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Essay

***433** "RETHINKING PROFESSIONALISM"—AND THEN LIVING IT!

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We lawyers know that something is very wrong with our profession. But like a patient with heart disease, we implore the doctor to give too much consideration to what we ate for lunch in making a diagnosis — we would much prefer a diagnosis of heartburn. Perhaps we are accepting a superficial diagnosis of our professional malaise today because we fear a more upsetting diagnosis.

When I attended law school in the early 1970s, I felt that my school, a typical "good" law school, was morally adrift: the faculty did not appear to hold a point of view (or competing points of view) with respect to the institution's responsibility to serve the public. As students, we were not taught that we would soon assume important responsibilities to serve the public beyond compliance with the disciplinary rules of professional conduct. After ten years in private practice and five years in public law, I can only conclude that the entire profession is largely uninformed and uncertain about its professional values and public responsibilities. Undoubtedly, tensions and strains will always persist when a system of justice attempts to function successfully in a private economy driven by the profit motive. Moreover, achieving widespread agreement on fundamental values (and goals) is no mean trick. However, as a chronic optimist (and a non-believer in "inevitabilities"), I think we can choose to place public service ahead of self-interest and continue to earn decent livelihoods. Our failure as a profession to find a moral balance between self-interest and public service can be corrected. In all events, we owe it to ourselves, our profession, and the public to try to balance the scales currently weighted down by the gold coins of self-interest.

The professionalism debate to date has been shallow because we have talked only about how we see ourselves. We have limited the contours of the discussion to how we relate to each other and how we can better serve paying clients. We have turned our heads nervously from any consideration of our public image or from any serious discussion of how we can ***434** help serve all members of the public who need our services. Instead, this Essay argues that we must engage in a broader discussion of professionalism and embrace a higher conception of its demands for our profession to function successfully in society.

I. IN SEARCH OF HIGHER GROUND (WITH OUR EYES OPEN)

The professionalism debate has centered on a decline in lawyer civility resulting from economic strains on the profession, and focused on how we can best enhance civility and make the practice of law more satisfying. The debate has also included the goal of keeping costs down for clients who pay more when our incivility results in wasteful fees and costs. We have limited the discussion to how we see ourselves without paying atten-

tion to our dismal public image. Enhancing service to the public by expanding legal services to the poor is mentioned as an afterthought or not mentioned at all.

We do have a common heritage as attorneys, but we scarcely understand that heritage. For the most part, our law schools have not educated us about our professional values as lawyers. Whatever tasks our law schools do right (and there are many), they have failed to instill a commitment to public service in their graduates. While in law school, most of us become familiar with the *ABA Code of Professional Responsibility* and its minimal standards. We study the types of lawyer misconduct that can result in discipline or disbarment and (implicitly) are taught that any other conduct meeting the test of civility is fair game. We are not taught that we have an affirmative obligation to the public beyond providing high quality legal representation to our clients. Thus, public service is defined as providing high quality legal services to clients who can afford to pay for such services. There is virtually no emphasis on the importance of lawyers giving time, talent, and money to make our legal system accessible to all members of the public, including those who cannot afford to pay.

We are now living with the consequences of our past failure to encourage higher standards of professional responsibility. All of our excuses and rationalizations for our public image can explain away neither the depth of the public's negative sentiments about the legal profession, nor the depth of our dissatisfaction as lawyers. For our profession to survive, we must open our eyes and acknowledge that our public image and our dissatisfaction represent a shared sense of failure.

***435** Because of the moral crisis we face as a profession, our self-respect and independence are in jeopardy. Increasingly we are becoming an ancillary service industry captured by corporations with “billable hours” as the only measure of professional success. An alarming number of lawyers are deeply dissatisfied with their work. Our healthy legal skepticism has deteriorated into rank cynicism with many lawyers viewing public service efforts as a waste of time. The decline in civility and our current malaise are not simply the result of increased competition in the marketplace and other economic tensions. These symptoms also reflect our failure to balance our self-interest with our professional ideal of service to the public. [FN1]

Timothy Terrell and James Wildman have carefully searched for higher ground in our dialogue about professionalism. [FN2] They have recognized that a thorough discussion must incorporate the values most fundamental to issues of professional responsibility. In my view, the traditional values identified by the authors do provide an adequate basis for professional agreement and concrete action. These values are: 1) an ethic of excellence, 2) an ethic of integrity, 3) respect for the system and rule of law, 4) respect for other lawyers and their work, 5) a commitment to accountability to the public, and 6) responsibility for an adequate distribution of legal services. [FN3] My purpose in this Essay is to focus on the importance of our professional responsibility for an adequate distribution of civil legal services to all members of society. [FN4] The quality of our future as a profession may well depend on whether we make substantial progress in realizing this substantive value.

