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The Ethical Bar and the LSC: Wrestling with Restrictions on Federally Funded Legal Services

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I. INTRODUCTION

Equal justice under law is not merely a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society. It is one of the ends for

> which our entire legal system exists . . . [I]t is fundamental that justice should be the same, in substance and availability, without regard to economic status.[1]

> [T]he United States provides less money for legal services than any other Western industrial country except Italy.[2]

In 1996, Congress passed a budget act containing the most restrictive set of legislative limitations on the Legal Services Corporation ("LSC")—the private, nonprofit organization responsible for administrating federal funding for and facilitating access to legal services for low-income people across the nation[3]—in the tumultuous history of that entity.[4] Designed to forestall advocacy and representation activities viewed as undesirable by those in political power,[5] these restrictions mandated that those organizations to which

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1. Lewis Powell, prior to his tenure on the Supreme Court, speaking in his capacity as the president of the American Bar Association, as quoted in Michael A. Mogill, *Professing Pro Bono: To Walk the Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 7 (2001) (citing NAT'L LEGAL AID AND DEFENDER ASS'N, LEGAL SERVICES: THE UNMET PROMISE 1 (1995)).

2. Mogill, *supra* note 1, at 11 n.35 (citing Mary Wisniewski Holden, *Clipped Wings and Budget Cuts Tax Legal Aid*, CHI. LAW., Aug. 1997, at 59).

3. Douglas S. Eakeley, *Role of the Legal Services Corporation in Preserving Our National Commitment to Equal Access to Justice*, 1997 ANN. SURV. AM. L. 741, 742; Rhonda McMillion, *LSC Down But Not Out: With Reauthorizations Stalling, ABA Carries on Fight for Legal Services*, 82 A.B.A. J. 118, 118 (1996).

4. *See, e.g.*, Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URB. L.J. 771, 774–75 (1998):

> [In 1996,] Congress withdrew from Legal Services grantees the funding, the stability, and the professional discretion to elect forms of delivery of legal services—class actions, community organizing, legislative lobbying—that might support more expansive or systemic representation. This action merely continued a process of curtailment of capacity for broad-based lawyering that began the minute that Legal Services offices received their first federal funding . . .

See also Symposium, *Ethical Issues Panel*, 25 FORDHAM URB. L.J. 357, 360 (1998) [hereinafter Ethics Panel]:

> [W]hile LSC programs have at a number of different points in time had some restrictions placed on the type of clients that could be represented, or even on the type of actions that could be brought, what had never been done before [1996] was to impose restrictions on the legal arsenal of tools available to a client once a person was determined eligible and the case involved an acceptable subject matter.

5. *See, e.g.*, William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960s to the 1990s*, 17 ST. LOUIS U. PUB. L. REV. 241, 241 (1998) (quoting *Hearing Before the Subcomm. on Commercial and Admin. Law of the Housc Comm. on the Judiciary*, 104th Cong., 2d Sess. 36 (1996) (statement of Kenneth F. Boehm, Chairman, National Legal and Policy Center)):

> From the very inception of the legal services program up until today, the controversies which marked the program have been the same. In the name of helping the poor, program resources were used to promote political and ideological causes. Lobbying, congressional redistricting cases, abortion litigation and legal attacks on welfare reform and laws against welfare fraud all served to mark this program as being a far cry from the traditional legal aid offered to the poor by the legal profession over the years.

the LSC awarded funds refrain from engaging in any of a wide variety of previously permissible actions (for example, assisting incarcerated persons in civil proceedings and encouraging other people to engage in political activity).[6] The restrictions also further foreclosed some actions that had long been restricted for grantees (for example, class actions and lobbying).[7] The LSC quickly promulgated regulations following these restrictions, with which its grantees had to comply or lose their funding. The combination of restrictions and regulations has resulted in an increasingly cramped mandate for LSC grantees, compounding the already dire situation in the United States with respect to low-income people's access to the legal system.

When President Richard Nixon signed the LSC into being in 1974,[8] the goal was to fund two lawyers representing the low-income population (hereafter "legal-services lawyers") for every 10,000 low-income people in the nation[9] (of whom there were then approximately 29 million).[10] Today, the LSC itself estimates that it provides only a single LSC-funded legal-services lawyer for every 11,500 low-income people.[11] By contrast, the country's population contains one lawyer for every *240* people above the eligibility cutoff.[12] Millions of Americans

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See also McMillion, *supra* note 3, at 118 ("Critics say that LSC lawyers should not take on cases beyond the bread-and-butter basics, and that no LSC funds should be used in areas such as legislative redistricting, lobbying, abortion-related litigation, political activities or class actions. These restrictions were attached to the LSC appropriations legislation for fiscal 1996.").

6. Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107, 107–08 & n.15 (1998).

7. *Id.*

8. Legal Services Corporation Act, Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified as amended at 42 U.S.C. § 2996 (2006)) [hereinafter the LSC Act or the Act].

9. Eakeley, *supra* note 3, at 742; ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN OVERVIEW OF THE PROGRAM IN 2003, at 4 (2003), *available at* http://www.clasp.org/publications/Legal_Aid_2003.pdf [hereinafter Houseman 2003].

10. Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1221 (2002) [hereinafter Houseman 2002].

11. LEGAL SERVICES CORPORATION, BUDGET REQUEST FOR FISCAL YEAR 2005, at 6 (2004), *available at* http://www.lsc.gov/about/budget/FY05BReq.pdf [hereinafter LEGAL SERVICES CORPORATION BUDGET REQUEST 2005]. One scholar puts the number slightly higher, at one lawyer for every 9,000 eligible people. David Luban, *Taking Out the Adversary: The Assault On Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 211–13 (2003). The LSC's recent publication on "the unmet civil legal needs of low-income Americans" calculates the numbers somewhat differently. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2005), *available at* http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001. pdf [hereinafter LSC, JUSTICE GAP]. Grouping together all legal-services lawyers—both those funded by the LSC and those working for non-LSC-funded organizations—the Justice Gap report specifies a ratio of one legal-services attorney per 6,861 income-eligible people. *Id.* at 16.

12. Luban, *supra* note 11, at 211–13. The Justice Gap report bases this calculation on the number of lawyers providing specifically civil legal assistance to the general population, which

are eligible for legal services, but the vast majority of those millions go without any legal assistance whatsoever. Congressional funding for the LSC reached its highest level (adjusted for inflation) a quarter of a century ago in 1981,[13] following what has turned out to be the program's only four-year period of strong Democratic governance to date, under President Jimmy Carter.[14] Since that time, as the political climate has become more conservative and the successive administration and congressional perceptions of the LSC and its target clientele have become correspondingly less beneficent, the LSC's very existence has been threatened with some regularity.[15] Among other things, its budget has shrunk substantially in real terms, even as the need for the services it funds has increased.[16] The 1996 restrictions and resulting LSC regulations exacerbate these problems in at least two ways: by limiting the ways in which legal services can be offered to income-eligible persons and by eliminating from eligibility entire groups of people who need help and would be entitled to it on income grounds.

These restrictions also negatively affect both the private bar and legal-services lawyers, who handle most of the representation the income-eligible population receives. One important area in which these effects are felt is that of professionalism. Seen through an ethical lens, professionalism requires lawyers to transcend the bottom-line orientation of their profession and to serve such overarching goals as social justice and public interest. A more practical view of professionalism highlights qualities including autonomy and honesty. Both views place an extremely high value on the quality of service given to the client—the essence of the work that lawyers do. Unfortunately, the LSC Act and the regulations promulgated pursuant to that Act and its revisions contain internal contradictions regarding these basic aspects of professionalism. These contradictions present legal-services lawyers with one set of potentially unresolvable

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appears to be approximately half the country's population of active lawyers. LSC, JUSTICE GAP, *supra* note 11, at 16; Mkt. Research Dep't, American Bar Association, *National Lawyer Population By State* 3 (2005), http://www.abanet.org/marketresearch/2005nbroflawyers bystate.pdf (last visited Apr. 30, 2006) [hereinafter ABA, *National Lawyer Population*] (noting that the number of active lawyers in the United States in 2005 totaled 1,104,766). This calculation yields "a ratio of one attorney per 525 people." LSC, JUSTICE GAP, *supra* note 11, at 16.

13. Houseman 2002, *supra* note 10, at 1221.

14. I am indebted to Professor Frank Bloch for outlining the political context of the 1981 peak for this child of the 1980s.

15. *See infra* notes 182–184 and accompanying text (discussing Congress's repeated attempts to end or severely restrict the LSC).

16. Houseman 2002, *supra* note 10, at 1221; Houseman 2003, *supra* note 9, at 4.

dilemmas, and the bar as a whole with another, related set. Furthermore, the Act and the regulations alike run afoul of the Model Rules of Professional Conduct established by the American Bar Association ("ABA").[17]

A second legal area affected by the restrictions is pro bono work, typically performed by private lawyers as a complement to their regular positions and responsibilities. There has been and continues to be both an enormous need for pro bono and a shortage of willing and able practitioners thereof. This tension results in part from the legislatively mandated limitations that have encumbered LSC grantees from the time of the LSC's inception. The Office of Economic Opportunity ("OEO")[18] recognized that a case-by-case approach to legal-aid issues could only plug holes in an already crumbling dam. It believed that systemic efforts addressed to "fundamental community-wide issues"[19] promised a far more efficient and effective resolution of such issues.[20] Indeed, in its early years, the Legal Services Program ("LSP") engaged in precisely this sort of reform-oriented activity along with its regular casework.[21] The changes that Congress has made in the LSC's governing rules over the years, however, have forced LSC grantees to abandon any meaningful efforts at law reform and to return to the individual-case model that the LSC's precursors specifically rejected. By definition, law reform aims at solving the same or similar problems for multiple individuals and groups.[22] Thus, the forced move away from such large-scale reform has contributed to the increase in the number of people needing individual legal assistance.[23] Unfortunately, as the number of poor in the United States has risen, the number of lawyers working in legal-services areas has declined. In addition, for a variety of reasons, many members of the private bar whose pro bono contributions might partially compensate for that decline cannot or do not provide such services.

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17. The Model Rules form the basis for the ethical codes governing lawyers' behavior at the state and federal levels.

18. The OEO was the administrative parent of the original federal Legal Services Program ("LSP") that preceded the LSC.

19. Such issues are typically short-handed in legal-aid scholarship and discussion as "law reform."

20. Quigley, *supra* note 5, at 246–48.

21. *Id.*

22. *Id.*

23. Other contributing factors include the increase in the overall population of the United States, the increase in the number of U.S. residents eligible for and desirous of legal-aid services, and the increase in the complexity of problems facing both aid-eligible people and the lawyers striving to help them.

Legal aid to low-income people thus stands beset on every side. One possible solution to the dilemma facing eligible Americans and lawyers of all stripes would involve untying the hands of LSC grantees and the members of the private bar who choose to assist them. This could be done in two ways: by funding them fully and by removing from their work the restrictions imposed by Congress. Doing so could accomplish four interrelated goals: (1) free the lawyers best suited by training and inclination to poverty law to practice their chosen types of law effectively; (2) reduce the pressure on members of the private bar to perform pro bono work; (3) allow both legal-services and private lawyers to engage in their profession in ways that comport with its expectations of professionalism; and (4) substantially better serve the millions of poor in this country in the fundamentally American pursuit of life, liberty, and happiness.[24]

Part II of this Note outlines the ongoing crisis in legal services for low-income people from two different angles, briefly painting the picture of poverty in the United States today before explaining at somewhat greater length the LSC and the restrictions under which it operates. After providing an overview of the concept of professionalism, Part III discusses how that complex paradigm plays out under the LSC Act for both legal-services lawyers and their private-bar colleagues. It points up the tension between the law's expectations of its practitioners and the ways in which those expectations are sometimes frustrated under the Act and the resulting regulations. It also argues that this tension places those who provide legal services under ethical burdens that threaten the quality of those services. Part IV describes both the inadequate funding of the LSC itself and the failure of other sources of funding to make up for that federal shortfall. It discusses the fact that this uncertain financial situation further endangers legal services in both quality and quantity. Part V outlines the funding-increase and restriction-relaxation suggestions alluded to above, suggesting some specific ways in which these suggestions might be implemented and briefly discussing the potential effects on legal services. It concludes by reiterating this Note's central concern with equal access to justice for all.

24. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

II. "STATISTICS DON'T BLEED"[25]: LACUNAE IN LEGAL SERVICES AND THE GOVERNMENT'S PUZZLING RESPONSE

A. The Un- and Underserved: Crisis as Status Quo

> Often, one significant adverse legal result, such as the termination of public benefits, can be the difference between survival and disaster.[26]

The United States finds itself in the middle of a legal-services crisis.[27] Every year, millions of low-income Americans run into trouble with their housing, their benefits, their health care, their jobs, and their families[28]—trouble the law and its practitioners could fix, alleviate, or offset. Every year, the majority of those millions go unserved for various reasons: because they are unaware or do not believe that their problem can be solved legally;[29] because they know the law could help but do not have access to legal services or do not realize they are eligible for such services;[30] because they seek assistance from a legal-services program but are denied it "because

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25. Arthur Koestler, *On Disbelieving Atrocities*, *in* THE YOGI AND THE COMMISSAR 88, 92 (Danube ed. 1965) (quoted in Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2431 (1999) [hereinafter Rhode, *Cultures of Commitment*]).

26. Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 373 (1993).

27. *See, e.g.*, Memorandum from Bill Whitehurst, Chair, ABA Standing Comm. on Legal Aid and Indigent Defendants, to Helaine Barnett, President, LSC, ABA's 2006 Budget Recommendations to LSC (Aug. 24, 2004) (on file with author) [hereinafter ABA 2006 Budget Recommendations] ("Various credible studies—state and national—continue to show that despite the combined efforts of legal aid programs and private har pro bono attorneys, as many as 80% of the legal needs of people in poverty are not addressed in any way."); LEGAL SERVICES CORPORATION BUDGET REQUEST 2005, *supra* note 11, at 6 (noting that 80% of aid-eligible U.S. residents lack access to civil legal services); Margaret M. Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law Schools Conduct Them?*, 67 FORDHAM L. REV. 1879, 1883–84 (1999) ("The American Bar Association's ('ABA') Comprehensive Legal Needs Study reports that fewer than three in ten of the legal problems of low-income households are brought to the justice system. . . . The study found that in seventy-nine percent of the low-income households having legal problems, no lawyer was involved."); BRENNAN CENTER FOR JUSTICE, STRUGGLING TO MEET THE NEED: COMMUNITIES CONFRONT GAPS IN FEDERAL LEGAL AID 6 (2003), *available at* http://www.brennancenter.org/resources/atj/atj8.pdf [hereinafter BRENNAN CENTER 2003] ("Some 45 million low-income Americans meet the financial qualifications for LSC-funded representation, and LSC-funded programs strain to provide services to about 1.4 million of them a year . . . ."); Robert Hornstein et al., *The Politics of Equal Justice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1089, 1091 (2003) ("[I]t has been estimated that only one-eighth of the legal needs of poor people are addressed.").

