

# Professional Responsibility in Crisis

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It is the last Friday in August, 2005. New Orleans police are completing the usual processing and booking procedures at Orleans Parish Prison for the people they have arrested during the preceding twenty-four hours. Detainees in holding cells await their appearance before a local judge, who will decide whether they should be released or if bail is necessary. Aside from the relatively few people charged with serious violent felonies, such as murder and gun-related crimes, most detainees anticipate returning home shortly. Like many modern police forces, New Orleans' arrest policy targets minor offenders, the people most susceptible to charges of marijuana or drug possession, drunk and disorderly conduct, prostitution, petty property crimes, and violation of city traffic laws.<sup>1</sup> People who failed to pay court fines or fees

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\* Professor of Law, Maryland School of Law. The author would like to dedicate this article to every pro bono lawyer and volunteer law student who acts and responds to people's emergency legal needs following the devastation caused by a catastrophic event. In the aftermath of Hurricane Katrina, he praises the Louisiana lawyers who distinguished themselves by locating and communicating with thousands of incarcerated Orleans-area prisoners, many awaiting trial, who were transferred to prison facilities throughout the state. He also congratulates the law students who formed the Student Hurricane Network and who continue to provide the leadership that makes it possible for over four thousand law students from across the nation to travel during school recess and to provide legal and humanitarian assistance to Gulf Coast residents. He expresses heartfelt appreciation to Ms. Cecilia Marshall for her words of encouragement at the Wiley A. Branton Symposium and to her and her late husband, The Honorable Supreme Court Justice Thurgood Marshall, for their unwavering commitment to human rights. He took enormous pleasure writing this article with a special group of Maryland law students and thanks each of his research assistants—Anne M. Deady, Candace Holmes, Ashley Houston, Ingrid Lofgren, Matthew Laver, Kavita Sahai and Caleisha Stuckey—for their contributions, encouragement and ideas and for meeting the deadline. The author also expresses his genuine appreciation to the dean and associate dean for their support and for providing a generous summer research grant. Lastly, he thanks his Maryland colleagues who offered wonderful suggestions as to the “half-baked” presentation where the idea for this article first surfaced, and to colleagues Louise Harmon and Stephen Wizner for their advice and comments.

1. Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapses: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 159 (2006). Since the mid-1990's, New Orleans police followed the “broken-windows” strategy of law enforcement in which officers arrest small-time offenders for minor crimes on the theory that strict enforcement reduces the likelihood of greater damage to the community, just as fixing the window dissuades lawbreakers from causing

in a timely manner also are here serving weekend time for bench warrants<sup>2</sup> — just the typical zero tolerance and misdemeanor crowd that comprises New Orleans', and most cities', arrestee population. None of the detainees could possibly imagine that they would still be in jail seven months later, waiting to see a judge for the first time.

When the eye of Hurricane Katrina took dead aim at New Orleans, causing the destruction of several canals and massive flooding, criminal justice officials had no plan for evacuating the almost nine thousand prisoners and pretrial detainees in Orleans and surrounding parish prisons.<sup>3</sup> Instead, they maintained the usual policy of keeping detainees inside their locked cells during the storm and afterwards.<sup>4</sup> When the levees overflowed, most prisoners found themselves amidst a panic-stricken jail population and immersed in sewage-filled, chest-high water, with the loss of electrical power causing total darkness and stifling hot conditions.<sup>5</sup> Detainees' life-threatening exposure continued until they were evacuated the following day and removed from this "island of fear."<sup>6</sup> Remarkably, no one perished.<sup>7</sup>

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more harm. See, George L. Kelling & James Q. Wilson, *Broken Windows*; ATLANTIC, Mar. 1982, available at <http://www.theatlantic.com/doc/198203/broken-windows>; cf. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 271, 301-03 (1998). During the week of January 7-11, 2007, I supervised volunteer Maryland law students who assisted public defenders in New Orleans Magistrate Court where an arrestee first appears. My data revealed that, in a city that has one of the highest homicide rates nationally, only 12% were arrested for a violent crime, i.e., murder and attempt murder, aggravated assault, armed robbery and gun possession. Nearly ninety percent of arrestees were charged with non-violent, misdemeanor offenses, including about one out of three individuals were charged with marijuana possession (data on file with author). Vi Landry, *Defenseless*, GAMBIT WKLY., Sept. 5, 2006, [http://www.bestofneworleans.com/dispatch/2006-09-05/cover\\_story.php](http://www.bestofneworleans.com/dispatch/2006-09-05/cover_story.php) (quoting Public Defender Meg Garvey, "I just want someone to explain to me how the State has more interest in referring someone to court for having a joint than an individual has in his own safety").

2. Garrett & Tetlow, *supra* note 1, at 136.

3. *Id.* at 134. See also *id.* at 148 (indicating there were about 8,000 prisoners transferred from Parish Prison to Louisiana state prisons); *This World: Prisoners of Katrina* (BBC television broadcast, Aug. 13, 2006). Phyllis Mann, the former President of the Louisiana Association of Criminal Defense Lawyers and a leader in organizing volunteer lawyers to interview the Orleans prisoners transferred to Louisiana prisons, see *infra* note 15, provided detailed data indicating that the total Orleans Parish Prison and nearby parish jails, such as Ascension, Ibarca and Jefferson counties was 8,967. E-mail from Phyllis Mann, Attorney, to author (Jan. 4, 2008) (on file with author) (indicating that "the New Orleans Sheriff's database listed 6,375 prisoners evacuated from the Orleans Parish Prison, America's seventh largest jail facility.") See Garrett & Tetlow, *supra* note 1, at 148.

4. Garrett & Tetlow, *supra* note 1, at 136.

5. See *Id.* at 136-37.

6. *Id.* at 138. Michael Perlstein, *Prison Becomes Island of Fear: Inmates and Guards Were in it Together*, TIMES-PIYAYUNE, Sept. 23, 2005 at A1. It was not until the day after the levee broke and the prison flooded that the Louisiana Department of Corrections began to take prisoners and detainees out of the jail six at a time by boat to higher ground, which included a nearby highway overpass. It was on this interstate that over 1,200 inmates remained, some for

Surviving the Orleans Parish jail, however, exposed detainees to a different type of vulnerability, one in which they remained incarcerated indefinitely and without counsel or access to the courthouse. During the months that followed, they were the lost and forgotten people in a justice system where the conventional criminal courts remained closed for most of the next year.<sup>8</sup> While Louisiana Department of Corrections officials eventually succeeded in safely transporting detainees out of New Orleans, the detainees were then scattered in forty different Louisiana prisons and jails and not easily found.<sup>9</sup> Contrary to usual procedure, prison officials accepted the New Orleans prisoners without requiring identification by name and charge.<sup>10</sup> Once admitted, detainees in many facilities were unable to make outside phone calls or to speak with attorneys.<sup>11</sup>

Moreover, instead of segregating and protecting non-violent, pre-trial detainees from inmates charged or convicted of violent crimes, Correction officials housed everyone together.<sup>12</sup> Sometimes this meant placing detainees in poorly supervised outside living areas, like the football field adjacent to the Elayn Hunt Correctional Facility in St. Gabriel, Louisiana.<sup>13</sup> State Correction representatives also transported more than one thousand other men and women awaiting trial to the notorious, previously all-male, Angola State Penitentiary and to other maximum-security prisons.<sup>14</sup> Once there, detainees lost contact with the outside world, until a small rescue squad of criminal defense lawyers managed to locate them in the weeks following Katrina.<sup>15</sup>

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over three days, before they were bused to other Louisiana jails. *See This World: Prisoners of Katrina*, *supra* note 3.

7. Garrett & Tetlow, *supra* note 1, at 137 (citing interview with Renee Lapeyvolerie, Spokesperson, New Orleans Criminal Sheriff Marlin Gusman, in New Orleans, La. (Dec. 12, 2005)).

8. *See* Gwen Filosa, *Courthouse Set to Reopen Today: Trials Resume Monday at Tulane and Broad*, *TIMES-PICAYUNE*, June 1, 2006, at B1.

9. *See* Garrett & Tetlow, *supra* note 1, at 135. Phyllis Mann indicated that evacuated prisoners were transferred to forty jails and prisons throughout Louisiana and to one Florida federal facility. E-mail from Phyllis Mann, Attorney, to author (Feb. 29, 2008) (on file with author).

10. Garrett & Tetlow, *supra* note 1, at 148.

11. *Id.* at 139.

12. *Id.* at 137.

13. *Id.* at 138.

14. *Id.* at 139. Telephone Interview with Phyllis Mann, (Dec. 31, 2007). Approximately, four hundred women were transferred to Angola's all-male penitentiary where they remained for an average of four to six months. *Id.*

15. *Id.* The original band of ten to twenty full-time, volunteer lawyers included mainly displaced New Orleans private criminal defense and public interest lawyers and public defenders. Their numbers were soon supplemented by a rotating group of about eighty additional volunteer Louisiana lawyers who accepted specific assignments to interview prisoners at a prison located in their local community. Together, the "One Hundred Plus" attorneys took extraordinary mea-

Even then, most detainees and prisoners remained incarcerated and without a public defender for much of the next year and longer.

Where were the rest of the twenty thousand licensed lawyers of the Louisiana bar?<sup>16</sup> Like most residents, the great majority of the 9,000 attorneys in the New Orleans region were forced to evacuate. Virtually none returned until late October when they would face the massive job of recovering from Katrina and repairing the damage to homes and law offices.<sup>17</sup> Only ten public defenders remained out of the forty-four staff attorneys who previously practiced in the Orleans Parish Defender's Office.<sup>18</sup> The ad hoc, rescue group of criminal defense and public interest lawyers sounded the statewide alarm in an effort to galvanize the legal community.<sup>19</sup> Though some criminal de-

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asures by traveling to the many state prisons where prisoners had been transferred. According to Mann, the volunteer lawyers interviewed 6,281 prisoners or 70-75% of the 8,967 incarcerated individuals whom she indicated had been transferred from New Orleans Parish Prison. Mann explained that the emergency nature of the crisis and limited number of available attorneys resulted in an interview confined to identifying individuals' whereabouts, general well-being, case status, and family and community ties. *Id.*

16. E-mail from Frank Neuner, President, La. State Bar Assoc., to author (Feb. 10, 2008) (on file with author) (estimating that of the 20,000 members, about 16,000 lawyers practiced law in Louisiana. He indicated about 9,000 Louisiana attorneys practiced in the several parishes located in the New Orleans area and were displaced). See *infra* Part III.B. describing the post-Katrina catastrophe.

17. Interview with Frank Neuner, President, La. State Bar Assoc. (Jan. 6, 2008). The president-elect of the New Orleans City Bar Association, Carmelita Tertaut, took office just after Katrina. Ms. Tertaut, who had been practicing law for thirty years and who specializes as a product liability defense attorney with a New Orleans firm, described the tumultuous upheaval that she and other attorneys experienced after leaving the city. Ms. Tertaut lived in Alexandria the first ten days after the storm and traveled 155 miles each day from her sister's home to her law firm's satellite office in Baton Rouge, "terrified about getting a flat tire, finding gas and locating a safe water supply." Tertaut explained that the firm's "managing partner was able to secure space. Fifty lawyers shared six offices in a 4,000 square feet area. We immediately sent a message saying 'We survived, we're alive, here is our address.' All of us remained displaced till late October but even then our cell phones remained unreliable for 2-3 months." Tertaut described the extreme difficulties of managing a family life. Said Tertaut:

My teenage daughter stayed home alone from the time I left for work at 7 a.m. until I returned at 8:30 in the evening when I found her living in darkness because we had no electricity. My other children lived elsewhere with relatives. Schools remained closed for two months. No one from outside New Orleans can understand what we faced. They were not living it.

Telephone Interview with Carmelita Tertaut, President-Elect La. State Bar Assoc. (Feb. 15, 2008).

18. E-mail from Phyllis Mann to author, *supra* note 9. See also, Garrett & Tetlow, *supra* note 1, at 170.

19. Interview with Phyllis Mann, *supra* note 14. Baton Rouge attorney, Julie Kilborn, also was a prominent leader of the Louisiana criminal bar's volunteer efforts. The law students' Student Hurricane Network makes repeated references to attorneys Mann and Kilborn ("Mann-Kilborn") in their organization's annual reports. See *infra* Part III.C.2.

fense lawyers responded and “no one refused our request for help,”<sup>20</sup> these heroic efforts were the exceptions. Very few members of Louisiana’s predominantly civil bar answered the call for more defenders to assist the incarcerated detainees.<sup>21</sup>

Understandably, many displaced lawyers and families suffered substantial loss and injury that made it impossible to respond to indigent defendants’ need for representation during the aftermath and months that followed Katrina.<sup>22</sup> Yet, other Louisiana attorneys were significantly less affected and some not at all; indeed, many lawyers from outside of New Orleans were soon able to resume work. Consequently, Katrina had a varied impact upon Louisiana attorneys’ capability to engage in pro bono service, particularly as the bar became aware that the New Orleans Criminal Courthouse had closed and would remain inoperable during the next ten months and that judges conducted arraignment court from the Greyhound bus terminal.<sup>23</sup>

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20. Interview with Phyllis Mann, *supra* note 14 (describing volunteer lawyers contacting members of the Louisiana Association of Criminal Defense Attorneys and asking that they speak to New Orleans prisoners who were transferred to a nearby prison).

21. Interview with Frank Neuner, *supra* note 17 (indicating that about 95% of Louisiana attorneys practiced civil law and that most did not feel capable of volunteering to assist public defenders’ representation of indigent clients). See *infra* Part III.B. While acknowledging that “the organized bar is all about civil practice,” former State Bar President, Marta Schnabel, described how she and Neuner “attended meetings right after Katrina and made lots of phone calls. I am not sure what else we could have done back then.” Telephone Interview with Marta Schnabel, former President, La. State Bar Assoc. (Feb. 22, 2008). As time went by, Bar leaders recognized “it was time we knew what was going on in the criminal justice system.” Telephone Interview with Carmelita Tertaut, *supra* note 17 (estimating that “ninety-eight percent of city attorneys do nothing but civil law”). Tertaut was among two hundred volunteer city attorneys who took a criminal defense, training course in early Spring, 2006 and accepted assignment of an indigent defendant charged with a minor criminal offense. *Id.*

The State and New Orleans bar responded in many ways after Katrina to meet attorneys’ and people’s emergency civil needs. The Louisiana State Bar Center on St. Charles Avenue was “almost undamaged” and permitted lawyers to use its’ office space and computers. The State Bar created an emergency hotline for Katrina victims and allowed the office to become “an internet café.” *Id.* The city bar later became a place where Housing Court was conducted while joining the state bar as a clearinghouse for lawyers and assisting many who were displaced. *Id.* In the first months of 2006, about 600 to 800 civil lawyers volunteered for legal assistance that included presenting disaster training seminars and distributing written manuals. Interview with Frank Neuner *supra* note 17; see *infra* notes 225-31 and accompanying text. Marta Schnabel estimated that within the two-year period following Katrina, as many as two thousand Louisiana civil attorneys had made pro bono contributions. Telephone Interview with Marta Schnabel (Feb. 22, 2008).

22. Interview with Carmelita Tertaut, *supra* note 17 (describing returning New Orleans lawyers as “the walking wounded”).

23. Garrett & Tetlow, *supra* note 1, at 144-45. With the jails in New Orleans flooded, the Louisiana Department of Corrections was forced to set up a temporary jail known as “Camp Greyhound” at a bus terminal. For two months, people arrested after the storm were detained and represented by a public defender at bail hearings at Camp Greyhound. *Id.*; Interview with Phyllis Mann, *supra* note 14.

Other news articles reported that Katrina prisoners were serving longer sentences than the maximum that they might have received *had they first been tried and convicted* for the typical zero tolerance crime.<sup>24</sup> Some members of the judiciary did their best to answer the pleas of attorneys and judges who sought courtroom space to conduct habeas hearings for prisoners who had served their full sentence;<sup>25</sup> other attorneys and judges had less success with other appellate judges who paid little heed to their call for assistance.<sup>26</sup> Until the Orleans criminal courthouse opened in June, 2006, the Louisiana Supreme Court had taken no action to reopen it or to relocate the court elsewhere.

In contrast to the failure of most Louisiana attorneys to pitch in during the crisis and help the few available public defenders, New Orleans' clinic students and other law students from around the country responded to prisoners' legal needs. Within weeks after Katrina, Gulf Coast law students proposed and formed a national Student Hurricane Network (SHN).<sup>27</sup> In December 2005, SHN organized more than two hundred fifty law student volunteers, who traveled to the city and provided legal assistance to people desperate for counsel and advice.<sup>28</sup> Hundreds of colleagues from other law schools, who also refused to conduct business as usual, soon joined SHN students. Many more students followed. They provided the countless hours needed to locate thousands of people lost in the Orleans criminal justice sys-

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24. Garrett & Tetlow, *supra* note 1, at 149.

25. Louisiana Supreme Court Justice Katherine Kimball received universal recognition from Louisiana attorneys for the leadership role she assumed throughout the post-Katrina crisis and for her efforts to coordinate finding available judges and courtrooms where emergency petitions could be heard. Shortly after Katrina, Justice Kimball represented the Louisiana Supreme Court at the first emergency criminal justice meeting that was held at her Baton Rouge office. Among those attending were the State Attorney General, the New Orleans District Attorney, the State Bar Association President Frank Neuner and a representative of the State Criminal Defense Bar, Jim Boren. Justice Kimball and practicing attorneys also praised New Orleans Administrative Judge Calvin Johnson for his dedicated service in attempting to respond to the crisis generated from the closing of the city courthouse, the unavailability of defense counsel and the difficulty in transporting criminal defendants. Interview with Justice Katherine Kimball, La. Supreme Court (Feb. 26, 2008); conversations with Louisiana attorneys who preferred anonymity.

26. Garrett & Tetlow, *supra* note 1, at 149-51 (describing the difficulties in judicial officers finding an alternative courtroom site. "The few local judges who tried to intervene found an indifferent state supreme court." *Id.*). See also E-mail from Phyllis Mann to author, *supra* note 3; Telephone Interview with Phyllis Mann, *supra* note 14; Telephone Interview with Frank Neuner, President, La. State Bar Assoc. (Jan. 3, 2008).

27. See *infra* Part III.C.1. (describing the creation of the Student Hurricane Network in the weeks following Katrina and the work of law student volunteers).

28. See *infra* Part III.C.2.

tem.<sup>29</sup> By the spring of 2007, the newly-created Student Hurricane Network had attracted and organized more than 2,700 law student volunteers, who arrived in New Orleans and Mississippi during their school recesses and offered their legal skills and physical labor to the displaced population.<sup>30</sup>

Many first-year and upper class students, sometimes accompanied and supervised by volunteer lawyers and clinic faculty from their home states, worked directly with New Orleans public defenders. They fearlessly entered the prisons, interviewed prisoners who had never previously met or spoken with their attorney and completed the factual investigation by calling family and employers.<sup>31</sup> Students then gave the report with verified information to a public defender, who frequently succeeded in arguing for a person's pretrial freedom. After a week's volunteer stint, many law students wondered aloud: "If inexperienced students like us, having just completed one semester of law school, could do this work, why haven't more members of the bar stepped forward?"

Were admitted, licensed Louisiana attorneys obligated to lend assistance to a non-functioning criminal justice system and to indigent defendants who had been indefinitely denied access to court and to counsel? The formalistic, legal answer is no. Louisiana's ethical code

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29. See Garrett & Tetlow, *supra* note 1, at 153. Eight months after the storm, clinic students and faculty at Tulane and Loyola criminal law clinics were appointed by Chief Judge Calvin Johnson to represent indigent defendants. Tulane Law Professor Pamela Metzger described the situation she and her clinic students faced. "Part of what blew us away when we got up there, we just met person after person after person who had never seen a lawyer, who had no idea what they were in jail for . . . and to the extent they did, they were wrong, to a point. . . . The students kept saying, 'How can we not do something?'" Liz Porteus, *Victims of Post-Hurricane Katrina Justice System get Help from Law Students* (FOX News broadcast Aug. 29, 2006). Law students located and interviewed prisoners who had not been represented previously; they filed appropriate habeas and ineffective assistance of counsel motions in seeking court-ordered dismissal of charges. Ann Farme, *The Gulf Coast Needs You*, *STUDENT LAW*, Sept. 2006 (citing telephone conversation with Pamela Metzger, Associate Professor, Tulane Law School (Oct. 23, 2005); see also Landry, *supra* note 1.

