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## Conceptions of Lawyers' Agency in Legal Ethics Scholarship

### Cover Page Footnote

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## CONCEPTIONS OF LAWYERS' AGENCY IN LEGAL ETHICS SCHOLARSHIP

*Susan D. Carle\**

I have recently commented elsewhere in the pages of this journal on one of many pressing problems I see facing the legal profession in the twenty-first century.<sup>1</sup> I will focus here on what I think is one of the most urgent problems faced by those who study the pressing problems of the legal profession—i.e., legal ethics professors and scholars. That problem is how to conceive of lawyers' individual and collective "agency" in working to reform the profession and society more generally. By this I mean: how should we evaluate lawyers' ability to bring about meaningful change in the enormously complex, resistant, and ambiguous set of institutions we lump together when we refer to "the legal profession"?

The problem of how to conceive of individual and collective agency is, of course, a problem that pervades legal scholarship. On the one hand, the idea that people at a fundamental level "choose" how they conduct their lives is enormously appealing, having roots deep in classical philosophical liberalism and related Anglo-American jurisprudential justifications for holding individuals "morally accountable" for their acts.<sup>2</sup> On the other hand, strong conceptions of unconstrained agency defy our observations of the way in which social position affects life trajectory. Not only do we observe this phenomenon reflected in our personal social worlds, but a large sociological and historical literature amply documents the constraints imposed on individuals' opportunities in law as a result of structural

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1. See Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 *Fordham L. Rev.* 719 (2001) (arguing that the profession should grant more "honor" to lawyers who serve middle-income clients).

2. See, e.g., Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 *Harv. L. Rev.* 959 (1992) (describing how the law invokes notions of "free will" as a basis for holding individuals responsible for their actions); Frank Michelman, *The Subject of Liberalism*, 46 *Stan. L. Rev.* 1807, 1807 (1994) (describing John Rawls's liberal conception of "the subject" as one who has the "ability to form, revise, and rationally pursue [his or her] own conception of what gives value to [his or her] life"); see also Joel Feinberg, *Autonomy*, in *The Inner Citadel: Essays on Individual Autonomy* 27-53 (John Christman ed., 1989) (describing various liberal conceptions of autonomy). See generally *The Inner Citadel*, *supra* (collecting various essays on liberal conception of the self).

barriers including race, gender, class, religion, and ethnicity.<sup>3</sup> This literature further establishes that some of these barriers persist through nearly invisible but no less pernicious mechanisms, despite efforts to eradicate them.<sup>4</sup>

One of the many virtues of Deborah Rhode's new work, *In the Interests of Justice*,<sup>5</sup> is her sensitivity to the ways in which certain structural factors, such as sex and race, continue to affect lawyers' lives. Rhode is well aware that traditionally excluded outsiders, such as people of color and women, still do not have the same opportunities—or to say the same thing another way, still have more constrained individual agency—than do traditional insiders as a group. Rhode is, moreover, willing to come right out and say so, mincing no words despite the discomfort such statements may cause leaders of a profession that prides itself on securing justice.<sup>6</sup>

Rhode is, furthermore, well aware of the way in which the organization of the legal profession cramps the life projects and opportunities for meaningful careers of even the profession's most privileged members. Rhode thus writes about the discontent experienced even by well-paid, large-firm lawyers facing "the structure of practice" today.<sup>7</sup> In short, Rhode is not naïve about the many forces—social, historic, demographic, and economic—that constrain lawyers and the legal profession in their capacity for change.

Yet Rhode's impressive synthesis of scholarship on legal ethics and the legal profession over the past several decades is extraordinary in the artful way it combines critical and structural analysis with concrete, straightforward, pragmatic prescriptions for change. Rhode straddles these two objectives—providing sophisticated structural analysis and workable suggestions for solutions—with deceptive ease, giving the kind of virtuoso performance perhaps best appreciated by those who have discovered in their own writing that it is a great deal easier to criticize than to put forth a constructive agenda. But making

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3. Some classics include Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976); Virginia G. Drachman, *Sisters in Law: Women Lawyers in Modern American History* (1998); and J. Clay Smith, Jr., *Emancipation* (1993).

4. See, e.g., Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *Fordham L. Rev.* 291 (1995); The Ass'n of the Bar of the City of N.Y., Commission on Women in the Profession, *Responses to Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 65 *Fordham L. Rev.* 561 (1996); David B. Wilkins & G. Mitua Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 *Cal. L. Rev.* 493 (1996).

5. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000).

