

The State's Role in the Regulation and
Provision of Legal Services in South Africa
and the United States: Supporting, Nudging,
or Interfering?

Helen Kruise*

Philip Genty†

*

†

ARTICLE

THE STATE’S ROLE IN THE REGULATION AND
PROVISION OF LEGAL SERVICES IN SOUTH
AFRICA AND THE UNITED STATES: SUPPORTING,
NUDGING, OR INTERFERING?

Helen Kruuse * & *Philip Genty* **

I. INTRODUCTION374

II. REGULATION OF THE US AND SOUTH AFRICAN
LEGAL PROFESSIONS: A THREE CATEGORY
FRAMEWORK377

III. REGULATION OF THE UNITED STATES LEGAL
PROFESSION382

IV. THE SOUTH AFRICAN CONTEXT390

V. AUTONOMY VS EQUALITY AS “THE” CORE
PRINCIPLES IN THE US AND SA,
RESPECTIVELY?399

VI. CONCLUSION404

* Senior Lecturer, Faculty of Law, Rhodes University, South Africa.

** Everett B. Birch Clinical Professor in Professional Responsibility, Columbia Law School, United States.

***The authors thank Laurel S. Terry and Alice Woolley, as well as other participants in the conference, "Regulation of Legal and Judicial Services: Comparative and International Perspectives," Fordham Law School, December 2017, for their valuable comments on an earlier draft of this article.

****Shortly before publication, certain sections of South Africa’s new statute on the legal profession (the Legal Practice Act 18 of 2014) came into effect by proclamations R31 / GG 42003 / 20181029 and R31 / GG 42003 / 20181029 on October 30, 2018 and November 1, 2018. These provisions relate to the constitution of the new regulatory authority, being the Legal Practice Council. However, substantive provisions affecting attorneys and advocates have not yet taken effect.

I. INTRODUCTION

An independent legal profession is said to be “the bulwark of a free and democratic society.”¹ It is also said that a high measure of independence of mind and action by legal actors is necessary for the maintenance of the rule of law.² However, too often, there is the allegation (within the sociological literature in particular) that the legal profession has used the concepts of independence and the rule of law as a shield or cuirass rather than as a sword.³ The image of lawyers representing unpopular clients fearlessly and advocating on behalf of unpopular causes, so as to uphold legal rights, is replaced with images of lawyers using these self-same concepts to preserve the status quo,⁴ favor those with high social status⁵ and pursue self-regulation for self-interest rather than for any so-called public interest.⁶

It is against this contested terrain that this Article looks at, from a comparative perspective, regulatory efforts in both the United States and South Africa (“SA”) in untraditional and controversial ways to address what these countries perceive as societal failings. In particular,

1. Julie Debeljak, *Judicial Independence in the Modern Democratic State*, 74 AUSTL. L. REFORM COMMISSION REFORM J. 35, 38 (1999).

2. See Oscar Vilhena Vieira, *Inequality and the Subversion of the Rule of Law*, 4 SUR INT’L J. ON HUM. RTS. 26, 45 (2007); Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685, 2704 (2012). See generally GEOFFREY C. HAZARD & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 146.

3. See, e.g., William Saunderson-Meyer, *South Africa’s Lawyers Should Be Desperately Ashamed*, THOUGHT LEADER (Mar. 8, 2014), <https://thoughtleader.co.za/williamsaundersonmeyer/2014/03/08/south-africas-lawyers-should-be-desperately-ashamed/> [<https://perma.cc/W6Y3-KVTP>]. See generally JAMES MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS (2014).

4. See KEITH M. McDONALD, THE SOCIOLOGY OF THE PROFESSIONS 74-75 (1995) (discussing how lawyers in seventeenth century England retained their status quo amidst the political machinations of that era). See generally Lawrence M. Friedman, *Lawyers in Cross-Cultural Perspective*, in LAWYERS IN SOCIETY: COMPARATIVE THEORIES 1, 20-21 (R.L. Abel & P.S.C. Lewis eds., 1989).

5. See Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 FORDHAM L. REV. 2761, 2762 (2012); see also Friedman, *supra* note 4, at 20-21.

6. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 143 (2000). Kim makes the point that it may well be the case that “[i]t is economic self-interest, but not in the way we commonly think of it (for example, lawyers intentionally lying to the public or regulators in order to line their own pockets). Rather, it is economic self-interest warping cognition. It is vice, but not of a venal sort. It’s rather banal.” See Sung Hui Kim, *Naked Self-Interest: Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 159 (2011).

this Article focuses on regulatory efforts in two particular areas: access to justice (telling lawyers *whom* to represent); and access to the profession (telling lawyers *who* should be amidst their number). While regulation has traditionally told lawyers *how* they should represent clients (i.e., issues around competency, confidentiality, etc.), regulatory efforts in the United States appear to be telling the profession whom to represent, and in South Africa, in addition to this, there is an attempt to regulate affirmatively who should be part of the profession. A related issue in the United States, which is touched on below, is the debate over restrictions on the unauthorized practice of law. The purpose of this Article, then, is to consider these efforts and their genesis in each jurisdiction, and then look at whether these interventions will achieve the outcomes desired by their makers.

This Article begins with a cautionary note. Scholars have repeated the dangers of comparison where assumptions are made about the similarity of role and work by legal professions in any particular jurisdiction.⁷ For example, Lewis and Abel consider that requirements of the legal system influence, sometimes substantially, the behavior, attributes and organization of lawyers, while at the same time not discounting the possibility that lawyers may shape these requirements for their own purposes.⁸ Damaska further shows that fundamental differences in the underlying principles of a court system will have very important consequences for the role of lawyers in court proceedings.⁹ Finally, Dezalay and Garth have demonstrated that the organization of lawyering is closely tied to the position of the legal profession within national states and the political and social contexts in which lawyers operate.¹⁰

7. See Herbert M. Kritzer, *Lawyers' Professional Liability: Comparative Perspectives*, 24 INT'L J. LEGAL PROF. 73 (2017); see also Ronit Dinovitzer & Meghan Dawe, *Early Legal Careers in Comparative Context: Evidence from Canada and the United States*, 23 INT'L J. LEGAL PROF. 83 (2016). See generally LAWYERS IN SOCIETY: THE CIVIL LAW WORLD (R.L. Abel & P.S.C. Lewis eds., 1988); LAWYERS IN SOCIETY: THE COMMON LAW WORLD (R.L. Abel & P.S.C. Lewis eds., 1988); LAWYERS IN SOCIETY: COMPARATIVE THEORIES (R.L. Abel & P.S.C. Lewis eds., 1989).

8. See generally *Lawyers in Society: the Civil Law World*, *supra* note 7; *Lawyers in Society: The Common Law World*, *supra* note 7; *Lawyers in Society: Comparative Theories*, *supra* note 7.

9. See generally MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

10. See generally YVES DEZALAY & BRYANT G. GARTH, *ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE* (2010).

In terms of the comparison between the United States and South Africa one could focus on the startling differences in the political, social and economic contexts in which lawyers operate. The United States is characterized as a developed nation with a staunch classic liberalist and individualistic constitution, having broken away from its British colonizers over 200 years ago. On the face of it, the organization that regulates the profession, the American Bar Association (“ABA”), is largely independent of the state.¹¹ The ABA carries out this regulation indirectly, by promulgating model ethical codes, versions of which are later adopted by state court systems.¹² The ABA also regulates entry into the legal profession more directly by setting out detailed accreditation standards for US law schools.¹³ It is also fair to say that the legal system in the United States focuses on procedural fairness and protection from the state.¹⁴

In contrast, South Africa is a developing country which, while breaking away from its British colonizers over 100 years ago, only broke away from apartheid rule just over twenty years ago. In the post-apartheid era, its constitution has many similarities to the US Constitution in terms of the protection of individual rights but, in contradistinction to the US Constitution, it has been described as “social, redistributive, caring, positive, horizontal, participatory, multicultural and self-conscious about its historic setting, and transformative role and mission.”¹⁵ It would then be fair to assume that its legal profession would be structured in a way that emulates these outcomes, if attention is paid to the commentators who emphasize the

11. LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 27 (4th ed. 2016).

12. *Id.* at 36-39.

13. See *2018-2019 Standards and Rules of Procedure for Approval of Law Schools*, 2017 ABA Sec. of Legal Educ. & Admissions to the Bar 1, 15-21.

14. *Independence of the Legal Profession*, ABA (Nov. 2, 2018), https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/ [<https://perma.cc/5XFF-5GXC>].

15. Karl E. Klare, *Legal Culture and Transformative Constitutionalism* 14 S. Afr. J. Hum. Rts. 146, 152-53 (1998); Justice Sisi Khampepe, Lecture Delivered at Stellenbosch University’s Annual Human Rights Lecture: Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa’s Constitutional Democracy Lecture ¶ 31 (Oct. 6, 2016), available at https://www.groundup.org.za/media/uploads/documents/JusticeKhampepeAnnualHumanRightsLecture_6Oct_embargoedUntilAfterDelivery.pdf [<https://perma.cc/CM4F-6RR5>].

importance of social and political contexts in shaping lawyer behavior and role.

Notwithstanding, the structure of the legal profession in South Africa (apart from its semi-divided nature into attorney and advocate) has, to date, largely mimicked the US legal profession in uncanny ways from its largely self-regulated position, to its demographic profile, to its emphasis on autonomy as the proper end of the lawyer's moral role.¹⁶ One question this Article examines is why this is the case – particularly given the different circumstances of the US and SA legal systems. Part of the answer can be found in the story of how the legal profession has prioritized (or not) access to justice and access to the profession.

The discussion proceeds as follows. Section II sets out a framework for analyzing the regulation of the legal professions of the United States and South Africa. This Article suggests that there are three categories of regulations that are used in both systems. Section III discusses the regulation of the US legal profession and the ways regulation has evolved. Section IV discusses similar issues for the South African profession. Section V offers some comparative observations between the US and SA legal professions. Section VI provides concluding thoughts.

