

AN ODE TO RHODE: IN PRINCIPLE AND IN PRACTICE

*Scott L. Cummings**

This Essay is an ode to Professor Deborah L. Rhode: my intellectual hero, mentor, and friend. I use it to consider the impact that her scholarship and leadership had on the field of legal ethics and, critically, on the community of legal ethics scholars. Over the course of her transformative career, Deborah wrote unsparingly about the gap between the profession's principles and its practices, spotlighting professional hypocrisy as a lever for change. In her personal and professional life, she always strove to bring her own practices in line with the highest ethical principles, both at the micro level of treating people with dignity and respect and at the macro level of devoting her life's work to justice. The rigor and discipline with which she sought to match practice with principle—and the candor with which she acknowledged when she didn't—inspired me and everyone whose lives she touched.

Building on this theme, I take as my starting point the enormous influence of Deborah's pathbreaking 2005 book, *Pro Bono in Principle and in Practice: Public Service and the Professions*.¹ That book is now well known for helping to introduce pro bono as a field of professional action and inquiry, and for focusing attention on the role of the bar and law schools in promoting pro bono commitment. I want to use it to discuss its impact on me and the legal profession field, as well as reflect on its future influence in our unsettled world.

First, I want to share how I encountered the book. I came to the UCLA School of Law in 2002. Before that, I worked as a public interest lawyer at Public Counsel in Los Angeles, California, which is the nation's largest pro bono organization.² I entered teaching from this experience, interested in how pro bono fit into the landscape of access to justice—a topic that inspired

* Robert Henigson Professor of Legal Ethics, UCLA School of Law. This Essay was prepared for the Colloquium entitled *In Memory of Deborah Rhode*, hosted by the *Fordham Law Review* and co-organized by the Stein Center for Law and Ethics on October 21, 2022, at Fordham University School of Law.

1. DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* (2005).

2. See *History*, PUB. COUNS., <https://publiccounsel.org/history/> [https://perma.cc/2RWR-GFEC] (last visited Feb. 6, 2023); see also Press Release, Pub. Couns., Public Counsel Announces New President & CEO (Apr. 7, 2021), <https://publiccounsel.org/press-releases/public-counsel-announces-new-president-ceo/> [https://perma.cc/4CED-Y8B5].

my first major article project.³ Back then, we were expected to toil over our articles for a couple of years, producing big, one hundred-page and five hundred-footnote mini-dissertations. It was as I completed the draft of that article that I came across *Pro Bono in Principle and in Practice*. It was 2003.

My initial encounter with Deborah's work on pro bono was actually not with her book, but with an excerpt of it that she published in the *Journal of Legal Education*.⁴ The excerpt presented data on her "comprehensive national survey of the factors that influence lawyers' pro bono work."⁵ The survey of 3,000 lawyers included those who graduated from six law schools, as well as winners of the American Bar Association (ABA) pro bono awards and members of large firms.⁶ It was designed to understand the origins of the principle of pro bono in law school and what helped lawyers engage in pro bono in practice.⁷

The article was classic Deborah. It started with an exhaustive review of the literature on altruism,⁸ documenting how it is never pure but rather the result of a mixture of intrinsic and extrinsic motivations.⁹ It then moved onto a review of the evolution of pro bono requirements in ethics rules¹⁰ before heading into an analysis of justifications for pro bono,¹¹ deriving both from ideals of lawyer service¹² and more self-serving rationales of pro bono being good for business ("doing well by doing good").¹³ This background set up Deborah's empirical analysis, which sought to answer the question: how do we mobilize lawyer self-interest and legal institutions to bring out the best of pro bono?¹⁴ I will come back to her answers, but let me describe how reading the article led me from Deborah, the footnote in my bibliography, to Deborah, the person.

As I read Deborah's piece while working to finish my own, I felt like we had a connection that made me want to know this person. I got up the courage to organize a panel on pro bono at the 2005 Law & Society Association annual meeting in Las Vegas, Nevada. I decided to invite the people whose work I admired the most, and Deborah was first on the list. To my delight, she said yes! This was a pinnacle feeling for someone just starting out—to be on a panel with such a luminary.

I was nervous. I worked hard to prepare and exchanged emails with the panelists without having met or talked to any of them in advance. When I

3. See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

4. See Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413 (2003).

5. *Id.* at 414.

6. *Id.*

7. See generally *id.* at 443–64.

8. See *id.* at 414–24.

9. See *id.* at 415.

10. See *id.* at 424–28.

11. See *id.* at 430–36.

12. See *id.* at 432–33.

13. See *id.* at 431–32.

14. See *id.* at 459–64 (providing suggestions on how to "institutionalize [the] ideals of public service").

showed up to the session, right on time after rushing from another panel in one of those sprawling resort hotels, there she was, already seated on the dais. And I will confess that my first impression of Deborah was: diva.

