

ESSAYS

RETHINKING "PROFESSIONALISM"

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Over the past few years, "professionalism" has been much on the minds of lawyers across the country. It is more than just a topic of conversation, however. "Professionalism" is now the accepted allusion to the Bar's ambitious struggle to reverse a troubling decline in the esteem in which lawyers are held — not only by the public but also, ironically, by lawyers themselves.¹ Being a lawyer, particularly one engaged in private practice, seems suddenly an embarrassment rather than a source of pride. The Bar's response, unaccustomed as it is to apologizing for its social role, has been predictably defensive and schizophrenic: members are usually reminded by their leaders that, as a group, lawyers really aren't as bad as people seem to think, but they are admonished nevertheless that the profession is threatened by a decline in common decency, attitudes, and standards.² Not surprisingly, then, this confused message has led to little progress in reversing whatever negative trends lawyers perceive within the practice.

The legal profession's quandary can be summarized relatively easily: lawyers have sought a cure for a disease before agreeing on its nature, symptoms, and causes. We want to be happy in our professional lives without investigating seriously why many of us are unhappy. We want, in short, to moralize without examining our morals. Explaining this superficiality, however, is more difficult. Perhaps we are afraid of what we will find if we turn over the rock of lawyering and examine what lurks be-

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¹ See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 1.1 (1986) ("[P]robably more than any other profession, lawyers are the target of some of the most cutting, widesweeping, and relentless criticism. . . . Many lawyers themselves are not free of ambivalence and confusion about their own roles.").

² See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 14 (1990).

neath. Or perhaps the problem is not with what we do as lawyers, but with our understanding of "professionalism."

The perspective of this Essay is that the concept of professionalism has become confused and disjointed because it has been diagnosed too hastily. A proper evaluation requires patience. It demands, for example, that we begin with fundamental points like, among others, the contrast between the profession's past and its present, and the changing demands society has placed on the legal system over the last half century. Once we have established a better foundation, the true substance of legal professionalism — the values that make this nebulous concept worthy of our attention — becomes much easier to identify.

We turn first, then, to fundamentals. In Part I of this Essay, we explore briefly the most abstract issue at stake in this debate: the purpose or function of *any* claim of professionalism, no matter what its content. Lawyers seek, in effect, a sense of their "heritage" or tradition as a profession, and understanding what that entails helps us appreciate the importance of the debate over professionalism.

But the Bar's professional heritage is not an easy thing to identify. We devote three sections of this Essay to that effort alone. Part II acknowledges the difficulty of describing such a "heritage" when both the Bar and the nature of practicing law have changed so radically over the last half century. Our brief review of the Bar's history emphasizes several critical developments, including the growing moral diversity within the Bar's membership, the increasing control clients exercise over lawyers' conduct, and the new demands on lawyering caused by a heightened "rights consciousness" among the citizenry. Part III then describes how this historical context has impacted — often unfortunately — the struggle to define professionalism, both what it is and why it matters. We will criticize two common approaches to the subject, one that gives professionalism no meaningful content by reducing it to a concern merely with the "bedside manner" of lawyers, and another that limits professionalism to the single dimension of devoting time and energy to indigent legal services. In Part IV we suggest instead a quite different foundation for the heritage of legal professionalism: the vital and unique importance of law (and hence lawyers) to American culture.

From that very different perspective, we identify in Part V six essential

values that we believe characterize professionalism, values that reaffirm in particular the moral and social merit of the private practice of law on behalf of fee-paying clients.

I. THE CHALLENGE OF PROFESSIONALISM

The Bar's quandary as it struggles to reinvigorate a sense of legal professionalism stems from two basic problems. The first is simply that we do not appreciate adequately the lofty goal we have set for ourselves — that is, determining what professionalism must entail if it is to have any real meaning in lawyers' lives. We address this issue in Section A below. The second problem is that we do not understand why the idea of professionalism is so elusive for us. If other professions can readily point with pride to a set of shared and lasting values, why do we have so much trouble doing so? Section B suggests an answer, one that also helps explain the length and complexity of this Essay.

A. *Professionalism and "Tradition"*

The debate over professionalism might be better understood if we put it in a new, but quite useful, perspective provided by the esteemed political theorist Jaroslav Pelikan. Professor Pelikan suggests that a society can assess its history in two very different ways: one he calls "tradition," the other "traditionalism."³ To summarize in very short form, Pelikan argues that a society's sense of "tradition" is a positive and useful social force. It is an appreciation of one's cultural heritage that provides a perspective from which to connect current circumstances to the past, and hence improve the understanding of both. By linking one generation to the next, this heritage embodies what Pelikan calls a "living faith of the dead."⁴ In contrast, "traditionalism" is "the dead faith of the living."⁵ It is a superficial and simplistic appreciation of one's heritage that provides no meaningful sense of perspective and judgment. It is a reverence of the past for its own sake — a nostalgia for the "good old days." It is empty of moral content, and therefore sadly pretentious.

³ JAROSLAV J. PELIKAN, *THE VINDICATION OF TRADITION* 65 (1984).

⁴ *Id.*

⁵ *Id.*

Pelikan's distinction illuminates the dilemma we face concerning our understanding of the task of lawyering: our references to "professionalism" may be nothing more than a sentimental form of "traditionalism," a call for more civility and public respect simply because this is our impression of a happier past. If so, the effort amounts to little more than improving the profession's window dressing. No substance would lie behind it — no "living faith" begun by others that we feel responsible to continue and further. Legal "professionalism" would instead be a "dead faith" with no lasting, fundamental characteristics — a fad of the moment.

If instead "professionalism" is to refer to a true "professional tradition," lawyering must be capable of being uniquely defined by a set of essential, timeless principles that impose important restraints and create special expectations separating the attorney from others.⁶ Such a separation would in turn be a source of legitimate pride, not shame, in the services provided.

But these principles have proven very difficult for us to identify. The debate is a deep one: we disagree not only about what the essential elements of a professional tradition might be, but also whether any such elements exist at all.⁷ Why is this so? What makes us, and particularly the lay public, question our social legitimacy so seriously and continuously?

B. Professionalism and "Legal Health"

The answer to the questions posed above is simple but abstract, and is therefore better approached through a comparison with a more familiar example.

If members of the public were asked to name the single occupation that best exemplified a "profession" (whatever that term might mean to them), the one most often chosen would probably be physicians. This is not to say that physicians are the best example of a profession, only that they are perceived to be. The reason, we believe, is not that doctors are more hon-

⁶ See generally WOLFRAM, *supra* note 1, § 2.6 (providing a historical discussion of the major ethical codes).