II. REGULATION OF THE US AND SOUTH AFRICAN LEGAL PROFESSIONS: A THREE CATEGORY FRAMEWORK

There are at least three ways in which the legal professions in the United States and South Africa are regulated. The first, and most obvious, is the establishment of systems of attorney discipline.¹⁷ In the United States, courts enact the ethical rules, generally modeled on the ABA Rules, and these serve as the primary basis for discipline of attorneys.¹⁸ Courts and legislatures also define professional

16. In fact, lawyer codes in South Africa (through the divided profession of attorneys and advocates) make for less room for breaking attorney-client confidences than in the United States (exceptions limited to money laundering). *See* Financial Intelligence Centre Act 38 of 2001 §1 (S. Afr.) which makes all legal practitioners and/or firms “accountable institutions” with duties to report unusual transactions (with some qualifications – see section 37(2) on these qualifications). *See id.* §§ 1, 37(2); *see also* Commencement of Certain Sections of the Legal Practice Act, 2014, GG 42003 (29 Oct. 2018) (S. Afr.).

17. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 5 (AM. LAW INST. 2000); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1166-68 (2009).

18. Lerman & Schrag, *supra* note 11, at 36-39.

misconduct, which may go beyond violation of the ethical rules to include “any conduct prejudicial to the administration of justice” (e.g., the failure to pay child support),¹⁹ and establish the hearing procedures and the penalties that may be imposed.²⁰ The state courts and legislatures also impose requirements for registration of attorneys, payment of fees into client protection funds, and continuing legal education.²¹ These regulations govern the behavior of individual attorneys in their relationships with clients, adversaries and other participants in the legal system, courts, and administrative agencies. The regulations limit the autonomy of individual lawyers by telling them what they must²², may²³, or may not²⁴ do. This type of regulation exists in all legal systems, although the US ethical rules, which are supplemented by numerous ethics opinions and disciplinary decisions, are probably more detailed and fully developed than in most other countries.²⁵

In South Africa, while courts retain curial supervision over lawyers in their admission and disbarment, the picture is slightly more complex regarding this first category given (1) South Africa does not

19. *See, e.g.*, N.Y. JUD. L. §§ 90(2), (2-a) (McKinney 2018).

20. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 1240 (2016).

21. *See, e.g.*, N.Y. JUD. L. § 468-a (McKinney 2018); N.Y. STATE FIN. L. §97-t (McKinney 2018); N.Y. COMP. CODES R. & REGS. tit. 22, §1500.1.

22. For example, lawyers must provide competent representation, *see* MODEL CODE OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2018); must safeguard client funds and property, *see id.*, r. 1.15; and must take steps to ensure that subordinate lawyers comply with ethical requirements, *see id.* r. 5.1.

23. For example, a lawyer may limit the scope of representation, if the limitation is reasonable and the client gives informed consent, *see* MODEL CODE OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2018); may disclose confidential information if a client gives informed consent or if certain exceptions apply, *see id.* r. 1.6(a) and (b); and may, unless certain exceptions apply, continue to represent a client notwithstanding a conflict of interest, if the client gives informed consent to waive the conflict, *see id.* r. 1.7(b)(4).

24. For example, a lawyer may not bring or defend a legally or factually frivolous proceeding, *see* MODEL CODE OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2018); may not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law the lawyer has previously made, *see id.* r. 3.3(a)(1); may not, when representing a client, communicate on the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter without the other lawyer's consent, *see id.* r. 4.2; and, when dealing on behalf of a client, may not give advice to an unrepresented person whose interests are or have a reasonable possibility of being in conflict with the interests of the lawyer's client, *see id.* r. 4.3.

25. *See* Philip M. Genty, *The Challenges of Developing Cross-Cultural Legal Ethics Education, Professional Development, and Guidance for the Legal Professions*, J. PROF. L. 37, 41 (2011); *see also* *Independence of the Legal Profession*, *supra* note 14.

operate under a highly federalized system as in the United States; and (2) the legal profession has been divided to date, with advocates (barristers) and attorneys (solicitors) making up the Bar and Side-Bar-Bar respectively.²⁶

To date, the Bar was governed by the General Council of the Bar (“the GCB”), a voluntary national association with relatively unfettered powers of self-regulation.²⁷ The Side-Bar was regulated by provincial law societies set up by statute, under the umbrella of a non-statutory national law society.²⁸ Apart from particular statutory requirements regarding payments to a fidelity fund (professional insurance), and accounting checks, these societies have had almost exclusive freedom to determine the standards for admission, draft codes of conduct, and investigate and sanction attorney misconduct within disciplinary committees.²⁹ This is in line with the rationale proffered in many countries, as in the United States, that self-regulation is needed to safeguard lawyers’ independence which, in turn, secures the best chances of resisting any attempt by the state to infringe on the rights of its people.³⁰

Thus, in relation to the first category, the task of disciplining lawyers for misconduct has been largely left in the hands of the law societies and the GCB.³¹ However, where conduct is serious, the societies and the GCB do not have the power to suspend or disbar practitioners: an application has to be brought before a court by the law societies, the GCB or the state attorney for this purpose. The courts also have the power to impose costs on lawyers personally where their conduct in a case is regarded as irresponsible or negligent (“de bonis

26. Kees van Dijkhorst & Jacqueline Church, *Legal Practitioners*, in 14(2) *LAW OF SOUTH AFRICA* ¶ 111 (W.A. Joubert ed., 2d ed. 2005).

27. The GCB was formed in 1946 and is a confederation of the provincial and local bars. See GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA (Nov. 16, 1998), <https://www.sabar.co.za/> [<https://perma.cc/E6CV-XPFB>].

28. The provincial law societies—under the umbrella body of the Law Society of South Africa (“LSSA”)—are the Cape Law Society, The Kwa-Zulu Natal Law Society, the Law Society of the Free State, and the Law Society of the Northern Provinces.

29. See generally Admission of Advocates Act 74 of 1964 (S. Afr.); Attorney’s Act 53 of 1979 (S. Afr.); Legal Practice Act 28 of 2014 (S. Afr.).

30. W. Bradley Wendel, *Foreword: The Profession’s Monopoly and Its Core Values*, 82 *FORDHAM L. REV.* 2563, 2564 (2014).

31. See Admission of Advocates Act 74 of 1964 § 7(2) (S. Afr.); see also Dijkhorst & Church, *supra* note 26, ¶ 123.

propriis”).³² Finally, courts are able to govern the direction of litigation by requiring representatives in the court to comply with local court directions and rules.³³ Where courts have found the conduct of an attorney/advocate to be worthy of censure in his or her conduct before them, apart from a costs order, the most the courts can do is to send a copy of their judgment to the law society for further investigation.³⁴

A second category of regulation involves freedom of professional speech and commercial law practice. In the United States, in a series of decisions grounded in First Amendment and antitrust laws, courts have invalidated specific provisions of state ethical rules that restricted the ways attorneys were permitted to conduct their practices. These have included minimum fee schedules³⁵ and restrictions on attorney advertising.³⁶ This category is different from the first in that, while the courts have limited the autonomy of the *profession* to regulate itself, the rulings give individual lawyers greater economic autonomy in competing for clients.

In South Africa, this category has particularly affected the advocate’s profession – through the application of antitrust laws to some of its practices.³⁷ In the early 2000s, and not without a fight from

32. See *Lushaba v. MEC for Health* 2015 (3) SA 616 (GJ) at ¶¶ 68-79 (S. Afr.). In this case, the court indicated that costs would be awarded where the lawyers’ conduct substantially and materially deviated from the standard expected of the legal practitioner. See *id.* Examples of such conduct were dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, gross incompetence and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care.

33. These rules are made in accordance with Section 43 of the Supreme Court Act 59 of 1959. See *Rules and Practice Directions*, DEP’T: JUST. & CONST. DEV. OF REPUBLIC OF S. AFR., <http://www.justice.gov.za/legislation/rules/rules.htm> [<https://perma.cc/6LVM-9DUM>].

34. See, e.g., *January v. Standard Bank of South Africa Ltd.* 2010(2235/2008) ZAECGHC 6, ¶ 3 (S. Afr.); *City of Johannesburg v. WMA Winners Chapel Int’l* 2013 (37432/2012) ZAGPJHC 410, ¶ 8 (S. Afr.).

35. See generally *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (striking down minimum fee schedules as violating antitrust laws).

36. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (invalidating restrictions on attorney advertising as violating the First Amendment); see also *Alexander v. Cahill*, 598 F.3d 79, 103 (2d Cir. 2010) (finding that some content-based advertising restrictions in New York rules violated the First Amendment).

37. This is not to say that the attorney’s profession has not been affected. As in the US case, the Competition Commission has been concerned with restrictive rules by law societies relating to marketing, advertising, and touting for legal service. These rules have been challenged. See *Venter v. Law Society of the Cape of Good Hope and Others* 2013 (014688) ZACT 103 (S. Afr.). However, the rules will only change when the Legal Practice Act comes into force. See *Dijkhorst & Church supra* note 26.

the GCB,³⁸ South Africa's Competition Commission³⁹ managed to invalidate certain provisions promoting restrictive practices within the advocate's profession.⁴⁰ Despite efforts by the Competition Commission to restrict the referral rule (*viz.* that advocates may only work through an attorney) as anticompetitive, this effort was not successful due to procedural issues.⁴¹ However, this is about to change with new legislation not yet in force.⁴²

These first two categories have long histories and have earned at least a degree of general acceptance within the profession as a whole and among individual lawyers.⁴³ A third category is both more recent and more controversial, especially in the United States. In the past decade or so, there has been an effort in both countries to use regulations to improve the delivery of legal services and address unmet legal needs. Two approaches in the United States have been to encourage the provision of *pro bono* services and to permit non-lawyers to provide certain types of legal services, while the focus in South Africa has been on the provision of *pro bono* services. In particular, there has been a push to improve access to the profession itself. As will be discussed below, this third category of regulations has

38. The GCB litigated against the Competition Commission regarding its decision to invalidate certain practices. *See general Council of the Bar South Africa and Others v. Commissioner, Competition Commission* 2001 [4] All SA 597 (T) (S. Afr.). For a history of the decision-making process, litigation in the high court and in the Supreme Court of Appeal of South Africa, *see Commissioner of the Competition Commission v. General Council of the Bar South Africa and Others* 2002 [4] All SA 145 (SCA) (S. Afr.).

