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Cover Page Footnote

Louis Stein Professor of Law, Fordham University School of Law; Director, Louis Stein Center for Law and Ethics.

COLLOQUIUM

DEBORAH L. RHODE'S ACCESS TO JUSTICE

FOREWORD

*Bruce A. Green**

The photograph of Thurgood Marshall on the wall over my desk is not one of the well-known ones taken circa *Brown v. Board of Education*,¹ when he was a civil rights leader and courtroom lawyer striving heroically to realize the promise of “equal justice under law.”² It was taken by Deborah Rhode years later when Marshall was serving as a Justice of the Supreme Court. Like Rhode’s writings, her photograph is artfully composed and captures the essence of its subject. Marshall is leaning back in a chair in his chambers against a wall of Supreme Court opinions. I imagine he was in the middle of one of the humorous, but pointed, stories for which he was well-known among his clerks and colleagues—stories from his extraordinary experience that suggested both how far the nation had come and how much farther it had to go to realize its constitutional promise.³ That is how I best remember Justice Marshall during the Court’s 1981 Term when I had the privilege to serve as his law clerk, and I know that Professor Rhode, who clerked for the Justice three years earlier, shares that recollection.

I am very grateful to Professor Rhode for the photograph, and not only because of the fond recollections it invokes. Thurgood Marshall is an iconic figure for anyone in this country who cares about justice. The image reminds me every day of our national promise of justice for all; of the potential of the law, legal institutions, and lawyers to bring our nation closer to fulfilling this promise; and of how far we still have to go. Not incidentally, the “Rhode” signature underneath the photograph is a reminder that legal academics as scholars can contribute in our own way to the cause of equal justice, and that we as teachers can encourage our students to do the same.

* Louis Stein Professor of Law, Fordham University School of Law; Director, Louis Stein Center for Law and Ethics.

1. 347 U.S. 483 (1954).

2. Deborah L. Rhode, *Access to Justice* 3 (2004). The phrase “Equal Justice Under Law” is carved on the West Pediment of the U.S. Supreme Court building.

3. *See, e.g.*, Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 *Stan. L. Rev.* 1217 (1992).

Professor Rhode is the Ernest W. McFarland Professor of Law at Stanford Law School and director of the Stanford Center on Ethics. Her career runs counter to the perception of legal academics as overly theoretical or impractical.⁴ As a scholar,⁵ editorialist,⁶ public interest lawyer,⁷ congressional advisor,⁸ and leader within both academia⁹ and the profession,¹⁰ Rhode's life's work is grounded in the realities of law and legal practice and aimed at improving our legal processes in practical ways that will bring us closer to achieving our shared aspirations.

Rhode's latest book, *Access to Justice*, takes our national ideal of "equal justice under law" as its starting point.¹¹ Examining the nature and extent of procedural justice available to people with little or no income, she asks how closely the reality hews to our national ideal.¹² The book presents a convincing picture of a civil and criminal justice system that falls woefully short. On the civil justice side, Rhode underscores the obstacles to obtaining justice without legal assistance, the shortage of pro bono lawyers and legal services lawyers to address

4. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 35 (1992) (referring to criticism that elite law schools are filled with "impractical" scholars who are "disdainful of the practice of law" and defining the "impractical scholar" as one who "produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner").

5. Rhode is one of the most prolific contemporary legal scholars. Her recent books include *The Difference "Difference" Makes: Women and Leadership* and *In the Interests of Justice: Reforming the Legal Profession*, the latter of which was the subject of an earlier collection of articles in this journal. See *The Difference "Difference" Makes: Women and Leadership* (Deborah L. Rhode ed., 2003); Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000); Colloquium, *What Does It Mean to Practice Law "In the Interests of Justice" in the Twenty-First Century?*, 70 Fordham L. Rev. 1543 (2002). Her many articles have been published in leading law journals throughout the country, and she has been a generous contributor to this journal in particular. See Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 Fordham L. Rev. 2207 (2002); Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 Fordham L. Rev. 2415 (1999); Deborah L. Rhode, *Gender and Professional Roles*, 63 Fordham L. Rev. 39 (1994); Deborah L. Rhode, *If Integrity Is the Answer, What Is the Question?*, 72 Fordham L. Rev. 333 (2003); Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 Fordham L. Rev. 1543 (2002); Deborah L. Rhode, *Myths of Meritocracy*, 65 Fordham L. Rev. 585 (1996).