30. Fran Simon, *Law Students Storm New Orleans With Legal Aid*, *TUL. U. MAG.*, Mar. 29, 2007, available at [http://www2.tulane.edu/article\\_news\\_detailscfm?ArticleID=722](http://www2.tulane.edu/article_news_detailscfm?ArticleID=722)). Student volunteers represented about one hundred law schools. See *infra* notes Part III.C.1. E-mail from Morgan Williams, Co-Founder, Student Hurricane Network, to author (Mar. 9, 2008) (estimating that a total of 4,200 law student volunteers had provided legal assistance to the Gulf Coast region by late February, 2008).

31. For instance, during the winter 2006 school recess, University of Maryland and University of Baltimore law students worked with New Orleans public defenders. They interviewed detainees throughout the State. Some had been awaiting trial for periods ranging from several months to more than two years. Students also located individuals who had remained incarcerated longer than their maximum sentence. Other students interviewed newly-arrested individuals and assisted defenders who argued for pretrial release. See *infra* notes 290-291.

of professional responsibility requires no such action.<sup>32</sup> However, that response does not address the deeper issue of whether the legal profession in a state such as Louisiana where pro bono service is merely an aspiration ought to have a duty to assist the needs of prisoners in the event of a crisis. As professionals, lawyers should be concerned not only with meeting their obligations to clients according to the letter of the law, but also with acting as moral agents of justice for the public community. The current Model Rules of Professional Conduct reflect the profession's evolving standard of a lawyer's duty to serve the public's needs. Forty-one states now embrace the Model Rules' Preamble that considers every lawyer as "a public citizen having a special responsibility for the quality of justice."<sup>33</sup> Louisiana, though, is one of a handful of states whose ethical standards refused to incorporate the Model Rules' Preamble and considered the Model Rules' pro bono duty to serve the poor to be an aspirational goal.<sup>34</sup>

What, then, would the legal profession be required to do had a Katrina-type catastrophe occurred in one of the many states where the Bar accepted and followed the Model Rules? Would attorneys be obligated to assist prisoners who remained incarcerated long past their

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32. Louisiana is one of only nine states that does not include the Preamble to the Model Rules of Professional Conduct in its ethical standards. *See infra* note 34. The Louisiana state judiciary and bar also rejected the ABA's Model Rule 6.1 that recognizes "every lawyer has a professional responsibility to provide legal services to those unable to pay." ABA MODEL RULES OF PROF'L CONDUCT R.6.1 (2007) [hereinafter MODEL RULES]. Instead, the Louisiana rules adopted the language that makes a lawyer's pro bono, public service aspirational and not a professional duty. "Every lawyer should aspire to provide legal services to those unable to pay." *Id.* *See infra* pp. 708-10 and accompanying text.

33. ABA MODEL RULES OF PROF'L CONDUCT pmbl 1 (2007) [hereinafter PREAMBLE]. The first sentence of the Model Rules of Professional Conduct reads: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." *Id.*

34. *See supra* note 32. The following forty states have adopted the first paragraph of the Preamble of the Model Rules of Professional Conduct. *See* <http://www.abanet.org/cpr/links.html#States> (last visited Feb. 29, 2008). These states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. *Id.* Additionally, forty states have adopted the equivalent of Model Rules of Professional Conduct Preamble paragraph 6, stating that "[A]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and . . . should be mindful of deficiencies in the administration of justice." *Id.* Georgia omits the word *public* from its version. Eight states—California, Kentucky, Louisiana, Maine, Michigan, Nevada, New Jersey, Oregon—and the District of Columbia have no preamble at all. *Id.* New York's preamble follows the 1969 Model Code of Professional Responsibility.

maximum sentence or who had been denied access to counsel on charges ranging from illegally reading Tarot cards to gun possession?<sup>35</sup>

Katrina reveals the ambiguity of the Model Rules' ethical code. While the Model Rules honor the attorney's duties to the individual client, the Preamble begins by reminding lawyers of their "special responsibility for the quality of justice."<sup>36</sup> Though not insisting that attorneys dedicate specific hours and expertise to serve the unrepresented, the 1983 Preamble declares that attorneys take a proactive approach "to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."<sup>37</sup> The Preamble's powerful language exhorts lawyers to be "mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford legal assistance."<sup>38</sup> The Preamble's influence eventually led the profession to acknowledge the core value of "provid[ing] pro bono legal services to those unable to pay," though it explicitly declined to enforce an hourly requirement against members who fail to comply.<sup>39</sup> In brief, the Preamble speaks to lawyers' ethical societal values and commitment to equal justice and leaves compliance to each individual lawyer.

This article encourages bar associations to consider whether public service is required of attorneys during a time of crisis. At a minimum, it seeks to stimulate debate and to encourage bar associations to revisit the meaning of attorneys' professional and ethical responsibility when catastrophe strikes. Specifically, what ethical duty, if any, exists when defenders become scarce, a justice system malfunctions, and the accused disappear? Many attorneys may consider such an examination of pro bono responsibility foolhardy and part of the "been there, done that" school of reality that the bar previously faced when it considered and rejected similar proposals at the time the Model Rules were introduced and at other times during the past quarter cen-

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35. Garrett & Tetlow, *supra* note 1, at 128.

36. PREAMBLE, *supra* note 33, at ¶ 1.

37. *Id.* at ¶ 6.

38. *Id.*

39. See *supra* note 2, referring to ABA MODEL RULE 6.1 that recommends a lawyer's pro bono responsibility. Rule 6.1 recommends that a lawyer in the full-time practice of law "should aspire to render at least fifty hours per year of pro bono public legal services . . . a substantial majority . . . to persons of limited means." MODEL RULES 6.1(A)(1).

ture.<sup>40</sup> The ABA's and state bars' consensus then was that lawyers have no greater collective responsibility to provide uncompensated, pro bono legal assistance than any other group of professionals have to provide similar unpaid services. Lawyers declared they had the same right as everyone else to earn a livelihood and to make business decisions that are in their self-interest and maximize profitability. Consequently, most attorneys agreed that the legal bar is justified in declining to volunteer and in resisting required public service for pro bono causes, including coming to the assistance of suspected criminals who, like Louisiana's, were detained and denied access to court before trial for most of the year that followed Katrina.

Has anything changed since Katrina's catastrophe to cause the profession to reconsider its collective response in times of crisis? Should a bar association respond differently today by construing civil and criminal attorneys' license to practice law to include an ethical responsibility that stretches beyond the individual client and requires pro bono service during extraordinary moments of destruction and tragedy? Are the "member[s] of a learned profession" prepared to revisit their professional duty in a crisis context and inform colleagues that they must serve when disaster strikes? And if attorneys decide, after careful examination, that they are not required to come to the aid of a disabled legal system no longer capable of protecting individual liberty and fair process, should the profession say so explicitly and declare that professional responsibility does not require the bar's collective response, but is satisfied by the actions of relatively few volunteers?

Part I presents a historic context for understanding lawyers' ethical and "special responsibility to the quality of justice" in a time of crisis under the prevailing guidelines of the Preamble and Model Rules of Professional Conduct. Part I traces the historic path and century-old effort of the organized bar to establish uniform ethical rules. The ethical, public service journey began in 1908 when the American Bar Association drafted the Canons of Ethics and continues to the second revised 1969 Model Code of Professional Responsibility. In addition, Part I devotes considerable attention to analyzing the importance of the profession's evolving Preamble and to appreciating the profession's development of a shared consensus for defining a law-

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40. One commentator explained that the "proposal for mandating pro bono requests have come and gone but mostly gone." Deborah A. Rhode, *Cultures of Commitment: Pro Bono for Lawyers*, 67 *FORDHAM L. REV.* 2415, 2416 (1999).

yer's ethical duty. Lastly, Part I suggests that the social and political influence of the civil rights movement and the extension of human rights following *Brown v. Board of Education*<sup>41</sup> were substantial factors in transforming the Preamble's 1969 language.

Part II presents and analyzes the prevailing Model Rules of Professional Conduct which took effect in 1983. This discussion begins by exploring the impact of the civil rights and women's movements on the diversity of people entering the profession in the late 1960's and 70's, and how this generation of law graduates applied their human rights experience to extend lawyers' sense of social and public responsibility. In addition, it highlights the Preamble's revised language that places a special duty on lawyers to promote justice and to engage in pro bono, public interest endeavors. Part II then identifies the stark contrast between lawyers who view the law mainly as a business that focuses on the individual client with those who see the practice of law as a profession where lawyers' ethical commitment extends to the public community, and requires lawyers to respond when confronted with emergency issues, such as the malfunctioning of a justice system. Resolving this tension will be dispositive of lawyers' professional responsibility in times of crisis.

Part III examines the legal community's mixed and divided response to recent catastrophic events, like Hurricane Katrina and September 11th. It analyzes the New York and Louisiana legal communities' ethical duty and response to serve the legal needs of people directly affected by two different types of horrific tragedies. Part III also describes law students' contributions following the flooding and devastation of the Gulf Coast states caused by Katrina. It suggests that the ethical standard modeled by students may play an influential role in the legal profession's proper response to natural or human disaster.

Part IV presents an ethical model for consideration that affirms a broader conception of attorneys' professional duty to society and to the justice system during a time of crisis. It proposes a strategy and plan for implementation that requires lawyers' leadership and active participation. Part IV suggests that if the bar fails to adopt this model, attorneys should candidly accept their ethical responsibility to the individual client, while making plain to the public that the profession owes no special duty to volunteer to meet the emergency legal needs

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41. 347 U.S. 483 (1954).

of a community in crisis. Deciding the side of the professional responsibility fence on which attorneys want to be seen will be a self-defining moment for the profession.

Whatever the outcome, this article urges the profession, along with national and state bar associations, to engage in vigorous dialogue and to clarify the Preamble's numerous references to lawyers' special role as public citizens and dedication to pro bono service in a time of crisis. Delineating lawyers' ethical responsibilities is essential for understanding the role of government and the private sector when next faced with a catastrophe, whether it is a natural disaster, an act of terrorism, or any "deficiency in the administration of justice" that wrecks havoc on the criminal justice system. This article concludes that the profession owes the public community a straightforward pronouncement indicating either that it is prepared to lead and to act collectively in a crisis or is comfortable with members being sideline observers and voluntary participants. Should attorneys choose to accept a public service duty in a time of crisis, the article suggests a required plan in which each member of the bar would be obligated to serve on a rotating, pre-designated basis.

## I. THE EVOLVING PREAMBLE: FROM THE CANONS AND CODE TO THE MODEL RULES OF PROFESSIONAL CONDUCT

The current Model Rules of Professional Conduct reflect nearly one hundred years of movement by the legal profession and its influential, main national bar organization, the American Bar Association,<sup>42</sup> towards establishing a uniform standard for lawyers'

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42. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 65 (1976); Philip C. Aka, *Assessing the Impact of the Supreme court Decision in Grutter on the Use of Race in Law School Admissions*, 42 CAL. W. L. REV. 1, 22-23 (2005); James A. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395 (2003). Formed in 1878 "as an exclusive social fraternal organization of high status lawyers," *id.* at 2402 n.47, the American Bar Association remained an exclusively white and male membership until 1950 when it admitted the first African-American attorney. Susan Carle added that the American Bar Association's membership was "composed exclusively of men, who were Anglo-Saxon and protestant." Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 16 (1999). See also Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics* 8 U. CHI. L. SCH. ROUNDTABLE 469, 485 (2001); 68 ANNUAL REP. OF THE A.B.A. 110 (1943); GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 898-99 (3rd ed.1999). The ABA's "settled practice . . . to elect only white men" led members to rescind their 1912 admission of three African American lawyers, whom the executive committee had "unknowingly" admitted. Former Bar President Moorfield Storey declared "[i]t is a monstrous thing that we should undertake to draw a color in the Bar Association." *Id.*

professional conduct and ethical responsibilities. While the original 1983 Model Rules and subsequent revisions in 2002 focused primarily on clarifying the lawyer's duties while practicing law, the Model Rules' drafters spent considerable attention on rewriting the previous Preamble, which had served the profession for most of the twentieth century. The revised Model Rules' Preamble alerted the current generation of attorneys to their public and social responsibilities.

Unlike the Preamble to the first Canons of Ethics of 1908 and the Preamble to the 1969 Model Code of Professional Responsibility, the ABA Model Rules' Preamble commands attorneys to incorporate a commitment to public service into their practice that goes beyond the lawyer's maxim of loyalty to the client and of forthrightness as an officer of the court. The current Preamble directly communicates to lawyers that they are members of a profession<sup>43</sup> which has a "special responsibility to justice."<sup>44</sup> The 2002 revision makes pro bono work on behalf of the economically disadvantaged a necessary part of an attorney's professional obligation.<sup>45</sup>

The profession's evolving Preamble and ethical code reflect a remarkable shift within the profession to recognize an attorney's duty to provide access to counsel to poor and lower income people, and creates the potential for transforming the bar's responsibility to meet the needs of the economically disadvantaged. As the following sections explain, comparing the ABA's first effort in 1908 and again in 1969 to write a preamble and national code of ethics with the expansive public service language of the current Model Rules reveals the substantial distance the legal community has traveled these last twenty-five years.

#### A. The Significance of a Preamble

Writing a preamble is the starting point for any organization that is interested in creating a uniform code of ethics for its membership. The deliberate choice of language provides obvious clues for understanding the way in which members self-identify and gain a "feel[ing]

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43. PREAMBLE, *supra* note 33, at ¶ 1. In 2000, the ABA Ethics Commission modified the previous language by adding the reference to attorneys being members of a profession to the Preamble to the Model Rules.

44. *Id.* at ¶ 6. The Preamble states that all lawyers should devote professional time, resources and civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.

45. *See* MODEL RULES, *supra* note 39, at 6.1.

of cohesion.”<sup>46</sup> A Preamble’s declarations allow a group consensus to develop around the “pertinent and essential virtues” members share.<sup>47</sup> The agreed upon language essentially holds colleagues accountable for the ethical rules that follow, and requires compliance. Very clearly, a preamble “sets the tone” for describing an organization’s purposes in developing an ethical code in the first place.<sup>48</sup> The better a group is able to set forth clear objectives in a preamble, the more likely it will achieve a thoughtful and respected standard that “truly reflect[s] the virtue[s]”<sup>49</sup> members hold dear. Similarly, should a preamble fail to speak accurately and convey reality, the easier it becomes for members to ignore “rules” and violate core ethical values.

As the following sections reveal, the ABA’s century-long effort to create a national ethical standard has emphasized different “pertinent and essential virtues” that the membership approved in accepting the Canons of 1908, the Model Code of 1969, and the Model Rules of 1983 and 2002.

#### B. The Preamble to the Canons of Professional Ethics of 1908

In contrast to the current Preamble to the Model Rules of Professional Conduct, the Preamble to the first ABA Canons of Professional Ethics of 1908 (Canons) never mentioned lawyers’ “special responsibility to justice,” nor referred to the “deficiencies” within a legal system that failed to provide access to counsel for the poor and disadvantaged.<sup>50</sup> Additionally, none of the thirty-two canons were comparable to Model Rule 6.1’s pro bono provision, which requires lawyers to engage in pro bono activities.<sup>51</sup>

The 1908 Canons had a more limited agenda: the ABA sought to restore public trust to a profession that had suffered substantial dam-

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46. Andrew Olson, *Authoring a Code of Ethics*, 1998, <http://ethics.lit.edu/codes/Writing A Code. html>

47. *Id.*

48. *Id.*

49. *Id.*

50. This is not surprising considering it was accepted practice until 1932 to deny counsel to indigent defendants in criminal prosecutions ranging from misdemeanors to felonies and including capital crimes. In 1932, the U.S. Supreme Court first established a constitutional due process right to counsel in a capital crime on a case by case basis. *See Powell v. Alabama*, 287 U.S. 45, 71 (1932).

51. While the 1908 Canons made no mention of a pro bono requirement, it took the first step toward reminding attorneys that they should fulfill their responsibility to clients who may not be able to afford a legal fee. Canon 12 declared that “[a] client’s poverty might require a reduced fee or even no fee at all.” Canon 4 stated that a lawyer “ought not . . . be excused for a trivial reason.” A.B.A. *CANONS OF PROF’L ETHICS*, Canon 12 (1908).

age to its integrity.<sup>52</sup> It hoped to repair a legal system that the public no longer viewed as impartial, but rather as serving the interests of the wealthy and powerful. To counter this public perception, the drafters' proposed a one-paragraph Preamble to the ABA's Canons that would reflect the elite organization's "group consensus" of lawyers' shared core values of honesty, integrity, and impartial justice, which they placed in the "tone-setting" statement of purpose. The Preamble begins by declaring that

In America, where the stability of Courts and of all departments of government rests upon the approval of *the* people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the *public* shall have absolute *confidence in the integrity and impartiality* of its administration. The future of the Republic, to a great extent, depends upon our maintenance of *Justice pure and unsullied*. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.<sup>53</sup>

Approving the Preamble's language and shared values, however, left plenty of room for the ABA's leadership to interpret the Canons as requiring peer monitoring and ethical supervision only for some, and surely not for all, lawyers.

#### Political and Social Influences Leading to the 1908 Preamble

When the ABA Committee on the Code of Professional Ethics (Committee) first began the two-year process of drafting the Preamble and thirty-two canons that comprised the 1908 code, the leadership knew it faced a severe credibility crisis. During the preceding decades, the public had genuine doubts about the legal profession's commitment to justice and to the public interest. Their negative view stemmed from lawyers' close attachment and allegiance to the corporate community's financial interests. At best, attorneys' conduct translated into people perceiving them as selfish; at worst, lawyers were seen as a corrupting influence on the legal system.<sup>54</sup>

Consequently, the drafters' 1908 Preamble emphasized the "essential virtue" of the legal profession's "integrity" and its indispensa-

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52. Carle, *supra* note 42, at 7-8.

53. ABA CANONS OF PROF'L ETHICS, pmb. (1908) (emphasis added).

54. The public expressed discontentment with the increased "commercialization" of lawyers, as they were perceived as serving the interests of corporate America. See AUERBACH, *supra* note 42, at 40-41.

ble role in ensuring fair, “impartial,” and “unsullied” justice while representing clients’ interests.<sup>55</sup> For too long the public had been accustomed to members of the bar using their legal expertise and political influence to counsel corporate clients and the super wealthy “robber barons” about ways to bypass government regulation and to maximize profits, with little regard for the resulting harm to society and to the common person. Seeing lawyers’ clever legal strategies succeed, despite being inimical to the public good, became a matter of national concern.

President Theodore Roosevelt directly addressed this concern. Speaking at a Harvard commencement ceremony in June of 1905, President Roosevelt roundly criticized the elite legal community for creating “bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth.”<sup>56</sup> The President’s words echoed a similar charge that future Supreme Court Justice Louis Brandeis had leveled against corporate lawyers the previous month when he condemned attorneys’ spirit of commercialization<sup>57</sup> that had “allowed themselves to become adjuncts of great corporations.”<sup>58</sup> It was these corporate lawyers, said Brandeis, who had been “endeavoring to evade or nullify the extremely crude laws by which legislators sought to regulate the power or curb the excesses of corporations.”<sup>59</sup> Brandeis chided the bar for “hav[ing] neglected the obligation to use their powers for the protection of the people . . . .”<sup>60</sup> We hear much of the “corporation lawyer,” Brandeis told the Harvard Ethical Society, “and far too little of the “people’s lawyer.”<sup>61</sup>

President Roosevelt embraced Brandeis’s attitude toward the self-interested profession, while saving his strongest criticism for the

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55. The Preamble’s language was modeled after a draft report written by Committee member and Philadelphia lawyer, Lucien Hugh Alexander, who referred to lawyers’ role in obtaining fairness, integrity and impartiality of justice. See Lucien Hugh Alexander, *Some Admissions Requirements Considered Apart From Educational Standards*, 28 ANNUAL REP. OF THE A.B.A. 619 (1905); see also, Altman, *supra* note 42, at 2406, 2411.

56. Theodore Roosevelt, Address at Harvard Commencement Exercises: The Harvard Spirit (June 28, 1905) in XIV HARVARD GRADUATES’ MAGAZINE No. 53, Sept. 1905, at 7-8.

