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Norman W. Spaulding

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The Luxury of the Law: The Codification Movement and the Right to Counsel

Cover Page Footnote

Visiting Professor of Law, Stanford Law School. J.D., 1997, Stanford Law School; B.A., 1993, Williams College.

THE LUXURY OF THE LAW: THE CODIFICATION MOVEMENT AND THE RIGHT TO COUNSEL

*Norman W. Spaulding**

Professor Deborah Rhode's *Access to Justice* offers a rich and provocative set of arguments for making the legal system more open and responsive to low- and middle-income Americans. Perhaps the most compelling aspect of the book is its encyclopedic collection of data revealing a wide gap between our ideals—expressed in constitutional mandates, popular platitudes about equal justice for all, and our sense of superiority as a constitutional democracy committed to the rule of law—and the abysmal services available to average Americans when they turn to law. As she has done many times before, Professor Rhode enters a field and defines and dominates it by the sheer breadth of her fact-gathering and analysis. Her presentation is clear and forceful, inviting both legal and nonlegal audiences to engage the question of how to ensure access to justice.

The descriptive work of the book alone makes an invaluable contribution to the literature on the adversary system, access to legal services, and professional ethics. But the book also should have an impact outside legal academic circles as a corrective to popular misconceptions about American litigation. As Professor Rhode forcefully argues, sensationalist press coverage and a steady barrage of conservative attacks on “greedy” trial lawyers and “excessive” consumer litigation have fostered distinctly counterfactual perceptions about the adversary system and the interests it serves. Television and print media, stump speeches, and a vast array of internet sites regularly enjoin us to worry about excessive jury awards even though “juries are no more likely than judges to be swayed by sympathy for injured victims and to award punitive damages,” and “the vast majority of tort victims are *undercompensated*, not overcompensated.”¹ We are further encouraged to worry about runaway punitive damage awards and excessive consumer litigation

* Visiting Professor of Law, Stanford Law School. J.D., 1997, Stanford Law School; B.A., 1993, Williams College.

1. Deborah L. Rhode, *Access to Justice* 30, 40 (2004) (emphasis added); *see also id.* at 33 (“[M]edia coverage that disproportionately focuses on huge damage awards encourages . . . skewed perceptions. Cases reported by the press have verdicts between four and twenty times larger than the average.”).

even though punitive damages “occur in only about 4 percent of cases that plaintiffs win in court,” and “disputes between businesses are the largest and fastest growing category of civil litigation”;² to worry about tort litigation hampering the competitiveness of American enterprise even though studies estimate “that tort liability could represent no more than 2 percent of the total expense of United States goods and services, an amount ‘highly unlikely’ to have a substantial effect on American competitiveness”;³ and to worry about slick criminal defense lawyers tricking juries into acquitting guilty but rich defendants even though “[o]ver 90 percent of cases are resolved by guilty pleas, generally without any factual investigation . . . [and in] the small minority of cases that go to trial, convictions have been upheld where defense counsel were asleep, on drugs, suffering from mental illness, or parking their cars during key parts of the prosecution’s case.”⁴ Each of these messages distorts public awareness of deeper and far more disquieting facts about the failure of American civil and criminal law to meet basic standards of decency and fairness for low- and middle-income people.

It is impossible to solve a problem we don’t even recognize, and, as Professor Rhode contends, for the last twenty years misperceptions have driven “reforms” that arguably exacerbate the problem.⁵ *Access to Justice* thus offers a roadmap for improving not only the quality and distribution of legal services, but the terms of public and professional debate that determine the content of reforms.

I. THE CODIFICATION MOVEMENT—AMERICA’S FIRST FAILED REVOLUTION IN ACCESS TO LAW

The terms of public and professional debate, indeed the entire reform agenda on access to law, had a dramatically different valence

2. *See id.* at 30; *see also id.* at 29.

Current litigation rates in the United States are not exceptionally high, either in comparison with prior eras or with many other Western industrial nations not known for contentiousness. Americans were more likely to sue a century ago than they are now. Court filings in the United States now are in the same range, when adjusted for population, as those in Canada, Australia, New Zealand, England, and Denmark.

Id.

