Remarks upon Receiving the Michael Franck Professional Responsibility Award

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Even those of us who write for a living sometimes can find no words adequate to the occasion. I am deeply grateful, honored, and humbled by the challenge of trying to live up to this award. If I were to be thought deserving, it would be because I share the aspirations of this audience, exemplified in the life of Michael Franck. I am moved for another reason. It speaks volumes about the American Bar Association's Center for Professional Responsibility that it is willing to recognize someone who has spent much of her career chiding lawyers for the gaps between their principles and practices. In most occupational settings, the tendency is to shoot the messenger. And unless that comes later in the program, I appear to be having a rather atypical experience.

Part of the explanation may be that the critiques have also been coupled with alliances. Like many in this room, I have had the good fortune, through the Association, to partner with some of the profession's most dedicated members on issues that truly matter. These are the issues that I want to address briefly here—accountability and access to justice—because they continue to demand our best efforts and they implicate the values that the Franck Award expresses.

These are also the issues that sent me down the path that led here. Occasions like this inevitably prompt some reflection about how the journey starts, so let me share a brief account of my entry into the professionalism field three decades ago, before it was really recognized as a field. I did not have a course in professional responsibility in law school. Yale taught legal ethics by the "pervasive method," and the guiding principle seemed to be "less is more." I do not recall the subject ever arising. But I encountered it in the wild, so to speak, in the course of work that I was doing with a legal aid clinic in New Haven. The clinic's family law unit was, then as now, woefully understaffed and underfunded. It took in new cases only one morning a month on a first come, first served basis. If you were poor and hoping for a simple uncontested divorce, and if you didn't show up early that

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morning, you were looking at legal fees of over $2,500, when adjusted for inflation. Many of those priced out of the system had urgent needs. Battered women and parents at risk of losing child custody required help immediately, not in a month, maybe, if they came early on the right morning.

In these not so good old days, do-it-yourself kits and services were just beginning to emerge, and the reception among lawyers was anything but cordial. When the New Haven legal aid clinic proposed to develop a manual for pro se divorce litigants, the local bar association threatened to sue for unauthorized practice of law. One of my assignments was to research the issue. What I found seemed so contrary to sound law and policy that it inspired an extended empirical study that my now husband and I published in the Yale Law Journal. That, in turn, launched a lifelong interest in access to justice and the accountability of the legal profession.

Clearly, over the following three decades, much has changed, but much has remained the same. The scope of unauthorized practice doctrine and enforcement has greatly narrowed, and the availability of do-it-yourself services has dramatically increased. Law students no longer routinely graduate without courses in legal ethics, and the inadequacy of legal services is now high on the profession's reform agenda. But the fundamental problems are still unsolved. The vast majority of legal needs of poor and moderate-income individuals remain unmet, and the bar retains considerable power to regulate legal services in ways that serve the profession at the expense of the public.

I am not unmindful of the irony in raising these issues here. By definition, those present at the bar's annual professional responsibility conference and the readers of this journal are not those who most need to hear about access and accountability. But part of the function of these occasions is to remind each other of the importance of what we do, and the urgent need to do it better. In that spirit, let me offer a brief overview of progress that remains to be made.

I.

It is a shameful irony that the nation with the world's highest concentration of lawyers still does so little to make law available to those who need it most. Less than one percent of the nation's expenditures on legal services, about $2.25 per person, goes to support civil legal assistance for the one-seventh of the population that is poor enough to qualify for assistance.[1] At these funding levels, not much due process is available. Bar estimates consistently find that over four-fifths of the individual legal needs of the poor remain unmet.[2] These estimates do not include the millions of Americans of limited means who are above poverty thresholds, but cannot realistically afford lawyers or have collective problems in areas such as

1. *See* DEBORAH L. RHODE, ACCESS TO JUSTICE 7, 106 (2004). America spends only about $2.25 per person on aid, a level one-sixth to one-fifteenth of that of other countries with comparable legal systems like Canada, Australia, and Great Britain. *Id.* at 112.

2. *Id*. at 3.

education or the environment. Behind all these dry statistics are real people with pressing needs: disabled children, elderly Medicare patients, immigrants seeking asylum. The list is long and the stories are compelling.