6. See, e.g., *id.* at 12-13, 23-24, 38-44, 192-96, 208-09 (describing various forms of discrimination in the legal profession and legal education).

7. See, e.g., *id.* at 23-38 (describing various studies documenting lawyer dissatisfaction and analyzing its many sources in economics and other aspects of the profession's organization).

concrete proposals for change is exactly what Rhode does, on an extremely wide variety of topics, in a way that will be invaluable as an agenda and reference guide for years to come.<sup>8</sup>

In short, Rhode accomplishes the impressive feat of proposing a comprehensive agenda for change without ignoring the many powerful structural forces that constrain lawyers' choices in law. Implicit in her approach are important assumptions about agency that avoid casting lawyers' capacity for change either too broadly or too narrowly. On the one hand, Rhode does not resort to an overly optimistic or naïve view of the profession's capacity for reform; on the other, Rhode avoids an overly deterministic or fatalistic attitude about the difficulties of making meaningful progress in our complex, troubled "post modern" world. Rhode never suggests that all we need to do is decide that the profession should reform itself and change will come about—she does not, in other words, appear to assume unrestrained free will, at the individual or collective level.

At the same time, despite her structural sensibilities, Rhode does not succumb to the pitfalls to which some self-labeled "post-structuralist" theorists of the legal profession arguably fall victim.<sup>9</sup> These theorists, grimly determined to face the facts of unintended consequences, resilient power imbalances, and unconscious reactionism, sometimes appear to eradicate virtually all potential for human agency in discussing the state of today's legal profession. To take one example, the post-structuralists' leading theorist on "the legal subject" writes:

If the liberal subject disappears from the scene, a number of very troublesome questions immediately surface: who (or what) is controlling the levers running the social machinery? And if there's

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8. Thus, for example, Rhode proposes that lawyers: bear heightened responsibility for avoiding harm to third parties, including possible resort to "whistleblowing"—i.e., publicly disclosing client wrongdoing—to achieve this end, *id.* at 18, 96-105, 114; promote alternative dispute resolution procedures and allow non-lawyer specialists to assist in client self-representation, *id.* at 18-19, 134-41; loosen restrictions on advertising and solicitation, *id.* at 148-49; and increase enforcement of malpractice and unethical fee and billing practices and encourage specialized sectors of the legal profession to promulgate and enforce their own ethics rules, *id.* at 21, 158-83. Another set of her reform proposals focuses on workplace conditions, including promoting employers' adoption of more flexible policies on hours and leave, better mentoring systems, and increased opportunities for pro bono and other public service work. *Id.* at 45-48. Finally, she makes numerous suggestions about how law schools and legal education could better promote the values she finds underemphasized in the legal profession today. *Id.* at 185-206; see also *id.* at 207-13 (summarizing her numerous proposals).

9. I do not mean here to be denouncing post-structuralism generally, believing instead that at least some of the theorists Americans classify as "post-structuralists" offer a great deal to the study of the legal profession. I am simply suggesting that more work needs to be done in accounting theoretically for observed phenomena concerning the transmission and transformation of the values and structures of the legal profession across generations.

no one operating the levers, then what has been the effect of all that good, admirable, serious, normative legal thought?

As legal thinkers, we like to think we are doing good, normative legal work—advancing noble causes and the like—but if the liberal subject is no longer operating the levers, our work product can take on a different character. We may simply be rehearsing and reproducing the instrumentalist logic of bureaucratic practices. . . .

Viewed in this light, we can understand normative legal thought not as a noble attempt to criticize and reform the structures and practices of bureaucratic domination, but rather as a kind of discourse that has already been unconsciously captivated by those very same structures and practices. The pathways, the issues, the problems of normative legal thought are already constituted by bureaucratic domination. . . . Rather than contributing to our understanding or to the realization of the good or the right, all this normative argument simply perpetuates a false aesthetic of social life—one that prevents “us” from even recognizing the sort of bureaucratic practices that constitute and channel our thought and action.<sup>10</sup>

In contrast, Rhode appears to envision a mix of bureaucratic constraint and opportunity, conscious control and unintended consequence.

Rhode’s approach to the question of lawyers’ individual and collective agency is only implicit in her work—she does not explicitly address the issue of individual and collective agency in the formation and transformation of lawyers’ ethics. This seems to me an issue that deserves further attention among legal ethics scholars. A workable conception of lawyers’ individual and collective agency must, as Rhode’s does, balance an awareness that lawyers’ opportunities for transformative action are strongly constrained by structural forces with an appreciation of lawyers’ capacity for creative reform.