6. Rhode has been a contributor to the National Law Journal, the New York Times, and other periodicals.

7. From 1982 to 1986, Rhode served as a Cooperating Attorney with the American Civil Liberties Union.

8. In 1998, Rhode was Senior Investigative Counsel to the Minority Staff of the U.S. House of Representatives Committee on the Judiciary.

9. Rhode was President of the Association of American Law Schools in 1998.

10. Among her other contributions to professional service, Professor Rhode chaired the American Bar Association's Commission on Women in the Profession from 2000 to 2002.

11. Rhode, *supra* note 2, at 3.

12. *Id.* at 6-7.

the legal needs of low-income clients, and the legal barriers to obtaining assistance from qualified nonlawyers.¹³ On the criminal justice side, Rhode describes the poor quality of representation that is prevalent in this country, despite the constitutional promise of effective representation, as a result of insufficient state funding for criminal defense systems and the inadequate institutional responses.¹⁴ The book closes with a comprehensive roadmap for reform.¹⁵

The essays in this colloquium offer additional perspectives on the theme of access to justice, taking Rhode's book as their point of departure. In doing so, they advance the public dialogue about what can and should be done to narrow the gap between the promise of equal justice and the reality.

Three contributions focus on the role of lawyers and law students in securing justice for the poor and the need to educate lawyers for that role. Stephen Wizner and Jane Aiken, pioneers of clinical legal education, have collaborated on an examination of the changing role of law school clinics and clinical faculty over the past three decades.¹⁶ Their concern is that law school clinics have come to overemphasize the teaching of lawyering skills at the expense of their original, primary commitment to serving the poor and challenging social injustice, with the result that they now "dilut[e] the already meager contribution that clinical legal education makes to alleviating the crisis in access to justice."¹⁷ Wizner and Aiken propose that law school clinics re-commit to "inculcat[ing] in their students an understanding and compassionate concern for the plight of people living in poverty, and a sense of professional responsibility for increasing their access to justice."¹⁸

Martha Davis, who was an accomplished public interest lawyer before becoming a full-time legal academic,¹⁹ focuses on lawyers who volunteer their services to the poor.²⁰ She considers the possible power of pro bono work to transform the lawyers who render it by developing their empathy for poor communities and their understanding of those communities' needs. This would encourage lawyers to pursue a broader vision of justice for the poor, one that

13. *Id.* at 13-19.

14. *Id.* at 122-34.

15. *Id.* at 185-94.

16. Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 *Fordham L. Rev.* 997 (2004).

17. *Id.* at 1002.

18. *Id.* at 1011.

19. Professor Davis served as Legal Director of NOW Legal Defense and Education Fund before joining the Northeastern University School of Law faculty in 2002. Her book, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* (1993), won critical acclaim. It has been required reading for students in Fordham's public interest law program since it was published.

20. Martha F. Davis, *Access and Justice: The Transformative Potential of Pro Bono Work*, 73 *Fordham L. Rev.* 903 (2004).

includes social, political, and economic justice.²¹ Davis urges pro bono lawyers to examine their political values and seek empathetic engagement with their clients, and pushes for pro bono programs to promote lawyers' political and moral development through pro bono work.²² She exhorts scholars to conduct further research into how to develop lawyers' attitudes in professional settings, and how to cultivate their empathy for low-income clients.²³

Anthony Alfieri, who directs the Center for Ethics and Public Service at the University of Miami School of Law, strongly endorses the importance of pro bono representation to promote access to justice.²⁴ He offers his Center as a model to instill the value of pro bono work both within the law school and in the broader community.²⁵ As the Center's name reflects, its innovative work embodies a commitment to both teaching ethics and doing justice. Among the special attributes of the Center that Alfieri describes are its interdisciplinary partnership with the private and nonprofit community, and its dedication to mentoring relationships.²⁶

A fourth contributor, Norman Spaulding, offers a historical and sociological perspective on why lawyers are essential to securing access to justice.²⁷ He traces the movement in the nineteenth century to codify and simplify law and procedure to make them accessible to parties without the assistance of lawyers.²⁸ He explains the failure to achieve that aim, citing the bar's opposition to reform as one of the reasons.²⁹ Although the complexity of contemporary society makes lawyers essential in many legal contexts, Spaulding seconds Rhode's argument that in many areas relevant to low-income parties, law and procedure can be made more understandable and easier to use.³⁰ He closes by arguing that judges should take the lead in promoting the availability of legal assistance, given their authority, their responsibility to promote the administration of justice, and their knowledge of the justice system's inadequacies.³¹

But it is not enough to provide lawyers to those in need of legal assistance. To secure equal justice, those lawyers must have the skill, time, and resources to provide competent representation. As Lawrence Marshall describes, state and local governments throughout

21. *Id.*

22. *Id.* at 922-24.

