

# Washington University Journal of Law and Policy

## Access to Justice: The Social Responsibility of Lawyers

### Introduction

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Washington University School of Law inaugurated its Public Interest Law Speakers Series, entitled “Access to Justice: The Social Responsibility of Lawyers,” during the 1998-1999 school year. One of the goals of this on-going series is to highlight the social justice responsibility of lawyers. Through the series, the School hopes to send a strong message to our students and to the community that access to justice is an important part of the professional responsibility of lawyers and the professional responsibility education of Washington University graduates. Another goal of the series is to bring together students, faculty, alumni, and members of the community in an on-going, interdisciplinary discussion about the future of the legal profession. A third goal is to highlight the excellence of the Law School clinical program, through which many of our students are exposed to public service and public interest law practice. In our clinical program, which celebrated its 25th anniversary in 1998-1999, law students assist indigent and underrepresented clients with domestic

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violence, employment rights, environmental, criminal defense, and death penalty cases, and work with state and federal judges, Congressional committees, and federal agencies.

The year-long series featured a number of speakers, from diverse backgrounds and careers, each independently dedicated to providing access to justice, each demonstrating in their personal and professional lives the best of the legal profession—extraordinary integrity, inexhaustible courage, and unbounded compassion. The talks ranged in focus from international criminal justice, to systemic race and poverty biases in our legal system, to the role of our federal courts in influencing public interest law, to the day-to-day fights confronted by individual consumers, to public service in government and private practice. The series soundly dispelled the myth that lawyers work only for high wages and prestige, and provided an inspirational look, through the lives and words of real individuals, at the responsibilities and possibilities the field of law offers.

#### JUSTICE LOUISE ARBOUR—THE PROSECUTION OF INTERNATIONAL CRIMES: PROSPECTS AND PITFALLS

Justice Louise Arbour, a Canadian criminal law specialist and veteran judge from Ontario, was appointed the Chief Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda by the United Nations Security Council in October 1996. She visited Washington University to present the Holocaust Memorial Lecture in October 1998. In her talk, “The Prosecution of International Crimes: Prospects and Pitfalls,” Justice Arbour discusses the huge obstacles faced by the United Nations (U.N.) in establishing an international criminal justice system, citing the strength of national interests that come together to curtail the reach of the law and the power of abusive leadership within the concepts of state sovereignty. She emphasizes the challenges of marrying divergent legal systems and cultural environments, especially in contexts of war and devastation. On the other hand, she trumpets how much has been accomplished in the last six years by the International Criminal Tribunals and the International Criminal Court. In her view, more has been done in this period than in the past half century to address genocide, torture,

persecutions on ethnic, racial or religious grounds, sexual violence, and the deprivation of human dignity.

Although the International Tribunals and the International Court have been assailed by critics as a system created out of guilt and failure of other measures, Justice Arbour challenges the idea that recourse to criminal law enforcement is simply an implicit admission of failure. She concedes that a criminal justice system should not work as a replacement for “social institutions designed to protect a society from self-destruction,” such as education, shelter, and child care, but rather should “work in parallel with the revamping of the deficient social welfare institutions that may have served to prevent the harm that criminal law is asked to redress.” This is the role that Justice Arbour believes a fully empowered, international criminal justice system should have in the struggle toward world-wide social peace and harmony.

Justice Arbour proudly reports that the early expectations of failure for the Tribunals and the International Court have not proven true. She points out that many persons have been indicted by the Tribunals and are presently in custody through arrests or voluntary surrenders. Some have pleaded guilty, including the former Prime Minister of Rwanda, Jean Kambanda, who was sentenced to life imprisonment. Others have been convicted through legal proceedings. She notes, however, that publicly-indicted, accused persons continue to escape and that access to politically embarrassing and disturbing evidence is difficult.

Justice Arbour endorses the sentiments of U.N. Secretary-General Kofi Annan that the establishment of the International Criminal Court is “the gift of hope for future generations and a giant step forward in the march toward universal human rights and the rule of law.” However, Justice Arbour cautiously notes that it will be a long time before the rule of law succeeds over the rule of force, before impunity from massive human rights violations is no longer the norm, and before accountability for international crimes is no longer the exception. She highlights the need for uniform definitions of crimes and formalized rules of procedure and evidence.