57. Altman, *supra* note 42 at 2405-06; Carle, *supra* note 42, at 8.

58. Louis D. Brandeis, Address Before the Harvard Ethical Society: The Opportunity in the Law (May 4, 1905) in LOUIS D. BRANDEIS, *BUSINESS: A PROFESSION* 337 (Hale, Cushman & Flint 1933) (1914).

59. *Id.* at 338.

60. *Id.* at 337.

61. *Id.* Louis Brandeis added a further challenge for his colleagues. “The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.” *Id.*

business community and for “[e]very man of great wealth who runs his business with cynical contempt for those prohibitions of the law.”<sup>62</sup> The President characterized these highly successful entrepreneurs as “a menace to our community.”<sup>63</sup> He suggested that entrepreneurs’ rise to power would not have occurred without members of “the great profession of the law” providing the legal advice and strategies that allowed the wealthy to “override or circumvent the law.”<sup>64</sup> During his commencement speech, the President criticized the bar for failing to provide moral leadership and encouraged lawyers “to take the lead in the creation of just such a spirit” that would “‘actively frown on’ corporations seeking even greater accumulation of wealth at public expense.”<sup>65</sup> Taking dead aim at corporate lawyers who were “the most influential and most highly remunerated members of the Bar in every centre of wealth,” President Roosevelt urged the bar membership to separate itself from those who engaged in anti-social law practices, and to join government efforts to hold the business community accountable.<sup>66</sup>

The five-member ABA Committee on the Code of Professional Ethics, chaired by President Henry St. George Tucker,<sup>67</sup> accepted President Roosevelt’s “serious charge”<sup>68</sup> that a “hired-gun” mentality within the bar had willingly sold their expertise to the highest bidder<sup>69</sup> and helped clients avoid government regulation without regard to public consequences. Two months after President Roosevelt’s commencement speech, Tucker addressed colleagues at the ABA annual meeting. He urged them to respond to Roosevelt’s “broader inquiry whether the ethics of our profession rise to the high standard which its position of influence in the country demands.”<sup>70</sup> Addressing the ABA gathering, Tucker flattered the legal community for having “more potential for good than any other profession, excepting the Christian ministry, and in some respects more . . . [power] for good than even

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62. Roosevelt, *supra* note 56, at 7.

63. *Id.*

64. *Id.* at 7-8.

65. *Id.*

66. *Id.*

67. Historian Henry Prinker says the Canons “were primarily owing to [Tucker’s] influence.” HENRY S. DRINKER, *LEGAL ETHICS* 24 (1953). See Altman, *supra* note 42, at 2403.

68. Henry St. George Tucker, Address of the President, 28 *ANNUAL REP. OF THE A.B.A.* 299, 384 (1905).

69. Carle, *supra* note 42, at 4.

70. Tucker, *supra* note 68, at 384.

that high profession.”<sup>71</sup> Tucker congratulated his brethren “who stand forth clothed in priestly robes, as ministers at the altar of justice.” He placed utmost confidence in their capability to work toward “vindication of the claim that the profession of the law is the most ennobling and powerful for good of all the secular professions.”<sup>72</sup>

Tucker was well-aware that some corporate and private lawyers’ “pervasive commercialism”<sup>73</sup> had given the profession the negative public image of being a business and trade that cared primarily about money and “personal aggrandizement,”<sup>74</sup> rather than about acquiring a reputation for belonging to a “noble profession” that focused on securing justice and fairness. Yet Tucker and the ABA’s “high-status” leadership declined to scrutinize the conduct of these powerful lawyers. Instead, the Committee decided to move in a different direction. It targeted the practicing bar, and particularly, the recently-admitted, mainly foreign-born, solo practitioner, who comprised a considerably less influential group than did corporate attorneys. These perceived outsiders to the established profession, whom the Committee snidely labeled “the shyster, the barratrously inclined, the ambulance chaser, [and] the member of the Bar with a system of runners,”<sup>75</sup> were considered responsible for the profession’s low public image. It was their “hired cunning,”<sup>76</sup> not that of the corporate lawyer, that brought “dishonor upon the whole profession”;<sup>77</sup> it was they who were “controlled by graft, greed and gain, or other unworthy motive.”<sup>78</sup>

These charges by the elite against the non-elite were familiar. Since the ABA first organized in 1878, leaders remained concerned about the “flood of law school graduates” who, they said, joined the

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71. *Id.*

72. *Id.* at 389.

73. Tucker conceded that lawyers “delicate distinctions in the law . . . makes it possible . . . to cover his tracks in this accomplishment of his [crooked check] ends.” *Id.* at 387. He concluded that America needs the high toned, honorable, conscientious lawyer. *Id.*

74. ABA Comm. on Code of Prof'l Ethics, 29 ANNUAL REP. OF THE A.B.A. 600, 601 (1906).

75. 29 A.B.A. REP. 600, 600-01 (1906). Jerold Auerbach describes the established Protestant bar’s “class and ethnic hostility . . . ethical crusade [against] . . . Jewish and Catholic new-immigrant lawyers of lower-class origin. . . .” AUERBACH, *supra* note 42, at 51. The elite lawyers used the term “ambulance chaser” to scapegoat the foreign-born, “unfit” plaintiff’s lawyer. “Jews and Catholics from eastern and southern European backgrounds” faced overt forms of discrimination within the profession. *Id.* at 52. “Not only were they criticized for professional malfeasance; their speech was mocked . . . and their perseverance was denigrated as aggressive-ness (many were Jewish).” *Id.* at 50.

76. Altman, *supra* note 42, at 2399.

77. Tucker, *supra* note 68.

78. *Id.*; see Alexander, *supra* note 55.

profession “mainly for its emoluments”<sup>79</sup> and who practiced law “differently” than the white, Anglo-Saxon, protestant ‘gentlemen’ of the bar.<sup>80</sup> Once the Committee identified the lower class, foreign-born and individual practitioners as the parties responsible for “debas[ing] our high calling in the eyes of the public,”<sup>81</sup> the Committee easily justified the need for a written ethics code; such a code was required to monitor and discipline the unethical attorneys who “hamper[ed] the administration and even at times subvert[ed] the ends of justice.”<sup>82</sup> Hence, the ABA concluded, a uniform code of Canons would teach the inferior class of lawyers about the proper way to practice law and would “crystallize abstract ethical principles . . . which confront the lawyer in the routine of practice.”<sup>83</sup> The ABA predicted the new Canons would “restor[e] . . . the legal profession’s prestige in the eyes of the general public.”<sup>84</sup> At the same time, enforcing the Canons against the “little guy” attorney would divert public attention from the questionable practices of the corporate bar.

The Preamble’s references to “integrity” and “impartial justice,” then, should be construed within the context of how the ABA intended to apply the Canons of 1908. Rather than focusing on corporate lawyers’ conduct and activities, the ABA drafters appeared motivated to examine practices of the newly-admitted attorney, whose class background and eagerness to attract new clients meant he<sup>85</sup> was more likely to represent lower income clients seeking recourse for industrial, worksite injuries and other tort claims against corporations. The ABA Committee knew these lawyers depended on direct solicitation of clients, who were unfamiliar with the legal process, and on arranging contingency fee agreements with clients unable to afford fixed fees. Thus, when drafting the 1908 Canons, the ABA Commission targeted both practices for elimination, thereby limiting people’s access and ability to retain counsel.<sup>86</sup>

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79. See AUERBACH *supra* note 42, at 47-52, 58-67 (describing the elite lawyers’ opposition to recent immigrants entering the profession from the perceived “lower class”); Alexander, *supra* note 55, at 601.

80. Carle, *supra* note 42, at 16.

81. 29 ANNUAL REP. OF THE A.B.A. 600, 602 (1906).

82. *Id.*

83. *Id.* at 604.

84. Altman *supra* note 42, at 2413.

85. In 1908, the legal profession was more than 99% male. VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY 253-54 (1998) (reporting that in 1900, there were 1,010 women attorneys compared to 113,693 male lawyers).

86. See Judith Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities*, 77 TUL. L. REV. 91, 113 (2002); see also, AUERBACH, *supra* note 42, at 43-48.

Consequently, the Preamble's references to promoting lawyers' integrity and honesty appears to have more to do with the ABA drafters protecting their corporate clients from being sued<sup>87</sup> than it did with embracing President Roosevelt's serious concern that corporate lawyers' greed showed no limit. The ABA leadership took full advantage of the President's criticism to draw attention from lawyers serving the interests of the wealthy and powerful and to cast the spotlight instead on the integrity of the foreign, small-time lawyer, whose "unethical" behavior required a national ethics code. In so doing, the Preamble and Canons protected the elite members of the legal profession from scrutiny. Plaintiffs' lawyers who sued corporations did so knowing they should expect close monitoring by the bar association and were likely to be professionally assailed as a "shyster" or "ambulance chaser."

Perhaps most importantly for the long-term, the creation of the Preamble and Canons of Ethics allowed the ABA to exercise significant control over who would enter law school and who would be permitted to practice law.<sup>88</sup> By raising admission and bar practice standards, the ABA addressed the underlying ways the so-called unqualified "foreign" lawyer had been able to enter and sully the bar's reputation. Empowering the ABA to serve both as the profession's gatekeeper and disciplinarian, the Canons of 1908 actually decreased the availability of attorneys to represent lower income clients, thereby further widening "the ominous gap between the services dispensed by the legal profession and equal justice" for the next 60 years.<sup>89</sup>

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87. Altman, *supra* note 42, at 2405.

88. The ABA leadership frequently commented on the increasing role of the law school, and the diminished practice of apprenticeships, for determining admission to the bar. Alfred L. Brophy, *Race, Class and the Regulation of the Legal Profession in the Progressive Era: The Case of the 1908 Canons*, 12 CORNELL J.L. & PUB. POL'Y 607, 608-12 (2003). Apprenticeships acted to perpetuate the exclusive nature of the profession: only an admitted attorney could approve and accept a person interested in pursuing a law career, which gave the established bar the power to limit membership and to exclude women, people of color, and other "foreign" outsiders. In this sense, law schools had a greater potential for creating a wider opening of the admissions door. In the 1930's and 40's, the NAACP's litigation strategy concentrated on desegregating the public law school by relying on a Fourteenth Amendment, Equal Protection argument to demonstrate the unconstitutionality of the separate but equal standard. *See generally* Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sweatt v. Painter, 339 U.S. 629 (1950).

89. *See* AUERBACH, *supra* note 42, at 13, 87-88, 95-101. As more foreign-born attorneys joined the bar during the first part of the twentieth century, ABA President Elihu Root focused on this "disturbing development" at an ABA dinner in 1916 where he was honored. Root noted that "fifteen percent of New York lawyers were foreign-born [and] an additional third of the metropolitan bar had foreign-born parents." He concluded that the attorneys "must be expelled by the spirit of American institutions." *Id.* at 94. When foreign-born lawyers increased significantly in the 1920's, bar leaders warned that "a pestiferous horde would be set loose upon the

C. The Preamble to the Model Code of Professional Responsibility (1969): The Influence of the Post-*Brown* Civil Rights Movement

Changing a legal profession's view toward regulating members' ethical conduct rarely occurs in a historical vacuum. To the contrary, virtually every change in law and practice usually reflects, and is influenced by, prevailing political and social forces operating in the period of reform. As we have seen, that appeared true when the ABA first decided in 1908 to establish a national code of ethics after thirty years of inaction since the organization's formation. ABA members had just heard both the nation's President and a highly-regarded leader of the bar deliver sharp rebukes against the profession's corporate attorneys for acting against the public good and for providing legal advice that appeared to benefit only themselves and their wealthy clients. Progressive Era reformers had made similar charges against other powerful monopolies and Gilded Age entrepreneurs during this period of the late nineteenth and early twentieth century when they called for heightened government regulation and protection of consumers against unsafe, unhealthy and corrupt business practices.<sup>90</sup>

Consequently, when trying to explain why the ABA revisited the sixty-year-old Canons of Ethics and issued a new Preamble and ethics code in 1969, one should contextualize this event within the fundamental social changes and constitutional upheaval that had taken place nationally since the Supreme Court's landmark 1954 decision in *Brown v. Board of Education*.<sup>91</sup> Otherwise, a reader might decide to look no further than the statement of the Commission's Chair, concluding that there was nothing noteworthy about the revised three-paragraph Model Code's Preamble, aside from some "editorial revi-

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profession if standards were not raised." *Id.* at 121. Auerbach described former U.S. Attorney General George Wickersham warning that the "horde" included men "whose knowledge of the English language is of the most imperfect character" and who were not "from Anglo-Saxon stock." *Id.* at 115, 121.

90. See, PAGE SMITH, *AMERICA ENTERS THE WAR: A PEOPLE'S HISTORY OF THE PROGRESSIVE ERA AND WORLD WAR I* 499-500 (1985); DONNA J. WOOD, *STRATEGIC USES OF PUBLIC POLICY: BUSINESS AND GOVERNMENT IN THE PROGRESSIVE ERA* 39-68 (1986).

91. 347 U.S. 483, 495 (1954). In a unanimous decision, the Court held that the doctrine of "separate but equal" had no place in the field of education and that separate educational facilities were inherently unequal. Furthermore, the Court consequently found that plaintiffs had been deprived of equal protection of the laws and that their Fourteenth Amendment rights had been violated. *Id.*

sion, caused by the need for modernizing the language” and replacing “old-fashioned phrases” with more elegant language.<sup>92</sup>

Surely, there is some truth to the Chairman’s assertion. Substantively, the Preamble to the Model Code compared favorably with the content of the 1908 Canons. Each stressed general themes of the importance of lawyers’ ethical conduct and “vital” role in achieving justice and sustaining democracy. Both referenced lawyers’ standing among peers as the strongest incentive for gaining public confidence and abiding by ethical standards. Finally, like the original Preamble to the Canons of 1908, the subsequent 1969 Preamble made no mention of the profession’s responsibility to address class-based “deficiency” issues, such as denying counsel to the lower economic class or engaging in pro bono service.<sup>93</sup>

The 1969 Preamble, though, went beyond integrity issues. It provided lawyers with a more sophisticated and deeper understanding of their public duty to protect and safeguard individual rights, which had been sorely tested during the post-*Brown* decade of fundamental social change. Applying the expanded Preamble’s new language<sup>94</sup> to

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92. RAYMOND WISE, LEGAL ETHICS 4 (1979).

93. While the Preamble was silent, the Model Code of Professional Responsibility recognized that every lawyer, and the profession generally, had an obligation to ensure a person’s access to the legal system. See Maute, *supra* note 86, at 119. See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1969) (urging lawyers to serve the unrepresented: Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged).

94. The new Preamble to the Model Code read as follows:

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. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require performance of many difficult tasks. Not every situation which the lawyer may encounter can be foreseen, but fundamental ethical principles are always present for guidance. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer’s own conscience must provide the touchstone against which to test the extent to which the lawyer’s actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of

African Americans' struggle for freedom and equality during this period provides greater insight into the drafters' decision to delineate the bar's ethical responsibility to protect people's human rights in a time of constitutional crisis.<sup>95</sup>

### 1. The Constitutional Transformation and Lawyers' Professional Responsibility

Like the rest of the nation, the ABA drafters of the 1969 Preamble had lived through a tumultuous fifteen-year period. Violent resistance to *Brown's* mandate of racial equality and rejection of racial apartheid posed a direct threat to "the continued existence of a free and democratic society."<sup>96</sup> That the drafters began with these words underscored their concern for the life of the nation's democracy. In the late 1950's, they had seen local law enforcement stand by while white mobs attacked African-American children entering an all-white high school in Little Rock, Arkansas.<sup>97</sup> They had witnessed that state's Governor defy a federal court desegregation order and dare the federal government to intervene.<sup>98</sup> Not long afterwards, they had heard the shocking news that white supremacists had planted a bomb that exploded and killed four African-American schoolgirls waiting for Sunday mass to begin in Birmingham, Alabama.<sup>99</sup> The following year in Philadelphia, Mississippi, night-time Klan riders, including a sheriff and deputy sheriff, kidnapped and murdered three young civil rights workers involved in registering Black voters.<sup>100</sup> Nightly television news footage in the protest era of the 1960's showed southern sheriffs setting dogs loose on civil rights marchers, assaulting defense-

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ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

MODEL RULES OF PROF'L CONDUCT pmb1. (1969).

95. I am not suggesting that the Preamble should be read exclusively through a race perspective. The language also applies to understanding lawyers' role in responding to critical political events, such as the country's post-World War II, period of McCarthyism in which some elected and government officials challenged citizens' right to association and political expression whom they suspected of belonging to the Communist Party. I refer to a race perspective because the *Brown* ruling represented the most fundamental constitutional change to individuals' human rights during the fifteen-year period leading to the 1969 Model Code.

96. *See supra* note 94.

97. *See Little Rock Central, 500 Years Later* (HBO television broadcast Sept. 25, 2007).

98. *Cooper v. Aaron*, 358 U.S. 1 (1958).

99. *See generally* Editorial, *Justice for Four Little Girls*, WASH. POST, May 24, 2002 at A34.

100. *U.S. v. Price*, 383 U.S. 787 (1966).

less protestors, and allowing white lawbreakers to act with apparent immunity.<sup>101</sup>

The legal community was well-aware that members of their profession were instrumental in creating a variety of “bold and ingenious schemes”<sup>102</sup> that helped segregationists forestall *Brown’s* promise of freedom and equality and emboldened citizens’ violent resistance against integration. Drafters’ rewriting of the Code’s Preamble during the 1960’s civil rights movement reflected, in part, the profession’s response to colleagues whose legal strategies had encouraged others to flout the law and maintain a segregated system of racial injustice. The new Preamble delivered a second message as well: it expressed disapproval of the majority of attorneys who stood by and neglected to fulfill their ethical duty to protect people’s human rights and encouraged them to do more.

The Code’s Preamble gave the bar a heightened role and public duty to respond to egregious constitutional violations. Lawyers, after all, had a favored position and direct access to the judicial process. The Preamble’s first sentence reminded the bar 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.” Now that *Brown* had fundamentally changed human rights law to require the formal opening of public institutions to African-Americans and other people of color, the ABA’s Preamble suggested that lawyers faced a choice: either assume a leadership role in promoting racial equality or continue to be viewed as a major reason why people suffered humiliation and loss of dignity. The Preamble’s words resonated with civil rights advocates, who had met opposition from law enforcement and outraged white citizens who blocked their path to exercise fundamental rights, like engaging in public protest, voting in state elections, and enjoying public accommodations.

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101. See generally *Eyes on The Prize* (PBS television broadcast Jan. 1987).

102. Brandeis *supra* note 58. During the decade following *Brown*, segregationists relied on a variety of legal strategies that succeeded in delaying and evading court-ordered integration. By the 1963-64 school year, only 1.17% of black students attended school with white students. Robert L. Carter, former NAACP general counsel and one of the plaintiff attorneys in *Brown*, described the series of procedural exhaustion requirements and pupil placement tactics southern school boards used to avoid compliance. Robert Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968). In Prince Edward County, Virginia, school board lawyers advised closing every public school and funding only white private schools. In 1964, in *Griffin v. Prince Edward County Board of Education*, 377 U.S. 218, 234 (1964), the Supreme Court condemned this practice. The following year in *Bradley v. School Board of Richmond*, 382 U.S. 103 (1965), the Supreme Court indicated that “[d]elays in desegregating school systems are no longer tolerable.” *Id.* at 105.

Perhaps this is the best way to understand the 1969 Preamble's new language and impact: when the drafters said "justice is possible" only when lawyers' practices are "grounded in respect for the dignity of the individual," they were speaking directly to the formerly enslaved and segregated people who found their centuries-long struggle for human rights blocked by attorneys' ingenious legal strategies and reliance on precedent. The drafters intended to remind the profession that justice depended upon a devotion to a changed rule of law, one that now recognized and respected African-Americans' and every person's, freedom and citizenship rights. The Preamble implicitly told lawyers that they could no longer remain silent and passive when mobs functioned with "unrestrained power;" they must use their genius for the common good. Should lawyers fail to fulfill their duty of maintaining respect for the "rule of law," the Preamble predicted an outcome in which the public's "respect for law is destroyed and rational self-government is impossible."<sup>103</sup>

Influenced by the post-*Brown* civil rights movement, the 1969 Preamble defined a critical role for the legal profession: lawyers had to engage in the highest possible degree of ethical conduct on behalf of the public interest and act with "courage and foresight . . . to the ever-changing relationships of society." Members were ethically-bound to "understand[ ] . . . their relationship with and function in our legal system." From this strong language, it surely suggested that each lawyer had to be prepared to respond in a time of crisis and ensure that people's constitutional rights were protected. The Preamble's expanded language set the tone for the Model Code, recognizing the profession's pro bono obligation to guarantee every citizen's access to the legal system.

