

# Washington University Journal of Law & Policy

## Access to Justice: The Social Responsibility of Lawyers

### Introduction

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Since the first volume of the *Washington University Journal of Law & Policy* in fall 1999, the *Journal* has published a volume each year dedicated to Access to Justice. This volume marks the seventh annual Access to Justice volume published by the *Journal of Law & Policy*.

Like the prior six volumes dedicated to Access to Justice, most of the articles in this volume are written by presenters in the School of Law's annual Public Interest Law Speaker Series, entitled *Access to Justice: The Social Responsibility of Lawyers*. These presenters/authors are nationally and internationally prominent academics and practitioners from diverse backgrounds in areas such as international human rights, the economics of poverty, racial justice, capital punishment, conflict resolution, clinical legal education, government public service, and pro bono private practice, who share a commitment to access to justice.

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The Public Interest Law Speaker Series was developed in 1998–99 in celebration of the School’s nationally recognized Clinical Education Program, through which many of our students are introduced to public service and public interest law practice. The Series informs the Washington University community through the presentations of the speakers, through the articles drawn from the presentations that are published by the *Journal*, and through the readings course that accompanies the Series in which students have the opportunity to meet with the speakers, read their work, and develop papers that focus on the speakers’ ideas.

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#### FINAL TRIBUTE TO JUDGE THEODORE MCMILLIAN: A MAN OF LAW AND JUSTICE

From 1997 to 1999, Washington University School of Law undertook an evaluation of the School’s *Journal of Urban and Contemporary Law*. The students and faculty adopted a new name for the Journal—the *Journal of Law & Policy*—and revised its mission. The new *Journal* was designed as a symposium-based publication, committed to bringing together communities of scholars through a mutual and collaborative student and faculty process; to emphasizing interdisciplinary and multi-cultural visions of the law; to exploring the implications of technology and the consequences of economic globalization; and to influencing law and social policy.

One of the many motivations for the change was the success of a symposium published by the *Journal of Urban and Contemporary Law* in 1997, dedicated to Judge Theodore McMillian, U.S. Court of Appeals for the Eighth Circuit.<sup>1</sup> That volume recognized his many contributions to Washington University and legal education, the legal profession, and the development of the law during his life long journey for justice and equality. It is fitting that this year’s Access to Justice volume includes a final tribute to Judge McMillian, who

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1. See Symposium, *A Tribute to Judge Theodore McMillian: His Journey for Justice and Equality*, 52 WASH. U. J. URB. & CONTEMP. L. 1 (1997).

passed away January 18, 2006, just two weeks shy of his 87th birthday, after almost fifty years on the state and federal bench.

KENNETH R. FEINBERG—NEGOTIATING THE SEPTEMBER 11 VICTIM  
COMPENSATION FUND OF 2001: MASS TORT RESOLUTION WITHOUT  
LITIGATION

Kenneth Feinberg kicked off the 2004–05 Public Interest Law Speaker Series to a standing room only audience. Feinberg, who served as Special Master of the September 11 Victim Compensation Fund and previously served as Special Master of the Agent Orange Settlement, is the founder and managing partner of The Feinberg Group, L.L.P., former Chief of Staff to Senator Edward M. Kennedy, and former special counsel to the Judiciary Committee of the United States Senate. In his article, Mr. Feinberg describes his experience with the September 11 Victim Compensation Fund, in which he participated with no remuneration, and the noble role that lawyers played in the aftermath of the September 11 attacks.

The Victim Compensation Fund was designed by Congress to give those who had lost a loved one or had been physically injured on September 11 the option of voluntarily electing to forgo litigation against the airlines, the World Trade Center, and/or the Port Authority, and instead enter into the fund for compensation. Ninety-seven percent of all eligible families elected the program, including foreign claimants and the families of undocumented workers. Eighty people decided to sue, many of whom asserted they sued in an effort to make the airlines safer or to find out what really happened and who was responsible. Thirty people did neither. Feinberg believes that most of these individuals were overwhelmed with grief and depression.