3. *Id.* at 32; *see also id.*

Other estimates suggest that businesses’ total liability for all legal claims, including torts, is about 25 cents for every 100 dollars in revenue. Given these modest costs, it is not surprising that corporate risk managers have reported relatively little adverse effect from liability on larger economic indicators such as gross revenues or market share. In managers’ experience, the major impact of tort claims has been to improve product safety and warning efforts.

Id.

4. *Id.* at 4; *see also id.* at 122-44.

5. *See, for example,* her discussion of the funding and positional constraints imposed on federally subsidized legal aid attorneys. *Id.* at 61-64, 108-10.

for much of the nineteenth century. Egalitarians of the period were, in a sense, more ambitious, more politically powerful, and less deferential to the profession than their modern counterparts. Rather than demand subsidized access to lawyers, they sought direct access to law through “codification.” But we miss the most dynamic aspects of this movement for legal reform if we concentrate exclusively on the right to counsel—as Professor Rhode rightly observes, charitable and publicly subsidized legal aid for criminal defendants and civil litigants are of fairly recent origin.⁶

To modern lawyers, codification calls forth images of technical drafting undertaken by legislators and expert advisory committees. As the restatements and uniform codes indicate, codification purports to offer guidance and provide a foundation for uniformity and generality in law. But the result is often hopelessly obtuse statutory language or unenforceable recapitulations of law only a specialist can decipher.

It was not always so. In the nineteenth century, codification represented a democratic movement for access to justice—for reforming the legal system so that laypersons could not only understand, but operate, the machinery of law. In its strongest form, it presented a direct threat to the legal profession, to judicial authority, and to the doctrine of common law reception. A perfect legal code would require no intermediaries, no self-appointed class of authoritative interpreters, between law and the people. And with precedent and practice reduced to principle, everyone could know the law and everyone could be his own lawyer.

The politically operative form of codification was less utopian, and was led by lawyers who embraced the democratic impulses animating the movement, but by no means believed it should eliminate the bench and bar.⁷ Their focus was on reducing the expense, delay, excessive formality, and confusion of common law litigation, not doing

6. *See id.* at 47-78. Poor and low-income Americans had no affirmative right to legal assistance in the nineteenth century, so if they received help from lawyers, it was usually by professional grace. The extent of pro bono service in the nineteenth century is impossible to measure, but there was ample incentive for young lawyers to take litigation work for free, especially criminal cases or other trial work likely to attract public attention and, thereafter, paying clients. Still, it is unlikely that the supply of pro bono service met demand even when combined with legal services offered by lay practitioners under the lax unauthorized practice laws of the period.

7. *See, e.g.,* Thomas Smith Grimke, An Oration of the Practicability and Expedience of Reducing the Whole Body of the Law to the Simplicity of a Code, Address to the South Carolina Bar Association (Mar. 17, 1827), in *The Legal Mind in America: From Independence to the Civil War* 147, 150, 158 (Perry Miller ed., 1962) [hereinafter *The Legal Mind in America*] (“[B]eyond question, the era never can arrive, when every man will be his own Lawyer.”). Indeed, there is evidence that these lawyers hoped codification would help improve the standing of the profession. *Id.* at 156; *see also* David Dudley Field, *Study and Practice of the Law, in Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* 484, 490 (A.P. Sprague ed., 1884) [hereinafter *David Dudley Field*].

away with lawyers and adjudication.⁸ Arguing in 1824 that the common law was a “pagan idol” and that “[w]e must either be governed by laws made for us, or made by us,”⁹ William Sampson, an Irish refugee and early supporter of codification, believed that

[w]e should have had laws suited to our condition and high destinies No longer forced into the degrading paths of Norman subtleties, nor to copy from models of Saxon barbarity, but taught to resolve every argument into principles of natural reason, universal justice, and present convenience, truth would [be] the constant object of [lawyers’] search; chicane and pettifogging would have . . . no dark crevices to lurk in . . . good sense would not be shocked with the failures of right, upon execution of idle and unmeaning form; and Justice would not be seen forever traveling upon bypaths¹⁰

Simplicity and accessibility, Sampson insisted, are essential to the legitimacy of law in a democratic society: “The efficacy of the law depends on the confidence it creates, and it never will inspire so much confidence, as when it lays aside the veil of mystery, and presents itself in all the simple majesty of truth.”¹¹ Codification, he believed, would bring both simplicity and accessibility, restoring public faith in law “as a human, not a preternatural institution,” and opening the way for progress in the science of jurisprudence beyond the feudal morass of common law doctrine:

