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Cover Page Footnote
Herzog Endowed Research Professor, University of San Diego School of Law. The author appreciates the contributions of Michael Devitt, Sharon Soroko, and Steven D. Smith, who commented on an earlier draft of this essay.

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TRUE CONFESSIONS ABOUT THE ROLE OF LAWYERS IN A DEMOCRACY

Fred C. Zacharias*

INTRODUCTION

The title of this Symposium, *The Lawyer’s Role in a Contemporary Democracy*, has several possible interpretations. It could represent a call to discuss the nature of democracy itself. Alternatively, it might employ the term “contemporary democracy” as shorthand for freedoms commonly associated with liberal democracies, such as free speech and equality, and anticipate that Symposium participants will explore how lawyers can promote those freedoms. Although this essay discusses these approaches, it ultimately takes a different perspective. Fordham Law School’s Louis Stein Center for Professional Ethics, which typically focuses on how lawyers should act in their professional lives, has sponsored this Symposium. Given the Center’s orientation, I perceive its invitation as encouraging the Symposium participants to consider the common notion that attorneys, because of their status, have unique obligations to support law reform enhancing individual rights and open, representative government.

Participants who envision liberal or other reformist values as the core of an enduring, modern democracy may argue that lawyers are especially

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competent and inclined to promote those values. I myself originally shared this orientation and, deep down, still wish lawyers would adhere to it. Nevertheless, this essay concludes that there is no reason to expect that lawyers generally will work in support of substantive progressive ideals.

A working democracy, however, may incorporate process values to which lawyers have a special tie. There is some justification for encouraging lawyers to be sensitive to process concerns and to help create a setting in which democracy can flourish. This essay suggests that, in a very limited sphere, lawyers play a unique role in the protection of the rule of law.

I. PERSPECTIVES ON THE SUBJECT OF LAWYERS IN A DEMOCRACY

Before entering academia, I was a public interest litigator, dedicated to using law to "improve" society. Like many young lawyers of my generation, I was inspired by the important contributions of attorneys in American history, starting with the Founding Fathers and culminating in the lawyer heroes of the labor and civil rights movements, such as Clarence Darrow and Thurgood Marshall. I had read all the right books—ranging from Darrow's biographies to To Kill A Mockingbird. My professional career was built on the belief that attorneys usually are the catalysts for progressive reforms in the legal and social structures of the nation.
For the second time this decade, a Fordham symposium has made me confront the reality of my public interest experience. Toward the end of my practice career, the Reagan revolution took hold. So-called conservative public interest groups started to become dominant, with funding for the more traditional civil rights, consumer, and environmental organizations drying to a trickle. Reagan appointees to the bench limited access to the federal courts, a trend that continued with subsequent changes to the U.S. Supreme Court. In perhaps the most frightening repudiation of the successes achieved through progressive public interest litigation, the Civil Rights Division of the U.S. Department of Justice rolled back governmental policies designed to maximize citizens’ voting rights.


13. See, e.g., Michael Herz, The Rehnquist Court and Administrative Law, 99 Nw. U. L. Rev. 297, 329 (2004) (stating that the overall tendency of the Rehnquist Court has been to limit access to the courts); cf. Erwin Chemerinsky, Closing the Courthouse Doors to Civil Rights Plaintiffs, Trial, Mar. 2008, at 64 (arguing that the Roberts Court is closing the courthouse doors to litigants, especially in civil rights cases, and that it is likely to use procedural doctrines as gatekeeping devices more aggressively than the Rehnquist Court); Joseph P. Tomain, Four Failures of the Political Economy, 6 Tul. Envtl. L.J. 1, 12 (1992) (arguing that the post-Reagan Supreme Court contracted citizens’ ability to access and influence administrative agencies).
and combat discrimination.\textsuperscript{14} For me, the lessons were clear. As much as lawyers and litigation may have done over the years to shape American law in favor of individual rights and open government, such results are at least as much a function of political trends and financial support as the inherent nature of what lawyers do. Lawyers have been a force for movements in all directions, including potentially antidemocratic directions.

Which brings me to today's topic. As I have suggested, there are numerous ways one might conceptualize the core questions, including "What is democracy?" This is a contentious threshold issue,\textsuperscript{15} and independent even of the existence of lawyers.\textsuperscript{16} The Symposium's sponsorship seems to call for a more direct emphasis on the bar.\textsuperscript{17}

The Symposium participants might therefore consider the everyday practice of attorneys and ask whether lawyers, consistent with their obligations to represent client interests, can further democratic values. Even if we confined our inquiry to so-called "liberal democracies,"\textsuperscript{18}

\begin{footnotesize}
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\item The University of San Diego library alone contains seven books with the simple title "Democracy." Even within this Symposium, several papers illustrate varying visions of democracy. See, e.g., Martin Böhmer, \textit{Equalizers and Translators: Lawyers' Ethics in a Constitutional Democracy}, 77 FORDHAM L. REV. 1363, 1367 (2009) (characterizing democracy as an "imperfect political substitute of modern moral deliberation," though one that "reproduces certain conditions of impartiality that make it possible for this political system to help us make better decisions than any other process of collective decision making"); Oko, supra note 2, at 1314 ("Democracy will flourish only when its values and precepts resonate with the citizens."); Piomelli, supra note 2, at 1386 (espousing a vision of democracy centering "on the robust participation of ordinary citizens and their groups in individual and collective self-government").
\item See Liberty and Justice for Some, ECONOMIST.COM, Aug. 22, 2007, http://www.economist.com/markets/rankings/displaystory.cfm?story_id=8908438 ("There is no consensus on how to measure democracy ... "). At its simplest level, "democracy" refers to a form of government featuring open elections and majority rule. See ARISTOTLE, POLITICS 237 (Penguin Classics 1970) ("A democracy exists whenever those who are free and are not well-off, being in the majority, are in sovereign control of government ... ."). But the range of democracies currently in existence around the world is staggering. See Liberty and Justice for Some, supra, at 1 (noting that "almost half of the world's countries can be considered to be democracies," but only 28 qualify as "full democracies"). In some democratic countries, suffrage is limited. The concept of majority rule has, in places, been replaced by joint governments, representative governments, or leadership by a strong minority. In highly developed democracies, the notion of democracy implies the existence of structural features such as free speech, freedom of the press, and open access to the ballot. In newer democracies, the simple fact of elections suffices.
\item See supra note 1 and accompanying text.
\end{enumerate}
\end{footnotesize}
however, the nature of democratic values would be unclear. Democratic values can range from specific rights, such as free access to the ballot, equality, and freedom of speech and of the press, to broader notions such as the promotion of autonomy and liberty. Democratic values also may encompass contradictory concepts, such as majority rule and freedom from the tyranny of the majority. Parsing these values, again, would divert us from addressing the part lawyers are to play.