The Fund legislation set up a Special Master to evaluate the claims and laid out a four-part formula for doing so. The Special Master was to calculate the economic loss and the non-economic loss (pain and suffering), subtract collateral sources of income (such as life insurance), and then use his discretion to see that justice would be done. Feinberg, the Special Master, decided that non-economic loss would be equal for everyone, and then used his discretion to bring down the aberrational top numbers and bring up the bottom numbers.

He also established an administrative appeal process so that families could be heard, which he felt gave them a degree of closure. The average payment was \$2 million and the median payment was \$1.8 million.

One of the challenges for Feinberg of administering the Fund was deciding who could file a claim and receive funds. He addressed claims involving various family members, same-sex partners, siblings, and fiancés. Most of these disputes were resolved through mediation; the others were resolved using the state tort and estate laws of the victim's domicile.

Feinberg believes the program was a success because it made great efforts to communicate directly with as many claimants as possible, made generous payments, and offered due process considerations. Feinberg argues that the program should be judged on three bases: Was the program sound public policy, i.e., how do we justify creating this program for September 11 victims and not the victims of other tragedies, such as the Oklahoma City bombings? Did Congress do the right thing in making sure in the statute that everybody would get a *different* amount of money? If this happens again, should we replicate the program in some way?

Feinberg talks candidly about the emotional challenges that he and others confronted during the process as they listened to the stories of people who came to speak with them. Some told stories of their loved ones dying while saving other people, some brought photographs and songs, and one even brought a recording of the phone call that his wife made while she was dying.

Feinberg concludes that a major success of the program was that it showed the noble profession of the law; he notes that the lawyers represented families with compassion and sensitivity, usually pro bono or for very small fees.

VIET D. DINH—LIBERTY AND THE RULE OF LAW AFTER  
SEPTEMBER 11

Viet Dinh, Professor of Law and Director of Asian Law and Policy Studies at Georgetown University, is the former Assistant Attorney General for Legal Policy for the United States Department of Justice and former Associate Special Counsel for the Whitewater

Committee of the United States Senate. Dinh is frequently credited as a key architect of the Patriot Act adopted by Congress post-September 11. In his article, he discusses what he sees as the false choice between liberty and security in a post-September 11 world, and presents what he believes is a paradigm of prevention of future terrorist attacks.

Dinh argues that liberty is distinguished from license, and that true liberty only exists in a state whereby order is preserved. He argues that order prevents one person's license from trampling other people's licenses to pursue his or her own ends, and that you can neither have liberty without order, nor order without liberty. Dinh believes that Al Qaeda attacked the World Trade Center on September 11 because the Center was a symbol of the achievement of our democratic capitalist system that has flourished because of the liberty founded in our Constitution and protected by the rule of law.

Dinh points out that our international order is based upon the sovereign nation-state, and that terrorists challenge that system. He argues that terrorists are fundamentally different from the traditional nation-state in that they have no responsibility to sovereignty, population, or territory. In order to defeat the terrorists without becoming the enemy ourselves, Dinh asserts we must focus on the rule of law and our established international order based on sovereignty. While recognizing that this is challenging as terrorists do not play by the same rules, Dinh believes we must do so by creating a culture shift within our law enforcement agencies and the Department of Justice whereby we focus on prevention, not prosecution.

According to Dinh, our traditional system of justice waits for a crime to be committed, investigates the crime, and prosecutes the perpetrator. In terrorist attacks such as September 11, the perpetrators are already dead, and so our system of justice cannot function. Instead of waiting for terrorists to strike, Dinh argues that we must prevent them from striking in the first place, using whatever means we have to identify suspects and to bring them up on charges, thus removing them from the streets and preventing them from attacking.

Dinh concludes by discussing the "June terror trilogy" through which the Supreme Court decided that detainees, such as Jose Padilla and Yassir Hamdi, should be treated based on the restraints of our Constitution and the rule of law. He argues that these decisions

“reaffirm our rule of law even in a time of crisis, while at the same time not unduly hampering the ability of the executive to prosecute this war in the short term and to win it in the long term.”