***436** II. WHAT ABOUT JUSTICE?

A functional approach to professional responsibility requires us to recognize that our legal system does not operate in a political or social vacuum. While it is appropriate to recognize that our dialogue about professionalism cannot be limited to the single social or political goal of assisting the poor, this observation should not distract us from the vital importance of access to our system of justice by all members of society. Our democratic society and our profession have historically embraced the goal of access to justice as one of our most fundamental values. We should be mindful that “the roots of the democratic system” are “the true roots of the legal

system. . . . [T]he legal system that is grafted lightly onto a democracy will not be sustained." [FN5]

The preamble to the United States Constitution proclaims that our government was ordained and established by its citizens to serve its citizens. The constitutional powers of government were granted by the people to be exercised directly for their benefit. One of the first purposes of government identified in the Preamble is to "establish Justice" through the offices of government. Our Bill of Rights and subsequent amendments to our Constitution reflect a strong tradition of guaranteeing due process and affording the equal protection of our laws to all citizens. For generations, we have pledged allegiance to the goals of "liberty and justice for all" citizens. The value of a system of justice for all citizens is central to our democratic traditions and a cornerstone of our legal system. If the purpose of government is to serve its citizens, it is also the purpose of our legal system and profession to do so. "It is the avowed purpose of law to serve the public interest and to satisfy the private demands of individual justice [for all members of society]." [FN6]

***437** Thus, our democratic aspirations and commitment to justice have been and remain our bedrock cultural values as Americans. Indeed, we measure our collective difficulties and shortcomings against those values.

To the contrary, however, Terrell and Wildman have concluded that "[t]he 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." [FN7] The authors do acknowledge that lawyers have a "special responsibility to assist in the effort to distribute legal services widely in our society" based on "the importance of law to our culture" and the fact that law "pervades all significant social arrangements and institutions . . . ." [FN8] They further acknowledge that our legal system plays a central role in our culture and "embodies our last remaining vestige of a sense of 'community' — of shared values and expectations." [FN9] Nevertheless, Terrell and Wildman apparently do not see lawyers playing an active role in building democratic institutions; nor do they see lawyers promoting equal access to justice as part of our professional responsibility. Indeed, there are no express references in their essay to principles of democracy or justice.

The fact that law pervades our institutions is not in itself a justification for expansion of services to all members of society. Law is pervasive in our society because of our cultural commitment to democratic values. Citizen access to and participation in government are hallmarks of a society with democratic aspirations, as is a citizen's ability to resolve important disputes and enforce legal rights. Thus, access to justice for all members of society is the most important substantive value carried by our professional heritage.

Professional recognition of this value does not imply reduction of professionalism to "a single, politically biased value [of] helping the poor," [FN10] as Terrell and Wildman suggest. Our social commitment to establishing ***438** justice and making the machinery of justice available to all members of society is not a politically biased value; rather, this commitment represents values fundamental to our system of government. As lawyers, we can work in common for equal access to justice for all citizens no matter how our views might differ about poverty's causes or the government's role in eradicating it. The provision of legal services to the poor guarantees equal access to justice when the poor are faced with serious problems and legal remedies are available. We all know that access to a lawyer often makes the difference between some measure of justice and no justice at all. As a profession, we must be committed to the principle of equal access to justice if we share our culture's most important values. If we do not embrace these values, we are not legitimate custodians of the legal system — and we will not be perceived by the public as its legitimate custodians.

