

Washington University Journal of Law & Policy

Access to Justice: The Social Responsibility of Lawyers

Introduction

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This volume marks the fifth annual volume published by the *Washington University Journal of Law & Policy* dedicated to Access to Justice. Each year, the special issue includes articles from 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, clinical legal education, government public service, and pro bono private practice—who share a commitment to access to justice.

Many of the articles are drawn from presentations in the School of Law's annual Public Interest Law Speakers Series, entitled *Access to Justice: The Social Responsibility of Lawyers*. This Series introduces our community to the ideas of outstanding academics and practitioners, highlights the responsibility of lawyers to ensure access to justice, and provides a forum for the law school and the wider University community to engage in a discussion of legal, social, and ethical issues that bear upon access to justice. This Series, begun in 1998–99, was developed in celebration of the twenty-fifth anniversary of the School's nationally recognized Clinical Education

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Program, through which many of our students are introduced to public service and public interest law practice.

Some of the articles are drawn from the Clinical Education Program's annual Access to Equal Justice Colloquium on *Creating Collaborations Between the University and the Community to Improve Access to Justice in Our Region*. This colloquium, initiated in 2000–01 by the Association of American Law Schools, brings together civil and criminal attorneys; community leaders; government officials; judges; and faculty, staff, and students from local law schools and universities to collaborate on improving access to justice and the delivery of legal services in the region.

This volume, like the prior four volumes, provides a truly inspirational look, through the words and stories of real leaders, at the broad social justice responsibilities and aspirations of lawyers to foster access to justice for all.

MARTHA MINOW—SURPRISING LEGACIES OF
BROWN V. BOARD

Martha Minow is the William Henry Bloomberg Professor of Law at Harvard University School of Law and the internationally recognized author of numerous books and articles on identity politics, education, family relationships, genocide, and reconciliation. In her article, she traces the dynamic history of the struggle for equality that has emerged in the aftermath of *Brown v. Board of Education*.

Minow does not limit her discussion to issues of racial equality; rather, she highlights how *Brown* changed the moral landscape for the country and how it has affected the battles for equality for other groups. She explores the tension between *Brown's* call for integration and the possibility that, for some groups, segregation may serve a means for achieving equality. She explains that, while *Brown* stands for the principle that equal education is a fundamental right, it struck down the validity of “separate but equal,” leaving society in the tenuous position of determining what exactly equality is, and how to achieve it.

In addressing racial equality in public schools, Minow explains that although *Brown* ended state-mandated segregation, it has since become unclear whether equal opportunity requires simply the end of

segregationist policies, or whether it requires proactive efforts to desegregate areas. She poses the question of whether the Supreme Court in *Brown* found educational segregation to be inherently unequal because black schools were educationally inferior, or whether segregation itself is inherently inferior to racial integration. Whatever the moral answer, Minow posits that the legal answer to this question is that racially-segregated education is permissible as long as it is not the result of intentional governmental action. She argues that the national ambivalence over whether we as a country should actively pursue the racial integration of our schools is reflected in the Court's recent affirmative action decisions, where diversity is recognized as a valid concern for university admissions, but is limited by the Court's expectation that eventually race and ethnicity will no longer be permissible factors in the admission decision.

In discussing the struggle for educational equality in contexts other than race, Minow touches on the controversy surrounding the integration or separate instruction of bilingual students in America. She describes the tenuous balance between the need to provide bilingual students with an atmosphere in which they will receive effective language tutelage, and the risk that such segregation might undermine larger desegregation efforts. Because many programs that separate non-English speaking students never manage to reintegrate those students, Minow questions whether such programs need to be overhauled.

Minow also addresses single-sex education, noting that *Brown* prompted many women's rights advocates to challenge single-sex education. Minow suggests that plausible rationales for allowing single-sex education may include compensating for inadequate opportunities in the past, improving educational outcomes, and diversifying school choice. She endorses single-sex education where the enrollment is a voluntary choice among many quality alternative schooling options.

Minow also discusses how *Brown* prompted advocates for children with disabilities to pursue segregation of students with disabilities from the rest of the classroom population. These efforts generated the Individuals with Disabilities in Education Act, which empowered students with disabilities with affirmative rights. Still,

Minow explains, the debate continues as to whether it is more beneficial for the class as a whole to include children with disabilities in the traditional classroom. Minow chimes in on the debate by reminding us that integration is not the exclusive way to achieve equal opportunity, because treating people the same, who are in actuality fundamentally different, is not really equal treatment.

Demonstrating the versatility and vitality she sees in *Brown*, Minow extends her discussion of segregation in education to issues of citizenship, sexual orientation, and religion. She explains how in each of these debates advocates have tried to extend the rationale in *Brown* to secure equal treatment for different pockets of minority-group students.