SUSAN R. JONES—DR. MARTIN LUTHER KING, JR.’S LEGACY: AN  
ECONOMIC JUSTICE IMPERATIVE

Susan Jones, Professor of Clinical Law and Supervising Attorney of the Small Business Clinic at The George Washington University, is the Senior Editor and Immediate Past Editor-in-Chief of the *American Bar Association Journal of Affordable Housing and Community Development Law*. She is also the author of *A Legal Guide to Microenterprise Development*. She spoke at the School of Law as the 2005 Dr. Martin Luther King Commemorative Speaker. In her article, Jones explores the ways in which Dr. King’s legacy demands that lawyers work to abolish poverty and homelessness, and the ways that lawyers can help to advance economic opportunity for low-income people through legislation that promotes the abolition of poverty and through the development of nonprofit groups and progressive corporations.

Jones highlights that Dr. King’s Poor People’s Campaign demanded a comprehensive anti-poverty effort, including a full-employment act, guaranteed annual income for all citizens, and construction of low-cost housing. After his death, the Campaign ended unsuccessfully, and today 12.5% of the population falls below the poverty line. According to Jones, U.S. government policies are ineffective, reducing poverty by only 38%, while other Western industrialized nations have reduced poverty by an average of 79%.

Jones asserts that economic justice is affected by the complexities of economic globalization. The nature of work in America has changed, and geography has become increasingly important in determining opportunity. She believes that economic justice is closely linked to (if not the same as) international human rights, and that the U.S. should ratify both the Universal Declaration of Human Rights and the International Covenant on Economic and Social Rights. These international norms, she argues, can be used in domestic litigation particularly around housing and homelessness issues.

For Jones, the keys to ending poverty and homelessness are building affordable housing, creating jobs, and encouraging savings and asset development. Jones believes law schools can better prepare students for addressing issues of inequality by teaching economic justice and by advancing the ideal of the lawyer as abolitionist of poverty. She also believes lawyers can play an important role in the Community Economic Development movement by working with community residents to provide legal services, helping to create microenterprises and community development banks, fighting for environmental justice, combating predatory lending, forming nonprofit organizations, and obtaining federal tax exemptions. Lawyers, Jones concludes, must become interdisciplinary workers who collaborate with other professionals to meet multiple client demands in order to eviscerate poverty in America.

FRANCES M. VISCO—BREAST CANCER ADVOCACY AND PUBLIC  
POLICY

Fran Visco is President and Member of the Board of Directors of The National Breast Cancer Coalition (NBCC), praised by many as one of the most effective grassroots organizations in the country. She is a three-time appointee to the President's Cancer Panel and recipient of the American Association for Cancer Research's 1998 Public Service Award. Visco, who was diagnosed with breast cancer in 1987, resigned her law firm partnership in 1995 to become the first, and so far only, president of the NBCC. In her article, she discusses how her legal training enabled her to be a better breast cancer advocate, preparing her to identify goals, develop step-by-step plans for achieving that goal, evaluate good and bad public policy ideas, and build a case to convince decision-makers to care about breast cancer.

The issue of breast cancer, Visco argues, is ultimately a political one. In her view, what and how much research is done, what connections are made and understood about breast cancer and the environment, and how the government addresses access to health care are all political decisions. She believes that in order to make significant changes for women affected by breast cancer, significant changes to the health care system must be made.

The goal of the NBCC is to eradicate breast cancer, and to do so the NBCC focuses on the issues of research and access to care. Visco's first objective was ensuring that the research community had the necessary funds to conduct their research. She was able to use the skills that she acquired from her litigation practice to develop a convincing argument to federal decision-makers that they should increase breast cancer research funding. In 1992, the NBCC determined from their research that the research community could use an additional \$300 million in funding. They fostered a grassroots network to pressure lawmakers to increase the funding, and Visco testified before Congress, not merely asking for money, but declaring war on breast cancer.

Visco's second strategy was to improve women's access to quality health care to help detect and treat breast cancer. Congress had already passed a law that provided government funding for cancer screening, but provided no money for treatment if a problem was detected. The NBCC researched the charity care system and provided evidence to Congress to prove that this system was inadequate to deal with the needs of these uninsured women. NBCC built their case around evidence and was able to pass legislation that made these women eligible for breast cancer treatment through Medicare.