39. Established under the Competition Act 89 of 1998 (S. Afr.).

40. The practices which were invalidated related to rules requiring two lawyers in particular matters, the prohibition of partnerships within the Bar, the defaulters' list, advertising, tariff of fees, and location of premises. Prior to the litigation, the GCB conceded that the "closed-shop" rule and the rule preventing the taking on of cases on a contingency basis were anti-competitive. *See General Council of the Bar South Africa and Others v. Commissioner, Competition Commission* 2001 (4) All SA 597 (T) (S. Afr.); *Commissioner of the Competition Commission v. General Council of the Bar South Africa and Others* 2002 (4) All SA 145 (SCA) (S. Afr.).

41. *See Commissioner of the Competition Commission v General Council of the Bar South Africa* 2002 (4) All SA 145 (SCA) at para 14-17 (S. Afr.). *See also* D Davis, G Marcus & J Klaaren, *Administration of Justice*, in 2002 ANNUAL SURVEY OF LAW 990 at 1005.

42. *See infra* Part IV.

43. The second category of regulations – those promoting greater competition within the profession – have encountered some resistance within the European Union. *See* Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 NW. J. INT'L L. & BUS. 1 (2009).

encountered vigorous opposition from the US legal profession, and to a lesser extent, from the SA profession as well.

This third category of regulations is different from the first two in another interesting respect. Bradley Wendel has pointed out that most of the law governing lawyers involves the “negative rights to counsel,” i.e. the law of lawyering is primarily concerned with removing threats to the attorney-client relationship.⁴⁴ Wendel presents the attorney-client privilege and prohibitions on contact with represented persons (the “no-contact rule”) as examples of such “negative rights.” In contrast, Wendel suggests that the organized bar has given insufficient attention to the “positive right to counsel,” i.e. access to lawyers for poor and middle income people in civil proceedings such as family and public benefits cases.⁴⁵

Thus, regulations in this third category – those that promote the “positive right” of access to legal services by imposing *pro bono* requirements on the legal profession, permitting non-lawyers to provide certain categories of legal services, and regulating entry to the profession itself – present a direct challenge to the autonomy of lawyers to choose whom to represent and the profession’s power to regulate who may practice law. As such, these regulations have the potential to reshape the practice of law in both the United States and South Africa in significant ways. It is this third category of regulations that is the central focus of this comparative analysis.

III. REGULATION OF THE UNITED STATES LEGAL PROFESSION

The US legal profession prides itself on what it sees as its self-regulation. This is articulated in the Preamble of the American Bar Association Model Rules of Professional Conduct (“ABA Rules”), which devotes three full paragraphs to the subject.⁴⁶ The Preamble links the principle of self-regulation to that of professional independence:

44. See Wendel, *supra* note 30, at 2565.

45. See Wendel, *supra* note 30, at 2565-66.

46. MODEL RULES OF PROF’L CONDUCT pmb1. & scope, ¶¶ 10-12 (AM. BAR ASS’N 2018), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html [https://perma.cc/7RF3-YDCW].

[11] . . . Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government . . . A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.⁴⁷

Bruce Green described the way in which the ABA connects self-regulation and professional independence: “[T]he bar’s principal rationale is that self-regulation is necessary to secure individual lawyers’ independence. The fear is that, if the government can make the rules for lawyers, it may make repressive rules, which undermine lawyers’ ability to perform as independent professionals.”⁴⁸

Neither the idea of a self-regulated legal profession nor the principle of professional independence is unique to the United States. For example, in language paralleling that of the ABA Rules, the Council of Bars and Law Societies of Europe (“CCBE”) Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers (“CCBE Charter”) draws a connection between professional independence and self-regulation: “[T]he lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates. . . . Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer.”⁴⁹ The

47. *Id.* at ¶¶ 11-12. According to the ABA, the *quid pro quo* for this self-regulation is that lawyers are expected to comply with the ethical rules and ensure that their colleagues do so as well.

48. Bruce A. Green, *Lawyers’ Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 604 (2013) (citations omitted).

49. COUNCIL OF BARS & LAW SOC’YS OF EUR., CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION & CODE OF CONDUCT FOR EUROPEAN LAWYERS princ. (a), at 8 (2018) [hereinafter CCBE CHARTER & CODE], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf [<https://perma.cc/7KXL-AWFB>]. Another example of a code of ethics that contains provisions relating to both self-regulation and professional independence is TAIWAN BAR ASSOCIATION, CODE OF ETHICS FOR LAWYERS OF THE TAIWAN BAR ASSOCIATION, pmbl., art. 4, available at <http://www.twba.org.tw/en/Lawyers.htm>.

CCBE Charter also lists “independence of the lawyer and the freedom of the lawyer to pursue the client’s case” as the very first core principle.⁵⁰

However, in the United States both self-regulation and independence are less than they might at first appear. The US legal profession is extensively regulated by courts, as well as legislatures and administrative agencies.⁵¹ The late Fred C. Zacharias went so far as to describe self-regulation of the profession as a “myth” and observed:

Law in the United States is a heavily regulated industry . . . The courts regulate lawyers . . . through supervisory decisions in the course of litigation and by implementing common law civil liability rules that govern legal practice. These include malpractice, breach of fiduciary duty, and other causes of action. Administrative agencies – particularly federal agencies – also establish and implement rules governing lawyers who practice before them. Federal and state legislatures play a further role in regulating the bar, providing statutory regulations and criminal penalties that apply to lawyers.⁵²

As Zacharias further noted, however, despite this extensive degree of regulation, the legal profession continues to think of itself as self-regulated and find support in that view from a number of sources.⁵³

The US profession’s related perception of itself as independent is no less complicated. As Bradley Wendel notes, the definition of independence involves a threshold question: “independent from what?”⁵⁴ In his systematic analysis of the concept of professional independence, Bruce Green states that the term is used in two distinct ways: “independence from clients” and “independence from the pressures and influences of others who might compromise lawyers’ loyalty to clients.”⁵⁵ Green observes that the ABA Rules have surprisingly little to say about independence in either of these senses, and that, apart from some provisions relating to the lawyer’s role as

50. CCBE CHARTER & CODE, *supra* note 49.

51. For a discussion of the many ways the US legal profession is regulated, see John Leubsdorf, *Legal Ethics Falls Apart*, 57 *BUFF. L. REV.* 959, 968-71, 1051-55 (2009).

52. Fred C. Zacharias, *The Myth of Self-Regulation*, 93 *MINN. L. REV.* 1147, 1147-48 (2009) (citations omitted).

53. *See id.* at 1148-49.

54. *See* Wendel, *supra* note 30, at 2575.

55. *See* Green, *supra* note 48, at 607-08. Green also discusses at length individual lawyers’ independence from the judiciary. *See id.* at 619-38.

advisor to the client,⁵⁶ the concept is largely buried in the sections of the rules dealing with conflicts of interest.⁵⁷

Green's arguments about the limited way in which professional independence is addressed in the ABA Rules are borne out by a comparison with the ethical codes of other countries. Unlike the ABA Rules, most of the European ethical codes have sections devoted exclusively to professional independence.⁵⁸ This is also true of the CCBE Code of Conduct for European Lawyers and the International Bar Association's International Principles on Conduct for the Legal Profession.⁵⁹

The codes of Albania, Belgium, Bulgaria, Cyprus, Denmark, Macedonia, Norway, Scotland, Spain, and Ukraine all contain provisions relating explicitly to the two types of independence described by Green (independence from clients and independence from others who would compromise lawyers' loyalty to their clients).⁶⁰

56. See Green, *supra* note 48, at 610-11. Green cites ABA Rule 2.1 as an example.

57. See *id.* at 616. Green cites ABA Rule 5.4 as an example. See *id.* The idea of independence is imbedded in other conflict of interest rules as well. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."), r. 1.8(f) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . (2) there is no interference with the lawyer's independence of professional judgment. . . .") (AM. BAR ASS'N 2018).

58. For a compilation of Professional Regulations prepared by the CCBE, see *Professional Regulations*, CCBE, <http://www.ccbe.eu/documents/professional-regulations/#panel-712-0> [<https://perma.cc/NE92-8BZR>] (last visited Dec. 4, 2018).

59. See CCBE CHARTER & CODE § 2.1, *supra* note 48; INTERNATIONAL BAR ASSOCIATION, INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION § 1 (2011), available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx [<https://perma.cc/Y84D-RGR3>].

60. See NATIONAL CHAMBER OF ADVOCACY OF ALBANIA, ATTORNEY ETHICS CODE ch. I, art. 1-3 (2005) [Alb.], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Albania_Attorney_Ethics_Code.pdf [<https://perma.cc/92D8-699G>]; FLEMISH BAR COUNCIL, CODE OF ETHICS FOR LAWYERS § 1.2.1 (2014) [Belg.], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Belgium_OVB_Code_of_Ethics_for_Lawyers.pdf [<https://perma.cc/5QK5-YKUA>]; SUPREME BAR COUNCIL, ATTORNEYS-AT-LAW ETHICS CODE § II, art. 3 (2005) [Bulg.], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Bulgaria_Attorneys_at_Law_Ethics_Code.pdf [<https://perma.cc/J6K5-L7AW>]; CYPRUS BAR ASSOCIATION, CODE OF CONDUCT REGULATIONS § 10 (2002) [Cyprus], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Cyprus_Code_of_Conduct_Regulations.pdf [<https://perma.cc/5UZZ-FXRK>]; GENERAL COUNCIL OF THE DANISH LAW & BAR SOCIETY, CODE OF CONDUCT FOR THE DANISH BAR & LAW SOCIETY § 2.1.1 (2008) [Den.], available at

Article I.2.1.1 of the Belgian code is one succinct example:

A lawyer is subject to obligations that require his absolute independence, free from all pressure, especially from his own interests or outside influence. A lawyer must avoid any impairment of his independence and may not disregard professional ethics to please the client, the judge or third parties. Independence is essential in all activities.⁶¹