Justice Arbour concludes with her hopes for the future. She believes the success of the International Criminal Tribunals and the

International Criminal Court will depend on the continued co-operation of many countries in order to “dispense justice visibly and expeditiously,” in accordance with the legitimate expectations of decent citizens of the world.

*Postscript:* Justice Arbour’s articulated commitment as Chief Prosecutor of the International Criminal Tribunals to follow the evidence of war crimes to the top of the chain of command, first in the Bosnia conflict and later in Kosovo, was vividly depicted on the front page of *The New York Times* and other major news sources around the world just two months after her visit to Washington University. In early January 1999, following the massacre of Kosovo Albanians in the village of Racak, Justice Arbour traveled to the Macedonian border and demanded access to the site. Although Yugoslav border guards turned her away, foiling her attempts to investigate the crimes, Arbour’s physical attempt at entry into Macedonia drew international attention to the atrocities of the crimes and the cause of international justice. In early summer 1999, she further thrust the Tribunals squarely into public view when she issued controversial indictments against Yugoslav President Slobodan Milosevic and high-ranking members of the Serbian military for crimes against humanity.

Although Justice Arbour will leave the Chief Prosecutor position in September 1999 for an appointment to the Supreme Court of Canada, her legacy is unquestioned. During her tenure, the Tribunals and the International Court made significant strides—emerging from relative obscurity to international prominence, with a budget that jumped sharply to \$94.1 million this year and a staff that exploded to more than 730 employees from 57 countries. Increased funding, staffing, and notoriety for the Tribunals and the International Court portend new political clout and a greater likelihood of achieving Arbour’s goals of “eradicating a culture of impunity from massive human rights violations” and creating “institutions capable of delivering international criminal justice.”

#### DERRICK BELL—GETTING BEYOND A PROPERTY IN RACE

The Honorable A. Leon Higginbotham, legal scholar, legal historian, and former judge of the Third Circuit Court of Appeals, was

scheduled to serve as Jurist-in-Residence at the Law School and to present a two part talk on “Race and the American Legal Process—a 60 Year Personal Perspective” in Spring 1999. Due to Judge Higginbotham’s sudden death from a stroke in December 1998, Derrick Bell, Visiting Professor of Law at NYU and former Professor of Law at Harvard, spoke in place of Judge Higginbotham, his friend and colleague. Professor Bell dedicated his talk, which focused on the history of racial discrimination experienced by African Americans in our country, to Judge Higginbotham who in Bell’s words “quite literally gave his life . . . in the struggle in which he was often heard, but too infrequently heeded . . . determined to speak the truth about race as he saw it . . . without regard to the criticism he was almost certain to receive from those who felt his remarks were inappropriate or untimely.” Professor Bell praised Higginbotham’s lifetime of defying racial stereotypes and “ignoring tradition in the furtherance of justice,” noting among other targets Higginbotham’s public condemnations of Justice Clarence Thomas.

Throughout his forty year career as a lawyer, activist, teacher, and writer, Professor Bell has provoked his critics and challenged his listeners with his uncompromising candor and original, progressive views. In his speech, “Getting Beyond a Property in Race,” he uses an historical context for his analysis of the plight of African Americans from the days of slavery up to the present. He posits that “segregation took hold because working class whites insisted that they needed some government reassurance that—despite their lowly economic condition—they really were better than blacks.” He suggests that African Americans in professional positions today have a difficult role trying to change the direction of social justice for the less fortunate, while at the same time representing to many “living proof that there is no color bar.” He sees additional difficulties in overcoming patterns of discrimination in a society where racial bias has become more covert and systemic. For Professor Bell, racism is more than just open bigotry; it is a system of advantages for non-minorities that is “based on racial prejudice, involves cultural messages and institutional policies and practices, that operates to the advantage of whites and to the disadvantage of people of color.”