## 2. The 1969 Code's Invitation to Engage in Pro Bono Work

After completing the new Preamble, the drafters focused on providing greater guidance to attorneys' ethical practice of law and on answering critics' complaints that the 1908 Canons suffered from vagueness and "vaporous platitudes."<sup>104</sup> In proposing nine canons to serve as organizing principles, the drafters broke new ground in the profession's eventual recognition of a duty to engage in pro bono ac-

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103. See *supra* note 94.

104. See *Lies & Lawyers Charity & Perjury*, TIME, May 13, 1966. University of Pennsylvania Law Professor Anthony Amsterdam criticized the usefulness of the Canons and referred to them as "vaporous platitudes."

tivities and to meet the legal needs of the under-represented, lower income population.

The 1969 Model Code's three-part structure – Canons, Ethical Considerations (EC) and Disciplinary Rules (DR) – informed attorneys of the essential practices they must follow to avoid punishment and of the ethical standards it hoped the profession would embrace. The Code's preliminary statement described each Canon as a "statement of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers." From these general principles, the Code distinguished between enforceable Disciplinary Rules that a lawyer was obligated to respect, and Ethical Considerations, such as the responsibility to serve the unrepresented, that the Code encouraged lawyers to perform. Indeed, the Model Code's second Canon spoke to the individual attorney's professional duty to volunteer and assist the local bar in making counsel available to the poor. Lawyers were not compelled to represent a non-paying individual client, but had recognized the bar's shared, collective responsibility of providing counsel to the indigent.

Despite its non-enforceability, the second 1969 Canon added an important layer to what the 1908 Canons had articulated as the ethical duty of "serving People without adequate resources."<sup>105</sup> Unlike the prior 1908 Canons' general language, the Code in its second Canon directed that "every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."<sup>106</sup> Introduced at the peak of the 1960's civil rights movement that targeted equal justice for the poor, the Code's aspirational message was consistent with the national objective of ensuring that poor people gained access to the justice system. Indeed, ABA President and future Supreme Court Justice, Lewis Powell strongly supported a federally-funded, not-for-profit, legal services model to address the unmet legal needs of the economically disadvantaged, a

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105. *See supra* notes 50-52.

106. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 explained that "every lawyer . . . should find time to participate in serving the disadvantaged." By placing the onus on the individual lawyer to serve the unrepresented, rather than on the collective responsibility of the profession, one scholar concluded that the poor did not benefit from this unrealistic standard; Douglas Amdahl, *Minnesota Judicial System: Twenty-Five Years of Radical Change*, 26 *HAMLIN L. REV.* 215 (2002). *See infra* note 156, where the Ethics 2000 Commission restated this language to inform each attorney that while he or she has an "ethical commitment to engage in pro bono activities, it is the legal profession as a whole that has the obligation to provide pro bono services to the poor."

position that ultimately led to the creation of the Legal Services Corporation.<sup>107</sup>

The ABA's debate concerning the delivery of legal services to the poor and the eventual approval of the second Canon brought much needed attention to gross inequities in the legal system, which had long denied counsel to the poor in criminal and civil matters. Many appreciated the historic nature of the ABA's "radical departure" from its reputation as an elitist and exclusive lawyers' organization to one that now focused on justice and egalitarian concerns.<sup>108</sup> Others acknowledged that the ABA's significant shift represented a "giant step forward" from the organization's charitable, noblesse oblige gestures when it first proposed the earlier Canons of 1908.<sup>109</sup> Though the Model Code's pro bono measure was voluntary and non-enforceable, it moved the profession closer toward accepting an ethical responsibility for serving people who were financially disadvantaged. In the words of Model Codes reporter John Sutton, the second Canon was "only the start of a new effort . . . to state a valid philosophy of the lawyer's place in society."<sup>110</sup> Sutton and others believed that "[c]onstant review and reappraisal of the Code . . . [was] necessary in refining our professional ethical standards."<sup>111</sup>

Less than a decade later, when the ABA Special Commission on Professional Standards met again, it heeded Reporter Sutton's call for reappraisal and appeared ready to take an even bigger step toward extending the bar's responsibility to serve the unrepresented.

## II. THE 1983 MODEL RULES OF PROFESSIONAL CONDUCT

### A. The Changing Face of the Legal Profession

The late 1960s and on through the decade of the 1970s, saw a new brand of attorney entering the legal profession. Unquestionably influ-

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107. Some private attorneys thought that the need to deliver legal services to the poor could be met through the private, general practitioner providing group legal services. ABA President Powell joined others who disagreed and believed voluntary legal services would prove insufficient. After considerable debate, the ABA House of Delegates approved the group legal services model through a non-profit government funded legal services organization. See Maute, *supra* note 86, at 117-121.

108. See Eugene Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available,"* 48 TEX. L. REV. 285, 286 (1970).

109. See John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction,* 48 TEX. L. REV. 255, 266 (1970).

110. *Id.*

111. *Id.*

enced by their law school experiences and social movements of their generation, including the civil rights, women's rights, and other human rights movements, a growing number of law students and experienced lawyers became interested in legal careers where they could devote their legal skills to the poor, the economically disadvantaged and the underserved populations. In criminal law, the Supreme Court's constitutional rulings on the right to counsel had required that states revamp their indigent criminal defense systems.<sup>112</sup> Federal funding of poverty law attorneys through the Legal Services Corporation and government-funded fellowships also opened many new, civil law employment opportunities for graduates. It is within the context of these students' and lawyers' coming of age and entering the public arena that a reenergized ABA Special Commission on Professional Standards, chaired by Omaha attorney Robert J. Kutak,<sup>113</sup> convened in 1978 and commenced the writing of the new Preamble and Model Rules of Professional Conduct.

### 1. The New Law Student

Within law schools, the face of incoming students in the late 1960's and 70's revealed a considerably more diverse class. This generation of students included many who had joined the civil rights movement and witnessed the benefits of collective action. Reflecting the movement's persistence in fighting for people's rights and the public's renewed appreciation of lawyers who defended protestors and initiated pro-active litigation to enforce *Brown's* promise of equal educational opportunity, there was a perceptible increase in college graduates pursuing a public-spirited legal career. Between 1960 and 1980, the bar membership and law student population doubled in size.<sup>114</sup> Where previously the sight of a female law student would

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112. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that the right to counsel extends to misdemeanor prosecutions); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth and Fourteenth Amendments guarantees counsel to indigent defendants in a state felony prosecution).

113. In 1977, ABA President William B. Spann, Jr., appointed Nebraska attorney Robert J. Kutak to chair the ABA Commission on Professional Standards. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 *LAW & SOC. INQUIRY* 677, 677 (1989).

114. See Julie Taylor, *Demographics of the American Legal Profession*, in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 48, 48 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 1st ed. 1985). In 1960, there were approximately one quarter of a million attorneys. *Id.* Twenty years later, the profession had more than doubled in size to 585,000. Law students, too, increased dramatically. By 1979, the 123,000 enrolled law students represented twice as many as those who had registered in 1963 and were nearly one quarter of the number of admit-

have been considered unusual, the emerging women's movement's demand for equality translated into women comprising more than one third of incoming law students by the time the Kutak Commission began meeting.<sup>115</sup>

People of color, and particularly African-American law students, however, remained grossly under-represented and the civil rights community continued to identify racially exclusionary educational and employment policies as a burning issue of the day. Some law schools responded by initiating affirmative action plans that valued diversity and considered race a "plus" factor during the admissions process and educational experience. When the Supreme Court upheld the constitutionality of crediting the race of historically excluded groups,<sup>116</sup> it created a stronger potential for law schools and the profession to further transform the overwhelming white student body.

The influx and presence of a diverse and politically active student body that had witnessed a period of fundamental social and political change served as a catalyst for law schools to promote innovative curriculum changes that addressed students' need for more "relevant" learning experiences. Clinical and experiential learning courses exposed many students to poor and disenfranchised people's legal needs; a range of new, poverty law classes extended students' rudimentary understanding of the legal system's response to human rights claims. Many law students graduated school having seen first-hand and becoming personally aware of the unmet legal needs of the poor and unrepresented.

## 2. Lawyers for the Indigent

Law students' activism added to practicing lawyers' sense of professional obligation to society and to the general public. As more graduates found positions within the growing legal aid and legal service community, they brought national and local attention to the legal

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ted attorneys. *Id.* at 49. Taylor states that "[f]or every two lawyers in 1970, there were three in 1980," and many more on the way to entering the profession. *Id.* at 48.

115. The legal profession has been historically male. In 1910, women constituted about one half of one percent of admitted attorneys; *see supra* note 88; fifty years later, 1,800 female law students or 3.8% of incoming students were enrolled in law school. *Id.* at 50. By 1970, women students had increased to 7,000 or 8.5% of the law student body; by 1981, the 45,000 women law students represented 35.3% of the total number of students enrolled in U.S. law schools. *Id.*

116. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (holding permissible use of race in law school admissions process); *Gruter v. Bollinger*, 539 U.S. 306 (2003). *Cf. Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding race an impermissible factor in the admission process to justify a public university's interest in achieving a diverse student body).

system's failure to make counsel a reality for America's indigent and working populations. Newly-admitted attorneys understood that a formal constitutional right to counsel at a criminal trial did not necessarily translate into legal representation at the early stages of a criminal proceeding.<sup>117</sup> Additionally, they learned that a defender's excessive client caseload frequently made the right more illusory than real.<sup>118</sup>

The growing number of Legal Aid lawyers and public defenders called the traditional bar's attention to the pressing need for quality representation and more attorneys. Legal Aid defenders who practiced in New York City in the early 1970's, for instance, highlighted the deficiencies of an assembly line justice system for accused indigents. Witnessing the young lawyers engage in lengthy strikes and work stoppages over excessive caseloads, the NYC Bar Association and other lawyer groups echoed their call for more staff to represent accused indigents. New York City Legal Services attorneys, who represented the poor in civil proceedings, engaged in similar collective job actions and exposed a legal system with far too few lawyers representing the rising clientele population. Within the private bar, a new type of law graduate and attorney appeared, one whose law practice emphasized human rights and responded to Justice Brandeis' turn-of-the-century call for more "people's lawyers."<sup>119</sup> A shared "feeling of cohesion" and dedication to equal justice on behalf of the poor and the excluded led many public and private attorneys to engage in proactive, legal work that gave voice to people's demand for quality legal representation.

Consequently, this new generation of socially committed lawyers, who had entered the profession following a period of intense political change, turned the public spotlight onto the reality of poor and other disenfranchised people's limited access to justice. Their efforts would influence and have a significant impact on the reform work of the

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117. See Douglas L. Colbert, *Thirty-five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 (1998).

118. See *State v. Peart*, 621 So. 2d 780 (La. 1993) (holding that indigent defendants were generally not provided with effective assistance of counsel in light of defenders' excessive caseloads); see also Adam Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85 (2007).

119. See *supra* note 58. In the middle to late 1960's, attorneys and graduating law students formed non-traditional law firms that focused on people's human rights in a variety of civil, constitutional, economic and social rights issues. Examples include the New York City Center for Constitutional Rights, the People's Law Collective of New York City and The Anyday Now Collective in Newark, New Jersey.

ABA Kutak Commission.<sup>120</sup> It is not surprising, then, to appreciate why the drafters revised the Model Code to include pro bono service and replace the Preamble's language to reflect what the newly-constituted legal profession believed represented attorneys' ethical public duty to society.

### 3. The Revised 1983 Model Rules

Only eight years after the ABA had approved the 1969 Model Code, the Kutak Commission initiated a lengthy redrafting process that resulted in the Model Rules of Professional Conduct in 1983, which is the version of the rules currently in effect.<sup>121</sup> When completed, the Kutak Commission had made substantial stylistic changes to the prior Code but avoided wholesale substantive changes. Indeed, when explaining the revised Model Rules, the Commission Chair declared it "merely restate[d] rules developed in cases decided before and after the 1969 Code [of Professional Responsibility]."<sup>122</sup>

The same could not be said of the newly-drafted Preamble, which went through a comprehensive transformation. It now stretched to twelve paragraphs from the previous Code's three-paragraph model and set forth ethical core values that emphasized a lawyer's "special responsibility to justice." Consistent with the Preamble's revised language, the Kutak Commission also made one of its few substantive changes from the previous Code. Building upon a recent ABA House of Delegates resolution,<sup>123</sup> it included Model Rule 6.1, which fundamentally transformed lawyers' public service responsibility. Attorneys now had an explicit, ethical obligation to pro bono service.

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120. See *supra* note 114. The ABA's Commission was distinguishable in composition from earlier ethical bodies. For the first time, it included "several women and designated public representatives. See MODEL RULES OF PROF'L CONDUCT (Proposed Final Draft, May 30, 1981) (naming attorneys Betty Fletcher as consultant, Jane Frank Harman as commissioner, and Lois Harrison as commissioner).

121. Professor Maute attributes the ABA's call for a review of the Model Code to several factors, including an increased interest in legal ethics and attorneys' public service "in the wake of the civil rights and consumer movements, antipoverty programs and Watergate." See *supra* note 86, at 128.

122. The Rules are considerably different in appearance from the former three-prong structure of the Model Code. See *infra* Part II. The drafters concluded that "a great deal of the current code's language and concepts are reflected in the proposed rules." *Id.*

123. In 1975, the ABA membership approved a "Montreal Resolution" that recognized attorneys' professional duty to provide legal services to the poor. See Testimony of the Standing Committee on Pro Bono and Public Service: Hearing on Ethics, available at <http://www.abanet.org/cpr/Weiner.html> (last visited Feb. 1, 2008).

a. The Preamble

At the outset, the Preamble to the Model Rules articulated the “pertinent and essential virtues” of a new generation of lawyers. The Preamble’s first sentence informed members that their professional responsibility was built on three foundational principles. Lawyers were familiar with the first two obligations from the model 1908 Canons: their role as a “representative of clients” and of their conduct as “an officer of the court.” The third core value, however, represented new and uncharted territory. Every lawyer, the Preamble declared, must demonstrate more than loyalty to a client and respect to judges: each lawyer is “a public citizen . . . having special responsibility for the quality of justice.”<sup>124</sup> Such a clear, straightforward statement represented a radical shift within a profession that had long been dedicated to serving the interests of the individual client.

While different meanings may attach to the phrase “the quality of justice,”<sup>125</sup> few would dispute that a core value of procedural and substantive justice requires a legal system meeting the objectives of fairness and equality. Though relatively easy to articulate, achieving these twin goals has proven a formidable challenge. Within the criminal legal system, for instance, class and race considerations have consistently assumed a prominent role and have posed a difficult, and often insurmountable, obstacle to administering even-handed justice.<sup>126</sup> It took nearly 175 years, for instance, before the Supreme Court acknowledged that in felony prosecutions, counsel’s presence and advocacy at trial is vital and fundamental to ensure fair process and treatment of an accused poor person.<sup>127</sup> Since then, Court rulings have not extended appointed counsel’s “guiding hand”<sup>128</sup> to every

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124. MODEL RULES OF PROF’L CONDUCT, pmbl. (Discussion Draft 1983).

125. See Rhode, *supra* note 40, at 2422 (discussing substantive and procedural justice).

126. To illustrate, accused indigent defendants, disproportionately African-American and people of color, were denied the right to counsel and received substantially harsher sentences than white, European-Americans. Until 1932, an accused had no constitutional right of counsel when charged with a capital crime and only then in select circumstances. See *Powell v. Alabama*, 287 U.S. 45 (1932). States also were not obligated to provide counsel in a felony case until 1963. See generally *Argersinger*, 407 U.S. 25; *Gideon*, 372 U.S. 335. Absent counsel, accused indigents also were considerably more likely to receive a death sentence or a substantially longer prison sentence. See Jeffrey Levinson, *Don’t Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 149 (2001).

127. See *Gideon*, 372 U.S. 335.

128. *Id.*; see also *Powell*, 287 U.S. at 69.

stage of a judicial proceeding,<sup>129</sup> nor guaranteed that counsel's assistance is meaningful and "effective."<sup>130</sup>

The Preamble's recognition of a lawyer's 'special responsibility to justice' was meant to spur the profession to invest time and energy to close the gap of inequality and substantially reduce injustice. Calling upon lawyers to act "in the public interest," the Preamble commands that the membership desist from acting solely "in furtherance of parochial or self-interested concerns."<sup>131</sup> The Preamble makes plain what lawyers must do generally to meet their societal obligation. "As a public citizen, a lawyer's ethical duty should [be to] seek improvement of the law [and] the administration of justice . . . ."<sup>132</sup> Attempting to narrow this broad mandate, the Preamble draws attorneys' attention to class-based reform endeavors that acknowledge people's limited resources and access to counsel. "[T]he attorney's responsibility requires that he or she "should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance."<sup>133</sup> Aware that many people are unrepresented and need counsel, the Preamble attempts to connect the dots by urging lawyers to fill this vacuum and "devote professional time and . . . civic influence[s] in their behalf."<sup>134</sup> Ethically, then, the Preamble expects lawyers to lend their expertise to "aid the profession" and "help the bar regulate itself in the public interest."<sup>135</sup> Lawyers are obligated professionally to "exemplify the legal job's ideals of public service" and are required to "cultivate knowledge of the law beyond its use for clients [and] employ that knowledge in reform of the law."<sup>136</sup>

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129. The Supreme Court's critical stage analysis has narrowed the guarantee of counsel to pretrial proceedings considered essential to a fair trial and where a lawyer's presence was necessary. *See, e.g.,* Gerstein v. Pugh, 420 U.S. 103 (1975); Kirby v. Illinois, 406 U.S. 682 (1972); Coleman v. Alabama, 399 U.S. 1 (1970); U. S. v. Wade, 388 U.S. 218 (1967). *Cf. Ashe v. Swenson* 397 U.S. 436 (1970). In most American jurisdictions, including New Orleans, people have no counsel at the initial bail stage and may remain incarcerated for days, weeks and months without seeing a lawyer. *See* Colbert, *supra* note 117, at 8-13.

130. *See* Strickland v. Washington, 466 U.S. 668 (1984). A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction and death sentence has two components. *Id.* at 687. First, the defendant must show that counsel's performance was deficient or counsel was incompetent. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Id.*

131. PREAMBLE, *supra* note 33, at ¶ 12.

132. *Id.* at ¶ 6.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

The Kutak Commission's revision of the Model Codes' Preamble communicated a crucial message: the legal profession had an increased role and responsibility in meeting its public service commitment. While the Preamble's language was meant to inspire and bring attention to the shortage of legal aid and legal service lawyers serving the poor, the Commission knew considerable work remained to persuade the profession to step forward and help lower income people in gaining access to the legal system. Fearing too few lawyers would volunteer for pro bono work, the Kutak Commission took the radical measure of proposing that every lawyer engage in mandatory service. The membership's response is telling.

b. The Pro Bono Model Rule 6.1

Between 1977 and 1983, the Kutak Commission facilitated extensive discussion regarding lawyers' ethical responsibility to volunteer and provide pro bono legal service to the underserved population.<sup>137</sup> While the number of uncompensated hours varied,<sup>138</sup> the principle of mandating public service and raising the legal profession's ethical public service marker revealed a deep division among the membership.

During the course of the five-year debate, the Kutak Commission's obligatory "shall" language met with fierce opposition. Law-

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137. In contrast to the closed process of the previous Model Code and Canons of Ethics, scholars credit the Kutak Commission for promoting extensive discussion and comment. During the early stages, Commission members freely exchanged ideas about a professional code and sought comments from outside groups considered among the ABA critics. See Schneyer, *supra* note 114, at 698-99. Yet the Commission received criticism for declining to seek input from the membership and for attempting to impose a silence order on speakers who were asked to comment on the initial, pro bono draft at the ABA's annual meeting in August 1979. *Id.* Professor Monroe Freedman strongly objected to the commission's directive to not refer to the draft and circulated copies prior to his public criticisms. See Maute, *supra* note 86, at 132. Following the "Dallas Showcase" meeting, the Commission opened the drafting process. *Id.* at 132-33. It circulated drafts to the membership and encouraged comments, leading Professor Schneyer to characterize the process as "the most sustained and democratic debate about professional ethics in the history of the American bar." See Schneyer, *supra* note 114, at 678.

