Defense Attorney*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 293, 293, 300 (Leslie C. Levin & Lynn Mather eds., 2012).

37. See LUBAN, *supra* note 5, at xxi.

38. Kathryn A. Sabbeth, *Towards an Understanding of Litigation As Expression: Lessons from Guantánamo*, 44 U.C. DAVIS L. REV. 1487, 1495, 1501 (2011).

39. See FREEDMAN, *supra* note 31, at 1–4.

40. See Simon, *supra* note 6, at 135–37.

41. See LUBAN, *supra* note 5, at xix–xxiii.

42. RHODE, *supra* note 7, at 66–70.

43. See Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 166 (1996).

44. *Id.* at 180–81.

45. *Id.*

46. See Simon, *supra* note 6, at 36.

or trust, and no social solidarity.⁴⁷ The resulting precariousness could threaten the rule of law and even the fabric of society. Not surprisingly, the Model Rules of Professional Conduct (“the Rules”) state that lawyers must contain their zeal within the bounds of the law.⁴⁸

Where lawyers have discretion in the application of zeal, however, the Rules provide limited guidance. Lawyers must balance their roles as zealous advocates, officers of the court, and public citizens, but the Rules suggest that this is relatively easy; the drafters claim that the exercise of zeal is “harmonious” with other obligations, such as candor toward tribunals and fair dealing with third parties.⁴⁹ Moreover, while the Rules reference lawyers’ “special responsibility for the quality of justice,”⁵⁰ they provide little indication of how justice might influence the exercise of zeal. The Rules do not indicate that the social position of a client may enter the calculus. The next section of this Article introduces the proposition that it should.

C. *Neutrality*

In the standard conception of the lawyer’s role, the principle that goes hand-in-hand with zeal is neutrality.⁵¹ Neutrality requires that the lawyer represent clients regardless of the lawyer’s views of the client or the client’s ends. The duties of neutrality and zeal are interrelated: the lawyer’s combined obligation is the zealous pursuit of the client’s goals without moral judgment.⁵²

Consideration of a client’s vulnerability might threaten the principle of neutrality. To suggest that lawyering for different clients might be approached differently appears at odds with a constitutional framework that espouses government neutrality. The attempt to

47. Cf. TRUDY GOVIER, *SOCIAL TRUST AND HUMAN COMMUNITIES* 89 (1997) (“To think that people can do without trust in professional relationships is to misunderstand the need for judgment and decent human relationships in the transmission and application of professional knowledge. . . . An ethos of distrust is counter-productive in professional institutions and relationships. It makes people and their projects worse than they could be.”).

48. See MODEL RULES OF PROF’L CONDUCT pmbl. (2012).

49. *Id.* The Preamble also describes lawyers’ obligation to “show respect for the legal system and . . . to uphold legal process,” and lawyers’ roles as “public citizen[s].” *Id.*

50. *Id.*

51. See LUBAN, *supra* note 5, at 7, 11, 52; Simon, *supra* note 6, at 36–37.

52. See LUBAN, *supra* note 5, at 6–7.

identify, let alone regulate, a substantive conception of public good may be controversial in a liberal democracy like the United States.⁵³

Rationing zeal based on an assessment of vulnerability creates the possibility that lawyers would reserve their energies for clients whom the lawyers deem deserving.⁵⁴ This might undermine some clients' freedom to choose their activities and to enjoy equal treatment under the law.⁵⁵ It might seem undemocratic, given lawyers' government-granted monopoly on legal services.⁵⁶

Yet lawyers do ration their efforts. They ration their zeal between their clients and the potential clients they reject.⁵⁷ Lawyers make these decisions when they accept or reject individual clients and, less directly but no less importantly, when they establish fees and other barriers to service. Given that lawyers' zeal is already rationed, it is worth considering whether factors other than purchasing power should influence that rationing.

A key question of this Article is whether the vulnerability of a client can justify heightened zeal—acts of zeal that might otherwise cross ethical boundaries. This inquiry is inspired partly by Monroe Freedman's observation that criminal defense lawyers must compromise the interests of third parties more frequently than most members of the bar will admit.⁵⁸ Freedman's loyalty to his clients is

53. For a critique of the neutrality principle in liberalism, see MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 3–24 (1996).

54. See Robert P. Mosteller, *Why Defense Attorneys Cannot, but Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 48–50 (2010).

55. See FREEDMAN & SMITH, *supra* note 2, §§ 3.04–.05, 3.07, at 56–59, 64–67; see also LUBAN, *supra* note 5, at 7 (“Otherwise, ‘If the saint sues the sinner, the sinner shall not be defended. If it should happen that a saint wrongs a sinner, the sinner cannot sue the saint.’” (quoting Letter from David Dudley Field to Samuel Bowles (Jan. 5, 1871), in ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 257–58 (1976))); RHODE, *supra* note 7, at 73 (arguing that representing guilty defendants protects the integrity of the legal system and restrains prosecutorial power).

56. See Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 150, 151 (David Luban ed., 1983) (acknowledging that if lawyers refuse to provide services based on moral qualms, persons with lawful claims may be denied access to services). *But see id.* (suggesting that the reasons for holding lawyers morally accountable outweigh legal access problems). Given lawyers' obligation to provide access to the law regardless of the substantive morality of the client or the client's goals, lawyers cannot be morally responsible for the outcomes of their legal representation. For this reason, some scholars describe the principle of neutrality as a principle of “nonaccountability.” See, e.g., *id.* at 150.

57. See Monroe H. Freedman, *Response*, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 116–17 (1995) (arguing that lawyers do have a moral obligation to justify their choices of clients, even if they must devote equally robust zeal to all they choose to represent).

58. See Freedman, *supra* note 32, at 772, 777.

deeply compelling. Yet, fidelity to the client above other parties is only as good as the reason for it. It is difficult to believe that the legal system serves fundamental values like individual human dignity when the market allocates lawyers to individuals on an uneven basis.⁵⁹ In a society where the vulnerability of the citizenry and their access to the legal system vary, the system may require adjustment to provide equal justice for all. Promoting substantive equality may require acknowledging and compensating for the social positions of vulnerable clients. Below is a discussion of one way lawyers might do so.

II. TEST OF ZEAL FOR VULNERABLE CLIENTS

The vulnerability of a client could potentially operate as a thumb on the scale for zealous partisanship and against obligations to third parties. To explore this idea in concrete terms, Part II of this Article will borrow from a case previously described by Deborah Rhode. The discussion will review her and other scholars' observations and will provide an initial analysis of the relevance of vulnerability to a lawyer's zealous representation of a client.