Professor Bell poses the question of how law can be used to further social change. His answer is that “lawyers must be the visionaries in our society.” He reminds us that if lawyers are to play important social and moral roles, “we must begin by recognizing that our Nation’s basic human problems . . . poverty, hatred, malnutrition, inadequate health care and housing, corruption in government, and the failures of our public school system continue to haunt us today because those in power often have lacked personal morality or have failed to make real the values that they have professed to hold in the abstract.”

*Postscript:* Judge Higginbotham had intended to speak, in his Public Interest Law Speaker Series presentation, about his personal perspectives and his current writing on racism in America. His sudden stroke in December 1998 prevented him from completing his work. His friend and mentee, Professor Charles J. Ogletree, Jr., the Jesse Climenko Professor of Law and Director of the Criminal Justice Institute at Harvard Law School, has taken up the assignment and will continue Judge Higginbotham’s work at the request of Higginbotham’s widow. Professor Ogletree will speak in the Public Interest Law Speaker Series in April 2000 on “Racial Justice in the New Millenium: Following in Judge Higginbotham’s Footsteps.”

ERWIN CHEMERINSKY—THE REHNQUIST COURT AND JUSTICE:  
AN OXYMORON?

Erwin Chemerinsky, the Sydney M. Irmis Professor of Public Interest Law, Legal Ethics, and Political Science at the University of Southern California, is a frequent legal commentator and consultant for numerous media outlets, and lecturer for the Federal Judicial Center, the National Judicial Center College, the Center for Civic Education, and the Constitutional Rights Foundation. In his talk, “The Rehnquist Court and Justice: An Oxymoron?,” Professor Chemerinsky explores the direction that the Supreme Court has taken over the past twelve years and critiques what he perceives as the harsh effects of the Rehnquist Court on public interest law. He does not mince words in his assessment. “In the perspective of public interest law,” he asserts, “the Rehnquist Court, simply put, is a disaster.” He charges that the

Court is activist in showing little deference to the majoritarian branches of government or to precedent, and conservative in the sense that it is “animated by the right-wing political agenda.” To support his theory, he describes five principles under which he thinks the Court has acted throughout its twelve year history.

First, Professor Chemerinsky believes the Rehnquist Court gives excessive deference to state government power and favors limitations of federal power in conflicts involving federalism. In what he calls a “revolution in constitutional jurisprudence,” he cites examples of the Court greatly narrowing the scope of Congress’ power in the name of federalism such as the Court’s rejection of a federal statute forbidding guns within a certain radius of public schools by limiting the federal government’s Commerce Clause power for the first time in sixty years and the Court’s rejection of public interest laws requiring states to clean up their nuclear waste and to conduct background checks before issuing firearm permits under the rarely used Tenth Amendment.

Second, Professor Chemerinsky highlights what he views as the Rehnquist Court’s tendency to uphold conservative moral values especially in legislation involving sex, drugs, and gambling. Third, he shows the Rehnquist Court’s failure to recognize new fundamental rights and a narrowing of already existing constitutional rights. Some examples he cites include the rejection of physician-assisted suicide, the denial of Native American rights to traditional use of Peyote in their religious ceremonies, and an abandonment of the fundamental right that unmarried biological parents have to visitation of their children.

Fourth, Professor Chemerinsky criticizes the Court’s hostility toward existing suspect classes and its unwillingness to find any new suspect classes. He criticizes the Court’s use of a rational basis review for discrimination based on disability and sexual orientation, and its use of strict scrutiny for all affirmative action efforts. His fifth and final assertion is that criminal defendants almost always lose in the Rehnquist Court, especially in capital cases. He is especially critical of the Court’s legal and procedural handling of a recent California execution.

Professor Chemerinsky is diplomatically but soundly unabashed in

his distress with the Rehnquist Court for what he views as its disdain for the public interest and its lack of compassion and caring. In conclusion, he invokes the Jewish tradition “Tikkun Olem” and challenges law students and lawyers to use their legal training “to heal a broken world.”