138. Initially, the Commission had declared a fifty-hour mandatory requirement but its' first written draft, submitted in June 1979, proposed every lawyer engage in forty hours annually or an equivalent monetary amount. See Letter from Robert J. Kutak, Chair of American Bar Association Committee on Ethics and Professional Responsibility, to American Bar Association Committee on Ethics and Professional Responsibility (May 23, 1979). Two months later, following the criticisms heard at the annual meeting, the Commission affirmed mandatory service but omitted quantifying the amount of hours and offered a reporting requirement instead. See Letter from Robert J. Kutak, Chair of American Bar Association Committee on Ethics and Professional Responsibility to American Bar Association Committee on Ethics and Professional Responsibility (Sept. 13, 1979). When approved by the House of Delegates, Rule 6.1 invoked non-mandatory language ("[a] lawyer should render public interest legal service") and made no attempt to quantify. See MODEL RULES, *supra* note 39, at 6.1.

yers' objections ranged from strongly favoring expanding legal services to meet the needs of the poor but opposing requiring attorneys who did not share the "calling,"<sup>139</sup> to vehemently opposing<sup>140</sup> on constitutional and personal autonomy grounds<sup>141</sup> being coerced to provide free legal services. The most vocal anti-mandatory voices claimed mandatory legal services were a form of "latent fascism," "economic slavery," and "involuntary servitude."<sup>142</sup> Advocates countered with equally passionate arguments that mandatory service was necessary and consistent with attorneys' professional responsibility.<sup>143</sup> Some found lawyers' use of the thirteenth amendment's prohibition against slavery and involuntary servitude insulting and embarrassing to the profession.<sup>144</sup>

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139. Professor Maute described those who opposed mandatory service because they did share the moral and religious-based perspective that the law was a calling and a vocation in which lawyers served the common good to maintain the integrity and fairness of the legal system. Professor Monroe Freedman, a strong proponent of increased legal services to the poor, opposed mandatory participation because he believed it would include attorneys who would provide inept representation. *Id.* at 132. See Maute, *supra* note 86, at 132. Cf. Steve Lubet, *Professionalism Revisited*, 42 EMORY L.J. 197, 206 (1993) (suggesting the presence of the big firm, prominent lawyer promoted the cause of equal justice and of guarantee to counsel, while also having a "transformative effect" within the courtroom).

140. Individual lawyers expressed "furious" opposition. See generally Schneyer, *supra* note 114, at 678.

141. Opponents characterized mandatory service as forcing a lawyer to work without pay in violation of their autonomy and freedom rights. They based their constitutional arguments on the Thirteenth Amendment prohibition against involuntary servitude, the Fifth and Fourteenth Amendments' due process protection against the "taking" of property, and the equal protection guarantee. See Stafford Byers, *Delivering Indigents' Right to Counsel While Restricting Lawyers' Right to Their Profession*, 13 ST. JOHN'S J. LEGAL COMMENT. 491 (Spring 1999).

142. See Deborah L. Rhode, *Perspectives on Legal Practices*, 37 STAN. L. REV. 589, 610 (1985); Michael J. Mazzone, *Mandatory Pro Bono: Slavery in Disguise*, TEX. LAW., Oct. 22, 1990, at 22.

143. See Tigran Eldred & Thomas Schoenherr, *Lawyer's Duty of Public Service: More than Charity*, 96 W. VA. L. REV. 367, 369 (1994) (arguing that the bar's monopoly over legal services requires lawyers to accept their fundamental duty of public service). For other perspectives on the pro bono debate, see Steven Lubet & Cathryn Stewart, *A Public Assets Theory of Lawyers' Pro Bono Obligations*, 145 PA. L. REV. 1245 (1997) (contending that lawyers' exclusive access to consumers and duty to maintain confidences justifies imposing a pro bono, concessionaire "user-tax"); Howard A. Matalon, *The Civil Indigent's Last Chance for Meaningful Access in the Federal Courts*, 71 BOSTON U. L. REV. 545 (1991) (suggesting the judiciary has the inherent power and duty to the public to compel attorneys to represent the poor); Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, 54 BUFFALO L. REV. 1067 (2007) (contending that a lawyer's professional responsibility includes a public obligation to serve that is arguably greater than the duty owed the individual client).

144. See Michael A. Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Questions*, 49 MD. L. REV. 18, 70 (1990), (responding "[i]t is surprising — surprising is a polite word — to have some of the most wealthy, unregulated and successful entrepreneurs in the modern economic world invoke the amendment that abolished slavery to justify their refusal to provide a little legal help to those, who in today's society, are most like the freed slaves").

When the intensity of the bar's differences made it clear that attorneys were not ready to endorse a mandatory service measure and that, even if one passed, enforcement against non-complying attorneys would be difficult, the Kutak Commission succeeded in locating a shared consensus between the opposing factions. While many resisted being told they must take on the individual responsibility, each substantially agreed that poor people's access to counsel was seriously deficient and must be addressed and remedied. Seeking to close the widening gap between those who could afford counsel and those forced to self-represent, the ABA House of Delegates moved forward. Members' approved the revised Rule 6.1 that declared every lawyer "must render public interest legal service"<sup>145</sup> to those unable to afford private counsel, and offered a smorgasbord of options toward satisfying individual responsibility. Those interested in offering legal representation could donate their "professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations."<sup>146</sup> Lawyers also could satisfy Rule 6.1 by engaging in a broad range of "service in activities for improving the law, the legal system or the legal profession."<sup>147</sup> Partners and associates of law firms could opt to contribute "financial support for organizations that provide legal services to persons of limited means."<sup>148</sup>

Though Rule 6.1 fell short of the Kutak Commission's original mandatory and enforceable proposal, it informed every lawyer that each is individually responsible for providing pro bono, public interest service to the underrepresented community. During the next two decades, the ABA Commission on Legal Ethics would build on this foundation and continue exploring a path to ensure that attorneys fulfilled their public service responsibility.

c. The Springboard to the Ethics 2000 Commission

The 1983 Preamble and Model Rule 6.1 represented significant movement from the ABA's previous efforts to define professional responsibility. The lawyers' ethical, pro bono movement built upon these normative pro bono measures and approved similar measures that encouraged lawyers to devote their legal skills to the poor and underserved.

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145. See MODEL RULES, *supra* note 39, at 6.1 cmt. (1983).

146. See MODEL RULES R. 6.1 (1983).

147. *Id.*

148. *Id.*

In 1988, lawyers meeting at the ABA annual conference in Toronto approved a general resolution that called for practicing lawyers to fulfill their pro bono duty by devoting a minimum of fifty hours annually of direct service on behalf of the unrepresented or by engaging in a law reform activity that enhances the administration of law.<sup>149</sup> While not binding, ABA members reaffirmed the “Access to Justice” principle when they met again three years later.<sup>150</sup> In 1993, the ABA House of Delegates approved the Toronto Resolution “suggestion.” Members voted in favor with the understanding that their fifty hour minimal commitment was wholly voluntary and not enforceable.<sup>151</sup>

Proponents of mandatory service hoped these resolutions meant that the profession was ready to take the next big step. When the ABA Commission on Evaluation of the Rules of Professional Conduct (the Ethics 2000 Commission) met in 1998 to consider substantial revisions to the Model Rules, proponents reopened discussion about whether the Toronto Resolution’s fifty hour pro bono aspiration should be mandatory because it “truly reflect[ed] the virtues” of the profession. Seeking to persuade lawyers to accept a morally enforceable obligation to serve the poor and unrepresented, the Ethics Commission acknowledged that attorneys’ “pro bono *publico* service is a time-honored ethical obligation of all members of the legal profession.”<sup>152</sup> Hoping to facilitate dialogue and encourage members’ participation, the Ethics Commission took advantage of the internet and produced an open and “unrestrained”<sup>153</sup> discussion.

Once again, opposition to mandatory pro bono service came from unexpected places. Individuals and organizations who usually provided a strong voice in favor of extending counsel to the poor now feared that a divided ABA membership would undermine the participation required for the profession to meet the legal needs of the poor and underserved.<sup>154</sup> Hearing these “friendly” critics’ voices, the Eth-

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149. See Maute, *supra* note 86, at 136.

150. *Id.*

151. See MODEL RULES R. 6.1 & cmt. (1993).

152. See <http://www.abanet.org/legalservices/probono/stateethicsrules.html> (last visited Mar. 7, 2008).

153. See Maute, *supra* note 86, at 139. Professor Maute referred to the Ethics Commission process as an “orgy, not in the sense of debauchery, but in the sense of unrestrained indulgence in any activity. . . [and as a] provocation to continuing discourse.” *Id.*

154. Professor Maute testified at the June 2000 hearing and opposed mandatory pro bono as being “inconsistent with the concept that law is a public calling and politically unfeasible predictable backlash by the bar risked a public relations debacle.” *Id.* at 141. Doreen Dodson, Chair of the ABA Standing Committee on Legal Aid and Indigent Defendants, expressed the “hope that each lawyer . . . will have moral compass call[ing] to give something back to society,” but added

ics Commission concluded that it was not an “appropriate response” to mandate service and directed members to find other ways to increase the bar’s participation.<sup>155</sup>

In the end, the ABA House of Delegates overwhelmingly approved the Ethics Commission’s modified language in which every lawyer acknowledged his or her “professional responsibility to provide legal service to those unable to pay.”<sup>156</sup> In addition to achieving this major objective, ABA delegates agreed to two other important revisions to the 1983 Preamble. First, it modified the Preamble’s first sentence and explicitly told lawyers that they should consider themselves as “a member of the legal profession”<sup>157</sup> and not in the business or commercialization of law. Second, the Preamble clarified the lawyer’s duty as a public citizen who had a responsibility to justice. From this point forward, every lawyer was expected to “devote professional time, resources and civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”<sup>158</sup>

Though deciding against mandating pro bono service, the revised Model Rule 6.1 leaves no doubt that every lawyer “has an affirmative responsibility to do her fair share of pro bono work, ensuring access to justice for those unable to pay.”<sup>159</sup> Read together with the new Preamble, the Model Rules affirm that when an attorney ensures a poor person’s access to court and facilitates a peaceful resolution of a dispute through the legal process, she re-establishes attorneys’ “vital role in the preservation of society” and places their “relationship to our legal system . . . in the public interest” and considerably beyond “further[ing] . . . a parochial or self-interested concern . . . .”<sup>160</sup>

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that “conscripts make poor lawyers.” Robert Weiner, Chair of the ABA Standing Committee on Pro Bono and Public Service also agreed that a recalcitrant private bar would provide inferior representation to clients. *Id.* at 143. As Chair of the pro bono committee that succeeded in passing the 1993 Toronto Resolution, Robert Hirshon spoke to a divided membership that would not support mandatory service. *See generally id.* at 142. John Pickering, recipient of numerous pro bono awards, thought “a mandatory approach . . . would be ineffective in broadening access to justice, counterproductive to efforts to better serve the poor and unworkable in practice.” *Id.*

155. *See generally*, MODEL RULES, *supra* note 39, at 6.1 (1983), Reporter’s Explanation of Changes.

156. MODEL RULES, *supra*, note 39, at 6.1 (1983) (stating that “a lawyer should aspire to render at least 50 hours of pro bono public legal services per year”).

157. PREAMBLE, *supra* note 33, at ¶1 (1983).

158. *Id.* at ¶ 6.

159. Maute, *supra* note 86, at 147.

160. PREAMBLE, *supra* note 33, at ¶12 (1983).

Recognizing the enormous distance the profession has traveled in identifying a broader ethical, public responsibility, one is still left wondering whether the revised Preamble and pro bono Rule 6.1 have real currency in a world when human or natural catastrophe strikes. Do the Model Rules require a lawyer's pro-active participation in the face of a legal crisis caused by acts like Hurricane Katrina or the terrorist destruction of 9/11? Or does the profession merely approve this language to promote and encourage additional acts of individual heroism and volunteerism by do-gooders?

The next section focuses on lawyers' response to the September 11th destruction of the Twin Towers in New York City and to the devastation caused by Hurricane Katrina, which shut down New Orleans' criminal justice system. It also describes law students' reaction and efforts to address the glaring vacuum in legal representation. Part III concludes by suggesting the students' example is one that the profession should consider replicating.

### III. THE LEGAL PROFESSION'S RESPONSE TO CRISIS

#### A. September 11, 2001

When the world witnessed the unforgettable sight of one jet and then another crashing into New York City's Twin Towers, observers stared in disbelief as they realized that the people inside the Towers were trying to survive by leaping from them shortly before they crumpled. Others saw desperate, panic-stricken people racing through downtown city streets to escape the wreckage and avoid injury or death. In the aftermath of this unimaginable tragedy, outside observers pondered the enormity of what had occurred. They wondered how many had perished and mourned the immense loss of life. They thought about how the victims and their families would recover from such trauma. People feared and awaited the next terrorist attack.

For observers, the loss of nearly 3,000 lives was the most serious and extreme consequence of terrorism ever to shock the United States. Indeed, the crashing of the towers remains a vivid picture that most recall when thinking about 9/11. Though people understood that losing a loved one is devastating and empathized with survivors whose world had been thrown into tumult and emotional chaos, few would attempt to describe the pain and agony that families experienced when reliving September 11th and realizing it was their parent, sibling, child or dear friend who had been trapped inside Tower I or Tower II.

Most outside observers also were unlikely to consider real and practical issues that survivors' faced, while coping with immeasurable personal suffering and consoling other grieving family members. People who have had to deal with a loved one's death have an idea of the many legal and non-legal responsibilities the 9/11 survivors confronted, the "depressingly practical details, including arranging funerals and burials, balancing financial obligations, applying for aid, administering estates, [and] applying for death certificates . . . ." <sup>161</sup> In ordinary situations, these tasks are emotionally difficult; after experiencing trauma of this magnitude, 9/11 survivors had the added hurdle of confronting even more cumbersome legal and administrative obstacles. Something as basic as proving the death of a loved one who was missing and presumed dead so that family survivors could obtain a death certificate and apply for insurance proceeds or probate a will, became an ordeal requiring legal assistance. Locating a licensed New York notary to administer a legally, notarized signature so that survivors could obtain emergency assistance funds required an available New York lawyer, paralegal or legal secretary. A surviving spouse seeking answers to legal or tax issues concerning a loved one's will or estate looked to an attorney for advice and for protection against financial ruin.

While some of the deceased probably had retained a family lawyer to assist in these matters, many did not. Would anyone from the New York legal community come forward and provide free legal assistance for 9/11 survivors? <sup>162</sup> Fortunately, not every injured or affected party suffered the loss of human life and the burdensome legal issues that followed. Most 9/11 victims, though, sustained substantial loss and faced immediate living needs. The massive destruction had eliminated jobs where many had worked and apartments where they had lived. As documented by New York's legal volunteers, "[b]etween 3,000 and 6,000 individuals and families were displaced from their homes, hundreds of businesses were destroyed, and more than 100,000 people, by some estimates, lost their jobs." <sup>163</sup> According to volunteer

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161. Judith S. Kaye, Forward, *Public Service in a Time of Crisis, A Report and Retrospective on the Legal Community's Response to the Events of September 11, 2001*, 31 FORDHAM URB. L.J. 831, 833 (2004).

162. New York is one of the few states that does not embrace the Preamble to the Model Rules of Professional Conduct or Rule 6.1, which recognizes a lawyer's duty to engage in pro bono services. See *supra* note 34. While currently reforming its' ethical code, New York still adheres to the 1969 Model Code of Professional Responsibility and its' aspirational requirement of twenty (as compared to the Model Rules minimal fifty) hours of public service.

163. Kaye, *supra* note 161, at 840.

Legal Aid lawyers, many required emergency assistance. “These people needed benefits, whether public or private; they had housing problems, with many facing eviction and rent arrears; they had no health insurance or means of obtaining medical care.”<sup>164</sup> Numerous ethnic groups had particular reason for seeking legal advice. Non-citizen survivors faced immigration and deportation proceedings;<sup>165</sup> people of Middle Eastern ancestry experienced ethnic discrimination.<sup>166</sup> Each needed counsel from a volunteer lawyer.

How did the New York legal community respond following 9/11? Like most important questions, the answer often depended on an observer’s perspective and expectations. Speaking as the representative of New York’s bar, Chief Justice Judith Kaye of the state’s highest Court of Appeals, showered praise on the “thousands of lawyers, paralegals and staff members” who came forward immediately after the terrorist action and “enthusiastically volunteered for the public good.”<sup>167</sup> Surely, the Chief Justice was referring to the roughly 3,000 volunteer lawyers,<sup>168</sup> who received training and devoted “hundreds of thousands of hours” of pro bono, legal assistance to the “more than 4,000 individuals and families who were affected by the disaster.”<sup>169</sup> Calling the volunteer lawyers’ actions an example of “the Bar at its finest,” Justice Kaye rejected the public’s oft-heard, negative image about lawyers’ perceived indifference and selfishness.<sup>170</sup> Justice Kaye stated:

Would that this report [Public Service in a Time of Crisis] could be appended to every headline grabbing story of a lawyer’s malfeasance and to every book and article declaiming our lost and betrayed profession. This is the real story of the Bar, the real character of New York lawyers and their neighbors.<sup>171</sup>

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164. *Id.* at 877.

165. *Id.* at 841.

166. *See generally id.* at 889-891.

167. *Id.* at 833.

168. *Id.* The Report suggests that “the actual number of volunteers was probably much higher than the 3,000 lawyers who attended training sessions. It indicated “more than 4,000 private-sector lawyers volunteered to provide pro bono services.” *Id.* at 847. Earlier, the Report referred to “more than 2,800 lawyers registered on the Pro Bono.net 9/11 website to gain information and resources.” *Id.* at 839. Professor Rhode quoted estimates that suggest between 6,000 and 9,000 attorneys volunteered. Deborah Rhode, *The Legal Community’s Response to 9/11: Pro Bono in Times of Crisis; Looking Forward by Looking Back*, 31 *FORDHAM URB. L.J.* 1011, 1011 (2004).

169. Kaye, *supra* note 161, at 833, 840.

170. *Id.* at 833

171. *Id.*

Having studied and critiqued the legal profession's limited pro bono participation before Katrina, Stanford Law Professor Deborah Rhode presented a "broader context"<sup>172</sup> and a different voice for assessing the New York bar's response. Emphasizing that "[t]he 9/11 terrorist attacks revealed much that is best in the American people and lawyers were no exception,"<sup>173</sup> Professor Rhode agreed with Justice Kaye that "the profession's response offers much to celebrate . . . . Thousands of New York lawyers gave generously at a time of crisis."<sup>174</sup> Indeed, Rhode acknowledged that the collaboration formed among members of the New York judiciary, court administrators, legal service organizations, the private bar, professors and students, government lawyers and legal volunteers from other states was "impressive."<sup>175</sup> Together, the volunteer lawyers created an "Individual and Family Facilitator Project" that provided comprehensive legal services to people who "have no idea where to turn and need help navigating through the maze of agencies, programs and procedures developed to address their needs."<sup>176</sup> New York's lawyer-facilitators addressed a wide range of legal issues and provided advice and counsel in areas such as wills and estates, Social Security, state and federal aid, life and health insurance, family law, taxes, immigration and unemployment.<sup>177</sup>

Despite this, Professor Rhode offered a sobering perspective of the relatively limited extent to which New York's legal community fulfilled its pro bono, public service duty. While congratulating New York's 3,000 lawyers who trained and lent legal assistance, and acknowledging that as many as "two to three times that many practitioners may have [actually] volunteered," Rhode nevertheless concluded that "the profession's response . . . offers no grounds for complacency."<sup>178</sup> Pointing to the sixty-thousand plus New York attorneys who were State Bar members, Rhode contended that, overall, law-

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172. Rhode, *supra* note 168.

173. *Id.*

174. *Id.*

175. *Id.* at 1012. Considering the bar's rapid response to the terrorist attack, the New York legal community's coordination was extraordinary. Ironically, on September 11th, many of the volunteer lawyer groups had been present in Albany at the first state-sponsored, Access to Justice conference where they watched the horrific news together. This fortuitous meeting allowed for a coordinated planning strategy for legal assistance to commence that afternoon. *See* Kaye, *supra* note 161 at 843.