A. *Rhode's Case of the Vulnerable Client*

While working as a law student in a legal services office that represented poor people, Rhode encountered the following situation.⁶⁰ A client sought assistance with an application for welfare benefits.⁶¹ Rhode and her supervisors faced the question of whether and how to provide such assistance.⁶² They found this decision ethically and legally complicated because they believed that the client earned income that disqualified her from such benefits.⁶³

59. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 611–12 (1985) (suggesting that partisanship loses social value on individualist grounds when partisans are allocated by market forces).

60. See RHODE, *supra* note 7, at 77.

61. *Id.* at 76–77. At the time, the benefits were provided under Aid to Families with Dependent Children. See Temporary Assistance for Needy Families Program (“TANF”), 64 Fed. Reg. 17720, 17720 (Apr. 12, 1999) (“[T]he Temporary Assistance for Needy Families . . . replaces the national welfare program known as Aid to Families with Dependent Children . . .”). Similar benefits would be provided today under Temporary Assistance to Needy Families. See *id.*

62. RHODE, *supra* note 7, at 77.

63. *Id.* (“It appeared obvious . . . [that the client] had undisclosed income that would have made her technically ineligible for benefits.”). That this case takes place outside the context of litigation makes it no less significant. The lawyer's obligation of zeal applies to all representation, not just courtroom advocacy; there is always a potential adversary because any act of drafting or negotiation could influence the client's position in later

As background, Rhode explains that the financial subsidies provided under the governing welfare regulations were “grossly inadequate.”⁶⁴ The benefit levels were unrealistically low and did not actually provide sufficient funds for a family to subsist in the then-current economy.⁶⁵ As a result of the mismatch between the benefit levels provided by the regulations and the level of income required for survival, poor people commonly supplemented welfare income with additional earnings but chose not to report the additional earnings.⁶⁶

Rhode asserts that the client in this particular scenario needed the welfare support to finish an educational program.⁶⁷ Rhode posits that the educational program could have helped the client “escape poverty and achieve long-term financial independence.”⁶⁸ Therefore, Rhode maintains, this client is a person the welfare laws were intended to support.⁶⁹

Rhode interpreted the client’s position to be one the formal law does not support.⁷⁰ Rhode understood the client not to be legally entitled to the benefits because of her independent income.⁷¹ The dilemma she and her supervisors faced was “whether to provide assistance” with a benefits application that would help the client “maintain benefits to which she probably was not entitled.”⁷²

Rhode presents this factual scenario in the context of a discussion of the advocate’s role in the adversary system. She articulates two types of cases that present ethical challenges for advocates.⁷³ The first is the use of justifiable means for unjust ends.⁷⁴ She offers an example of an attorney raising a statute of limitations defense although the defendant experienced no prejudice as a result of the plaintiff’s delay in bringing suit.⁷⁵ The second type of case, more relevant to the discussion here, is the use of unjust means for

litigation. See FREEDMAN & SMITH, *supra* note 2, § 4.01, at 80. Moreover, all legal advice assists with negotiating social relations, thereby potentially increasing a client’s relative social power.

64. RHODE, *supra* note 7, at 76.

65. *Id.*

66. *Id.* at 76–77.

67. *Id.* at 77.

68. *Id.*

69. *Id.*

70. *See id.*

71. *Id.*

72. *Id.*

73. *Id.* at 71.

74. *Id.*

75. *Id.*

justifiable ends.⁷⁶ Rhode identifies this as the “classic dilemma of ‘dirty hands.’”⁷⁷ The dilemma of “dirty hands” is not unique to the practice of law—for example, it is common in politics—but it may raise special problems for lawyers, whose position carries special duties to uphold the law, in spite of moral reasons to subvert it.⁷⁸

Rhode presents the factual scenario above as an example of a situation in which a client’s position is morally but not legally justified. The question for the lawyer is whether to assist the client, and thereby subvert the law, for moral reasons. Though she avoids saying it explicitly, Rhode suggests that her supervisor did so.⁷⁹ In this sense, the supervisor arguably used unjust means—assisting a client with violating the letter of the law—to achieve a just outcome: supporting a poor woman who was using the benefits for support while pursuing an education that might eventually allow her to support herself independently.⁸⁰ The supervisor’s resolution involved “selective ignorance”: she assisted the client while avoiding the acquisition of information that would have put her in the position of “knowingly” assisting in the preparation of an application that included inaccurate statements of fact.⁸¹ Rhode defends this choice, proposing that, so long as their own conduct is not illegal, lawyers may⁸² pursue results that are morally but not legally justified.⁸³

Rhode buttresses her argument by emphasizing social context.⁸⁴ She highlights that the “dirty hands” dilemma appears in particularly

76. *Id.*

77. *Id.* at 76.

78. *Id.*

79. *Id.* at 78.

80. *Id.* at 77–78. It is unclear why the client’s path toward financial independence should influence the analysis. Perhaps Rhode believes the legislature intended welfare benefits to be temporary, but, if we set aside the requirements of formal law, assisting a client to maintain the means of survival might be intrinsically good, regardless of the client’s educational or financial plans.

81. *Id.* at 78.

82. Note that Rhode’s proposal is a permissive one; it is not a requirement.

83. See RHODE, *supra* note 7, at 77–78. In explaining this approach, Rhode divorces the conduct of the client from the conduct of the lawyer: she implies that a lawyer could lawfully assist with unlawful conduct. *See id.* This may create a very fine line for a lawyer to walk. *See* Ted Schneyer, *Reforming Law Practice in the Pursuit of Justice: The Perils of Privileging “Public” over Professional Values*, 70 *FORDHAM L. REV.* 1831, 1844 n.79 (2002) (“[T]hey might have committed a crime and would have violated ethical bans on knowingly assisting clients in crimes or frauds.” (citing MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(7) (1982); MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (1983))).

84. RHODE, *supra* note 7, at 77–78.

compelling forms in the practice of poverty law.⁸⁵ A better solution to the tension between formal law and human needs is often unavailable in the context of representing poor people.⁸⁶ The letter of the law tends not to favor the poor.⁸⁷ Lawyers representing poor people tend to be dependent for their own incomes on funders who limit lawyers' political activities, hampering lawyers' own efforts to correct the law's injustices through democratic means.⁸⁸ Finally, poor people present lawyers with time-sensitive needs of survival, which cannot wait for legal reform.⁸⁹ Rhode therefore concludes that such circumstances "can justify partisan practices that would be indefensible in other contexts."⁹⁰

The case study above highlights how social realities shape the context in which lawyers operate. It underscores the need for flexibility and creativity when interpreting lawyers' duties, given clients' varied social positions. It hints at the possibility that lawyers should adjust their level of zeal in consideration of client vulnerability.