The CCBE Code of Conduct for European Lawyers contains similar language.⁶² The ABA Rules do not contain any equivalent provision.⁶³

Thus, the US legal profession is more heavily regulated and places less importance on professional independence than the Preamble to the ABA Rules and the profession's own self-image would suggest. The

http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Denmark_Code_of_Conduct_for_the_Danish_Bar_and_Law_Society.pdf [https://perma.cc/3YG8-PWFB]; ASSOCIATES & LAWYER'S APPRENTICES OF THE MACEDONIAN BAR ASSOCIATION, CODE ON PROFESSIONAL ETHICS OF LAWYERS § 1 (2002) [Maced.], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_FYROM_Code_on_professional_ethics_of_lawyers.pdf [https://perma.cc/89G5-ESNM]; NORWEGIAN BAR ASSOCIATION, RULES OF CONDUCT FOR ADVOCATES § 2.1 (2002) [Nor.], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Norway_Rules_of_conduct_for_advocates.pdf [https://perma.cc/W7S7-68TZ]; THE LAW SOCIETY OF SCOTLAND, CODE OF CONDUCT FOR SCOTTISH SOLICITORS AND CODE OF CONDUCT FOR CRIMINAL WORK art. 1 (2002) [Scot.], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_UK_Scotland_Code_of_conduct_for_solicitors.pdf [https://perma.cc/3YQE-3BLP]; GENERAL COUNCIL OF THE SPANISH BAR, CODE OF CONDUCT OF THE SPANISH BAR art. 2 (2002) [Spain], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Spain_Code_of_conduct_of_the_Spanish_Bar.pdf [https://perma.cc/7AZU-VGFF]; UKRAINIAN NATIONAL BAR ASSOCIATION, RULES OF PROFESSIONAL CONDUCT § II, art. 6 (2012) [Ukr.], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Ukraine_UNBA_Rules_of_Professional_Conduct.pdf [https://perma.cc/GHE2-ZGFJ].

61. FLEMISH BAR COUNCIL, CODE OF ETHICS FOR LAWYERS § I.2.1, art. I.2.1.1 (2014) [Belg.], available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Belgium_OVB_Code_of_Ethics_for_Lawyers.pdf [https://perma.cc/FC5K-FWES].

62. See CCBE CHARTER & CODE § 2.1.1, *supra* note 49.

63. Laurel S. Terry provides a thoughtful analysis of the differences between the conceptions of independence contained in the CCBE Code of Conduct for European Lawyers and the ABA Model Rules. See Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 45-46 (1993).

prominence that the ideas of self-regulation and independence continue to play can be explained in part by history. The US legal profession began as a small, homogenous, economically and socially elite group of lawyers operating with a significant degree of independence.⁶⁴ Over time the profession became more formally structured and regulated.⁶⁵ The profession also became more diverse, and the practice of law came to be seen as a “business,” as well as a “profession.”⁶⁶

Despite this historical evolution, it is clearly important to both the US Bar and individual lawyers to hold on to this image of an independent group of professionals conducting their affairs unimpeded by outside regulation. It is this cultural adherence to strict notions of professional autonomy that is at the heart of the US legal profession’s fierce opposition to the third category of regulations as described in Section II – regulations designed to address through compulsory means the unmet need for legal services. The ABA has so far been unwilling to go beyond a voluntary responsibility to perform *pro bono* legal services.⁶⁷ The Comments to the ABA Model Rules make this explicit, stating: “The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.”⁶⁸ Mandatory *pro bono* requirements have not been adopted for admitted lawyers in any state.⁶⁹ The Bar has also resisted efforts to require lawyers to report their hours of *voluntary pro bono* work,⁷⁰ although nine states now have

64. RICHARD ZITRIN, CAROL M. LANGFORD & LIZ RYAN COLE, *LEGAL ETHICS IN THE PRACTICE OF LAW* 6-7 (4th ed. 2013).

65. For a discussion of this history, see generally Russell G. Pearce & Eli Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. ST. L. REV. 513, 516-29 (2012).

66. See generally Samuel J. Levine, *Conference: The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century: Foreword*, 40 FORDHAM URB. L.J. 1, 2-4 (2012) (discussing the “business-profession dichotomy” in a variety of contexts).

67. See MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR ASS’N 2018).

68. See MODEL RULES OF PROF’L CONDUCT r. 6.1, cmt. 12 (AM. BAR ASS’N 2018).

69. See Joan C. Rogers, *Pro Bono Is Responsibility, Not Mandate, Under Ethics Rules*, BLOOMBERG BNA (Oct. 25, 2017), <https://www.bna.com/pro-bono-responsibility-n73014471570/> [<https://perma.cc/2VMM-V4FS>] (discussing state *pro bono* provisions and noting, “Not a single state mandates *pro bono* service as a condition of staying licensed to practice law.”).

70. See, e.g., Letter from David M. Schraver, President, New York State Bar Association, to Honorable Jonathon Lippman, Chief Judge, State of New York (June 26, 2013), available at <http://www.nysba.org/workarea/DownloadAsset.aspx?id=28656> [<https://perma.cc/YPX7-FCR3>] (objecting to proposal to require public disclosure of *pro bono* hours reported as part of biennial attorney registration). In response to these concerns, the reporting rules were eventually

mandatory reporting, and another twelve have voluntary reporting.⁷¹ Mandatory *pro bono* requirements have been successfully imposed on law students and graduates of law schools who have not yet been admitted to practice. This has been accomplished through the regulations that govern bar admission requirements.⁷²

Additional authority for the provision of *pro bono* services is a federal statute that gives federal judges authority to “request an attorney to represent any person unable to afford counsel.”⁷³ The ABA Model Rules contain a parallel provision that makes it a general duty of lawyers to accept such appointments from the courts.⁷⁴ Courts have begun to use the federal statute to appoint attorneys to handle civil representation without compensation,⁷⁵ but lawyers have sometimes resisted such appointments.⁷⁶

Even more controversial within the US legal profession are efforts to loosen restrictions on the work that non-lawyers may perform. Although the Supreme Court of the State of Washington implemented a system of “limited license legal technicians,” this was done over a

modified to make the reporting anonymous, *see* 22 N.Y. COMP. CODES R. REGS. tit. 22, § 118.1(e)(14), and to make the information available to the public only on an aggregate basis. *See* Glenn Lau-Kee, *A Message From the President: Changes to Mandatory Pro Bono Reporting Requirement*, N.Y. STATE BAR ASS’N, <http://www.nysba.org/probonorequirement> [<https://perma.cc/P8PB-5VZG>].

71. *See Pro Bono Reporting*, ABA, https://www.americanbar.org/groups/probono_public_service/ts/pbreporting.html [<https://perma.cc/CH5K-R2NK>].

72. *See, e.g.*, 22 N.Y. COMP. CODES R. REGS. tit. 22, § 520.16 (requiring completion of fifty hours of qualifying *pro bono* service as a condition for admission to practice in New York State). In New York, admitted attorneys, while not subject to mandatory *pro bono*, are encouraged to perform fifty hours of *pro bono* service each year and are required to report the total of their *pro bono* hours in the registrations they file pursuant to Section 468-a of the New York Judiciary Law. *See* N.Y. JUD. LAW § 468-a (Consol. 2018). Students and lawyers not yet admitted to practice are less powerful than admitted attorneys and therefore much easier to regulate. *See also* 2017-2018 *Standards and Rules of Procedure for Approval of Law Schools*, standard 303(b)(2) (“A law school shall provide substantial opportunities to students for . . . (2) student participation in pro bono legal services, including law-related public service activities.”).

73. 28 U.S.C.S § 1915(e) (LexisNexis 2018).

74. *See* MODEL RULES OF PROF’L CONDUCT r. 6.2 (AM. BAR ASS’N 2018). The Rule sets out three exceptions to this duty: representation is likely to result in a violation of the Model Rules; is likely to result in an unreasonable financial burden on the lawyer; or is “so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer’s ability to represent the client.” *Id.* ¶ (c).

75. *See* *Naranjo v. Thompson*, 809 F.3d 793, 801 (5th Cir. 2015).

76. *See* *Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa*, 490 U.S. 296 (1989). There, a lawyer, representing himself, took his case all the way to the Supreme Court, successfully arguing, in essence, that he was not competent to handle the pro bono case that had been assigned to him.

vigorous dissent.⁷⁷ A similar New York initiative encountered active opposition from some in the New York Bar,⁷⁸ but the program has nonetheless moved forward on a limited basis in housing and civil court matters.⁷⁹ The debate over allowing non-lawyers to perform legal services may also be affected by a US Supreme Court case involving dentistry.⁸⁰ In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the Court cast doubt on whether a profession may impose its own restrictions on who is permitted to provide services to the public.⁸¹ The case has implications for self-regulation of other professions as well, including law.⁸²

Part of the reason this third category – regulations designed to address the “justice gap” in the unmet need for legal services – inspired such vigorous opposition is that the regulations implicate two decisions that are at the core of traditional notions of lawyer autonomy in the United States: whom to represent and who may provide legal services. Individual lawyers want to be able to choose their clients and, with limited exceptions, have the freedom to do so.⁸³ And the profession has jealously guarded its ability to limit the “practice of law” to lawyers.⁸⁴

A comparative discussion of the regulation of the US and SA legal professions must therefore start with an understanding of how this

77. See *In the Matter of the Adoption of New APR 28*, Order No. 25700-A-1005 (Wash. 2012) (Owens, J., dissenting).

78. See THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 36-39 (Nov. 2012); NASSAU COUNTY BAR ASS’N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE USE OF NON-LAWYERS IN CLOSING THE ACCESS TO JUSTICE GAP, AS ADOPTED BY THE NCBA BOARD OF DIRECTORS, RESPONDING TO THE REPORT OF THE STATE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK (2013) (opposing recommendations).