The panel was about to begin. In fact, my memory was that, by the time I got situated, it was already time to start. But we couldn't start . . . because Deborah was on the phone. And not any phone, mind you. Think Gordon Gekko in the 1980s movie *Wall Street*¹⁵: one of those massive walkie-talkie-type phones with an antenna. We were all waiting there uncomfortably as she finished her conversation, nonplussed by the building quiet among the audience. When she was done, she packed the phone away, I introduced her, and she launched into her presentation with the cool crispness that always defined her speaking style. I was mesmerized.

I recount this memory not only because it left such an indelible impression, but also because it reveals the distortions of first impressions. Deborah insisted on dinner afterward, at which I watched her drink her signature beer with ice, and what was revealed, starting then and building over many years, was not diva at all, but a person of great humanity and warmth. Shy even. Her tremendous gift of focus made her able to produce work of such enormous impact but maybe made her inattentive to some things, like a crowded room waiting as she finished a call. But in other ways, she was deeply attentive to her surroundings, especially her community—inviting all of us into it and sharing herself to make us better.

That's how I encountered Deborah and her amazing book.

Let me turn to what the book did, why it remains so vital, and what it reveals more generally about Deborah's intellectual style and impact.

In the arc of Deborah's body of work, I think of this book as located at a pivot point. She had written books before: *Justice and Gender: Sex Discrimination and the Law*,¹⁶ *In the Interests of Justice: Reforming the Legal Profession*,¹⁷ and *Access to Justice*.¹⁸ *Pro Bono in Principle and in Practice* came a year after *Access to Justice* and opened the spigot on this enormous stream of books, coming one after the other—all field-defining.

Why was *Pro Bono in Principle and in Practice* so important intellectually and politically? Like Deborah's other work, it spoke truth to power. It marked pro bono as a set of practices that symbolized the contradiction at the heart of the profession: at once proclaiming a duty to serve the public good while simultaneously serving the interests of lawyers.¹⁹ She saw that pro bono was Janus-faced: a critically important tool for access to justice built on genuine altruism yet too often used to benefit lawyers and firms—by generating good publicity—rather than the clients they claimed to serve.²⁰

15. *WALL STREET* (Twentieth Century Fox, Amercent Films & Am. Ent. Partners 1987).

16. See DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* (1989).

17. See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

18. See DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004).

19. See, e.g., RHODE, *supra* note 1, at 1–3, 175–77.

20. See, e.g., *id.* at 91.

This was important to say, it was brave to say, and Deborah said it like no one else could.

Let me highlight some features of this book that define Deborah's style.

First, Deborah didn't waste words. She was parsimonious. She was an incredible stickler for language. She studied writing, how it worked, when it worked, and how to use it to have the maximum impact. This was a carryover from her training in debate, but it was imprinted onto everything she did. It is evident in the title of her book, which if you look carefully is often misstated. It is *Pro Bono in Principle and in Practice*. She demanded that second preposition be inserted because it was grammatically correct.

Second, Deborah did not mince words. Although she was willing to lift up and praise lawyers for their lofty aspirations, she was unforgiving when they did not meet them. She expected more. And she let you know. This is the book's first paragraph:

The American bar's contributions of unpaid service "pro bono publico" (for the public good) often express what is most admirable in the legal profession. But not often enough. Over the course of their careers, many lawyers give generously of their time and talents to causes that would otherwise be priced out of the justice system. Some lawyers also provide significant financial support to legal aid organizations. Yet the majority do not. Most lawyers make no 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 poor or to public interest causes, but either favors for friends, family, or clients, or cases where fees turn out to be uncollectible. The bar's pro bono activities are, in short, a reflection of both the profession's highest ideals and its most grating hypocrisies.²¹

Ouch.

But "ouch" not through hyperbole or wild accusation. Rather, "ouch" by starting with the profession's own values, giving credit where due ("many lawyers give generously"), marshaling evidence ("yet the majority do not"), and hoisting the profession on its own petard (calling out its "grating hypocrisies").²²

This relates to a third defining feature of Deborah's work: she effectively used empiricism to make normative claims. The argument of *Pro Bono in Principle and in Practice* illustrates this point. In the book, her survey of pro bono lawyers revealed that only a minority of lawyers performed meaningful pro bono work and that the reasons were institutional: law schools did not make the programs accessible,²³ and firms did not give lawyers sufficient credit and incentives.²⁴ Therefore, as a prescription, Deborah offered concrete steps that lawyers needed to take to live up to the standards that they presented to the world—at law schools, creating staffed programs, involving

21. *Id.* at 1.

22. *See id.*

23. *See id.* at 164–65.