[The law’s] defects will be excused, its excellencies acknowledged, and what is most desirable, it will advance with a free and unimpeded step towards perfection. Its stubborn forms will be taught to bend to the convenience and exigencies of the people for whose use it subsists. It will be separated from the rubbish and decay of time, and stripped of the parasitical growths that darken and disfigure it.¹²

Much of the problem, Sampson and others argued, was excessive reverence among lawyers for English common law. “[W]e should import no more,” he insisted, for English judges “are not fit persons to

8. See David Dudley Field, *First Principles of Reform*, in David Dudley Field, *supra* note 7, at 225 (“These champions of things as they are . . . by no means represent the majority of the profession; with the larger body of lawyers, the opinion is very prevalent—an opinion that gains ground every day—that the present system is unreasonably arbitrary, dilatory, and expensive.”); see also Daun Van Ee, David Dudley Field and the Reconstruction of the Law (1974).

9. William Sampson, Showing the Origin, Progress, Antiquities, Curiosities, and the Nature of the Common Law, Anniversary Discourse Before the Historical Society of New York (Dec. 6, 1823), in *The Legal Mind in America*, *supra* note 7, at 119, 123, 126. On Sampson’s life and role in the codification movement, see Maxwell Bloomfield, *American Lawyers in a Changing Society 1776-1876*, at 59 (1976).

10. Sampson, *supra* note 9, at 125; see also Robert Rantoul, Jr., Oration at Scituate (July 4, 1836), in *The Legal Mind in America*, *supra* note 7, at 222 (“The Common Law had its origin in folly, barbarism, and feudality.”).

11. Sampson, *supra* note 9, at 122.

12. *Id.*

legislate for us. . . . Must we tread always in their steps, go where they go, be what they are, do what they do, and say what they say? . . . If we can only be wise when they are wise, we must also be foolish if they are foolish. . . .”¹³ Common law reception also dangerously inflated the power of the judiciary in America. With codification, by contrast, “[p]articular cases will not . . . be resorted to instead of general law. The law will govern the decisions of judges, and not the decisions the law.”¹⁴ And once defined by principle rather than precedent, “[o]ur jurisprudence then will be no longer intricate and thorny; nor will it need those fictions, which give it the air of occult magic, or those queer and awkward contrivances, which, by rendering it ridiculous, greatly diminish its dignity and efficacy.”¹⁵ The profession would finally “be delivered from those odious volumes of special pleading,” the bane of nineteenth century trial practice,

where the suitor’s story is told in twenty different ways, and answered in as many, and must be hunted for with fear and trembling in printed books . . . and made conformable to precedents composed before the party was in being, and which, in no one single instance, conform to the truth: insomuch, that he who dares to tell his case according to the simple and honest truth, will *for that very* reason . . . fail in his suit.¹⁶

Lawyers, he predicted, would rise in public esteem.¹⁷

Twenty years later, Timothy Walker, a prominent Cincinnati lawyer, treatise writer, and disciple of Joseph Story, echoed Sampson’s views on the folly and antidemocratic logic of common law reception. “[T]he whole body of common law,” he insisted in a report published in the *Western Law Journal*, “is the vast work of *Judicial Legislation*. . . . Accordingly it may happen that the rights of an American citizen, in the nineteenth century, will depend upon the

13. *Id.* at 128-29.

14. *Id.* at 132; *see also id.* at 128 (“It is the meagreness and insufficiency of this ancient stock, that has obliged judges to legislate *pro re nata* [with respect to each thing as it appears], upon every new point.”). As Robert Rantoul put it: “Judge-made law is *ex post facto* law, and therefore unjust. . . . Judge-made law is special legislation. The judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to decide the next case differently, he has only to *distinguish*, and thereby make a new law.” *Rantoul, supra* note 10, at 223; *see also id.* at 224 (“The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till . . . a whole system of law is built up without the authority or interference of the legislator.”); *id.* at 223, 225 (“The legislature must act on general views, and prescribe at once for a whole class of cases. . . . Statutes, enacted by the legislature, speak the public voice.”).

15. Sampson, *supra* note 9, at 132.

16. *Id.* (emphasis added).