176. Kaye, *supra* note 161, at 850.

177. *Id.*

178. Rhode, *supra* note 168, at 1011.

yers' response "leaves much to be desired."<sup>179</sup> Her critique highlighted the crucial point: at least seventeen out of twenty attorneys, and as many as ninety-five percent of New York attorneys, declined to participate and contribute any time to 9/11 victims' needs. Additionally, most who volunteered contributed "relatively modest[ly]:" three out of ten lawyers gave between one to fifteen hours; three out of five volunteers reported devoting between one and fifty hours.<sup>180</sup>

From this perspective, Justice Kaye's praise for the relatively few volunteering attorneys sounds more like the motivational words of a head coach congratulating the leaders of her team for their valiant rally against an overpowering opponent, than applause for an entire profession that did not collectively sacrifice in achieving its shared goal. Three thousand volunteer lawyers is surely a big number and each volunteer attorney, particularly the ones who dedicated substantial pro bono service hours,<sup>181</sup> deserves the highest recognition. Yet Justice Kaye was aware that most New York lawyers had not participated. While extolling the virtues of the volunteers, she spoke to the much larger force of non-participating attorneys and hoped they would become inspired after reading about their colleagues' "personal satisfaction that comes from pro bono work."<sup>182</sup> Justice Kaye challenged the profession to commit itself fully to pro bono service. "This is the complete answer to every lawyer," she declared, "who [says he] is too busy or lacks the right experience. You aren't and you don't."<sup>183</sup> She closed by telling the profession: "We don't need another disaster to remind us of whom we are. We can just pull out a copy of *Public Service in a Time of Crisis*."<sup>184</sup>

Chief Justice Kaye's enthusiasm for the legal community's response to 9/11 reflected her genuine admiration for the New York lawyers who responded to the victims' legal needs. Surely she had reason to have been concerned about the extent to which the bar would participate. National and states' statistics show that the American ideal of equal justice and the legal profession's duty of ensuring

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179. *Id.* at 1012. Rhode declared that "[w]hat attorneys did — and equally to the point — did not accomplish points up the gap between our ideals and institutions." *Id.* at 1011.

180. *Id.* at 1016.

181. Only ten percent of volunteer lawyers answered the city bar's questionnaire, which asked a series of questions about their experience. From this relatively small sample, one out of five lawyers declared that they had dedicated between 100-500 hours. Two percent indicated they devoted more than 500 hours of free legal assistance. *See generally id.* at 1016.

182. *Id.*

183. *Id.*

184. *Id.*

poor people's access to counsel appears more like "rhetoric"<sup>185</sup> than a core policy concern. Professor Rhode has been among those who have sharply criticized bar leaders for "wax[ing] eloquent"<sup>186</sup> about lawyers' pro bono work, while failing to hold law firms and bar members accountable to their ethical, pro bono commitments to serve the needs of indigent and working people. New York's own pro bono hours, while comparatively better than other state bars', still fell nearly twenty percent short of meeting the fifty-hour national standard, even under a broad interpretation of service.<sup>187</sup>

Surveying the limited information available before 9/11,<sup>188</sup> Professor Rhode concluded that "[m]ost lawyers provide no significant pro bono assistance to the poor"<sup>189</sup> or working people generally.<sup>190</sup> The typical lawyer averaged "less than half an hour a week" and less than "fifty cents a day" on activities dedicated to pro bono service.<sup>191</sup> Data shows that while one lawyer was available to every 380 people in the general population, states guaranteed a court-assigned Legal Aid or Public Defender attorney would be available for every 4,300 poor people. In brief, government spends very little on counsel for the poor – only eight dollars per person, less than one percent of total expenditures.<sup>192</sup> Rhode concluded that "[i]t is a shameful wrong that the nation with the world's most lawyers has one of the least adequate

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185. See generally Deborah A. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785 (2001).

186. *Id.* at 1808. For instance, she points to the ABA Executive Director highlighting "the extraordinary accomplishment" of large law firms contributing "three million hours of donated services," *id.* at 1809, while neglecting to say that less than one out of five firms met the ABA's standard of pro bono hours and only one-third made the required financial contribution equivalent to 3-5% of gross revenues. *Id.* at 1810.

187. Almost one half (47%) of New York lawyers engaged in pro bono work, considerably higher than the 15-18% of attorneys in Minnesota, Florida, Maryland, Texas and Michigan who volunteered. New York's volunteer corps averaged 42 hours compared with Texas' median of 20 hours. Yet three out of four New York lawyers considered pro bono work they performed for free for a friend or family member. Two out of three included clients, who could not pay the lawyers' agreed fee. Only one out of seven lawyers accepted cases from a bar association's pro bono program. See Gary Spencer, *Pro Bono Data Show Little Improvement*, N.Y.L.J., Mar. 5, 1999, at 1; see also Rhode *supra* note 185, at 1810. Denise Johnson estimates that only one out of ten New York lawyers represented poor people without charge. Denise R. Johnson, *The Legal Needs of the Poor As A Starting Point for Systemic Reform*, 17 *YALE L. & POL'Y REV.* 479, 480 n.6 (1998).

188. See generally Jason Thiemann, *The Past, The Present and The Future of Pro Bono: Pro Bono as a Tax Incentive For Lawyers, Not a Tax on the Practice of Law*, 26 *HAMLIN J. PUB. POL'Y* 331 (2005).

189. Eighty percent of the poor are without representation because they cannot afford counsel in civil and criminal cases. Rhode, *Access to Justice supra* note 185, at 1809.

190. *Id.*

191. Rhode, *Culture of Commitment, supra* note 40, at 2415.

192. Rhode, *Access to Justice, supra* note 185 at 1788.

systems for legal assistance . . . . Most lawyers' voluntary contributions are minimal."<sup>193</sup>

Why do some attorneys decide to volunteer, while most overwhelmingly refuse? Although the data is not conclusive, Professor Rhode's research about altruistic behavior is revealing when applied to the volunteer 9/11 lawyers. Studies show that people who offer their time and talent to any cause have a capacity for empathy and a sense of human and group solidarity.<sup>194</sup> The capacity for shared feelings may come from connecting with another person's social condition (class), identity (e.g. race, gender, etc.), civic or moral obligation, or deeply-held values.<sup>195</sup> Clearly, New York's volunteer lawyers empathized with the victims and families of 9/11. Four out of five of the volunteer lawyers indicated that they "wanted to help"; one half thought "it was the right thing to do."<sup>196</sup> Rhode also believed that the 9/11 volunteer lawyers had much in common with the people they provided pro bono service. "The outpouring of assistance for victims by New York lawyers, as well as other local groups, was fueled partly by the proximity of tragedy, a sense of common identity and a desire to demonstrate national strength and solidarity."<sup>197</sup> Apparently, the circumstances in which 9/11 unfolded, particularly within the legal community that witnessed the disaster unfold, provided a strong and convenient nexus for New York's legal profession to respond directly to the legal needs of survivors.

Every crisis presents a different challenge for the legal profession. The next section describes the Louisiana bar's response to Hurricane Katrina's unexpected, disastrous flooding and to the closing of the New Orleans criminal courthouse for almost a year.

## B. Hurricane Katrina

Looking back, no criminal justice official could have anticipated that Hurricane Katrina would cause the city's levees to break and create flooding of such massive proportions that law enforcement offi-

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193. *Id.* at 1786.

194. See Rhode, *The Legal Community's Response to 9/11* *supra* note 168, at 1013, 1021 n.9; See also Deborah Rhode, Director, Stanford Center on Ethics, Remarks, *Altruism and Hurricane Katrina: Lessons For and From the Public's Response to Social Needs* (Nov. 7, 2005), in STANFORD CTR. ON ETHICS NEWSLETTER, Fall 2005, <http://ethics.stanford.edu/newsletter/December%2005/Altruism.htm>.

195. Rhode, *Access to Justice* *supra* note 185, at 1786.

196. *Id.*

197. *Id.*

cials would be forced to evacuate the almost nine thousand pretrial and convicted inmates from Orleans and nearby parish prisons.<sup>198</sup> Nor could any judicial officer imagine that the late August storm would wreak such havoc upon the city's criminal court system as to prevent the city's lone criminal courthouse from reopening until June 2006. Judges, prosecutors and public defenders probably assumed that the storm would come and go, causing extensive damage but allowing people to move toward recovery and return to work at the courthouse within a reasonable time period.<sup>199</sup> Surely, they were not prepared for the devastating consequences that followed Katrina.

Warned that the city might be facing a category five storm, New Orleans residents, including about nine thousand attorneys who lived in the surrounding community, did the best they could to flee to safety. Frank Neuner, who had been elected President of the Louisiana State Bar Association two months earlier, estimated that the storm displaced the city's attorneys and left most others without a law office for, at least, one or two months.<sup>200</sup> Many attorneys, probably a third or more, left Louisiana.<sup>201</sup> The remaining majority relocated within the state and fled to places like Baton Rouge, which had been spared the storm's direct hit but now faced many recovery problems. Baton Rouge criminal defense attorney, Jim Boren, explained that "we had no [electrical] power, temperatures were in the high nineties and we had 150,000 more people in town. We were not prepared to deal with their pressing needs."<sup>202</sup> Bar President Neuner remembers the difficulty lawyers had communicating and addressing clients' needs. "Our home phones did not work, our cell phones had constant busy signals, we could not speak to colleagues. Fifty year olds like me had to learn text messaging."<sup>203</sup> Most New Orleans lawyers would not gain access to their homes and offices until Halloween weekend, two months later.<sup>204</sup>

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198. See Garrett & Tetlow, *supra*, note 1.

199. E-mail from Phyllis Mann to author, *supra* note 9 (writing "I honestly don't think anyone assumed anything. Hurricanes come and hurricanes go and [New Orleans] was always famously notorious for its hurricane parties. The previous year, lots of folks evacuated only to watch NOLA on CNN as it sat high and dry without even a drop of rain. People just truly did not consider at all what the consequences would be if a hurricane really hit the city.").

200. Telephone Interview with Frank Neuner, *supra* note 26.

201. *Id.*

202. Interview with Jim Boren, Attorney, in Baton Rouge, La., (Jan. 9, 2008).

203. Telephone Interview with Frank Neuner, *supra* note 26.

204. *Id.*

On the weekend Katrina struck, many prosecutors, defenders and judges hastily arrived at the New Orleans courthouse and “took their laptops with them to wherever they went for the weekend.”<sup>205</sup> Not surprisingly, neither New Orleans nor Louisiana officials had planned for such a crisis. Before vacating their offices, however, the criminal justice officials never communicated with each other.<sup>206</sup> No one said where they were going and how they could be reached. With no plan in place and no way for justice officials to communicate or enlist volunteer lawyers from the bar to handle the thousands of jail cases, people already incarcerated were doomed to forfeit their freedom for most, if not all, of the next twelve months.

Neither Corrections nor the Sheriff had evacuated prisoners when the levees broke and the rising waters flowed into Orleans Parish Prison.<sup>207</sup> When they eventually transferred the prisoners to various state prisons, the judges and principal players in the justice community had no preconceived strategy for ensuring that the criminal courts functioned and that the accused had access to counsel. State and city bar associations had not anticipated such a crisis and, therefore, had never previously considered what they could demand from members’ pro bono responsibility in the event a catastrophe closed the city’s courts. In the face of the brewing constitutional crisis, it would be left to each lawyer and judge to decide what, if any, time and care they should devote to the thousands of people awaiting trial and serving sentences who had been transferred to state prisons.

In emergency situations, people react differently. Most do everything possible to ensure the health and safety of their families and loved ones. Some limit their concern to self-survival and act only for their self-interest. Others appear helpless and needy or temporarily paralyzed; some avoid dealing with the situation and try to escape.<sup>208</sup> At the opposite extreme, there are individuals who always surface and go beyond the commitment to loved ones. They appear at crucial mo-

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205. E-mail from Phyllis Mann to author, *supra* note 3; See Garrett & Tetlow, *supra* note 1, at 146.

206. Garrett & Tetlow, *supra* note 1, at 146.

207. *Id.* at 136.

208. Frank Neuner explained that “each individual lawyer’s situation was different and depended, in part, on how people reacted to the storm.” Neuner referred to the experience of lawyers like Carmelita Tertaut, *see supra* note 17, who struggled to maintain a practice, a home and a family during the crisis. He also distinguished between lawyers who “adjusted” and those “who did not adjust.” He observed that “some attorneys mobilized into action and some law firms opened satellite offices. Other lawyers remained inactive. Some took vacations.” Telephone Interview with Frank Neuner, *supra* note 26.

ments when help is needed. They are driven to act selflessly and with extraordinary courage. Lawyers' reactions to emergencies are no different from the typical person's reactions, except for one factor: lawyers took an ethical oath before entering their profession. They belong to a profession that is committed and that aspires to justice.

Within days of Katrina, a small group of "very active" lawyers in Louisiana's criminal defense and public interest civil bar began speaking to each other. "Two days after Katrina struck, we began asking whether anyone had heard from this lawyer or that one," said Alexandria attorney Phyllis Mann.<sup>209</sup> Mann and Baton Rouge attorney, Jim Boren, also joined conversations with out-of-state colleagues representing criminal defense, bar and civil rights organizations, like the National Association of Criminal Defense Lawyers (NACDL), the American Bar Association and the American Civil Liberties Union (ACLU). Displaced New Orleans attorneys and local defense lawyers congregated at Mann's Alexandria home law office and began hearing rumors that State Corrections was moving the Parish Prison jail population to other state prisons outside New Orleans.<sup>210</sup> They asked, "What needs to be done? How do we learn who is being transferred and where they are going? How can we contact people's lawyers and help those without counsel?"<sup>211</sup> Remarkably, this ad hoc group of between ten to twenty full-time attorneys<sup>212</sup> went into action the moment "the court system stopped working."<sup>213</sup> Mann, the former

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209. Telephone Interview with Phyllis Mann, *supra* note 14.

210. Attorney Mann's law practice in Alexandria, Louisiana is a three to four hour drive from New Orleans. Because she had not suffered extensive damage from the storm, she invited New Orleans criminal defense and public interest colleagues to stay there. Mann described the first days after Katrina as "quiet and stagnant." On the third or fourth day, she remembers discussing the New Orleans jail situation. "We were aware of a problem," said Mann. "We saw on television that the Parish Prison had been evacuated. What was Corrections going to do? We began hearing rumors that they were disbursing people to other jails." A few days later on September 7th, attorney Mann called the local warden at the nearby Rapides Parish Detention Center and confirmed that four hundred pretrial detainees had arrived from New Orleans. She and four colleagues went to the jail and interviewed detainees from morning till midnight. When we left, "we knew we had a much bigger problem that would require lots of help and work." Telephone Interview with Phyllis Mann, *supra* note 14.

211. *Id.*

212. Since New Orleans prisoners had been transferred throughout the State, attorney Mann and her colleagues called on members of the private defense bar who lived near the jail facilities and asked each colleague to obtain information from inmates. "No defender refused, when I asked them to do us this favor," Mann said. She told about a volunteer private defender who wanted to finish his assignment so much he refused to evacuate even though a second hurricane named Rita, which hit the Gulf Coast three weeks after Katrina, was fast approaching. "I don't know if I can finish," the lawyer told Mann disappointingly. "I am told by authorities I must leave right now." *Id.*

213. *Id.*

President of the Louisiana Association of Criminal Defender Lawyers, and her colleagues began the process of locating and identifying the evacuated “New Orleans Nine Thousand.”<sup>214</sup> At first, State Corrections limited access to Louisiana lawyers and refused to allow volunteer paralegals or investigators to enter. They relented after facing the threat of a lawsuit. Boren remembered:

[A]n early meeting with law enforcement and correction officials where we told the Attorney General we needed to get access to the prisoners. Corrections thought we were planning a lawsuit. We said that was not our purpose and only wanted to identify the prison population and get people out of jail, who should be freed because they had already served the maximum sentence. The State Attorney General agreed to let us enter.<sup>215</sup>

During the course of the next several weeks, the volunteer army of “One Hundred Plus” lawyers traveled to most of the forty Louisiana prison and jail facilities and interviewed thousands of people who, until then, had been “lost in the system.”<sup>216</sup> The volunteer lawyers created a questionnaire and opened a file for each incarcerated person; they published the list on a website so that families and lawyers knew the person was alive and where he or she was located.<sup>217</sup> In mid-October, however, a contentious dispute arose about lawyers who entered the prison to document alleged brutality charges. Jail officials then revoked permission and refused entry to any of the “One Hundred Plus” volunteers.<sup>218</sup> Before interviewing ceased, the volunteer attorneys had spoken to six thousand two hundred eighty-one men, women and juveniles incarcerated throughout Louisiana.<sup>219</sup>

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214. E-mail from Phyllis Mann to author, *supra* note 3; *see also supra* note 3 (referring to almost nine thousand prisoners who were transferred from the New Orleans Parish Prison and surrounding counties).

215. *See* Interview with Jim Boren, *supra* note 202.

216. Phyllis Mann gathered basic information about the majority of the 8,967 prisoners and detainees who were evacuated as a result of Katrina from the volunteer lawyers who interviewed them in prisons and jails throughout Louisiana. E-mail from Phyllis Mann to author, *supra* note 3. Telephone Interview with Phyllis Mann, *supra* note 14; E-mail from Phyllis Mann to author, *supra* note 9.

217. Telephone Interview with Phyllis Mann, *supra* note 14.

218. In mid-October, after witnessing a violent confrontation in which some officers allegedly assaulted a prisoner, another group of volunteer lawyers commenced legal action against correction officials and officers. Corrections believed some of these lawyers entered the jail with the Mann volunteer group. Thereafter, the Louisiana Department of Corrections barred the Mann group from further interviewing. Telephone Interview with Phyllis Mann, *supra* note 14.

219. E-mail from Phyllis Mann to author, *supra* note 3.

From September to December 2005, this “ad hoc, volunteer, rag tag group”<sup>220</sup> and a few public defenders, led by their chief defender, were the only group of Louisiana attorneys “representing” the many thousands of New Orleans incarcerated pretrial and convicted prisoners. Indeed, their primary mission was to gain the release of people who should have already been freed. They focused on two groups: detainees who had been arrested and held on relatively minor crimes, and convicted inmates who had served the maximum sentence permitted by law.<sup>221</sup> “Everyone was doing their best but we were scrambling,” explained Phyllis Mann as she remembered the post-Katrina days. “There were times when we could not find or speak to each other. We were receiving e-mails from all over the country from lawyers wanting to volunteer, but we had so many fires to put out. I could not think how to use people.”<sup>222</sup> The ad hoc lawyers filed more than two thousand habeas petitions and presented arguments at various real and makeshift courtrooms throughout the state.<sup>223</sup> “We were practicing law in a foreign legal system, one where, at different times, there was no law to follow, no courtroom or judge available to present argument and usually no clients standing next to their attorney.”<sup>224</sup>

After New Year’s in 2006, the volunteer lawyers were joined by a decimated but willing group of ten New Orleans public defenders. Beginning in January 2006, additional private lawyers surfaced. State Bar officials became more involved and recognized the impossibility of a small group of public defenders representing newly arrested people, as well as thousands who had been evacuated.<sup>225</sup> Bar President Neuner remembers that “right after Katrina,” he and Jim Boren and other representatives of the criminal defense bar had “attended the first criminal justice meeting in September. We agreed then to work within the existing makeshift system and not challenge detention by

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220. Telephone Interview with Phyllis Mann, *supra* note 14. Tilden Greenbaum, Chief of the Orleans public defender office, appeared at Camp Greyhound, along with members of his staff. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Mann explained that “for a while after Katrina, there was no law in Louisiana. Courts closed. Then one would open and a traveling judge would be there every other week. Habeas law did not apply. When we argued habeas, we rarely had clients present, except for a few times a judge held hearings at the Rapides and Avoyelles Parish prisons. Still, we represented the women jailed at the all-male Angola Prison and the people whose period of incarceration had exceeded the maximum possible sentence for the crime. Telephone Interviews with Phyllis Mann, *supra* note 14; (Dec. 31, 2007 and Jan. 4, 2008).

