

COLLOQUIUM
FOR DEBORAH L. RHODE,
LEGAL ETHICS SCHOLAR

FOREWORD

*Bruce A. Green**

Professor Deborah L. Rhode (1952–2021), the Ernest W. McFarland Professor of Law at Stanford Law School, was the world’s preeminent legal ethics scholar. Along with a small handful of others, her work defined the contemporary field, elevating it beyond a bunch of rules for how lawyers should conduct their work. She began with a splash as a student at Yale Law School, coauthoring a groundbreaking work on the unauthorized practice of law (UPL).¹ That work is aptly described in these pages as “an amazing piece of scholarship,” at once an “empirical study . . . almost twenty years before empirical legal studies really took off” and “a full-frontal assault” on one of the legal profession’s objects of worship.² When Deborah embarked on this project, legal ethics had long been, as she later observed, “a subject of popular ridicule and bar platitudes.”³ It started attracting serious attention only after the Watergate scandal embarrassed the American Bar Association into requiring law schools to teach the subject.⁴ When Deborah began teaching at Stanford after completing a clerkship with Justice Thurgood Marshall, her dean discouraged her from entering what was still an academic and scholarly backwater.⁵ But she swam against the tide, paving the way for an expanding group of legal academics who believed that the legal profession

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1. Ralph C. Cavanaugh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976).

2. Benjamin H. Barton, *Deborah L. Rhode in Memoriam: Three Stories and Ten Life Lessons*, 91 FORDHAM L. REV. 1139, 1145 (2023).

3. Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 CLINICAL L. REV. 43, 43 (2009).

4. See *id.* at 46; Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 39 (1992).

5. Barton, *supra* note 2, at 1148.

was an important subject, and one that should be viewed with a penetrating eye.⁶

I am privileged to introduce a collection of scholarly writings paying tribute to Deborah's work as a legal ethics scholar by colleagues who also write in this field. Those represented here were among Deborah's friends and admirers. Some of us coauthored with Deborah,⁷ collaborated with her on other projects,⁸ or benefitted from her mentoring,⁹ and all of us continue to be influenced by her work.¹⁰ Deborah has been remembered and honored in many other ways¹¹ that reflect the breadth of her imprint as a lawyer and law professor, but we hoped to honor her further with writings building on, and inspired by, her scholarship.

The nine writings gathered here pay homage to various strains of Deborah's legal ethics scholarship while also tipping a hat to two other fields in which Deborah was a preeminent legal scholar: feminist legal studies¹² and leadership in the law.¹³ These writings were first presented at a colloquium in October 2022 at the Fordham University School of Law—the latest in a three-decade series of programs on the legal profession cosponsored by Fordham's Stein Center for Law and Ethics and the *Fordham Law Review*. This one differed from previous colloquia, however, in that the

6. A decade ago, I responded to Justice Antonin Scalia's characterization of legal ethics as the "least analytically rigorous and hence most subjective of law-school subjects," *Holland v. Florida*, 560 U.S. 631, 670 (2010) (Scalia, J., dissenting), by pointing to Professor Ted Schneyer's rigorous scholarship in the field. See Bruce A. Green, *Foreword—The Legal Ethics Scholarship of Ted Schneyer: The Importance of Being Rigorous*, 53 ARIZ. L. REV. 365 (2011). Deborah's scholarship alone also serves as ample refutation.

7. Professor David Luban, who writes in this collection, collaborated with Deborah on eight editions of a legal ethics casebook that was first published in 1992. See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (1992). Professor Scott L. Cummings, who also wrote in this collection, later joined the casebook as a coauthor. DEBORAH L. RHODE, DAVID LUBAN, SCOTT L. CUMMINGS & NORA FREEMAN ENGSTROM, *LEGAL ETHICS* (8th ed. 2020). Professor Benjamin H. Barton also coauthored several writings with Deborah. See Barton, *supra* note 2, at 1155 n.92.

8. See, e.g., *supra* note 7.

9. See, e.g., Barton, *supra* note 2, at 1140 (identifying Deborah as a mentor); Renee Knake Jefferson, *Mentored: On Leaders, Legacies, and Legal Ethics*, 91 FORDHAM L. REV. 1285, 1285 (2023) (same).