79. See *Administrative Order of the Chief Administrative Judge of the Courts*, N.Y. COURTS (Feb. 10, 2014), <https://www.nycourts.gov/courts/nyc/SSI/pdfs/AO-42-14.pdf> [<https://perma.cc/8JXS-45TM>]. There are proposals to expand this program. See also Lawrence K. Marks, *Non-Lawyers Help to Bridge the Justice Gap*, N.Y. L.J. (May 1, 2017), <https://www.law.com/newyorklawjournal/almID/1202784735407/nonlawyers-help-to-bridge-the-justice-gap/?slreturn=20181022155258> [<https://perma.cc/5JVD-AXEF>].

80. N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n, 135 S. Ct. 1101 (2015).

81. *Id.* at 1116-17. The case involved an antitrust challenge to an attempt by a state Board of Dental Examiners to prevent non-dentists from providing tooth-whitening services.

82. See David L. Hudson, Jr., *Does This Hurt?: The Supreme Court’s Ruling in an Anti-Trust Case Involving the Regulation of Dentists has Raised Questions About the Regulatory Structure for Lawyers?*, 102 ABA J. 22 (2015).

83. PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 244 (4th ed. 2016). See *supra*, notes 22, 23, 24 and accompanying text; LERMAN & SCHRAG *supra*, note 11.

84. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS’N 2018).

perceived “American exceptionalism” shapes the US profession’s general attitude toward constraints on autonomy in the practice of law. As Deborah Rhode and Alice Woolley aptly observe in their comparative analysis of the regulation of the Canadian and US legal professions: “The central challenge is to design regulatory processes that preserve professional independence but that also secure professional accountability where market mechanisms are unable to do so.”⁸⁵

IV. THE SOUTH AFRICAN CONTEXT

It is impossible to talk about the regulation (and the real or perceived independence) of the South African legal profession without reference to South Africa’s history of an official system of racial segregation (apartheid). Three and a half centuries of discrimination and oppression enforced by a system of legislative supremacy is bound to affect the ways in which a legal profession is regulated in any country. This is especially true where the legal profession is seen as complicit in this history, as South Africa’s Truth and Reconciliation Committee found of the SA legal profession.⁸⁶ However, slightly surprisingly, regulation of the legal profession was (and is) similar to many commonwealth countries.⁸⁷ Ellman opines that this was due to South Africa’s aspirations “to membership in the Western rule of law

85. Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 *FORDHAM L. REV.* 2761, 2764 (2012).

86. South Africa’s Truth and Reconciliation Commission (“TRC”) (set up in 1996 to deal with apartheid crimes and amnesty) found that the legal profession had to take some responsibility for upholding apartheid, despite some valiant examples of certain lawyers furthering justice. The legal profession’s complicity, according to the TRC, was to be found in their “uncritical acceptance of promulgated rules of law” without recourse to justice. Ultimately, the TRC found that the legal profession failed to hold the legal system accountable to its final objective or moral end, namely the pursuit of justice. See TRUTH AND RECONCILIATION COMMISSION, 5 TRUTH AND RECONCILIATION REPORT OF SOUTH AFRICA 131 (1998); Heidi Rombouts, *The Legal Profession and the TRC: A Study of a Tense Relationship*, CTR. FOR THE STUDY OF VIOLENCE AND RECONCILIATION (Feb. 2002), <http://www.csvr.org.za/docs/trc/legalprofession.pdf> [https://perma.cc/NT2Q-DLUS].

87. George E. Glos, *Contemporary Trends in Continental and British Legal Education*, 11 *S. TEX. L.J.* 373, 394 (1969); David McQuoid-Mason, *Can't Get No Satisfaction: the Law and Its Customers: Are Universities and Law Schools Producing Lawyers Qualified to Satisfy the Needs of the Public?*, 28 *J. FOR JURID. SCI.* 199, 199 (2003). Cf. ROB MCQUEEN & WESLEY W. PUE, *MISPLACED TRADITIONS: BRITISH LAWYERS, COLONIAL PEOPLE* 14 (1999).

world and because the legal system for whites *was* in large part a rule of law modelled on British principles.”⁸⁸

Despite this terrible history, it is hard to ignore the fact that the origin of South Africa’s legal profession shares distinctive similarities with that of the United States, especially in its assertions that self-regulation is necessary for independence. Given this reality, the SA legal profession’s calls for professional independence can be challenged in the same way (or even more so) as the US legal profession has been challenged. The SA legal profession, similarly to the United States, began as a small and elitist group of lawyers⁸⁹ who exerted extensive independence over the practice of law in the then Cape Colony. After complaints by the profession of “overcrowding” and competition from immigrants, the Incorporated Law Society of the Cape of Good Hope was set up in 1883.⁹⁰ One of the society’s first acts was to prohibit non-lawyers (known as “law agents”) from the practice of law.⁹¹ This was done ostensibly as a response to the lack of ethics in law agents’ practice, but the law society at the same time conveniently ensured that the status quo of this elite group remained unchanged.⁹² Fast forward to 2017, and it appears that retention of the status quo remains a theme. In fact, Klaaren points out that “the story of the legal profession in South Africa in the last three decades can be told as the story of what has not happened.”⁹³ This must be set against the fact that

88. See Stephen J. Ellman, *The Struggle for the Rule of Law in South Africa*, 60 N.Y. L. SCH. L. REV. 57, 58 (2016); see also RICHARD ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994*, 19-21 (1995).

89. See generally MARTIN CHANOCK, *THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902-1936: FEAR, FAVOUR AND PREJUDICE* 222, 239 (2001) (arguing that in the very early years [1660s through to the 1800s], legal practice was a rag-bag of legal agents and loosely named lawyers but by the first British Charter of Justice (1827) elitism was the flavour of the day).

90. H. R. HAHLO & ELLISON KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND* 248 (1968); Jacqueline Church, *Attorneys, Notaries and Conveyancers*, in 2 *THE LAW OF S. AFR.* 149 (W. A. Joubert ed., 2007). See Incorporated Law Societies Act 27 of 1883 (discussing the trust the Society gained with regulating the uniform practice, discipline and training) (1883) (S. Afr.).

91. See H.R. HAHLO & ELLISON KAHN, *THE UNION OF SOUTH AFRICA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 220 (1960); see also *Pienaar and Versfeld v. Incorp. Law Soc’y* 1902 TS 11 (S. Afr.).

92. See Friedman, *supra* note 4, at 20-21 (arguing that lawyers are, in general, “pillars of conservatism because they exert their considerable influence in upholding the status quo”).

93. See Jonathan. Klaaren, *The South African Legal Profession and Transformation: Lawyers in Society after 30 years*, in *LAWYERS IN SOCIETY* (Richard Abel & Hilary Sommerlad eds.) (forthcoming) (on file with authors); see also Richard Calland, *Lawyers Must Embrace and Support Reform*, MAIL & GUARDIAN (May 24, 2012), <https://mg.co.za/article/2012-05-24->

in SA not only does its constitution contemplate a “social justice” imperative, but there is also a constitutional right to counsel, even though, as in the US, this right is limited to certain categories of case.⁹⁴

Thus, in focusing on the third and most controversial category of regulation in South Africa, this category resonates with this social justice imperative and can be linked directly to addressing unmet legal need and accessing the profession.⁹⁵ For many years, the “in forma pauperis” rule, similar to the US federal judge’s authority to request assistance, has allowed high courts to refer indigent people in civil matters to private practitioners. Under the rule, the private practitioner must take the cases without compensation.⁹⁶ However, anecdotally, the rule is not often utilized, and its effectiveness can be questioned given that it assumes that the indigent will have the wherewithal to approach the court in the first instance.⁹⁷

More pertinently, and in contrast to the ABA, the law societies and the General Council of the Bar have, on the face of it, increasingly⁹⁸ embraced the responsibility to address unmet legal needs through mandatory *pro bono* legal service schemes.⁹⁹ These schemes are usually structured on the basis that each of its members needs to complete a minimum of hours of *pro bono* per year, usually around twenty to twenty-four hours.¹⁰⁰ While this stands in stark contrast to

lawyers-must-embrace-and-support-reform [https://perma.cc/4PHC-H7G3] (quoting the first Minister of Justice of democratic South Africa as characterising the Bar Councils as “conservative cabals”).

94. The South African Constitution provides for right to counsel for those arrested, detained and accused (§ 35(2)(c), (3)) as well as specific guarantees for minors (§ 28(1)). S. AFR. CONST., 1996 § 28(1), 35(2)(c), 35(3).

95. J. Milton et al., *Procedural rights*, in *RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER* 114-15 (David van Wyk et al. eds., 1994).

96. UNIFORM RULES OF COURT r. 40 (S. Afr.). The rule allows for the recovery of disbursements and other qualifications. *Id.*

97. This is not to say that it has been used in the last few years. For instance, during 1996-97, *in forma pauperis* matters were heard across South Africa. The SA Department of Justice and Constitutional Development has not reported on *in forma pauperis* statistics in its annual reports since its Annual Report for 1996/7977. See David J. McQuoid-Mason *The Delivery of Civil Legal Aid Services in South Africa*, 24 *FORDHAM INT’L L.J.* S111, S1116 (2000) (citing DEPARTMENT OF JUSTICE, ANNUAL REPORT FOR PERIOD 1 JULY 1996 TO 30 JUNE 1997 (1998)).

98. The first law society to impose mandatory hours was the Cape Law Society in 2003. See D. Holness, *Recent Developments in the Provision of Pro Bono Legal Services by Attorneys in South Africa*, 16 *PER/PELJ* 129, 137 (2013).

99. *Id.*

100. See, e.g., RULES FOR THE ATTORNEY’S PROFESSION r. 25.2 (S. Afr.) (“[P]ractising members shall perform *pro bono* services of not less than 24 hours per calendar year, save that

the ABA's reluctance to go beyond voluntary responsibility, the actual nature of the so-called mandatory rules is quasi-mandatory – that is, while there are reporting mechanisms, there is no actual enforcement or sanction for non-compliance or publicity measures in place. While it is possible for a member of the public to complain that a practitioner has refused to deliver *pro bono* services without good cause, if a member does not complete his or her hours, there are no consequences.¹⁰¹ Interestingly, with respect to the question of who may provide legal services, there has been a deafening silence regarding any debate for non-lawyers to provide certain types of legal services, except to contemplate, but then remove, the statutory recognition of paralegals in South Africa's future legislation governing legal practitioners since the legal profession feared that “paralegals would ‘become’ attorneys very quickly.”¹⁰²

The South African Constitution adopted in 1996¹⁰³ establishes a general right of access to the courts together with a right of legal representation for those arrested, detained and accused as well as specific guarantees for minors. These provisions are captured as follows:

Section 34: “[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

Section 35(2): “everyone who is detained, including every sentenced prisoner, has the right - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; . . .”

an attorney who becomes a practising member during the course of a year shall perform *pro rata pro bono* services.”)