⁷ See, e.g., Murray Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. BAR FOUND. RES. J. 953 (suggesting that the American Bar's history of self-governance reflects a waning interest in ethical considerations and an increased dependence on minimum prohibitions).

est or hard-working or "expert" at what they do than members of other professions. Instead, doctors enjoy this subtle social endorsement because the value of their function in society is obvious and undisputed: all doctors are dedicated to "health," a commodity that everyone understands relatively well and wants all the time. No doctor actively campaigns for "unhealth," and while there may be some difference of opinion in certain circumstances as to exactly what "health" means or demands, these disagreements are very much the exception rather than the rule. In any event, disputes among doctors are certainly never so fundamental that they challenge the basic value of "health" itself. It therefore remains a constant beacon of moral justification in an otherwise confusing world.

Other professions operate in similar circumstances in which a basic concept unites the occupation — priests, rabbis, and so on attending to the requirements of their faiths; scientists observing the demands of the scientific method; civil engineers attentively testing the usefulness and safety of their creations. For each of them, "professionalism" is no great mystery. It is the expectation among the members of the profession that all of them are dedicated to, and respect, the basic value and social function of their occupation.

Lawyers, however, toil in a very different universe. Few practitioners understand this consciously, but the fact is that lawyering as a profession exists largely *because of* moral ambiguity, not to resolve it. Our work reflects, even at times celebrates, the diversity and disagreements characteristic of real life. Because life is not static — because human interactions are in perpetual flux, with opinions about rights and wrongs, about appropriate and inappropriate behavior, about who should have what and why constantly inconstant — the law that purportedly regulates this cacophony is always under stress. Contrary to popular belief, lawyers do not create that stress on the social fabric; human freedom does. But lawyers are nevertheless intimately and inevitably connected with that turmoil and tension.

There is no such thing, then, as "legal health" to which lawyers can point with easy self-satisfaction to justify their labors. No common purpose apparently unites the profession to serve as the starting point for conversation about reform or improvement. Even basic values like "freedom" and "fairness" and "rights" are comparative and relative rather than absolute — one person's liberty may be viewed as another's victimi-

zation; people may disagree vehemently over the adequacy, or even the necessity, of procedures to protect a person's property. All these concepts are very abstract and circumstantial, rarely lending themselves to easy "cures" or tidy happy endings. While a new drug that eliminates pain needs no defense, the public must be reminded why a court decision that frees a convicted prisoner might be good news. In turn, with no convenient moral bedrock, we can scarcely agree on the *nature* of reform in the legal profession, much less how to go about achieving any.⁸ We are therefore often as chaotic as the society we serve.

The saddest part of this picture, however, is that we now seem in danger of developing a "heritage" for ourselves that is worse than none at all: it could become a tradition of moral default, consisting only of a shared cynicism about our function and our future. But despair on this point is premature. Although we may not have an easy lodestone to guide us as a profession, that does not mean that we are completely adrift. Some standards do exist against which we could measure our professional well-being. But we will have to do more work than do other professionals to identify the basic moral principles that shape our social function, and in turn provide the foundation for our concept of professionalism.

The counterattack should begin, we believe, with a thorough rethinking of the concept of legal professionalism — its history within the practice of law and the lessons that recent debates about it contain for understanding the deeper values inherent in lawyering.

II. THE BAR'S CHANGING "TRADITION"

Part of the problem with the debate about legal professionalism is that the subject is a moving target. Both the legal profession and the law itself have changed dramatically over the past century, suggesting that any attempt to identify a single professional tradition or heritage may be fanciful. But this conclusion is too quick and reflects the kind of cynicism we must avoid. Instead, analyzing the changes in the profession gives us an appropriate and very important historical perspective on the present struggle to define professionalism.

⁸ See generally Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274 (1986) (analyzing the rhetorical structures of competing reformist agendas).

A. *The Bar as a "Club"*

One lesson that history reveals, not surprisingly, is that some of the cynicism about professionalism is justified. The heritage of Bar associations, like that of all trade organizations, rests initially in self-interest and protectionism rather than any noble spirit of public service. Our medieval predecessors established guilds to control competition, not to encourage it, and until relatively recently we happily continued that tradition. But before we leap to the conclusion that we should therefore condemn our past, we should realize two things: self-interest can in fact produce public benefits, and our history predicts much of the ambivalence with which we today approach professional ethics and professionalism.

A useful perspective from which to view the growth and popularity of professional associations is that of the economic theory of "clubs."⁹ This theory holds that social organizations even this informal do not arise by accident, but because they serve some purpose for their members.¹⁰ It would be a mistake to assume, however, as many do, that those purposes are essentially "negative" — that is, to control behavior in ways that benefit that group but not the larger community (for example, to stifle competition). To the contrary, social groupings of this kind can in fact originate out of an interest to enhance economic efficiency, not avoid it.¹¹

The basic efficiency-enhancing feature that clubs can provide is predictability.¹² In situations of great uncertainty — where social circumstances are in flux or the nature and quality of a product are not readily apparent — individuals with similar interests may organize to provide each other with consistent, comprehensible feedback, and to provide outsiders with a standard against which the members of the club might be assessed. The essential function of the group, consequently, is informational. Member-

⁹ See James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1 (1965). See also Mark V. Pauly, *Clubs, Commonality, and the Core: An Integration of Game Theory and the Theory of Public Goods*, 34 *ECONOMICA* 314 (1967); Mark V. Pauly, *Cores and Clubs*, 9 *PUB. CHOICE* 53 (1970); Sandler, *The Economic Theory of Clubs: An Evaluative Survey*, 17 *J. ECON. LIT.* 1481, 1482 (1965) (definition of a club as "a voluntary group deriving mutual benefit from sharing one or more of the following: production costs, the members' characteristics, or a good characterized by excludable benefits").

¹⁰ Buchanan, *supra* note 9, at 1-2 & n.1.

¹¹ *Id.*

¹² *Id.* at 2-6, 7-11.

ship tells members something about each other — it helps them predict the kind of interaction they will have with members they do not otherwise know well — and it likewise tells non-members something about those in the club. This information can sometimes predict a great deal about how the member will interact with others because the rules of the club are pervasive and fundamental to the member's life, like those of being a Buddhist monk. In other situations membership might say very little because the interests represented by the club are either very limited — like being in a bridge club or a movie star fan club — or very diverse — like being a Presbyterian or in the Chamber of Commerce.

Thus, in order to serve this information function, club membership must mean something; but to mean something, clubs must in turn be able to exercise serious control over entry into the group and the behavior of their members.¹³ The danger here, of course, is that rigor and consistency can devolve into rigidity and stagnation, and the organization can destroy its social usefulness.