As members of the Bar, we possess exclusive power to resolve disputes and enforce the law in our cul-

ture. Over fifty years ago, one of our finest scholars, Karl Llewellyn, made the point succinctly: "Law is a profession in theory, and a monopoly in fact; a monopoly not merely by force of skill and brain but established and maintained by law. Only through lawyers can the layman win in fact the rights the law purports to give him." [FN11]

In return for our license to practice law we owe a substantial debt to society. The profession has been rightly analogized to a public utility — with the grant of exclusive power comes the obligation to give time, talent, and money back to the public where needed most to advance the ends of justice. As custodians of a public system of justice, we owe more to the public than other professionals. [FN12] Over forty years ago, Reginald Heber Smith observed that:

> [the] demand for ordinary, everyday legal justice is so great and the moral nature of the demand is so strong that the issue has become whether we devise, maintain, and support suitable agencies able to satisfy the demand or, by our own default, force the government to take over the job, supplant us, and ultimately dominate us. [FN13]

***439** For many years, we have assured the public that providing access to justice for all our citizens is a part of our professional responsibility as lawyers. However, in practice (and in relationship to our resources), we have not made good on those assurances. Terrell and Wildman recognize that our legitimacy as a self-regulated profession is "granted by society in exchange for the implicit promise by lawyers" that they will help the legal system "continue to function within our culture as the crucial mechanism for social cohesion and stability." [FN14] In private transactions, an implied promise may be legally enforceable based upon principles of reason and justice under appropriate circumstances. These principles of reason and justice also require us to uphold our promise to balance our self-interest with public service.

The primary error of Terrell and Wildman's essay is its summary conclusion that "[l]awyers as a whole . . . [are] involved in the Bar's responsibility to subsidize legal services to the poor." [FN15] Their suggestion is that our collective performance as lawyers on this score is acceptable, and that suggestion is incorrect. While the authors demonstrate a strong commitment to expanding access to justice, their essay is seriously undermined by the false premise that most lawyers are currently involved in subsidizing legal services to the poor. There is an enormous amount of work undone to expand legal services to those who cannot afford to pay — we should credit ourselves as professionals without exaggerating the extent of our accomplishments. Moreover, the authors do not appear to recognize the magnitude of the unmet need for legal services by the poor. They see that legal services are "no longer a luxury available only to a small segment of society; such services are now widely available, and at competitively varying cost." [FN16] Nevertheless, for millions of Americans, legal services are simply not available at all. Based on federal standards, it is estimated that thirty-four million Americans are impoverished. Moreover, a growing population of "working poor" are also completely priced out of the legal market. [FN17] ABA studies confirm that legal services programs turn away two out of three eligible clients due to lack of resources. [FN18] In Oregon, pro ***440** bono efforts meet only four percent of the need for legal services by the poor. Generally, these pro bono efforts do not include representation on technical "poverty law" issues such as public assistance, Medicaid, or public housing. [FN19]

In the 1070s, federal funding for legal services provided some hope for progress toward equal access to justice for all. Many of us then anticipated the 1980s as the time to make substantial progress:

> Thus, for the present, the poor still cannot help but see the concept of full and equal access to the law as a privilege granted only to those Americans who can afford it, not as a basic right of all citizens. And

> yet, without effective representation, the poor person sees the law only as his enemy, forcing his acquiescence to its demands without providing him with a voice to protest them. As long as access to the courts is conditioned, in Justice William O. Douglas' words, "upon the length of a person's purse," the law will remain, for the people upon whom its penalties most harshly fall, yet another arm of a monolithic and mystifying bureaucracy, which seems to care little enough for their rights and needs as it is. Fortunately, the last decade has seen the first glimmer of hope that the most basic premise of the American legal system, equal justice under law, might begin to have some meaning for the country's legions of poor people. Conscientious and dedicated efforts on the part of legislators, lawyers, law enforcement officials, and the public could make that hope, in the next decade, a reality. For now, at least, a start has been made. [FN20]

Since these hopeful remarks were made by Congressman Conyers, we have taken one step forward and three steps backward in expanding legal services to the poor. Substantial progress in the 1970s was severely undercut in the 1980s by a radical decline in federal funding for legal services programs. The following summary of a recent report on the sharp decline in the availability of legal services for the poor in California provides a cogent overview of the problem:

> The poverty law delivery system in California has significantly deteriorated***441** in the past decade. Additional funding is required to stop this precipitous decline — a decline which has left thousands of poor people to face serious legal problems without any legal assistance whatsoever.
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> 1. The number of poor people in California has increased by 41%, and will continue to rise, yet there are now 20% fewer legal services attorneys than a decade ago. There is currently only one legal services lawyer for every 10,074 poor people in California — nearly half the rate of ten years ago. (In contrast, there is one non-legal services attorney for every 231 non-poor California residents — over 3,000 percent higher than for low-income residents.)
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> 2. Only 15.2% of the legal needs of California's poor are being met. Despite a significant increase of *pro bono* lawyers willing to provide free legal representation for the poor through established legal services programs, these programs are still only able to help one out of every six poor people who need legal help for problems — such as evictions, a battering spouse, or a cut-off of disability benefits. And there is often nowhere else to turn.
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> 3. The lives of the poor are highly regulated, and legal representation is often critical to their very survival. The legal needs of the poor, and the clientele served by legal services programs, are diverse, and cut across many sectors of society. Their legal needs fall primarily into the areas of income maintenance, housing, health, family, employment, education, consumer finance and individual rights. Constituent groups include the homeless and near-homeless, persons with AIDS, the disabled, children, families, immigrants, and the elderly. Each of these groups has unique needs and faces specific, often complex, legal problems.
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> These and many other legal problems plaguing the poor are critical to their very health and well-being. Only when the system can offer needed legal assistance to the poor when they are facing such serious consequences — losing their homes, their jobs, or their health care — can we as a society rest assured that we actually do value the goal of achieving equal access to our system of justice. [FN21]

***442** The California experience is typical of the decline in legal services for the poor across this nation. In Oregon, the number of legal services attorneys (representing an eligible client base of over half a million people) has decreased from eighty-five to seventy-four since 1980. During the same period of time, the overall number

of lawyers in the state increased by fifty percent (from 6,074 to 9,123). [FN22] To date, this increase in lawyers has not benefited the poor in Oregon.

The truth is that most poor people have no access at all to our system of justice. For millions of Americans this is a country where citizens are entitled to all the justice money can buy — no money, no justice. Millions of Americans have legitimate claims raising issues of entitlement to various public benefits without access to legal representation. For example, legal services programs do virtually no advocacy on behalf of homeless individuals or families, and they provide virtually no representation for children or place any special emphasis on children's rights. Education cases involving disabled children are rarely taken. Legal services programs generally do not represent battered women in shelter homes even though most of these women are financially eligible for legal services. No matter how important these issues are for our citizens, most of these individuals are rejected by legal services programs because our society and our profession have not adequately funded these offices. When citizens' claims for just treatment are summarily rejected, those citizens are told, in effect, that they have no rights. No matter what our legislatures and judges have said, those citizens have no rights because they have no money. As lawyers, we know that rights must be enforceable — citizens who cannot enforce their rights, have no rights.

The current state of affairs is grossly at odds with our cultural value of access to justice for all. As a profession, we have not recognized that the quality of justice depends on high standards for the delivery of legal services, principled decisionmaking, *and* the conditions under which services are made available to those who need them. When vast numbers of citizens are flatly excluded from our legal system, the quality of justice can only be assessed as unacceptably low. This conclusion cannot be avoided by pointing to how well we deliver services to our paying clients. For the poor, an ethic of excellence in the delivery of legal services to paying clients***443** is nothing more than a form of self-serving elitism by the legal profession. Lawyers must accept professional responsibility for this wholesale denial of justice — we must do our part to equalize access to our legal system.

III. LIVING PROFESSIONALISM

> [I]deals are goals, to be won by hard striving; they will not be achieved by slothful men who merely mouth their ideals, who are satisfied with big talk of noble aims while they avert their gaze from painful actualities.
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> That is the paradox of wisdom: Insofar as we become mindful that life must be less perfect than we would like it to be, we approach nearer to perfection. The impossibility of reaching it does not justify indifference to the aim of constantly bettering man's lot. [FN23]

Rethinking professionalism will be an exercise in futility if we do not strive to further our most important professional goals. I have argued that our most important unrealized goal is equalizing access to our system of justice for all citizens. We can only make substantial progress toward achieving this goal if we direct our attention to the tremendous unmet need for legal services by the poor — to deny this need for legal representation is to deny our professional heritage as custodians of the legal system. Further, we must adopt an ambitious plan of action to provide access to our system of justice for those who cannot afford to pay for services. We must give time and money to carry out a sensible plan of action. In short, we must do more than rethink professionalism; we must believe in its ideals and take practical steps to carry out its goals.