24. *See id.* at 44.

faculty, and recognizing student achievement; at firms, adopting formal policies and giving billable credit to associates.²⁵ This is logic on the razor’s edge—again, starting from the bar’s own premises—that is hard to dispute.

But Deborah the debater knew that statistics only go so far. To grab the audience, you also need a good story. And this is the fourth defining feature of Deborah’s work. In her book, she tells the following story about “a recent southern bar convention”:

Its program included a presentation of pro bono awards for exceptional service that truly was exceptional. . . . [T]he ceremony . . . featured lavish praise for lawyers who had volunteered during the meeting for a brief community service project. Their efforts were presented as emblematic of the selfless public spirit that defines our profession. In fact, the service project involved fewer than a sixth of the lawyers present, who had sacrificed a few hours of golf or shopping in order to pick up trash in a local riverside park.²⁶

Ouch again. If you needed to see hypocrisy in action, there you had it.

The fifth takeaway from this book is that Deborah was deeply theoretical, even though she didn’t dress things up in fancy theory. She was theoretical in that she changed the way that we understood problems and how to fix them. She presented a total-systems view that included diagnosis and prescription. And her prescriptions were not pie-in-the-sky, but deeply pragmatic. She would always say: “I’m for the revolution, but until it comes, here is what we can do here and now.” This was her approach to pro bono. Make it live up to its ideals. Structure it better. Make it work for people who need it the most. Connect it to other strategies for access to justice.

The sixth important, and underappreciated, dimension of Deborah’s book is that it provided one of the first contributions to global legal studies of pro bono. In chapter five, Deborah explored the evolution of pro bono in the United Kingdom, Australia, and China.²⁷ Although the comparative part of her work received less notice at the time, it opened up a new way of thinking about access-to-justice research that would become enormously important. Specifically, Deborah was interested in what caused pro bono to emerge as a set of practices and norms in other countries, and what factors influenced how well pro bono worked as a vehicle for expanding access to justice. In chapter five, she noted that the United States was “exporting” pro bono to other countries (via global law firms and transnational networks),²⁸ and that the practice of pro bono taking shape around the world was deeply influenced by local legal culture and local actors, including the bar, law schools, and the government.²⁹ In this way, the book’s comparative analysis previewed a growing global trend: the institutionalization of pro bono in countries around

25. *See id.* at 169–70 (suggesting best practices for employers and schools).

26. *Id.* at 1–2.

27. *See generally id.* at 100–24.

28. *Id.* at 102–04, 122–23.

29. *Id.* at 123–24.

the world led by large corporate firms with capacity to donate services and the aspiration to build pro bono as a centerpiece of law firm culture.

This part of Deborah's work provided a model for my book, *Global Pro Bono: Causes, Context, and Contestation* (coedited with Professors Fabio de Sa e Silva and Louise G. Trubek). *Global Pro Bono* studies the spread of pro bono in over twenty countries across six continents, spanning common- and civil-law systems, as well as liberal democracies and authoritarian regimes. The book builds on Deborah's in two key ways. First, it deepens understanding of the process of hybridization that Deborah first identified, revealing how pro bono varies across contexts based on professional conflict—or “turf wars”—between different sectors of the bar.³⁰ Second, it extends Deborah's identification of the “gap” between the profession's normative commitment to pro bono (in principle) and the lived reality of pro bono (in practice)³¹ by analyzing the contested meaning of pro bono across countries.³² Both of these insights owe a debt to Deborah's seminal work.

This leads to my final point on Deborah's book, which is that it illustrated Deborah's unflagging and courageous commitment to placing social justice and reform at the center of her work. She cared about the lawyer's role in making society better, and I admired how she made that value the motive force that drove all that she did. She was deeply progressive but not ideological in her scholarship. She made a choice to use her voice, her status, and her incredible platform to hold the profession to account to those with less power—and that is something she inspired all of us to carry on.

In the end, what reverberates through the pages of *Pro Bono in Principle and in Practice* is the singular force of Deborah's voice—a voice that I am certain will forever echo forward. I want to conclude this Essay by reflecting on the uniqueness of her voice—full of erudition, humor, and humanity—and how lucky I feel to have been able to hear it for so long in so many contexts. As I have already suggested, it was a voice of balanced persuasion, attention to facts, concern about accuracy and rigor, and a passion for mobilizing facts and evidence in the service of making our world a better place. These values, which she held so dear, not only serve to guide us in the academic enterprise, but also teach us how to be a citizen in our democracy and how to protect democratic values in this moment and beyond.