28. Eldred & Schoenherr, *supra* note 26, at 372–73.

29. Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 380–81 (2004); LSC, JUSTICE GAP, *supra* note 11, at 13.

30. LSC, JUSTICE GAP, *supra* note 11, at 13.

the program lack[s] sufficient resources";[31] or perhaps because their legal issues require actions the legal-services office in their area is prevented by law from taking on their behalf.[32]

To be eligible for legal-services assistance, a potential client applying for aid must have a family income under 125 percent of the poverty level.[33] In 2005, the poverty level for a single person living in the District of Columbia or one of the forty-eight contiguous states stood at $9,570, making the cut-off for legal services $11,962.50.[34] To put this into perspective, a single person working forty hours a week, fifty-two weeks a year at the federal minimum hourly wage of $5.15 would gross only $10,712 before taxes.[35] By that standard, at least forty-three million Americans are eligible for publicly funded legal services.[36] This statistic lines up with the spectrum of need in a variety of other related areas. For example,

> [t]he federal government reported that in 1999, during our most prosperous period in decades, thirty-one million people were food insecure—that is, they experienced or feared hunger. During the same year, 3.5 million people—including 1.35 million children—were homeless at one time or another. Forty-two million Americans remained without health insurance. The Census Bureau recently reported that for the first time in eight years, the number of Americans living in poverty increased.[37]

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31. *Id.* at 5. This particular prohlem is so acute that the LSC estimates that "for every client served by an LSC-funded program, at least one eligible person seeking help will be turned down." *Id.* (emphasis omitted).

32. See *infra* notes 69–84 for a discussion of the restrictions Congress levied on the LSC in 1996 as a condition of continuing its funding and of the effects of those restrictions on the representation available to income-eligible persons.

33. Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567, 2663 n.127 (1993) ("LSC regulations supplement statutory eligibility factors enumerating maximum income levels, not to exceed 125% of the current HHS [Department of Health and Human Services] Federal Poverty Income Guidelines . . . .").

34. U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *The 2005 HHS Poverty Guidelines*, *available at* http://aspe.hhs.gov/poverty/05poverty.shtml. The rates are slightly higher for Alaska and Hawaii. *Id.*

35. U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *Questions and Answers About the Minimum Wage*, http://www.dol.gov/esa/minwage/q-a.htm (last visited Apr. 30, 2006). Basic state minimum wages range from $2.65 (Kansas) to $7.63 (Washington); some states lack minimum-wage laws entirely. U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *Minimum Wage Laws in the States* (Jan. 1, 2006), http://www.dol.gov/esa/minwage/america.htm (last visited Apr. 30, 2006).

36. Sources vary on this number. *See, e.g.*, LEGAL SERVICES CORPORATION BUDGET REQUEST 2005, *supra* note 11, at 6 (putting the number of eligible people at forty-three million); Luban, *supra* note 11, at 211 (putting the number at forty-five million and citing to the 2000 U.S. Census in support); U.S. Census Bureau, Poverty: Historical Poverty Tables, tbl. 6: People Below 125 Percent of Poverty Level and the Near Poor: 1959 to 2004, http://www.census.gov/hhes/www/poverty/histpov/hstpov6.html (last visited Apr. 30, 2006) (putting the number in 2004 at almost fifty million—over seventeen percent of the country's population).

37. Hornstein et al., *supra* note 27, at 1090–91.

Multiple surveys provide evidence that somewhere between eighty and eighty-five percent of the poor have failed and continue to fail to get the legal aid they need.[38] The legal harms inflicted on and by the low-income population are so disparate and acute, and the resources available to combat them so insufficient, that some legal-services lawyers have begun to approach their workload using a triage model. This approach borrows from combat and emergency medicine the idea that where limited resources meet insurmountable need, only the most life-threatening cases receive treatment.[39] The disparity that

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38. *See, e.g.*, Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 NEW ENG. L. REV. 809, 825 n.40 (2000) ("'Numerous studies have shown that only [fifteen] to [twenty] percent of the nation's poor receive legal services[,]' much of that provided by increasingly embattled legal[-]services providers rather than by the private bar.") (quoting Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433, 440 n.46 (1998)); Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695, 1697 (1993) (citing a recent study in support of the statement that "fewer than 20 percent of poor people's legal needs are adequately addressed"); Laurie A. Morin, *Reflections on Teaching Law as Right Livelihood: Cultivating Ethics, Professionalism, and Commitment to Public Service from the Inside Out*, 35 TULSA L.J. 227, 238 n.53 (2000) (quoting STANDING COMMITTEE ON LAWYERS' PUBLIC SERVICE RESPONSIBILITY, AMERICAN BAR ASSOCIATION, COMMITTEE REPORT SUPPORTING 1993 AMENDMENT TO RULE 6.1, *reprinted in* REGULATION OF LAWYERS: STATUTES AND STANDARDS 308–09 (Stephen Gillers & Roy D. Simon, Jr. eds., 1995)) (internal citation omitted):

> The ABA Standing Committee on Lawyers' Public Service Responsibility, which proposed the 1993 amendment to Rule 6.1, stated that "the inability of the poor to obtain needed legal services has been well documented: Since 1983, when Rule 6.1 was adopted, at least one national and 13 state-wide studies assessing the legal needs of the poor have been conducted. Of those studies reporting unmet legal need, there has been a consistent finding that only about 15%–20% of the legal need[s] of the poor are being addressed.

See also Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 992 (1998) (quoting Roger Abrams, *Are There Too Many Lawyers?*, N.J. L.J., Feb. 13, 1995, at 23):

> [T]he vast majority of legal needs among low[-]income households are unmet . . . . [T]he problem for most Americans is not that there are too many lawyers, but rather that "there are just too many lawyers trying to serve the same clients." Corporations and individuals with deep pockets or large potential damage claims may encounter a glut of would-be advocates. Ordinary Americans with ordinary needs do not.

See also Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24, 26 (1999) [hereinafter Rhode, *Professional Responsibilities*] ("[A] nation with the world's highest concentration of lawyers meets less than a quarter of the legal needs of its low-income population."); Christina M. Rosas, *Mandatory Pro Bono Publico for Law Students: The Right Place to Start*, 30 HOFSTRA L. REV. 1069, 1074 (2002) ("The poor of this country suffer from a severe lack of access to legal services. . . . Over eighty percent of this population's legal needs are not adequately addressed. One estimate places this group's total number of hours of unmet legal needs at twenty million annually." (citing Eldred & Schoenherr, *supra* note 26, at 372–73)).

39. *See, e.g.*, Eagly, *supra* note 38, at 440:

> Legal Services has become overwhelmed with demands for assistance. Case priorities are usually set according to a "triage model," similar to the system in place in hospital emergency rooms. Under this model, programs decide which types of cases to

drives the triage model is on the radar of various high-profile legal actors, including the ABA,[40] the National Legal Aid and Defenders Association ("NLADA"),[41] and the LSC itself.[42] Indeed, thirty years ago, Congress explicitly entrusted to the LSC the task of ensuring equal access to justice for all. Unfortunately, in the intervening years, legislative and regulatory forces have conspired to render this task increasingly difficult, if not impossible.

B. The Storm Before the Storm: The Federal Government and the LSC

> [The 1996 restrictions] hobble the ability of legal[-]services lawyers to address the causes as well as symptoms of poverty. By expanding "access to justice" only on these terms, legal assistance . . . foster[s] the illusion that "justice" has been done when underlying problems remain unsolved.[43]

Although the idea of legal services for the low-income population of this country goes back to the urban legal-aid efforts that

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undertake by using factors including degree of need, severity of poverty, and likelihood of success.

See also Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 94 (2002) ("Emergency triage is the only practical option to manage the overwhelming demand."). *See generally* Paul Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999) (discussing the triage model and its implications).

40. ABA 2006 Budget Recommendations, *supra* note 27:

> [L]ocal LSC-funded legal aid programs throughout the country are forced to turn away many thousands of individuals and families who need assistance with basic legal problems. Various credible studies—state and national—continue to show that despite the combined efforts of legal aid programs and private bar pro bono attorneys, as many as 80% of the legal needs of people in poverty are not addressed in any way. These are people who encounter legal problems relating to family relationships, domestic violence, health, employment, housing and other basic life issues.

41. Memorandum from Lillian M. Moy, Chair, Nat'l Legal Aid and Defender Ass'n [NLADA] Civil Policy Group & Don Saunders, Director of Civil Legal Services, NLADA, to Helaine Barnett, President, LSC, Recommendations for FY 2006 Mark (Aug. 16, 2004), http://www.nlada.org/Civil/NLADA_News/2004092052167018 (last visited Apr. 30, 2006) [hereinafter NLADA 2006 Budget Recommendations]:

> During the time of federal retrenchment in funding since 1995, we have seen an increase of 5.7% in the number of Americans living in poverty. Over 36 million people qualify for services from your grantees. Yet, as the Board all too well knows, we as a society remain able to address only about 20% of that need.

42. LEGAL SERVICES CORPORATION BUDGET REQUEST 2005, *supra* note 11, at 6 ("A sample of recent legal needs studies performed on the state level demonstrate that there has been little or no improvement since the ABA study was conducted"; for example, under twenty percent of low-income people in Oregon, only fourteen percent in Massachusetts, and only twelve percent in New Jersey are able to obtain help with their legal needs.).

43. Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1797 (2001) [hereinafter Rhode 2001].

began in the last quarter of the nineteenth century,[44] the origins of the LSC lie in the poverty-law practice and political mood of the 1960s.[45] The LSC's predecessor program, the LSP, began in 1965 under the auspices of the OEO and with the philosophical and structural support of President Lyndon Johnson's War on Poverty.[46] Submitting to Congress the bill that would become the LSC enabling act, President Nixon recognized that "[t]he legal problems of the poor are of sufficient scope that we should not restrict the right of their attorneys to bring any type of civil suit" and prioritized "integrity of the adversary process and full [protection of] the attorney-client relationship so central to our judicial process."[47] "At its peak outreach in 1980, LSC received $300 million in federal funding, and was able to finance a 'minimum access' level of two lawyers for every 10,000 low-income people within each service area throughout the country."[48] In 1999, operating within a much lower budget and under even more confining regulations,[49] "LSC grantees reported closing 1,038,662 million civil

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44. *See, e.g.*, Houseman 2003, *supra* note 9, at 5 (stating that "[c]ivil legal assistance for poor people in the United States began in New York City in 1876"); Michelle S. Jacobs, *Full Legal Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness*, 44 HOW. L.J. 257, 287 (2001) [hereinafter Jacobs 2001] (noting that "[s]hortly after the New York Legal Aid Society was formed, similar efforts were undertaken in other areas of the country" and that "[b]y 1917, there were thirty-seven cities with forty-one different Legal Aid organizations").

45. The LSC's history has been told in detail numerous times in journal articles and books. The sources cited here represent only a tiny sampling of the scholarship on the subject. For overviews from different—and sometimes diametrically opposite—positions, see generally ALAN W. HOUSEMAN & LINDA PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL AID IN THE UNITED STATES (2003), *available at* http://www.clasp.org/publications/Legal_Aid_History.pdf; Eagly, *supra* note 38; Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. PUB. INT. L.J. 39, 86–87 (1994); Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976); Hornstein et al., *supra* note 27, at 1091–1100; multiple sources by Alan Houseman, including Houseman 2002, *supra* note 10, at 1213, 1217–21, and Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary* [on Marc Feldman's article of that name, 83 GEO. L.J. 1529 (1995)], 83 GEO. L.J. 1669, 1670–84 (1995) [hereinafter Houseman 1995]; Jacobs 2001, *supra* note 44; John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101 (2000); Quigley, *supra* note 5; Kelly Keenan Trumpbour, *Serving the Poor: The Need for Unification within Today's Legal Services*, 2 MARGINS 63 (2002); Mauricio Vivero, *From "Renegade" Agency to Institution of Justice: The Transformation of Legal Services Corporation*, 29 FORDHAM URB. L.J. 1323 (2002).

46. Houseman 2002, *supra* note 10, at 1213.

47. Quigley, *supra* note 5, at 252 (quoting President's Message to Congress Proposing Establishment of tbe Independent Corporation, 7 WEEKLY COMP. PRES. DOC. 726, 729 (May 10, 1971)).

48. Eakeley, *supra* note 3, at 742.

49. In 1998, Congress passed a new set of restrictions that gave the LSC the power to "foreclose recipients from future grants if they substantially violated the Legal Services Corporation Act or appropriation provisions[] or if they sued LSC because of the restrictions," eliminated the right that had existed prior to that time whereby organizations denied LSC funds could demand a hearing before an independent hearing officer and the LSC was precluded from

legal cases relating to issues such as domestic violence, child custody and visitation rights, evictions, access to health care, bankruptcy, unemployment and disability claims, and many other issues."[50] In 2002, a reduced number of LSC-funded legal-services organizations and networks[51] closed "nearly one million civil legal cases."[52] The majority of these were resolved outside the courtroom "through advice, referral[,] or brief services, maximizing the limited resources available to serve the most clients."[53]

Remarkably, however, the LSC has been under almost constant attack since before Nixon signed it into law. Nixon's nominee for head of the OEO in 1973 "had as his first order of business a plan to dismantle the program."[54] President Carter's administration supported the LSC to such an extent that its funding more than tripled, with a concomitant increase in program offerings.[55] But even that degree of presidential favor was insufficient to push through a reauthorization of the enabling act during Carter's tenure, and since then the LSC has survived only year to year via budget

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eliminating a challenging organization's funding until that hearing had been resolved, and established a rule requiring grantees to reveal basic information about the participants in any case they instituted. Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2190 (1999) [hereinafter Houseman 1999]. Although discussion of these restrictions lies outside the scope of this Note, their potential constricting effect on the already cramped provision of legal services seems clear.

50. LEGAL SERVICES CORPORATION, LSC SPECIAL REPORT TO THE CONGRESS ON 1999 STATISTICS 1 (2000) [hereinafter LEGAL SERVICES CORPORATION SPECIAL REPORT] (on file with author). The LSC adjusted this number "by the average estimated error rate (11%), . . . [for] a total of cases closed for 1999 of 924,000." *Id.* at 7. The LSC defines a case as "the provision of permissible legal assistance to an eligible client with a legal problem, or set of closely related legal problems, accepted for assistance supported by LSC or non-LSC funds in accordance with the requirements of the LSC Act, regulations, and other applicable law." *Id.* at 5.

