

2004

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Recommended Citation

Lawrence M. Friedman, *Access to Justice: Some Comments*, 73 Fordham L. Rev. 927 (2004).
Available at: <http://ir.lawnet.fordham.edu/flr/vol73/iss3/6>

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ACCESS TO JUSTICE: SOME COMMENTS

Lawrence M. Friedman*

Deborah Rhode has written a wise and unsettling book.¹ There are endless complaints that our country has too many lawyers, too many lawsuits, too much resort to the law. There is all sorts of talk about a litigation explosion, about everybody suing everybody.² Yet, as Professor Rhode points out, a strong case can be made for the very opposite proposition: not enough law, not enough lawyers, not enough litigation.³ This is so at least with regard to access to justice for ordinary people. On this point, the United States is definitely a laggard.⁴ It is far below the standards and achievements of other countries that we like to compare ourselves to. Far from suing everybody in sight, the average person is, in fact, virtually shut out of the process of civil justice. The situation in criminal justice is even more scandalous. Most people accused of crime are poor. They cannot afford to hire their own lawyer. They do, of course, have a constitutional right to a lawyer, to be paid for by the state,⁵ but apparently any old lawyer will do. What they actually get in some states is an assigned lawyer, who may or may not know anything about how to manage a criminal case. In these jurisdictions, “[n]o experience, qualification, or training is necessary,” and “competence is not reviewed.”⁶ In the alternative, they could get a public defender, who is probably experienced, but who is also, no doubt, staggering under a crushing load of files. In almost no case can defense lawyers match the prosecution in money or in forensic experts. A free lawyer does not mean free access to specialists. It does not guarantee that the defense can investigate, or do research, or get hold of experts who might make the defendant’s case stronger. The result, far too often, is

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1. Deborah L. Rhode, *Access to Justice* (2004).

2. Whether there is, in fact, a litigation explosion is a matter much contested by scholars. See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983).

3. See Rhode, *supra* note 1, at 103-04.

4. See Nat'l Equal Justice Library, *Comparative Statistics About Equal Access to Justice in Different Countries*, at <http://www.equaljusticelibrary.org.cnchost.com/international/comparative.asp> (last visited Oct. 29, 2004).

5. This was guaranteed, of course, by the landmark case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), but many states had already moved in this direction.

6. Rhode, *supra* note 1, at 127.

a slapdash or incompetent defense. Even people who are facing the death penalty do not get good lawyering.

Technically, this is a violation of their constitutional rights. The U.S. Supreme Court, in a recent case, overturned a capital punishment case on the grounds that the lawyers did a job so miserable that the defendant really lacked a fair trial.⁷ But the problem is not going to be solved by the Supreme Court. It has to be solved on the ground, and it can only be solved if the states want to solve it. There is not much evidence that most states do. For one thing, good lawyering would cost money—money that the states seem unwilling to spend. In addition, the legal profession does not seem to care very much. Lawyers, for the most part, are absorbed in the pursuit of money, power, and prestige like everybody else. They show little inclination to take the steps that Professor Rhode would like them to take.

I want to comment, briefly, on a few aspects of the problem and to add a few additional thoughts. One aspect of the problem, which Professor Rhode emphasizes at various places in her book, and which appears to be pervasive and deep-seated, is what we might (bluntly) call public ignorance.⁸ Or worse than ignorance: misinformation. It is bad enough not to know; it is much worse to think you know, when in fact you do not. On issues of access to justice, and on the operation of the legal system in general, the level of public ignorance and misinformation is simply appalling.

What is it that people think they know and do not? I have already mentioned one salient example, the belief in a litigation explosion. People are firmly convinced on this point. People also think that the criminal justice system is inexcusably mild, that courts coddle criminals. They think that the tort system has gone berserk. They think that ridiculous lawsuits clog the dockets. They think that juries give away billions to frivolous or conniving plaintiffs. They think that lawyers are parasites, who stir up trouble, drive honest gynecologists out of business, and bankrupt healthy businesses with litigation.

This misinformation is part of a bigger picture. In part, it may be the product of a deliberate campaign, a campaign of distortion, financed by interests that feel victimized by the liability explosion.⁹ But the campaign, if there is one, succeeds because it taps into a willing wellspring of ignorance. This is not just ignorance about the

7. *Wiggins v. Smith*, 539 U.S. 510 (2003). *Wiggins* claimed his lawyers had “rendered constitutionally defective assistance,” in that they never brought out evidence of his “dysfunctional background,” the way he was beaten and abused as a child, and an adolescent. *Id.* at 516. The Supreme Court agreed with this argument.