B. Challenges for Variability of Zeal

The notion of heightened zeal for vulnerable clients will meet stiff resistance. The traditional conception of the lawyer as a neutral partisan mandates that the lawyer's obligation of warm zeal operates with equal strength and purpose regardless of a client's financial circumstances or other aspects of the social context.⁹¹ The lawyer must always use all reasonably available means, within the law and

85. *Id.* at 76. While she does not define poverty law, it is likely Rhode meant "the legal statutes, regulations and cases that apply particularly to the financially poor in his or her day-to-day life." Lillian Salinger, *Poverty Law: What Is It?*, 12 LEGAL REFERENCE SERVICES Q., no. 2-3, 1992, at 5, 6. Traditionally, this has been understood to include an intersecting web of civil law topics such as health care law, housing law, education law, elder law, family law, and welfare law. *Id.* at 6, 13. Today, more legal services offices include programs focused on consumer law, immigration law, domestic violence, employment law, and other areas. See, e.g., *Civil Practice*, LEGAL AID SOC'Y, <http://www.legal-aid.org/en/civil/civilpractice.aspx> (last visited May 1, 2015).

86. RHODE, *supra* note 7, at 78-79.

87. *Id.* at 78 ("To suggest that poverty lawyers could rectify injustices in welfare rules through political initiatives is to ignore the forces that gave rise to those rules in the first instance. Such suggestions also overlook the statutory prohibitions on political activity and welfare reform litigation by government-funded legal aid lawyers.").

88. *Id.*

89. *Id.* at 78-79.

90. *Id.* at 79. Rhode suggests this may be "an imperfect solution, but we live in an imperfect world." *Id.* at 78.

91. Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1726-27 (2002).

governing ethical regulations, to advance the client's interests.⁹² The traditional approach to zeal is mandatory, not permissive,⁹³ and does not allow for flexibility in degree.⁹⁴

As Monroe Freedman describes it, the question in Rhode's welfare scenario⁹⁵ is simply whether assisting the client with her application is in her interest and lawful.⁹⁶ The means to be employed as part of the lawyer's zealous advocacy should not be limited by the lawyer's moral judgment but only by the client's interests and the law.⁹⁷ Freedman believes that lawyers should counsel clients about the moral and legal consequences of their actions,⁹⁸ but once a client has defined her interests, the lawyer must serve them.⁹⁹

In the case of assisting a client to submit a welfare application despite suspicion that the application includes false information, Freedman suggests that the Model Rules actually condone Rhode's supervisor's tactic of selective avoidance.¹⁰⁰ He explains that the Model Rules define knowledge as "actual knowledge," which in turn requires "an outright admission from a client."¹⁰¹ Additionally, the Model Rules put no burden on the lawyer to investigate.¹⁰² Although he notes that the Code of Conduct would put more stringent limits on the lawyer's conduct,¹⁰³ Freedman suggests that the supervisor's

92. *Id.* at 1727.

93. Freedman's assessments of what lawyers must do and what they may do with respect to acting zealously are often indistinguishable, perhaps due to the fact that he believes lawyers' ethics are rooted in the Bill of Rights. *See* FREEDMAN & SMITH, *supra* note 2, at vii; *see also* MODEL RULES OF PROF'L CONDUCT Scope (2012) (identifying within the Model Rules and comments a combination of imperatives whose violation creates cause for professional discipline, discretionary rules defining areas for attorneys to exercise professional judgment, and mere guidance).

94. *See* FREEDMAN & SMITH, *supra* note 2, § 4.05, at 88 ("For a lawyer to represent her client less than zealously would . . . warrant professional discipline.").

95. Freedman suggests that there is not a question in this scenario because the governing rules permit the conduct contemplated. *See infra* notes 100–04 and accompanying text.

96. *See* Freedman, *supra* note 91, at 1727.

97. *Id.*

98. *Id.*

99. *Id.* Note, however, that Freedman believes that the choice of whom to represent is a moral decision, and social context may influence that decision. Freedman, *supra* note 57, at 116–17. Neither Rhode nor Simon emphasizes this factor, but in the welfare benefits scenarios that they present, each client is already a client, not merely a prospective client. *See* RHODE, *supra* note 7, at 77; WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 148 (2000).

100. *See* Freedman, *supra* note 91, at 1725.

101. *Id.*

102. *Id.*

103. *Id.* at 1725 & n.49.

chosen conduct is perhaps not so controversial at all and, in fact, is rather accepted by the legal establishment.¹⁰⁴

Yet this conclusion means the interpretation of knowledge should be the same in the representation of wealthy clients. Herein lies Freedman's objection to Rhode's contextual approach to lawyers' conduct. Freedman points out that the "evasive strategies" she embraces on behalf of poor clients, such as "selective ignorance," are the same strategies she criticizes when employed on behalf of wealthier clients.¹⁰⁵ For example, Rhode criticizes truth-thwarting games played by corporate defense counsel during discovery.¹⁰⁶ Freedman argues that Rhode embraces a double-standard: her perspective leads to different rules for lawyers of the poor and lawyers of the rich.¹⁰⁷

As a practical matter, selective application of rules based on moral judgments could harm those persons Rhode aims to protect.¹⁰⁸ With respect to the welfare scenario, Freedman points to right-wing pundits who view women receiving welfare assistance as immoral.¹⁰⁹ He further suggests that the subjectivity of this morality consideration can permit *any* lawyer to claim that her client is morally righteous and therefore deserving of assistance by way of evasive strategies.¹¹⁰ Freedman worries that lawyers for the powerful would exploit Rhode's approach at least as frequently as lawyers for the powerless.¹¹¹

104. Freedman does not seem to think avoidance is generally the wisest approach, in part because lawyers need full information to best represent their clients' interests. Freedman, *supra* note 32, at 1470 ("It is . . . essential to maintain the fullest uninhibited communication between the client and his attorney, so that the attorney can most effectively counsel his client and advocate the latter's cause."). Freedman would likely conclude that the better approach is, with eyes wide open, to counsel the client regarding the moral and legal implications of the conduct but then, if it can be done within the confines of the law as aggressively interpreted, assist her.

105. See Freedman, *supra* note 91, at 1724–26.

106. RHODE, *supra* note 7, at 86–88.

107. See Freedman, *supra* note 91, at 1724 (citing RHODE, *supra* note 7, at 79); see also Schneyer, *supra* note 83, at 1847 (arguing that there is no social consensus on the moral principles animating Rhode's theory, and therefore her approach provides no firm guidelines for ethical behavior).

108. Freedman, *supra* note 91, at 1726–27.

109. See *id.* at 1726.

110. *Id.* at 1726–27; see also Schneyer, *supra* note 83, at 1847 & n.96 (critiquing "theories of legal ethics . . . driven by the aim of enlisting the legal profession in the pursuit of one political perspective at the expense of other perspectives within mainstream American politics" (citing Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 19–20 (1991))).