10. As David notes, "[s]he was, by a large margin, the most cited legal ethics scholar in the world . . ." David Luban, *The Shape of a Life: Deborah L. Rhode in Memoriam*, 91 FORDHAM L. REV. 1333, 1333 n.1 (2023).

11. See, e.g., Swethaa S. Ballakrishnen, *Managing Sudden Death, Grief, and Loss in Close Community: Not Your Usual Law Review Essay*, 74 STAN. L. REV. ONLINE 20 (2021); Irene Oritseweyinmi Joe, *Hard Questions About 'Soft Skills': A Celebration of Deborah Rhode's Scholarship*, 74 STAN. L. REV. ONLINE (2021); Clay Risen, *Deborah Rhode, 68, Whose Intellectual Heft Balanced Scales of Legal Ethics, Dies*, N.Y. TIMES, Jan. 26, 2021, at B12.

12. See, e.g., DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* (1989); DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* (1997); DEBORAH L. RHODE, *WHAT WOMEN WANT: AN AGENDA FOR THE WOMEN'S MOVEMENT* (2014).

13. See, e.g., DEBORAH L. RHODE, *LAWYERS AS LEADERS* (2013); Deborah L. Rhode, *Leadership in Law*, 69 STAN. L. REV. 1603 (2017).

discussion of scholarship was liberally punctuated—and sometimes overwhelmed—by warm personal remembrances.

But first, a word on why we thought that Fordham would be a fitting host for a colloquium honoring Deborah and why our law review would be a fitting home for the published works. Although Stanford was Deborah's primary residence, she was always welcome at Fordham, where she taught as a visiting distinguished professor in the 1990s and to which she often returned, whether to speak at or attend programs, or just to pay a visit when she was in or around New York City. Deborah became a mainstay of Fordham's Stein Center, which collaborated with her legal profession center at Stanford (now renamed the Deborah L. Rhode Center on the Legal Profession). Deborah helped inaugurate a biannual "Legal Ethics Schmooze," first hosted at Fordham, to encourage and foster new scholarship in this field by bringing junior and senior scholars together to discuss early-stage drafts. As the founding president of the International Association of Legal Ethics, Deborah encouraged the Stein Center to host the association's biannual International Legal Ethics Conference in 2016, and then collaborated with us two years later on another worldwide gathering of legal profession scholars.¹⁴ Her prodigious scholarship comprised more than a dozen contributions to the *Fordham Law Review*,¹⁵ including a posthumous 2021 article on lawyers' mental health challenges.¹⁶ The *Law Review* devoted an issue to *Access to Justice*, one of Deborah's thirty-or-so books.¹⁷

Among us, Professor David Luban had the longest friendship and collaboration with Deborah, who shared his deep interest in moral philosophy. David's contribution to this collection explores moral questions that should be fundamental to all practicing lawyers—primarily, how lawyers should lead their lives, and secondarily, how, in doing so, they should navigate the tension between their professional role and ordinary morality.¹⁸ As a starting point, David's essay takes two of Deborah's moral influences, a Tolstoy novella and a Peter Singer paper, and relates them to several of Deborah's articles and books, including *Character: What It Means and Why It Matters* and *Ambition: For What?*, as well as to her philanthropic,

14. See Deborah L. Rhode, *International Legal Ethics: The Evolution of a Field*, 42 FORDHAM INT'L L.J. 219, 228 (2018) (describing the development of the field of international legal ethics and introducing symposium writings that address two core issues in this field: "who should regulate lawyers and how should oversight processes be structured" and "professional independence and oversight").

15. See Deborah W. Denno & Bruce A. Green, *Mental Health and the Legal Profession: Foreword and Dedication*, 89 FORDHAM L. REV. 2415, 2416 n.1 (2021) (listing fourteen *Fordham Law Review* articles authored or coauthored by Deborah).