Bar associations are excellent examples of all the features economic theory predicts, not only concerning the early structure they exhibited, but also the current challenges they face. Regarding their past, Bar associations exhibited all the classic “negative” features of a closed club:

- Barriers to entry into the profession were serious. Before the advent of law schools, the only route available was apprenticeship to a current member of the Bar, and there were very few of them. They could in turn exercise idiosyncratic control over those they permitted to work for them. Such individual control meant that the barriers to entry would not necessarily relate simply to one's intelligence or good character; the criteria could be much more socially and personally detailed, like one's race, class, religion, and so on. Later, once law schools became the principal place of initial legal education, entry was still difficult because of the expense involved and a continuing interest by current members in permitting only certain types of people to try to gain membership.
- Control over the decision to admit new members was tightly held by existing members, so that growth of the organization

¹³ *Id.* at 13.

could be kept small and slow.¹⁴

- Competition among members was kept within a very narrow range. Price-fixing, for example, was not only characteristic, it was rigidly enforced. Advertising anything other than club membership was similarly prohibited.¹⁵
- Written codes of conduct, on the other hand, were consequently all but unnecessary. Because the members of this club were so similar to each other (virtually all drawn from the same social stratum, often closely interconnected with each other in the community, and so on), they shared very similar personal values concerning ethics and decorum. Consequently, sanctions for misbehavior could be imposed in a number of subtle social forms of ostracism rather than through official means. Professional standards did not therefore have to be taught formally; they were merely understood or could be learned quickly through observation. This is not to say that these standards were therefore necessarily "good"; instead, they were simply accepted (ordinarily) without serious challenge.

The Bar associations of today provide a stark contrast. Indeed, the present struggle over the concept of professionalism is largely a function of the fact that each of these characteristics has not simply changed, it has been reversed:

- The only barriers to entry into the profession are the educational requirements imposed by law schools. An applicant's racial or other social background plays no serious role, and economic background is not nearly as relevant as it once was because of financial aid and low tuitions at state-funded institutions. Competition among law schools has even lowered the educational prerequisites to remarkably low levels.¹⁶

¹⁴ See Sandler, *supra* note 9, at 1482 ("Since the entry of a firm into an industry causes a market thinning (congestion) effect in the form of reduced sales to other competitors . . . club analysis can be used as a new paradigm for the determination of industry size.") (citation omitted).

¹⁵ *Id.* See also *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (anticompetitive activities of Bar associations not immune from federal antitrust laws).

¹⁶ See Richard Wasserstrom, *Legal Education and the Good Lawyer*, 34 J. LEGAL EDUC. 155 (1984).

- Control over admission to the Bar is still held by the Bar itself, but those making the decisions are a relatively small group faced with assessing a very large pool of applicants. Criteria are therefore non-personal and relatively objective: graduating from an accredited law school and passing a local Bar examination. Neither of these criteria, as it turns out, are particularly difficult to meet, and few applicants are therefore excluded because of them. The profession has consequently grown very rapidly.¹⁷
- Anti-competitive controls, such as those on fees and advertising, are out, and competition is fully in. Legal services are therefore no longer a luxury available only to a small segment of society; such services are now widely available, and at competitively varying cost.¹⁸
- Lack of limitation on entry has meant that the Bar has grown not only in number but in the diversity of its membership on every dimension: race, religion, gender, and (of specific interest here) sets of moral values.¹⁹ What was once understood or assumed concerning appropriate behavior no longer pertains generally. Instead, the standards that supposedly characterize the practice of law are vague, lack serious moral force, and are constantly being challenged or rethought.²⁰

Over the last half century, then, we have witnessed the fundamental transformation not only of the Bar, but concomitantly of the information conveyed by the simple fact of Bar membership. Where membership once signaled a host of impressions or expectations about the lawyer's personal-

¹⁷ See WOLFRAM, *supra* note 1, § 15.2. See also GEOFFREY C. HAZARD, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 31-52 (1988) (discussing the growth of the legal profession).

¹⁸ See *supra* note 15. See also THOMAS EHRLIC & MURRAY SCHWARTZ, *REDUCING THE COSTS OF LEGAL SERVICES: POSSIBLE APPROACHES BY THE FEDERAL GOVERNMENT: REPORT TO SUBCOMM. ON REPRESENTATION OF CITIZEN INTERESTS OF THE SENATE SUBCOMM. ON THE JUDICIARY*, 93d Cong., 2d Sess. 2-4 (1974).

¹⁹ See WOLFRAM, *supra* note 1, § 1.4. See also RANDALL JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* 95-129 (1989).

²⁰ See David M. White, *The Definition of Legal Competence: Will the Circle Be Unbroken?*, 18 SANTA CLARA L. REV. 641 (1978).

ity, social background, fees, tasks that would be accepted, and so on, it now indicates much less. In other words, what was once akin to a priesthood may now be little more than a fan club. The question before us now, therefore, is whether this change is significant in any way. Specifically, has it had an impact on the practice of law or the concept of legal professionalism? It has, on both.

B. Five Consequences of the Breakdown of the "Club"

The transformation of the Bar from a close-knit community of colleagues to a large, diverse, competitive service industry has generated five important consequences for the practice of law.

1. Moral Diversity, Codes of Ethics, and Professionalism

In moving from moral clubishness to moral diversity, Bar membership *could have* become virtually meaningless. If no particular set of values could be ascribed to lawyers — indeed, if the public could no longer ascribe *any* values *at all* to a lawyer that might limit or channel her conduct — then being a member of the Bar would say very little of any significance to anyone. Neither lawyers nor non-lawyers would be able to predict the kind of interaction they would have with each other in professional contexts. This sad state of affairs would then be economically inefficient: without information, everyone would waste much of their time and energy protecting themselves from the unscrupulous, and trying to determine whom they *could* trust.

This extreme result has been avoided, however, by introduction of the Bar's self-generated and self-imposed codes of "professional ethics."²¹ The unique function of these sets of standards is to restore to Bar membership some basic but quite useful "moral information." In other words, despite the Bar's moral diversity and economic competitiveness, the codes announce a purported set of common values held by all Bar members. This in turn produces some level of predictability in one's interactions with lawyers: the public and other lawyers can now expect lawyers to do or not do some things in certain circumstances.

²¹ See MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE].

But those things and circumstances remain vague and limited.²² The rhetoric of these codes is often lofty, but they in fact *enforce* only minimum standards of behavior: sanctions are imposed only for the most egregious forms of misconduct.²³ Thus, the "moral information" provided by the fact of Bar membership is really very small; indeed, so small as to form the irony underlying all the lawyer jokes currently so popular.

This, then, is where "professionalism" is supposed to enter the picture. Its function is to reach beyond the basic and uninspiring values enforced by the codes, and demonstrate that lawyers share, or ought to share, higher, more ambitious moral aspirations. Professionalism seeks to infuse into Bar membership the important moral information it currently lacks. But herein lies the basic problem that makes all discussions of professionalism so controversial and unsatisfying: in an era characterized by moral diversity and economic competitiveness, it is very difficult to discuss any "shared professional aspirations."²⁴ The differences that separate us may simply be too vast.