I will give two briefly summarized examples from my own research to illustrate this point. In a pair of articles on the NAACP’s early litigation strategies, I compared how two differently situated generations of NAACP lawyers dealt with the potential inconsistencies between the NAACP’s “test case” litigation strategies and traditional legal ethics norms that forbade certain techniques the NAACP used, such as “creating” litigation where it would not have existed otherwise and soliciting plaintiffs.<sup>11</sup> I showed that white

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10. Pierre J. Schlag, *The Problem of the Subject*, 69 *Tex. L. Rev.* 1627, 1739-40 (1991) (citations omitted).

11. See Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 *Law & Hist. Rev.* 97 (2002) [hereinafter Carle, *Race, Class, and Legal Ethics*]; Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 *U. Chi. L. Sch. Roundtable* 281 (2001) [hereinafter Carle, *From Buchanan to Button*].

patrician lawyers such as Morefield Storey and others on the NAACP's first national legal ethics committee in the period between 1910-1920 displayed little concern about the potential legal ethics violations involved in these practices, and I argued that this was so because they were comfortable in their elite standing in the bar.<sup>12</sup> In contrast, when African-American lawyers Charles Hamilton Houston and Thurgood Marshall took over as the directors of the NAACP's legal strategy in the mid-1930s, they took a very different perspective on legal ethics issues. As Mark Tushnet first documented,<sup>13</sup> both Houston and Marshall displayed great concern about the NAACP's vulnerability to legal ethics charges—quite correctly, it turned out, as shown by southern states' subsequent attacks on the NAACP on legal ethics grounds in the wake of *Brown v. Board of Education*.<sup>14</sup> I argued that a host of complex factors accounts for the different legal ethics perspectives of Storey, as opposed to Houston and Marshall, including the difference in the structural position of Houston and Marshall compared to Storey and the other elite white lawyers who directed the NAACP's legal strategy in an earlier era.<sup>15</sup> As African-American lawyers, Houston and Marshall were well aware that, despite their excellent educational credentials, they retained an "outsider" status in the profession that made them particularly vulnerable to politically motivated legal ethics attacks.<sup>16</sup>

This example provides one illustration of the potentially constraining nature of structural position in the profession. But Houston and Marshall also exemplify the potential for lawyers' transformative agency as perhaps few other lawyers of the twentieth

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12. See Carle, *Race, Class, and Legal Ethics*, *supra* note 11, at 100, 143-44.

13. See, e.g., Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950*, at 105 (1987) (describing Houston's concern that involvement in particular cases might lead to charges of "trumped up" litigation); Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*, at 117 & n.4 (1994) [hereinafter Tushnet, *Making Civil Rights Law*] (quoting correspondence between Marshall and Walter White in 1940, in which Marshall advised White that asking a teachers' association for "'contributions to the NAACP on condition that we file [a] case for them'" was "'clearly within the statute forbidding solicitation of legal business,'" and warned, "'All of the states in the South are convinced that they cannot defeat these cases in court and are looking for any means at all to stop them.'"); *id.* at 274 (describing legal ethics problems NAACP encountered); see also Carle, *From Buchanan to Button*, *supra* note 11, at 297-99 (presenting further archival research on Houston and Marshall's concerns about ethics charges).

14. 347 U.S. 483 (1954). For a discussion of the southern states' attacks on the NAACP on legal ethics and other grounds, see Tushnet, *Making Civil Rights Law*, *supra* note 13, at 272-300.

15. See Carle, *From Buchanan to Button*, *supra* note 11, at 298.

16. Of course, the NAACP's increased visibility and success contributed greatly to this threat of backlash, which undoubtedly would have occurred regardless of who was in charge of legal strategy. My point is simply that Houston and Marshall immediately exhibited a much greater concern about this threat than the NAACP's earlier, elite white lawyers had.

century can. Houston's biographer, Genna Rae McNeil, best captures the magnitude of Houston's achievement in this respect, describing how Houston took the materials of his social context, including his personal experiences with racism and his Harvard Law School education, and transformed them into a vision of civil rights lawyers as social engineers.<sup>17</sup> My study of Houston's law school notes reveals a fascinating link between Houston's intense study of the tenets of sociological jurisprudence with one of his law school mentors, Roscoe Pound,<sup>18</sup> and his subsequent vision of lawyers as social engineers. Houston took Pound's ideas and profoundly reconstructed them to fit his own context and goals. Pound's influence was crucial, but Houston's creative agency provided ingredients that no post-structuralist account can fully dismiss.