23. *Id.*

24. Anthony V. Alfieri, *Teaching Ethics/Doing Justice*, 73 *Fordham L. Rev.* 851 (2004).

25. *Id.*

26. *Id.* at 859-62.

27. Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 *Fordham L. Rev.* 983 (2004).

28. *Id.* at 984-94.

29. *Id.*

30. *Id.* at 993-94.

31. *Id.* at 994-96.

the country fail to adequately fund indigent defense systems and, as a consequence, criminal defendants are denied the competent representation necessary to protect against the conviction of innocent people.³² Marshall, who directs the Northwestern University Center on Wrongful Convictions, underscores that the problem exists even in death penalty cases.³³ He argues that judges, no less than legislatures, have a responsibility to address the problem, but that they need to be emboldened to do so by public pressure.³⁴ The public, in turn, must be educated about how underfunded defense systems have led to the conviction of innocent people.³⁵

Without denying the importance of making more and better lawyers available to assist those who cannot afford to retain one, two other contributors look at additional ways in which unrepresented individuals might be assisted in dealing with the complexities and challenges of the civil legal justice system. Deborah Cantrell, who provided legal services to the elderly before taking charge of Yale Law School's public interest fellowship program, endorses the role of lay representatives.³⁶ She takes aim at Unauthorized Practice of Law ("UPL") provisions that restrict nonlawyers from rendering legal assistance and consequently leave those without lawyers to fend entirely for themselves.³⁷ The UPL provisions are ordinarily defended on the assumption that lay representatives will serve clients poorly, but as Cantrell points out, the assumption is undermined by the available empirical studies,³⁸ including Rhode's pathbreaking collaboration with her husband Ralph Cavanagh in 1976,³⁹ and a 2001 comparison of work by lawyers and nonlawyers who provide assistance in similar contexts (e.g., housing and welfare benefit cases) in the United Kingdom.⁴⁰ Cantrell challenges legal services lawyers in particular to advocate reform of UPL restrictions for the benefit of the population they serve.⁴¹

32. Lawrence C. Marshall, *Gideon's Paradox*, 73 *Fordham L. Rev.* 955 (2004).

33. *Id.* at 964-65.

34. *Id.* at 956-59.

35. *Id.*

36. Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 *Fordham L. Rev.* 883 (2004) [hereinafter Cantrell, *The Obligation of Legal Aid Lawyers*]. The essay builds on the theme of Cantrell's previous contribution to this journal. See Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 *Fordham L. Rev.* 1573 (2002) (arguing that it is unrealistic to expect legal services lawyers to be funded at the level necessary to meet the civil legal needs of indigent parties, and that innovations must therefore be undertaken to assist pro se parties).

37. Cantrell, *The Obligation of Legal Aid Lawyers*, *supra* note 36.

38. *Id.* at 885-91.

39. Ralph C. Cavanagh & Deborah L. Rhode, Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 *Yale L.J.* 104 (1976).

40. Richard Moorhead et al., *Contesting Professionalism: Legal Aid Lawyers and Nonlawyers in England and Wales*, 37 *Law & Soc'y Rev.* 765 (2003).

41. Cantrell, *The Obligation of Legal Aid Lawyers*, *supra* note 36, at 895.

My colleague, Russell Pearce, another long-time public interest advocate,⁴² argues that judges should play a stronger role in mitigating the injustices caused by the unavailability of lawyers in civil proceedings.⁴³ He suggests that it is important, but not sufficient, for courts to assist unrepresented parties by providing forms and clerical assistance, and by simplifying judicial processes in contexts where parties tend to be unrepresented.⁴⁴ He encourages a deeper consideration of how judges, by thinking of themselves as managers or “active umpires” rather than passive arbiters, can individually redress imbalances of resources that undermine the integrity of judicial proceedings.⁴⁵ Pearce contends that an enhanced judicial role is essential because expanding the availability of lawyers is not enough in itself to ensure equal justice under law.⁴⁶