225. Telephone Interview Frank Neuner, *supra* note 26. (Jan. 3, 2008).

filing habeas petitions.”<sup>226</sup> Three months later, Neuner recalled, “it was now clear to all that the system was dysfunctional. The Public Defender had no office and the other people involved were not getting it done. We sent an urgent pro bono message to the eighty percent of our membership who had e-mail capability, telling them defenders needed help.”<sup>227</sup>

Over the next few months, six to eight hundred attorneys responded and offered civil, but not criminal, law assistance. The volunteer civil lawyers conducted disaster-training seminars throughout the state,<sup>228</sup> advised the displaced and homeless population of their rights and procedures, and distributed an emergency manual that the State Bar created.<sup>229</sup> Finally, in April, eight months after Katrina, one hundred fifty to two hundred civil practitioners volunteered to assist the public defenders. They attended a criminal defense-training program and accepted several hundred cases that involved minor criminal charges.<sup>230</sup> State Bar President Neuner offered his explanation for why so few civil practitioners volunteered to help the public defenders. “Most believe[ed] they . . . [did] not have a clue how the criminal justice system worked and thought they lacked the skill set to do criminal defense work.”<sup>231</sup>

Neuner’s analysis reflects a commonly held view by most civil attorneys that they are not competent to contribute anything to indigents’ criminal defense in a crisis situation. It is a puzzling perspective that not all civil lawyers share.<sup>232</sup> People were in jail and had not seen a lawyer. Many were there illegally, having completed their sentence. Criminal law practice is not rocket science; most civil attorneys are smart and fully capable of applying their experienced practice skills to interview people and obtain basic factual information to show that the person had served the imposed sentence and was now being held illegally. Many attorneys could have worked with the New Orleans pub-

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226. Interview with Frank Neuner, *supra* note 17.

227. *Id.*

228. *Id.*

229. *Id.*; see *supra* note 21.

230. Interview with Frank Neuner, *supra* note 17.

231. The Bar President told of a conscientious colleague who accepted an indigent defendant’s case. Because courts were still mostly inoperable, the lawyer could not file motions, the judge presided only every other week, the police officer was seldom there. Weeks later, the client pled guilty and was given time served, causing the President to wonder whether or not an experienced lawyer would have done the same.” I assured him it is a common practice among lawyers representing a client who cannot afford bail and seeks to regain his liberty. Telephone Interview with Frank Neuner, *supra* note 26.

232. Telephone Interview, Marta Schnabel, *supra* note 21.

lic defenders, as law students had done. Or some could have engaged in more advanced lawyering skills, such as counseling, negotiation, trial preparation, and presenting a respectable defense for an incarcerated person. Other reasons may better explain why so few Louisiana civil attorneys did not respond to the criminal defense and State Bar's call for legal assistance during the first year following the storm.

Long before Katrina, a well-known and common divide existed between the overwhelming majority of civil attorneys and the relatively small criminal defense bar. It would not be easy for a merger to occur. Some practitioners, like Phyllis Mann, also believed that the Louisiana and New Orleans bars remained in a "Katrina coma" following the shock and personal damage that many attorneys and their families suffered.<sup>233</sup> Then again, unlike New York's situation, the Louisiana judiciary and bar had not been present at the same lawyer conference when Katrina struck, and were unable to speak immediately and coordinate plans. Instead, many lawyers commented that Louisiana judges were not easy to find and only a few accepted leadership roles. Additionally, Louisiana's high Courts of Appeals refused to allow volunteer out-of-state lawyers to practice law and lend assistance.

One also may speculate how much of a difference it made that New York lawyers were asked to assist the innocents who died or were injured at New York City's Twin Towers in civil matters, while Louisiana's bar was asked to respond to the legal needs of suspected and convicted criminals. New York's lawyers "connected" easily with Twin Towers' victims; Louisiana lawyers may not have felt the same "empathy" with inner-city, predominantly African American and economically disadvantaged New Orleans prisoners. No one can objectively measure the extent to which race and class enters a lawyer's decision, consciously or unconsciously, when considering whether to volunteer. Yet, it certainly appears easier for New York volunteers to respond to a contained crisis in lower Manhattan, especially for lawyers who had neither lost homes nor suffered personal loss, than for New Orleans attorneys who had witnessed their city flooded and were looking at substantial rebuilding and turmoil for a long time.

Many reasons likely explain why a lawyer decides not to participate and devote pro bono public service in a time of crisis. Taken as a whole, the various explanations make a strong argument for support-

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233. Garrett & Tetlow, *supra* note 1, at 151.

ing the urgency of a State Bar Association preparing for future contingencies. Lawyers, no doubt, will offer many reasons, some good and others not so readily accepted, for not volunteering generally, and even more excuses when the victims are perceived as unpopular or disliked like African-American criminal defendants. Instituting mandatory service and requiring participation of the bar may be the only means to ensure that the legal profession is present in sufficient numbers to serve the public interest.

Like the New York bar, Louisiana's bar demonstrated it, too, has a small cadre of heroic attorneys, who gave generously of their time to people who were in dire need of legal representation. Some lawyers, like the leaders and members of Louisiana's rescue team of "One Hundred Plus" volunteers, did not need a Model Rules Preamble or Rule 6.1 or an aspirational model to remind them about their professional responsibility to provide exceptional service beyond the fifty-hour minimum standard. But, their numbers were comparatively tiny and their service limited to habeas representation, not to representation at trial. Ten months after Katrina, Louisiana's lawyers continued to remain on the sidelines and had not sufficiently replenished the ranks of this exhausted group of volunteers to address the systemic problem of denying counsel and court access to the thousands of accused indigents. One can only imagine the frustration of dedicated jurists and bar members as they witnessed the legal profession's inadequate response to a problem as grave as incarcerating American citizens, charged with minor offenses, and denying them any prospect of a trial or of conferring with an assigned lawyer.

In April 2006, eight months after Katrina, New Orleans Administrative Judge Calvin Johnson acted. Desperate for available counsel, Judge Johnson assigned the Tulane and Loyola Law School faculties and criminal law clinics to represent the thousands of unrepresented prisoners. Little did the Judge know that the "cavalry" of local law students would perform admirably and would inspire a much larger force of volunteer law students from more than one hundred law schools to travel to New Orleans and try to fill the vacuum of representation for accused indigent defendants.

C. Law Students and the Student Hurricane Network

1. Forming a National Student Hurricane Network

Law students in New Orleans had just completed their first week of classes at Tulane and Loyola when they turned their full attention to the news that Hurricane Katrina, a category five storm, was heading directly their way. Like other residents, most students did their best to leave the city. Second-year Tulane law student and native New Orleanian, Morgan Williams was one of the few who chose to stay. “My mom evacuated with a family friend, but my dad and I decided to make sure our house would be okay.”<sup>234</sup> When the storm struck Sunday night, both remained vigilant and got little sleep. The next day they discovered that they were among the fortunate: the damage to their house had been minimal. “We had lots of work to do to get things back in order but were sure we had made the right decision,” Williams recalled.<sup>235</sup> “When we went to sleep Monday night, we were exhausted but believed the worse had come and gone.”<sup>236</sup>

In the middle of the night, a neighbor’s shouts awakened Morgan and his dad. New Orleans’ levees had broken.

Our neighbor was yelling that the waters were rising and we had to get out fast. My dad and I raced to his car. By the time we got there, the water level had already covered the tires and was rising. Fortunately, the car engine started. We just got out before everything flooded.<sup>237</sup>

Morgan made it safely to Jackson, Mississippi and then moved from place to place for ten days before settling with relatives in Washington, D.C. His law school classmates had similar escape stories which he would hear about later. “For the first days, there was a complete breakdown of communication. Phones were down and I could not reach anyone.”<sup>238</sup> But then he made contact with some law students who had been displaced all over the country, Williams learned that members of his Tulane law school community, led by Constitu-

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234. Telephone Interview, Morgan Williams, Co-Founder, Student Hurricane Network (Jan. 27, 2008).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

tional Law Professor David Gelfand,<sup>239</sup> had become “heavily involved” with a series of legal assistance, civil law projects.

Shortly after the levees broke, Professor Gelfand founded a law group called From the Lake to the River Coalition (FLTR). “Our professor grasped the serious legal issues that the region faced,” Williams recalled.<sup>240</sup> “He also was the first person who made me aware of the pending crisis in the Orleans criminal justice system.”<sup>241</sup>

Morgan became a steering committee member of the FLTR, along with attorneys Kristen Clark-Avery and Brian Mauldin.<sup>242</sup> As they learned more from Professor Gelfand, they communicated with other law students, including Allison Korn from Mississippi Law School, Laila Hlass, a Mississippi Gulf Coast native who attended Columbia Law School, and her colleague, Ann Arceneaux, a Shreveport, Louisiana native who had been volunteering work with The Justice Center, one of New Orleans biggest non-profit centers and among the first to re-open after the storm.<sup>243</sup> Hlass formed a list serve of law students in the Northeast who expressed interest in humane relief efforts. Before long, the students’ conversations extended to a weekly conference call that included a dozen or so out-of-staters, who had close ties to New Orleans and the Gulf Coast region. “We were all trying to figure out what was happening,” Williams recalled.<sup>244</sup> “As we

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239. Professor Gelfand tragically and suddenly died on Sept. 25, 2005, about three weeks after he formed the FLTR. The Student Hurricane Network law students dedicated their first Annual Report (2005-06) to Professor Gelfand and to the memory of SHN Nebraska law student, Paul Brunner, for their advocacy to justice. *Law Students Working Within the Post-Katrina Legal Landscape: The Student Hurricane Network Annual Report*, Oct. 2005-Oct. 2006 at 2 (Laila Hlass, Morgan Williams, Josie Beets, Laurence Spollen, Kesav Wable, Jeremy Pfetsch, Anna Arceneaux eds.) [hereinafter *SHN Annual Report*].

240. Telephone Interview, Morgan Williams, *supra* note 234.

241. *Id.* According to Williams, Professor Gelfand formed FLTR in the immediate aftermath of Katrina. On Sept. 9, 2005, Professor Gelfand, then living in Florida, convened a large conference call with people from across the country, although most members had relocated to Washington, D.C. and New York City. “The organization was entirely remote, such that most of the work I did was from D.C.,” Williams recalled. “I twice traveled to New Orleans, in early October and for Thanksgiving.” *Id.*

242. During the Fall 2005 semester, Tulane and Loyola law schools closed. While some students continued their education at other schools that semester, other students took leaves of absence. The Tulane Placement office arranged numerous work opportunities for students on leave. Williams, for instance, worked in the Anti-Trust Division of the Department of Justice. Williams joined FLTR on September 12 and became the communications coordinator before joining the steering committee. *Id.*

243. *Id.* The Justice Center is the home of several public interest and non-profit organizations including the Louisiana Legal Assistance Center, the Louisiana Capital Assistance Center (LCAC) and Capital Appeals Project (LCAP), the Innocence Project and Juvenile Justice Project of Louisiana (JJPL). The Justice Center was spared extensive damage and was one of the few legal organizations functioning in September 2005.

244. *Id.*

heard more about the volunteer criminal defense lawyers interviewing prisoners and about other emergency human rights issues, we realized there was an opportunity and acute need for more law students to get involved.”<sup>245</sup>

After Hurricane Rita leveled a second devastating blow to the region less than a month after Katrina, the law students’ weekly conference call became an essential communication for the relatively few Orleans students who had found safe haven in the city and for their out-of-state and displaced colleagues who wanted to know the most current news. During the days between the weekly calls, Arceneaux, Hlass, Korn, Williams and other law students from across the nation continued to discuss their role in the region’s recovery. The Gulf Coast collective shared their evolving thoughts with the out-of-state students during the weekly conversation.<sup>246</sup> Everyone was looking forward to seeing one another at the Equal Justice Works Career Fair and Conference in Washington, D.C. in late October.<sup>247</sup>

Shortly before the Equal Justice event, Williams drafted and circulated a one-page description for a proposed national Student Hurricane Legal Network that would create an organization for law students wanting to get involved and address the “far-reaching legal issues facing the hurricane-affected communities.”<sup>248</sup> The Gulf Coast students understood the urgent need to assist the volunteer criminal defense attorneys and others in the legal community who were working on housing,<sup>249</sup> employment<sup>250</sup> and voting rights<sup>251</sup> issues. The weekly conference calls became more frequent, as students pursued the idea of a law student network contributing to the rebuilding effort.

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245. Telephone Interview, Morgan Williams, *supra* note 234.

246. *Id.*

247. Equal Justice Works is a non-profit organization providing leadership and facilitating opportunities for law students to engage in public service. *See* [www.equaljusticeworks.org](http://www.equaljusticeworks.org).

248. Telephone Interview with Morgan Williams, *supra* note 234.

249. *See SHN Annual Report*, *supra* note 239 at 14-21. The storm destroyed 65,000 homes and damaged more than twice that number in Mississippi. In the New Orleans region, Katrina caused the loss of nearly 160,000 homes and apartments. *Id.* at 13. Loyola Law Professor Bill Quigley described the critical housing issues facing the rental resident returning to New Orleans, who was included among the “tens of thousands of people facing eviction from their homes and who would find their possessions tossed out in the street. *See* Bill Quigley, *Six Months After Katrina: Who Was Left Behind – Then and Now, Common Dreams*, <http://www.commondreams.org/views/06/0221-36htm>.

250. *See SHN Annual Report*, *supra* note 239, at 22-27 (describing African American evacuees’ loss of employment and the substandard living and working conditions of immigrant workers).

251. *Id.* at 28-31 (referring to the voting rights obstacles facing 300,000 displaced New Orleans residents).

At about the same time, law students in the Northeast gathered in New York City and began making travel plans for doing pro bono work in the Gulf Coast region during winter recess.<sup>252</sup>

At the Equal Justice Works Conference, the Gulf Coast students' collective prepared to present their idea for a national organization to colleagues from across the nation. Karen Lash, the Equal Justice senior program counsel and a former associate law school dean, had arranged for Williams to speak to one thousand lawyers, students and law school professionals at the annual dinner and at a panel the following day.<sup>253</sup> Williams' presentation, Lash explained, provided an opportunity "to talk about the legal academy's response and to see what schools could do" to facilitate law students' involvement.<sup>254</sup> Lash believed Williams' talk made the law students' commitment "real" and enabled host organizations to sponsor student volunteers when they traveled to Louisiana and Mississippi.<sup>255</sup>

When student attendees of the Equal Justice Fair heard the Gulf Coast collective's proposal for a national organization, they enthusiastically supported the newly-named Student Hurricane Network. Following approval, the SHN students immediately went to work. They sent an urgent message to law school public interest counselors: send volunteers. The response was overwhelming. "Within five days," Williams proudly declared, "we had received one thousand replies and commitments for winter recess."<sup>256</sup> Unable to handle such a large group at a time when the city was still under water, the SHN capped the number at two hundred sixty and promised to arrange housing and transportation, a huge undertaking considering the city's situation.<sup>257</sup> By December 2005, four months after Katrina, the SHN had become fully operational and had launched its first major student-initiated, pro bono project.

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252. In mid-October, law students from approximately twelve schools met in New York City and began discussing and planning for volunteering in New Orleans during the winter school recess. *Id.* at 5.

253. Telephone Interview, Karen Lash, Senior Program Counsel, Equal Justice Works (Feb. 25, 2008). Lash previously served for twelve years as Associate Dean at the University of Southern California Law School.

254. *Id.*

255. *Id.*

256. *Id.*

257. The SHN learned from this experience how time-consuming and onerous it was to make arrangements for volunteer students. From this point forward, SHN's policy requires student organizers to make their own housing and transportation arrangements before arriving. Telephone Interview with Morgan Williams, *supra* note 234.

2. The First SHN Student Volunteers: Winter Recess 2005-2006

Following the usual grueling, end-of-semester series of exams, two hundred sixty-one law students from fifty-seven different law schools arrived in Louisiana and the Mississippi Gulf Coast during the 2005-2006 winter recess.<sup>258</sup> The SHN assigned volunteers to nineteen different legal organizations, mostly in the New Orleans area but also in Shreveport and Alexandria, Louisiana, and to the hard-hit region in neighboring Mississippi.<sup>259</sup> Most student placements involved civil legal work in non-profit law offices that focused on the displaced population's desperate need for emergency disaster funding, temporary housing and health care.<sup>260</sup>

The remaining students, representing about one out of four volunteers, worked for indigent criminal defense organizations that represented capital and juvenile defendants.<sup>261</sup> As students became more familiar with the extensive flooding that had closed the New Orleans' criminal courts and public defender's office, and forced the evacuation of the city's prison complex, a dozen SHN volunteers joined the Mann-Kilborn army of "One Hundred Plus" where they helped search for the many "lost" and unrepresented prisoners.<sup>262</sup> Students prepared habeas petitions for people who had completed their maximum sentence and for others who had never seen a judge following arrest.<sup>263</sup> "Law students were well-suited for this type of investigative work," said Morgan Williams.<sup>264</sup> "Attorneys could have done it but

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258. See *SHN Annual Report*, *supra* note 239, at 7.

259. Most student assistance focused on New Orleans and Louisiana-based law offices. Thirty-one students, or about fifteen percent of the volunteers, worked in Gulfport, Mississippi. *Id.* at 4, 6 n.2 (listing organizations where volunteers were assigned). SHN leaders had met with host organizers at the Equal Justice Works Conference in October.

260. For example, thirty-nine students worked at the New Orleans Legal Assistance Corporation (NOLAC), thirty-five students were assigned to the People's Hurricane Relief Fund (PHRF), and twenty-five other students worked at the Advancement Project. Student volunteers interviewed numerous people and also researched legal issues that involved employment, immigration and civil rights claims. *SHN Annual Report*, *supra* note 239, at 4.

261. The SHN assigned twenty-two students to the Justice Center which housed the Louisiana Capital Assistance Center (LCAC), Innocence Project of New Orleans (IPNO) and Capital Appeals Project. Thirteen students worked with the American Civil Liberties Union prison project and nineteen other students were assigned to the Juvenile Justice Project of Louisiana (JJPL), *id.*, where they worked with the Chief Judge of the Juvenile Court and closed open warrant cases "so that the kids could go on with their lives wherever they had ended up." *Id.* at 9 (quoting Fordham law student, Katy Schuman).

262. *Id.* at 10.

263. *Id.* at 8 ("When the law students arrived, they assisted the attorneys in the long process of filing habeas corpus petitions for inmates and paving the path to secure the eventual release of hundreds of defendants being held in violation of their constitutional rights.").

264. Telephone Interview, Morgan Williams, *supra* note 234.

they were needed elsewhere.”<sup>265</sup> Appreciating that the relatively few, volunteer lawyers had precious little time for supervising students, Williams explained that SHN “wanted to provide a service without being a burden.”<sup>266</sup>

Consequently, SHN volunteers became a reserve force for the front-line volunteers of the “One Hundred Plus” Louisiana lawyers who had tried to fill-in for the displaced public defenders and private defense bar. Non-profit organizations fully appreciated law students’ work. Jelpi Picou, executive director of the Capital Appeals Project, considered students the “unsung heroes” and praised their professional ethic in which they “performed with courage and persistence.”<sup>267</sup> Picou described students’ “invaluable” contributions of “collecting data on dispersed inmates, conducting interviews with those inmates [and] tracking down family members.”<sup>268</sup> He recognized that students’ assistance went far beyond the individual person; it also produced the “research and writing for attorneys attempting to press forward on the legal challenges to . . . overall systemic challenges to the incarceration of thousands without access to courts of justice.”<sup>269</sup>

When the law students concluded the week and returned home to law school, the SHN collective leadership could take satisfaction in knowing that their first pro bono project was a big success. By providing a variety of legal service opportunities, the SHN had paved the way for many more law students—almost three thousand during the next sixteen months<sup>270</sup>—to return and serve the Gulf Coast population’s many emergency needs. Students could opt for a criminal or civil law experience, engage in legal research projects, or work with an advocacy project that prepared local residents to “gain access to quality jobs, education, house care and housing.”<sup>271</sup> They also could participate in legislative and lobbying efforts, assist other states’ disaster preparations, and lend their physical labor to rebuild New Orleans communities.<sup>272</sup>

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265. *Id.*

266. *Id.*

267. See *SHN Annual Report*, *supra* note 239, at 9 n.9 (referring to e-mail communication from Jelpi Picou to SHN founding member, Josie Beets (Sept. 21, 2006)).

268. *Id.* at 9.

269. *Id.*

270. See *SHN Annual Report*, *supra* note 239.

271. *Id.* at 6.

