

Washington University Journal of Law & Policy

Volume 4 *Access to Justice: The Social Responsibility of Lawyers*

2000

The Good That Lawyers Do

Kathleen M. Sullivan
Stanford Law School

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Legal Profession Commons](#)

Recommended Citation

Kathleen M. Sullivan, *The Good That Lawyers Do*, 4 WASH. U. J. L. & POL'Y 007 (2000),
https://openscholarship.wustl.edu/law_journal_law_policy/vol4/iss1/3

This Essay is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

The Good That Lawyers Do

Kathleen M. Sullivan^{*}

It is a delight to be at Washington University School of Law in a beautiful new building and to have an introduction from Dean Joel Seligman. I want to thank Dean Seligman for all the help, guidance, and wonderful advice he has given me; I will continue to call on him as I get into my fourth week and beyond as Dean at Stanford Law School.

My topic is the good that lawyers do. This essay provides a set of arguments for law students who are coming into this noble calling, this important profession. The essay offers a kind of booster shot, inoculation, or vaccination against every relative, classmate from college, or taxi driver who gives you a hard time about being a lawyer.

Where does this skepticism about lawyers come from? It is quite ancient. Lawyer jokes and bashing are such an ancient practice that complete books exist on the typology of lawyer jokes since the Middle Ages. In Shakespeare's *Henry VI, Part II*¹ the character Dick, contemplating a new regime, says: "[T]he first we do, let's kill all the lawyers."² The practice of lawyer bashing runs from Shakespeare to the present. For example, recently the *New Yorker*, which regularly contains lawyer cartoons, showed a picture of a God-like figure, up high on a cloud surrounded by a number of men and women wearing suits and casting lightning bolts down toward earth, with God saying: "I used to do it myself but now I have my lawyers do it." That is the joke side of the attack on lawyers.

^{*} Dean and Richard E. Lang Professor and Stanley Morrison Professor, Stanford Law School. J.D., Harvard Law School, 1981. The following Article is based on a presentation by Dean Sullivan in the Public Interest Law Speaker Series at Washington University School of Law on September 15, 1999.

1. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* (Michael Hattaway ed., Cambridge University Press, 1991) (n.d.).

2. *Id.* at act 4, sc.2, 1.83-84.

Some attacks on lawyers are more serious. Former Vice-President Dan Quayle recently gave a speech in San Francisco, in which he blamed a wide range of current problems on “cultural decline.”³ By cultural decline he meant parents’ loss of authority over their children and schools’ loss of authority over their students. This time Quayle blamed cultural decline not on Murphy Brown,⁴ but rather on the “legal aristocracy,”⁵ which he defined as those lawyers who bring lawsuits for civil rights on behalf of children and other individuals in our society.⁶

These kinds of skeptical accounts, whether joking or serious, about the good that lawyers do warrant a serious response. This essay responds to these popular versions of professional slander, or, at least, unfortunate myopia, about the good that lawyers do. This essay’s title refers to that good in two different senses. The good has at least two kinds of meaning in liberal political theory and in the American legal tradition. Sometimes, when one talks about the good, one means the good in the sense of social welfare, social product, or social utility. This sense of the good comes from utilitarian and classical economic traditions.⁷ One also uses the term good to mean virtue, beneficence, or benevolence; doing things for reasons other than mere will, gratification, or self-interest. This use of the term connotes a moral sense arising from the Kantian⁸ or deontological tradition, and, ultimately, from Aristotle.⁹ This essay uses the term good in both senses; it addresses the good as social product, and then as social virtue.

3. Carla Marinucci, *This Time in S.F. Quayle Blames the Lawyers; But His Speech Lacks Punch of Murphy Brown*, S.F. CHRON., May 20, 1999, at A1.