We also have not begun even to quantify, let alone address, the inadequacies in indigent criminal defense.[3] Many court-appointed attorneys lack the time, resources, or training to mount an effective defense. Statutory fees and caseloads are often set at ludicrous levels, which makes sufficient preparation for most poor clients a statistical impossibility.[4]

The profession's response to inadequate representation has itself been demonstrably inadequate. In criminal cases, the standards governing effective assistance of counsel are a national embarrassment; convictions have been upheld where defense lawyers have been asleep, drunk, on drugs, or parking their cars for key portions of the prosecution's case.[5] Even in death penalty proceedings, defendants have been executed despite their counsel's lack of prior trial experience, ignorance of relevant precedents, and failure to present any mitigating evidence.[6] An entire jurisprudence has emerged to determine how much dozing is constitutionally permissible. Some jurisdictions have developed a three part test: Did the lawyer sleep for repeated prolonged periods? Was the lawyer actually unconscious? Were crucial interests at stake during the nap?[7]

The profession's preferred solution to these problems has been increased resources for civil legal aid and indigent criminal defense. Yet although I, like others in this audience, have argued endlessly for such an increase, its political prospects seem hardly promising in the foreseeable future. Compared with other social and national security needs, legal services have seemed less urgent, partly because the general public has such little appreciation of what passes for justice among the have nots. About four-fifths of Americans believe, incorrectly, that the poor already are entitled to counsel in civil cases.[8] About three-quarters also think

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3. *Id*. at 123. *See also* DAVID COLE, NO EQUAL JUSTICE 64, 84 (1999); Douglas McCollum, *The Ghost of Gideon*, AM. LAW. March 2003, 63, 67.

4. Hourly rates for out-of-court work are as low as $20 or $25, and ceilings of $1000, or caseloads of 500 felony matters, are common. RHODE, ACCESS TO JUSTICE, *supra* note 1, at 12. *See* Vivian Berger, *Time for a Real Raise*, NAT'L L. J. Sept 13, 2004, at 27; ABA Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2005), *available at* www.indigentdefense.org/ .

5. RHODE, ACCESS TO JUSTICE, *supra* note 1, at 13, 134-35.

6. *Id.* at 13, 140-41; Texas Defender Service, *Lethal Indifference* (December, 2002), *available at* http://www.texasdefender.org; Stephen B. Bright, *Equal Justice Under Law* (Open Society Institute, working papers 2002); COLE, *supra* note 3, at 87.

7. *See* Yarborough v. Gentry, 540 U.S. 1(2003); Tippins v. Walker, 77 F 2d 682 (2d Cir. 1996); Burdine v. Texas, 66 F. Supp. 2d 854 (S.D. Texas 1999), *aff'd sub nom*. Burdine v. Johnson, 362 F. 3d 386 (5th Cir.), *cert. denied sub nom*. Cockrell v. Burdine, 530 U.S. 1120 (2002).

8. RHODE, ACCESS TO JUSTICE, *supra* note 1, at 4; Access to Justice Working Group, *Report to the State Bar of California* 4-6 (1996); Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MARYLAND JOURNAL OF CONTEMPORARY LEGAL ISSUES 199 (1994).

that too many criminal defendants are getting off on technicalities: over-, not under-representation, is the dominant popular concern.[9] Clearly, the profession needs to redouble its public education and lobbying efforts concerning legal services. But the bar must also develop other ways of increasing access to justice.

II.

This is not the occasion for a comprehensive discussion of reform proposals. However, a few observations about the general directions for change bear emphasis. In essence, the key strategy is to make attorneys more accountable, both individually and collectively, for getting adequate assistance to those who need it most. For criminal matters, courts and bar associations need to institutionalize remedies for ineffective representation, to require compliance with performance standards, and to hold jurisdictions politically and constitutionally responsible for providing sufficient funds.[10] In civil contexts, judges, legislators, bar leaders, and legal service providers need to work together to reduce the cost and increase the accessibility of legal remedies, especially for communities of color, which are most poorly served.

Appropriate models both here and abroad are readily available.[11] More procedural simplification, pro se assistance, holistic dispute resolution, and qualified non-lawyer services are obvious strategies. In "poor peoples' courts" that handle housing, bankruptcy, small claims, and family matters, parties without lawyers are less the exception than the rule.[12] Yet the system in which these parties operate has been designed by and for lawyers. The challenge is to make it more responsive to everyone else. As members of a largely self-governing profession, lawyers and judges have an obligation to ensure that their ethical rules, enforcement structures, and dispute resolution processes adequately serve pubic interests.

A related cluster of strategies should involve pro bono service. Law is the nation's highest earning profession, but the best estimate of lawyers' average pro bono contribution to underrepresented groups is under half an hour a week in direct assistance and under half a dollar a day in financial donations.[13] Performance is particularly unimpressive among those who could most readily

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9. American Bar Association, *Perceptions of the United States Justice System* 59 (2000).

10. RHODE, ACCESS TO JUSTICE, *supra* note 1, at 131-36; 143; Bruce Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY Law J. 1169 (2003).