51. In 1995, the LSC had 325 grantees. Houseman 2003, *supra* note 9, at 2. That year, in partnership with national legal organizations including the NLADA, the ABA, the Center for Law and Social Policy, and Interest on Lawyers' Trust Accounts ("IOLTA") programs, the LSC reacted to Congress's one-third reduction of its funding by inaugurating a still-ongoing large-scale effort to integrate state-level legal-services providers into more efficient, effective, and streamlined service-provision networks "called state justice communities." *Id.* at 6–7. More than 350 legal-services offices were closed in the wake of the 1996 funding cuts. McMillion, *supra* note 3, at 118. The justice-community effort then ramped up significantly in 1998, after Congress passed further restrictions on the LSC. Houseman 2003, *supra* note 9, at 7. In part as a result of this initiative, by 2003, the LSC had 160 grantees. *Id.* at 2. *See also* Meredith McBurney, ABA Center for Pro Bono, *The Impact of Legal Services Program Reconfiguration on Pro Bono*, at 1 (Apr. 2003), http://www.abanet.org/legalservices/probono/impact_reconfiguration.pdf (last visited Apr. 30, 2006).

52. LEGAL SERVICES CORPORATION, BUDGET REQUEST FOR FISCAL YEAR 2004, at 3 (2003) [hereinafter LEGAL SERVICES CORPORATION BUDGET REQUEST 2004] (on file with author).

53. LEGAL SERVICES CORPORATION BUDGET REQUEST 2005, *supra* note 11, at 4.

54. Hornstein et al., *supra* note 27, at 1094.

55. *Id.* at 1095–96.

appropriations.[56] Having lost a battle against federally funded legal services during his tenure as governor of California,[57] President Reagan made a concerted effort early in his first term to dissolve the LSC entirely by appointing a board hostile to the very organization it was intended to govern[58] and "drastically" decreasing the LSC's funding.[59] In the years since reaching its 1980 high-water mark, "the LSC has been unable to obtain funding sufficient to maintain the level of access achieved at that point and has lost considerable ground because of . . . budget reductions . . . and an inability to keep up with inflation even with increased funding."[60] "In real dollars, the [fiscal-year 2002] appropriation amount[ed] to approximately half of the 1980 funding level"—and the fiscal-year 2005 appropriation amounted to *less* than half of the funding level the following year.[61]

The LSC came under renewed assault after a Republican sweep of the November 1994 elections brought Newt Gingrich and his Contract With America into power.[62] On April 26, 1996, the 104th Congress passed the Omnibus Consolidated Rescissions and Appropriation Act of 1996 ("OCRAA").[63] Via the OCRAA, Congress rewarded governmental departments and agencies with varying budget allotments revealing congressional priorities and preferences.[64]

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56. *Id.*

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> In 1970, Governor Reagan vetoed the California OEO grant [to California Rural Legal Aid, or CRLA] on the stated grounds that legal[-]services funds had been diverted to an activist political agenda far-distant from the original legislative intent. . . . An investigatory commission of the OEO concluded that in fact routine legal matters made up over 95% of the caseload of CRLA . . .

Quigley, *supra* note 5, at 249–50.

58. Houseman 1995, *supra* note 45, at 1687.

59. Reed Elizabeth Loder, *Tending the Generous Heart: Mandatory Pro Bono and Moral Development*, 14 GEO. J. LEGAL ETHICS 459, 460 n.3 (2001).

60. Houseman 2002, *supra* note 10, at 1221.

61. Larry R. Spain, *The Unfinished Agenda for Law Schools in Nurturing a Commitment to Pro Bono Legal Services by Law Students*, 72 UMKC L. REV. 477, 478 n.11 (2003) (citing to LEGAL SERVICES CORPORATION, ANNUAL REPORT 2000–2001 12 (2001)); LSC, JUSTICE GAP, *supra* note 11, at 5.

62. Lawrence J. Fox, *Legal Services and the Organized Bar: A Reminiscence and a Renewed Call for Cooperation*, 17 YALE L. & POL'Y REV. 305, 310 (1998); *see also* Hornstein et al., *supra* note 27, at 1097 ("In June of 1995, twenty-eight members of Congress . . . sent a letter to House Speaker Newt Gingrich warning that 'there is every reason to believe that this agency will threaten the reforms contained within the Republican "Contract with America."'") (internal citation omitted).

63. Pub. L. No. 104-134, 110 Stat. 1321 (1996).

64. For example, allocations to the Department of Justice included $16 million for the Radiation Exposure Compensation Trust Fund and—for the now-engulfed Immigration and Naturalization Service—a total of close to $1.4 billion, of which more than a third came earmarked for the Border Patrol. § 101, 110 Stat. at 1321-1, 1321-7.

Under Title V—Related Agencies, Congress awarded monies to such little-known entities as the Commission for the Preservation of America's Heritage Abroad, the Competitiveness Policy Council, and the Ounce of Prevention Council.[65] Title V also reflected Congress's allocation of $278 million to the LSC.[66] This allocation, however, struck two significant blows at legal services.

First, in setting the LSC's allotment at $278 million, Congress slashed its budget by forty percent. This effectively pushed the LSC's funding back fifteen years, forcing the closing of more than a twelfth of the nation's already insufficient legal-services offices and the reduction in number of clients served by more than a million.[67] The number of open legal-services cases fell by 14.6 percent, with upwards of 300,000 cases arrested, unfinished, by the sudden and drastic reduction in funds.[68]

Second, Congress encumbered the allocation with yet another lengthy set of administrative provisions restricting how the money was to be spent "to carry out the purposes of the Legal Services Corporation Act of 1974, as amended."[69] The LSC then promulgated regulations that instructed its grantees on compliance with the new congressional restrictions. Under these restrictions, perhaps the easiest way to indicate what LSC grantees may do for their clients is to outline what they may *not* do. Since at least 1996, the LSC regulations have proscribed legal-services lawyers from, among other things:

- bringing or participating in class action suits, including filing amicus briefs in support thereof;[70]

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65. § 411, 110 Stat. at 1321-47, 1321-48, 1321-60.

66. § 501, 110 Stat. at 1321-50.

67. BRENNAN CENTER 2003, *supra* note 27, at 10. By contrast, consider the following numbers: $61,656,965 (amount billed by Enron's bankruptcy lawyers in the first four months after the company's collapse); more than one billion dollars ("the net operating income of only the twenty largest firms in the District of Columbia in 2002"); thirty billion dollars ("the gross national product of the legal profession in the United States"—in *1980*). Hornstein et al., *supra* note 27, at 1103–04.

68. Comms. on Civil Rights and Prof'l Responsibility, Ass'n of the Bar of the City of New York, *A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers*, 53 THE RECORD 13, 18 (1998) [hereinafter Committees on Civil Rights and Professional Responsibility].

69. § 501, 110 Stat. at 1321-50. The 1996 restrictions were not the first to be levied, simply the most stringent. *See supra* note 6 and accompanying text.

70. LSC Rule on Class Actions, 45 C.F.R. § 1617.3 (2006) ("Recipients are prohibited from initiating or participating in any class action."); 45 C.F.R. § 1617.2(b)(1) ("Initiating or participating in any class action means any involvement at any stage of a class action . . . 'Involvement' includes acting as amicus curiae . . .").

- engaging in any of a wide variety of political activities, including (although not limited to): (1) capitalizing on their knowledge of poverty law and related issues by running for a partisan office or supporting another candidate for such an office;[71] (2) lobbying for a law or referendum favorable to their clients or in opposition to one that works against their clients' interests;[72] (3) registering their clients to vote or providing them with transportation to the polls to exercise that fundamental right;[73] (4) or even training their clients to engage in political activism on their own behalf;[74]

- representing in a public-housing eviction procedure a person accused or convicted of a drug-related offense;[75]

- or participating in any civil litigation on behalf of prisoners, even those incarcerated pre-trial.[76]

Various arguments have been made against these restrictions. One group focuses on constitutional concerns, particularly those implicating the First Amendment right to freedom of speech.[77] This

71. LSC Prohibited Political Activities, 45 C.F.R. § 1608.5 (2006). Although a number of the verboten activities enumerated in this paragraph have political elements, they can also be characterized as legal: they concern the establishment, achievement, and protection of legal rights through law-related means, from the development of fundamental concepts of those rights to efforts to take advantage of them in environments in which doing so is otherwise difficult or impossible. Moreover, the oft-touted separation between political and legal concerns is honored more in the breach than not, given that laws and their regulatory analogues stand at tbe heart of most political activity. Consider, say, the number of "political" rallies that concern actual or proposed laws or legally binding regulations. Abortion, marriage equality, euthanasia and the existence of a right to die, adoption, the separation of church and state—all are hot-button political issues, and all implicate a wide variety of legal principles. The life of the mind compartmentalizes far more neatly than does the everyday practical version.

72. LSC Restrictions on Lobbying and Certain Other Activities, 45 C.F.R. § 1612.3 (2006).

73. 45 C.F.R. § 1608.6.

74. 45 C.F.R. § 1612.8.

75. LSC Restriction on Representation in Certain Eviction Proceedings, 45 C.F.R. §§ 1633.1–.3 (2006).

76. LSC Rule on Representation of Prisoners, 45 C.F.R. §§ 1637.1–.4 (2006). Like section 1633, this regulation appears to reflect biases against certain groups of people that are so strong as to trump the fundamental presumption that an accused person is innocent until proven guilty.

77. *See, e.g.*, Committees on Civil Rights and Professional Responsibility, *supra* note 68, at 32–33:

> The reach of the government's restraint . . . amounts to an outright ban on conventional lawyering activities by lawyers for the poor—barring attorneys who work for offices that receive even modest support from the LSC from using non-LSC funds for lawyering activities that the federal government has chosen not to support. . . . Under the doctrine of unconstitutional conditions, [this bar] is plainly inconsistent with the First Amendment.

argument holds that "[b]y conditioning LSC funding on the surrender of such rights as the right to file a lawsuit and the right to engage in advocacy, the restrictions implicate the First Amendment."[78] Another set of objections focuses on administrative and financial issues. For example, the purpose provision of the regulation on "program integrity" indicates that the regulation

> is designed to implement statutory restrictions on the use of non-LSC funds by LSC recipients and to ensure that no LSC-funded entity shall engage in any restricted activities and that recipients maintain objective integrity and independence from organizations that engage in restricted activities.[79]

The prohibition provision of that regulation then explicitly bars LSC grantees from taking any action forbidden elsewhere in the LSC regulations—not only with LSC funds, but with any funds received from non-LSC sources as well.[80] This regulation has been interpreted to require LSC grantees that want to engage in forbidden activities to establish an entirely separate physical facility for that purpose—a difficult proposition for already understaffed, underfunded legal-services organizations.[81]

The 1996 restrictions also included a requirement that the LSC immediately implement a competitive grant-awarding process under which "[n]o person or entity that was previously awarded a grant or contract by the Legal Services Corporation for the provision of legal assistance [could] be given any preference in the competitive selection process."[82] By removing any certainty that a given organization's funding will continue from year to year, this provision threatens the

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78. Harvard Law Review, *Constitutional Law—Congress Imposes Restrictions on Use of Funds by the Legal Services Corporation: Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321*, 110 HARV. L. REV. 1346, 1347 (1997).

79. LSC Rule on Use of Non-LSC Funds, Transfer of LSC Funds, Program Integrity, 45 C.F.R. § 1610.1 (2006).

80. 45 C.F.R. § 1610.3.

81. *See, e.g.*, Press Release, Brennan Center for Justice, Federal Judge Strikes Down Discriminatory Restrictions on Lawyers for the Poor (Dec. 20, 2004), http://www.brennancenter.org/presscenter/releases_2004/pressrelease_2004_1220.html (last visited Apr. 30, 2006):

> The only way for a legal aid office to use private money to bring these restricted cases was to establish a physically separate facility. Complying with this "pbysical separation requirement" is so expensive that virtually none of the approximately 140 LSC grantees around the country—which are already so cash-strapped that they can only represent a small fraction of eligible clients—have been able to meet it. For example, . . . South Brooklyn Legal Services would have to turn away 500 more people each year if it set up a separate office.

In December 2004, a New York federal judge found the program-integrity requirement unconstitutional on First Amendment grounds. Dobbins v. Legal Services Corp., *companion case to* Velasquez v. Legal Services Corp., 349 F. Supp. 2d 566 (E.D.N.Y. 2004). See *infra* note 205 and accompanying text for a discussion of the follow-up to this decision.

82. Pub. L. No. 104-134, 110 Stat. 1321, 1321-53 (1996).

stability of grantees' ongoing work and the integrity of their service to their clients.[83] These arguments and others have been advanced in court cases challenging the 1996 restrictions on a variety of grounds; to date, however, such challenges have met with, at best, limited success.[84]

III. SHORTFALLS AND STRATEGIES: ETHICAL REPRESENTATION UNDER THE ACT

The legal profession expects a great deal of itself. To get a sense of the nature of these expectations, one need only consider the preamble to the ABA's Model Rules of Professional Conduct. This important statement on legal professionalism makes clear that lawyers serve the public interest and "play a vital role in the preservation of society" and that equal access to justice should be a goal, not just for poverty lawyers, but for *all* members of the profession.[85] Other discussions of professionalism, the broad-based behavioral rubric under which lawyers operate, invoke similar concepts. In restricting legal services, the LSC Act and concomitant regulations conflict with not only the goal of equal access to justice, but also significant mores of professional legal conduct. These conflicts affect all lawyers, both public and private, who provide legal services to the income-eligible.

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83. *See, e.g.*, Bennett, *supra* note 4, at 777:

> Being able to stay put and to dedicate resources over time[] is the greatest contribution that a program can make to the practice of long-haul lawyering. Long before Congress stripped Legal Services offices of most of the weapons in their arsenals for systemic strategies, consultants reminded them that their greatest strength lay in "being there": on the "collective institutional memory" of the neighborhood law office, a repository of impressions filtered through individual cases that build insight about neighborhood problems.

Cf. Kenneth F. Boehm, *The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary*, 17 ST. LOUIS U. PUB. L. REV. 321, 323 (1998), applying a free-market competitive model to legal services with no apparent understanding either of the value of continuity of service or of the idea that legal-services lawyers might have non-financial motives for providing their clients with the best possible representation:

> The prevailing practice within the program of "presumptive refunding" has meant that once a local group has become a grantee, it will typically get automatic renewals of that grant in perpetuity. There is little incentive to provide excellent legal services because the grant is renewed regardless of whether the group has done a good, poor or mediocre job. The size of the grant is calculated based on the poverty population of the service area, not the quality of service.