Two additional contributors accept the importance of providing meaningful legal assistance to the poor in adjudicative proceedings, but emphasize that “access to justice” must be conceptualized in broader terms.⁴⁷ Steven Hobbs reminds us that there are many settings outside litigation where the poor need legal assistance to secure private rights, a point illustrated by the richly varied pro bono work he has rendered over the years.⁴⁸ Drawing on his early legal experience in the New Jersey Department of the Public Advocate, Hobbs contends that access to justice means not just protecting private rights, but also ensuring that government agencies properly and fairly perform their legislated functions.⁴⁹ The need for pro bono lawyers, therefore, goes well beyond the courtroom. Hobbs highlights the historic role played by the National Bar Association for more than three-quarters of a century in helping address this need.⁵⁰ Also, he points out, it is not just private lawyers who have a role to play in advancing equal justice. He identifies the potential role for government lawyers themselves, as exemplified by the innovative

42. Prior to joining the Fordham faculty, Pearce served as General Counsel to the New York City Human Rights Commission and, before that, as a housing lawyer in the Legal Aid Society, where he successfully litigated the first case on the rental rights of a surviving “gay life partner.” *Two Associates v. Brown*, 502 N.Y.S.2d 604 (N.Y. Sup. Ct. 1986). Among his other teaching responsibilities, Pearce co-directs Fordham’s clinical program for students representing low-income tenants in housing court.

43. Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *Fordham L. Rev.* 969 (2004).

44. *Id.* at 975-78.

45. *See id.* at 977.

46. *Id.*

47. As noted, this is also a theme of Martha Davis’s contribution. *See* text accompanying *supra* notes 20-21.

48. Steven H. Hobbs, *Shout from Taller Rooftops: A Response to Deborah L. Rhode’s Access to Justice*, 73 *Fordham L. Rev.* 935 (2004).

49. *Id.* at 942-45.

50. *Id.* at 945-49.

lawyers within the public advocate department where he once served.⁵¹

Aiming to encourage better informed decisions about how to allocate limited resources, Gary Blasi, a nationally renowned advocate for the homeless, explores questions about what “access to justice” means and how it should be measured.⁵² He suggests, for example, that one can strive to promote parties’ subjective beliefs that they are receiving justice, or one can promote better and fairer outcomes in judicial proceedings, but that these conceptions are different and do not necessarily go hand-in-hand.⁵³ Further, drawing on both his early experience in a working-class Los Angeles community law office and his current work in UCLA’s legal clinic, Blasi shows that offering limited advice and assistance to parties who must then represent themselves in court does not necessarily promote their ability to achieve justice by either measure.⁵⁴ Like Professor Hobbs, Blasi underscores that there are many “legal needs other than those related to litigation or other dispute-resolving systems,” thus heightening the significance of the resource-allocation questions that he poses.⁵⁵

Can the reforms that Rhode and others propose to promote access to justice realistically be achieved? Stanford historian Lawrence M. Friedman’s contribution, which explores this question, begins pessimistically.⁵⁶ He identifies the widespread popular ignorance about our justice system, the campaign of distortion that reinforces popular ignorance, and the culture and ethos out of which public attitudes emerge, all of which stand as barriers to reform.⁵⁷ But Friedman closes on a note of cautious optimism based on the lessons of history: He observes that the criminal justice system has improved since the days of lynching, vigilante justice, and the chain gang; suggests that even though the civil justice system may be more resistant to reform, “that is no reason to give up”; and rightly observes that “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.”⁵⁸

Finally, as a coda to this colloquium, Professor Rhode has generously contributed an afterword which recapitulates the major

51. *Id.* at 944-45.

52. Gary Blasi, *How Much Access? How Much Justice?*, 73 *Fordham L. Rev.* 865 (2004).

53. *Id.*

54. *Id.* at 868-69.

55. *Id.* at 877.

56. Lawrence M. Friedman, *Access to Justice: Some Comments*, 73 *Fordham L. Rev.* 927 (2004).

57. *Id.* at 928-29.

58. *Id.* at 934.

themes of both her own book and the responses.⁵⁹ In doing so, she highlights the role that should be played by so many institutions and individuals—legislatures, courts, bar associations, law schools, disciplinary agencies, and individual lawyers alike—to achieve the reforms that will bring us closer to achieving equal justice. Among the obstacles to reform that she describes are “ignorance and indifference,” even among lawyers.⁶⁰ That is precisely the target of both Rhode’s book and this colloquium.

I am deeply grateful to all who have contributed to this marvelous colloquium. First and foremost, my thanks to Professor Rhode both for allowing us to use her book, *Access to Justice*, as the occasion for exploring its important theme and for her own contribution to this colloquium. Next, my thanks to the authors who have taken Rhode’s book as the starting point for their own reflections on this theme. Individually and collectively, their essays carry the conversation forward in many important ways. My thanks also to the *Fordham Law Review*, which so fittingly begins the second decade of its special commitment to scholarship on the legal profession⁶¹ with the present colloquium examining the role and responsibility of lawyers to promote access to justice.