A second example concerns the reform efforts of Florence Kelley, perhaps the most important early twentieth century white female "public interest" lawyer (though largely unrecognized as such). Kelley was the leader of the National Consumers' League, a leading white women's social reform organization in the decades around the turn of the twentieth century.<sup>19</sup> In reviewing a recent biography of Kelley, I examined the way in which she took the ingredients of her social context, including her class privilege and an ideology that espoused women's special aptitude for social welfare concerns, and used them to promote a maternalist social welfare politics that provided an important underpinning for the later New Deal.<sup>20</sup> I argued that Kelley was both empowered and restrained by the conventional notions of her time concerning women's proper place in the public arena. Indeed, Kelley went so far as to hide from public view her status as a well-trained and licensed lawyer, overseeing the organization's legal work behind the scenes. She relied on male lawyers to provide the organization's public legal face, a strategy that would cost her dearly when she eventually clashed with those male lawyers on strategy decisions.<sup>21</sup>

In somewhat the same way as Houston did, Kelley faced constraints imposed by virtue of her social identity and, like Houston, drew on

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17. Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (1983).

18. See Carle, *From Buchanan to Button*, *supra* note 11, at 295-96.

19. The National Consumers' League, for example, was the organization that sponsored the famous so-called "Brandeis brief" in *Muller v. Oregon*, 208 U.S. 412 (1908). As feminists are fond of pointing out, Kelley's lieutenant, Josephine Goldmark, in fact drafted that entire brief, so that it is arguably misnamed. See Susan D. Carle, *Gender in the Construction of the Lawyer's Persona*, 22 *Harv. Women's L.J.* 239, 258 & n.70 (1999).

20. See Carle, *supra* note 19, at 258-73 (reviewing Kathryn Kish Sklar's biography of Kelley, Florence Kelley and the Nation's Work).

21. *Id.* at 259-62; see also Susan D. Carle, *Re-envisioning Models for Pro Bono Lawyering: Some Historical Reflections*, 9 *Am. U. J. Gender Soc. Pol'y & L.* 81, 91-92 (2001).



the resources provided by her social context in exhibiting remarkably creative agency, both as an individual and in motivating others to a form of collective agency that had a lasting impact on U.S. law and social policy.

These two examples could stand with a large number of others in showing how lawyers—in ways sometimes modest and sometimes significant, through a combination of witting and unwitting exertions of individual and collective agency<sup>22</sup>—remake their profession in each new generation. This fact of transformative agency is, in my view, underappreciated in some of the leading theoretical perspectives espoused in the legal academy today. I thus argue in a project on which I am now at work for a revival of the more robust views of human agency contained in the theoretical perspectives of the early American pragmatists John Dewey, George Herbert Mead, and Charles S. Pierce.<sup>23</sup> That topic is obviously far beyond the scope of this short comment, but it is perhaps not insignificant that Rhode hails from an institution housing some of the chief proponents of the pragmatist revival in American law, such as Margaret Jane Radin and Thomas Grey.

A pragmatist would note that, in every citation of authority, every idea included or discarded in her book, Rhode contributes to recreating and redefining the profession for new generations. Were I to have any criticism of Rhode's work, it might be that she could display even more sensitivity to the way in which her citation practices perpetuate hierarchies, organized on axes other than race and sex (such as social class, educational credentials, and institutional affiliation), in the legal profession as well as its sub-sector of the legal academy. Perhaps Rhode views these types of class-based hierarchies as less pernicious than hierarchies based on sex and race.<sup>24</sup> Whatever her views on these loaded questions,<sup>25</sup> Rhode has provided an enormously valuable and inspiring primer to bar leaders and law professors who feel an obligation, not only to critique the profession, but also to use the power and privilege of their positions to make concrete efforts at reform.

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22. For a wonderful example of a lawyer's unwitting transformation of professional norms through his legal reform work, see Daniel R. Ernst, *Lawyers Against Labor: From Individual Rights to Corporate Liberalism* (1995) (describing how anti-labor lawyer's efforts to promote individual rights jurisprudence heralded a jurisprudence based on notions of interest group pluralism).

23. See Susan D. Carle, *A Pragmatist Theory of the Self* (draft manuscript on file with author).

24. See Rhode, *supra* note 5, at 38-44 (arguing against "myths of meritocracy").

25. On the extremely loaded nature of class-based hierarchies in the legal profession and in United States society more generally, see Carle, *supra* note 1, at 720-22.

*Notes & Observations*