16. Deborah L. Rhode, *Managing Stress, Grief, and Mental Health Challenges in the Legal Profession; Not Your Usual Law Review Article*, 89 FORDHAM L. REV. 2565 (2021). The article was published in an earlier symposium issue of the *Law Review* dedicated to Deborah. See Denno & Green, *supra* note 15, at 2415.

17. See Bruce A. Green, *Foreword: Deborah L. Rhode's Access to Justice*, 73 FORDHAM L. REV. 841 (2004) (citing DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004)) (introducing articles responding to Deborah's book).

18. See generally Luban, *supra* note 10.

pedagogic, and other personal and professional commitments.¹⁹ For Deborah, he concludes, the answer to both questions involved promoting social justice, a moral and professional commitment undergirding her rigorous, evidence-based scholarship that set out “to identify institutional and psychological impediments to moral conduct and to propose reforms.”²⁰ Deborah’s scholarship—enough for a dozen ordinary academic careers—included many deeply researched writings on pro bono legal service and access to justice, and typically concluded with calls for concrete, attainable improvements.

Two of her other friends offer personal perspectives on Deborah as a morally and socially engaged scholar. First, Professor Scott L. Cummings addresses Deborah’s scholarly impact, focusing on her influential 2004 book on pro bono work.²¹ Scott’s essay shows that, among the defining features of her work, is Deborah’s use of “empiricism to make normative claims.”²² In this case, after showing that the legal profession fails to live up to its expressed commitment to pro bono, Deborah’s book identifies institutional reasons for this failing and proposes reforms to increase incentives for lawyers to donate their time to providing legal services to the poor.²³ At the same time, Scott tells us, “Deborah was deeply theoretical.”²⁴ For example, her comparative work, which analyzed how local legal culture and other local factors affect U.S. efforts to export ideas about lawyers’ pro bono work, “opened up a new way of thinking about access-to-justice research” on which Scott’s own comparative work would later build.²⁵

Second, Professor Benjamin H. Barton’s personal remembrance recounts three stories and draws ten life lessons from Deborah’s life and work.²⁶ Several lessons strike me as being particularly relevant to legal ethics scholars. First, it is important as a scholar to be “appalled” by injustices—such as the denial of justice to those who cannot afford lawyers—but then to respond with rigorous empiricism.²⁷ Further, especially for those looking for subjects to pursue (a situation in which Deborah never found herself), there is much more to be mined from the gap between professional ideals and the professional reality, or “between our principles and practices.”²⁸ Another lesson is the value of becoming a “lifelong learner” and of keeping an open

19. Luban, *supra* note 10, at 1334.

20. *Id.* at 1346.

21. See Scott L. Cummings, *An Ode to Rhode: In Principle and in Practice*, 91 FORDHAM L. REV. 1201 (2023).

22. *Id.* at 1204.

23. *Id.* at 1204–05.

24. *Id.* at 1205.

25. *Id.* See generally GLOBAL PRO BONO: CAUSES, CONTEXT, AND CONTESTATION (Scott L. Cummings, Fabio de Sa e Silva & Louise G. Trubek eds., 2022).

26. Barton, *supra* note 2.

27. *Id.* at 1145–46.

28. *Id.* at 1157 (quoting DEBORAH L. RHODE, IN PURSUIT OF KNOWLEDGE: SCHOLARS, STATUS, AND ACADEMIC CULTURE 1 (2006)).

mind.²⁹ Legal ethics scholars who take these lessons to heart will have plenty to keep themselves busy.

One injustice that appalled Deborah throughout her academic career was the underrepresentation of women and people of color in the legal profession, and especially in positions of power and influence. She attacked this problem from many angles. Dr. Paola Cecchi-Dimeglio addresses one of the less successful initiatives that Deborah promoted—the Mansfield Rule, which is meant to diversify partnerships and other leadership positions in large law firms.³⁰ Modeled on an effort to promote diversity among football teams’ head coaches, the rule requires participating law firms to ensure that at least 30 percent of their candidates for leadership and governance roles are women, people of color, and as of late, LGBTQ+ lawyers and lawyers with disabilities.³¹ Several years after firms began implementing the Mansfield Rule, Paola conducted research, which Deborah supported, demonstrating that the rule had not measurably improved diversity in law firms.³² Paola has now followed up with “a supply-demand analysis of the legal leadership population,” indicating that the rule cannot achieve its objective because “there is a shortage of supply required to operate the 30 percent rule.”³³ Although the rule still has some utility, for example, in focusing “attention on the important issue of [diversity, equity, and inclusion] in the legal profession,”³⁴ for the moment, it cannot have a direct impact.