101. For a discussion of the quasi-mandatory nature of the rules, see Helen Kruse, *Vuku'zenzele ('Arise and Act'): Lawyers and access to justice in South Africa*, in HELENA WHALEN-BRIDGE, *LAWYERS AN ACCESS TO JUSTICE: CHALLENGING PRO BONO* (forthcoming).

102. WITS JUSTICE PROJECT FOR THE INNOCENT & THE GRADUATE SCHOOL FOR PUBLIC AND DEVELOPMENT MANAGEMENT'S CRIME, POLICING AND CRIMINAL JUSTICE PROGRAMME, *JUSTICE FOR BREAKFAST: COMMUNITY PARALEGALS IN SOUTH AFRICA: OUTCOME REPORT 4* (2013), available at http://nadcao.org.za/wp-content/uploads/2016/04/Justice-for-Breakfast_Community-Paralegals-in-South-Africa_Outcomes-Documents_February-2013.pdf [<https://perma.cc/MLT6-7SYM>].

103. Similar but truncated provisions were set out in the Interim Constitution, Act 200 of 1993. See S. AFR. (INTERIM) CONST., 1993.

Section 35(3): “every accused person has a right to a fair trial, which includes the right -(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; . . . (o) of appeal to, or review by, a higher court.”

Section 28(1): “every child has the right, (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; . . .”¹⁰⁴

As is clear from section 35, the SA Constitution requires the state to provide legal aid to those facing criminal charges, but does not explicitly include the right to legal aid in civil claims unless one is a minor whose failure to have legal aid will result in “substantial prejudice.”¹⁰⁵ This is similar to the United States, where the constitutional right to counsel is primarily limited to criminal defense of both adults and juveniles and is generally denied to civil litigants.¹⁰⁶

104. S. AFR. CONST., 1996. These sections are in turn underpinned by various international conventions and treaties. For instance, *see* the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171; the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, *opened for signature* July 11, 2003, *available at* <http://www.achpr.org/instruments/women-protocol/> [<https://perma.cc/9AEA-3THD>]. The adoption of the United Nations principles and guidelines on Access to legal aid in Criminal Justice systems by South Africa in 2014 has arguably paved the way for the development of legal aid systems and increased access to justice by indigent persons in all member states. *See* U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, U.N. Doc. A/Res/67/187 (Mar. 28, 2013). The Johannesburg declaration adopted in 2014 was used to motivate for inclusion of access to justice in the United Nations Sustainable Development Goals. *See* International Conference on Access to Legal Aid in Criminal Justice Systems, *The Johannesburg Declaration of the U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, (June 24-26, 2014), *available at* http://www.legal-aid.co.za/InternationalConference/International_Conference_on_Access_to_Legal_Aid_in_Criminal_Justice_Systems/Home.html [<https://perma.cc/A9T7-3XFP>].

105. S. AFR. CONST., 1996. The courts have said the meaning of substantial prejudice is context specific and must be determined with due regard to all the facts of a case. *See S v. N* 1997 (1) SACR 84 (TK). (S. Afr.). The Legal Aid Board has started to take on civil cases incrementally, but access is difficult and subject not only to a means test, but also to a success test. *See* LEGAL AID SOUTH AFRICA, LEGAL AID MANUAL 2018 (2018), *available at* <http://www.legal-aid.co.za/?p=56> [<https://perma.cc/NF43-BKXE>]; LEGAL AID SOUTH AFRICA, LEGAL AID ACT REGULATIONS (2018), *available at* <http://www.legal-aid.co.za/?p=56> [<https://perma.cc/NF43-BKXE>].

106. *Compare Gideon v. Wainwright*, 372 U.S. 335 (1963) (discussing felony defendants’ right to counsel in state criminal proceedings), and *In re Gault*, 387 U.S. 1, 41 (1967) (discussing juveniles’ right to counsel in delinquency proceedings), with *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (denying right to counsel in civil termination of parental rights proceeding).

While much has changed in South Africa since 1883, the self-regulation of lawyers has generally continued unimpeded through apartheid (1948-1994) and constitutional democracy (1994-present). Even many of the law societies retain the old apartheid provincial names.¹⁰⁷ This, however, is set to change in a major way. The Legal Practice Act of 2014 (“LPA”) attempts to move the SA legal profession from a largely self-regulatory framework with similarities to the United States, to a position more in keeping with the reforms in England and Australia, that is, a co-regulatory framework, with the state playing much more of a prominent role.¹⁰⁸ In particular, the government’s actions deal directly with “who” and “whom,” with the preamble of the LPA emphatically setting out that:

- “Access to legal services is not a reality for most South Africans;
- the legal profession is not broadly representative of the demographics of South Africa; and
- opportunities for entry into the legal profession are restricted in terms of the current legislative framework; . . .”

To do this, the LPA contains provisions for the imposition of compulsory community service for both law graduates and practitioners.¹⁰⁹ (Interestingly, the language of “pro bono” is not used.)¹¹⁰

107. See Attorneys Act 53 of 1979 § 56 (S. Afr.). Even more interesting, is the fact that attorneys and advocates admitted during the existence of the so-called independent states of Transkei, Bophuthatswana, Venda and Ciskei (effectively the Bantustans created by the apartheid government for the black population’s so-called independence) are still subject to statutes those “countries” inherited when they became “independent.” See S. AFR. CONST., 1996 § 8(1); *L. Soc’y of the N. Provinces v. Maseka* 2005 ZANWHC 19; see also P. ELLIS & A.T. LAMEY, *THE SOUTH AFRICAN LEGAL PRACTITIONER: A COMMENTARY ON THE LEGAL PRACTICE Act 1-4* (LexisNexis 2017).

108. See Laurel S. Terry et al., *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 *FORDHAM L. REV.* 2661, 2673 (2012); Duncan Webb, *Are Lawyers Regulatable?*, 5 *ALBERTA L. REV.* 233, 243 (2008); Noel N Semple, *Regulation, Access to Justice, and the New Legal Realism: Searching for Connections 2-3* (University of Ottawa Faculty of Law, Working Paper No. 2013-14, 2013).

109. The Legal Practice Act of 2014, §29 (S. Afr.).

110. In the light of the massive misalignment of lawyers to population demographic, the government has also sought to control access to the profession through various measures. It bears noting that the government, through the Ministry of Justice, entered in what was called “The Legal Services Sector Charter” with the law societies and the GCB in 2007. The Charter – containing various affirmative action and pro bono undertakings – needed to be controlled and

The rationale for the change has been debated extensively and purposes ascribed to this change fall on a spectrum that raises concerns that are valid for most jurisdictions. On the one extreme, many in the SA legal profession oppose the future change on the basis that they see the government as attempting to dominate legal practice, and in this way subvert the legal system for their own ends.¹¹¹ This cohort sees lawyer independence as integral in keeping the state honest, effectively acting as a form of “loyal opposition” to government in that they fight “the system” but within strict limits helping to legitimate the political structure in general.¹¹² Many of these arguments are made in good faith¹¹³ and certainly make sense in the light of the Truth and Reconciliation Commission’s (“TRC”) claims that the failure of lawyers to be independent of the SA government, or sufficiently critical of it, led to the injustices of apartheid.¹¹⁴

On the other end of the spectrum are those – mainly in government but also other sectors – who complain that the SA legal profession has not done anything to transform its practices to provide for two types of access discussed earlier: first, access to the profession by those previously disadvantaged by a racially classified political system;¹¹⁵

funded through a Council which the Ministry of Defence undertook to fund and establish. Nothing was ever done by the Ministry; the Charter is de facto defunct.

111. See Johan Kruger, *The Legal Practice Bill and Independence of the Legal Profession*, (Centre for Constitutional Rights 2013). See generally Green, *supra* note 48, at 604 (commenting on how the ABA connects self-regulation and professional independence in much the same way, particularly the fear “is that if the government can make the rules for lawyers, it may make repressive rules, which undermine lawyers’ ability to perform as independent professionals.”).

112. See Friedman, *supra* note 4, at 19. In this vein, Duncan Webb comments that some see co-regulation as an Orwellian term for a framework under which “lawyers undertake all of the regulatory work subject to the supervision and shadow of intervention of government.” Webb, *supra* note 108, at 234.

113. Duncan Webb attributes their beliefs – even if exaggerated – to the fact that throughout their education and professional lives, lawyers are trained to see the law, lawyers, and legal institutions as integral to society, necessary, and fair. See Webb, *supra* note 108, at 243.

114. TRUTH AND RECONCILIATION COMMISSION, 4 TRUTH AND RECONCILIATION REPORT OF SOUTH AFRICA 101 (1998).

115. *Transformation of the Legal Profession: Discussion Paper*, S. AFR. GOV., ¶¶ 1-2, 3.4 (1999), <https://www.gov.za/documents/transformation-legal-profession-discussion-paper> [<https://perma.cc/GL9L-U8FG>]; CENTRE FOR APPLIED LEGAL STUDIES, TRANSFORMATION OF THE LEGAL PROFESSION 5-8 (2014); Shane Godfrey, *The Legal Profession: Transformation and Skills*, 26 S. AFR. L.J. 91, 98-99, 119-20 (2009).

and secondly, access to justice, understood in this context as the unmet legal needs of the majority of the SA population.¹¹⁶

This group also contains those who complain that lawyers opposed to change have more sinister motives: that the profession desires to suppress competition in its own economic interests (*viz.* a form of protectionism).¹¹⁷ Those in this group are skeptical of claims of self-regulation in the name of the rule of law and rely on, consciously or unconsciously, those grand theories that see professionalism as a form of market control.¹¹⁸

It is probable that the truth lies somewhere amidst these extreme views. On the one hand, there is certainly evidence in the early drafting of the LPA that the government, unhappy with the number of decisions taken against its various departments by the Constitutional Court (the apex court in South Africa),¹¹⁹ wanted to open the door to controlling the profession.¹²⁰ For example, one early provision in the Legal Practice Bill gave wide powers to the Minister of Justice to dissolve an integrated new regulatory structure (the Law Council) for both advocates and attorneys “on good cause shown [that] [he] loses confidence in the ability of the Council to perform its functions

116. *Transformation of the Legal Profession: Discussion Paper*, *supra* note 115.