In conclusion, Minow suggests that *Brown* offers the dual insights that educational opportunity is fundamental to an individual's success and should be made available to everyone equally, and that separate educational facilities that are products of mandated segregation are inherently unequal. With these two principles in mind, she warns that segregation, even if so-called voluntary, should be embraced selectively, and only if it is actually shown to promote equal opportunity, which may very well be specific to the particular minority group in question. She recommends that in scrutinizing contemporary uses of separate education, we should return to the fundamental considerations of *Brown*, recognizing that race, ethnicity, language, disability, gender, citizenship, sexual orientation, and religion should not interfere with an individual's equal access to quality education.

THEODORE M. SHAW—FROM *BROWN* TO *GRUTTER*: THE LEGAL
STRUCTURE FOR RACIAL EQUALITY

Theodore M. Shaw, Director-Counsel and President of the NAACP Legal Defense and Educational Fund, Inc., presented the School's 2004 Martin Luther King, Jr., Commemorative Address. Shaw, a former faculty member at the University of Michigan School of Law, was one of the architects of the School of Law affirmative action admissions plan. In 2003, in *Grutter v. Bollinger*,¹ the U.S.

1. 539 U.S. 306 (2003).

Supreme Court upheld the School of Law plan, ruling in favor of diversity as a compelling state interest. Shaw was lead counsel in a coalition that represented African-American and Latino student-intervenors in *Gratz v. Bollinger*,² a parallel case challenging the undergraduate affirmative action admissions plan at the University of Michigan. In his article, as in his talk, Shaw comments on the fifty years of legal struggle for racial equality from *Brown v. Board of Education*³ to *Grutter*—both from his personal view and from a legal perspective.

Shaw first witnessed the civil rights struggle as a young black man in Harlem in the 1960s. For him, this time was a revolutionary period where blacks were “awakening” to a new black consciousness movement. Shaw relates being selected for a high school leadership project for black youth, created in the wake of Dr. Martin Luther King, Jr.’s assassination, that focused on the study of black history and culture in order to build a sense of camaraderie and pride within the black community. Such programs, he submits, were not a reflection of society’s growing desire for diversity, but instead were justified and supported as remedial, affirmative initiatives.

Shaw stresses the necessity of affirmative action programs that allow access to opportunities for minorities. He believes that the leadership project in which he was engaged in high school opened up the door for him to attend college and then law school. Shaw announces proudly that, as a product of affirmative action, he has had access to higher education and has been able to attain his dream jobs working for the U.S. Department of Justice, Civil Rights Division, and the NAACP Legal Defense & Education Fund.

Shaw points out that despite incremental changes led by the Supreme Court, desegregation has been a slow and difficult process. On the anniversary of *Brown*, Shaw warns that the celebration should be a critical one, focusing on present-day issues of race and segregation. Shaw laments that the Supreme Court’s 1978 decision in *University of California Regents v. Bakke*⁴ was a step backward for the Supreme Court and a loss for African-Americans. He chides the

2. 539 U.S. 244 (2003).

3. 347 U.S. 483 (1954).

4. 438 U.S. 265 (1978).

Court for ignoring the history of the Fourteenth Amendment, for drawing distinctions between “invidious” and “benign” discrimination, and for creating the catch-all category of “societal discrimination,” for which no one is responsible. Finally, he argues that *Bakke* was deficient in that it was too narrow, asserting that the First Amendment was not the proper ground on which to rest affirmative action.

Shaw emphasizes that the Supreme Court’s decision in *Grutter* was a huge victory for affirmative action in that it maintained the use of such plans. But, he notes that the decision reinforces the weakness of *Bakke* in justifying affirmative action based on diversity, rather than remedial action. He warns that affirmative action and school desegregation efforts will continue to be targeted in the wake of *Bakke*’s approach.

Despite the mounting challenges facing the civil rights movement, Shaw is not discouraged. He embraces the struggle for equality, recognizing that decades worth of effort have elevated the country to a better place than it was fifty years ago, although there is still work to be done.

A CONVERSATION WITH JUDGE HARRY T. EDWARDS

Judge Harry T. Edwards was appointed to the United States Court of Appeals for the D.C. Circuit in 1980, where he served as Chief Judge from 1994 until 2001. Prior to joining the Court, he was a tenured member of the faculties at the University of Michigan Law School and Harvard University Law School. Judge Edwards has co-authored four books and several law review articles on issues relating to the federal courts, legal education, professionalism, and judicial administration. In his article, drawn from his public-forum conversation with students and faculty, he addresses several of these issues.

Judge Edwards explains that collegiality, in the sense that he uses it, refers to the common interest of members of the judiciary in “getting the law right,” and doing so under conditions of respect and cooperation. He praises the policy of the D.C. Circuit Court of Appeals of not using visiting judges to decide cases on their docket in order to encourage the judges on the circuit bench to work together

more cohesively. This intra-circuit accord, he maintains, provides for a more balanced work-load for the judges and coherence in the law within the circuit. In his view, when a circuit becomes too large, as he believes the Ninth Circuit Court of Appeals is with its nearly fifty judges, the coherence within the circuit becomes strained. For this reason, Judge Edwards endorses the notion of keeping circuit courts smaller in order to maintain collegiality.