Alternatively, this Symposium could take a historical perspective. We might ask: “What role have lawyers played in changing, or safeguarding, democratic society or democratic governmental structures in the past?” and “What does that history suggest for modern times?” As my public interest experience suggests, however, history may not help us accurately forecast the future.

There also are a variety of philosophical approaches the Symposium participants might pursue. For example, Plato (who did not approve of democracy) argued that democracies favor those who have expertise in winning elections, rather than those with expertise in properly governing society. Arguably, under Plato’s theory, lawyers with skill in producing regulation have a special role to play in counteracting, or supplementing, the inclinations of elected officials. Alternatively, in Political Liberalism, John Rawls sought to define democracy in terms of a society that provides “fair terms of social cooperation between citizens characterized as free and equal yet divided by profound doctrinal conflict.” Consistent with Rawls’s perspective, lawyers may have the function of helping to assure “public reason” (in discourse or processes) through which the democracy maintains free and equal citizenship. Peter Singer, in contrast, has described democracy largely as an expedient mechanism for making decisions that affect a large group of citizens, but one that does not necessarily produce correct results. Singer justifies a role for civil disobedience that corrects for, or responds to, the failures of Western democracies. Lawyers presumably would need to play a part in implementing that disobedience, because it necessarily calls the legal system into action. Attempting to tie the myriad visions of democracy to lawyers’ potential contributions could provide intellectual sport.

19. See, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 8 (1980) (arguing that the core of constitutional law in our democracy “has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule”); Randall Peerenboom, China’s Long March Toward Rule of Law 515 (2002) (discussing the tension between “majoritarian democracy” and “liberal rights-based democracy”).
22. Id. at 223–24.
24. Id.
Given my practice background, however, the most interesting focus for me is the validity of the view that lawyers should drive the fulfillment of democratic values (however those are defined). Typically, this view is expressed in an obligatory form. In other words, the American Bar Association (ABA) or proponents of social reform claim that lawyers have an affirmative duty, arising from their status or role, to actively promote particular values—through litigation (including representation of the indigent), taking public positions, or supporting particular political affiliations. My ambivalent memories of lawyer-driven public interest movements over the past three decades make me question this emphasis on attorneys’ obligations. It seems fair to ask, “Are lawyers in fact different than other educated, relatively prosperous professionals for purposes of influencing contemporary democracy?”

II. THE ROLE OF LAWYERS IN PRESSING SUBSTANTIVE PROGRESSIVE IDEALS

Current events make timely an inquiry into the role of lawyers in fostering democratic values. Like other members of the American bar, I was proud to read about the brave Pakistani lawyers who—almost exclusively among Pakistan’s elite—stood up to defy President Pervez Musharraf’s suspension of the Pakistani Constitution. The pictures of these attorneys locking arms in the streets and being forcibly carried away by police conjure up an image of attorneys as the guardians of civilization. As lawyers around the world have claimed their kinship with the Pakistani bar, they have encouraged the notion that such conduct is representative of what lawyers can and should do.

25. See Jane Perlez, Pakistani Lawyers’ Anger Grew as Hope for Changes Withered, N.Y. TIMES, Nov. 7, 2007, at A1 (reporting Pakistani lawyers taking the lead in staging protests against the suspension of the constitution and estimating that 700 lawyers had been jailed as a result).


27. See, e.g., Nicola Berkovic, Global Campaign to Defend Human Rights, AUSTRALIAN, Nov. 9, 2007, at 33 (quoting the Law Council of Australia as saying they were “extremely concerned about the arrest and treatment of hundreds of lawyers in Pakistan and the impact on the rule of law”); Carl Chancellor, Lawyers Back Pakistani Brethren. Akron Protestors Emphasize Importance of Rule of Law, Democratic Freedoms Protected by Courts, AKRON BEACON J. (Ohio), Nov. 10, 2007, at B6 (reporting a rally by Ohio lawyers and law students in front of the Akron federal building to show support for Pakistani lawyers and judges jailed for protesting their government’s suspension of the constitution and disbanding of the Pakistani Supreme Court); James Morton, Letter to the Editor, Lawyers and Democracy, GLOBE & MAIL, Nov. 8, 2007, at A22 (noting the statement of a British lawyer that “Pakistan’s lawyers deserve our support in seeking constitutional democracy”).
I will return to the Pakistan scenario presently. But let me posit at the outset that the performance of the Pakistani lawyers, while laudable, is not obviously generalizable to other settings and other issues in which lawyers might become involved. The Pakistani bar had a personal interest and expertise in the subject they were protesting, since the suspension of the constitution was designed primarily to hamstring the Pakistani Supreme Court and would have impacted the importance of the legal profession in Pakistani society. Lawyers have not always been at the forefront of generally focused democratic revolutions, however. More frequently, that task has fallen to students, women, the working class, and, most recently, Tibetan monks.