17. *See id.* at 125.

opinion of a British judge, pronounced in the tenth century.”¹⁸ More troublingly, adaptation of British precedents circumvented popular ratification of law, “[s]o that the question, what is the law of Ohio, can only be answered by saying, that it is what our judges please to determine.”¹⁹ If law is indeed a science, he continued, it should be possible to “arrange [its principles] into a system, and give them a legislative sanction,” so that law is known, certain, accessible, and “in harmony . . . with the general spirit of our institutions.”²⁰ Lawyers oppose codification, he lamented, because “[t]hey are the most directly interested in keeping things as they are” and because they have been taught to revere the “time-hallowed mysteries” of precedent.²¹ American law, he wrote in an 1848 essay, “must be redeemed from the well deserved charge of excessive technicality,”²² and Walker pushed for the profession to lead the way in reform.²³

As Sampson and Walker’s writings suggest, the ideological roots of the codification movement were radically egalitarian, tapping into longstanding ambivalence about the growing power and aristocratic pretensions of the legal profession, as well as hostility to the project of shaping American law by borrowing common law doctrines from the country’s colonial oppressor rather than deferring to democratically

18. Timothy Walker, *Codification—Its Practicability and Expediency—Being a Report Made to the Cincinnati Legislative Club, in 1835*, 1 W. L.J. 433, 435 (1844); see also Walter Theodore Hitchcock, *Timothy Walker: Antebellum Lawyer* (1990).

19. Walker, *supra* note 18, at 436.

20. *Id.* at 436, 438.

21. *Id.* at 433-34; see also Charles P. James, *Lawyers and Their Traits, An Address Delivered Before the Law School of Cincinnati College*, 9 W. L.J. 49, 55 (1851) (arguing that common law precedents do not fit the present and that lawyers must be emancipated from “servitude to obsolete things”). James argued that because the common law protected barons as a class, lawyers relied on complexity and “unintelligible circuitry . . . [to] circumvent[] the political power of the great landholders [The lawyers] were obliged to practice as a virtue the faculty of tortuous and subtle interpretation. Since nothing but a tangled net would bind the sleeping lion, they learned the poor art of weaving such a mesh.” *Id.* at 52-54; *id.* at 63 (complexity, absurdity, technicality of common law, and conservatism of the bar are not an inherent tendency in legal science, “but the stooping of the shoulder which has borne too heavy a burden”); *id.* at 57 (arguing that lawyers should be “part and parcel of the people. . . . It is through him, chiefly, that the wants of society are to become known to judges, and recognized in judgment” and that this cannot happen if he “sets himself apart from . . . society” into “a separate order”).

22. Timothy Walker, *Law Reform—Procedure*, 5 W. L.J. 337, 341 (1848).

23. In a letter endorsing the Field Code, Timothy Walker wrote the following:

I have long regarded the existing system as a monstrous abuse. Did it ever occur to you to attempt an estimate of the proportion of cases which turned upon a mere technicality, without reaching the merits? I believe you would find it more than half. Again, did you ever consider that, in order to become an adroit pleader and practitioner, you must give much more to the study of forms, than of principles? Now these ought no longer so to be.

Timothy Walker, *Kentucky Convention—Codification—Law Reform*, 7 W. L.J. 199, 217 (1850).

elected legislators.²⁴ Henry Dwight Sedgwick, a New York lawyer, was even more blunt in linking law reform to the ideal of equal access to justice:

Americans will not long believe, and the inhabitants of many of these states do not now believe, that there is any necessity that the forms of conducting a legal controversy should be so multiplied and expensive, that the mere costs of suit, without taking into consideration the rewards of professional eminence, should be so great, that none but the rich can indulge in the luxury of the law.²⁵

Radical nonlawyer reformers went further still, insisting that in a true democracy, lawyers, if not law itself, should be unnecessary. Rights would be sedulously observed, liberties openly enjoyed, and order self-enforcing.²⁶

Codification thus reflected several distinct strains of political thought and action. Jeffersonian Republicans at the turn of the eighteenth to nineteenth century, and later Jacksonian Democrats, viewed the bench and bar, and their support for common law reception, as fundamentally undemocratic—popularly elected and accountable legislatures were authoritative lawmakers in a democratic society, not the judiciary. Classical republicanism assumed that an enlightened, virtuous citizenry would both understand and protect the general welfare. For Jeffersonians and Jacksonians, the revised republicanism of Federalists and Whigs, which doubted the wisdom and virtue of the people and placed authority in a supposedly virtuous