Terrell and Wildman provide no clear direction as to whether lawyers should do anything different to meet the demands of professionalism. They have apparently concluded that lawyers as a group are currently meeting the demands of professionalism in all important respects. With respect to the goal of access to justice, they in-

dicate that a lawyer does not have a "personal" responsibility to give time or money to provide such services. They characterize our responsibility as "enabling" and limit that ***444** responsibility "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." [FN24] It is suggested, however, that the organized Bar could "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." [FN25] I agree that Bar associations should assess a fee for this purpose. However, we must first take considerable steps within our Bar associations to build popular support for such fees.

Bar associations are not so separate from their membership that a mandatory fee would be passed absent popular membership support. The most critical issue we face in expanding legal services to the poor based on lawyer support is that many lawyers do not believe it is part of their professional responsibility to give time or money for this purpose. Until most lawyers recognize that they have a special responsibility to help meet the need for legal services by the poor, we cannot realistically expect more significant support from the Bar. We cannot reasonably expect Bar associations to impose a mandatory fee on their members until lawyers acknowledge their responsibility for paying their fair share for such services. Therefore, we must first determine why most lawyers are not inclined to contribute time or money for this purpose and what steps we can take to strengthen our professional commitment to providing legal services to the poor.

It is imperative that law professors recognize their responsibility to advance the core values of the profession as part of a student's formative legal education. Not only must law schools teach professional ethics more effectively to our students, law schools must also advance core professional ***445** values by teaching students about their social responsibilities as lawyers: studies have shown that professional schools can *indeed* affect values and assist in anchoring their students' moral judgments. More importantly, they have an *obligation* to do so. As Herbert Spencer stated over a century ago, "education has for its object the formation of character."

Whether they realize it or not, professors are not merely teachers of substance and skills; they are mentors in the process of professional training. They are the first professional role models students encounter. Professional values observed in law school will leave indelible marks on students' visions of the profession. Troubling signals are communicated when students perceive a lack of respect for the views of others and the absence of a commitment to providing pro bono services. Former Dean Erwin Griswold of Harvard Law School observed that law students frequently come to law school with broader ideals than they take out. He emphasized that this was not only due to a loss of innocence or naivete on the part of students, but to a diminution of their desire, as seen by example, to serve society. [FN26]

Our legal education will remain deficient if students are allowed to graduate with no understanding of the nature and scope of the problem of equal access to justice or the lawyer's responsibility to assist in meeting the demand for services. Law schools continue to graduate students who are ill-informed about our professional heritage and our goal of equal access to justice for all. Professional acceptance of this responsibility must begin in law school and expand during our continuing legal education. There is no good reason why law professors and Bar leaders cannot foster a much greater appreciation of this value in a way that results in a greater acceptance of professional responsibility by lawyers. The attitudes of students and lawyers can be shaped in law school and strengthened in professional practice in favor of a more expansive view of professional responsibility.

In recent years, Bar associations have directed their efforts toward improving the quality of legal services to paying clients. This effort and other efforts relating to attorney discipline and accountability to the public ***446**

have been legitimate. [FN27] But we currently face a crisis in leadership in our Bar associations. The immediate question is whether Bar leaders will face the fact that the profession is radically out of balance in favor of self-interest over public service and that we have largely earned our poor public image by reneging on our promise of public service. Our profession will not benefit from the professionalism debate unless we take remedial actions to better serve the public. We must take concrete steps to make legal services available to all citizens if we wish to enjoy the public's respect. The public will continue to see us as self-serving technicians until we serve the public at a level commensurate with our rhetoric. There is simply no good substitute for putting our time and money where our mouths are. We need bold leaders to make the professionalism debate a more serious discussion about public service and to plan a course of action to better serve the public. A better code of professional responsibility will be to no avail if it does not reflect a willingness of lawyers to better serve the public. [FN28]