In addition to advocating for increases in funding and access to care, Visco also used her legal training to identify other problems in health care legislation, such as the absence of enforcement provisions. The NBCC encourages its grassroots network to include enforcement provisions in all of the policies they support. Visco concludes that her legal training is an invaluable tool in becoming an effective breast cancer public policy advocate.

MARJORIE M. SHULTZ—TAKING ACCOUNT OF ARTS IN  
DETERMINING PARENTHOOD: A TROUBLING DISPUTE IN  
CALIFORNIA

Marjorie Shultz is Professor of Law at the University of California, Berkeley and a former member of the Legal Review Group for the 1993 White House Health Care Reform Proposal and the First Advisory Committee for the Office of Women's Health Research, National Institutes of Health. She is co-author of



*Whitewashing Race: The Myth of a Color-Blind Society*. In her article, she discusses the consequences of applying traditional family law statutes based on conventional coital relationships to cases where artificial reproductive techniques (ARTs) are used.

Shultz centers her article on the case of *Robert B. v. Susan B.*, a case where a doctor mistakenly implanted in “Susan’s” uterus an embryo created with “Robert’s” sperm and a donor ovum, intended to be used to implant Robert’s wife, “Denise.” Susan had intended to be implanted with an embryo created from donor sperm and ovum. Although this mistake was known to the doctor almost immediately, neither Robert, Denise nor Susan became aware of it for nineteen months, during which time Susan carried the embryo to term and give birth to Daniel. At the same time, Denise, who had been implanted with another embryo on the same day, gave birth to another child.

After being advised of the mistake by her doctor, Susan allowed the doctor to give her name to Robert and Denise, who then demanded custody of Daniel. Robert and Denise took their case to court. A series of subsequent judicial decisions relied on traditional family law. First, the court granted Robert’s request for a genetic test to prove paternity based on his standing as a man “alleged or alleging himself to be the father.” According to Shultz, this decision is flawed because, when the statute was written, there was no way for a stranger to the mother to claim paternity; without the advent of ARTs, there would have had to have been at least one sexual encounter between the two adults. Without this previous sexual relationship, she argues, Robert did not have standing to claim to be Daniel’s father. The importance of this relationship is reflected in the updated Universal Parentage Act, article 5. Once the court used the genetic relationship between Robert and Daniel to declare Robert the legal father, there was no question about his fitness as a parent and he was granted visitation rights.

Shultz argues this case differs from a traditional custody dispute in that the two “parents” were complete strangers and had no previous relationship. Thus, in this case, shared parentage presents challenges that a traditional case would not. Shultz also examines the role that preference for two-parent families (even if the parents are not married) and the best interest of the child played in this case. Ultimately, she argues that the narrow interpretation of traditional

family law as applied in this case effectively silenced Susan's arguments and victimized all parties in this case. Although both Susan and Robert were victims of a doctor's mistake, she concludes that "it would be better to ask Robert to face the loss of a child whose very existence was unknown to him before this belated dispute, than to permanently impose a stranger into the planned and harmonious family unit of an already-situated and treasured child."

BARBARA J. FLAGG—OF HEARTS AND MINDS: *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY*

Barbara Flagg is Professor of Law at Washington University in St. Louis School of Law. Prior to joining the School of Law, she was a law clerk to Ruth Bader Ginsburg, then a U.S. Court of Appeals judge for the D.C. Circuit. She is an expert on Constitutional Law and Critical Race Theory, and author of the book, *Was Blind, But Now I See: White Race Consciousness and the Law*. In her piece, Flagg reviews *Whitewashing Race: The Myth of a Color-Blind Society*, a collaborative endeavor written by Marjorie Shultz and six other academics: Michael K. Brown, Martin Carnoy, Elliott Currie, Troy Duster, David B. Oppenheimer, and David Wellman. Flagg praises the book for addressing "the persistence of racial inequality in this country" and providing a response to "a conservative 'consensus' that represents the problem of race as 'solved.'"