24. As one historian has written:

While a residue of sentiment against the supposedly Anglophilic lawyer remained at the beginning of Jefferson's presidency, the attack, by then, had shifted ground markedly. No longer were lawyers trained at the English Inns; nor was their work primarily the thankless task of collecting wartime debts. Their offensiveness, it was discovered, came instead from their attempts to entrench themselves as a professional aristocracy, fattening their purses at the people's expense. In the demagogic idiom they were parasitical and superfluous agents who had arrogated an important democratic function—the administration of justice.

Gary Nash, *The Philadelphia Bench and Bar, 1800-1861*, 7 *Comp. Stud. in Soc'y & Hist.* 203, 210 (1965); *id.* at 210-14 (detailing radical democratic assault on the legal profession in Pennsylvania); *see also* Anon., *Bar Associations*, 4 *So. Lit. Msgr.* 583 (1838) (complaining that bar associations are "odious" monopolies and that "[m]en cannot investigate their rights, or pursue them, when ascertained, without the aid of the bar").

25. Henry Dwight Sedgwick, *Showing the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law, Anniversary Discourse Before the Historical Society of New York* (Dec. 6 1823), in *The Legal Mind in America*, *supra* note 7, at 145-46.

26. For examples of anti-lawyer sentiment, see P. W. Grayson, *Vice Unmasked, an Essay: Being a Consideration of the Influence of Law Upon the Moral Essence of Man, with Other Reflections*, in *The Legal Mind in America*, *supra* note 7, at 191, and more generally, see Bloomfield, *supra* note 9, at 32. *Cf.* Alexis De Tocqueville, *1 Democracy in America* 272-80 (Henry Reeve trans., Cambridge Univ. Press 1862) (1835) (arguing that lawyers are a necessary mediating force).

class of elites, was anathema. Popular sovereignty, they argued, is meaningless if common law doctrines propounded by lawyers and judges subvert legislative enactments, insulate privilege, and forestall innovation.²⁷ The writings of Jeremy Bentham and the Code Napoleon in France also offered precedent and inspiration for using the science of jurisprudence to reduce law to its most basic principles—to simplify law and render it more accessible.²⁸ And natural law theory provided reformers a foundation for arguing that anyone capable of reasoning could understand and apply legal principles, that a special class of experts was not only undesirable, but also unnecessary.²⁹

Conservative lawyers saw the threat in codification and mounted a vigorous opposition campaign. They attacked codification as unwarranted and impracticable,³⁰ defended the common law as a form of organic communal wisdom that could never be matched by even the wisest legislature,³¹ and promoted a consoling image of the lawyer as a hardworking and “benevolently neutral technocrat” to counter charges of greed, megalomania, and antidemocratic elitism.³² The ensuing struggle spanned most of the century, culminating in the well-known clashes between David Dudley Field and James Coolidge

27. See Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967); Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (1981); Arthur M. Schlesinger, Jr., *The Age of Jackson* (1946); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *Professions and Professional Ideologies in America* 70, 83-87 (Gerald L. Geison ed., 1983).

28. On the influence of the Code Napoleon, see Bloomfield, *supra* note 9, at 69. See also Cook, *supra* note 27, at 72-73. On Bentham's influence, see *id.* at 97-105.

29. Gordon, *supra* note 27; cf. Jesse Root, *The Origin of Government and Laws in Connecticut 1798*, in *The Legal Mind in America*, *supra* note 7, at 33-35 (arguing that domestic common law is derived from “the law of nature” and the “perfection of reason,” not English doctrine and supporting codification).

30. See Elijah Paine, *Reports of Cases Argued and Determined in the Circuit Court of the United States, for the Second Circuit*, 60 N. Am. Rev. 167 (1828); see also Cook, *supra* note 27, at 110-18 (describing views of anti-reformers).

31. As Peter Du Ponceau insisted:

But admitting that this country possesses superior legislative talents to any other, I assert, without the fear of contradiction, that it is impossible to abolish the Common Law. Make as many codes as you will, this second nature will still force itself upon you: *Expellas furca tamen usque recurret* [Expel it with a pitchfork, nevertheless it will forever rush back] We should still recur to it for principles and illustrations, and it would rise triumphant above its own ruins, deriding and defying its impotent enemies.