117. See generally *Legal Practice Bill: Public Hearings Day 1*, PARLIAMENTARY MONITORING GROUP (Feb. 18, 2013), <https://pmg.org.za/committee-meeting/15388/> [<https://perma.cc/PT6J-CEPR>].

118. See Andrew Boon & Avis Whyte, *Charity and Beating Begins at Home: The Aetiology of the New Culture of Pro Bono Publico*, 22 LEGAL ETHICS 169, 169 (1999); see also Richard Abel, *Between Market and Statemarket and State: The Legal Profession in Turmoil*, 52 MODERN L. REV. 285 (1985).

119. In 2012, the South African government announced that it wanted to undertake an audit of court decisions by the Court given their displeasure at various courts finding against it, leading to what the media reported as “impeding the democratisation project.” While a university was appointed to do this work, they have never produced a report. See *ANC mulls review of Constitution*, MAIL & GUARDIAN (Mar. 4, 2012, 9:36 AM), <https://mg.co.za/article/2012-03-04-anc-mulls-review-of-constitution> [<https://perma.cc/V439-PU6H>]. Despite the report in 2015 reporting positively on the Constitutional Court’s role, the rhetoric has continued – at least in some sections of the ruling political party. See Mahlatse Gallens, *Constitutional democracy is not working, courts have too much power – ANCWL*, NEWS 24 (June 22, 2017, 12:20 PM), <http://www.news24.com/SouthAfrica/News/constitutional-democracy-is-not-working-courts-have-too-much-power-ancwl-20170622> [<https://perma.cc/3UZW-VCJT>].

120. A former leader of the Bar is quoted as having called the three government representatives of the regulatory body “the Minister’s spies.” See Izaki Smuts, *Submission to the Parliamentary Portfolio Committee regarding the Legal Practice Bill*, CONSTITUTIONALLY SPEAKING (Feb. 11, 2013), <https://constitutionallyspeaking.co.za/smutts-sc-submission-to-parliament-on-legal-practice-bill/> [<https://perma.cc/GE2V-XN9T>].

effectively and efficiently, or on any other reasonable grounds.”¹²¹ The Bill further allowed the Minister to appoint an interim council in its place,¹²² to exercise control over important aspects such as legal education,¹²³ to prescribe what should be, and to control the fees that can be charged for legal services.¹²⁴ The late Arthur Chaskalson, the first Chief Justice of South Africa post-apartheid, in an extra-curial statement made the following observations:

[T]he mere fact that [the Minister] can . . . dissolve the council and . . . appoint an interim council, is a potential threat hanging over the heads of the council, is inconsistent with the independence of the profession, and *is calculated to secure compliance rather than resistance from it should differences on important issues ever surface between them.*¹²⁵

Against this fear of state control is the mere fact that South Africa is, statistically, the most unequal country in the world.¹²⁶ Senior members of the Bar and Side-Bar have recognized that this fact is related, in part, to the Bar’s failure to live up to its relatively recent policy of “providing representation, . . . , access to justice for indigent persons and alternative dispute resolution.”¹²⁷ Bizos, erstwhile attorney for Nelson Mandela commented in his submission to Parliament on the Bill that “[m]any of us [attorneys] are concerned about what is good for us and what is good for our group, and not what is good for the legal

121. The Legal Practice Bill of 2012 (as introduced in the National Assembly, May 30, 2012) § 14(1) (S. Afr.).

122. The Legal Practice Bill of 2012 (as introduced in the National Assembly, May 30, 2012) §§ 14(4), 14(5) (S. Afr.).

123. The Legal Practice Bill of 2012 (as introduced in the National Assembly, May 30, 2012) § 94(1) (S. Afr.).

124. The Legal Practice Bill of 2012 (as introduced in the National Assembly, May 30, 2012) § 94(1) (S. Afr.).

125. Arthur Chaskalson, *The Rule of Law: The importance of independent courts and legal professions*, CONSTITUTIONALLY SPEAKING (Nov. 9, 2012), <https://constitutionallyspeaking.co.za/arthur-chaskalson-on-independence-of-legal-profession/> [<https://perma.cc/LBN8-4VBM>] (emphasis added).

126. South Africa has a Gini Co-efficient (an international measurement of income or wealth distribution in a country or region) of approximately 0.6 percent. This is consistently the lowest of all countries on this scale. See Kruuse, *supra* note 101.

127. *Mission Statement*, GEN. COUNCIL OF THE B. OF S. AFR., ¶ 3, <http://www.sabar.co.za/about.html> [<https://perma.cc/7FZK-X6W5>]. See *Transformation of the Legal Profession: Response by the GCB*, 12 CONSULTUS 9, 9 (1999) (acknowledging that “it has not succeeded in living out [their] commitment in all respects” and that it “acknowledges past failures.”)

profession as a whole nor what is good for the people of South Africa.”¹²⁸

Bizos’s Comment implies that lawyers should be acting for the good of the people of South Africa, presumably through increasing legal representation for those who cannot afford to do so. This in turn implies that Wendel’s suggestion that the US organized bar has given insufficient attention to the “positive right to counsel,” applies equally to the SA legal profession.¹²⁹ As in the United States, any regulations which impose obligations on lawyers to address the justice gap have a similar potential to reshape the practice of law in the South Africa in significant ways.

V. AUTONOMY VS EQUALITY AS “THE” CORE PRINCIPLES IN THE UNITED STATES AND SOUTH AFRICA, RESPECTIVELY?

The preceding Sections provided brief descriptions of the ways in which the legal professions of the United States and South Africa are regulated, and the recent attempts to use these systems of regulation to address inequities in the two societies. The two countries provide an interesting comparison, because they are racially diverse and characterized by serious economic inequality between rich and poor, even if the United States and South Africa differ radically in general development terms. In both countries, regulation of the legal profession has traditionally focused on defining the standards of practice and the duties owed to clients, courts, and third parties; and prescribing discipline for violations of those standards.

But as discussed in Section II, efforts are now underway to move regulation into an entirely new realm: moving from regulating the “how” – how lawyers should represent clients – to the “who” and “whom” – who should practice law and whom lawyers should represent. These efforts are designed to equalize access to law and lawyers throughout society.¹³⁰ However, as discussed above, in both countries these efforts sparked debates about whether such regulation is an appropriate means of addressing these societal problems.¹³¹ The key question at the heart of these debates is whether it is appropriate to

128. Kim Hawkey, *A step closer: Oral hearings on the Legal Practice Bill*, 529 DE REBUS 22, 22-37 (2013).

129. See Wendel, *supra* note 30, 2565-66.

130. MODEL RULES OF PROF’L CONDUCT r. 6.1 cmt. 1, 2 (AM. BAR ASS’N 2018)

131. See *supra*, notes 69-71, 101-04 and accompanying text.

use regulation of the profession in this way, i.e., achieving social change through fundamental changes in the way the legal profession is regulated. This is, at heart, a means-ends issue: taking as a given that the intended ends (a more racially and economically just and equal society) are highly desirable, is regulation of the profession the appropriate means for achieving this end?

This Article has already considered the various underlying political, social, and economic contexts in each country.¹³² However, in order to properly deal with this question we also need to consider the different requirements or principles in each legal system and how these requirements may affect the lawyer's role.¹³³ Despite many common features, as described above, in the histories of the legal professions in both countries, and the similar problems of racial and economic inequality, there are important cultural differences that may justify different approaches to regulation of the profession.

In the United States, it is useful to look to the purpose of its constitution which, US Supreme Court Justice Brennan once observed, is "a charter of human rights, dignity and self-determination".¹³⁴ If the main requirement of US law is to protect an individual's autonomy or self-determination, and an ordinary person cannot exercise autonomy without the help of a lawyer,¹³⁵ then a lawyer's first and foremost commitment is to enhance the client's autonomy. This requires giving the lawyer autonomy as well as to make representational choices about what clients to represent and how to represent them, as long as the actions of the lawyer and client are legal. This is the basic argument of

132. See Dezalay & Garth, *supra* note 10.

133. See *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD*, *supra* note 7; *LAWYERS IN SOCIETY: THE COMMON LAW WORLD*, *supra* note 7; *LAWYERS IN SOCIETY: COMPARATIVE THEORIES*, *supra* note 7; DAMAŠKA, *supra* note 9; Kritzer, *supra* note 7.

134. Freedman & Smith, *UNDERSTANDING LAWYER'S ETHICS* 7 (Carolina Academic Press 2016).

135. See Duncan Webb, *Bounded Autonomy and Bounded Zeal*, 28 U. QUEENSLAND L. J. 273, 281 (2009) (noting that "lawyers are an essential corollary to any meaningful self-determination").

many US legal ethicists, including Stephen Pepper¹³⁶, Charles Fried,¹³⁷ and Monroe Freedman¹³⁸, who argue forcefully that autonomy serves as the root justification for an ethical role for lawyers. Thus, enhancing the autonomy of individuals should be seen as the proper goal, end, or “good” in lawyering as it is an explicit requirement of the US legal system.

In addition, as discussed above in Part II, the idea of self-regulation and professional independence is a fundamental aspect of the way lawyers in the United States see themselves. Even if this notion is actually a “myth,” it is a powerful and enduring one within the US legal profession.¹³⁹ In contrast, equality rather than autonomy has been said to be the “organising” principle behind the SA legal system, at least post-Constitution.¹⁴⁰ This is not surprising given South Africa’s historic context of inequality.