To paraphrase Jerome Frank, the final hope for our profession is not in a code of professional responsibility, but in our leadership. [FN29] Lawyers who have a strong commitment to public service must assert themselves as leaders on these important issues. Bar leaders can encourage greater pro bono efforts and financial support by lawyers to expand legal services to the poor. A mixed approach recognizes the limits of pro bono and the extent of the need for services. Mandatory pro bono is a bad answer to the ***447** good question of how do we provide these services given the demand? Terrell and Wildman are correct that mandatory pro bono is a bad answer for many reasons, not the least of which is the mandate that lawyers provide representation in areas where they have not acquired the requisite skill or experience. [FN30] Moreover, it is unrealistic to expect pro bono lawyers to represent the millions of clients currently turned away by legal services programs due to inadequate resources. As a practical matter, only adequately funded law offices can provide high volume (and high quality) representation efficiently in these technical areas of the law. The time has come for the Bar to acknowledge honestly the limits of pro bono and help financially support legal services to the poor. As suggested recently by Professor Stephen Gillers, we should “dig into our pockets to help realize the promise of equal access to justice as our institutional responsibility.” [FN31] The continuing crisis in legal representation for the poor can be ameliorated by lawyers pledging to financially support offices providing such services. This support would be a major step toward changing the public's image of the legal profession. It would also result in personal and professional satisfaction for real (not imagined) efforts to serve the public.

In Oregon, attorneys last year contributed significantly to a consortium of Legal Aid programs as part of a statewide “Campaign for Equal Justice.” Most lawyers participating in the campaign contributed the suggested amount of two hundred dollars. A number of law firms matched the contributions of associates as part of their commitment to the campaign. Lawyer contributions were matched by a local foundation and will be matched for a period of three years to build lawyer support for legal services to the poor. After the first successful year of the campaign, the headline in the state's leading newspaper read: “Oregon Lawyers Donate Time, Cash To Provide Legal Help For Poor.” [FN32] Another headline read: “Lawyers: Not Just For Jokes Anymore.” [FN33] Bar leaders and committed lawyers now have an opportunity to substantially expand lawyer participation in the future. If all lawyers in the state annually contributed an average of two hundred dollars to the consortium, program budgets would ***448** increase by approximately twenty-five percent, allowing for a significant expansion of legal services to the poor.

Direct financial support for legal services by lawyers is also working in Georgia and Massachusetts. However, only broad-based participation by lawyers in such fundraising efforts will make a significant difference. Most importantly, if broad-based participation is achieved, a modest contribution by individual lawyers (e.g., two to three hundred dollars annually) would substantially increase legal services to the poor. Funding would continue to come primarily from Congress through the Legal Services Corporation, and

from local sources of funding such as a percentage of interest accrued on lawyers' trust accounts. But lawyers would help tremendously by paying their fair share for legal services as part of their professional responsibility to the public. Successful fundraising efforts could increase program budgets by twenty-five percent and result in legal representation for millions of Americans currently denied critical services.

There are many additional ways that lawyers and Bar associations can take steps to promote legal services for the poor. [FN34] These include an elimination or reduction in Bar dues and a waiver of fees for legal services lawyers participating in continuing legal education seminars. Pro bono clinics can utilize the expertise of legal services attorneys to identify the greatest need for services by the poor. Lawyers can be recognized both for their pro bono efforts and for their work on fundraising campaigns designed to assist legal services programs. Bar associations and Bar leaders could promote a mixed approach of pro bono efforts [FN35] and financial ***449** support for legal services to meet the demand for services. Lawyers need to know that Bar associations and their senior partners will credit them for giving time and money to expand legal services to the poor. Again, this is best accomplished by leadership and example. Lawyers working together in pro bono clinics and on fundraising campaigns in common cause for legal services enhances civility and mutual respect. Furthermore, such activities would increase the number and quality of Bar leaders who take a more expansive view of professional responsibility. A corresponding increase in the public service efforts of the Bar would then lead to an improved public image of lawyers. We could justifiably take greater pride in our public service activities and our profession.