Peter Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States*, Valedictory Address Delivered to the Students of the Law Academy of Philadelphia, at the Close of the Academic Year (Apr. 22, 1824), in *The Legal Mind in America*, *supra* note 7, at 113.

32. Bloomfield, *supra* note 9, at 142.

Carter.³³ By all accounts, the conservative bar succeeded in stifling the more radical ambitions of the codification movement and in co-opting its practical agenda. David Dudley Field's 1848 code of procedure in New York became a template for procedural reform in many other states (particularly in the West) and attempts at drafting and implementing substantive law codes met with some success. But the bench and bar controlled many of these reforms, either by taking charge of the drafting process or complicating new codes by securing amendments after passage and adding judicial gloss and precedent to the interpretation of code language through subsequent litigation.³⁴

The turn to legal aid and arguments for an affirmative right to counsel in the late nineteenth and early twentieth century can thus be seen in part as a response to defeat in the larger battle to reform law itself and make it directly accessible to the people. Conservative legal elites, to put it differently, forced reformers to settle for lawyers—to settle for a reform agenda that concentrated heavily on expanding access to counsel.

The forced compromise has held. Today, American concepts of due process and access to justice are exceedingly lawyer-centric and deeply rooted in values derived from the adversary system.³⁵ Even critiques and imagined alternatives to the adversary system tend to reason backward from its defining features rather than beginning from genuinely new premises about access to justice and the proper sources of law. Modern reformers speak of permitting substitutes and competition for full-blown legal representation, and of turning lay people into good lawyers for themselves, not fundamentally altering the relationship of low- and middle-income people to the law.

There are several reasons for this reification of adjudicatory law. First, the stark difference that having a lawyer, especially a good lawyer, makes for corporations and individuals who can afford one draws the energy and attention of liberal reform efforts to the issue of representation—getting good legal help for those who cannot afford it. Second, the primary constituency of liberal reformers today is disenfranchised minorities, groups who cannot even begin to wield the kind of political power in legislatures that antebellum reformers (speaking then for a newly enfranchised white, male working class majority) held.³⁶ For groups marginalized from the political process

33. See Lawrence Friedman, *A History of American Law* 403-05 (2d ed. 1985); Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 *Law & Hist. Rev.* 577, 587 (2002).

34. Friedman, *supra* note 33, at 393-94, 406-08.

35. Cf. Thomas C. Grey, *Modern American Legal Thought*, 106 *Yale L.J.* 493 (1996) (book review) (discussing early twentieth century progressive legal theorists' confidence in legislative competence and distrust of courts).

36. Rhode is right to point out that the middle class has much to gain from reforms in access to justice today, and they are surely more politically powerful than

today, the courts at least provide a forum in which one has a right to be heard—a forum in which oppressive legislative and executive action can be challenged.³⁷

Third, both historical and sociological accounts often give the rise of the American legal profession an air of inevitability by suggesting that lawyers became increasingly necessary as social action (particularly economic social action) became more complex.³⁸ According to this “complexity thesis,” some form of dependence on professional expertise in law was, and by implication is now, inevitable. Perhaps this is the underlying reason why the codification movement failed. Opposition from the bar was palpable, but in an age of transition between the intimacy and simplicity of primarily rural, agrarian social action, on the one hand, and the complexity of urban, industrial, mass society, on the other, perhaps too much was in flux for reduction to code; perhaps too many conflicts, opportunities, and risks were present to make do without specialized, expert advice. The bar thrived in the antebellum period, after all, even in the absence of meaningful controls on admission and unauthorized practice, so it is fair to conclude that lawyers were at least meeting perceived social needs.

There is surely some truth to the complexity thesis. Specialization is an efficient response to market growth and specialized advice about new, complex transactions is more likely to be competent than a generalist’s guess. The corporate form, commerce, business finance, real estate development, labor relations, and countless other areas of economic action grew more sophisticated as the nation moved toward an industrial economy. It took until well into the twentieth century for the legal profession to develop firm, legally enforceable protections for its monopoly on providing legal advice. But the possibility of competitive lay practice (if not competition from other

low-income groups, but misperceptions forestall the momentum necessary for reform. See Rhode, *supra* note 1, at 1.