4. On May 19, 1992, then Vice-President Dan Quayle delivered a speech to the Commonwealth Club in California where he criticized Hollywood’s “cultural elite” and what he called the popular sitcom’s “glamorizing” of single motherhood and “mocking” the importance of fathers because the main character on the show, a career woman, chose to have a child without the involvement of a father. Vice-President Dan Quayle, Address at the Commonwealth Club of California (May 19, 1992), reprinted in *After the Riots; Excerpts from Vice President’s Speech on Cities and Poverty*, N.Y. TIMES, May 20, 1992, at A20.

5. Marinucci, *supra* note 3.

6. *Id.*

7. JOHN STUART MILL, UTILITARIANISM (Roger Crisp ed., 1998) (1863).

8. IMMANUAL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS (May Gregor trans. & ed., Cambridge University Press 1997) (1788).

9. ARISTOTLE, ETHICS (Carlton House 1900) (n.d.).

I. GOOD AS SOCIAL PRODUCT

It is often asked: “Does society really need another lawyer?” Sometime during the year 2000 the United States likely met the magic benchmark of having one million lawyers. This means that the nation shifted from one lawyer for every 627 people in 1960 to one lawyer for every 260 as of the year 2000. Many people look at the growth rate and say, “Why do we need so many lawyers?” and “Why do we need lawyers increasing at such a rapid rate?” They claim that other countries do not have so many lawyers per capita. One must look at that claim, however, with skepticism.

Frequently, when people notice the small number of lawyers in other countries they ignore the fact that people in those countries serve the same role that lawyers serve in the United States, but are not denominated as lawyers. In Japan for example, it is commonly said that there is only one lawyer for every 10,000 residents of Japanese society. This statistic, however, uses the term lawyer to refer to members of the *bengoshi*, the group that corresponds to British barristers and represents people at the formal judicial bar. But Japan, like many developed nations other than the United States, fills its government bureaucracies, civil service ranks, and dispute resolution centers with many more people than these statistics account for; Japan simply does not classify these individuals as lawyers. In the United States the term lawyer does not describe merely one who works at the private bar; lawyers fill many positions in public affairs and the civil services. Other countries do not classify people who fulfill these roles as lawyers. Thus, statistics from other countries underreport the actual number of people performing the lawyer function. The United States thus does not have more lawyers so much as it has more versatile lawyers who do more things.

What do lawyers in the United States do? American lawyers are not just litigators. Only about 10% to 12% of American lawyers describe themselves as litigators; that is, as people who primarily engage in courtroom advocacy of the kind that television and other parts of popular culture heavily represent as the work that lawyers do. In television, trial work is misrepresented. The trials are as short as the skirt lengths, there is no visible evidence of the time it takes to do legal research, and a closing argument takes under thirty seconds.

Popular culture focuses on trial law to the exclusion of all the other things that lawyers do, contributing to misconceptions about lawyers. The portrait of lawyers as courtroom gladiators fails to capture the way most lawyers actually work.

In fact, American lawyers do a wide range of work that Dean Robert Clark of Harvard Law School has aptly called “normative ordering.”¹⁰ It is a lawyer’s job, taking the profession as a whole, to create, find, interpret, adapt, apply, and enforce rules and principles that structure human relationships.

Why do we need normative orderers, or specialists who create, interpret, apply, and enforce rules and principles that enable people to work together? The answer, if it does not come from human nature since time immemorial, certainly comes from features of American life with which everyone is familiar. In American life, since at least the Constitution’s framing, conflict among factions and groups in our society is inevitable. James Madison, writing in *The Federalist Papers, Number Ten*, stated that “divisions” among people, which he famously referred to as “factions,” derive from human nature.¹¹ Madison delineated two types of factions: (1) factions of passion that divide people by their deepest principles, religious beliefs, and morals, and (2) factions of interest that divide people according to their line of work, wealth, and expectations in society. According to Madison, factions are “sown into the nature of man.”¹²

The notion that society needs normative ordering simply recognizes the irreducible fact that in human society conflict arises among groups organized in overlapping ways by passion and interest. Society needs to find ways to coordinate people’s activities across that conflict.

Lawyers create normative order in a great many ways beyond the passage of formal laws and regulations. One might believe that normative order refers simply to statutes and regulations. True, statutes and regulations are one form of normative order, but lawyers also provide normative order through the rules and procedures they

10. Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAML REV.* 275, 281 (1992).