84. For a discussion of constitutional arguments against the 1996 restrictions and details of some of the first cases to bring such challenges (including the early stages of what became *Velasquez v. Legal Servs. Corp.*, 529 U.S. 1052 (2000), and *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998)), see Roth, *supra* note 6.

85. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROF'L CONDUCT Preamble (2004), *available at* http://www.abanet.org/cpr/mrpc/mrpc_toc.html [hereinafter ABA 2004].

A. The Premises of Professionalism

> The responsibility of the lawyer to exercise professional responsibility, thereby maintaining the efficient and just functioning of the legal system, is a theme often repeated in discussions of professionalism.[86]

Of all the concepts bandied about in legal scholarship, professionalism is one of the most inchoately defined and widely debated.[87] The terms "professionalism," "professional responsibility," "professional conduct," and even "ethics" or "legal ethics" are often used interchangeably.[88] Articles on the legal world's "professionalism crisis" abound, sometimes with a notable lacuna where a definition of the central term might logically be.[89] Published conceptions of professionalism involve a wide variety of components that are occasionally contradictory[90] and often intertwined. These include, but are not limited to,[91] concepts such as the following: equality,

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86. Michelle S. Jacobs, *Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?*, 8 ST. THOMAS L. REV. 97, 104 (1995) [hereinafter Jacobs 1995].

87. An earlier version of this paragraph was written by the author for a paper entitled "When and How They Enter: Law Students, Public-Interest Law, and What We Don't (Yet) Know" and submitted in fall 2004 to Vanderbilt University Law School's Law & Poverty Seminar.

88. *See, e.g.*, CTR. FOR PROF'L RESPONSIBILITY, AMERICAN BAR ASSOCIATION, PROFESSIONALISM CODES, http://www.abanet.org/cpr/profcodes.html (last visited Apr. 30, 2006) (listing state-level codes, the titles of which include words such as "professionalism," "civility," "appropriate conduct," "courtesy" and "professional courtesy," "professional conduct," "professional responsibility," "ethics," and even "client rights and responsibilities").

89. On the professionalism crisis, see Morin, *supra* note 38, at 237–38 nn.46–51 (citing an American Bar Association report and multiple books and articles on the subject). For an example of a definitional lacuna, see Bruce A. Green, *Public Declarations of Professionalism*, 52 S.C. L. REV. 729, 733 (2001) (suggesting that debate over the precise meaning of the term be abandoned, on the ground that "[e]ven if lawyers have different understandings of what it means to be 'professional,' almost all understand the importance of being 'professional'").

90. *See, e.g.*, Melissa L. Breger et al., *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 305 (2003) ("[T]here is substantial debate over standards of professionalism beyond the mandatory rules. What may seem like civility to one lawyer may seem like a breach of the ethical duty of zealous advocacy to another.").

91. Complementary definitions of professionalism abound. A sampling:

- "pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood" (American Bar Association, Commission on Professionalism, *". . .In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 261 (1986) [hereinafter ABA 1986]).
- doing the best possible job of representation (Green, *supra* note 89, at 736).
- honesty and truthfulness (*see, e.g.*, Green, *supra* note 89, at 736 ("[A] professionalism code might state simply: . . . 'We will be honest and keep our word.'"); Deborah L. Rhode, *The Professionalism Problem*, 39 WM & MARY L. REV. 283, 304 (1998) (describing honesty as an element of professionalism)).

autonomy, and community, all incorporating an element of balance between the client's interests and those of the lawyer;[92] competence, diligence and promptness, preserving the rule of law, serving the profession, and ensuring access to the courts;[93] justice, fairness, and morality;[94] zeal and zealous advocacy;[95] and ethics.[96]

- an obligation to perform public service (*see, e.g.*, James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, The Profession and Legal Education*, 13 LAW & INEQ. J. 51, 65 (1994) ("[T]he public service obligation of lawyers is an inherent characteristic, or defining element, of the profession. If there is no larger calling to public service, then the practice of law is simply a trade, consisting of a collection of analytical skills honed for commercial success."). Green calls this component "assistance to the underserved." Green, *supra* note 89, at 736.
- "a way for people to participate in a meaningful fashion in the resolution of their social disputes or in prevention of social disputes or both" (Jacobs 1995, *supra* note 86, at 107–08 (quoting JACK SAMMONS, LAWYER PROFESSIONALISM, 5–6 (1988))).
- "a genuine interest in preserving the rights of the many against the power of the few" (Kara Anne Nagorney, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12 GEO J. LEGAL ETHICS 815, 827 (1999)).
- "those goals, values, and attitudes which exemplify the nobler aspects of the practice of law and that enhance the public image of lawyers and the legal profession" (Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1343 (1997)).

92. Richard L. Abel, *Taking Professionalism Seriously*, 1989 ANN. SURV. AM. L. 41, 43. Other scholars also list autonomy as a component of professionalism. *See, e.g.*, Jacobs 1995, *supra* note 86, at 104 (arguing that defining "autonomy" as control over one's own work creates a damaging distance between lawyers and their clients). Another scholar includes client-centeredness under a nominally different rubric, that of representational ethics. Baker, *supra* note 38, at 841.

93. Baker, *supra* note 38, at 812. Baker categorizes all of these components under the general rubric of "ethical issues." *Id.* He derives them from several sources, including: AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT (1999); AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983); AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Robert MacCrate ed. 1992) [hereinafter MacCrate Report]; and SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS (1996). *Id.* at 819–25. Other scholars also list competence as a component of professionalism. *See, e.g.*, Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for the Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 13 (2000); Breger et al., *supra* note 90, at 335.

94. *See, e.g.*, Beverly Balos, *The Bounds of Professionalism: Challenging Our Students; Challenging Ourselves*, 4 CLINICAL L. REV. 129, 145 (1997); Barry et al., *supra* note 93, at 13, 55 ("[C]linical education [has a] longstanding commitment to social justice and the inculcation of the professional values of access to justice, fairness, and non-discrimination in the legal system."). Like Baker, *supra* note 38, Balos derives these components from the values section of the MacCrate Report, *supra* note 93. Balos, *supra*, at 145.

95. *See, e.g.*, Breger et al., *supra* note 90, at 335; Nagorney, *supra* note 91, at 817 ("[P]rofessionalism and zealous advocacy are not mutually exclusive. In fact, it could be considered a mark of professionalism for a lawyer to firmly protect and pursue the legitimate interests of his or her client.") (internal citations omitted).

This overview suggests that the concept of "professionalism" has something of an "I know it when I see it" quality. Nonetheless, certain overarching themes are relatively clear. Ideas/ideals of ethics provide a recurrent refrain, incorporating values such as public service, equality of representation and access, high-quality representation, autonomy, and justice. These ethical concepts do not arise solely from legal scholarship; the ABA advocates them as well. When the ABA commissioned a study on legal education and professional development in the early 1990s, the resulting report included "provision of competent representation" and "striving to promote justice, fairness, and morality" in a list of only four values that all lawyers should possess.[97] Correspondingly, the Model Rules and the comments thereon support professional goals of, among other things, competent representation, zealous advocacy, and pro bono work.[98]

Both the ABA and courts have made clear that these standards apply to legal-services lawyers just as they do to members of the private bar.[99] In 1986, the ABA updated its "[s]tandards for the operation of civil legal aid programs," which had been in operation since 1961 and had not been reviewed since before the creation of the LSC in 1974.[100] The introduction to this update specifies the degree to which legal-services lawyers remain affected by the Model Rules even within their constrained professional context:

> These Standards do not impose any different ethical requirements than those already contained in the Model Code of Professional Responsibility and the Model Rules of

96. *See, e.g.*, Rhode, *Professional Responsibilities*, *supra* note 38, at 28; Breger et al., *supra* note 90, at 305 ("[W]e agree that professionalism embraces the realm of ethics, but also reaches far beyond. . . . [E]thical rules provide a minimum level of professionalism . . . .").

97. Jacobs 2001, *supra* note 44, at 260 (quoting the MacCrate Report, *supra* note 93, at 140–41).

98. ABA 2004, *supra* note 85, R. 1.1, 5.4(c), and 6.1 (2004). These rules are discussed in more detail *infra* at notes 110–128 and 165–169 and accompanying text.

99. *See, e.g.*, Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 503 (2001) ("[I]t has long been held that the same ethical standards apply to lawyers working in legal[-]services programs as to lawyers in law firms.") (citing, *inter alia*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 324 (1970) (legal-services lawyers have a "'primary obligation of loyalty' to their clients and are required 'to act in accordance with the Code of Professional Responsibility'") and Borden v. Borden, 277 A.2d 89, 92–93 (D.C. 1971) ("We are reluctant ever to make an exception from the professional norm for attorneys . . . who provide legal representation without compensation from the client because then we might encourage a misapprehension that the special nature of such representation justifies departure from the profession's standards.")).

100. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS (SCLAID), STANDARDS FOR PROVIDERS OF CIVIL LEGAL SERVICES TO THE POOR 1 (2002 ed.), *available at* http://www.abanet.org/legalservices/downloads/sclaid/civilstandards.pdf [hereinafter ABA, STANDARDS].

> Professional Conduct. In some instances, they touch upon issues that are governed hy the accepted rules of professional conduct, and eIucidate their application in the context of the special circumstances of providing civiI Iegal services to indigents. In those instances the commentary may make appropriate reference to, but does not alter, the controlling ethical requirement.[101]

B. The Public Providers: Performance Under Pressures

> The practice of law in the spirit of public service can and should be a hallmark of the profession.[102]

In light of these professional expectations, the congressional restrictions on the LSC and the resulting regulatory restrictions on the LSC's grantees create an untenably self-contradictory situation for many legal-services lawyers by preventing them from effectively serving those whom they are mandated to serve. Evidence of this Gordian knot appears in the very act authorizing the LSC, which provides that

> [t]he Corporation shall not, under any provision of this title, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of tbe American Bar Association (referred to collectively in this title as "professional responsibilities") or abrogate as to attorneys in programs assisted under this title tbe authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction.[103]

With this mandate, the Act clearly reflects an expectation that legal-services lawyers will comply with the ethical guidelines governing their profession as a whole. Thus, on the understanding of professionalism articulated above, they will work for equal access to justice. Indeed, Congress explicitly spells out this expectation in the "statement of findings and Declaration of purpose" that opens the Act: "[T]here is a need to provide equal access to the system of justice in our Nation . . . [P]roviding legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice . . . ."[104]

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101. *Id.* at 3. In 2004, the ABA formed a task force for the purpose of updating the standards to accommodate the changes in the provision of legal services in the intervening eighteen years. The task force intended to present its revisions to the ABA House of Delegates in February 2006. ABA Standing Comm. on Legal Aid and Indigent Defendants, Task Force to Revise ABA Standards for Providers of Civil Legal Services to the Poor (2004), http://www.abanet.org/legalservices/downloads/sclaid/standards/revisionprojectoverview.pdf (last visited Apr. 30, 2006).

102. ABA 1986, *supra* note 91, at 261.

103. LSC Act, 42 U.S.C. § 2996e(b)(3) (2006).

104. 42 U.S.C. § 2996.

1. Congressional and Regulatory Restrictions

Contrary to this clear statement of purpose, the 1996 amendments to the Act and the ensuing regulations repeatedly undercut Congress's expressed goal of equal access to justice. The enacting bill insists that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."[105] The Act re-emphasizes this point in no uncertain terms only a few provisions later when it states that

> [w]ith respect to grants or contracts in connection with the provision of legal assistance to eligible clients under this subchapter, the [LSC] shall . . . insure the maintenance of the highest quality of service and professional standards, the preservation of attorney-client relationships, and the protection of the integrity of the adversary [sic] process from any impairment in furnishing legal assistance to eligible clients.[106]

These requirements seem incompatible, however, with the impediments Congress has placed in the path of any lawyer attempting to meet them, via the laundry list above of options, opportunities, choices, and tactics foreclosed by law to legal-services lawyers.[107] The fact that the tools on this list remain generally available to other lawyers strengthens the argument that, held to a professional standard that specifies "the highest quality of service," legal-services lawyers must attempt to meet that standard with fewer and weaker options than those available to the private bar. Given the handicap these restrictions present, one might wonder whether such assistance remains possible—and how realistic the goal of equal access to justice can be if it is not.

The LSC regulations promulgated in the wake of the 1996 restrictions both echo and undercut the Act's aims. For example, the purpose section of the regulation regarding prohibited political activities specifies that "[t]his part is designed to insure that the Corporation's resources will be used to provide *high quality legal assistance*" and that "[t]he part should be construed and applied so as to further this purpose without infringing upon the constitutional rights of employees or the professional responsibilities of attorneys to

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105. *Id.*

106. 42 U.S.C. § 2996f(a)(1) (2006). A past chair of the LSC echoes this foundational goal: "As part of its role in providing a national foundation for the delivery of legal services to low-income people, LSC has a responsibility to ensure that the delivery system provides throughout the country cost-effective assistance that meets the highest standards of thoroughness, quality, and professionalism." Eakeley, *supra* note 3, at 744–45.

107. *See supra* notes 70–76 and accompanying text.

their clients."[108] The regulations outlining the requirements for LSC grantees' governing bodies and restricting lobbying and training, however, imply that the standard of service for low-income clients need merely be "adequate."[109] One subsection of the lobbying regulation juxtaposes its invocation of this standard of service with language prohibiting legal-services lawyers from training clients to organize on their own behalf, or even conducting training sessions that "advocate particular policies"—presumably policies beneficial to those clients. Taken together, these provisions imply that shutting legal-services lawyers out of organized political action will not lower the quality of the legal assistance they provide to their clients. Given the protest-heavy, highly politicized atmosphere of today's world, this seems somewhat improbable.

2. Regulations Versus Rules

The 1996 restrictions also present legal-services lawyers with interconnected ethical problems. These problems lie at the nexus of the restrictions, which govern legal-services lawyers' workplaces and the specifics of their work, and the Model Rules, which establish the ethical guidelines according to which lawyers should conduct their work. The conflict is clear from the outset of the rules. Rule 1.1 sets out the first responsibility of a lawyer to her clients: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[110] The Comment on Rule 1.1 amplifies this point: "Competent handling of a particular matter includes . . . use of methods and procedures meeting the standards of competent practitioners."[111] Considered in light of that overarching directive, the 1996 restrictions and their concomitant LSC regulations would seem to prevent, or at least to hinder, legal-services lawyers from meeting even their profession's threshold goal of *competent* representation.