11. RHODE, ACCESS TO JUSTICE, *supra* note 1, 85-86; 89.

12. *See id*. at 82.

13. Bureau of Labor Statistics, Table 39, Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex, Employment and Earnings 249-53 (2004); RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 20 (2005). Recent ABA survey results finding that two thirds of lawyers report doing some pro bono work are not inconsistent with this estimate, given that the average hourly contribution of lawyers who offered pro bono assistance needs to be adjusted for the numbers who did not, and for those whose contributions involved activities such as bar association service. *See* ABA Standing Commission on Pro Bono and Public Service, *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers* (2005).

afford to do more. Only about a third of the attorneys in the nation's 200 largest and most financially successful firms provide at least 25 minutes a week of pro bono service.[14]

Legal education has similar room for improvement. Few issues are more central to the American public and more peripheral to legal education than access to justice; little discussion of the issue occurs outside of clinics. In my own recent survey of some 3000 law school graduates, only one percent recalled coverage of pro bono obligations in orientation programs or professional responsibility courses.[15] Only three percent of graduates observed visible faculty support for pro bono service.[16] Four-fifths of law schools do not require student pro bono participation; of those that do, the obligations are often quite modest, under ten hours a year.[17] In schools with voluntary programs, it is estimated that only about a quarter to a third of the students participate, and average time commitments are highly limited.[18] As a result, a majority of law school graduates have no pro bono legal work as part of their educational experience.[19] Most schools remain a considerable distance from meeting the recommendation of an Association of American Law Schools Pro Bono Commission: that every institution "make available to all students at least once during their law school careers a well-supervised law-related pro bono opportunity and either require the students' participation or find ways to attract the great majority of students to volunteer."[20]

Surely we can, and must, do better.[21] As Marian Wright Edelman once noted, "service is the rent each of us pays for living."[22] That is especially true for members of a profession that serves as a gatekeeper to justice. Pro bono work is critical, not only for the assistance it provides in protecting fundamental rights, but also for the exposure it offers to lawyers and law students of how the legal sys-

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14. Aric *Press, Brother, Can You Spare 20 Hours?*, AM. LAW. ON THE WEB, Sept. 1, 2005, *available at* http://www.americanlawyer.com.(noting that only 36 percent of lawyers provided 20 hours of assistance a year).

15. *See* RHODE, PRO BONO IN PRINCIPLE, *supra* note 13, at 162.

16. *Id*. at 162.

17. CYNTHIA F. ADCOCK & ALISON M. KEEGAN, A HANDBOOK ON LAW SCHOOL PRO BONO PROGRAMS: THE AALS PRO BONO PROJECT (AALS 2001). *See also* Cynthia F. Adcock, *Fact Sheet on Law School Pro Bono Programs* (AALS Feb. 20, 2003).

18. AALS Commission on Pro Bono and Public Service Opportunities in Law Schools, *Learning to Serve: The Findings and Report of the AALS Commission on Pro Bono and Public Service Opportunities* (1999), *available at* http://www.aals.org/probono/report.html.; RHODE, PRO BONO IN PRINCIPLE, *supra* note 13, at 24.

19. AALS Commission, *Learning to Serve*, *supra* note 18, at 4. Although some schools have recently strengthened their pro bono programs, no evidence suggests that voluntary student involvement rates have changed dramatically.

20. AALS Commission, *Learning to Serve*, *supra* note 18, at 7.

21. For discussion of various proposals concerning mandatory service or reporting for lawyers and law schools, *see* RHODE, PRO BONO IN PRINCIPLE, *supra* note 13, at 26-54; 167-72.

22. Marian Wright Edelman, *Introduction*, I CAN MAKE A DIFFERENCE: A TREASURY TO INSPIRE OUR CHILDREN 6 (Marian Wright Edelman, ed. 2005).

tem functions, or fails to function, for the have nots.

As experience with pro bono cases makes all too clear, "equal justice under the law" may be what we put on courthouse doors, but it by no means describes what goes on inside them. All of us bear responsibility for addressing that gap between principle and practice. We cannot afford, as bar leaders and legal educators, to treat public service responsibilities as someone else's responsibility.

The problems of unequal justice that reshaped my career some three decades ago are still very much with us. They are a sobering reminder of the observation by former ABA President Jerome Shestack: "professionalism is no sport for the short winded."[23] But surely this audience, and others like it, is equal to the challenge. The Michael Franck Award commemorates someone who truly stayed the course so well and so often, and made so much of a difference. His legacy inspires us to do no less.

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23. Jerome J. Shestack, *Defining Our Calling: Focus On Professionalism Benefits Individual Lawyers and Justice As a Whole,* ABA J. Sept. 1999, at 8.