It is also important to note that the Pakistani lawyers acted as a group, pressing a shared point of view. This contrasts markedly with a situation in which all lawyers act individually, in their representation of clients, because of a sense that their function compels them to take particular steps. The first dynamic is based on a group consciousness, or uniform opinion within the bar, about a controversial issue. The second dynamic requires the bar to agree about process—the role of lawyers—without necessarily demanding a consensus on any substantive political point. However, to the extent the second dynamic calls upon lawyers to act with respect to particular (democratic) values, or in reaction to particular threats to (democratic) values, the scenario in effect requires lawyers’ agreement on both process and substance.

In asking the participants to focus on democracy and democratic values, the Symposium seems to assume that the terms have readily identifiable meanings. In fact, however, the underlying substance of these concepts, and their relationship to lawyers, is not something about which a consensus exists. If all we comprehend by “democracy” is a government elected by the people, then (in America at least) democracy is not at risk and lawyers play little role in preserving it. Even to the extent that lawyers are involved in the occasional litigation that refines the meaning of democracy in America, such as Bush v. Gore, lawyers appear on both sides of the litigation. The content of democratic values is even less obvious, once one gets beyond the simplest conception that all qualified people should be

28. See Laurie Goering & Bay Fang, Musharraf Declares State of Emergency Crackdown Suspends Pakistan Constitution, CHI. TRIB., Nov. 4, 2007, at 1 (“Facing a decision by Supreme Court judges that could have declared his continued leadership of Pakistan unconstitutional, President Pervez Musharraf declared a state of emergency Saturday, suspending the nation’s constitution and firing the chief justice.”).

29. It would, for example, have diminished the usefulness of litigation in society and the status of the whole legal system, not simply that of the Pakistani Supreme Court.

30. A more moderate form of this dynamic occurs in the United States when the American Bar Association (ABA), seeking to speak for all lawyers, takes a position on a controversial issue. The impact of such an occurrence is more limited, however, because the ABA rarely acts on a consensus of its members, much less of all lawyers in the United States.

31. 531 U.S. 98, 111 (2000) (overruling the Florida Supreme Court’s decision to order a manual recount of Florida’s election results in the 2000 presidential election).
allowed to vote. The civil rights movement has taught us that this limited value is one that all members of American society should support, not just the bar.

From time to time, the modern ABA has taken positions on political issues (such as the death penalty, gay rights, and gender politics) that seem to have suggested that, because lawyers sometimes serve as guardians of individual rights in litigation, they have some responsibility to rally behind specific, usually liberal, causes. Viewed fairly, the ABA’s positions largely reflect the political preferences of a majority of the membership, rather than proof that particular values or substantive positions are uniquely relevant to the role or functions of lawyers. For purposes of this essay, I set aside any liberal or conservative bent. I am more interested here in the


It is worth noting that the ABA has not always exhibited a liberal bent. During the McCarthy period, the ABA was at the forefront of anticommunist activity, establishing a special committee to prevent “subversives [from penetrating] the legal profession” and adopting resolutions against allowing communists and witnesses who exercised Fifth Amendment rights to practice law. See Ellen Schrecker, The Age of McCarthyism 97 (2d ed. 2002).

33. See Thomas L. Jipping, Verdict Is in: ABA Is Biased, WorldNetDaily, Aug. 9, 2001, http://wnd.com/index.php/index.php?pageId=10375 (arguing that the “ABA’s House of Delegates has adopted well over 1000 policy positions since 1970[,] . . . [a]nd the ABA always, always, always takes the liberal position” (internal quotation marks omitted)); Orrin G. Hatch & N. Lee Cooper, Q: Was the Senate Right to Remove the American Bar Association from the Judicial Nomination Process?, BNET, Apr. 21, 1997, http://findarticles.com/p/articles/mi_m1571/isn4_v13/ai_19329281 (arguing that, since the 1980’s, the “ABA has taken stands on a series of controversial political issues on which the bar has no more special expertise or experience than any other citizen”); cf. Neil A. Lewis, Abortion Issue a Magnet for A.B.A Annual Event, N.Y. Times, July 27, 1990, at B5 (reporting an ABA resolution supporting a woman’s constitutional right to abortion that caused some members to resign and claim that it was “inappropriate for the A.B.A. to have taken a position” on this subject).
ABA's apparent view that lawyers are peculiarly important in, and responsible for, furthering social reform.\textsuperscript{34}

Of course, given my original inspirations for entering the legal profession,\textsuperscript{35} I share the ABA's apparent longing for the re-emergence of progressive lawyer activists and honorable lawyer-statesmen in the United States.\textsuperscript{36} I like heroes as much as the next person.\textsuperscript{37} Yet I cannot help but think that the thesis that lawyers as a group will, and should be expected to, campaign for positive change in society—whatever that change may be—is more wistful than realistic. Although lawyers have at times been prominent in politics, wise counselors, and active in promoting social reform, they have also represented the forces resisting change.\textsuperscript{38} The question remains, is there anything unusual about lawyers or their role that would cause us to count on lawyers, as a class, to be more forceful or useful than other well-heeled intelligentsia in fostering so-called democratic values?