RALPH NADER—CORPORATE LAW FIRMS AND THE PERVERSION OF JUSTICE: WHAT PUBLIC INTEREST LAWYERS CAN DO ABOUT IT

Ralph Nader, civic, consumer, and environmental activist, is the founder of the Center for the Study of Responsive Law and the Consumer Project on Technology. In his talk, “Corporate Law Firms and the Perversion of Justice: What Public Interest Lawyers Can Do About It,” he addresses the social responsibility of today’s lawyers in a legal world that he sees as dominated by corporate interests. He perceives a loss of power for individuals in the modern legal system and urges lawyers to shed their corporate goals and to fight for civic awareness and improvement.

Mr. Nader argues fiercely for the importance and necessity for more public interest lawyers. Discussing his experiences as a Harvard law student in the 1950s, he squawks at the emphasis in his education on the importance of business law and corporate practices, without in his view sufficient preparation for consumer issues, automobile accidents, landlord/tenant disputes, discrimination in jury selection, or problems with public lands, investments, airways, etc. He is highly critical of the lack of attention in his law school education to the fundamental meanings, goals, and purposes of justice. Mr. Nader commends the new directions of legal education, although he does not believe that it has changed enough. While noting new opportunities for hands-on exposure to justice issues through clinical education and summer internships, he asserts, “The problem is law students tend to be very anxious about their courses, their careers, and their debt load. That can eat up a lot of opportunity cost for spending your time in law school in a broader and deeper manner.”

Mr. Nader encourages law students to recognize the importance of legal history and legal theory in order to achieve “a comprehensive understanding of our legal system today in our country,” rather than

just learning what is on the bar exam. He emphasizes a need to look at law more expansively. He points out the decline of suits filed by individual citizens due to economic constraints, as well as the loss of bargaining power experienced by the “little guy” with the onslaught of adhesion contracts and binding arbitration clauses.

Mr. Nader reminds law students and lawyers of their responsibilities to help clients and act as officers of the court. He warns of lawyers who get caught up in a lifetime of corporate law, after deciding upon that road to “get a little experience.” He warns of lawyers who can end up spending “years of their lives representing [one] company from a FTC deceptive claim,” who then realize “they missed the justice train when it was pulling out of the station.” He cautions students of the internal pressure they may experience in big firms to partake in such things as cover-ups or contracts that deceive the poor and exploit the needy out of land and money.

In sum, Mr. Nader challenges law students and lawyers to justify money-driven legal careers in a country where 25% of children grow up in poverty, homelessness is rampant, and the environment is being depleted. According to Mr. Nader, “We are growing up corporate [and] we have to shed our corporate binoculars and grow up civic. . . . [L]aw students and lawyers are in a prime position to expand the civic culture with its institutions, [to] renew priorities of what is important in life, [to leave a] sense of legacy for future generations, and [to] develop a civic culture that can combat and countervail the overwhelming spread of the commercial corporate culture throughout our society.”

DOROTHY ROBERTS—POVERTY, RACE, AND NEW DIRECTIONS IN  
CHILD WELFARE POLICY

Dorothy Roberts, Professor of Law at Northwestern University, was the Spring 1999 Orthwein Scholar-in-Residence at the School of Law. A frequent speaker and prolific scholar on issues related to race, gender, and child welfare, she has published more than thirty articles in law reviews and books. In her speech, “Poverty, Race, and New Directions in Child Welfare Policy,” she looks at our country’s changing child welfare system and discusses its goals in the context of

its past and potential failures. She asserts that the pure number of children in the child welfare system alone attests to the fact that the system is not working. According to Roberts, the past emphasis on reuniting children with their biological families resulted in too many children being returned to violent homes, while today's emphasis on adoption may result in too many children being permanently separated from loving, but disadvantaged families. She believes that the overriding goal in child welfare should be to stop kids from ending up in the system in the first place.

Professor Roberts sees deep flaws in our child welfare system, in particular how race and class affect shifts in federal child welfare policy. To begin, she notes that there are an alarming half million children in foster care in America today. In her view, our child welfare system fails to take care of these half million children—too few families are being kept together, too many parental rights are being terminated, and too many children are being returned into violent homes.