37. With what degree of success remains open to doubt. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991); Patricia J. Williams, *The Alchemy of Race and Rights* (1991) (discussing critical legal studies critique of rights).

38. See David Dudley Field, *supra* note 7, at 486.

As the relations of men multiply, the rules which regulate them multiply also. These relations increase with the increase of population, property, commerce, and the arts. . . . And when [the rules] became too many and too complex to be understood by all the people, a separate class was indispensable, who should devote themselves to the study, and on whom should devolve the interpretation and application of these rules.

Id.; see also Friedman, *supra* note 33, at 411; James Willard Hurst, *The Growth of American Law: The Law Makers* (1950); Gordon, *supra* note 27, at 83 (noting that legal complexity was part of the stock defense of common law adjudication offered by antebellum Whig-Federalists).

experts) was likely diminishing just as the codification movement became salient in nineteenth century politics.

Still, the complexity thesis can be overstated or, even worse, converted from descriptive generalization into normative prescription, especially in the hands of bar associations keen on protecting lawyers' monopoly rents from the competition lay practitioners would offer.³⁹ As Professor Rhode powerfully contends, there are numerous areas in which law and the process for enforcing legal rights can be simplified for low- and middle-income people, however inexorably complex other fields may be.⁴⁰ Proponents of codification were also keenly aware of the opportunities for simplification and we owe some of the most significant advances in modern civil procedure to their work.⁴¹

It is less often considered that the complexity of social oppression of low-income groups may have outstripped the remedial capacity of law. If this is so, one wonders how fruitful efforts to simplify law and expand access to legal services will be. One of the core attributes of the full-blown adversarial process is its capacity for highly individuated rights definition, rights application, and rights enforcement. Simplification through forms, easy access web filing, "rocket docket" case management, high-volume courts of special jurisdiction, and routinized, mass produced, market-driven legal services risk diminishing this individualized review—reducing law to commodity form, clients to mere consumers, and rights application to mere rubber stamping.⁴² On the other hand, even in full adversary adjudication, rights definition and enforcement have proven to be limited tools for rectifying sustained group-based harms such as discrimination and class subordination. Perhaps law can only reach so far into the machinery of political, cultural, and economic marginalization. The problem is not merely the inherent conservatism of rights definition, but the stark difference in the way legal rights and other forms of social power operate. Even if the Supreme Court is correct that the "right to sue and defend" is "conservative of all other

39. Whether the market always creates sufficient incentives for competence, I leave to another day.

40. See Rhode, *supra* note 1, at 185-94.

41. See Friedman, *supra* note 33 (discussing the impact of the merger of law and equity in the Field Code).

42. Even alternatives to litigation explicitly designed to be informal, claimant-friendly, and non-adversarial can become confusing, frustrating, and rights-defeating in the absence of legal assistance to ensure that decision makers are presented with the right facts and arguments. Consider, for instance, the experience of veterans seeking benefits for service-related disabilities from the Veterans' Administration. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985). There is also the problem of the visibility of rights definition and enforcement when secret settlements and private dispute resolution replace public litigation. And it is telling that the class action—a procedural tool that, as Professor Rhode observes, can be distinctly insensitive to individual rights—has become one of the most effective tools for protecting consumers. See Rhode, *supra* note 1, at 34-35.

rights, and lies at the foundation of orderly government,"⁴³ rights and lawyers to enforce them may not be sufficient to check social forces that can subvert rights or operate beyond the remedial power of courts.

Notwithstanding these lingering concerns, Professor Rhode's book shows that the importance of access to legal services cannot be gainsaid. Imbalances in access to legal services exacerbate the problem of marginalization for low-income groups and limit the opportunities of the middle class. The cases that opened the door of the Warren Court's due process revolution amply illustrate the impact legal representation can have in the lives of low- and middle-income people.⁴⁴

II. LOCATING PROFESSIONAL FAILURE

Access to Justice demonstrates that there is plenty of blame to go around for the maldistribution of legal services. Bar associations have behaved more like rent-seeking interest groups than the self-policing, public-minded regulatory bodies they purport to be; state legislatures and state supreme courts have too long caved to patently self-serving claims by bar associations for insulation from direct public regulation; Congress has abandoned its commitment to meaningful publicly subsidized legal services (not only by cutting funding but by restricting the attorney-client relationship to prevent significant challenges to the status quo); and individual lawyers have, for the most part, utterly failed to meet even the rather modest voluntary standards set out by the ABA and state bar associations for pro bono work.⁴⁵