111. Freedman, *supra* note 91, at 1726. Rhode also recognizes this possibility. See RHODE, *supra* note 7, at 78 ("Given the economic and psychological pressures of practice,

Freedman insists on a uniform standard under which all lawyers act with full zeal but within the bounds of the law. Although his vision of the lawyer's zeal is famously robust,¹¹² Freedman does not acknowledge any tension between zeal and formal law.¹¹³ On the contrary, he borrows from the Model Code of Professional Responsibility to define the terms of the discussion so that obligations to clients and to the law are coterminous:

Unfortunately, the word "overzealous" is sometimes used rhetorically (and without definition) to attack the ethic of zealous representation. Since zealous representation involves "seek[ing] the lawful objectives of [the] client through reasonably available means permitted by law and the Disciplinary Rules," . . . we should define "overzealous" as conduct that goes beyond what is permitted by law and the Disciplinary Rules. Under that definition, I too disapprove of overzealous representation.¹¹⁴

For Freedman, lawyers serve justice precisely by serving their own clients' interests zealously within the rule of the law, thereby protecting clients' dignity and autonomy.¹¹⁵ His preferred solution for addressing any immorality in the conditions facing poor clients is to increase the number of lawyers serving them.¹¹⁶ Freedman does not

attorneys may too often convince themselves that fundamental values and irrational rules permit covert noncompliance [with governing law and rules]. If the bar's history is any guide, the clients most likely to benefit from such decision making would not be the poor and oppressed.").

112. William H. Simon, "Thinking Like a Lawyer" About Ethical Questions, 27 HOFSTRA L. REV. 1, 1 (1998) ("Suppose you had to pick the two most influential events in the recent emergence of ethics as a subject of serious reflection by the bar. Most likely you would name the Watergate affair of 1974 and the appearance a few years earlier of an article by Monroe Freedman [entitled *Three Hardest Questions*].").

113. See Freedman, *supra* note 91, at 1722 n.27. He does, however, acknowledge tensions between zeal and other ethical mandates; for example, he boldly claims that zeal towards one's client must sometimes trump the obligation of candor. See generally Freedman, *supra* note 28, at 771–72 ("[Z]ealous representation . . . may sometimes require the lawyer to violate other disciplinary rules.").

114. See Freedman, *supra* note 91, at 1722 n.27 (alteration of quoted material in original) (internal citation omitted) (quoting MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A) (1982)). Of course, Freedman's description of the ethic of zeal is far more complex, robust, and animated in his other work. Freedman would likely claim that the two statements are consistent and it is a matter of how one interprets the bounds of the law. He interprets them as permitting, but also requiring, the lawyer to take aggressively zealous steps on behalf of the client.

115. See *id.* at 1727.

116. *Id.* (expressing support for increased funding of legal services to expand access to lawyers); see also Freedman, *supra* note 57, at 116–17 (arguing that the choice of whom to represent is a moral one).

agree with adjusting the activities of the lawyers who already provide that service.¹¹⁷

An underlying premise of this perspective is that lawyers pursue equal justice by treating all clients the same. Variation in lawyers' duties in consideration of clients' vulnerability would compromise this approach to equality. That approach, however, suggests a formal, rather than substantive, view of equality. The next section will present a different, substantive approach.

C. *Zeal for Substantive Justice*

An interesting model for varying zeal can be found in the work of William Simon.¹¹⁸ Simon prioritizes substantive justice, and although he does not directly address the question of zeal for vulnerable clients, his approach to substantive justice offers important insights for this discussion. Simon interprets the law to embody fundamental values,¹¹⁹ which sometimes trump formal legal requirements.¹²⁰ Simon views the obligation to pursue substantive justice as central to lawyers' ethics,¹²¹ and believes lawyers should be permitted to engage in that pursuit even when formal law appears to erect barriers to it.¹²² Simon's view of substantive justice suggests zeal should vary—sometimes lawyers should circumscribe their zeal even more sharply than formal law requires, but sometimes they should engage in zealous advocacy beyond what formal law might permit.

This approach to how a lawyer for vulnerable clients pursues justice may be clarified by comparison to the perspectives described above. Freedman would say pursuit of justice is the same in any representation: zealous advocacy within the bounds of the law (and of course the lawyer may argue in good faith for changes in the law).¹²³ Rhode would say the lawyer for the vulnerable client may use contextual analysis and creative lawyering to take steps beyond what she might do for a less vulnerable client.¹²⁴ Simon does not suggest that vulnerable clients are categorically entitled to enhanced zeal, but, in practice, the application of Simon's philosophy often leads to that result.

117. Freedman, *supra* note 91, at 1727 (arguing that evasive strategies are not “[t]he best way to help the poor and the oppressed”).

118. SIMON, *supra* note 99, at 7–10.

119. *Id.* at 138.

120. *Id.* at 77.

121. *Id.* at 138.

122. *Id.* at 77.

123. *See supra* Part II.B.

124. *See supra* Part II.A.

For Simon, the degree of the lawyer's zeal should be circumscribed not by formal law, but by substantive justice. Simon recognizes that substantive justice may not be identical to a particular client's interests, and where there is a conflict, Simon insists that the lawyer prioritize the former.¹²⁵ This means that in some cases the lawyer must stop short of taking all technically lawful steps to advance the client's interests.¹²⁶ In such cases, the lawyer will act less zealously than Freedman would require.

Simon's approach, however, also contemplates circumstances in which the lawyer might act more zealously than under Freedman's model.¹²⁷ Simon's ethical lawyer is not bound by formal law, but by the law as it embodies fundamental values.¹²⁸ Freedman is careful to define zeal so that it is in harmony with lawful conduct,¹²⁹ but Simon's limiting principle is different.¹³⁰

Like Rhode, Simon analyzes lawyers' obligations in the context of social and economic structures. In his book, *The Practice of Justice*, Simon explores the topic of financial planning.¹³¹ He discusses advising two clients, one poor and surviving on welfare benefits, and the other employed in a hotel, earning a handsome salary.¹³² After a complicated analysis, Simon concludes that assistance for the former client is more justified.¹³³

For Simon, whether the attorney should offer financial planning advice turns on substantive justice. He suggests that, in the pursuit of substantive justice, the lawyer has an obligation to consider the purposes of a regulation.¹³⁴ The clearer those purposes are, and the closer to fundamental legal values those purposes are, the more closely the lawyer must adhere to the substance of the regulation.¹³⁵

125. SIMON, *supra* note 99, at 7–9, 26, 50–52.

126. *See, e.g., id.* at 145–46 (“The Dominant View [of legal ethics] tends to license the manipulation of form to defeat purpose . . . [and] to permit any client goal not plainly precluded.”).