11. *THE FEDERALIST NO. 10*, at 57 (James Madison) (Jacob E. Cooke ed., 1961).

12. *Id.* at 58.

create in myriad private relationships. When lawyers help private parties or entities make deals, whether for a marriage, an initial public offering or a merger and acquisition of an established company, they engage in normative ordering—a kind of mini-constitutionalism. If the Constitution’s framers created a grand institutional design in order to keep factions in check, then every time lawyers contractually frame a deal, they engage in mini-constitutionalism. Just as the framers of the Constitution created government in order to settle disputes among factions of passion and interest, lawyers create contracts to regulate and anticipate disputes among individuals and businesses.

Many lawyers facilitate deals, but many other lawyers provide counseling and planning services. Counselors and planners try to anticipate future conflict and make sure that their clients are prepared in the event of such conflict. Outside the courtroom, many lawyers resolve disputes in alternative forms, such as arbitration, mediation, and private settlement.

Even if one accepts that someone in society must do the job of normative ordering in order to resolve, anticipate, prevent, and settle conflict, one might question why lawyers must be the normative orderers. Indeed, plenty of other people also act as normative orderers in American society. Parents create normative order in their households through a whole series of rules, standards, principles, regulations, and precedents. Similarly, spiritual leaders, such as priests, rabbis, ministers, and representatives of organized religion in other forms, create normative order in society by finding, creating, interpreting, applying, and enforcing moral principles with the authority of sacred texts.

Apart from parents and religious leaders, the operation of markets also contributes to normative order in society. Many believe that the marketplace merely involves the procedural interaction of individuals expressing tastes and preferences. In fact, substantive norms also emerge out of market practices. For example, if people want to deal with others in the future, then they must be honest and trustworthy, keep their word, and not renege on deals. Market incentives create habits that are a form of normative order.

If society has parents, priests, and markets creating normative order, then why do we need lawyers? In the United States we need

lawyers because parents, priests, and markets cannot, by themselves, suffice to create normative order.

Three principal features of American culture support the argument for lawyers as the leading source of normative order: (1) democracy, (2) diversity, and (3) size.

A. Democracy

In the United States people pride themselves on individualism, believing that where they come from does not determine where they may go. A cultural commitment to social mobility distinguishes the United States from troubled regions of the world ranging from Belfast to Belgrade. In the United States people believe that they are not born into a tribe, caste, religious identity, social status, guild, or faction from which they cannot escape, but rather can vote with their feet by moving across the country, changing jobs, or starting a company. People believe they have the power to exercise fluid social choice; the notion of democracy that goes along with this free-flowing individualism is deeply engrained in American culture.

When former Vice-President Quayle, quoting Alexis de Tocqueville, said disparagingly that there is a legal aristocracy in America, his reading of Tocqueville, with all respect, was no more accurate than his infamous spelling of “potatoe.”¹³ When Tocqueville wrote about lawyers taking the place of the aristocracy in the United States, he did not mean that lawyers were a big bad privileged caste, setting themselves above the common people and relying on unearned privileges.¹⁴ Moreover, Tocqueville did not suggest that lawyers are an aristocracy in the sense of a social class with privileges above others due to accident of birth.

To the contrary, Tocqueville’s key insight in *Democracy in America* was that the United States does not have the equivalent of a European aristocracy. In his view, the United States’ yeoman farmers, early mercantilists and industrialists were not like the European craft guilds, dukes, and earls. Rather, the United States is a

13. *Mr. Quayle’s ‘E’ for Effort*, N.Y. TIMES, June 17, 1992, at A24.

14. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed., Alfred A. Knopf 1976) (1834).

democracy, eschewing aristocratic feudal forms of social order. In that democracy, said Tocqueville, “[t]he greatest danger was the potential tyranny of the majority”¹⁵ over the minority. Contrary to Vice-President Quayle’s reading, Tocqueville actually said that lawyers take the place of an aristocracy not because they are aristocratic, but because, like other intermediaries between individuals and the state, they help protect people from the danger of the tyranny of the majority.¹⁶ Lawyers create, Tocqueville said, “[a] form of public responsibility and accountability that would help preserve the blessings of democracy without allowing its untrammelled vices.”¹⁷

This point translates into modern terms. Today, many Americans are distrustful of big government, government bureaucracy, and a large civil service. Compared with Europeans and citizens of other developed nations around the world, Americans are not only more mistrustful of centralized government, but also more reluctant to pay the high taxes needed to sustain centralized government. That explains, in part, why all lawyers, and not just government lawyers, have an important role in the United States. Private lawyers take on many functions in American society that other societies absorb into the kind of centralized government Americans distrust.

Lawsuits operate as a decentralized form of normative order. If a lawyer cannot get a result in one state, then he or she may try to obtain the result in a different state. When lawyers bring private lawsuits on behalf of states against tobacco manufacturers or cities bring lawsuits against gun manufacturers, they pioneer new public policy. The reason for this practice is in part the failure of centralized strategies. However, it may also be in part an affirmative preference for decentralized strategies. By performing an intermediary role between individuals and the state in a decentralized fashion, lawyers operate, in Tocqueville’s sense, as classic agents of American democracy in a geographically and socially fluid society.

15. *Id.*

16. *Id.*

17. *Id.*

B. Diversity

Diversity, a second important feature of American life, also makes lawyers strong candidates for the essential job of normative ordering in the United States. Since its very founding, the United States has been extraordinarily heterogeneous by world standards—not just with respect to religion, but with respect to race, national origin, and, in the twentieth century, with respect to opportunities that are open to women. Societies that survive with mere social custom creating normative order, unlike the United States, are usually homogeneous, small, and contained. The United States, by contrast, is sprawlingly heterogeneous. Heterogeneity brings more conflict and less agreement about social customs, and thus, more necessity for law to help mediate across diversity or, as Madison said, factions. By creating normative order, lawyers play the role that social custom plays in other less diverse societies.

C. Size

Large scale, a third feature of American life, likewise points to lawyers as the key to conflict settlement. Madison described America's size in *The Federalist Papers, Number Ten*, as the "extend[ed] . . . sphere."¹⁸ The United States is not a village capable of having a single custom; it is a vast, expansive territory, in which individuals are far flung and corporations and nonprofit organizations operate nationally. The United States cannot take a local view because it contains a multitude of transactions, among a multitude of individuals, who cannot possibly know each other face-to-face like small businesspersons know each other on a local main street.

In a nation of large-scale organizations with large-scale work forces and large-scale transactions, lawyers help create economies of scale. Lawyers help clients save money on transactions by helping them establish procedures and rules that enable clients to accomplish the same type of transaction on a repeated basis. When people describe lawyers as obstacles who create dead weight, social loss, and hold up deals, they miss a key point. Rules and processes that

18. THE FEDERALIST NO. 10 (James Madison) at 64.
https://openscholarship.wustl.edu/law_journal_law_policy/vol4/iss1/3

regularize large-scale organizational activity in the long run enable deals and reduce the cost of conflict, contributing not social loss but social gain.

Given the globalization of commerce and law in the contemporary world, one must multiply the problem of size presented by the United States by several orders of magnitude. Radical advances in communication and transportation technologies have reduced costs and lowered the barriers to trade and to the flow of capital and labor across national borders. Accordingly, everything previously mentioned about diversity and size is multiplied. The complexity of dealing not only with the multiplicity of individuals across the United States, but with the multiplicity of individuals across the world—each of whom comes from a different culture, a different market culture, and, in many cases, a different spiritual or normative religious culture—increases the demand for law and for lawyers to fashion workable institutional structures. It is no accident that the demand for lawyers increases in parity with the increase in international commerce and trade. No supervening sovereign entity and no supervening social custom unites everyone around the world. Lawyers, engaging in mini-constitutionalism, try to determine procedures and structures for interacting peaceably and practically across a wide set of differences on a large scale. These functions are even more important in the international arena.