8. See, e.g., Rhode, *supra* note 1, at 4-5.

9. See Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, 11 *Stud. in L., Pol., and Soc’y* 95 (1991).

system of trials or about crime and punishment. Millions of people, for example, believe that the Social Security system is either bankrupt now or will go bankrupt soon. Many younger workers think, and say, "I'll never see it when the time comes for *me* to retire." In reality, the system is far more solvent than they think, and its shortfalls will certainly be curable. People also believe we spend vast amounts of money on foreign aid. We do not. They think that anybody who wants to can find a job. Often, they cannot. People think that immigrants steal jobs from Americans, and that they drain billions of dollars from state, local, and federal governments. But this idea is, at the very least, debatable. People also imagine that welfare payments go almost exclusively to black women on drugs who have baby after baby, fathered by deadbeat dads who come and go. None of this is true.

Of course, not everybody subscribes to these beliefs, and perhaps few people believe *all* of them. But the reader will recognize them as the reflection of quite common attitudes. And these beliefs do hang together—they are not just a random collection of ideas. We could label them views of the right wing of the American public. In fact, they are more than that. They are core ideas that derive from one aspect of American culture. That is the aspect (it is not the only one) that stresses individualism, self-help, every man for himself (and perhaps every woman for her man), and don't tread on me. It is the ethos that induces wealthy ranchers and big farmers to babble about sacred rights of property or to join the "sage brush revolution," while their cattle chomp away at grass on land that may belong to the public, or whose crops greedily suck up vast amounts of subsidized water, or whose bank accounts are swollen with money from crop support plans. It is the ethos that has turned welfare on its head. Aid to Dependent Children started out as a program to help struggling mothers with small children. The money was supposed to enable them to stay home and take proper care of their children.¹⁰ It started out with an image of poor widows, women who had trouble making ends meet; it ended with the image of the brutish welfare queen. So, now we have a program that insists on sending these mothers out to work, though, of course, without a subsidized childcare program to make their lives less frantic and to make real jobs for them a possibility.

Why is it that a country that was perhaps the first real democracy in the western world, a country that considers itself the land of opportunity, is so retrograde in some regards? A strong program of legal aid is not the only thing missing: Most Western democracies have much better systems of health care or health insurance, and they provide much more of a social safety net. Meanwhile, American

10. See Molly Ladd-Taylor, *Mother-Work: Women, Child Welfare, and the State, 1890-1930*, at 135-66 (1994).

criminal justice is the harshest and the most severe in the whole western world. It is a system that is “long on degradation and short on mercy.”¹¹ No member of the European Union retains the death penalty.¹² In Texas, it is almost a religion. American prisons and jails are jammed with prisoners. No Western country has such long sentences, or puts so many of its citizens behind bars. A disproportionate number of these prisoners are members of minority groups. Inside these prisons, the prisoners are, on the whole, treated much more brutally than prisoners in, say, Holland or France.¹³

Perhaps, paradoxically, the problem lies in the very nature of American democracy. Democracy in Europe evolved slowly, and much of its progress consisted of chipping away at the privileges of an entrenched aristocracy. Most European countries still maintain habits of deference to authority that long since vanished in the United States. Authority in this country is fragmented and decentralized. Small local people, with small, local minds, wield enormous power over schools and over municipal politics. We are a loose, disjointed, mobile, and restless society. Class means less here than it does in Europe; money means more. Americans believe they live in a society with open doors, a land of endless opportunity. Those who fail deserve to fail. Government is demonized. People are expected to “make it” on their own. People do not need, or deserve, government help. Criminals are nothing but scum. Poor people are not much better.

A second widespread belief is that America is simply the best. The view is that America is the best at everything: the richest, the strongest, with the best system of justice, the best cities, and the best technology. Everybody in the world envies America. If we opened our doors, everybody in the world would come here. That there are other countries that are richer, have less crime, less social disorganization, provide a better standard of living is something that millions of people in this country would find inconceivable. Equally inconceivable is the idea that these countries might have a better or fairer system of justice.¹⁴ The provincialism of most people who live in the United States is breathtaking. I am not arguing that other countries are better in this regard, indeed many of them, perhaps most of them, are not. Provincialism is by no means an American monopoly. But because of our position in the world, our own provincialism is much more harmful in its effects than, say, the

11. James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* 207 (2003).

12. See European Union, EU Policy & Action on the Death Penalty, at <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm> (last visited Oct. 29, 2004).