On the other hand, if we do not broaden our view of professionalism to include equal access to justice, we will be constricted by a narrow self-serving view and become victims of a self-fulfilling prophesy. By focusing our discussions primarily on our self-interest, we will continue our dramatic decline as a profession. [FN36] Our respect for both ourselves and our profession will continue to erode, with even more of us becoming deeply dissatisfied with our work. Public service will remain largely lip service to an increasingly hostile public. Instead of taking positive steps to improve our profession, we will be reduced to attempting to deflect legislative proposals for mandatory pro bono or a professional tax on our services. [FN37] Tragically, by continuing to take a meager view of professionalism we will lose the independence we so cherish as lawyers. If we fail to take our heads out of the sand now, we may do so only in time to view the regulation of our profession by the public. [FN38]

The moral crisis we face today is essentially a crisis in professional will. We *are* capable of shaping a better future for our profession. Our importance in society as a profession provides us with an opportunity to serve ***450** the public well as a livelihood and to work actively to achieve equal access to our system of justice for our citizens. It is imperative that we accept the challenge presented by both opportunities. If we do, we will have done our part as lawyers to make our society and our profession a better place to live.

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[FN1]. These comments refer to a large percentage of lawyers who have not balanced their self-interest with public service. Although many lawyers have made enormous contributions to our profession and society, we need to greatly increase the percentage of lawyers honoring an active commitment to professional responsibility in order to make substantial progress.

[FN2]. Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403 (1992).

[FN3]. *Id.* at 424-31.

[FN4]. This Essay focuses only on civil legal services because I am not in a position to comment on the availability of adequate legal services to criminal defendants. I am aware that there are serious deficiencies in the provision of such services to indigent defendants notwithstanding the constitutional mandate that adequate representation be provided; however, I am not sufficiently informed to discuss the importance of professional responsibility for an adequate distribution of criminal legal services to all citizens.

[FN5]. Ralph Nader, *An Overview, in* VERDICTS ON LAWYERS xviii (Ralph Nader & Mark Green eds., 1976) [hereinafter VERDICTS].

[FN6]. JAY A. SIGLER, AN INTRODUCTION TO THE LEGAL SYSTEM 21 (1968). The importance of principles of democracy and justice to considerations of professional responsibility was recognized by the drafters of the *Model Code of Professional Responsibility:*

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1984).

[FN7]. Terrell & Wildman, *supra* note 2, at 422.

[FN8]. *Id.* at 428.

[FN9]. *Id.* at 422.

[FN10]. *Id.* at 419.

[FN11]. Nader, *supra* note 5, at ix.

[FN12]. *See generally* F. RAYMOND MARKS, THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY (1972); Thomas Ehrlich, *Lawyers and their Public Responsibilities*, 46 TENN. L. REV. 713 (1979).

[FN13]. Reginald H. Smith, *Legal Service Offices for Persons of Moderate Means*, 1949 WIS. L. REV. 416, 418.

[FN14]. Terrell & Wildman, *supra* note 2, at 423.

[FN15]. *Id.* at 432.

[FN16]. *Id.* at 412.

[FN17]. UPDATE: THE NATIONAL ORGANIZATION OF LEGAL SERVICES PROGRAM, vol. xiv, no. 25,

Nov. 5, 1991, at 4.

[FN18]. George D. Lundberg, *50 Hours for the Poor*, A.B.A. J., Dec. 1, 1987, at 55.

[FN19]. Proposal to Meyer Memorial Trust by Oregon Consortium of Legal Services Programs, Jan. 10, 1991, at 21 [hereinafter Proposal].

[FN20]. Congressman John R. Conyers, Jr., *Undermining Poverty Lawyers, in* VERDICTS, *supra* note 5, at 142-43.

[FN21]. *Unequal Justice: A Report on the Declining Availability of Legal Services for California's Poor, 1980-1990*, PUB. INTEREST CLEARINGHOUSE, June 1991, at 11.

[FN22]. Proposal, *supra* note 19, at 27.

[FN23]. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 426, 428 (1949).