Deborah's voice was always irrepressible. When Deborah wanted to say something, she said it. She picked up the phone to call you—apparently never getting the Gen Z memo, often invoked by my kids, that *no one ever* calls on the phone anymore. But Deborah did because she cared about

30. See Scott L. Cummings, Fabio de Sa e Silva & Louise G. Trubek, *What Is Global About Pro Bono and What Is Global Pro Bono About?*, in *GLOBAL PRO BONO: CAUSES, CONTEXT, AND CONTESTATION* 1, 9–51 (Scott L. Cummings, Fabio de Sa e Silva & Louise G. Trubek eds., 2021).

31. See RHODE, *supra* note 1, at 1–3.

32. See Cummings et al., *supra* note 30, at 4–5, 39–44. For more information on the meaning of pro bono across countries and the gap between pro bono in principle and in practice, see country case studies in parts one to five of *Global Pro Bono*.

closeness (she also apparently never learned to text). Whether it was calling to ask whether I had completed my portion of our projects (and this unfortunately occurred often, since she was *always* done before I had even started), or just to ask how I was doing in moments when I needed that.

Deborah's voice spoke truth to power and that took courage. It took courage to break barriers at every step: to be that person—that *woman*—whose success would be scrutinized before others could pass. It took courage to take on the study of lawyers at a time when no one did that, when she was told as an untenured professor *not* to do that, and then to not only do it anyway, but to call lawyers out, often by name, when they failed to live up to the aspirations that they proclaimed. It took courage not only to use her voice to tell bar leaders—often right to their faces—that they were failing to ensure justice, but also not to be satisfied with critique and to roll up her sleeves and show us how to fix it. She didn't have to do any of that. But she did. And if she could, we could too.

As I have already noted, Deborah spoke with a voice that was rigorous and precise. Deborah was a student of language. She studied it voraciously. She wanted to know how it worked and how to use it to have maximum impact. Although she left us with a lot of words, she didn't waste them. She honored them with economy. Indeed, as I wrote this, I chuckled to think how viciously she would have redlined it if I had been able to share it with her. Who needed autocorrect when you had Deborah editing your work?

Her voice was unwavering: a megaphone that projected far beyond her frame, which she always used to elevate the interests of those with less power from her perch on the highest rung of the academic ladder. I will never forget a conference at the Fordham University School of Law on access to justice. Deborah gave the keynote. As the packed room waited in anticipation, Deborah started by saying that, although she had been to hundreds of such conferences, she was thrilled to be there on that day because she always learned something new and was always motivated to do more by the work of others. It was electric—to have someone like Deborah name the importance of our movement and say that *she* showed up because *we were teaching her*.

Deborah's voice was constant. She was always present, engaging with people whether they were eminent or ordinary. This, to me, was the essential foundation of her leadership: she brought people together, treated them the same, and didn't put on airs (though she could have). She created community by example, not just by serving as president of the Association of American Law Schools, but by making everyone around her feel valued and showing us all what it looked like to lead a life with purpose.

I think what I will miss most of all about Deborah's voice was its raw honesty. She was disarmingly unguarded. She shared with you her experience of feelings universal to us all. I remember her telling me a story about how, after receiving tenure, she decided she was going to wait for the big-bang idea to come. And she waited and waited and waited, and ultimately decided that was not the approach that worked for her. Instead, she needed to throw herself into new projects, get lost in them, and then plow

ahead with the next without overthinking whether it was the right or best or most impactful one. I remember thinking, coming from someone at her level with her accomplishments, that insight was enormously self-reflective and conveyed an essential life lesson: you have to not only define what matters to you in principle and use it to power your work, but you also have to figure out what works for you in practice—as a matter of technique in the day to day—and what will sustain and keep you grounded in the long run. And that, to me, may be Deborah’s most enduring legacy of all.

In the end, Deborah’s voice rang out the ideal of lawyers as a force for making society better, not just as a model for scholarship, but as a way for us to be effective citizens of our fragile democracy and protect it through challenging times. As we reflect on Deborah’s legacy, I think about a world without Deborah in which so many of the values that she spent her life fighting for remain imperiled. It is impossible for me to imagine a world in which Deborah is not here to give these values voice or to give others the courage to speak because she spoke first. But I do know that what Deborah would have wanted more than anything is for us to continue showing up—which she liked to remind me was 90 percent of life—and to use our collective voice to uplift and sustain the struggle for a better world, one defined by the principles of inclusion and equality that she fought for to the very end. This, to me, is how we may all do justice to the life of someone who made justice *her* North Star.

In all of her communications, Deborah always ended with “many thanks.” It was her voice’s perfect coda: succinct, warm, and wholly unique. It is one of her great gifts that Deborah went through life giving so many thanks to others—to those she touched up close and those she inspired from afar. We honor her best with a loud echo back of incalculable gratitude—the “many thanks” owed to her—a debt that we will forever pay forward.