127. *Compare id.* at 77 (arguing that there are circumstances that “may warrant the lawyer to go beyond [the bounds of the law]”), with Freedman, *supra* note 91, at 1727 (arguing that lawyers must zealously advocate for clients “within the rule of law”).

128. SIMON, *supra* note 99, at 77.

129. *See* Freedman, *supra* note 28, at 771–72 & n.6; *see also* MODEL RULES OF PROF'L CONDUCT pmb. (2012) (defining obligation of zeal as harmonious with lawyers' other obligations).

130. SIMON, *supra* note 99, at 77–108.

131. *Id.* at 148.

132. *Id.* at 146–49.

133. *Id.*

134. *Id.* In explaining Simon's work, I use the term “regulation” to include any statute or regulation that potentially governs the situation.

135. *Id.* at 145–46.

This requires the lawyer to abstain from manipulating formal law to violate the spirit of the regulation.¹³⁶ Evasive strategies, like those that Rhode identifies as permissible in certain contexts,¹³⁷ would be improper under Simon's view when the regulation's purposes are clear and closely aligned with fundamental legal values.¹³⁸ Where the purposes of a regulation are less clear or where those purposes threaten a fundamental legal value, however, the lawyer may interpret the regulation formally and comply with them only technically.¹³⁹ Rhode's evasive strategies would therefore be available if the purposes are less clear or would threaten a fundamental value.

Simon generally finds advice to assist with tax avoidance¹⁴⁰ more troubling than do many other lawyers and theorists of legal ethics.¹⁴¹ He demonstrates this in his discussion of the hypothetical situation involving the lawyer for the "highly paid hotel manager."¹⁴² The manager could reduce his tax liability by arranging to live at the hotel in exchange for a reduction in pay, because the in-kind shelter benefit would be tax exempt.¹⁴³ The lawyer believes that the purpose of the relevant tax provision is to benefit employees required to live onsite in spite of their own presumed preference for larger cash payments.¹⁴⁴ After a thorough description of how the lawyer might analyze the purposes of the relevant tax provision, Simon concludes that if the lawyer believes the regulatory purpose is "clear and not problematic," and advising the client to initiate the arrangement with his employer

136. *Id.* at 145. For Simon, it also requires that the lawyer often correct, rather than take advantage of, the mistakes or absence of information of third parties. *See, e.g., id.* at 141–43.

137. *See* RHODE, *supra* note 7, at 78.

138. SIMON, *supra* note 99, at 145–46.

139. *Id.* at 146.

140. The term "avoidance" is intended here in an ordinary, non-legal sense. Generally, "tax avoidance" is distinguished from "tax evasion," with the former being recognized as lawful and the latter as unlawful. *See* Stuart P. Green, *What Is Wrong with Tax Evasion?*, 9 HOUS. BUS. & TAX L.J. 221, 222–23 (2009); *see also* Assaf Likhovski, *The Duke and the Lady: Helvering v. Gregory and the History of Tax Avoidance Adjudication*, 25 CARDOZO L. REV. 953, 993 (2004) (tracing the historical development of the recognized distinction between avoidance and evasion). In this discussion, however, the term "tax avoidance" is not meant to indicate that the conduct is lawful or unlawful, but simply that it is a form of financial planning or other activities for the purposes of avoiding or reducing tax liability.

141. *Compare* SIMON, *supra* note 99, at 142–43 (proposing that a lawyer should not use "a new tax avoidance device" even if "there is a nonfrivolous argument for its legality"), *with* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2012) (limiting lawyers' zeal to asserting claims that are "not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law").

142. SIMON, *supra* note 99, at 146.

143. *Id.*

144. *Id.* at 147.

would circumvent the statutory purpose, the lawyer should refrain from suggesting it.¹⁴⁵ The lawyer should circumscribe her zeal to promote substantive justice.

Yet Simon acknowledges the need for a different approach when representing a client with basic human needs at stake.¹⁴⁶ He presents a hypothetical case in which a client receives public assistance and lives in her cousin's home at no charge, but the free shelter threatens her public assistance eligibility.¹⁴⁷ The regulations governing public assistance provide that receipt of shelter "at no cost" constitutes "income in kind" and will reduce the client's monthly benefits by one hundred and fifty dollars.¹⁴⁸ The lawyer recognizes, however, that the client could technically avoid receiving shelter "at no cost," and could thereby avoid the corresponding reduction in benefits, if the client gives her cousin a nominal amount of money each month.¹⁴⁹ Simon applies his concept of substantive justice to the scenario.¹⁵⁰ To demonstrate how a lawyer might apply the theory, he walks through one possible analysis of the legislative history and purpose of the governing regulations.¹⁵¹ He suggests that the benefit reduction in the regulations was likely intended to reflect that persons provided with shelter have less of a need for financial support.¹⁵² Additionally, he finds some evidence that crafters of the regulation probably did not consider financial planning.¹⁵³ On the other hand, financial planning is not explicitly prohibited, so perhaps the language of the regulation reflects a compromise between different legislative agendas.¹⁵⁴ Simon asks us to imagine that, after this careful process of consideration, the attorney concludes that the legislative purpose is unclear.¹⁵⁵ These circumstances, Simon explains, suggest that the attorney should treat the regulation formally.¹⁵⁶ This means the lawyer should advise the client about the financial planning option. Simon further suggests that, even if the lawyer had found the regulation's purpose to be clear, if the lawyer concluded that this purpose endangered

145. *Id.*

146. *Id.* at 146–49.

147. *Id.* at 148.

148. *Id.*

149. *Id.*

150. *Id.* at 148–49.

151. *Id.*

152. *Id.* at 148.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

fundamental legal values, she could still be justified in providing the financial planning advice.¹⁵⁷

How does Simon justify this conclusion? He suggests that the lawyer might determine that the client's interest "in a minimally adequate income is a value of exceptional legal importance";¹⁵⁸ that the assistance grant does not suffice to meet that interest; and that the financial planning would help to bridge the gap.¹⁵⁹ Simon asserts that the shelter reduction provision frustrates the fundamental legal value he has identified.¹⁶⁰ Therefore, the lawyer might conclude that a financial planning arrangement like the one contemplated is not prohibited by the regulation unless the regulation states so explicitly.¹⁶¹ In the absence of an explicit prohibition, the lawyer should advise the client on the financial planning option to avoid the benefits deduction and maintain a benefits level closer to the minimal level she needs.¹⁶²

Whether the interest in a minimally adequate income is an exceptionally important legal value—or is even commonly accepted as a legal value at all in the United States—is controversial. Simon finds that "there is substantial authority" for the proposition,¹⁶³ but admits that the Supreme Court has provided mixed support.¹⁶⁴ He also suggests looking to other legal standards, such as federal poverty guidelines, for an indication of the legally recognized minimum income needed for survival.¹⁶⁵ Simon acknowledges that the conclusion about the analysis is debatable but insists there is sufficient authority for an attorney to conclude that the shelter reduction provision contradicts a fundamental legal value.¹⁶⁶ On this basis, the attorney could interpret the regulation formally and assist the client to evade its substance.¹⁶⁷

Simon's approach to the vulnerability of clients, like Rhode's, is contextual. He does not advocate for a separate framework for the ethics of representing vulnerable clients, but he allows clients'

157. *Id.* at 148–49.