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108. LSC Prohibited Political Activities, 45 C.F.R. § 1608.1 (2006) (emphasis added).

109. LSC Governing Bodies, 45 C.F.R. § 1607.1 (2006) ("This part is designed to insure that the governing body of a recipient will be well qualified to guide a recipient in its efforts to provide high-quality legal assistance to those who otherwise would be unable to obtain *adequate legal counsel* . . ."); (emphasis added); LSC Restrictions on Lobbying and Certain Other Activities, 45 C.F.R. § 1612.8 ("Nothing in this section shall be construed to prohibit training of any [persons] involved in the representation of eligible clients necessary for preparing them: (1) to provide *adequate legal assistance* to eligible clients or (2) [t]o provide advice to any eligible client as to the legal rights of the client.") (emphasis added).

110. ABA 2004, *supra* note 85.

111. *Id.*

For example, one LSC regulation[112] flatly forbids legal-services lawyers from either bringing or participating in class action suits.[113] Although a version of this restriction has existed since the LSC's creation in 1974, the original version differed from the 1996 restriction in one vital way: until 1996, legal-services lawyers could bring or become involved with class action suits "where necessary to provide appropriate client representation" if the grantee organization for which they worked approved the action.[114] On promulgation of this regulation, however, many LSC grantees had to abandon ongoing class action suits, sometimes ending the case without resolution for those seeking help.[115] Since the option of bringing or participating in a class action is a tactic readily available to general practitioners, denying it to one particular group of lawyers may directly affect that group's ability to fulfill the competency requirement of the Model Rules. The ABA Committee on Ethics and Professional Responsibility recognized this more than ten years ago when it established that it is "unethical to limit an attorney's ability to file a class action lawsuit when such relief [is] essential for the attorney's client."[116] In addition,

112. This section comes directly from the 1996 OCRAA restrictions. Pub. L. No. 104-134, 110 Stat. 1321, 1321-53 (1996) ("None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a 'recipient') . . . (7) that initiates or participates in a class action suit").

113. LSC Rule on Class Actions, 45 C.F.R. § 1617.3 (2006) ("Recipients are prohibited from initiating or participating in any class action."). Class actions are not a cure-all for the maladies of poverty and deprivation, any more than is any other legal tactic. They do, however, offer the advantage of efficiency. Given appropriate client consent, a legal-services lawyer to whom the class-action tool was available could, for example, bring suit against a low-income-housing landlord/property owner on behalf of multiple clients deleteriously affected by the landlord's habit of failing to make major structural repairs to floors and ceilings damaged by weather and age. Contrast this with the current system, under which the same lawyer representing the same clients must bring multiple separate suits against the same landlord over the same issue. From a practical perspective, this system necessarily expends scarce legal-services funds and loads court dockets with repetitive litigation. At a minimum, the ethical concerns articulated elsewhere in this Note suggest that the class-action tool should be available to legal-services lawyers and their clientele, thereby rendering the substantive effect of that availability susceptible of judgment over some reasonable length of time. *See supra* notes 105–107 and accompanying text.

114. Committees on Civil Rights and Professional Responsibility, *supra* note 68, at 22.

115. *See, e.g.*, BRENNAN CENTER, LEFT OUT IN THE COLD: HOW CLIENTS ARE AFFECTED BY RESTRICTIONS ON THEIR LEGAL SERVICES LAWYERS 6–7 (2000), *available at* http://www.brennancenter.org/resources/atj/atj6.pdf [hereinafter BRENNAN CENTER 2000] (describing a California deadbeat-dad child-support class action turned over abruptly to a private firm and a Louisiana class action regarding disability benefits that found no new counsel). When the 1996 restrictions took effect, the California firm (which was comprised of former legal-services lawyers) inherited thirty class actions from its local legal aid office. *Id.* at 13.

116. Ilisabeth Smith Bornstein, Comment, *From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys*, 2003 U. CHI. LEGAL F. 693, 715–16 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1995)).

there is a practical consideration: in forbidding legal-services lawyers from bringing class actions on behalf of their clientele, Congress removed from their hands a tool uniquely designed to assist that clientele in extricating themselves from poverty.[117] This socially desirable end is also economically desirable.[118] After all, the smaller the population of income-eligible poor, the less money legal services might require and the more money Congress could therefore allocate elsewhere.

The restrictions may also put legal-services lawyers in conflict with the Rules with regard to informed client consent. According to Rule 1.0(e), "[i]nformed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[119] The Rules require lawyers to obtain clients' informed consent in several circumstances, including in any situation in which the scope of representation is to be limited[120] by, for example, the "terms under which the lawyer's services are made available to the client."[121] This mandate puts the legal-services lawyer, whose representation is restricted from the outset by the restrictions discussed herein, on the horns of a significant ethical dilemma: whether an income-eligible client's consent can be viewed as genuinely meaningful when the agreement she signs may represent her only hope of help. Relatedly,

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117. BRENNAN CENTER 2000, *supra* note 115, at 7 ("And while class actions and other now-banned activities sometimes enabled legal[-]services lawyers to attack systemic problems and achieve sweeping solutions, the results were not abstract philosophical victories. Instead, the restricted activities helped people deal with serious problems and made their lives better in concrete ways."). Although the ABA legal-services standards do not discuss class-action suits specifically, their governing principles do seem to imply a conflict between the LSC's rendering verboten certain law-reform activities (of which lobbying and political advocacy join class actions as examples) and the ABA's expectation of the lawyers from whom such activities are foreclosed:

> When effective resolution of individual clients' problems is circumscribed by existing laws and practices, or when existing laws and practices result in the same or similar problems for many indigent clients, *representation of a client may call for a practitioner to reach beyond the individual problem to challenge the law, policy or practice.* The fact that such advocacy may be complex, difficult, or controversial should not be a barrier to a practitioner pursuing it.

ABA, STANDARDS, *supra* note 100, at 4 (emphasis added).

118. *See, e.g.*, Jacobs 2001, *supra* note 44, at 299:

> Resolution of economic deprivation of the poor would benefit everyone because it would reduce the drain on the costs of social services to the poor and the costs of securing everyone against crime committed by the poor. . . . More gainfully employed workers mean more disposable income to pump into local economies. More incomes mean better services and living conditions, which translate into safer communities.

119. ABA 2004, *supra* note 85, R. 1.0(e).

120. *Id.* R. 1.2(c).

121. *Id.* R. 1.2(c) cmt. [6].

> [t]he restrictions on legal[-]services attorneys [also] erode the informed client's right of choice by obstructing the client's . . . ability to command as many options for the resolution of the case as possible. . . . The restrictions prevent the client from being heard . . . because they deprive the client of any opportunity to argue that a particular case should be accepted, or that a particular strategy should be employed.[122]

3. Ethical Tensions: The Big Picture

The conflict outlined above between restrictions, regulations, and rules informs two large-scale ethical issues facing legal-services lawyers. The first concerns the central professional value of autonomy, particularly the components thereof regarding the exercise of independent professional judgment and the need to prevent third parties from controlling one's work.[123] The Model Rules highlight this central value, mandating that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[124] The Rules also specify that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless . . . (2) there is no interference with the lawyer's independence of professional judgment . . . ."[125]

The second arises with regard to the professional expectation of zealous advocacy.[126] This expectation derives from the Comments on Model Rule 1.3, which make clear that "[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[127] Under the 1996 restrictions,

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122. Galowitz, *supra* note 45, at 92–93.

123. Etbics Panel, *supra* note 4, at 370; *see also* Committees on Civil Rights and Professional Responsibility, *supra* note 68, at 18 ("The Budget Act impermissibly interferes with the independent lawyer-client relation by, among other things, restricting the autonomy and professional judgment of lawyers who work for LSC-funded organizations.").

124. ABA 2004, *supra* note 85, R. 5.4(c).

125. *Id.* R. 1.8(f).

126. Ethics Panel, *supra* note 4, at 369.

127. ABA 2004, *supra* note 85, R. 1.3 cmt. [1]. As one reviewer of this note pointed out, the *language* of zealous advocacy has been removed from the "black-letter" Rules themselves and relegated to the comments thereon, which are informative at best and do not carry the force of the regulations from which they depend. *Id.* (I am indebted to Professor Susan Kay for this point.). Even a cursory search on LexisNexis, however, reveals that the *concept* of zealous advocacy still occupies a significant place in matters concerning legal ethics and professional goals. *See, e.g.*, Colloquium, *Zealous Advocacy In a Time of Uncertainty: Understanding Lawyers' Ethics*, 8 D.C. L. REV. 219, 221 (2004). A similar search on the ABA's website leads the searcher to a similar conclusion. Whatever the Rules say (or do not say) about zeal in advocacy, the discussion thereof is alive and well. Moreover, the standards laid out by the ABA specifically for legal-services lawyers explicitly articulate the "zealous representation of client interests" as one of the four fundamental principles underlying those standards. ABA, STANDARDS, *supra* note 100, at 4.

legal-services lawyers must endeavor to meet this standard hampered by all of the limits outlined thus far. These restrictions and the concomitant LSC regulations both prevent legal-services lawyers from serving otherwise eligible clients and cabin their ability to assist those clients whom they are permitted to represent by limiting the methods and means they may use. Thus, truly autonomous advocacy is inherently off-limits to legal-services lawyers. Moreover, the very nature of legal representation means that legal-services lawyers cannot always tell at the outset of a case what tactics they will want or need to use in resolving that case to their client's benefit—or what changes may occur in a client's life over the course of the case.[128] Under the 1996 restrictions and subsequent regulations, such uncertainty confronts legal-services lawyers with the reality that they may be forced to terminate their aid to a client without notice and without much, if any, expectation that the client will be able to get help elsewhere. This ethical bind is virtually untenable, and yet, as the restrictions stand, it seems unavoidable.

By definition, the ethical concerns specific to legal-services work do not typically affect private lawyers. Thus, one might imagine that the best way to avoid the ethical tangles outlined above would be to turn over to the private bar any person in need of assistance that the public bar may not, under current law, provide. Unfortunately, this theoretically elegant solution runs afoul of certain private-bar norms. Private lawyers are subject to their own set of ethical pressures with regard to the legal needs of low-income people as they arise in the complicated area of pro bono work. Combined with the profession's general reluctance to engage in any substantial amount of such work, these pressures raise a significant barrier to the effective sharing of responsibility for low-income legal assistance.

C. The Private Bar: Pro Bono and Its Problematic Potential

> Nowhere is the gap between professional ideals and professional practice more apparent than on issues of pro bono responsibility.[129]

> Although supporters of the cuts and restrictions said that state, local and private funding would pick up the slack [in legal-services funding], and although bar leaders and legal aid supporters find broad support for legal services in many parts of the country, the bottom line is that these expectations have been largely unfulfilled.[130]

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128. Ethics Panel, *supra* note 4, at 375.

129. Rhode, *Cultures of Commitment*, *supra* note 25, at 2415.

130. BRENNAN CENTER 2003, *supra* note 27, at 4.

1. Pro Bono: Who and Why

The ABA has established a substantive pro bono goal for U.S. lawyers:

> A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and (b) provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.[131]

On its face, this seems to be a reasonable goal. Fifty hours of pro bono work per year per lawyer averages out to approximately an hour a week, or less than thirteen minutes a day. Moreover, as discussed above,[132] the ethics of legal professionalism place a high value on service to the public, as well as on the access-to-justice aspect of lawyers' fundamental role as officers of the court. Pro bono work appears to fit into both categories. Indeed, the general professional discourse on pro bono boasts a number of arguments supporting such work. These include but are not limited to the following ideas:

- that an obvious and unmet need for legal services exists;[133]
- that lawyers, given a monopoly on a large body of important knowledge, owe it to their fellow citizens to operate within the confines of that monopoly in a way that benefits society—to "share the wealth," as it were;[134]

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131. ABA 2004, *supra* note 85, R. 6.1.

132. *See supra* Part III.A.

133. *See supra* notes 27-42 and accompanying text.

134. *See, e.g.*, Eldred & Schoenherr, *supra* note 26, generally and at 395 (internal citations omitted):

> It is an obvious fact . . . that all of our legal institutions (except small claims court) are designed to be operated by lawyers and not by laypersons. Laws are written in such a way that they can be interpreted only by lawyers; judicial decisions are crafted so as to be fully intelligible only to the legally trained. Court regulations, court schedules, even courthouse architecture are designed around the needs of the legal profession. . . . As a result, meaningful access to the legal system unavoidably requires the services of competent counsel.

- that "a duty of service is one strand of the lawyer's role as officer of the court and therefore expected of every lawyer," arising from the history and tradition of lawyering and tacitly assumed when one enters the field;[135]

- that service may be conceived of as "discharg[ing] a debt owed for the privilege of licensure, the so-called quid pro quo approach";[136]

- "that special abilities sometimes confer moral obligations";[137]

- that service to others benefits lawyers themselves in a variety of ways, including "increas[ing their] empathy and expand[ing] their perspectives," improving their grasp of practical legal skills, and conferring on them "the experience of personal reward associated with professional generosity";[138]

- and that pro bono work will improve lawyers' public image.[139]

Some evidence exists that many members of the private bar do strive to live up to the ABA's aspirational pro-bono standard. A 2005 study conducted by the ABA Standing Committee on Pro Bono and Public Service reports that sixty-six percent of the 1,100 attorneys surveyed had provided at least some free legal services to "persons of limited means or organizations serving the poor" in the previous year.[140] Moreover, of the attorneys offering any kind of pro bono services as defined in Rule 6.1, forty-six percent had "provided 50 or more hours" thereof.[141] Although these numbers derive from a very small sample and reflect attorney self-reporting rather than reporting

135. Loder, *supra* note 59, at 463.

136. *Id.*

137. *Id.*

138. *Id.* at 463–64.

139. *Id.* at 464.

140. ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 11, 13 (2005), *available at* http://www.abanet.org/legalservices/probono/report.pdf [hereinafter ABA, SUPPORTING JUSTICE]; ABA 2004, *supra* note 85, R. 6.1(a). The Standing Committee's pro bono reports paint a strikingly different picture from that outlined in most prior research. *See, e.g.*, sources cited *infra* note 143. Statistically speaking, however, it is not yet clear whether that picture is likely to be truly representative, particularly given that, as of this writing, the data is too new to have been corroborated.