272. *Id.*

As the spring 2006 recess approached, SHN projects continued to attract new volunteers. Eight hundred law students began arriving in New Orleans that February.<sup>273</sup> Many students joined efforts to revive New Orleans', mostly moribund, criminal court system.

#### The Crisis in New Orleans Criminal Court: Project Triage 2006-2007

Seven months after thousands of New Orleans inmates had been evacuated and transferred to various prisons throughout Louisiana, most pre-Katrina detainees still had neither seen a lawyer nor returned to court. Other convicted inmates, who had completed serving their full sentence, also remained incarcerated.<sup>274</sup> Aside from the heroic, post-Katrina, jail interviewing and habeas representation by the "One Hundred Plus" volunteer lawyers, no new force of the Louisiana bar had seen or spoken to imprisoned inmates.<sup>275</sup>

The skeletal ranks of public defenders had remained unfilled. Though after the storm, only one out of six attorneys had returned to staff and many focused on new arrests, rather than pre-Katrina clients.<sup>276</sup> While some members of Louisiana's Supreme Court took initiative and responded to the crisis, the Full Bench declined to order New Orleans judges to open the criminal courthouse and return to work. Nor had the judicial leadership demonstrated a willingness to assign counsel to defend the remaining "four-to-five thousand prisoners who [lacked] any meaningful legal representation, and for whom there [were] no prospects of legal representation."<sup>277</sup> As the spring of 2006 approached, some additional Louisiana civil and criminal attorneys stepped forward to offer assistance,<sup>278</sup> but the New Orleans judiciary still had no idea whom to ask to research the status of the thousands of people in jail. When the New Orleans Administrative Judge assigned the Tulane and Loyola clinical programs to represent

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273. *Legal Aides: Law Students Travel a Long Way to Land Legal Stuff*, SUN HERALD, Mar. 18, 2006, at A1.

274. James Gill, *The Case of the Disappearing Lawyers*, TIMES-PICAYUNE, Mar. 21, 2006, at Metro 7.

275. The Louisiana State Bar's leadership, including then-President, Frank Neuner, and his predecessor, Marta Schnabel, had been actively involved in attempting to identify the optimal strategy for responding to the pressing, emergency needs in the court and prison system. Bar leaders met with the criminal defense and broader criminal justice community during the first months of 2006. Interview with Marta Schnabel, *supra* note 21; Interview with Frank Neuner; *supra* note 26.

276. Laura Parker, *Lack of Public Defenders May Force New Orleans to Free Accused Felons*, USA TODAY, Feb. 14, 2006, at A1.

277. *SHN Annual Report*, *supra* note 239, at 10.

278. *See supra* note 21.

the pre-Katrina jail population,<sup>279</sup> it became clear that law students were the system's best hope for doing the tedious job of reviewing court files and identifying prisoners who should have already been freed. The SHN contributed significant resources to this endeavor.

Following the first SHN sponsored volunteer work, students who had worked with the Mann-Kilborn group of volunteer lawyers told the leadership about the grave judicial crisis in which people remained trapped inside the prison system. Recognizing the gravity of the situation and responding to the administrative judge's order, SHN joined the Tulane and Loyola clinical students and faculty and volunteer criminal defense lawyer volunteers. Together, they created Project Triage, a "massive . . . and major defense initiative" designed to locate and free the wrongfully incarcerated.<sup>280</sup> Few would consider the work of SHN's fifty-five student Triage volunteers exciting. Judges and defenders assigned the volunteers to create a master database for each imprisoned New Orleans detainee who had a pending criminal charge. Law students, like Mary Anne Mendenhall, who had recently completed her first semester at Brooklyn Law School, had a clear reason for choosing this assignment. "It's just a matter of identifying the people who should be released. There is no disagreement about their existence—all that keeps running through my head is, six months and still there is no plan."<sup>281</sup>

Project Triage's plan for a database represented the first step of a coordinated plan to identify people wrongfully imprisoned. Entering Louisiana's Federal District Court the morning of March 13, 2006, Mendenhall and her colleagues commenced the painstaking task of reviewing every individual defendant's court file. Researching case histories gave judges and lawyers the information they needed to determine whether any inmate was entitled to release. One could only imagine the bizarre scene that greeted the presiding federal and state judges when they entered court that morning and observed hordes of volunteer law students

packed into the courtrooms of the Honorable Jay Zainey and the Honorable Chief Judge [of Louisiana's highest court] Ginger Berri-gan in the Federal Courthouse for the Eastern District of Louisiana. Rows of long tables and yards of extension cords supported stu-

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279. *See supra* note 29.

280. *SHN Annual Report*, *supra* note 239, at 10.

281. *Id.* Fun with Spreadsheets, posting of Mary Anne Mendenhall to BLS-SHN Spring Break Blog, available at <http://bls-shn.blogspot.com> (Mar. 13, 2006).

dents' laptops as they sifted through stacks of court dockets, tracking the often convoluted odysseys that became the lives of many defendants even prior to Katrina's landfall.<sup>282</sup>

Project Triage continued through the summer. When New Orleans Criminal Court opened in June,<sup>283</sup> law student interns worked with the Orleans Public Defender to ensure that an accused would not remain in jail beyond the lawful 45 day and 60 day period when the District Attorney must commence formal prosecution or release a detainee.<sup>284</sup> Many summer volunteers, though, were needed to assist the lone public defender at first appearance court; students' background investigation often made the difference in providing the necessary information for a defender to persuade a magistrate to order pretrial release or affordable bail.<sup>285</sup>

The final stage of completing Project Triage's mission to locate lost or disappeared prisoners would wait until the fall 2006 school semester when volunteer students met at Brooklyn Law School. Six months earlier, Tulane Law School Clinical Professor, Pam Metzger, and her New Orleans faculty colleagues had been given the near-impossible assignment of representing the entire backlog of the thousands of indigent clients. At that time, Professor Metzger led the effort to track inmates' whereabouts. Now she arrived at Brooklyn Law School determined to train the volunteer students and finish Triage II's mission of locating prisoners who should have been released. Professor Metzger and her "twenty-three SHN volunteers from four New York City-area schools processed over 1,000 records in a four-day period."<sup>286</sup> Metzger and volunteer students "settled into a class room [and] . . . recorded a snapshot of where these defendants' cases had been and were going, whether they had any representation,

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282. *SHN Annual Report*, *supra* note 239, at 10.

283. The SHN reported that the "courthouse . . . was running at half-capacity, with only the upstairs courtroom operating. Judges shared courtrooms, with paired sections meeting on alternate weeks. . . . Sheriff Marlin Gusman refused to bring more than six inmates at a time into any one courtroom, despite a backlog of over 6,000 cases." *Id.* at 11.

284. Louisiana law provides that prosecutors must file formal misdemeanor charges within forty-five days from arrest and formal felony charges within a sixty-day period. LA. CODE CRIM. PROC. art. 701 (2008). Before Katrina, an accused who could not afford bail waited most, if not all, of the statutory period doing "DA's time." After the storm, detainees remained incarcerated considerably past the maximum 45 and 60 days, serving "Katrina time." *SHN Annual Report*, *supra* note 239, at 11 (discussing "Katrina time").

285. See Landry, *Defenseless*, *supra* note 1 (describing Brooklyn law student, Josie Beets, who worked alongside the lone public defender, Meg Garvey, coordinator of the newly-created, First Appearance Project).

286. See *SHN Annual Report*, *supra* note 239 at 12.

and whether they had been over-detained . . . beyond their release date or longer than the maximum sentence for their crime.”<sup>287</sup> Fourteen months after Katrina had dispersed the Orleans’ prison population, the SHN students and their professor succeeded in creating a court database that revealed every defendant’s status.

Earlier that summer, the public defender had proposed a reorganization plan that called for each lawyer’s continuity of representation. Indigent defendants would be represented when first appearing in court and would be assigned the same public defender each time they returned until trial. Theoretically, continuity provided a lawyer for every incarcerated indigent defendant waiting for trial. Because the office of the public defender remained grossly understaffed, however, implementation would be delayed. Pre- and post-Katrina prisoners would not actually see anyone from the public defender’s office until December 2006. It was then that Tulane Professor Pam Metzger’s long wait “for the cavalry to arrive”<sup>288</sup> finally produced the volunteers for whom she had been waiting.

In place of the lawyers she had been expecting, Metzger greeted nearly six hundred law students who had volunteered for the SHN Gideon Project during their winter and spring 2006-2007 school recesses.<sup>289</sup> Together with clinical law professors and volunteer lawyers from many states, SHN law students focused upon the huge backlog of incarcerated people who had not spoken to a lawyer since being arrested. Beginning in the three weeks of students’ winter recess, the SHN’s Katrina-Gideon Interview Project concentrated on interviewing prisoners, writing memoranda, and opening case files. Law students performed remarkably. They traveled long distances, entered Louisiana prison facilities, interviewed hundreds of prisoners, and gained freedom for many who had been held illegally.<sup>290</sup> Other stu-

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287. *Id.*

288. Sandhya Bathija, *A Big Easy Mission That Won’t Be So Easy*, NAT’L. L.J. Dec. 11, 2006, at 4.

289. *Id.*

290. During the winter 2006 trip, I accompanied fifty-five Maryland Law School students to New Orleans. Fifteen Baltimore Law School students and five volunteer Maryland public defender supervisors joined the State of Maryland contingent. About two thirds of the law students worked with the Gideon Project; the remaining third worked on a housing project to help rebuild damaged or destroyed homes. The Project Gideon students spent the full week interviewing and investigating cases of New Orleans prisoners who had remained incarcerated throughout Louisiana since Katrina. Virtually every prisoner indicated they had not seen a public defender or a representative for the past sixteen months. Students travel included driving four hours to visit a prisoner at the Texas border, who had not seen a defender representative for 22 months. See Ron Cassie, *U. Md. Law Students Help New Orleans Public Defender’s Office*,

dents worked in the partially-opened, Orleans jail where they interviewed people just entering the system. Located in a single, very large room, first-year law students appeared unfazed as they conducted lengthy interviews of people arrested on charges ranging from traffic and marijuana possession to serious felonies. Students' professionalism was evident throughout the interview and when they later appeared before the Orleans Magistrate; they treated clients with respect, obtained crucial information related to bail and verified information which they gave to a public defender. Once again, students' background investigations were instrumental in aiding the public defender's successful motions for pretrial release.<sup>291</sup>

Project Triage concluded in April 2007, after the six hundred SHN volunteers had interviewed about one thousand eight hundred prisoners and detainees,<sup>292</sup> people who otherwise would have remained without access to counsel and without an identity within the Orleans court system. Students performed admirably and in the highest tradition of the legal profession. Witnessing SHN volunteers' dedication, enthusiasm and competence illustrated the meaning of professional responsibility. SHN's leadership and three thousand student volunteers had finally answered the emergency call from people who had been denied freedom and been quarantined from the public community for many months and longer. Law students knew little of a profession's ethical code or aspirational goals. They acted from a sense of what was right and morally necessary from members of a "noble" profession. Seeing law students walk fearlessly into prisons and treat criminal defendants with the respect and dignity to which they were entitled, while also witnessing many other SHN volunteers answer people's emergency human needs, are compelling reasons for believing that this generation of law students accept its pro bono responsibility in crisis and as part of becoming members of the profession. While students should be applauded for their spontaneous

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THE EXAMINER, Jan. 11, 2007; Ron Cassie, *UB Law Volunteers Discuss Katrina 'Legal Cleanup,'* THE EXAMINER, Jan. 17, 2008.

291. During the Gideon Bail Project, Maryland Public Defender, Edie Fortuna and I, supervised twelve Maryland Law School students, including ten students who had just completed their first semester. Each day, students entered the Orleans Parish Prison and conducted extensive interviews of about thirty-five newly-arrested people. By week's end, students had interviewed about one hundred seventy people; their investigations helped gain the release of about forty-five percent, which, according to public defenders, is several fold more than what usually occurs when students are not present. Orleans Magistrate Gerald Hansen offered his congratulations to the students and praised their dedication and professionalism.

292. *SHN Annual Report*, *supra* note 239, at 10.

response to human deprivation, law schools and professors must instill this core value of justice and of professional public service responsibility into their teaching curriculum.<sup>293</sup>

#### IV. PROPOSAL FOR CODIFYING COMMITMENT TO PRO BONO SERVICE

Lawyers' volunteerism and aspiration to engage in pro bono service are not sufficient to meet the immediate needs of the public in a time of crisis. In normal times, only a fraction of the profession's membership reach the Model Rules' minimum fifty hour standard of pro bono service, or even a reduced hourly amount. The great majority of lawyers choose to avoid pro bono work altogether or fail to devote adequate time toward fulfilling their "special responsibility to justice." While the profession accepts that every attorney has a public service duty, most state bars and high courts decline learning what portion actually engages in pro bono work. Instead, the profession appears comfortable with designating a self-selected group of volunteers to assume the public service burden. Bar association and judicial leaders' reluctance to press for more members' participation sends a further message of not wanting to disturb the status quo. Consequently, both Rule 6.1's non-enforceability and the states' unwillingness to take the threshold step of insisting that members submit annual pro bono reports as a condition of practicing law indicates how much distance remains to travel before attorneys accept pro bono work as an integral part of their daily professional lives.

The recent 9/11 and Katrina crises demonstrate that even when the emergency scenario is extraordinary and compelling, the profession should expect only a limited response by attorneys on a voluntary or aspirational basis. In many ways, New York represented a best case scenario and still received volunteer legal assistance from only one to three attorneys out of twenty state bar members. Consider first

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293. The traditional law school professional responsibility course focuses on covering material that prepares students for the practice of law and emphasizes issues, such as client confidentiality, conflict of interest, client perjury and maintaining separate escrow accounts that typically appear on students' Multistate Professional Responsibility Exam (MPRE). In my conversations with colleagues, most spend little or no time teaching the Model Rules Preamble and emphasizing lawyers' "special responsibility to the quality of justice," or to engage in pro bono service. My critique of the academy is not limited to classroom faculty; clinical professors, too, who often share a strong commitment to public service, also spent too little time teaching their students about the core value of public service. I intend to focus future scholarship to law schools' and professors' professional responsibility to instill dedication to their students to meet their pro bono obligations to the poor and underserved.

that the New York bar was a leader in pro bono work before 9/11. Then add the optimal situation for collaboration and coordination among the state's legal community because they were present at a conference on the morning of the terrorist action and could, therefore, take immediate action to respond to people's needs. Lawyers' volunteer work was limited to the more acceptable, civil legal assistance; New York's criminal justice system did not require additional lawyers to represent the predominantly poor, African-American and people of color jail population. Nor did the 9/11 terrorist action interfere with judges, lawyers and public officials' ability to communicate and to deploy volunteer lawyers where they were most needed. Lastly, the extent of the Twin Towers' destruction, though devastating beyond words, was limited to a particular section of the city and did not prevent volunteer lawyers from reaching people in need.

The situation was drastically different in New Orleans and likely represents a more typical attorney response to a crisis situation, particularly in the criminal justice system. Like most state bars, Louisiana lawyers' commitment to pro bono service was spotty. The judiciary did not require members to submit annual reports of pro bono service. Instead they relied on lawyers acting voluntarily and without judicial monitoring. Absent judicial and bar leadership, it is understandable why prosecutors, defenders and bar officials dispersed without a plan for communicating. Once Katrina struck, communications initially were non-existent and ultimately lacked a coordinated response. Unlike in New York City, the damage in New Orleans caused by the storm and flooding was extensive and not self-contained; displaced attorneys suffered human and economic losses, which made volunteering very difficult during the aftermath. Unaffected Louisiana civil lawyers were not likely to volunteer because of their distant and sometimes frosty relations with the New Orleans criminal defense bar.

No one can predict when the next crisis will occur and the extent of damage it will cause. In general, though, the legal profession should predict that the overwhelming majority of attorneys will not volunteer in significant numbers. Reasons will vary and some explanations will be justified, others less so. It also seems reasonable that more available attorneys will volunteer for a "just" cause where they feel a connection to the victims. Fewer lawyers will perform pro bono service to less popular or disliked groups, or where they believe responsibility, such as for indigents' defense, rests with government. In

Louisiana, for instance, only a very small fraction of the bar volunteered to meet the pressing needs of pretrial detainees denied liberty while awaiting trial, and of convicted prisoners who should have been released but who were denied access to court for almost one year. Most of those denied assistance were poor, lower income and predominantly African American. New York's bar performed better in a civil context where they identified more easily with the victims of the catastrophe.

An emergency legal crisis calls for the profession's emergency response. While every member of the non-legal community has a moral duty to assist, lawyers' professional duty recognizes a special responsibility to justice. Does this require pro bono, attorney volunteers in a time of crisis? That is the question every state bar must answer by engaging in protracted discussion and debate. In the world we live, where an environmental accident, natural disaster or a future act of terror or violence is likely to occur during our lifetime, attorneys must decide whether professional responsibility includes serving the public at a time of crisis.

My proposal calls for state bar associations and judiciaries to consider implementing a plan that requires public service during a designated year. Selected members would be "on call" and would be ready to serve the public interest in the event a crisis occurred that prevented courts from operating or that posed a substantial danger to people's health and safety. Under my proposal, every state bar would assign a portion of its members annually to meet the public's needs during an emergency. Should a disaster or emergency occur in that lawyer's designated year, the selected attorneys would be required to give their best efforts to be present and lend their legal expertise to a variety of criminal and civil crisis situations. Should an attorney be unable to be present, he or she would be required to document his or her unavailability and defer his or her volunteer duty to a different year. The drafted volunteer force would be bolstered by a reserve group consisting of the usual volunteer lawyers who consistently meet their public and social responsibilities and by law students who have demonstrated a genuine interest and commitment to pro bono service.

Should lawyers accept my proposal, they should revisit the Preamble to the Model Rules of Professional Responsibility or their state's ethical code and explicitly make clear that they accept their social obligation in times of crisis. If they choose to reject the proposal, attorneys should revise the Preamble's current language and de-

clare such service is not required so that the citizenry does not expect the legal profession to act in a time of crisis.

## CONCLUSION

Since 1969, the legal profession has traveled a huge distance in recognizing lawyers' ethical responsibility to serve the public. Within the past four decades, a more diverse membership has moved steadily toward acknowledging the bar's professional responsibility to provide legal services to people who cannot afford private counsel. The inclusion of lawyers who have developed a heightened concern for people's human rights has influenced the profession's evolving consensus that public service and promoting justice are core values of a lawyer's professional responsibility.

In a time of crisis, the legal profession finds itself at an ethical crossroads in what it expects and demands from membership. Because it has declined to require pro bono service in ordinary times, most lawyers opt not to fulfill this duty and fail to meet an aspirational standard. Emergency situations, though, call for a different response. Katrina's devastation and the closing of New Orleans' only criminal courthouse for nearly a year was a crisis of grave constitutional concern and represented a clear threat to the rule of law and to democracy in one of America's leading cities. Denying an accused access to court and to counsel during such a prolonged period represented a formidable challenge to constitutional rule that the profession was unable to meet. Minimally, the profession's failure to respond adequately requires a public explanation for why attorneys declined to participate and answer the public call for assistance.

Similarly, after New York City suffered the unimaginable destruction of the Twin Towers and the loss of thousands of people's lives and substantial economic loss to many more victims, fundamental human rights issues arose in a different context. The legal profession again considered whether it was obligated to provide free legal assistance to the families of those who perished, the survivors who had pressing health and economic needs, and the people who lost jobs and homes as a result of the devastation. Several thousands of attorneys responded, yet most bar members decided not to participate.

Like most people, lawyers generally prefer acting as individuals who are responsible to themselves and not as members of a profession that considers the public's interest. No doubt, many attorneys will re-

sist and feel pressure at being asked to clarify ambiguity in their public service, professional responsibility. Recent catastrophic events and the likelihood of new emergencies, however, make it necessary that attorneys resist these libertarian impulses and resolve this ethical dilemma before the next human tragedy occurs.

Bar associations throughout the nation must now consider what they demand of their membership. They must decide whether attorneys are required to provide legal assistance in a time of crisis or endorse lawyers' refusal to engage in such volunteer service. In many ways, the choice mirrors the ethical issue members initially tried to answer in the first ethical code in 1906. Are lawyers engaged in a business when they practice law where only loyalty to the client governs? Or are they members of a profession where ethical responsibility extends beyond the client and includes responding to a social emergency? The profession owes the public a candid assessment and understanding of attorneys' professional responsibility in times of crisis.