In this light, Constitutional Court Justice Kriegler comments: “The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, *our constitution was written with equality at its centre*. Equality is our Constitution’s focus and organising principle.”¹⁴¹ South Africa’s Constitutional Court, despite

136. See Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617 (1986). Cf. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (1986) (objecting to Pepper’s characterization in that he sees Pepper as overvaluing individual autonomy).

137. See Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060, 1071 (1976).

138. See Monroe Freedman, *Personal Responsibility in a Professional System*, 27 CATH. UNIV. CATH. U. L. REV. 191, 197 (1970).

139. Zacharias, *supra* note 52, at 1147-49.

140. See, e.g., Justice Moseneke’s words in *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) at paras. 23-24 (S. Afr.) (“For good reason, the achievement of equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and economic disparities will persist for long to come. In effect the commitment of the Preamble is to restore and protect the equal worth of everyone; to heal the divisions of the past and to establish a caring and socially just society. ... Our supreme law says more about equality than do comparable constitutions.”).

141. *President of the Republic of South Africa and Another v. Hugo* 1997 (4) SA 1 (CC) at 68, ¶ 74 (S. Afr.).

resisting an explicit strict “hierarchy of rights” in its Constitution,¹⁴² has effectively confirmed Justice Kriegler’s comments in its jurisprudence, stating that the equality provision is “a core value”;¹⁴³ “lies at the heart of the Constitution”;¹⁴⁴ “permeates and defines” the Constitution’s ethos;¹⁴⁵ “assumes special importance”;¹⁴⁶ and “goes to the bedrock of [SA’s] Constitutional architecture”.¹⁴⁷

This Article recognizes that, even without these cultural differences, there may be a deep, philosophical basis for *any* legal profession in *any* jurisdiction not wanting to impose *pro bono* work on practitioners. Commentators have raised concerns that, by forcing practitioners to do *pro bono*, it undermines the practitioners’ appreciation for the moral significance of *pro bono* and it compromises their existing altruistic commitments.¹⁴⁸ In this way, practitioners’ judgments are short-circuited and prescription replaces deliberation about one’s professional responsibility.

The first two areas of regulation that have been discussed (discipline and antitrust provisions) benefit from the certainty and efficiency that codes and rules provide, least of all as a way to signal to the public how a lawyer will act in representing them. However, this third category of regulation – obedience to a rule to “act for the public good” – has limited value of this sort, as it fails to provide a substantive source of motivation as to why lawyers should provide, if not *pro bono* work, then representation for the indigent at reduced rates.

The goal of developing a self-generated *pro bono* mindset is nonetheless laudatory. But cultural differences may well influence different approaches to achieving this goal, and what may distinguish the US legal profession from the SA legal profession is its focus on

142. See e.g., *Johncom Media Inv. Ltd. v. M and Others* 2009 (4) SA 7 (CC) (S. Afr.); see *South African Broad. Corp. Ltd. v. Nat’l Dir. Of Pub. Prosecutions* 2007 (1) SA 523 (CC) (S. Afr.).

143. *Minister of Educ. And Another v. Syfrets Trust Ltd. NO and Another* 2006 (4) SA 205 (C) at 24, ¶ 30 (S. Afr.).

144. *Fraser v. Children’s Court Pretoria N. and Others* 1997 (2) SA 261 (CC) at 16, ¶ 20 (S. Afr.).

145. *Brink v. Kitshoff* 1996 (4) SA 197 (CC) at 18-19 ¶ 33 (S. Afr.).

146. *Bhe and Others v. Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at 45 ¶ 71 (S. Afr.).

147. *Minister of Fin. v. Van Heerden* 2004 (6) SA 121 (CC) at 14 ¶ 22 (S. Afr.).

148. See Marvin E. Frankel, *Proposal: A National Legal Service*, 45 S.C. L. REV. 887, 890-91 (1994). Cf. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *FORDHAM L. REV.* 2415, 2421 (1999).

autonomy. If the US legal profession sees this “third type” of regulation as inconsistent with deeply ingrained notions of professional autonomy, it will not succeed. It is likely that US lawyers will feel that they are being unfairly burdened with the responsibility of addressing social inequities. And clients will not be well-served by having lawyers who may not actually want to represent them. In addition, there is no guarantee that lawyers who are assigned to *pro bono* clients will have the skills necessary to meet the clients’ needs. A better approach, both philosophically and practically, may be to provide greater public funding of legal services specifically targeted to indigent clients¹⁴⁹, or failing that, to loosen unauthorized practice of law restrictions to make it possible for specially trained non-lawyer professionals to assist indigent clients with a carefully defined range of legal services.

In South Africa, on the other hand, this “third way” of regulating the profession may have a much greater chance of succeeding, because “equality,” rather than “autonomy”, is the core societal value.¹⁵⁰ Further, as mentioned earlier, history must be an important instrument in the interpretation of the SA legal system’s constitution,¹⁵¹ and in our context, the interpretation of the legal profession’s role in that legal system.

But this “third way” has some shortfalls. It does not deal with another part of South Africa’s history, a history which has (correctly) alerted legal professionals to be extremely cautious and skeptical of government’s attempts to interfere in the workings of its legal system. The other issue, similar to the United States, is to ask who should be the primary provider of access to legal services in any jurisdiction.

149. This is the approach New York City has recently taken for housing court proceedings. See *Mayor de Blasio Signs Legislation to Provide Low-Income New Yorkers with Access to Counsel for Wrongful Evictions*, THE OFFICIAL WEBSITE OF THE CITY OF NEW YORK (Aug. 11, 2017), <http://www1.nyc.gov/office-of-the-mayor/news/547-17/mayor-de-blasio-signs-legislation-provide-low-income-new-yorkers-access-counsel-for#/0> [https://perma.cc/HR2Y-4R72].

150. This is not to say that “autonomy” does not feature in the SA legal system or “equality” in the US legal system, just that the emphasis is the result of the peculiar history of each jurisdiction.

151. See Pierre de Vos, *A Bridge Too Far - History as Context in the Interpretation of the South African Constitution*, 17 S. AFR. J. ON HUM. RTS. 1, 33 (2001). It should be noted that de Vos qualifies his reliance on history as an important interpretative tool. He directs the interpreter (judges in his context) to avoid “the rigid, exclusive and nationalistic version of history.” *Id.* However, to embrace a version of history that is “sensitive to the insights of post structuralism.” *Id.* at 32.

A possible response to the first issue is simply for the SA legal profession to regulate itself more rigorously on *pro bono* before the government does. In this way, the government cannot use the excuse of *pro bono* as a pretext or “foot in the door” for more insidious means of undermining the progressive stance of the courts vis-à-vis government policy. Sounding a warning, Gauntlett noted in 2013 (in relation to government’s proposed regulatory intrusion): “Without independent courts, there are no rights in the country; without independent lawyers, there are no independent courts,” concluding that “[i]t is we [viz. the legal profession] who have to do this, not some big brother in Pretoria.”¹⁵²

In relation to the second issue, given the express access to courts and access to representation provisions in SA’s constitution, it is clear that the government ought to do more to promote the access to justice sector by prioritizing spending.¹⁵³ However, the fact that this should be done, is not inconsistent with a duty on the SA legal profession to assist in this regard. These duties are mutually supportive rather than mutually exclusive.¹⁵⁴

VI. CONCLUSION

The legal professions of both the United States and South Africa have a tradition of relative independence, although both have been regulated in similar ways through disciplinary systems and antitrust provisions. Both systems set standards for lawyers’ representation of their clients and impose discipline for professional misconduct. And both systems have regulations that are designed to facilitate competition among lawyers and firms within the private sector of the profession.

152. Kim Hawkey & Mapula Sedutla, *Who Guards the Guardians? Regulation of the Legal Profession*, 28 DE REBUS 29 (2013) (quoting Jeremy Gauntlett S.C.). Pretoria is one of the three capital cities of South Africa, serving as the seat of the executive branch of government.

153. For example, securing greater access for the indigent through its Legal Aid Board (the statutory body responsible to realizing sections 34-35 of the SA Constitution, alternative forms of dispute resolution (*see e.g.*, The Traditional Courts Bill, GG 40487 (Dec. 9, 2016)) and proposed regulation of paralegals (despite not impacting on reserved lawyer work)).

154. We are indebted to Chris McConnachie for pointing this out. *See* ELLIS & LAMEY, *supra*, note 107, at 1-10 (“[The] enjoyment of a freedom goes hand in hand with an obligation.”). In terms of the legal profession in South Africa, Ellis and Lamey, argue that the freedom to choose a calling or profession “brings with it the obligation to advance access to justice and not to restrict it.” *Id.*

In addition, both societies are racially, ethnically, and socially diverse, and both share a history of institutionalized racism. One of the consequences of this history is a high degree of economic inequality, including significant unmet legal needs for low income people.

To attempt to address these societal problems, both countries have begun to attempt to implement a third type of regulation of the legal profession, in which lawyers are required to represent low income individuals through mandatory *pro bono* and other means as part of their professional obligations. In addition, South Africa is attempting to use similar regulations to diversify the profession.

Despite the similarities between the two countries, this Article argues that this third type of regulation is more likely to succeed in South Africa than in the United States, because of important differences in the core values that are at the heart of the respective legal systems. In the United States, the deeply held notions of professional autonomy have led to resistance to any efforts to tell lawyers whom to represent. For this reason, attempts to address social inequities through regulation of the profession may ultimately fall far short of their goals or fail altogether. Thus, rather than pursuing this third type of regulation, efforts in the United States to address unmet legal needs and societal inequality should rely to a greater extent on alternative approaches, such as greater public funding of legal services for the poor and perhaps a loosening of unauthorized practice of law restrictions.

In contrast, such an approach to regulation is more likely to succeed in South Africa, where the core value of the legal profession is, or at least should be, equality. Social justice initiatives such as diversifying the profession and mandating *pro bono* services are consistent with and reinforcing of this core value. The preference though is that the legal profession can come closer to the equality ideal without having government interfere.

These approaches are, of course, not mutually exclusive. In both societies, there is much work to be done, and the legal professions of both countries must be in the forefront of addressing these deeply entrenched issues of racial and economic inequality.