Indeed, at one level, our intuition may run in the opposite direction. The lawyer's role as a client advocate sometimes actually prevents lawyers from actively promoting important political and social values, including democratic values. One standard conception of the lawyer's role is Henry Lord Brougham's notion that a lawyer should "know no one but his client."\textsuperscript{39} When Lord Brougham uttered these words, he was speaking in direct response to the notion that he, as lawyer for Queen Caroline against a claim of treason, should constrain his tactics on her behalf in order to

\begin{itemize}
  \item \textsuperscript{34} Cf \textit{Model Rules of Prof'L Conduct} pmbl. (2002) (asserting that a lawyer is "a public citizen having special responsibility for the quality of justice").
  \item \textsuperscript{35} See \textit{supra} note 5 and accompanying text.
  \item \textsuperscript{36} I use the term "lawyer-statesmen" differently from Anthony Kronman. See \textit{Anthony Kronman, The Lost Lawyer} (1993). Kronman envisions lawyers who act as wise counselors and facilitate the resolution of disputes, while implementing a "special talent for discovering where the public good lies and for fashioning those arrangements needed to secure it." \textit{Id.} at 14. I am thinking more of what Kronman would characterize as adherents of the modern "scientific law reform model"—lawyers who focus on "the structural arrangement of the legal order as a whole and not the resolution of particular disputes," hoping to use the law to produce social reform through litigation or legislative and other governmental processes. \textit{Id.} at 19.
  \item \textsuperscript{37} See Gerard J. Clark, \textit{The Lawyer as Hero}, in \textit{The Lawyer and Popular Culture: Proceedings of a Conference} 179, 180–88 (David L. Gunn ed., 1993) (discussing real and fictional lawyers who have assumed "mythical" proportions in society's perceptions).
  \item \textsuperscript{38} In a psychological study conducted in the early 1980s, Lawrence Landewehr concluded that "the cognitive orientation of lawyers toward ethical problems is such that lawyers overwhelmingly accept the sociolegal order as is." Lawrence J. Landwehr, \textit{Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers, 7 Law & Psychol. Rev.} 39, 39 (1982); see also Carrie Menkel-Meadow, Professor of Law, \textit{The Lawyer's Role(s) in "Restoring" Democracy in Transitional Regimes, Remarks at The Lawyer's Role in a Contemporary Democracy Symposium} (Sept. 18, 2008) (discussing the contribution of lawyers in resisting democratic change in some countries).
  \item \textsuperscript{39} \textit{2 Trial of Queen Caroline} 8 (J. Nightingale ed., London, Albion Press 1821). Others have characterized the role of lawyers in different, but equally neutral, ways. See, \textit{e.g.}, Anand, \textit{supra} note 4, at 1612 (describing lawyers as the "People's people"); Böhmer, \textit{supra} note 15, at 1372–75 (discussing lawyers as "rhetorical equalizers").
\end{itemize}
preserve national interests. Brougham argued that the lawyer’s commitment to the client’s interest should outweigh any separate concerns about a properly functioning and secure government:

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

From the Brougham perspective, nothing inherent in the attorney’s role serves or diserves democratic or other governmental values. It all depends on who retains the lawyer’s services and the client’s goals.

Concededly, if lawyers did not institute cases and represent clients on both sides, litigation would not be available as a potential benefit to society. Some lawyer, for example, had to file Brown v. Board of Education before a court could decide it. Equally obviously, in particular cases, individual lawyers help produce results consistent with democratic values; for instance, a criminal defense attorney who achieves the acquittal of an innocent defendant. Moreover, in the regular course of litigation, all lawyers have ethical duties, some of which arguably contribute to justice (which may be a “democratic” value). Thus, prosecutors must avoid intentionally convicting the innocent and private attorneys are supposed to contribute to the adversarial truth-seeking process. Nevertheless, simply noting the participation in the legal system of lawyers who are governed by prescribed professional obligations is a far cry from establishing a

40. Indeed, Henry Lord Brougham’s statement represented “a veiled threat to reveal embarrassing information about the King should the proceeding go forward.” Fred C. Zacharias & Bruce A. Green, “Anything Rather than a Deliberate and Well-Considered Opinion”—Henry Lord Brougham, Written by Himself, 19 GEO. J. LEGAL ETHICS 1221, 1221 n.2 (2006).

41. 2 TRIAL OF QUEEN CAROLINE, supra note 39, at 8.

42. 347 U.S. 483 (1954).


44. See Lon L. Fuller, The Adversary System, in TALKS ON AMERICAN LAW 30, 37 (Harold J. Berman ed., 1961) (arguing that lawyers contribute to truth-seeking by acting as advocates in the adversary process); Robert Gilbert Johnston & Sara Lufrano, The Adversary System as a Means of Seeking Truth and Justice, 35 J. MARSHALL L. REV. 147, 160 (2002) (“Interpreting the Model Rules [of Professional Conduct] as holding an attorney’s duty to the public as officer of the court to be the attorney’s first priority and by broadly construing the rules of discovery, the adversary system is supported in arriving at a truthful and just result.”); Fred C. Zacharias, Reconceptualizing Ethical Roles, 65 GEO. WASH. L. REV. 169, 174 (1997) (“The role typically ascribed to criminal defense counsel envisions her as protecting not only the defendant, but also society’s interest in the truth-seeking process and in keeping government honest.”).
So let us frame the issue in a slightly different way: does a practicing lawyer’s role facilitate the lawyer’s active involvement in promoting societally beneficial results? Clearly, as we expect ethical attorneys to act in contemporary American society, a lawyer would have no right to override a client’s desire to pursue an antidemocratic position. Moreover, although an attorney need not agree to represent the client in an antidemocratic case, nothing in the standard conception of the lawyer’s role forbids him to undertake the representation. Probably, the most positive position one can espouse in this context is one I have taken elsewhere: if one assumes that professionalism requires every lawyer to exercise a measure of objectivity, the lawyer may need at least to discuss with his client the potentially negative effects the client’s choices will have, including the negative effects upon democratic values. This approach, however, does not take us far down the road of developing lawyer-statesmen.