Professor Roberts criticizes uninformed legislators who rush to change the system in the wake of horrible headline news, frequently resulting in legislation that is not in the best interests of children. She attacks the federal child welfare policy embodied in President Clinton's 1997 Adoption and Safe Families Act (ASFA)—legislation that emphasizes adoption rather than reuniting foster care children with their families. She believes that ASFA's goal of reducing foster care and increasing adoption too often manifests itself in expedited permanent termination of parental rights, in part because states receive greater monetary incentives for children who are adopted. She is concerned that parental rights are terminated in cases where family preservation is not hopeless. She points out that there are more parental rights being terminated than adoptions made, resulting in many children stuck in the system who have been cut off from their biological parents. This phenomenon, she says, not only potentially takes children from loving homes, it perpetuates racial discrepancies. While black children are most likely to be put into foster care, they are often the least likely to be adopted.

Professor Roberts argues for a shift in emphasis to the question of

why so many children are living in poverty and ending up in the child welfare system in the first place. She also argues for a broader racial understanding of child welfare policies. According to Roberts, “Children are affected by the value placed on the group to which they belong. And policies that devalue black families also hurt individual black children because their status in the society, their welfare, their identity is very much tied to the status and welfare of the group. . . . We need to figure out a way of thinking how to incorporate child welfare issues into the broader struggle to eradicate racial and other kinds of oppression in this country.”

In conjunction with her presentation, Professor Roberts participated in an interdisciplinary panel that also featured Professors Susan Appleton, Larry May, and Mark Rank of the Washington University Schools of Law, Philosophy, and Social Work, respectively. Their responses to Professor Robert’s talk also are included in this issue.

#### WILLIAM WEBSTER—PUBLIC SERVICE IN THE PRIVATE PRACTICE

William Webster, an alumnus of Washington University School of Law and a senior partner at Milbank, Tweed, Hadley, & McCoy, is the former director of the Federal Bureau of Investigation and the Central Intelligence Agency, and a former judge on the Eighth Circuit Court of Appeals. In his talk, “Reflections on a Lifetime of Public Service,” Mr. Webster illuminates the important responsibility of lawyers to provide public service. He emphasizes the many ways attorneys in private practice can contribute to their communities and asserts his view that lawyers have a duty to improve the quality of life and justice in our country.

According to Mr. Webster, “There is much more to practicing law than maximizing billable hours, leveraging associates, and working through the night to become a partner.” He illustrates, through an intriguing account of his own life, the abundant opportunities available to lawyers to take part in the public interest arena and to improve to justice system. Mr. Webster explains that all of the different experiences in his life came to him as a result of his receptiveness to new opportunities, his willingness to remain loyal to his values, and

his own assessment of his ability to do his job.

Following his long and successful life in the public sector, Mr. Webster now practices in a large private firm with 375 lawyers, who provide approximately 20,000 hours of dedicated pro bono work in a year, valued at around \$7 million. Among his myriad of contributions, he serves on the Board of CPR Institute for Dispute Resolution and the American Arbitration Association, on the Securities & Exchange Commission, and the Separation of Powers Commission. He chairs the Legal Center for the Public Interest and the National Commission on the Advancement of Federal Law Enforcement, and he is involved with the National Commission on DNA. He has also served on numerous committees for Washington University.

Mr. Webster's life is the best example that "being a lawyer" is not enough. For him, "Working to preserve the ideals of our profession, the opportunity for growth of freedom, the use of truth to inform and enlighten us in all ways, and the right of people to speak the truth are the most important contributions we can make as lawyers . . . [and] truth and freedom are the highest aspirations of the human spirit."

#### CONCLUSION

It is fitting that the Law School's new "Access to Justice" speaker series is being and will continue to be published in the school's newly renamed *Journal of Law and Policy*, whose mission is to publish cutting edge scholarship that critiques and develops policy, and highlights the distinctions between law and justice.