141. ABA, SUPPORTING JUSTICE, *supra* note 140, at 13.

of a more formal type,[142] they do appear to represent an improvement over pro bono figures from the recent past.[143]

2. Programmatic Problems

When viewed from the perspective of the pro bono programs themselves, however, the pro bono picture becomes somewhat more troubling. An LSC study of the Private Attorney Involvement ("PAI") pro bono programs mandated by LSC regulations found that between 1997 and 1998 the number of cases closed under such programs fell by 13.33 percent, while the number of private-bar lawyers working therein fell by 6.38 percent.[144] In 2003, of approximately 150,000 lawyers "registered to participate in" such programs, only 45,000 were actually doing so to any degree.[145] According to the ABA, there were 1,104,766 active lawyers in the United States in 2005.[146] Assuming that the number of PAI-active private-bar lawyers remained essentially the same between 2003 and 2005, those 45,000 lawyers represent only a little over four percent of the country's population of active lawyers. The work these lawyers do through PAI programs represents both a laudable effort and a necessary complement to paid legal-services work, but at this level of participation it would appear to be, at best, a valuable insufficiency. Moreover, a recent ABA publication implies that the LSC-mandated merging and reduction of legal-services programs that began in the 1990s has put PAI rather low on reconfigured grantees' list of priorities.[147] PAI programs do

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142. *Id.* at 9. Eleven hundred is less than one percent of the country's active lawyer population as of 2005. *See infra* note 146 and accompanying text.

143. *See, e.g.*, BRENNAN CENTER 2003, *supra* note 27, at 20 (citing the AMERICAN LAWYER and the NEW YORK TIMES in support of the statement that as of 1999, "lawyers at the country's largest law firms" averaged only 36 hours of pro bono a year, down from 56 in 1992); Chaifetz, *supra* note 38, at 1696 ("A recent study found that fewer than 20 percent of poor people's legal needs are adequately addressed, and that under 20 percent of attorneys participate in pro bono programs.") (citing to AMERICAN BAR ASSOCIATION, CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, 1990 DIRECTORY OF PRIVATE BAR INVOLVEMENT PROGRAMS 146–47 (May 1990)); Caroline Durham, *Law Schools Making a Difference: An Examination of Public Service Requirements*, 13 LAW & INEQ. 39, 39 (1994) (citing Jason Adkins et al., *Campaigning for a Law School Pro Bono Requirement*, 1991 NAT'L ASS'N FOR PUB. INTEREST L. 1, 1 for the proposition that as of 1991, "only one in six attorneys [was] providing pro bono services"); Eldred & Schoenherr, *supra* note 26, at 389 ("According to recent surveys, approximately eighty percent of the bar engages in no form of pro bono activity on behalf of the poor.").

144. LEGAL SERVICES CORPORATION, LSC STATISTICS: PRIVATE ATTORNEY INVOLVEMENT—PROGRAMS (on file with author).

145. Houseman 2003, *supra* note 9, at 3.

146. ABA, *National Lawyer Population*, *supra* note 12, at 3.

147. McBurney, *supra* note 51, at 2 (noting that the difficulties inherent in the reconfiguration process mean that "pro bono appears to be among the least pressing issues addressed during the first phases of [that] process").

not, of course, comprise the only pro bono option for members of the private bar, who may also have firm-sponsored, bar-sponsored, or independent programs available to them.[148] This plethora of possibilities does not, however, guarantee actual private-bar *participation* in pro bono at either the firm or the individual levels. For example, as of 2005 there were 155 firm-run pro bono programs in the United States—and well over 46,000 law firms.[149]

Moreover, the emphasis placed on pro bono work at the state-bar level appears to vary widely between states. Although some state bar associations place a high institutional priority on the pro bono performance of their members, "[the] rule is not 'enforced' in most states; lawyers are not subject to any disciplinary proceeding if they fail to adhere to the Rule, and the Rule is titled Voluntary Pro Bono Publico Service."[150] Only a few state bar organizations have set their aspirational pro bono goals commensurate with those set by the ABA in the Model Rules.[151] In addition, to date only a few states have begun to develop a centralized infrastructure, whether via mandatory reporting[152] or via voluntary surveys,[153] that could facilitate the

148. Houseman 2003, *supra* note 9, at 3. Houseman puts the total numher of pro bono programs at 755, of which more than three-quarters are bar-sponsored or freestanding. *Id.* at 3.

149. *Id.*; American Bar Foundation, *An ABF Update*, 16 RESEARCHING LAW 1, 10 (Winter 2005), *available at* http://www.abfn.org/images/reslawwin05.pdf. The latter statistic dates from 2000; although this footnote presumes that the number of law firms in this country remained static between that year and 2003, the trend in the statistics recorded by the ABF suggests that that number probably rose during that time. ABF, *supra*, at 10. It is, of course, unreasonable to rebuke for its lack of an in-house pro bono structure a two-to-five-person law firm such as those that employed 76 percent of private-practice lawyers in 2000. Mkt. Research Dep't, American Bar Association, *Lawyer Demographics* (2004), http://www.abanet.org/marketresearch/lawyerdem2004.pdf (last visited Apr. 30, 2006) [hereinafter ABA, *Lawyer Demographics*]. If even the top 5 percent of firms by size ran their own pro bono programs, however, the number of such programs would increase to almost 2,400—more than fifteen times the current number.

150. Rosas, *supra* note 38, at 1073–74.

151. States with fifty-hour aspirational goals include the District of Columbia and Maryland. Barry, *supra* note 27, at 1885; ABA Standing Comm. on Pro Bono and Pub. Serv., *News: Maryland Court of Appeals Adopts New, Revised Pro Bono Rules*, Feb. 7, 2002, http://www.abanet.org/legalservices/probono/newsarchive.html (last visited Apr. 30, 2006).

152. *See, e.g.*, ABA, SUPPORTING JUSTICE, *supra* note 140, at 7 (noting that Maryland and Nevada both have mandatory reporting programs); Mississippi Supreme Court, Mississippi Rules of Professional Conduct, R. 6.1(e) (amended Mar. 21, 2005), *available at* http://www.mssc.state.ms.us/rules/RuleText.asp?RuleTitle=RULE+6.1+VOLUNTARY+PRO+BONO+PUBLIC+SERVICE&IDNum=7 ("Each member of the bar shall annually certify whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor . . . [including] (1) the number of hours the attorney dedicated to pro bono legal services").

153. *See, e.g.*, ABA, SUPPORTING JUSTICE, *supra* note 140, at 7–8 (noting that the Missouri, New York, and Texas bars have all conducted voluntary surveys of pro-bono activity in recent years).

impartial and accurate collection of on-the-ground data about pro bono hours.[154]

Given this demonstrated gap between aspiration and accomplishment, one might wonder why the ABA and its state and local analogues have not stepped in to address the legal-services crisis by simply *requiring* some quantity of pro bono work from all members of the bar. The answer is equally simple: as the following sub-section illustrates, when mandatory pro bono is broached, lawyers rise up and argue against it in the most strenuous terms.

3. Private-Bar Objections

This law-trained Hydra has many heads, with many voices. One of the most popular arguments opposing pro bono holds that it is fundamentally unfair to require the legal profession to provide its expertise free of charge, even in the face of extreme need, when such a requirement is not levied on the members of other professions whose services could also answer a demonstrated need.[155] Another counterargument takes an administrative tack, arguing that mandatory pro bono cases "can place considerable pressure on lawyers who must bill sufficient hours to keep their firms afloat."[156] A third involves issues of competency. Those putting forth this argument assert that many members of the bar have little or no education and experience in legal areas relevant to low-income people. They also express concern that a mismanaged mandatory system could match a practitioner in one area with a client needing legal assistance in an entirely unrelated one, yielding substandard or otherwise problematic representation and creating inefficiencies where effective service is perhaps most needed.[157] A related concern centers around the LSC

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154. Puzzlingly, the 2005 report on pro bono from the ABA's Pro Bono Committee appears to have drawn its favorable statistics entirely from personal interviews with the aforementioned tiny sample of the country's lawyers. At the very least, it contains no indication that the surveying organization substantiated its findings by contacting any actual pro bono programs of any kind, whether PAI, bar-sponsored, firm-sponsored, or independent. *See generally* ABA, SUPPORTING JUSTICE, *supra* note 140.

155. Loder, *supra* note 59, at 464.

156. Barry, *supra* note 27, at 1886. An ABA fact sheet from 2004 provides some support for this argument. According to the most recent statistics, sixty-three percent of the country's private lawyers work alone or belong to a firm with fewer than six members, suggesting that many lawyers might have some trouble diverting resources from their compensated work. ABA, *Lawyer Demographics*, *supra* note 149.

157. *See, e.g.*, Barry, *supra* note 27, at 1886–87 (internal citations omitted):

> [A] mandatory system that requires a personal injury lawyer to provide pro bono representation in a landlord/tenant case may not be the most efficient use of this particular resource . . . Too often, large law firms offering to provide pro bono service will litigate a case well beyond the precepts of good judgment. . . . In other instances,

restrictions themselves, the chilling effect of which extends to all work performed within grantee-facilitated structures, including pro bono, and which private lawyers may view as too complicated and constricting to deal with when other worthy causes abound.[158]

Many lawyers hold "the traditional view that public service is a matter of personal charity, to be performed at the discretion of the individual attorney."[159] This view reflects a concern that requiring public service of attorneys compromises an almost spiritual value that attaches to such service when performed voluntarily.[160] Some worry that mandatory pro bono might even "stifle the altruistic tendencies of lawyers who already serve, or who are so inclined."[161] Others put forth theoretical constitutional infractions,[162] articulate concerns that establishing a bureaucratic structure for mandatory pro bono would be expensive and intrusive,[163] and reject the idea that lawyers exert monopolistic control over the legal world.[164] Whatever the counterargument, however, the result is the same: institutional and individual resistance to mandatory pro bono requirements. Moreover, ironically, many of the arguments advanced to support that resistance, particularly those concerned with administrative and competency issues, could also apply to voluntary pro bono.

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attorneys required to provide pro bono service will litigate well below the standards of sound practice.

See also BRENNAN CENTER 2003, *supra* note 27, at 20 ("[T]here are whole areas of law where private lawyers know little. When those lawyers provide representation in such areas, they must spend a lot of time mastering the law, and their representation is consequently inefficient.").

158. *See, e.g.*, Fox, *supra* note 62, at 313–14 ("[W]hy should [a private firm] volunteer to take federally funded legal[-]services cases when the impact of those precious pro bono hours may be compromised by the need to observe a set of vastly complicated and confining regulations?").

159. Eldred & Schoenherr, *supra* note 26, at 368.

160. *Id.* at 374–75.

161. Loder, *supra* note 59, at 460.

162. These include an uncompensated-taking argument under the Fifth Amendment, the idea that mandatory pro bono violates First Amendment freedom of speech and association rights, and complaints that mandatory pro bono contravenes the Fourteenth Amendment's guarantee of equal protection and the Thirteenth Amendment's proscriptions against involuntary servitude. Thus far, such claims have found little success in courts. *Id.* at 464–65; Mogill, *supra* note 1, at 24.

163. Loder, *supra* note 59, at 465. Ironically, the PAI programs mandated by the government via the LSC regulations would seem to require just such a structure. *See infra* notes 200–201 and accompanying text.

164. *See, e.g.*, Mogill, *supra* note 1, at 24 ("[C]ritics reason that a law license does not provide attorneys with monopoly access to the justice system because a party has the right to appear pro se and that the licensing requirement serves only to assure minimum competency and protect the public, not to give attorneys a competitive advantage.").

4. Ethical Issues

In addition to these intra-professional issues, pro bono work presents the private bar with at least one potential ethical conflict to which legal-services lawyers are largely immune. In this situation, a positional conflict arises between the interests of a regular client—whether former or current—and those of a potential or actual pro bono client.[165] Resolving this conflict implicates the ethical dimension of several of the Model Rules. For example, "Model Rule 1.9(a) bars a lawyer from representing a client with interests 'materially adverse to the interests of [a] former client' where the present representation concerns 'the same or a substantially related matter' as the former representation."[166] As a practical matter, this conflict may prevent private firms from being able to perform pro bono work[167] in areas such as labor and employment law and landlord/tenant law that loom large for eligible clients.[168] Preventing pro bono work in these areas or limiting it to consultation with legal-services lawyers, a potential alternative to direct representation of low-income clients, may put the private bar in another difficult ethical situation. If, in the course of consultation, the consulting private lawyer reveals information protected by an expectation of privacy, "the consulted lawyer and her firm may be limited in their ability to undertake or continue representation of their own clients if the representation will be

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165. Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1401, 1414 (1998):

> The most obvious positional conflict arises when a lawyer or firm argues one position on a particular legal question for a client while simultaneously pursuing the exact opposite position for another client. . . . Although positional conflicts are most stark in the context of simultaneous representation, they may also arise in subsequent representation—that is, between positions taken on behalf of former and present clients.

166. *Id.* at 1406.

167. *Id.* at 1414.

> [I]n discussing the possibility of positional conflicts, many [firms] state the issue in broader terms of paying clients' expectations. As one lawyer for a large national firm commented: " . . . I suppose that if a pro bono client walked in the door and wanted to sue one of our clients, we'd say no. If he wanted us to take a position adverse to the interests of our paying clients, we would probably refer him someplace else."

Id.; *see also* BRENNAN CENTER 2003, *supra* note 27, at 20 ("[T]here are some types of cases—such as employees' wage, hour and job discrimination cases—that most private lawyers are wary of handling, because of either real or perceived conflicts of interest.").

168. LEGAL SERVICES CORPORATION BUDGET REQUEST 2005, *supra* note 11, at 3 (pie chart illustrating legal issues addressed by LSC grantees in 2002 indicates top four issues were family, housing, income maintenance, and consumer).

materially limited by her duty to protect the consulting lawyer's client information."[169]

Even full compliance with the Model Rules' pro bono requirements on the part of the private bar may make only a dent in the country's legal-services crisis, particularly in remote areas.[170] "The sheer magnitude of unmet legal needs is best captured by the opinion of one commentator who . . . conservatively concluded that an additional twenty million hours of annual service would be required to meet the civil legal service needs of low-income individuals."[171] Certainly "[a]n increased commitment to providing pro bono legal services would have a dramatic impact on fulfilling the ideal of equal access to justice."[172] Twenty-five hours of pro bono work a year from every active attorney in the country would yield more than twenty-seven million hours of pro bono legal services; across-the-board achievement of the ABA's fifty-hour benchmark would result in more than fifty-five million such hours.[173] Even if across-the-board compliance with the ABA's nonbinding standard could be achieved and a basic hour-for-hour match made between need and availability, however, the uneven regional distribution of lawyers across the country would render that match problematic.[174] "There is a particular shortage of pro bono services in rural areas, where there are few lawyers, and where the few lawyers who do exist rarely work for the sort of large firms that can afford to contribute vast amounts of pro bono time."[175] Nor do private firms necessarily have any great

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169. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-411 (1998) (discussing ethical issues in lawyer-to-lawyer consultation). A headnote summary of the previous source is available at http://www.abanet.org/cpr/ethicopinions.html (last visited Apr. 30, 2006).