Perhaps the argument that lawyers have a unique role to play in supporting particular progressive values depends on something external to the lawyer’s functions in representing clients. For example, does the fact that lawyers have been blessed (or cursed) with a legal training change the calculus? Legal education endows the class of lawyers with sensitivities and skills that might be useful in producing democratic values and that most laypersons do not have—including the ability to institute litigation, write regulations, and lobby legislatures and administrative agencies. But other members of society have special and potentially useful attributes as well: the wealthy, the educated, political scientists, philosophers, union leaders, political organizers, fund-raisers, etc. Is it fair to say that lawyers’ professional skills oblige them to sacrifice themselves to produce certain values any more than others who can affect those values? Or, at root, is that the essential truth—that everyone who can further democracy should, as a moral matter, do so even if they have no special obligation arising from the unique functions they perform?

Some scholars have argued that, because of the benefits lawyers are accorded in society, lawyers have a special obligation to perform pro bono

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45. It may, however, suggest that one role of lawyers in a democracy is to carry out their professional functions consistently with the prevailing rule of law. See infra note 68 and accompanying text.

46. See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 643–45 (1966) (involving a lawsuit brought by registered voters in New York challenging the constitutionality of a federal statute that, in effect, extended the right to vote in New York to persons who could not read and write English).


48. Id. at 1359–61 (identifying objectivity as a function of lawyer professionalism and suggesting that discussing moral issues with clients is one way in which lawyers may and should exercise objective judgment).
legal work. Perhaps the democracy issue can be framed in the same way: are lawyers, by virtue of the monopoly on legal practice that they are granted by the state (and the status they are accorded in society) in debt to society, repayable by working toward the appropriate operation of the government? At one time, there was an obvious linkage between the practice of law and the ability to structure the government. Lawyers initially monopolized positions in the legislatures and typically controlled lobbying organizations with access to legislators. In that context, it arguably made some sense to perceive a fiduciary type of obligation requiring the protected guild of lawyers to work for even-handed laws. But the questions remain. Why just lawyers? And why lawyers who are not connected with the legislatures or lobbying? More importantly, the reality is that the contemporary bar’s monopoly over government service has waned, at least somewhat, with more nonlawyers today serving in the government and engaged in lobbying. Although lawyers still can play an

49. See, e.g., DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 3 (2005) (“Without private lawyers willing to fill more of these gaps [in the provision of legal services], millions of critical legal needs will go unaddressed, and urgent public interest causes will go undefended. A nation and a profession that consider themselves global leaders in human rights can and must do better.”); Tigran W. Eldred & Thomas Schoenherr, The Lawyer’s Duty of Public Service: More Than Charity?, 96 W. VA. L. REV. 367, 399 (1994) (arguing that lawyers have an obligation to perform pro bono service “as a condition of [bar] membership”); Steven Lubet & Cathryn Stewart, A “Public Assets” Theory of Lawyers’ Pro Bono Obligations, 145 U. PA. L. REV. 1245, 1246 (1997) (“[A] portion of lawyers’ income is directly attributable to their ability to market ‘lawyer-commodities’ that have been provided to them, at no charge, by the public. The exaction of a pro bono obligation can therefore be seen as a simple recapture of some of the profit derived from access to this asset.”); cf Fred C. Zacharias, Rethinking Confidentiality II: Is Confidentiality Constitutional?, 75 IOWA L. REV. 601, 607 (1990) (considering the argument that “lawyers as regulated businesspersons who, in qualifying to serve the public, forfeit first amendment rights whenever they act in a professional capacity”).

50. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 647 (1973) (stating that, from 1790 to 1930, two-thirds of the Senate and about half of the House of Representatives were lawyers); Richard Pérez-Peña, Making Law vs. Making Money: Lawyers Abandon Legislatures for Greener Pastures, N.Y. TIMES, Feb. 21, 1999, at 3 (Week in Review) (stating that, in 1969, 58% of U.S. congressional seats were held by lawyers).

51. It is impossible to quantify how many lawyers are lobbyists, because not all lawyers and law firms need to register as lobbyists. In general, lobbying organizations depend on the expertise of lawyers and often hire former legislators who are lawyers. Cf. Neil A. Lewis, The Lawyer as Lobbyist: Lobbying Lures Fresh Faces as Lucrative Legal Specialty, N.Y. TIMES, Dec. 29, 1989, at A1 (“There are nearly 13,000 registered lobbyists in Washington . . . . Many of them are lawyers who prefer to call their specialty ‘legislative work.’”).

52. According to a 1995 New York Times article, The November [1994] election produced the biggest drop in lawyers in Congress in at least 14 years, according to the American Bar Association. Compared with the previous Congress, there [were] 12 fewer lawyers in the House and 3 fewer in the Senate. . . . Since 1981, lawyers . . . accounted for 46 percent to 48 percent of the members of Congress. [In 1995], they constitute[d] 43 percent. Lawyers headed about half the committees in the old Congress; [in 1995], they [led] only a third.

Katharine Q. Seelye, At the Bar: A Congress with Fewer Lawyers Is a Congress with Different Inclinations, N.Y. TIMES, Apr. 7, 1995, at A33. In the 109th Congress, which met
active role in producing particular types of laws, does that mean they must do so or have more of an obligation than nonlawyers in the same position?

I do not mean to overstate my dubiousness. Depending on the particular values that participants in this Symposium identify as the "democratic values" that need promoting, lawyers probably will be called to participate in some capacity. If, for example, the task before society is the better enfranchisement of qualified voters, that may require litigation, better regulation, and new laws. Because of the skills and training necessary to produce these results, lawyers would have to be involved. But saying that some lawyers can or should help promote democratic values is a far cry from concluding that there is something inherent in being a lawyer that requires all lawyers to engage in those functions. And my experience in public interest law suggests that, given a choice, some lawyers will pursue the light and others will flee to the dark side—how actively and in which direction being primarily dependent on personal political preferences, political trends, and financial realities.