[FN24]. Terrell & Wildman, *supra* note 2, at 430 (emphasis in original). An ethic of personal responsibility is a necessary element of any adequate theory of professional responsibility; otherwise, no one is responsible. This point was forcefully made by Marna S. Tucker:

> The bar must take steps to enforce the professional duty on each individual lawyer to provide representation or to make sure that representation is provided to all who seek it. The present notion of a "collective responsibility" to provide representation does not translate into the individual lawyer's responsibility. Everybody's business can become nobody's business. A collective duty is no duty at all when each lawyer can point to someone else who should be doing the job. It is no longer an adequate response, if it ever was, for the bar to assume that legal aid and legal services should handle the private bar's share of the burden of representing the poor.

Marna S. Tucker, *Pro Bono ABA?, in* VERDICTS, *supra* note 5, at 27.

[FN25]. Terrell & Wildman, *supra* note 2, at 431.

[FN26]. Richard A. Salomon, *"Shades of Gray" and Other Myths*, 1 GEO. J. LEGAL ETHICS 465, 467 (1987).

[FN27]. *See, e.g.*, HERBERT JACOB, JUSTICE IN AMERICA: COURTS, LAWYERS, AND THE JUDICIAL PROCESS 82-83 (4th ed. 1984).

[FN28]. Witness the rejection of a modest pro bono reporting obligation when proposed by the Kutak Commission in 1982: the proposed rule would have required lawyers to "make an annual report concerning such service to appropriate regulatory authority." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1 (Discussion Draft 1983), *reprinted in* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 830 (2d ed. 1990). The adopted version of Rule 6.1 regarding Pro Bono Public Service provides:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1984).

[FN29]. Jerome Frank's statement was "[t]he final hope for democracy must be, not in its letter law, but in its leadership." FRANK, *supra* note 23, at 408.

[FN30]. *See also* Suzanne Bretz, Note, *Why Mandatory Pro Bono is a Bad Idea*, 3 GEO. J. LEGAL ETHICS 623 (1990).

[FN31]. Stephen Gillers, *Words into Deeds: Counselor Can You Spare a Buck?*, A.B.A. J., Nov. 1990, at 81.

[FN32]. OREGONIAN, Dec. 8, 1991.

[FN33]. OREGONIAN, Dec. 5, 1991.

[FN34]. The ABA has staunchly supported federal funding for legal services during the past decade. It should continue to lobby Congress to provide additional funding. Moreover, individual lawyers should contact their representatives at critical junctures to support such funding.

[FN35]. In 1976, Marna Tucker made the following observation about pro bono efforts by the Bar:

> The ABA's programs, including the *pro bono* work of the private bar, have for the most part allowed the activities of some lawyers and law firms to make all the others look good. In the final analysis, only a handful of exceptional attorneys are attempting to meet the vast needs of the public and to atone for the general failure of the bar to service the non-rich public. The majority of funds used to operate these programs do not come directly from the average lawyer's pocket. These programs are paid for in large part by government, foundations, and other private and public sources.

Tucker, *supra* note 24, at 26. These remarks ring true today notwithstanding the fact that there has been a significant increase in pro bono activity. Pro bono efforts alone cannot begin to meet the unmet need for legal services by the poor. Currently only 15% of the Bar participate in pro bono programs. Deborah Graham, *Mandatory Pro Bono: The Shape of Things to Come?*, A.B.A. J., Dec. 1, 1987, at 63.

[FN36]. *See* Peter Megargee Brown, *How to Stop the Decline of the American Law Profession: Divide the Bar and Raise a Cadre for Civilization*, 1 GEO. J. LEGAL ETHICS 653 (1988).

[FN37]. Such measures may or may not result in quality legal services to those in need. For example, a professional tax could provide some revenue to state general funds with little, if any, direct increase in legal services to the poor. However, direct contributions by lawyers for legal services pay for the delivery of such services. *See also* Bretz, *supra* note 30.

[FN38]. For an argument that the equalization of access to our legal system requires public regulation of the legal profession in the public interest, see JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 308 (1976). Mr. Auerbach argues that without public regulation, "equal justice under law will remain subservient to unequal justice under lawyers." *Id.* If our profession does not prove Mr. Auerbach wrong, the public may prove him right.

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