170. *See, e.g.*, Barry, *supra* note 27, at 1885 (quoting a recent observation by a judge on the Court of Appeals for the District of Columbia "that the problem is so extensive it does not matter what service contributions lawyers are asked to make").

171. Spain, *supra* note 61, at 477 (citing DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 241 (1988)). The U.S. Census Bureau indicates that in 1988, the year in which Luban published his conservative estimate, approximately 42.5 million people were living at or below 125% of the poverty level (tbe qualifying income parameter for legal aid). U.S. Census Bureau, Historical Poverty Tables, *supra* note 36. That number has since risen by more tban 7 million. *Id.*

172. Spain, *supra* note 61, at 479.

173. The author came up with these figures by multiplying the number of active lawyers resident in the U.S. by twenty-five and fifty, respectively. For otber relevant figures, see *supra* notes 144–146 and accompanying text.

174. The number of lawyers actively practicing in each state varies from 142,538 in New York to a mere 1,302 in North Dakota. ABA, *National Lawyer Population*, *supra* note 12, at 3. Aid-eligible population also varies by state, as does population in general. States such as North Dakota, however, present an additional concern: the larger and less populated the area, tbe more likely legal-services and private-bar pro-bono lawyers are to be spread tbin.

175. BRENNAN CENTER 2003, *supra* note 27, at 20.

incentive to contribute funds to legal-services organizations, either in lieu of or in addition to pro bono hours. Indeed, the private bar may view federally funded legal services as a bad investment in light of the LSC's myriad restrictions.[176]

IV. FUNDING FRUSTRATIONS: THE BOTTOM LINE ON THE BOTTOM LINE

> There is far too much law for those who can afford it and far too little for those who cannot.[177]

Compounding the issues of ethics and assistance outlined above, basic funding for legal services remains uncertain, as does the existence of the LSC itself. Congressional attacks on legal services continue. "The legislation [creating the LSC] was reauthorized in 1977, but has not been reauthorized since. In fact, the LSC exists because it continues to receive appropriations from Congress," and because its statutory authorization as yet contains no sunset provision.[178] Meanwhile, every year congressional appropriations fall short, not only of what would be necessary to fully fund legal services on a national level,[179] but also of what the LSC[180] and other legal-

176. *See, e.g.*, Fox, *supra* note 62, at 313–14 ("Does it make any sense for [a private firm] to contribute to an LSC-funded program when its dollars cannot either support real law reform or address whole areas of concern to poor people?"). Moreover, monetary contributions from the private bar may have substantially less impact on the legal-services crisis than would real-time legal assistance, for various complicated reasons. *See, e.g.*, David Luban, *Lawyers As Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 840–45 (arguing that the provision of pro bono services may be both of more practical use and more respectful of the client's dignity than cash assistance would be—even if the goal of the pro bono representation is to obtain money for the client); Mississippi Bar, *supra* note 152, R. 6.1(b)(1)–(3) (permitting Mississippi lawyers to discharge their annual aspirational pro-bono responsibility by providing 20 hours of pro bono legal services—or a *$200* contribution to the bar for monetary support of legal-aid organizations).

177. Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983).

178. Houseman 1999, *supra* note 49, at 2191–92.

179. It is difficult to determine precisely how much funding would suffice to meet the needs of the millions of people currently eligible for legal services without first defining several threshold variables. *See supra* note 36. These might include, although they would not be limited to: the rate of growth or decline of the population eligible for aid over a given fiscal year; the number and types of legal problems the members of that population are most likely to encounter; the number of lawyers actively practicing in the legal-services area and the number of lawyers willing and able to do so given job availability; whether the current restrictions on legal services remain in force; and the effect of the continuation or cessation of those restrictions on the kinds and number of legal-services cases brought.

Above all, fully funding legal services would require a threshold definition of what comprises "sufficient" aid for low-income people. Even accepting the standard Nixon had in mind at the LSC's inception, that standard envisioned funding two legal-services lawyers per 10,000 poor, based on an eligible population of 29 million, for a total of 5,800 lawyers. *See supra* notes 8–10 and accompanying text. Applied to the current income-eligible population, that standard would

services authorities[181] request. The push to drastically reorganize the LSC,[182] privatize it,[183] or simply defund it out of existence[184] remains strong.

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require 9,800 legal-services lawyers. As of 2000, the total number of legal-services lawyers and puhlic defenders *combined* numbered only 10,854. ABA, *Lawyer Demographics*, *supra* note 149. The LSC's Justice Gap report conservatively estimates that "to provide necessary access to civil legal assistance . . . will require increasing our nation's capacity to provide [such] assistance to *five times* the current capacity." LSC, Justice Gap, *supra* note 11, at 4.

180. For fiscal year 2004, the LSC submitted a budget request for $352.4 million, a 4.4% increase over its allocation for fiscal year 2003. It rationalized the increase by pointing out the rise in the number of aid-eligible people since 1990 and the fact that the requested increase exceeded by only 0.4 percent "the Administration's stated goal of 4.0% growth for domestic programs," as announced by the Office of Management and Budget in January 2003. LEGAL SERVICES CORPORATION BUDGET REQUEST 2004, *supra* note 52, at 1. Instead, Congress allocated the LSC $338.8 million (the same as tbe pre-rescission FY 2003 allocation, and $16 million shy of the LSC's request) and eventually reduced that amount via rescissions to $335.3 million—$1.3 million *less* than its post-rescission FY 2003 allocation to the LSC. LEGAL SERVICES CORPORATION BUDGET REQUEST 2005, *supra* note 11, at 10 n.2.

For fiscal year 2005, the LSC's request stayed static at $352.8 million, but its final funding allocation actually declined several million from the FY 2004 level, to $330.8 million. LEGAL SERVICES CORPORATION BUDGET REQUEST 2005, *supra* note 11, at 1; LEGAL SERVICES CORPORATION, BUDGET REQUEST FOR FISCAL YEAR 2006 1 (2005), *available at* http://www.lsc.gov/about/budget/FY06Req.pdf [hereinafter LEGAL SERVICES CORPORATION BUDGET REQUEST 2006].

For fiscal year 2006, tbe LSC requested $363.8 million to return it to its approximate FY 2002 funding level vis-à-vis the 7.4-percent inflation between 2002 and 2004. LEGAL SERVICES CORPORATION BUDGET REQUEST 2006, *supra*. Instead, Congress further reduced its funding, to a post-rescission level of $329.8 million as of December 2005. Legal Services Corporation, *LSC's Budget: FY 2006 Appropriation* (2006), http://www.lsc.gov/about/FY06app.pbp (last visited Apr. 30, 2006).

181. *See infra* note 208.

182. When the LSC Act came up for reauthorization in 1998, the chair of the judicial subcommittee suggested the following: dismantling the LSC; giving responsibility for federally funded legal aid to the Department of Justice ("DOJ"); restructuring tbe program so that the DOJ would give block grants to states and tbe states would then re-grant to programs; and limiting acceptable cases to twelve areas, including sucb arguably infrequent concerns for low-income people as probate/estate management and the quieting of title to land. Alexander D. Forger, *Address: The Future of Legal Services*, 25 FORDHAM URB. L.J. 333, 339 (1998).

183. In 1995, Senator Jesse Helms introduced a bill to eliminate the LSC entirely and turn all administration, funding, and provision of legal aid over to unspecified private entities, on the ground that the Senate believed "the operations of the Legal Services Corporation are not essential functions of the Federal Government." Repeal of the Legal Services Corporation Act of 1974, S.958, 104th Cong. (1st Sess. 1995).

184. BRENNAN CENTER 2003, *supra* note 27, at 6 ("In 2000, tbe House Appropriations Committee recommended cutting LSC's 2001 appropriation to $141 million—a familiar proposal that has become the committee's annual tradition."). The LSC's eventual budget award that year came to approximately $330 million. *Id. See also* Hornstein et al., *supra* note 27, at 1097–98 (internal citations omitted):

> [S]ince 1996, the House Appropriations Committee bas recommended a fixed $141 million budget for the agency. This recommended budget was about fifty percent less than what the agency's actual funding levels were for most of the 1990s, and if approved would have effectively destroyed tbe agency. . . . [T]he House Appropriations Committee's starvation funding recommendation has occurred each year since 1996.

Though alternative sources of funding exist,[185] these sources have never solved more than a small part of the problem—a fact that the LSC itself has brought to Congress's attention.[186] In many areas of the country, all such sources combined could not support legal services without the federal funds received through the LSC.[187] Moreover, these alternative sources of funding often impose restrictions on usage that mimic or exceed the federal restrictions.[188] Although funding of this type may serve admirable ends, the services such funding would support still fail to reach the bulk of the eligible population. As well, at present, the amount of funding provided by such sources is stagnant or decreasing.[189] Furthermore, the private

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LSC-funded legal-services offices provide the primary infrastructure supporting pro bono efforts by firms without in-house programs. Thus, the elimination of the LSC would deleteriously affect the provision of legal services to income-eligible persons not only by legal-services lawyers but also by the private bar. Forger, *supra* note 182, at 342–43.

185. Such sources include state aid, IOLTA funds, private foundations and other private sources, United Way, filing fee surcharges, abandoned-property funds, punitive damage awards, and donations from lawyers' groups and individual lawyers. BRENNAN CENTER 2003, *supra* note 27, at 7–8, 12; Houseman 2003, *supra* note 9, at 20. In 1999, IOLTA funds "generated over $139 million for legal aid nationwide." BRENNAN CENTER 2003, *supra* note 27, at 7. By contrast, "[l]egislatures in at least ten states—including Alabama, Arkansas, Connecticut, Delaware, Idaho, Mississippi, New Mexico, South Dakota, Utah, and Wyoming—and the District of Columbia provide no financial support for civil legal assistance for the poor." *Id.* at 12. *See* LSC, JUSTICE GAP, *supra* note 11, at 18 (noting that although non-LSC funds have more than tripled since fiscal year 1981, the real-dollar decline in federal funding over the same period has essentially negated that increase).

186. LEGAL SERVICES CORPORATION, STRATEGIC DIRECTIONS 2000–2005 1 (2000), *available at* bttp://www.lri.lsc.gov/sd00.pdf ("Many states and local governments do not invest adequate funds in support of civil legal services . . . Private, charitable, *pro bono* and other contributions vary widely among States [sic] and programs, and are not sufficient to meet the burden imposed by inadequate governmental investment.").

187. *See, e.g.*, Houseman 2003, *supra* note 9, at 20 ("[T]here are many parts of the country—the South, Southwest, and Rocky Mountain states—that have not yet developed sufficient non-LSC funds to operate civil legal assistance, including pro bono programs, without federal support.").

188. *See, e.g.*, BRENNAN CENTER 2003, *supra* note 27, at 17:

> [L]ack of money is not the only reason that non-federal revenues for legal aid fail to fill the gap left by decreases in and restrictions on federal legal aid funding. Another reason is that much of the newly found revenues are either earmarked for certain populations or purposes or encumbered by restrictions barring their use for certain populations or purposes. For example, Colorado, Georgia, Illinois, Montana and West Virginia all authorize general appropriations or filing fees for legal aid, but all also earmark these funds exclusively for victims of domestic violence.

See also Houseman 1999, *supra* note 49, at 2196 ("Many state funding initiatives have also imposed restrictions similar to those of federal funding sources," including, e.g., restrictions on abortion-related litigation, lobbying, representing prisoners, representation of illegal aliens, fee-generating cases, and policy-change-oriented/political training activities).

189. *See, e.g.*, ABA 2006 Budget Recommendations, *supra* note 27 (noting that the real-dollar reduction in federal funding over time has been accompanied by "overall economic conditions [that] have resulted in significant decreases in supplemental funding provided by state and local

bar shows no significant signs of picking up the slack. Indeed, its highest-profile professional organization, the ABA, argues publicly that the solution to the crisis lies in increased federal funding.[190] Nor does even a significant minority of jurisdictions have an unrestricted legal-services program (one funded entirely outside the LSC and thus able to avoid its restrictive regulations), that might be able to accept cases that are off-limits to LSC grantees.[191]

Finally, in addition to the external funding issues, both the LSC Act and the LSC's regulations contain provisions forbidding legal-services lawyers to take certain otherwise logical actions to bolster their bottom line. One such prohibited action is representing clients in suits that might generate plaintiffs' fees. Legal-services lawyers in these types of cases could put any resultant fee awards into the organizational coffers. The Act, however, specifies that no LSC funds shall be used "to provide legal assistance . . . with respect to any fee-generating case" unless "a client seeks only statutory benefits and appropriate private representation is not available."[192] The related LSC regulations mandate that a grantee "may not provide legal assistance in a fee-generating case" except under certain narrowly defined circumstances[193] and that even under those circumstances, a grantee may not "claim[] or collect and retain" such fees if awarded.[194] This prohibition deprives legal-services lawyers of an otherwise viable way to supplement inadequate funding and thus expand their organization's range of services. It also removes from the legal-

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sources. For example, while IOLTA income nationwide has declined by 8%, in some states IOLTA has seen up to a 25% reduction in income.").

190. *Id.* ("An increase in the appropriation for LSC is the only realistic way that the system can respond to the overwhelming demand for services."); Ethics Panel, *supra* note 4, at 366 (responding to the 1996 restriction by stating "that '[i]n the end, the only real solution is for this country to recognize the need to fully fund lawyers for the poor free from restrictions that hamper their ability to serve their clients.'") (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-399 (1996)).