To summarize the argument thus far, lawyers play a vital role in the normative ordering of our society that has no clear substitute; our size, diversity and democratic traditions ensure that such a role cannot be fulfilled by custom, organized religion, or markets alone. Why, then, do people barely notice this good that lawyers do? Why do people ignore all that lawyers contribute to American life in every seat of government, every financial district, every local courthouse, and every major city and small town in the nation? Three myths or fallacies prevent people from seeing all the good that lawyers do in the sense of social product.

First, the fallacy of the anecdote prevents people from seeing the good that lawyers do. For example, newspaper stories about large punitive damages awards due to car crashes or scalding cups of coffee at McDonald's are fuel for the explosion of editorials criticizing trial lawyers, punitive damages, and seeming windfalls and

wealth transfers to plaintiffs and plaintiffs' lawyers. These anecdotes usually do not mention that the accident might have injured many other people besides the plaintiff, that the trial judge or an appeals court upon review might have reduced the punitive damages award dramatically, or that the lawsuit might have prompted legislative or regulatory changes supported by a democratic majority. The colorful anecdote inspires negative press by ignoring all of the surrounding information. Beware of such negative anecdotes because they often are incomplete.

If there is to be a battle of anecdotes, in any event, good anecdotes perhaps can trump the bad. For example, compare the scalding cup of coffee anecdote to the anecdote of Thurgood Marshall's heroic sweep through racial segregation, starting with graduate schools and working up to *Brown v. Board of Education*,¹⁹ peaceably changing society through respect for the rule of law. Other examples of good anecdotes include the work of law students and lawyers in clinics protecting women and children from violence, restoring wrongfully evicted tenants to their homes, and preventing the location of unsafe industrial plants in residential neighborhoods. Lawyers have the power to correct negative and incomplete anecdotes, by supplanting them with anecdotes of good.

Second, and more insidious than the fallacy of the anecdote, the fallacy of myopia or nearsightedness prevents people from seeing all the good that lawyers do. While the fallacy of the anecdote involves clearly visible activities, lawyers' best work is largely invisible to the naked eye because lawyers tend to anticipate and avert press-attracting conflict. A focus solely on visible conflicts ignores all the invisible conflict anticipation and prevention that lawyers do. Lawyers anticipate, prevent, and provide for potential negative fallout. Someone who wants to start a company, for example, may only think optimistically about how to produce and market, while her lawyer wonders about the possible consequences of the company going belly-up for the investors, creditors, neighbors, surrounding community, and the environment. The lawyer's attention to private liability and debt thus in effect attends to the public good. This work

19. 347 U.S. 483 (1954).

often is most invisible when it is most successful. If the lawyer is successful, then the conflict or calamity never arises and the press has nothing to report.

Again, Tocqueville anticipated this phenomenon, describing the role of lawyers as often under the surface and not visible, but vital nonetheless. He said that “[w]hen the American people is intoxicated by passion and carried away by the impetuosity of its ideas, it is checked and stopped by the almost invisible influence of its legal counselors.”²⁰ Tocqueville’s comments on public life apply with equal force to private ventures. In short, if somebody suddenly eliminated lawyers from the world in one fell swoop, conflict and calamity would arise and somebody will have to pick up the pieces. Only then would the invisible, preventive, and vital work of lawyers be visible.

Third, the myth of private ordering prevents people from giving lawyers adequate credit for the good they do. People often say that issues should be removed from the legal system, deregulated, and put into private hands. This argument, however, forgets the lessons Americans have learned since the New Deal, as first articulated by the great writings of the legal realists. Since the New Deal, the notion of a pure or natural private order has been understood as a myth. Private relationships exist peaceably only because of law. The law prevents the operation of force or fraud and dictates that neighbor *A* can not build a pool in neighbor *B*’s backyard. If neighbor *A* does build the pool, then law dictates that neighbor *B* cannot punch him. One might argue that neighbor *B* could bribe neighbor *A* not to put a pool in his backyard, and that, thus, the law is unnecessary. But even if that were true, the situation is more complicated when one deals on a larger scale with a smokestack that belches smoke or a strip mine that causes muck to run down a stream, imperiling many people’s property.