Judge Edwards strongly asserted his position that collegiality cannot exist within a circuit if dissenting judges insist upon rehearings en banc in order to justify their positions. He forewarns that “politicking will replace thoughtful dialogue” and judicial decision-making will be contaminated by ideology if such practices are encouraged.

In contrasting appellate scholarship from academic scholarship, Judge Edwards explains that in order to work effectively and to reach good conclusions, judges must commit to collaborative decision-making. It is this distinction, he maintains, that provides the impetus for judges to strive for collegiality, where such internal mechanisms do not necessarily exist in academia. He suggests that there may be difficulty fostering collegiality among law school faculty because legal scholarship has historically not been a collaborative process.

Judge Edwards reiterates a criticism he has expressed in his scholarship that some of the curricular developments in legal education are not positive changes. He worries that, with vast course offerings available, students develop their own unguided courses of study with little coherence. Additionally, he is concerned with law school hiring policies that favor PhDs over well-regarded practitioners with real-life lawyering experience. He points out that law schools are professional schools, and suggests that practicing lawyers have valuable insights and skills that should not be downplayed.

Judge Edwards stresses that legal education shapes the profession and highlights the role law faculty can play in influencing students to go into public service careers. He offers three suggestions that law schools can undertake to encourage students to engage in public service work. First, the judge believes that law school curriculums should join both legal education and public interest ventures. Secondly, he advocates for the hiring of professors with diverse

perspectives. Thirdly, Judge Edwards supports encouraging students to pursue public interest by offering scholarships and loan forgiveness programs.

Finally, Judge Edwards expresses his thoughts on Senate confirmation hearings and their affect on judicial behavior. The judge earnestly states his belief that judges should not tailor their opinions to appease political parties with the thought of promotion in mind. In conclusion, he warns that the politicization of the confirmation process in the public eye may ultimately devalue the role of the judiciary.

JANE HARRIS AIKEN—CLIENTS AS TEACHERS

Jane Aiken, Professor of Law and Director of the Civil Justice Clinic, Washington University School of Law, was installed in fall 2004 as the William Van Cleve Professor of Law. Aiken is an experienced clinical teacher and nationally recognized author and expert on evidence, family law, and legal education.

In her chair installation speech, reprinted in this volume, Aiken extols a lawyer's duty to her clients and community, as exemplified by the life of William Van Cleve, a Washington University School of Law graduate and former managing attorney of the Bryan Cave law firm. Aiken praises Van Cleve as a respected "holistic lawyer" who offered his clients and the community wisdom, legal skill, dedication to public service, and instrumental contribution to helping the youth of St. Louis.

Aiken asserts that law schools spend insufficient time instilling in students the qualities and values that made Mr. Van Cleve a respected and successful lawyer. She argues that the best way to teach future lawyers to be holistic practitioners is through direct exposure to clients. This belief, explains Aiken, is why she teaches clinical courses—because in clinics students encounter clients. In recognizing the success of Washington University's Clinical Program, Aiken stresses the importance of teaching strategies that foster in law students a sense of reflective skepticism and appreciation for the preservation of justice. She emphasizes the power law professors have to influence their students to be conscientious practitioners like Van Cleve.

Aiken expresses her dissatisfaction with the model of legal education based solely on the case method, which she believes teaches students to be detached from the people involved in legal disputes. She observes that this detachment in the classroom experience removes emotion, pain, and a sense of justice and injustice, and encourages students to adopt an emotionally remote and morally neutral approach to human problems and social issues. While Aiken recognizes the value of critical objectivity, she stresses that students must comprehend that the playing field is not level and that as lawyers they will have the ability to affect positive change to correct instances of injustice.

As a clinical teacher, Aiken sees opportunities to place students within a context of social justice, prompting them to become conscious of the hierarchy of power and the role that law students and lawyers can play in challenging such a structure. She seeks to provide her students with “justice readiness,” to be sensitive to issues of justice, as they develop into practitioners. Aiken utilizes and promotes teaching that forces students to confront “disorienting moments,” where their personal schemes are challenged. Through this model, Aiken posits, students are forced to examine their own privilege and to become aware of the ways in which power is distributed and exercised in our legal system.

Aiken concludes by reinforcing the necessity of providing students with the opportunity to engage in social justice work. To this end, she emphasizes the notion that law students are the clients of their professors, and that it is the duty of the law faculty to determine and impart the skills and content will allow students to identify and correct injustice. Aiken ends by expressing her optimism that the law school will be able to generate more socially conscious lawyers through educational opportunities tailored to the pursuit of justice.

CONCLUSION

The *Washington University Journal of Law & Policy* is honored to publish the Access to Justice volume each year in furtherance of one of the *Journal's* missions—to publish scholarship on legal and public policy that analyzes the crucial differences between law and justice.