191. Houseman 1999, *supra* note 49, at 2201. Houseman notes that such programs exist "[i]n sixteen states and in another twenty-six major urban areas," with the latter defined, somewhat dubiously, as including such locales as Charlottesville, VA (2004 population estimate 36,605; 19th largest city in Virginia in 2000 census), and Saginaw, Michigan (2004 population estimate 59,045; 26th largest city in Michigan in 2000 census). *Id.*; U.S. Census Bureau, Population Finder, http://www.census.gov/ (last visited Apr. 30, 2006). By contrast, Knoxville, Tennessee had an estimated 2004 population of 178,118. Census Population Finder, *supra.*

192. LSC Act, 42 U.S.C. § 2996f(b)(1) (2006).

193. LSC Rule on Fee-Generating Cases, 45 C.F.R. § 1609.3 (2006). Note that with the exception of actions seeking benefits under two specific provisions of the Social Security Act, all qualifying circumstances have as a threshold requirement the attempted involvement of the private bar. *Id.*

194. LSC Rule on Attorney's Fees, 45 C.F.R. §§ 1642.3–.4 (2006). The latter regulation makes clear that this ban on attorneys' fees extends to members of the private bar when working for compensation with a legal-services organization.

services toolbox a tactic available to other lawyers where such fees are statutorily available.[195] In some cases, the prohibition against the acceptance of attorneys' fees even runs afoul of other laws, amplifying the harm done to the intended beneficiaries of legal aid.[196]

The second internal funding specification arguably reflects a singular view of legal-services lawyers on the part of the LSC. The Act provides that LSC grantees must "adopt procedures for determining and implementing priorities for the provision of [legal] assistance" and ensure that "appropriate training and support services are provided in order to provide such assistance."[197] It also specifies that the LSC itself must "insure [sic] that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas . . . ."[198] Although neither provision textually requires either the involvement of private attorneys in the provision of legal services or the devotion of any percentage of LSC funds to facilitate such involvement, the LSC reads them as mandating that "recipients of [LSC] funds involve private attorneys in the delivery of legal assistance to eligible clients."[199] To that end, LSC regulations require that grantees "shall devote an amount equal to at least twelve and one-half percent . . . of [their] LSC annualized basic field award to the involvement of private attorneys in such delivery of legal services . . .

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195. The collection of awarded fees from a defeated party can have a powerful deterrent effect on defendants, hitting them in the pocketbook as it does. *See, e.g.*, Ethics Panel, *supra* note 4, at 357 ("[A]ttorneys' fees can be a significant weapon to use in litigation."); Houseman 2002, *supra* note 10, at 1230–31 ("Under the American system, an award of attorneys' fees is intended, among other things, to deter and punish illegal conduct by defendants. With the threat of a possible large attorneys' fee award removed, private parties may feel they can violate poor people's rights with impunity.") (internal citations omitted); Laurence E. Norton II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 611 (1997) ("The possibility of having to pay a large fee award is a powerful motivating factor for defendants to settle these claims early. This leverage and the benefits it purposefully provides plaintiffs both before and during litigation are unavailable to the poor."); Rhode 2001, *supra* note 43, at 1797 ("These lawyers also may not collect attorneys' fees, which removes an effective deterrent to future abuses and a crucial funding source for other work.").

196. *See, e.g.*, Houseman 2002, *supra* note 10, at 1230–31 (internal citations omitted):

> The prohibition completely negates the Civil Rights Attorneys' Fees Awards Act, a key part of the civil rights enforcement structure in this country, and similar fee-shifting statutes. The prohibition severely undercuts the ability of legal[-]services programs to effectively represent poor people[,] who are often members of minority groups intended to be protected by civil rights laws.

197. 42 U.S.C. § 2996f(a)(2)(C) (2006).

198. *Id.* § 2996f(a)(3).

199. LSC Rule on Private Attorney Involvement, 45 C.F.R. § 1614.1 (2006). This regulation specifically takes its authority from the two Act provisions excerpted in the text accompanying notes 197–198, *supra*.

referred to as the 'PAI requirement,'"[200] and that the PAI requirement may involve "both pro bono and compensated mechanisms."[201] Thus, instead of using their entire LSC grant to fund direct client services, legal-services organizations must divert a portion of their LSC funds to pro bono programs—notwithstanding the degree to which legal-services organizations are already underfunded and must grapple with the multifarious issues with pro bono outlined above. In addition to being a budgetary burden, this seems to send a no-confidence message regarding legal-services lawyers, since nowhere in the regulations does the LSC articulate any alternate connection that might exist between the Act's requirement of economic and effective legal assistance and the need to involve the private bar in the provision of that assistance.

V. CONCLUSION

> [I]n a democratic social order, equality before the law is central to the rule of law and to the legitimacy of the state.[202]

> In a society based on law, justice is available only to those who can make the legal system work for them. A right is not a right unless it can be enforced; a remedy is not a remedy if it is available only in theory.[203]

As the above discussion suggests, legal services in the United States are overburdened, underfunded, and understaffed. This crisis shows no signs of abating. Indeed, the number of poor is on the rise, with a concomitant increase in the number of people eligible for federally funded services.[204] In a legal system growing ever more complex, an increase in the needs that eligible parties demonstrate for such services seems equally likely, if not inevitable.

Hope glimmers in a few areas. In *Dobbins v. Legal Services Corporation*, a federal district court levied a preliminary injunction against the program-integrity requirement as unconstitutionally restrictive under the First Amendment.[205] And the Supreme Court's

200. 45 C.F.R. § 1614.1 (2006).

201. *Id.* § 1614.2(a).

202. Rhode, *Cultures of Commitment*, *supra* note 25, at 2418.

203. ABA, STANDARDS, *supra* note 100, at 1.

204. *See, e.g.*, LEGAL SERVICES CORPORATION BUDGET REQUEST 2005, *supra* note 11, at 1 (noting that "from 1990 to 2000, the number of people living in poverty in all LSC service areas increased by 5.74%.").

205. Companion case to Velasquez v. Legal Services Corp., 349 F. Supp. 2d 566, 613 (E.D.N.Y. 2004). Two days after this decision was handed down, the LSC issued a press release expressing pleasure at the judge's upholding other restrictions at issue in the case (including those on class actions, client solicitation, and attorneys' fees) and registering its objection to the program-integrity prong of the holding. Press Release, Legal Services Corporation, Statement of

decision in *Legal Services Corp. v. Velasquez* re-established the right of LSC-funded legal-services lawyers to challenge existing welfare law under certain, very closely cabined circumstances.[206] Although important, however, the *Dobbins* and *Velasquez* decisions pale next to the myriad remaining restrictions on legal services, which: (1) render legal-services lawyers legally incapable of living up to their ethical and professional responsibilities to their clients; (2) further deter already inadequate pro bono efforts; and (3) prevent legal-aid programs from doing much more than running in place.

This plethora of problems bedeviling federally funded legal services involves too many actors, too many voices, and too many competing needs to be susceptible of any truly simple solution. It seems possible, however, that some macro-level changes to the way the federal government manages legal services to low-income people could improve the situation significantly. In particular, an increase in congressional allocations to the LSC could significantly affect the quantity of legal-aid services available to aid-eligible people. Since at least 1981, the LSC has been severely underfunded, both in real-dollar terms and with respect to the aid-eligible population. Furthermore, its recent requests for modest increases over previous years' inadequate allocations have gone largely unmet. If Congress granted those requests, the LSC would be better able to carry out the variety of programs, initiatives, and oversight plans it has developed and which the budget allocations it requests are carefully calculated to support.[207]

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the Legal Services Corporation in Response to the Ruling in *Dobbins v. LSC* by the U.S. District Court for the Eastern District of New York (Dec. 22, 2004), http://www.lsc.gov/press/122204pr.php (last visited Apr. 30, 2006). In early 2005, the judge who had issued the preliminary injunction declined to convert it into a permanent one on the ground that both sides had already appealed the ruling. Velasquez v. Legal Services Corp. and Dobbins v. Legal Services Corp., 356 F. Supp. 2d 267, 270–72 (E.D.N.Y. 2005).

206. 531 U.S. 533 (2001). For an analysis of this case, see, for example, Bornstein, *supra* note 116, at 697–98 (citing *Velasquez*, *supra*, at 543–44) (emphasis added):

> Because the LSC funding neither constituted nor was intended to promote governmental speech, the government was not entitled to impose any viewpoint-based restrictions. . . . The Court found that the government was using an existing medium of expression, legal advocacy, and controlling it, via the restriction against suits for benefits, in such a way that the implementation of the restriction would have distorted the usual functioning of the medium. *According to the Court, restricting how LSC-funded attorneys may advise their clients and what arguments these attorneys may present to the court in suits for benefits sufficiently distorts the functioning of the judiciary by altering the traditional role of attorneys.*

A similar argument could be colorably advanced with regard to many of the 1996 restrictions.

207. *See, e.g.*, LEGAL SERVICES CORPORATION BUDGET REQUEST 2005, *supra* note 11, at 2–5.

Congress could also stabilize and regularize the LSC's funding. For example, each year's budget calculations could include incremental adjustments pegged to such factors as inflation, cost of living, and change in the number of aid-eligible persons in the population. Alternatively, it could use as budgetary benchmarks the funding suggestions made by groups such as the ABA and the NLADA. These organizations are comprised of some of the very people who provide legal services, both full-time and via pro bono work. Thus, they have a clear idea of what the lawyers' "market" will bear in terms of contributions to the funding and staffing of legal services and what proportion of those needs must be met through federal efforts.[208]

In addition, Congress might consider eliminating most, if not all, of the 1996 restrictions, freeing the LSC to promulgate new, relaxed regulations that would likely have a broadly beneficial impact on legal services. Congress could begin by allowing legal-services lawyers to bring class action suits on behalf of their clients where appropriate. As a result, the current case-by-case model and its brutally exclusive triage component[209] would be replaced with a unified approach designed to solve systemic problems for multiple clients. Utilized appropriately and with professionalism, class action suits serve the bedrock legal values of efficiency and economy, functioning as a "remedial device used under narrow circumstances to achieve consistent resolutions of legal issues. . . . [and are] an economical means of obtaining relief. [Fundamentally, they] assure

208. The "street sense" possessed by the ABA and the NLADA can be seen in their recent budgetary recommendations.

For fiscal year 2006, the ABA's initial budget recommendation was $516.6 million (subsequently reduced to $363.8 million to match the recommendation made by the LSC's board), and the NLADA's was $515.57 million. ABA 2006 Budget Recommendations, *supra* note 27; Robert J. Grey, Jr., ABA President, Letter to the Honorable Frank R. Wolf and the Honorable Alan B. Mollohan regarding FY 2006 Funding for the Legal Services Corporation (May 23, 2005), http://www.abanet.org/poladv/letters/109th/legalserv/wolfmollohan.pdf (last visited Apr. 30, 2006); NLADA 2006 Budget Recommendations, *supra* note 41. Note that, although these numbers are close to $200 million more than the LSC requested for fiscal year 2005, they represent precisely the same level, adjusted for inflation, at which Congress funded the LSC *ten years ago*, prior to the 25-percent reduction in the LSC's budget in 1996 and the post-Census discovery that the number of those earning at or below the poverty level had risen since 1990. *Id.*

The NLADA's basic budget recommendation for fiscal year 2007 is $512.74 million, slightly under its FY 2006 number, but it also urges the LSC to request an additional $30 million for aid related to Hurricane Katrina and to bump up its fiscal-year 2008 recommendation substantially, to nearly $700 million. Memorandum from the National Legal Aid and Defender Association to LSC, Recommendations for FY 2007 Budget Mark for LSC (Sept. 27, 2005), http://www.nlada.org/Civil/NLADA_News/2005092952167018/DMS/Documents/1128009734.72 (last visited Apr. 30, 2006). As of January 2006, neither the ABA nor the LSC had made its FY 2007 recommendation publicly available.

209. *See supra* notes 38–42 and accompanying text.

effective enforcement of judicial decisions and deter unlawful conduct towards others similarly situated."[210] Congress might also consider honoring the fundamentally American principle of "innocent until proven guilty" by relaxing the restrictions preventing representation in civil suits of those incarcerated pre-trial and in public-housing disputes of those charged with drug-related offenses. Finally, Congress might eradicate the general ban on fee-generating cases and relax the strict 12.5 percent PAI requirement. This would allow legal-services lawyers to grow their own funding through effective work on their clients' behalf and giving them more flexibility to use their grants in direct client aid. Taking one or more of these actions could free legal-services organizations to use their grants in genuinely efficient and effective ways impossible under the current law and regulations. Indeed, the ability to accept fee-generating cases, retain the resultant fees, and bring class action suits might even allow such organizations to bolster their budgets locally through their own work, rather than relying on increased federal funding.

These suggestions, which represent only potential solutions to the problems bedeviling legal services today, are proposed in the spirit that animated the creation of the LSC more than thirty years ago. Congress established the LSC as an independent federal corporation expressly designed "to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances" and "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel."[211] Today, with millions of income-eligible people going without legal assistance, it cannot reasonably be argued that these goals have been met. Indeed, the stark differences between federally funded legal services in 1981 and the legal-services situation as it currently stands suggest that the country is actually farther away from that goal today than it was twenty-five years ago. If high-quality legal assistance of the sort mandated by the LSC Act continues to be available to only a tiny minority of those eligible for and in desperate need of it, true equality of access to justice cannot be achieved. Moreover, if the LSC continues to be both underfunded and conditionally funded, the benefits accruing to the LSC's clientele will continue to be outweighed by that clientele's growing numbers and deepening poverty. Lawyers cannot in good conscience respond with indifference or acceptance to this problem and to the restrictions that are driving it, out of respect both for the dire needs of the poor in this country and for their fellow

210. Houseman 2002, *supra* note 10, at 1230.

211. LSC Act, 42 U.S.C. §§ 2996(1), (2) (2006).

practitioners whose professional ethical responsibilities are being threatened.[212]

No civil equivalent of *Gideon v. Wainwright* currently exists, vesting in the indigent a right to a fair civil trial via representation.[213] In the current political climate, and given the present composition of the Supreme Court, recognition of such a right at the federal level seems unlikely to occur any time soon.[214] In the absence of the systemic protection a civil *Gideon* would give low-income people grappling with legal issues, a national legal-services system funded sufficiently to reach at least a substantial majority of aid-eligible people and served by lawyers allowed to operate free of unethical restraints remains the best alternative method by which equal access to justice may one day be attained.

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212. *See, e.g.*, Ethics Panel, *supra* note 4. One panelist noted that when Congress enacted the 1996 restrictions, the ABA Ethics Committee "respond[ed] to the LSC restrictions not by determining whether these restrictions themselves are unacceptable but rather by examining how lawyers can comply with these restrictions without violating other ethical commands. . . . [W]e should not assume that the LSC's restrictions are compatible with lawyers' professional duties." *Id.* at 371. Another panelist argued that

> the preservation of an independent bar is threatened when the professional judgment of particular groups of unpopular lawyers—such as those representing the poor—is subjected to restrictions imposed as a result of political decisions by the state. It is especially troubling to see such restrictions imposed in the face of the longstanding, and far from adequately implemented, duty of all lawyers to ensure that even those without funds still have access to the legal system.

Id. at 384.

213. In *Gideon v. Wainwright*, the Supreme Court held that "in our adversary system of *criminal* justice, any person haled [sic] into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," whether at the state or federal level. 372 U.S. 335, 344 (1963) (emphasis added).

214. Houseman 2003, *supra* note 9, at 21.

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