Negotiation over every danger that could befall us is not always possible, and thus the law steps in to regulate private relationships. Law protects property and persons from harm from other people. Once the notion of pure private order is exposed as myth, the

20. TOCQUEVILLE, *supra* note 14.

question becomes not whether law should operate but rather how law should operate—by regulation or private contract, by national or local policy, by courtroom resolution or mediation.

In sum, lawyers create enormous social good in ways that have no obvious substitute in a society as large, diverse, and democratic as American society. If the United States did not have lawyers, it would have to invent them. This realization, by itself, should help you respond to taxi drivers and relatives who might tease you about being lawyers.

II. GOOD AS SOCIAL VIRTUE

The good as social virtue refers to the Aristotelian or Kantian sense of good, rather than the good in the sense of social product or utility. This sense of the good is reflected in the venerable view that law is a profession, not a business. The lawyer's license implies that the lawyer is meant to serve the good of the broader community, and not just the lawyer's, or the lawyer's clients', private self-interest.

This image of lawyers as a profession with a conception of the good is currently under pressure from market forces that have increased competition among law firms, changed firms' fee structure, and led to a great deal of mobility among firms where people used to stay for life. This image of lawyers is also under pressure from technological change that has increased the speed of business, now done by fax machines, e-mail, and cell phones. Lawyers are only a beeper away from their clients at all times. How can lawyers remain separate from business when they must be available twenty-four hours a day in order to keep up with the pace of deals? Likewise, external competition from accounting firms and other ventures also places pressure upon the notion of law as a profession distinct from business.

Notwithstanding pressure from clients, new technologies, and competitors, the death of professionalism in law has been greatly exaggerated. This is not because those attracted to law have unusual reservoirs of personal human kindness or benevolence. Rather, three structural features of lawyers' work ensure that lawyers attend to the common good, quite apart from any features of their souls.

First, law mediates between broad principles and specific

situations. This process distinguishes lawyers from economists, historians, and psychologists, as well as from pure troubleshooters. By mediating between broad principles and specific situations—ratcheting back and forth to reach a reflective equilibrium between justice, fairness, equality, allocative efficiency, and the particular conflict at hand—lawyers think not only about the result in a particular case, but also about the public trail they leave behind for resolution of future situations. When lawyers ratchet back and forth between broad principles and specific situations, they necessarily have one eye on the common good and the interests of society that transcend a particular situation.

A second structural feature of a lawyer's work that ensures advertence to the common good is that law is a distinctive social practice, not a mere matter of individual market taste or political ideology. To be sure, law is not autonomous from other disciplines. To the contrary, lawyers are magpies, or birds that pick up things from other disciplines and bring them back to their nest. Lawyers take the insights of other disciplines—economics, literature, history, psychology, cultural theory, finance theory, and statistics—and bring them back to the legal arena. Even though law is not intellectually autonomous, it is nonetheless a social practice that is distinct from pure politics and that has its own structure and rhetoric that enable it to operate independent of short-term political struggle. The following story illustrates this point.

Imagine that you are a welfare recipient and a mother without a job with three children to support. You want to move across state lines. When you get to the new state, however, the state says: "I am sorry. You cannot have welfare here until you have lived here for a year." What are you going to do? You might not travel across state lines, because once there you will not be able to feed your children if you are unable to find a job. Twenty-five years ago, in *Shapiro v. Thompson*,²¹ the Supreme Court invalidated a state law containing a similar one-year residency requirement for welfare. In *Shapiro*, Justice Brennan wrote for the Court that durational residency requirements interfere with the fundamental right to interstate

21. 394 U.S. 618 (1969).

travel.²² Justice Brennan, sounding in the 1970s rhetoric of welfare rights and equality, said in *Shapiro* that nobody should be denied the basic necessities of life for having moved on the other side of a state line.