But there is no reason to assume that moral diversity means we are left with moral nihilism. Quite the contrary, it means that the need to identify the essential elements of our shared professional heritage is greater than ever, for that perspective will give us an anchor for the inevitable debate about the profession's appropriate aspirations.

2. *Increased Client Control*

The effort to identify those aspirations faces another subtle challenge that is an outgrowth of the Bar's new moral diversity and sense of competitiveness. The popular image of the lawyer as an independent and objective counselor to whom a client could turn for dispassionate and, if nec-

²² See Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 (1981).

²³ See WOLFRAM, *supra* note 1, § 3.1 ("[T]he underlying purpose of disciplining lawyers is . . . to protect the public, the bar, and legal institutions against lawyers who have demonstrated an unwillingness to comply with minimal professional standards.").

²⁴ This difficulty is often expressed today as the distinction between a "calling" and a "business," the idea being that lawyering used to be the former but is now the latter (or at least that certain parts of law practice are now simply business operations). See FREEDMAN, *supra* note 2, at 14. This is a rather poor way of expressing the point, however, because competition has rendered *all* forms of law practice a "business" to one degree or another.

essary, unwelcome advice has eroded badly in recent years.²⁵ The reality is that clients now exercise remarkable control over their lawyers — the "good" lawyers, the ones to whom clients will return with additional work, are those who get things done, not prevent these things from happening.²⁶ The pressure on lawyers today is to portray themselves as "can do" people, dedicated to making every possible effort to achieve the goals set by the client. This pressure has in turn redefined how lawyers relate to each other (and often how they portray each other to clients), and it has significantly altered the way lawyers relate to the legal system. Although legal codes of ethics insist that lawyers owe a loyalty to that system itself,²⁷ the legal system often seems to be viewed today as simply one more tool to be manipulated as necessary in service to a client.²⁸

3. *Expansion of "Rights-Consciousness"*

The lawyer's changing relationship to the legal system has coincided with the public's changing perception of that system. The law is no longer viewed as a conservative social institution that reveres the past and is suspicious of change. Quite the contrary, the popular image of the law today is that of a dynamic social force that can, and should, vindicate the "rights" of citizens.²⁹ Lawyers, as "can do" people, have done their part to foster this modern perspective, shifting much of the debate about the proper social role of law into "rights-talk."³⁰ As a consequence, the client's expectation is that his lawyer will be as creative and dynamic as the new sense of the legal system suggests he should be. And given the transformations occurring within the Bar itself — its moral diversity and the demands of competition — there are no traditional conservative forces within the profession to hinder the continuation of this trend.

²⁵ See Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987).

²⁶ *Id.* See also HAZARD, *supra* note 17, at 304-06 (citing DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 96, 98-99, 106, 111-12 (1974)).

²⁷ See MODEL CODE, *supra* note 21, EC 1-1 to 1-6.

²⁸ See Post, *supra* note 25.

²⁹ One well-known legal theorist associated with this perspective is Ronald Dworkin. See RONALD M. DWORKIN, LAW'S EMPIRE (1986); RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

³⁰ A recent book critical of this development is MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

4. *Challenges for the Judiciary*

As both the Bar and the public have changed their approach to the legal system, a particularly daunting set of new challenges has arisen for the judiciary. Judges are lawyers with only the legal system itself as a client, and their unique responsibility is therefore to its proper functioning.³¹ But that duty can no longer be fulfilled simply by deciding legal issues in the way the public imagines judges do; instead, judges must now act as babysitters of the system's processes as well. Those processes have been strained by the use given the system by eager clients and their equally eager lawyers, and as diversity and competitiveness increase within the Bar, there is little consensus among litigators about limits they should impose on themselves.

Judges, therefore, find themselves as the only serious source of guidance on the appropriate use of the courts in the service of clients. Opinions vary greatly, however, on whether judges understand this responsibility, and whether they have performed their role adequately.³² But this debate as well seems poorly focused because it is difficult to criticize someone for failing to guide when the map itself remains in dispute. A better understanding of the demands of professionalism might therefore be a particularly useful anchor for the discussion of judicial responsibility as well.

5. *Changing Role of Law Schools*

Law schools face a related challenge. They too have changed dramatically in both size and composition over the last half century,³³ keeping pace with the increased demand for and interest in legal services. They have therefore been a major force in the move within the Bar toward moral diversity and economic competition, and furthermore, then, in the undermining of traditional impressions of the professional heritage of lawyers. The question, however, is whether law schools consequently have some special responsibility for reinvigorating the discussion of professionalism, and if so, what their effort should look like. It would be very easy

³¹ See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990) ("A judge shall uphold the integrity and independence of the judiciary.").

³² This was one of the points debated at the program entitled "The Trial of the Model Lawyer" at the 1991 Annual Meeting of the American Bar Association held in Atlanta, Georgia.

³³ See HAZARD, *supra* note 17, at 459-64.

for members of the Bar to cast special blame on law schools for the current moral predicament of lawyers — and they often do — claiming that the decline of professionalism is a function of a lack of academic interest in it: since it isn't taught early, it is never appreciated properly.

But this view assumes far too much. It assumes either that law professors know what professionalism is, and fail to teach it, or that they too are confused, and therefore avoid the matter. The truth, however, is probably more subtle: law schools do not focus much attention on the ideas that seem to be most popular in the current discussions of professionalism, not because they have failed to see their responsibility in this regard, but generally because they are not much impressed with the nature and substance of those ideas. Instead, by continuing to do what they do best — focusing on the rigorous examination of legal rules and principles — law schools are probably doing a good job of teaching (albeit implicitly and accidentally) the basic values that should be related to professionalism, an argument we will complete in later sections of this Essay. They would do better, however, to acknowledge those values more forthrightly.

C. *Minimum Points of "Procedural" Agreement Concerning Professionalism*

But for law schools or Bar associations or anyone else to acknowledge and preach the values of professionalism, lawyers must first agree on the nature and substance of the sermon. This is particularly difficult, as we have seen, in the context of a profession whose heritage has apparently changed significantly over the last half century, and is still evolving. We tackle in the next section of this Essay the task of identifying what we believe are the essential substantive values of legal professionalism; here, however, we seek to identify a few less controversial "procedural" aspects of professionalism with which we believe all lawyers, despite much disagreement on substance, would nevertheless agree.

By "procedural" we mean the scope and purposes within the legal profession of the values of professionalism *whatever* the substance of those values turns out to be. We believe there are three such propositions that lie behind all discussions of professionalism: the universality of its values, its relevance to the practice of law, and certain general functions it performs within the Bar.

1. *Universality*

We would argue that all lawyers believe that, if "professionalism" exists, then it applies to all lawyers and all areas of the practice of law, not to some smaller group within the Bar. In other words, we do not believe that some areas of legal expertise, such as tax law or criminal defense work, are inherently unprofessional or unworthy just because of the nature of the work involved. Instead, we all believe that there is inherent worth to society in all areas of law practice, and that all areas can therefore be practiced with a sense of professionalism, or with a lack of it. By the same token, law can be practiced with a sense of professionalism in big firms or small firms, in private practice or in government law offices, or whether a fee is being charged for the service or not.