Most especially, my thanks for the positive and constructive perspectives that the contributors offer. The contributors to this book are committed to the cause of justice in the most personal and

59. Deborah L. Rhode, *Access to Justice: Again, Still*, 73 *Fordham L. Rev.* 1013 (2004).

60. *Id.* at 1016.

61. The next book in this series will be Symposium, *Critical Race Lawyering*, 73 *Fordham L. Rev.* (forthcoming 2005). The previous collections were (in reverse chronological order): Symposium, *Integrity in the Law: In Honor of John D. Feerick*, 72 *Fordham L. Rev.* 251 (2003); Symposium, *The Legal Profession: Looking Backward*, 71 *Fordham L. Rev.* 1181 (2003); Colloquium, *What Does It Mean to Practice Law “In the Interests of Justice” in the Twenty-First Century?*, *supra* note 5; Symposium, *Lawyering for the Middle Class*, 70 *Fordham L. Rev.* 623 (2001); Symposium, *Achieving Justice: Parents and the Child Welfare System*, 70 *Fordham L. Rev.* 287 (2001); Symposium, *Case Studies in Legal Ethics*, 69 *Fordham L. Rev.* 787 (2000); Symposium, *Ethics in Criminal Advocacy*, 68 *Fordham L. Rev.* 1371 (2000); Symposium, *The Independent Counsel Investigation, the Impeachment Proceedings, and President Clinton’s Defense: Inquiries into the Role and Responsibilities of Lawyers*, 68 *Fordham L. Rev.* 559 (1999); *Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 *Fordham L. Rev.* 1713 (1999); *Ethics: Beyond the Rules*, 67 *Fordham L. Rev.* 691 (1998); Symposium, *The Legal Profession: The Impact of Law and Legal Theory*, 67 *Fordham L. Rev.* 239 (1998); Symposium, *The Relevance of Religion to a Lawyer’s Work: An Interfaith Conference*, 66 *Fordham L. Rev.* 1075 (1998); *Institutional Choices in the Regulation of Lawyers*, 65 *Fordham L. Rev.* 33 (1996); *Ethical Issues in the Legal Representation of Children*, 64 *Fordham L. Rev.* 1281 (1996); and *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 961 (1994). In 2000, in recognition of its prior contributions and ongoing commitment to publishing collections on the legal profession, the *Fordham Law Review* was co-recipient of the New York State Bar Association’s Sanford D. Levy Award, which is given in recognition of the publication that makes the most outstanding contribution in the area of legal ethics.

profound ways. Their writings reflect the premise that we are a long way from achieving equal justice. But it is striking and noteworthy that each takes as another, if implicit, premise that with the legal profession in the lead, we can move ever closer. I am sure that the authors find encouragement in many different places, but as I look up at Professor Rhode's photo of Justice Marshall, I cannot but recall how she closed her 1992 tribute to the Justice:

[W]hat was ultimately so inspiring and empowering about Marshall was his persistence in the face of continual reversals. Even after a long series of being in the majority "only on one issue—breaking for lunch," the Justice never lost sight of the progress that the nation had made and the possibilities that remained.

At times when I, or my like-minded students, become most depressed about the current directions of the Court, I sometimes recall Marshall's story about his initial appointment to the bench. He was one of the first African Americans to sit on a federal bench, and shortly after his term began, he and his colleagues on the Second Circuit Court of Appeals were scheduled for a group photograph. Marshall arrived a bit late, just after the photographer had blown a fuse and everyone was milling around in semi darkness and considerable confusion. As he entered the chambers, the Chief Judge's secretary, who had not yet met him, announced with evident relief, "thank God, the electrician's arrived." To which Marshall reportedly responded, "Ma'am, you'd have to be crazy to think they'd let me in that union." Today, at least they might. And it is in part because of Marshall's efforts, and his faith that sooner or later, the law just might catch up.⁶²

I salute Professor Rhode and the other contributors to this colloquium for championing the cause of equal access to justice, for making it such an important part of their work as teachers and scholars, and for inspiring future generations of lawyers to join in the cause.

62. Deborah L. Rhode, *A Tribute to Justice Marshall: Letting the Law Catch Up*, 44 *Stan. L. Rev.* 1259, 1265 (1992).

Notes & Observations