Moreover, in light of the intricacy of defining democracy, even differentiating the light from the dark side may be difficult. The public interest lawyers of my and earlier generations, for example, pushed the envelope of individual and civil rights—an enterprise that seemed consistent with democratic values in a developed liberal democracy. Yet the representation of Nazis in Skokie, criminal defendants, and whistleblowers arguably conflicted, at least potentially, with society's interest in preserving the democracy's social and political order and in safeguarding institutions essential to democratic government. Conservative lawyers who champion the original meaning of the Constitution (including a limited vision of individual rights), judicial restraint, and the ability of government to combat threats to its operations have an equal claim to be acting in the public interest, and in the interest of preserving our democracy.


53. See RAWLS, POLITICAL LIBERALISM, supra note 18, at 5-7 (stating the principle that "[e]ach person has an equal claim to a fully adequate scheme of equal basic rights and liberties . . . [in which] the equal political liberties, and only those liberties, are to be guaranteed their fair value" and arguing that "[s]ocial and economic inequalities . . . [should be] to the greatest benefit of the least advantaged members of society").

54. See Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977) (per curiam) (ordering a stay of an injunction against a demonstration by members of the American Nazi Party in Skokie, Illinois); Donald A. Downs, Skokie Revisited: Hate Group Speech and the First Amendment, 60 NOTRE DAME L. REV. 629, 640 n.50 (1985) (discussing the Skokie case from the perspective of the residents of Skokie who may have experienced psychological trauma when confronted by Nazi demonstrators).

55. One might conclude that it does not matter in which direction lawyers press so-called democratic values, but that every lawyer nonetheless should press democratic values in some direction. That vision, however, is doomed to produce a nonproductive equilibrium, in which the contradictory actions of lawyers will cancel each other out. The sole resulting benefit might be a positive impact on the soul of lawyers who seek to serve the public
III. THE ROLE OF LAWYERS IN PROTECTING PROCESS VALUES INHERENT IN A DEMOCRACY

Lawyers are the mechanics of the legal system. They drive and help fine-tune the engine, knowing that if it is not in working condition, it will not reach its destination. Lawyers are specially trained in the legal system's goals and have the greatest expertise about its operation. Is it possible that simply by implementing and standing up for the existing legal regime, lawyers promote democracy?

Other participants in this Symposium are better suited than I to discuss the philosophical aspects of this subject. Clearly, the issue depends significantly on the extent to which the legal regime and democratic values are intertwined. I have already suggested that the mere fact that lawyers represent clients does not tend to produce particular kinds of substantive values. The adversarial system at best maintains a process through which clients can press and potentially vindicate all issues, conservative or liberal.

But consider, again, the Pakistani lawyers, who seem to have evoked universal admiration from the American bar. The groundswell of approval for their actions does suggest that there are some matters that, by consensus, warrant special concern on the part of lawyers. What was it that the Pakistani lawyers were actually protesting and why did they do so as a class of lawyers, rather than simply as a group of concerned citizens?

The key, I think, is not that they were protesting the degradation of vague "democratic values" in Pakistan, but rather that they were protesting a specific attack on the rule of law. President Musharraf suspended the constitution for the precise purpose of terminating litigation through which the Supreme Court might invalidate his presidency. The Pakistani bar was in the best position to understand the long-term impact of Musharraf's action, not for immediate political events, but rather for the ability of the country's legal system to maintain its structure and independence. This concern, of course, was tied to broader notions of democracy in the sense that a rule of law can function as a protection for democratic values, including individual rights. But it was not the underlying democratic values themselves that provided the tie to lawyers.

This explanation also helps reconcile the Brougham approach to lawyering with the concept that lawyers have a role to play in preserving democratic values. How can a lawyer, like Lord Brougham, justify engaging in socially destructive (including potentially antigovernment or antidemocratic) practices when serving his client? Arguably, by representing his client aggressively, he preserves the rule of law—indirectly safeguarding individual rights and the ability of all citizens to use the courts to preserve their rights. The lawyer, Brougham might say, does have an

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56. See supra note 41 and accompanying text.
obligation to help preserve the rule of law by enabling clients to use the rule of law, even though the lawyer has no independent obligation to promote other particular (democratic) values.

Unfortunately, this analysis is incomplete. For it is not altogether clear that a “rule of law” will always be democratic in nature. Some scholars, such as Lon Fuller, have argued that good legal process (including adjudication and enacted lawmaking) contains an “inner” or “internal morality” that supports and may be inherent in democracy because it constrains and validates the broader “enterprise of subjecting human conduct to the governance of rules.” Others suggest that the rule of law, when produced abstractly and applicable to all citizens equally, is a foundation of and prerequisite to liberty. I do not propose to enter these philosophical thickets. Yet it seems worth noting that a particular legal regime may be well-established in a democracy, but have no particular relationship to, or inherent tendency to promote, democratic values; legal process may simply be the mechanism chosen by the government to resolve disputes, or limited types of disputes. Moreover, nondemocratic

57. LON L. FULLER, THE MORALITY OF LAW 33-94, 132 (1964). Lon Fuller defines eight tenets, or aspects, of process that are necessary to qualify a governmental act as “law.” Id. at 38-39.

58. See id. at 38-39 (arguing that a rule of law limits the ability of governing institutions to act through arbitrary decree or tyranny); see also Colleen Murphy, Lon Fuller and the Moral Value of the Rule of Law, 24 LAW & PHIL. 239, 239 (2005) (“[Fuller’s] rule of law specifies a set of requirements which lawmakers must respect if they are to govern legally .... [It] restricts the illegal or extra-legal use of power.”).