158. *Id.*

159. *Id.* at 149.

160. *Id.* at 148.

161. *Id.* at 149.

162. *Id.* at 148–49.

163. *Id.* at 149.

164. *Id.* at 149, 234–35 n.13 (citing *Goldberg v. Kelly*, 397 U.S. 254, 260–61 (1970); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

165. *Id.* at 149.

166. *Id.*

167. *Id.*

vulnerability to influence the lawyer's analysis when the law gives indications that addressing such vulnerability promotes fundamental values.¹⁶⁸ With respect to the level of zeal due to poor clients, Rhode suggests that not all poor clients are entitled to "unqualified advocacy," but that poverty is not irrelevant if it affects the justice of the claims.¹⁶⁹ Rhode and Simon both acknowledge that these contextual approaches leave significant room for lawyers' discretion.¹⁷⁰ Rhode would choose to limit that discretion by requiring that the lawyers' choices be "defensible under accepted ethical principles,"¹⁷¹ while Simon would set the limit at broader legal values.¹⁷²

Simon implies that addressing basic human needs might be one of those values.¹⁷³ In his scenario involving the client who lives with her cousin, Simon suggests that the client's need for minimally adequate income might be one such form.¹⁷⁴ In advocating the pursuit of substantive justice even in violation of formal legal requirements,¹⁷⁵ Simon draws an analogy to nullification by judges and juries.¹⁷⁶ He explains that such nullification, properly understood, is not a demonstration of lawlessness, but an act of interpreting what the law substantively requires.¹⁷⁷ Moreover, he argues, even if lawyers have a stronger obligation to respect and uphold the law than do other actors in the legal system, "obligation to 'law' may require violation of some legal norms in order to vindicate more basic ones."¹⁷⁸ Therefore, one could recognize a client's interest in a minimally adequate income as a fundamental legal value that could provide sufficient reason to override the dictates of formal law. Notwithstanding other ethical or legal considerations, the client's need for a minimally adequate income might justify the attorney's zeal.

168. As thinkers like Robin West have highlighted, this approach is actually a conservative one; it suggests that moral and activist goals must rest on existing legal values. Robin West, *The Zealous Advocacy of Justice in a Less Than Ideal Legal World*, 51 STAN. L. REV. 973, 981 (1999). This approach leaves little space to challenge unjust laws or to shift legal values.

169. RHODE, *supra* note 7, at 79.

170. *Id.*; SIMON, *supra* note 99, at 149.

171. RHODE, *supra* note 7, at 79.

172. *Id.*; SIMON, *supra* note 99, at 149.

173. SIMON, *supra* note 99, at 148–49.

174. *Id.*

175. *See id.* at 77.

176. *Id.* at 84–98, 107–08.

177. *Id.* at 84.

178. *Id.* at 106.

The above analysis offers several possible answers to the question of whether and to what extent clients' vulnerability may or should influence the lawyer's ethic of zeal. Rhode's case study highlights the social context in which lawyers work.¹⁷⁹ It reveals reasons to consider vulnerability and gives clues as to when a client's vulnerability may be relevant. The inquiry is enriched by the perspective of Simon, who highlights the significance of fundamental values.¹⁸⁰ He reminds us that the law does embody substantive, non-neutral values. Such values can and should inform lawyers' conduct. Building on these insights, the next Part will begin to tackle how to incorporate substantive values into the representation of vulnerable clients.

III. A NEW APPROACH TO ZEAL ON BEHALF OF VULNERABLE CLIENTS

The standard conception of lawyers' role cautions us to avoid double standards in zealous advocacy, to exercise zeal within the bounds of the law and accepted norms, and, if dissatisfied with the formal laws, to seek to change them.¹⁸¹ The realities of lawyering in a society with an unequal distribution of power and resources, however, provide reason to question this approach. The commonality and variability of vulnerability make it necessary to develop flexible and creative interpretations of the law. To promote and protect an equal society, the legal system ought to recognize people as it finds them and empower people in the positions they occupy. As agents of the legal system, lawyers should account for the differences between clients. Lawyers should consider client vulnerability when rationing their efforts. Client vulnerability will, in some cases, tip the balance towards increased zeal.

Drawing on themes underscored in the case studies discussed above, this third and final Part of the Article will identify particular forms of client vulnerability that justify increased zeal on the part of lawyers. Each identified category serves to acknowledge and compensate for an aspect of vulnerability that requires attention in a system of equal justice. The key forms of vulnerability are: (1) the absence of market power to purchase legal services;¹⁸² (2) the absence

179. See RHODE, *supra* note 7, at 78.

180. See SIMON, *supra* note 99, at 148.

181. RHODE, *supra* note 7, at 77.

182. *Id.* at 78 (highlighting that poor clients are represented by lawyers supported through public funds).

of political power to shape the law;¹⁸³ and (3) the presence of basic human needs.¹⁸⁴ Below is a brief sketch of the purpose and definition of these categories.

A. Absence of Market Power to Purchase Legal Services

The frequent absence of market power to purchase legal services creates a dynamic of underrepresentation that calls out for correction. In the aggregate, people without the capacity to purchase legal services generally have fewer lawyers than those able to pay. As a result, certain interests and positions are overrepresented, while others are underrepresented.¹⁸⁵ For example, it is not surprising that in a housing court where twelve percent of tenants are represented and ninety-eight percent of landlords are represented, judges' perceptions of the law reflect the landlords' views.¹⁸⁶ This makes zealous advocacy on behalf of the tenants all the more vital.

The absence of market power to purchase legal services is a factor that can be defined in concrete terms without posing a fundamental challenge to the neutral partisan ethic.¹⁸⁷ To evaluate whether a client has the market power to purchase legal services, one

183. *Id.* (“To suggest that poverty lawyers could rectify injustices in welfare rules through political initiatives is to ignore the forces that gave rise to those rules in the first instance.”).