2. *Relevance*

As a second point of "procedural" agreement, we believe all lawyers accept the idea that some set of special demands is made on them — which we now characterize as "ethics" and "professionalism" — even if their substance remains controversial. Despite moral diversity and competition, lawyers still have a sense of a shared professional heritage that at the very least establishes that their behavior can legitimately be constrained in certain contexts. In other words, we would all agree that there is some difference between "proper" and "improper" professional conduct, even if we are not sure where the line between the two should be drawn. This is not to say that lawyers believe that people have a moral awakening upon becoming members of the Bar. To the contrary, everyone now seems to concede that a person's moral values are basically set well before law school, and therefore certainly before one enters the practice of law. Therefore, we all seem to agree that by the time the Bar wants a member to behave "properly," there is little that the Bar itself can do to alter the content of that person's character. It can only channel the person's actions.

3. *Functions*

Despite an inevitable focus on actions rather than attitudes, the demands of professionalism, whatever they may be in detail, serve two functions that can have an impact on attitudes. First, if it were well-defined,

professionalism would help the Bar attract people to the profession who already have the values we hope will continue within it. This could in turn have both positive and negative effects: on the one hand, it would allow experienced lawyers to save the time involved in preaching those values to new entrants; on the other, that "saved" time would be a loss to the profession's sense of its heritage, and therefore to professionalism. Second, again if it were well-defined, professionalism would announce to all new entrants into the profession that the Bar's contemporary moral diversity and competitiveness, while consistent with the minimal standards of the *Model Code* and *Model Rules*,³⁴ nevertheless have their limits. In other words, some aspirational, professional values would be expected to be held by each lawyer regardless of his or her personal proclivities or desires.

The central issue in the professionalism debate, then, becomes: What are those values or aspirations that we must all share?

III. STRUGGLING WITH THE SUBSTANCE OF PROFESSIONALISM: TWO POPULAR, BUT FALSE, IMPRESSIONS

Recent attempts to define the demands of legal professionalism have often been unsatisfactory because they reflect one of two extremes. One reduces professionalism to the level of professional etiquette — pleasantness, returning telephone calls, and the like — so that it appears to lack any real moral content at all. The other vehemently gives professionalism moral content, but reduces it to a single, politically biased value — helping the poor. Although both these approaches contain a kernel of truth, they are far too limited to be the basis for a sustained analysis of our professional heritage.

A. *Trivializing Professionalism: The Lawyer's "Bedside Manner"*

Some comments on professionalism can be summarized simply as admonitions to treat clients and other lawyers with respect. Regarding relationships with clients, these appear to be little more than pleas for the development of a more polished and pleasing "bedside manner." But under this approach, a lawyer is no more entitled to the label of "professional" than

³⁴ See *supra* note 21.

is, say, a prostitute or a plumber. Each of these three — lawyer, prostitute, and plumber — seems to deserve being called a professional simply on the basis of skilled services performed to the client's satisfaction. .

Regarding relations with one's colleagues, professionalism is often used as a synonym for simple civility. A frequent observation is that "the fun has gone out of lawyering" in part because of the lack of common decency and politeness between lawyers. But stated in this form, the point is trivial, if not irrelevant. If law practice is a service industry, service to a client may demand nastiness rather than politeness.³⁵

Nevertheless, there does seem to be something to these ideas of civility and personal respect, for they arise consistently in discussions of professionalism among lawyers. But surely there is more. If there is nothing particularly special about lawyering as a profession beyond its own form of good manners, then it should not be surprising that so many lawyers now find themselves less than fully satisfied with the nature of their employment and their colleagues. No real "heritage" would lie behind our work to justify a meaningful sense of self-respect.

We believe, however, that such despair is premature. There is much more to the professional tradition of lawyering than these limited discussions suggest. The problem is not that respect for clients and one's colleagues is irrelevant to professionalism. To the contrary, both are quite important. The problem instead is one of incompleteness: the emphasis on better manners is inadequate if it is argued in isolation from other important values, and particularly if it is argued without some preliminary justification of why manners are relevant to the legal profession at all.

B. Politicizing Professionalism: Indigent Legal Services

Many who have written on the concept of professionalism argue that its essence is not something trivial like manners, but, quite the contrary, something of moral substance: the lawyer's sense of responsibility for giving attention to non-fee-paying clients or to community service outside the lawyer's practice.³⁶ As a convenience, we shall summarize this approach

³⁵ For a view critical of an emphasis on civility, see Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331 (1987).

³⁶ See, e.g., HAZARD, *supra* note 17, at 104 ("in the Spirit of a Public Service: A Blueprint of the Rekindling of Lawyer Professionalism"); SAMUEL BRAKEL, JUDICARE: PUBLIC FUNDS, PRIVATE

as one that equates professionalism with "indigent legal services." Whatever its label, however, its reasoning is seriously flawed.

In the first instance, it is oddly ironic. Under this approach, the principal obstacle to professionalism becomes the practice of law itself — that is, the time and effort consumed by providing expert services to fee-paying clients. This dilemma is usually disguised by casting the complaint not against the practice of law as such, but against its "degree" or "amount" in the form of billable hours. According to this reasoning, the economic pressures of private practice — often summarized in the ever-increasing demand by law firms for associate (and partner) billable hours — reduce the time available for indigent services and must therefore be diminishing the professionalism of the Bar as a whole.

But this approach is not only ironic, it is misguided, for it uses "professionalism" to transform a debate about "lawyering" into one about a particular social or political goal: assisting the poor. In other words, what had been a discussion of means (how best to supply legal services) is now one about ends (how best to supply those services for a specific purpose). Correspondingly, a lawyer who disagrees with those ends no longer simply has an alternative point of view; she is "unprofessional."

A result this drastic must be justified by a strong argument, rather than an assumption, that lawyers have some special duty to the public that requires service to the poor as part of our aspirational values. Unfortunately, however, all we seem to have is an assumption, and it runs something like this: Lawyers have this special duty because they exercise a "monopoly" over legal services. This argument, however, is based on an economic claim that can no longer be sustained: today, with no barriers to entry into the profession, no lack of competition within it, and no anti-competitive behavior permitted, lawyers no longer collect "monopoly rents."³⁷ With no economic premium handed to lawyers simply due to their status, this particular justification for a concomitant economic "tax"

LAWYERS AND POOR PEOPLE (1974); WOLFRAM, *supra* note 1, § 16.7 (citing BARBARA CURRAN, THE LEGAL NEEDS OF THE PUBLIC 127-28, 152-57 (1977)); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970). See also MODEL RULES, *supra* note 21, Rule 6.1 ("A lawyer should render public interest legal service.").