59. See FULLER, supra note 57, at 177 (“The two fundamental processes of decision that characterize a democratic society are: decision by impartial judges and decision by the vote of an electorate or representative body.”); see also Murphy, supra note 58, at 243 (noting that, under Fuller’s theory, when officials act in accordance with appropriate legal process, “citizens have reason to obey the law, even when the government pursues a particular policy with which individual citizens disagree”); Kenneth I. Winston, Three Models for the Study of Law, in REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN 51, 72 (Willem J. Witteveen & Wibren van der Burg eds., 1999) (“Fuller’s view is that democracy exists to the extent that citizens actually work out their relations with one another on their own ....”). For further elaboration of Fuller’s contribution to philosophic debate about the interrelationship between law and democracy, see David Dyzenhaus, Fuller’s Novelty, in REDISCOVERING FULLER, supra, at 78, 95-98.

60. FULLER, supra note 57, at 122; see also id. at 157 (“[A]cting by known rule is a precondition for any meaningful appraisal of the justice of law.”); David Ingram, The Sirens of Pragmatism Versus the Priests of Proceduralism: Habermas and American Legal Realism, in HABERMAS AND PRAGMATISM 83, 101 (Mitchell Aboulafia et al. eds., 2002) (“Political theorists from Joseph Schumpeter to Robert Dahl also sought to defend democracy as a system of impartial rules whose process alone bestowed legitimacy on majoritarian outcomes that, in and of themselves, might not conform to substantive standards of justice.”). For a discussion of Fuller’s view of the role of lawyers in helping devise appropriate social institutions, see generally LON FULLER, The Lawyer as an Architect of Social Structures, in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON FULLER 285 (Kenneth I. Winston ed., 1981).

61. See, e.g., F. A. HAYEK, THE CONSTITUTION OF LIBERTY 153-55, 210 (1960) (setting forth a conception that “rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are ... free”).

62. See PEERENBOOM, supra note 19, at 513 (noting that “rule of law need not lead to liberal democracy”).
governments (e.g., monarchies or dictatorships) also can use legal regimes to reinforce the prevailing undemocratic social and governmental institutions. In such jurisdictions, lawyers who remain committed to a rule of law in effect act against democracy. In the abstract, therefore, the rule of law seems to be neutral as between democracy and tyranny, serving either equally well. By working to maintain fair legal process, lawyers sometimes preserve a bulwark against tyranny, but that will not necessarily be the case.

The relationship between the legal system and democratic values may well depend on the specific kind of democracy that is at issue. Arguably, in constitutional democracies—such as the one that exists in America and the one Pakistan aspires to—a rule of law is essential to the nature of the government. In other words, the rule of law, while not inherently democratic, may nonetheless be a necessary condition of sound democracy as that term is constitutionally defined. By emphasizing the judiciary, for example, legal process can promote checks and balances inherent in a jurisdiction's separation of powers. A constitutionally prescribed rule of law typically sets enforceable limits on government, including limits that may safeguard representative government and otherwise relate to consensus democratic values such as the right to vote and dissent. To the extent democratic values include the ability of individuals to assert constitutionally defined rights, protect their own capacity to exercise their rights, and challenge the government, access to the courts is critical.

How does this bear on the role of lawyers in contemporary democracy? I have suggested that, even in constitutional democracies such as ours,

63. For example, because the doctrines the legal system implements maintain the status quo or the personnel staffing the judiciary favor the government. See, e.g., Oko, supra note 2, at 1304–11 (describing corruption within Nigeria's judiciary and governmental interference in legal processes).

64. See Peerenboom, supra note 19, at 515 (concluding that "democracy . . . implies rule of law, but not vice-versa").

65. In her study of various democracies in transition, Carrie Menkel-Meadow concludes that lawyers have played varying roles—good and bad—in the development of democracy and that the rule of law has been used both to counteract and prop up undemocratic regimes. See generally Menkel-Meadow, supra note 38.

66. Cf. Anand, supra note 4, at 1614 ("American legal ethicists must be circumspect in their thinking about lawyering in contemporary democratic society and be acutely aware of the fundamentally American character of this democracy and consequently the deeply American character of the practice of law in the United States.").

67. The ABA appears to take this position. See Model Rules of Prof'l Conduct pmbl. (2002) ("Legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority"); cf. Anand, supra note 4, at 1616–17 (characterizing American law as "a locus of faith and a domain of the holy. . . . It represents an expression of sovereign will. Law makes manifest the voice of the People, who is the god of all who live under law,") and arguing that "the political practice of law is an autonomous realm of experience. It defines a world unto itself, and in this way is an end in itself").

lawyers are not unique in most respects relating to the preservation of democracy. They do, however, have a monopoly on assuring that citizens can take advantage of the rule of law, are specially trained to comprehend the importance of the rule of law, and are granted special privileges (i.e. the economically valuable license to practice) that may encompass some expectation that they will function as advocates of the rule of law. If lawyers do not protect individuals' access to a properly functioning legal system, no one will. The Pakistani protestors probably had it right: in this limited aspect of democracy, the bar has a unique role to play.69

CONCLUSION

So where do my ambiguous observations lead? Mainly to the tentative rejection of one set of claims and the recognition of a separate set of legitimate issues. The claims I question are those of obligation. I do not think that lawyers, in their nature or the role they play, differ at their core from others in society for purposes of their duties to promote progressive democratic values. I would like all lawyers to be heroes and statesmen—and to engage heavily in public interest and pro bono practice—but I do not expect it of them. I hope that lawyers will act as good citizens and support consensus democratic values, such as universal enfranchisement, but I have the same hope for all persons who are in a position to positively affect these matters.