13. Whitman, *supra* note 11, at 59-67.

14. Rhode, *supra*, note 1, at 4. About four-fifths of all Americans believe that their justice system is “the ‘best in the world.’” *Id.*

provincialism of people in Switzerland or Honduras. This harm manifests itself in many ways. With regard to our subject, the justice system, it blinds people to the ways in which the system is failing. This provincialism blocks off criticism, encourages smugness, chauvinism, and arrogance, and makes it harder to make the system better.

Criminal justice is, perhaps, a special problem. Part of the problem is the way the system has evolved over the years. On paper, the system has been designed to be scrupulously fair to people accused of crime. The original Bill of Rights was, essentially, a kind of code of criminal justice. Most of its provisions tried to protect defendants. These include provisions about trial by jury, warrants, bail, punishment, and the right to counsel. In drafting these provisions, the founders were thinking of George III, and their grievances against the British government. They were thinking of a court system remote from the people, and dominated by the regime in power. Their notion was to design a system that would inoculate people against the tyranny of a central government. The Bill of Rights was supposed to do that at the federal level, and the states all had their own versions of the same.¹⁵

Did these safeguards work? To some extent they did succeed. But there is, in fact, a long history of abuse of criminal process, and of violence against people accused (rightly or wrongly) of a crime. Even in the early years the safeguards did not apply to everyone, and certainly not to slaves. In the late nineteenth and early twentieth centuries, lynching in the South made a mockery of criminal justice. Lynching was directed mainly against southern blacks, and was sometimes almost unbelievably brutal and sadistic.¹⁶ The vigilante movement in the West was less bloody, and has received much more favorable press. But it too circumvented ordinary process, and the typical vigilante "trial" fell far short of what anybody could call due process. Also, in the East, there was police brutality, the law at the end of the policeman's nightstick. In the station houses, there was the infamous "third-degree."¹⁷ Life in jails and prisons was sometimes unspeakably cruel; the southern chain gangs are only the most notorious example. Despite waves of scandal and exposé, the police and the prisons resisted meaningful reform. The police of the big cities were, on the whole, deeply conservative, and quite frequently racist. In labor disputes, they acted sometimes as if they were the private army of industrialists. Police forces were often deeply riddled

15. See Lawrence M. Friedman, *Crime and Punishment in American History* 72 (1993).

16. See Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (1998).

17. See generally Marilyn Johnson, *Street Justice: A History of Police Violence in New York City* (2003).

with corruption—a corruption that went hand-in-hand with brutality and mistreatment of prisoners.¹⁸

Why was the system so hard to reform? Why did the incessant scandals and exposés fail to bring about change? Partly, it is because the news fell on deaf ears. The public was not particularly interested in reform. By the late nineteenth century, respectable citizens looked at the problem of criminal justice through lenses very different from those through which the founders had seen the world. Respectable people were not afraid the government would tyrannize *them*. After all they *were* the government. The problem was crime, disorder, the dangerous classes; the problem was the criminals, not the forces of law and order. What had looked like protection against the despotism of the state now looked like handcuffs preventing the police from doing their job and protecting the citizens from violent and dangerous people. This attitude, alas, has proved to be extremely persistent. Millions of people, as we said, firmly believe that the courts coddle criminals and that the criminal justice system is, in fact, much too mild. In the movies and on television, the good guys are allowed to break the rules, so long as the bad guys suffer and are brought to “justice”; and justice does not mean due process, but solving crime and giving the wicked what they richly deserve. Punishing evil is popular; “technicalities” are not.

Professor Rhode’s book is a strong and thorough critique of the system. It calls for major reforms. It makes suggestions about some of these reforms. But it is hard to resist a certain amount of pessimism. It is not at all hard to think up better systems than the one we have—ones that are fairer and more efficient. But implementation is where the problems arise. A fair system costs money. So far, the states have not, on the whole, been willing to spend the money. Of course, this country is rich and it can afford to do the right thing. Budgets for public defenders, for example, are matters of pennies, compared to such big-ticket items as Social Security or defense.¹⁹ No, the problem is not money. It is cultural, political, and a matter of attitude and information. But a problem of this kind is devilishly hard to fix.