184. *Id.* at 78–79 (describing “clients with pressing economic survival needs and compelling moral claims”).

185. A notable exception is the client whose case is unusually attractive to high-profile pro bono counsel. *See, e.g.,* Sabbeth, *supra* note 38, at 1529–30 (describing pro bono counsel for Guantánamo detainees).

186. *See* CMTY. TRAINING & RES. CTR. & CITY-WIDE TASK FORCE ON HOUS. COURT, INC., HOUSING COURT, EVICTION AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL, at iv, 20 (1993) (“Only 11.9 percent of the tenants in Housing Court were represented by attorneys. Landlords were represented by an attorney in 97.6 percent of the cases.”); *see also* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 681 (1981) (“In the vast majority of transactions in every consumer sales or loan contract . . . one party is unrepresented.”); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 118 (1997) (describing mismatch between represented creditors and unrepresented debtors).

187. *See* Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1420–21 (1984) (arguing that non-profit organizations supporting corporate interests should not be recognized as public interest law firms under tax exemption law because they do not increase access for underrepresented groups or interests); Louise G. Trubek, *Public Interest Law: Facing the Problems of Maturity*, 33 U. ARK. LITTLE ROCK L. REV. 417, 421–22 (2011) (describing the Ford Foundation’s use of “‘market failure’ economic literature” to justify the development of non-profit, public interest law firms in neutral terms).

could consider whether the client paid for legal representation.¹⁸⁸ This consideration could be adjusted to account for whether the person took out a loan to pay, whether the person paid a limited amount based on a sliding scale, or whether the fee was paid through a statutory fee-shifting provision rather than from the client's independent resources.¹⁸⁹

Clients with the means to pay lawyers will always have the services of lawyers for as long as they wish to pay. Poor clients who depend on volunteer lawyers and lawyers employed by overburdened public and non-profit offices experience heightened vulnerability.¹⁹⁰ The latter group of lawyers must divide their time between many clients. Pro bono attorneys provide representation only if the lawyers view the clients or causes as worthy.¹⁹¹ Even lawyers committed full time to the representation of poor clients depend for their own financial support on the conception of the clients' needs as worthwhile in the eyes of public or private funders.¹⁹² These combined factors put the clients in a particularly precarious position compared with that of clients who can purchase legal services on the market.

Increased zeal on behalf of clients without the market power to purchase legal services complements the legal system. Persons unable to afford legal representation are generally less likely to receive any representation. When represented, they are likely to be represented less aggressively than those able to pay handsome sums.¹⁹³ The lawyers that do represent such persons should therefore use the opportunity to aggressively promote such clients' views. The zealous

188. This could of course include clients who have agreed to and are expected to pay, even if they have not yet handed over actual payment.

189. For further discussion of the relevance of payment to the definition of public interest lawyering, see generally Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 442–43 (2014). For discussion of the relevance of payment to the definition of litigation as expression, see Sabbeth, *supra* note 38, at 1531–32. Note that many middle-class persons are unable to afford counsel, so the absence of the market power to purchase legal services does not imply that a client is “poor.” See David C. Vladeck, *In re Arons: The Plight of the “Unrich” in Obtaining Legal Services*, in LEGAL ETHICS STORIES 255, 258–59, 261, 284–86 (Deborah L. Rhode & David Luban eds., 2006) (describing the absence of legal services for the middle class).

190. See Susan D. Carle, *Power As a Factor in Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 146 (2006) (“[W]here lawyers are representing relatively poor or disadvantaged clients, the typical moral hazard produced by self-interest is to do too little in light of clients' inability to pay for superior services.”).

191. See Deborah M. Weissman, *Law As Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 828 (2002) (challenging the interpretation of legal services for the poor as charity rather than rights).

192. *Id.*

193. See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 117 (2004).

representation of parties usually underrepresented in the legal system serves to bolster the diversity of viewpoints expressed in the system.¹⁹⁴ This improves the system both as a matter of fairness¹⁹⁵ and through enrichment of the marketplace of ideas.¹⁹⁶ To the extent that the adversary system and the ethic of zeal serve values such as that of individual dignity, the marketplace of ideas, and democratic government, it makes sense to put a thumb on the scale on behalf of those who tend not to have their voices heard.¹⁹⁷

B. Absence of Political Power to Shape Law

The absence of political power to shape the law is a second form of vulnerability that should tip the balance towards increased zeal on behalf of a client.¹⁹⁸ Political power informs the basic ground rules of the legal system, as those with power design the legal structure to fit their experiences and expectations. Political power further influences the framing and direction of political debates and potential for change. People who lack the capacity to influence legislatures are limited in their capacity to shape and change formal law.¹⁹⁹ That lack of political accountability in the creation of the formal law should influence how lawyers approach their obligations in relation to that law. Representing clients who lack political power requires more flexibility and creativity in interpretation. Increased zeal is justified because the lack of political power diminishes clients' capacity to advance their interests through alternative means.²⁰⁰

194. See Carle, *supra* note 190, at 141–42.

195. *Id.* at 141 (using the Rawls difference principle to create “[a] rule that grants less advantaged clients access to justice through the provision of zealous, client-centered advocacy”).

196. *Id.*

197. See Sabbeth, *supra* note 38, at 1496–1502.

198. In a social system that tolerates a financial influence on politics, imbalances of political power only compound the problems of market underrepresentation, given the overlap between the vulnerable populations underrepresented in both contexts. See *generally* Citizens United v. Fed. Elections Comm’n, 558 U.S. 310, 412 (2010) (Stevens, J., concurring in part and dissenting in part) (“Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates The Court’s ruling thus dramatically enhances the role of corporations and unions . . . in determining who will hold political office.”).

199. See Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. (forthcoming 2016) (manuscript at 21–23), available at <http://ssrn.com/abstract=2571756> (synthesizing literature demonstrating unequal political power between the poor and rich).

200. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546–49 (2001) (holding that a restriction on speech of poor people’s lawyers violated the First Amendment in part because of a lack of alternative channels for advocacy).

The absence of political power can be defined using existing literature on equality theory.²⁰¹ New research by Bertrall Ross II and Su Li on suspect classes offers a particularly useful approach.²⁰² In contrast to the Supreme Court's recent emphasis on the presence of laws favoring a group's interests, these scholars note that factors other than political power, such as legislators' ideology, may result in legislation favorable to a group.²⁰³ They therefore suggest consideration of the degree of organized lobbying advancing the group's interests; political responsiveness to the group's anticipated preferences; voter turnout; and descriptive representation in politics.²⁰⁴ Additional research could be done to further refine these factors, but they provide an excellent starting point.