Therefore, to the extent that lawyer involvement in producing social reform is important, our time may be better spent on identifying those limited enterprises for which lawyers are uniquely qualified and on developing mechanisms for encouraging lawyers to engage in those enterprises voluntarily. If I am correct that finding agreement about values inherent in all true democracies is nearly impossible, it seems anomalous to pursue the second order question of whether lawyers have a special obligation to those values. Rather, we should acknowledge that lawyers' contributions to democracy will stem from lawyers' individual moral decisions to act. This in turn would force us to justify particular endeavors as warranting the special attention of the bar.

Similarly, the absence of a consensus about democracy and democratic values makes it difficult to discuss the relationship between democratic

69. Interpreting the rule of law as having a somewhat more political content, W. Bradley Wendel recently has argued that
the moral goodness of the rule of law does not reside in qualities such as the
capacity of legal systems to safeguard against the abuse of power, and to enable
people to give a justification for their actions that refers to considerations that have
been adopted using tolerably fair procedures, in the name of the community as a whole. This . . . value . . . underpins the lawyer's role and gives it normative
significance.
id. at 10 ("[T]he most general obligation of all lawyers is [to] exhibit fidelity to enacted,
positive law when representing clients.").
government and the structure or practice of law. Consider the general question of whether the fact that lawyers work in a democracy (presumably, as opposed to a dictatorship, a monarchy, or a communist state) should influence either how lawyers represent clients or the role the legal system plays in promoting or protecting individual rights. The question is partly tautological, because the nature of the government itself will define the role of law. A constitutional democracy like ours, which prescribes a bill of rights enforced through judicial review, at least countenances lawyers as one instrument in safeguarding those rights. Again, however, it is not the inherent nature of lawyers that makes them instruments, but rather the functions which the system assigns lawyers. In American society, those functions are limited; they do not represent a broad guardianship of substantive democratic values. The theoretical inquiry that is worth pursuing therefore is not the issue of the relationship between lawyering and democracy generally, but rather the identification of the specific job with which our lawyers have been tasked.

There also are hortatory questions worth addressing. What precisely do lawyers have to contribute to democratic governance? What does their education and training qualify them to do? How could lawyers best implement their voluntary efforts? What incentives, institutional or personal, might society adopt to help lawyers conceptualize themselves as other-regarding or to encourage them to engage in socially beneficial activities? These again are different than the questions of obligation, but nonetheless important. Consensus regarding these questions is impossible without first attempting to identify the nature of our “democratic” goals on something other than a partisan political basis.

Only when we consider process values do the arguments for lawyer obligations seem defensible. Yet even these arguments are contingent either on a convincing Fuller-like theory that legal process or the rule of law is inherently democratic—a proposition about which I am dubious—or on the specific content of the democracy at issue. In constitutional democracies that define democratic values (e.g., representative government) and assign at least partial responsibility for protecting those values to the courts, the rule of law becomes increasingly significant for the democracy.

70. See Ely, supra note 19, at 105 (discussing constitutional areas, including the First Amendment, in which active judicial review is necessary to protect truly representative government).

71. Deborah Rhode, for example, has spearheaded the cause of encouraging lawyers to engage more frequently and more effectively in pro bono activities. E.g., Deborah Rhode, Access to Justice 145–78 (2004) (discussing the need to encourage lawyers to help provide access to legal services); Rhode, supra note 49, at 26–29 (discussing the rationales for emphasizing pro bono service); see also Neta Ziv, Regulation of Israeli Lawyers: From Professional Autonomy to Multi-Institutional Regulation, 77 Fordham L. Rev. 1763, 1768 (2009) (arguing disapprovingly that “lawyers’ self-regulation in Israel has strongly preferred clients’ interests and lawyers’ self-interests over their duties to the public, to the courts, and to third parties”).

72. See supra notes 57–59 and accompanying text.
As the experts in legal process, lawyers arguably have a special role to play in preserving that process.

My bottom line is this. My experience as a public interest lawyer makes me question broad generalizations about the functions lawyers can, must, or should fulfill in promoting democratic values. For every liberal lawyer-advocate of individual rights there is usually an equally reasonable conservative lawyer-advocate for restraint in judicial or executive enforcement of those rights. Although some of my own cases involved what I perceived to be democratic values, including the importance of open government\textsuperscript{73} and the integrity and responsiveness of public officials,\textsuperscript{74} other lawyers reasonably took contrary substantive positions or avoided the issues altogether. When there is no threat to the rule of law—either in an individual case or more globally—how each lawyer acts is a personal moral choice rather than a matter of role.

The importance of lawyers in preserving a democratic climate in society, and particularly the rule of law, can change as contemporary democracy changes. Pakistan’s example also illustrates that the centrality of lawyer action differs from country to country. In societies in which the legal system is an essential component of the democracy, representing clients and assuring clients full access to the legal system cuts to the core of what practicing lawyers are supposed to do. If the ability of the bar to accomplish those functions is threatened, lawyers individually and as a class are obliged to respond. In this sphere, their role in preserving society’s interests represents more than a moral option.

\textsuperscript{73} In some of my public cases, I represented government employees who had engaged in whistleblowing about various forms of governmental waste or misconduct. \textit{E.g.}, Applegate v. Weinberger, No. 79-0145 (D.D.C. filed Jan. 12, 1979) (settled case involving whistleblower’s reports of procurement waste by the U.S. Department of Defense).

\textsuperscript{74} A portion of my caseload challenged corruption by government officials. \textit{See, e.g.}, Agnew v. Maryland, 446 A.2d 425 (Md. Ct. Spec. App. 1982) (taxpayer suit seeking the disgorgement of bribes accepted by former Vice President Spiro Agnew when he was governor of Maryland).