³⁷ The term "monopoly rents" is the economist's jargon for the extra premium a monopolist can collect above the amount of profit that a competitive market would provide because the monopolist can exploit the lack of consumer choice.

on lawyers in the form of indigent services collapses.

IV. TOWARD THE TRUE FOUNDATION FOR THE VALUES OF PROFESSIONALISM: LAW AND AMERICAN "COMMUNITY"

If the discussion of professionalism is to recover from its many false starts and blind alleys, and reform itself into something meaningful, then we must rethink the concept entirely and start afresh. We begin that process, then, not by considering any particular values that professionalism might demand, but with issues more fundamental: why does anyone care about the "professional tradition" of lawyers in the first place; what justifies a careful inquiry into this profession when we are not similarly concerned with the "heritage" of (to return to some earlier examples) plumbers or prostitutes; why should lawyers be interested in establishing aspirational principles for themselves that reach beyond the present standards of ethics codes?

The answer, surprising to some, lies not within the profession itself, but outside it — in the law as a functioning social institution. Lawyering is a distinctive occupation with unique moral requirements because lawyers have established a special relationship to a fundamental aspect of our culture. Law, for Americans in particular, is not simply a set of rules and regulations that guide our behavior from time to time. It is far more central to our lives: the legal system embodies our last remaining vestige of a sense of "community" — of shared values and expectations. All the other dimensions of our lives — race, religion, education, the arts, regional loyalty, and so on — divide us as much as they join us together because they are based on matters of "substance" on which we so often disagree. No single social theme or set of themes could identify, for example, the "community" of New York City or Los Angeles or even Des Moines. The traditions, heritage, and perspectives of Americans are now so disparate and isolated within ever smaller subcommunities that no common purpose, direction, or moral values connect us fundamentally.

Except our system of law. Not any particular law, of course, but the system as a whole that embodies the "rule of law" in our society (in contrast to a despotic "rule by fiat"). Citizens of the United States, almost uniquely in the world, have come to respect the regularity, consistency, and basic justice over time of the officially promulgated rules and principles that regulate our conduct and redress our grievances. Evidence of this

attitude can be found simply in the way we talk: we all now habitually use the characteristic "rights" language of the law in describing our relationships with one another.³⁸ Ironically, then, we are connected to each other in the nature of the claims we make against each other: we do not ordinarily resort to self-help or depend upon various informal social groups like churches, families, or friends to take up our cause. Instead, we invoke our system of law, both because we have come to have faith in it and because we have largely abandoned other alternatives. American "community," consequently, now means only our ingrained expectation of official non-arbitrariness.

Lawyers are remarkably important in our culture, therefore, because they are the "gatekeepers" to this vital form of social cohesion. Lawyering exists as a profession to facilitate and control access to rules and courts that channel and temper our relations with each other. Moreover, in order to perform those important functions well, lawyers have long been granted a unique professional independence — an independence from regulation by others in society — so that their work within the legal system will be as unencumbered by extraneous pressures as possible.

But this independence has come with a price. The lawyer's professional latitude, because it is justified by the importance of the law rather than the importance of lawyers themselves, is granted by society in exchange for the implicit promise by lawyers that their autonomy will be used to enhance the social function of the law. That is, the lawyer's special pledge is that he or she will help the legal system remain the centerpiece of our fragile sense of community, help it continue to function within our culture as the crucial mechanism for social cohesion and stability.

That promise is the true essence and foundation of the concept of professionalism. Our heritage as lawyers — the "living faith" that links us with our predecessors, and that we must in turn teach to our successors — is the responsibility to recognize, honor, and enhance the rule of law in our society.

With that renewed understanding of the justification of professionalism,

³⁸ Professor Mary Ann Glendon has a contrasting negative view of this social phenomenon. See GLENDON, *supra* note 30. For another discussion of the importance of the rule of law to American society, see Timothy P. Terrell, *Rights and Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution*, 36 EMORY L.J. 541 (1987).

we can now turn to the difficult task of giving that concept some real substance. We will do so in the next section by identifying the values that define our basic, and traditional, professional responsibilities.

V. THE ELEMENTS OF A PROFESSIONAL TRADITION: SIX VALUES

Professionalism, troubling as it is to pin down, does, we believe, have content that should be meaningful to all practicing lawyers. This substance is not simple or single-dimensional, however, in a way that would help generate easy answers to controversial practice problems. Instead, as the previous section of this Essay suggested, legal professionalism is a concept as complex as the function of the law itself in modern society.

The essence of professionalism is composed of six interrelated values. These values are, in the language of philosophy, individually necessary and jointly sufficient to define the concept. That is, although each of these values is itself important to professionalism, none alone is the key principle at stake. All six must be combined together and given their proper weights to form the full meaning of the term. Blending them reveals, at a minimum, that professionalism is quite consistent with the hard work and long hours of any law practice, private or public.

A. *An Ethic of Excellence*

Perhaps most central of all to professionalism is a dedication to excellence in the services rendered to a client.³⁹ Little else matters if the job performed is second-rate or the client's interests have not been thoroughly considered. The client, of course, can be any recipient of legal services — a private or public entity, fee-paying or pro bono, individual or institution. All deserve the lawyer's appropriate attention and the full measure of the lawyer's expertise. And the services can be of any legal type — whenever the lawyer's knowledge of and judgment concerning the law and the legal system might be relevant to a client's interests.

This ethic is a "personal" one in that it applies to all lawyers individu-

³⁹ The *Model Rules* require first and foremost that a lawyer provide clients with "competent representation." MODEL RULES, *supra* note 21, Rule 1.1. Similarly, the *Model Code* directs that a lawyer who believes that she is not competent to handle a matter brought by a client should not represent that client. MODEL CODE, *supra* note 21, DR 6-101(A)(1).

ally, regardless of the nature or details of their employment. But it is also a value that extends to groups of lawyers as well who are bound together professionally in private firms, corporate law departments, or public agencies of any kind. Within these entities, this aspect of professionalism means a responsibility of the group to create internally an "environment" of excellence. That is, the group must develop a commitment of its own that its members will be the best lawyers they can be. This means that the group, as a matter of its understanding of its place in our general professional heritage, must be willing to invest (or must actively demand investment by the employer) in appropriate support services and resources to enable its lawyers to flourish professionally, to be the finest asset for their clients they can be.