The most significant failure, however, has been in the judiciary. No other group touching the administration of justice possesses the authority, responsibility, information, and opportunity to impose effective remedies. The inherent powers doctrine provides ample

43. Rhode, *supra* note 1, at 9 (internal quotations omitted).

44. See, e.g., *Greene v. Lindsey*, 456 U.S. 444 (1982); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

45. Rule 6.1 of the ABA Model Rules of Professional Conduct provides in part that

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) [organizations] in matters that are designed primarily to address the needs of persons of limited means.

Model Rules of Prof'l Conduct R. 6.1 (2003). But as Professor Rhode has shown, [m]ost lawyers make no [pro bono] contributions, and the average for the bar as a whole is less than half an hour a week and fifty cents a day. Moreover, much of what passes for 'pro bono' is not aid to the indigent or public interest causes, but either favors for friends, family, or clients, or cases where fees turn out to be uncollectible.

Rhode, *supra* note 1, at 145.

authority for judges to insist upon adequate representation for all parties appearing in court, if not for parties outside the litigation process. The Due Process Clause and ethical codes make clear that judges have a solemn obligation to protect the administration of justice. They are its stewards. Judges, particularly at the trial level, are also better situated than anyone else to know when counsel is needed.

Judges are pillars of the profession in their communities, both symbolically and practically. If they have failed to make access to legal services a priority, is it any surprise that lawyers, legislators, and bar associations have been equally indifferent? Conversely, if judges made access a priority, it's hard to imagine successful, sustained resistance from other quarters in the profession. Professor Rhode rightly points out that, at the state level, where many judges must run for office, political pressures undermine judicial independence.⁴⁶ Popular election of judges is, interestingly, another holdover from radical democratic antebellum politics—a result of the same nineteenth century egalitarian movement that pressed for codification. Now, however, popular election tends to invite the worst forms of political dependence. Campaign finance reform would mitigate the problem, but indifference to the needs of low- and middle-income litigants is also severe at the federal level, where political dependence is not an issue. This suggests that there are more fundamental forces at play in judicial failure.

Crushing caseloads undoubtedly prevent many judges from even considering the issue of access, let alone dedicating time to imagining solutions.⁴⁷ Others likely take the Supreme Court's woefully narrow definition of the constitutional minimum of due process as both floor and ceiling, reasoning that where there is no affirmative right to counsel, no superior ethical obligation requires them to ensure that litigants have lawyers, or, in criminal cases, that they need expect no more from lawyers appearing in their courtrooms than what the Supreme Court declares to be minimally competent performance.⁴⁸ Still others may feel that lawyers are part of the problem with the adversary system, not a solution.⁴⁹ That may very well be true in

46. See, e.g., Rhode, *supra* note 1, at 128, 132.

47. See, e.g., *id.* at 84 (“Judges often lack the time, expertise, or inclination to assist . . . pro se litigants. Over 90 percent of surveyed courts have no established policies concerning individuals who represent themselves.”); *id.* at 132 (discussing courts’ “already unmanageable dockets”).

48. See *id.* at 9 (discussing *Lassiter v. Dep’t of Soc. Serv.*); *id.* at 131-37 (discussing the constitutional standard for ineffective assistance of counsel in criminal cases and the low regulatory standards for managing publicly subsidized criminal defense work); see also *id.* at 56.

49. See Chief Justice Rehnquist’s critique of lawyers in *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 325 (1985) (“Under our adversary system the role of counsel is not to make sure that truth is ascertained but to advance his client’s cause by any ethical means. Within the limits of professional propriety, causing delay

certain areas, but in cases where those who can afford to hire counsel regularly do so, it's difficult to find convincing arguments that low- and middle-income litigants deserve less, especially when substantial rights are at stake.

All of this is just to say that I hope *Access to Justice* finds its way into judges' chambers. If reform is to come from within, if law is to be more than a luxury, judges must lead the way.

and sowing confusion not only are his right but may be his duty.'") (quoting Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1287-90 (1975)). And as Professor Rhode shows, judges can be equally hostile to pro se litigants as well. See Rhode, *supra* note 1, at 85.