JUSTICE JOHN C. MAJOR—UNCONSCIOUS PARALLELISM:  
CONSTITUTIONAL LAW IN CANADA AND THE UNITED STATES

The Honorable John C. Major has been an Associate Justice of the Supreme Court of Canada since 1992. Prior to joining the Court, he was senior counsel for the City of Calgary Police Service, counsel at the McDonald Commission of the Royal Canadian Mounted Police, and a judge on the Alberta Court of Appeal. In his article, Justice Major offers a comparison between the Supreme Courts of the United States and Canada. He discusses the historical and cultural differences between the two countries, the limitations on freedoms and rights built into the Canadian Charter of Rights and Freedoms, the similarities and differences in each Court's appointment process, and finally the manner in which he believes these similarities and

differences impact each of the courts' rulings on issues of freedom of expression and hate speech.

Justice Major explains that the United States and Canada have a fundamental cultural difference in the relationship between citizens and government that can be traced back to the way that each country gained its independence. The United States gained its independence after a long and bloody war against an oppressive government, and thus government is viewed as something from which citizens need the protection of inalienable natural rights. Canada gained its independence through a peaceful act of the British Parliament, and thus citizens view the government more as an entity to be trusted with solving their problems. In the United States, the Constitution is viewed as something that protects the natural rights of citizens from government oppression; the balance of power not expressly given to the federal government is reserved for the states. In Canada, the Charter is seen as something that grants rights to citizens; the balance of power is given to the federal government.

While the Constitution of the United States forbids the government from infringing on citizens' guaranteed rights, the Canadian Charter allows the government to act in a manner inconsistent with citizens' rights so long as it can demonstrate the action is justified. Another significant difference is that if a suspect's rights are violated by the police in the collection of evidence, the evidence is only excluded in Canadian courts if "the admission of it in the proceedings would bring the administration of justice into disrepute." Other differences in the Courts are in the founding of the Supreme Court (in the U.S., the Constitution established the court, while in Canada the Charter allowed the federal government to establish the court, which they did after nine years), the appointment of Justices (in the U.S., presidential appointments are subject to Senatorial consent, while in Canada the Prime Minister does not need consent), and the retirement age of Justices (none in the United States, while seventy-five years of age in Canada).

In both Canada and the United States, freedom of expression is recognized as a cornerstone of a free society. Both countries assert that limits to freedom of expression are acceptable, but limit it in different ways, particularly around the issue of hate speech. In the United States, the courts have found that the government cannot ban

certain types of speech based on their content (although certain types of lewd, obscene, or insulting speech can be limited) and have struck down most hate crimes legislation. In Canada, the government has been able to make a case that while hate crimes and hate speech legislation might violate a person's right to freedom of expression, such a limitation is an acceptable violation of that right. The United States limits speech by saying that some speech was not meant to be protected. Canada protects all speech, but says that it is acceptable to restrict freedom of expression in some cases.

JOEL SELIGMAN—2005 COMMENCEMENT REMARKS FROM A  
DEPARTING DEAN

Joel Seligman was Dean of the School of Law at Washington University from 1999 to 2005. He is now the President of the University of Rochester. He is the author of *Transformation of Wall Street: The History of the Securities and Exchange Commission and Modern Corporate Finance*, *Fundamentals of Securities Regulations*, a casebook on *Securities Regulation*, and an eleven-volume treatise on *Securities Regulation*. His piece is a transcript of the commencement remarks he gave at the 2005 School of Law graduation ceremonies. In his speech, Seligman discussed his love for the law, which he sees as an alternative to violence and a vehicle for fact-based dispute resolution. According to him, the law provides equality, justice and protection for all. Seligman discusses the importance of academic freedom and the pleasure he enjoyed in his career as a law professor, teaching more than ten thousand law students.

CONCLUSION

This annual volume of the *Journal*, dedicated to Access to Justice, provides through the words and stories of real leaders a truly inspirational look at the social justice responsibilities and aspirations of lawyers to foster access to justice for all.