This might seem a relatively uncontroversial point to raise concerning professionalism, but the pursuit of excellence seems too often put aside in the effort to promote other values in lawyering. For example, those who argue that, to demonstrate professionalism, lawyers should spend more time in pro bono activities assume implicitly that lawyers have some amount of "spare" time to devote to activities beyond those of fee-paying clients (or salary-paying employers). Although the sentiment behind this pressure is usually⁴⁰ noble and appropriate — a point we will develop below — it nevertheless fails to acknowledge adequately the fact that "excellence" in any area of law practice is harder than ever to achieve and maintain. Today the complexity of the law on virtually all topics is not only daunting but growing constantly, which in turn means that "mastery" of any legal subject matter will require more and more time.⁴¹

Thus, the fact (if it is a fact) that lawyers now spend a larger proportion of their time giving attention to their principal practice responsibilities does not necessarily demonstrate a decline in public-spiritedness in the profession, nor a decline, therefore, in professionalism. Quite the contrary,

⁴⁰ We emphasize the word "usually" because, as we discuss later in connection with the value of adequate distribution of legal services in society, the arguments for increased attention to pro bono activities are based on two very different approaches to the practice of law. One believes that private law practice is morally legitimate, but wants it spread more widely in society. The other generally holds private practice in contempt for various political and philosophical reasons. We accept only the first as an appropriate element in the debate about professionalism.

⁴¹ See, e.g., WOLFRAM, *supra* note 1, § 1.1 ("[M]uch of modern-day life is subject to extensive government regulation whose sheer volume requires extensive training by education and practice to permit efficient answers to questions about regulation.").

we see in this circumstance only a fact of modern legal life and, properly understood, an appropriate reflection of legal professionalism.

B. An Ethic of Integrity: A Responsibility To Say "No"

At some point, the "excellence" of a lawyer's service to a client necessarily entails delivering advice that the client would rather not hear. As painful and economically dangerous as this may be in the short run, professionalism demands a recognition of the long-range good produced by forthright acknowledgment of the limits of the law.

This does not mean that lawyers have a responsibility to turn their backs on their clients and their interests in favor of some higher "good"; instead, it means more subtly that a professional attitude will help a lawyer bring the client's interests and the interests of the legal system closer together so that one need not be sacrificed so harshly to the other. But in certain instances, tough choices will be necessary: providing excellent service to a client does not include being the client's slave. Part of the service for which the client pays, and part of the concept of professionalism, is the value of professional independence.

C. A Respect for the System and Rule of Law: A Responsibility To Say "Why"

This is the direct extension of the ethic of integrity: if we must sometimes say "no," we must also be able to say "why." We must believe that there is in fact some "long-range good" to which we can refer to justify our activities generally. That good is the basic integrity of our system of law which serves the vital social function we discussed earlier.

Moreover, our respect for the rule of law in society should be an active one. Part of our responsibility as legal professionals must be to work to maintain the law's ability to structure relationships appropriately and efficiently, and to resolve disputes fairly and as harmoniously as circumstances and litigants will allow. We must recognize that the social usefulness of the law, and in turn the esteem in which lawyers are held, depends ultimately on the respect the law receives from non-lawyers. But that objective can only be achieved if we lead by example. Only if lawyers take seriously their special responsibility to hold the law in respect themselves will others understand fully its importance to our culture. And only

with that understanding will others accept that the professional independence of lawyers is necessary to the adequate functioning of the legal system.

D. A Respect for Other Lawyers and Their Work

Based on the first three values we have discussed, we can now see that civility within the profession is not entirely a trivial matter. It does in fact have its place among our basic professional values. This is not because of the historic background of the Bar as a "gentlemen's club" in which etiquette would be expected, and it is not because a law degree in and of itself entitles anyone to special deference. Instead, civility should follow from the recognition of the lawyer's social function, not his or her social status. Because that function is based on the principle of the rule of law and its critical importance to our culture, our duty to that principle demands concomitantly that we respect the law's practitioners as well. This means not only that lawyers should treat each other with a certain courteousness in order to permit the legal system to function without unnecessary interference, but in addition it means that lawyers have a particular responsibility in conversations with their clients to avoid holding judges and other lawyers in disrepute.⁴² The public's respect for the law will often be closely related to its respect at a personal level for those who practice it, and lawyers should therefore acknowledge a special constraint not to undercut that subtle element within the rule of law.

This does not mean that lawyers should stop criticizing each other, or that we should consider it unseemly for one lawyer to sue another for malpractice. To adopt these attitudes would be to limit professionalism to this one value, when in fact civility must be understood in its relation to several other principles, including quite fundamentally the lawyer's responsibility to his or her clients and their rights. The limits imposed by civility will always therefore be vague and somewhat controversial, but they will also always remain relevant to professionalism: our respect for each other will inevitably continue to have an impact on the functioning of the legal system.

⁴² The Preamble of the *Model Rules* states that among a lawyer's primary responsibilities is the duty to "demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." MODEL RULES, *supra* note 21, pmb1.

E. A Commitment to Accountability

This value of respect within professionalism requires lawyers to recognize that their clients (and by extension, society as a whole) are entitled to understand the services that the lawyer renders,⁴³ and moreover to have the sense that the fees charged for those services are fair.⁴⁴ This accountability is the cornerstone of the professional independence lawyers enjoy: people generally accept the idea that lawyers need independence in order to provide their full value to society, but the public will continue to believe this only if lawyers respect the reciprocal social demand that they be accountable for their services.

Full accountability is closely related, of course, to the ethic of excellence in our professional services. Together these values mean that the primary pressure on a lawyer from the concept of professionalism is the demands of service to fee-paying *clients*, (or salary-paying employers), not the more general responsibilities to indigents or the community as a whole. This is not to say that pro bono and community service are irrelevant to professionalism, for we turn to that value next. Instead, excellence and accountability do mean that the requirements of professionalism cannot be met by substituting community service or other worthy pursuits in place of substantive legal competence and forthrightness about fees. Accountability is established first and foremost in the excellence of the lawyer's own practice; in the services rendered to clients on a daily basis.

F. A Responsibility for Adequate Distribution of Legal Services

The final value we would include within the essence of professionalism is a lawyer's special responsibility to assist in the effort to distribute legal services widely in our society.⁴⁵ This moral duty, like the others we have discussed, follows from the importance of law to our culture. Because law pervades all significant social arrangements and institutions, legal services

⁴³ See *id.* Rule 1.4 (duty to keep a client "reasonably informed" and to explain a matter to a client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

⁴⁴ *Id.* Rule 1.5 ("A lawyer's fee shall be reasonable . . ."). See also GEOFFREY C. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 97-106 (1978).