Twenty-five years later, this issue returned to the Court in a slightly different form. A series of states, with the blessing of Congress, said “we will give you welfare when you move to our state, but when you become a new resident you can only get as much welfare as you got in your previous state.” In other words, if a person comes from Mississippi and only received \$370 in Mississippi, then for the person’s first year in California she will only receive \$370 even though long-time Californians receive \$750. A class of indigent women sought to travel to California and take advantage of full Californian welfare benefits. When I became involved in this litigation, along with a team of lawyers from both legal services organizations and the American Civil Liberties Union (ACLU) of Southern California, we asked what we could do to defend this class, given the huge paradigm shifts since the late 1970s and the huge loss of public support for welfare. It did not seem likely that the current Supreme Court would adopt Justice Brennan’s majestic phrasing about the necessities of life. We determined that the current Court does care deeply, however, about a different federal constitutional principle that could be made to serve these clients: specifically, the structure of federalism and the importance of national citizenship in our structure of federalism. Accordingly, we argued that, ever since the Fourteenth Amendment’s citizenship clause overruled *Dred Scott*²³ and ended slavery, states may no longer maintain two classes of citizens.²⁴ In other words, one is not a new Californian or an old Californian, but rather simply a Californian. We argued that California could decide whether national citizens who entered its borders truly resided in California or whether they were faking residence, but otherwise must treat all bona fide state residents alike.

In a 1999 decision *Saenz v. Roe*,²⁵ our argument finally

22. *Id.* at 630-31.

23. 60 U.S. 393 (1857).

24. 394 U.S. at 627.

25. 119 S. Ct. 1518 (1999).

prevailed,²⁶ as the Court ruled, seven to two, that two-tier welfare residency schemes violate the Citizenship clauses of the Fourteenth Amendment. As a result, we took a class of people who were unlikely to prevail under the old paradigm about the necessities of life, and persuaded the Supreme Court that they should prevail under the structural paradigm of federalism. The power of argument, ideas, and ideals that transcended a political paradigm shift enabled this surprising victory. This story conveys that law is a distinctive social practice, not reducible to ordinary politics.

Finally, a third structural feature of a lawyer's work that ensures advertence to the common good is that lawyers care a great deal about professional autonomy, and with that autonomy comes distributive obligations. Lawyers are self-regulated. They are not subject to legislation in the same way as the butcher, the baker, or the candlestick maker. The price of professional autonomy and self-regulation is some duty of service. In recent years, bar associations, under pressure in some instances from courts, have rolled back professional practice regulations that inhibit competition, ban unauthorized legal practice, and prevent lawyer advertising. Such changes have appropriately allowed more competition in the profession, and increased allocative efficiency.

Nonetheless, lawyers' *distributive* obligations in reciprocity for professional autonomy should not be thrown out with the bath water of eliminating those restrictions on practice that decrease allocative inefficiency. Lawyers have preserved a large piece of professional autonomy by professing to ensure equal access to justice. This obligation is chiseled in marble above the nine seats and the crimson curtains of the United States Supreme Court. The norms lawyers adopt recite the obligation of equal access to justice. For example, the Model Rules of Professional Conduct state that lawyers should do at least fifty hours of unpaid work every year.²⁷

Providing increased access to justice thus is not merely a matter of personal beneficence, goodness, and virtue, but also a matter of professional independence. Lawyers will be relatively free of

26. The author argued a precursor case, *Anderson v. Green*, 513 U.S. 557 (1995) (per curiam).

27. MODEL RULES OF PROF'L CONDUCT R. 6.1 (1999).

government regulation only as long as they take care to justify regulatory privileges, including seeking to foster equal justice under law. Lawyers on average are far behind that mere fifty hours a year, although some lawyers are exemplary and do far more. Doing far more would contribute not only to personal satisfaction, but also to the independence of the legal profession.

Let me close by wishing you the best in your careers, and hoping that you will go out and do well, but also do good, in both its senses.