It should be recognized that the focus on political power requires recognizing clients as members of social groups. This may seem to cut against the common emphasis on individual rights in lawyering ethics. Yet vulnerability is largely a socially constructed phenomenon and addressing it requires an analysis grounded in a social context.

C. *Presence of Basic Human Needs*

The third form of vulnerability that should tip the balance towards increased zeal is the presence of basic human needs. This aspect may be the most important. The consideration of basic human needs suggests that attorneys may and should fight harder when certain interests are at stake. Meeting basic human needs is an essential prerequisite for an equal society. When those basics are jeopardized, extra protection is warranted.

It might seem intuitive that the higher the stakes for the individual, the more effort should be expended to protect those interests, but the current structure of the legal system suggests otherwise. Substantive and procedural rights often rank basic human needs below property rights. As just one example, many states expedite and streamline eviction proceedings; removing a tenant from her home is, procedurally, faster and easier than recovering a nominal sum of money.²⁰⁵ The defendant's potential deprivation of shelter

201. See, e.g., Darren Lenard Hutchinson, "Not Without Political Power": *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1003-04 (2014).

202. See Ross & Li, *supra* note 199 (manuscript at 1-5).

203. *Id.* (manuscript at 27-28).

204. *Id.* (manuscript at 49-51).

205. Compare, e.g., N.C. GEN. STAT. § 7A-214 (2013) (scheduling trials of small claims actions to begin five to thirty days after service of summons), and *id.* § 7A-217 (describing three permissible means of serving defendant in small claims action and one additional,

receives relatively little attention in the design of the adjudication system. To increase zeal on behalf of clients with basic needs at stake is to suggest a different order of priorities.

The priorities should not be difficult to define. A number of sources provide material helpful for identifying basic human needs. In addition to international human rights laws and the constitutions of various other nations,²⁰⁶ we also have a more familiar source. Almost a decade ago, the American Bar Association (“ABA”) adopted a resolution advocating the appointment of counsel in civil matters where “basic human needs are at stake.”²⁰⁷ The ABA resolution defines basic human needs to include five categories: shelter, sustenance,²⁰⁸ safety, health, and child custody.²⁰⁹ At the least, this seems a fine starting point for articulating the basic human needs that, when threatened, put a client in a position of vulnerability that justifies a heightened level of attorney zeal on his or her behalf.

Vulnerability turns on multiple social and physical factors. The presence of basic human needs, the absence of the political power to change formal law, and the absence of the market power to purchase legal representation each play a part. Scholars and advocates must analyze lawyers’ obligations and social role contextually. Equality

easier option that applies only for plaintiffs in eviction cases), *with id.* § 42-29 (requiring only two-day notice of eviction hearing and more minimal requirement for obtaining jurisdiction over tenant than other defendants).

206. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). See generally Colin J. Beck, Gili S. Drori, & John W. Meyer, *World Influences on Human Rights Language in Constitutions: A Cross-National Study*, 27 INT’L SOC. 483 (2012) (surveying the constitutions of 189 countries for evidence of human rights language).

207. Am. Bar Ass’n, Report to the House of Delegates, Resolution 112A, at 1 (2006), *available at* www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf. The ABA resolution focuses on “basic” rather than “immediate” needs, the latter of which was Rhode’s term. *Compare id.* (“[T]he American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake . . .”), *with RHODE, supra* note 7, at 66 (arguing that “clients’ immediate needs dictate” the advocate’s role). Rhode may have been focused on immediacy to justify a lawyer’s choice to flirt with assistance fraud.

208. Sustenance is defined as income from various sources including benefits from government agencies and wages from private employment. Am. Bar Ass’n, *supra* note 207, at 13.

209. *Id.*

does not necessarily mean treating a wealthy client the same as a much poorer one. In a system of justice, equality may instead require recognizing the differences in clients' vulnerabilities and adjusting legal structures accordingly.²¹⁰

CONCLUSION

The current reality for vulnerable clients is that their lawyers often face criticism and punishment for acts of zeal,²¹¹ while, at the same time, these lawyers lack the support needed to maintain levels of zeal remotely comparable to that expended for the privileged. The problem is not an ethical compunction of the lawyers for vulnerable clients but rather a limitation on time, energy, and resources.²¹² When calls are made for increased resources, this generally refers to increased funding.²¹³ Indeed, a significant shift in funding could improve zeal on behalf of vulnerable clients. As some lawyers have argued, such shifts are necessary for lawyers and government funders to comply with their ethical and constitutional obligations.²¹⁴ These arguments deserve our attention.

At the same time, Fineman's emphasis on designing social systems with vulnerable subjects in mind points toward more creative solutions. If we were willing to entertain the possibility of approaches to zeal adjusted for the vulnerabilities of clients, we might imagine new structures to facilitate it. Many of the existing facets of criminal procedure were crafted to support defense lawyers' ability to advocate zealously for their vulnerable clients. In particular,

210. This is reminiscent of the famous Anatole France quotation: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges . . ." *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (quoting JOHN COUNOS, *A MODERN PLUTARCH* 27 (1928)).

211. See Van Cleve, *supra* note 36, at 299, 309–12 (highlighting how judges and prosecutors threaten and punish lawyers for exercising zeal on behalf of poor clients); Karla McKanders, Professor, Univ. of Tenn. C. of L., Address at the North Carolina Law Review Symposium: Vulnerable Defendants in the Criminal Justice System (Oct. 10, 2014) (highlighting how judges punish zeal on behalf of vulnerable clients).

212. See RHODE, *supra* note 7, at 72–73 ("[T]he most common problem in criminal cases is under- rather than overrepresentation.").

213. See, e.g., LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 22 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf ("Legal aid programs will need to have both the additional resources necessary to employ more staff and to enhance their efforts to engage the private bar in providing pro bono services.").

214. See Matt Apuzzo, *Holder Backs Suit in New York Faulting Legal Service for Poor*, N.Y. TIMES, Sept. 25, 2014, at A1, available at <http://www.nytimes.com/2014/09/25/nyregion/holder-backs-suit-in-new-york-faulting-legal-service-for-poor.html> (describing suit seeking funds for public defenders).

asymmetry is built into the criminal process for the purpose of counteracting defendants' vulnerability in relation to the state.²¹⁵ Perhaps other mechanisms could be fashioned, in the civil or criminal context, to acknowledge and compensate for social inequalities.²¹⁶ Given increasing inequalities between client populations, combined with the ongoing inequality in the distribution of lawyers, it is time to begin rethinking uniform standards of zeal.

215. See generally Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. (forthcoming May 2015) (articulating the benefits of an asymmetrical approach to allocating peremptory challenges between the prosecution and the defense).

216. These might include adjustments to rules of evidence, procedure, or ethics.