⁴⁵ See WOLFRAM, *supra* note 1, § 16.5.1 ("Significant elements of the bar have developed a good deal of enthusiasm for developing new methods of delivering legal services to the middle class, both to meet those needs and to provide additional employment for the burgeoning ranks of lawyers.").

must be widely available to the citizenry, and the legal system should be functioning adequately on their behalf. The remarkable significance of law in this country means that the government, representing all of the population, has a responsibility, at a minimum, to fund courts, prosecutors, and other agencies adequately, and perhaps a broader duty to subsidize indigent legal services agencies of various kinds as well. But regardless of the government's proper role in this regard, lawyers have a special professional responsibility here as well.⁴⁶

This is, of course, a familiar claim made in discussions of professionalism, but we want to cast it rather differently. We believe it is very important to emphasize again, but from a different perspective, the basis upon which this responsibility rests. We noted earlier that any obligation for pro bono services assumes implicitly that lawyers have some measure of "spare" time⁴⁷ that they can devote to this activity. One can approach this idea of available time in two distinct ways, however. The first is the idea we have stressed above — that the lawyer's duty comes from the importance of the law itself to our culture — and it suggests that pro bono activities are an integral part of the lawyer's ordinary professional activities, not supererogatory or unusual. Under this attitude, pro bono services are rendered when the lawyer is not otherwise swallowed by the demands of the ethic of excellence. But this is not really "spare" time, then, properly understood.

A second approach to the time available for pro bono is quite different. It assumes that the practice of law on behalf of private clients (and more particularly, wealthy individuals and businesses who can afford to pay for excellence) is itself morally illegitimate, or at least highly questionable. Under this attitude, lawyers in private practice should generally be ashamed of what they do, and should consequently look for any possible opportunity to cleanse themselves of their moral turpitude by toiling on behalf of the poor and the oppressed. We reject this way of thinking. To include it in the discussion of professionalism would politicize and bank-

⁴⁶ See MODEL RULES, *supra* note 21, Rule 6.1 & cmt. See also *id.* Rule 6.3.

⁴⁷ Although it is convenient to do so at this point in the text, the discussion ought not be limited to a lawyer's "time." As we argue later in this section, the indigent service requirement should also be able to be met by payment of a special tax or fee by all lawyers. Thus, as far as our argument is concerned, lawyers have either inherent "spare time" or "capital" to spend on behalf of wider distribution of legal services.

rupt all conversation about the concept and halt all progress in understanding the legitimate demands it imposes on lawyers.

Having repudiated professional shame in favor of professional pride, we nevertheless would remold the discussion of pro bono obligations in another important way. We would argue, based on our earlier analysis of the roots of our professional tradition in the social function of the law, that the lawyer's special responsibility for community service has two features that limit its reach. First, that duty is focused on legal services in particular rather than community services more generally understood. For example, a lawyer who serves on the board of directors or trustees of the local symphony is not displaying heightened professionalism any more than does the successful real estate broker who also serves in that capacity. Both, however, may be considered better *people* for this free service to the community.

Second, and more controversially, we would argue that the lawyer's special responsibility for the distribution of legal services is *not* a personal, individual duty to distribute oneself as widely as possible. To understand this obligation as a personal requirement of direct service would inappropriately compromise the ethic of excellence. Many kinds of indigent services today involve areas of law that are quite detailed in their own right, meaning that competent service to that client will require levels of investment by a lawyer that cannot be justified by occasional involvement in pro bono service. This means in turn that a lawyer who ordinarily practices in one complex area of law but who is pressured to render services in a complex area of indigent law must face a painful choice: she either makes the necessary investment in learning the indigent area well enough to render the services properly, but thereby sacrifices her responsibilities to her usual clients, or she honors her usual clients' interests and consequently invests half-heartedly in the pro bono activity. If we are to avoid this dilemma, we must understand our professional obligations differently.

We believe that professionalism creates an "enabling," as opposed to a "personal," responsibility for the distribution of legal services. Our responsibility as lawyers is to see that the Bar *as an entity* assists and enables those in the profession *who desire to do so* to distribute legal services widely in society. Professionalism does not necessarily demand, then, that each of us personally pledge to devote time and effort to legal help for the poor. Instead, appropriate professional behavior would entail other indi-

vidual and institutional actions. Personally, lawyers at the very least should not interfere with the efforts of other lawyers who seek to provide this wide distribution. For example, law firms should not have internal policies, practices, or incentives that actively discourage partners and associates from becoming involved in pro bono projects. Beyond this, however, a firm, legal department, or agency should actively encourage such commitment to outside legal activities. But the decision to make that commitment should remain an individual moral choice not forced by the concept of professionalism.

In addition, because the responsibility here is "enabling" rather than personal, one way for the Bar as an entity to fulfill the profession's duty to foster wider distribution of legal services would be for it to impose a special tax or fee on its members that would be used to subsidize the efforts of those Bar members interested in providing legal services to indigents. We recognize how controversial such a tax would be, but we believe that opposition to the idea is based in part on an inadequate understanding of the justification such a tax has from the perspective of the Bar's professional heritage.

This "distributional" responsibility within professionalism would not entail much more, however. And it cannot. Any purported personal moral requirement on lawyers to give legal assistance to the poor would mean that lawyers would lack the traditional individual freedom to choose not to work on behalf of others they would not otherwise willingly assist.⁴⁸ The reason for this refusal should not matter to professionalism — it could be based simply in economics in that the client cannot pay full market value for the lawyer's services, or in philosophy in that the lawyer is not convinced of the legitimacy of the claim espoused by the client, or in any other explanation. To impose a personal obligation nevertheless would create a most unfortunate and sadly perverted form of professionalism: professionalism as indentured servanthood. A coerced, false, and politically biased morality of this kind has no place in this debate.

⁴⁸ See MODEL CODE, *supra* note 21, EC 2-26. See also FREEDMAN, *supra* note 2, at 58, 67 nn.10-11.

VI. CONCLUSION

Our list of fundamental professional values does not contain anything about the public popularity that lawyers may or may not enjoy. We believe any such concern with external perceptions is misplaced because it has the issue backwards. The principal purpose of professionalism is to generate and maintain a core sense of *self-respect* within lawyers individually and the Bar generally. The respect of the public can be achieved only *after* that internal effort has been successful.

Furthermore, we believe the legal profession is not as far off this mark as many seem to think. Professionalism of the kind we have advocated here exists to a much healthier degree within the Bar than is commonly recognized. The undeniable economic pressures and difficult moral choices faced in modern law practice are not, in and of themselves, reducing professionalism. If professionalism is properly understood, we can see instead that these inherent demands of client service are a reflection of dedication to one's craft, a value the vast majority of lawyers already fully accept. There is, then, a "living faith" within the profession that we too often fail to appreciate.

We therefore conclude that despite the modern challenge of economic competition among lawyers with diverse moral perspectives, in a society that contains not only demanding clients but also some individuals who believe that financial success is itself a moral evil, the truth of the matter is that lawyers today accept and honor the basic values of professionalism as much as they ever have. Lawyers as a whole remain dedicated to excellence, committed to accountability, and involved in the Bar's responsibility to subsidize legal services to the poor. Rethinking professionalism, then, is a healthy exercise. Although it reveals the appropriate criticisms we can make of ourselves as lawyers, it also demonstrates that we should not be cynical or defensive about our professional roles.