If, in fact, there is relentless propaganda against the civil justice system, and if this propaganda finds a ready audience, there is good reason to be pessimistic about the future of civil justice. It is hard to argue for better access to the system when so much mud is tossed at it, and when so many people are convinced the system is running amok. I have no idea how to remedy this situation. There is information out there; but nobody seems to want to absorb it. Most people, as we

18. See Friedman, *supra* note 15, at 360-63.

19. See, e.g., Rhode, *supra* note 1, at 187-88 (“For a nation that has spent over \$160 billion to safeguard the rule of law in Iraq, a modest additional investment in the rule of law at home should not be unthinkable.”).

said, have no understanding of the problem. Professor Rhode thinks the legal profession “needs to do a better job of educating the public” about criminal defense work and “the ways that the current system falls short.”²⁰ Agreed, but how? As Professor Rhode is well aware, many, if not most, lawyers simply do not care about the issue, and the public apparently hears only what it wants to hear.

Professor Rhode is a strong advocate of pro bono.²¹ She would like the legal profession itself to make up, voluntarily, for the lack of public investment.²² Why not enlist the profession in the noble work of increasing access to justice, and in furthering the public interest? Again, this runs up against resistance and recalcitrance. Some lawyers object on principle to anything that would force them to do pro bono work. It strikes them as a kind of high-class slavery. This is not a completely absurd idea. Most of us, who do not share the common allergy to the idea of government, actually prefer public funding of “good things” to reliance on private charity. And pro bono essentially *is* private charity.

Pro bono is short for a Latin phrase that means, “for the public good,” or “in the public interest.” This presents yet another problem. What, after all, is “the public interest”? Many things are in the public interest, presumably. Giving legal advice to the Philadelphia Symphony or the Art Institute of Chicago is what many lawyers count as their pro bono work. We are all in favor of helping out these wonderful institutions and Professor Rhode shares this view; but this is not the heart of the issue of access to justice, as she sees it. Access to justice means helping the underprivileged; it means getting them proper legal advice and proper representation in court. But legal help is not at all like medical help. Curing poor people of diseases is basically not controversial. The *legal* problems of the poor, in many cases, do present issues that people disagree about. After all, the legal problems of the poor often stem from *social* deficiencies, or from bureaucratic blindness and intransigence. What conservatives object to, Professor Rhode points out, is not “legal assistance per se, but to the rights that it makes possible to assert.”²³ Helping poor people often means taking on City Hall, or something even higher.

Of course, not all the problems of the poor are of this nature. Helping a poor woman get a divorce from an abusive husband is not shaking the foundations of society. Some of the legal problems of the poor are problems caused by other people who are equally poor, a noisy or unruly neighbor, for example. A lot of poverty warriors want

20. *Id.* at 144.

21. *See id.* at 145-84; *see also* Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *Fordham L. Rev.* 2415 (1999).

22. *See* Rhode, *supra* note 1, at 188-89 (offering proposals as to how the bar and law schools can increase pro bono service).

23. *Id.* at 109.

to be reformers, they want to take on the whole system, but there is a lot that can be done helping people one-by-one. At least you can have the satisfaction of doing a good job, or making sure somebody who is entitled to a pension actually gets it, or forcing the bureaucracy to cough up some other benefit. But basic, structural reform is another matter.

The tone of Professor Rhode's book can be read as quite pessimistic and these comments have echoed this tone. The pessimism is understandable. But perhaps it is not entirely justified. In some regards, the lessons of history permit a certain amount of cautious optimism. There is certainly not *less* justice, and access to justice, than in the "good old days." Lynching is a thing of the past. The vigilante movements have faded into legend. The chain gang is gone. Courts have tried to force prison systems to adopt at least some minimal kind of humanity. Police brutality is still a factor, but there is some evidence that the police are less blatantly violent than they were a century ago.²⁴ Ironically, it may be helpful that the system seems so lopsided in its impact. Because of its racial overtones, black and Hispanic organizations have often taken the lead in trying to reform the criminal justice system, along with such organizations as the ACLU. The Warren court decisions did not change the system fundamentally, but they may have made at least some difference. There is no doubt that the civil rights movement has had an impact. Scandals like the Rodney King incident also force the problems into bright light. In any event, it is no longer so easy to ignore or whitewash problems of the police. There seems to be something of a slight reaction, too, against the death penalty;²⁵ and some movement toward giving men and women on trial for their lives a better shot at a defense. Civil justice may be a tougher nut to crack, but who knows? I have voiced a certain amount of skepticism about the chances of getting the public to pay attention. But that is no reason to give up. And books like Professor Rhode's, if taken seriously, would be a major force for good, if we could only find a way to spread their message.

24. Franklin E. Zimring & Gordon Hawkins, *Crime Is Not the Problem: Lethal Violence in America* 168-69 (1997).

25. *See, e.g.*, Lawrence M. Friedman, *American Law in the 20th Century* 223 (2002).