At least in one respect, the Mansfield Rule’s limitations are worth celebrating because law firms’ willingness to adopt uncertain measures reflects the kind of commitment to open-mindedness, experimentation, and learning from failure that is essential to solving big problems. As Professor Michele DeStefano’s contribution emphasizes, this outlook is especially important when it comes to the legal profession’s problems in diversity, equity, and inclusion, which she argues are compounded by lawyers’ failure to collaborate and innovate to find solutions to their clients’ problems and, as in this case, their own.³⁵ She argues that law firms and in-house legal departments will never make the necessary changes to their internal “processes and systems that enhance [diversity, equity, and inclusion]” until their lawyers develop the skills and adopt the mindsets of innovators.³⁶ Lawyers must develop these skills through continuing legal education, Michele argues, because with rare exceptions (such as lawyers who went through Michele’s LawWithoutWalls program), lawyers do not develop

29. *Id.* at 1155.

30. Paola Cecchi-Dimeglio, *Why the 30 Percent Mansfield Rule Can’t Work: A Supply-Demand Empirical Analysis of Leadership in the Legal Profession*, 91 *FORDHAM L. REV.* 1161 (2023).

31. *Id.* at 1169–70.

32. Paola Cecchi-Dimeglio, *Is the Mansfield Rule Moving the Needle for Women and Minorities?*, 9 *J. PROS. & ORG.* 24 (2022).

33. Cecchi-Dimeglio, *supra* note 30, at 1185–86.

34. *Id.* at 1186.

35. Michele DeStefano, *Chicken or Egg: Diversity and Innovation in the Corporate Legal Marketplace*, 91 *FORDHAM L. REV.* 1209 (2023).

36. *Id.* at 1213.

them in U.S. law schools.³⁷ The law school curriculum traditionally “focuses on solo, autonomous work that requires analytical and strategic analysis, avoids risk, and seeks consistency with precedent,” which “stands in stark contrast to collaborative problem-solving that requires empathetic and experimental analysis that seeks novel (perhaps even risky) solutions.”³⁸

Professor Renee Knake Jefferson envisions mentoring—especially for young women—as one useful measure to address gender imbalances in the legal profession’s higher ranks. Her contribution recalls both Deborah’s good fortune to count Justice Thurgood Marshall as a mentor, and Renee’s own good fortune to count Deborah as one.³⁹ Renee distinguishes ethical from unethical mentoring,⁴⁰ underscores the importance of leadership research like Deborah’s, and recognizes the way in which ethical mentoring—especially informal and organic mentoring—contributes to personal growth and professional success.⁴¹ Renee says that professional standards should acknowledge that senior lawyers have a professional obligation to mentor junior lawyers.⁴² She also encourages junior lawyers to draw “mentorship from history,” that is, to learn from “the stories of those who navigated challenges before us.”⁴³ Renee offers Professor Tomiko Brown-Nagin’s biography of Judge Constance Baker Motley, another protégée of Justice Marshall, as a prime example,⁴⁴ and encourages other scholars to uncover, memorialize, and revise histories of women in the law,⁴⁵ as Renee and her coauthor recently did in their illuminating account of women shortlisted for U.S. Supreme Court nominations.⁴⁶

Professor Swethaa S. Ballakrishnen’s contribution also builds on the portion of Deborah’s scholarship that chronicles homogeneity, discrimination, and exclusion in the U.S. legal profession, including in U.S. law schools, which serve as the profession’s point of entry.⁴⁷ Beginning more than three decades ago, Deborah showed how gender discrimination in legal education was unacknowledged and typically occurred offhandedly.⁴⁸ Swethaa shows that nonbinary, trans, and genderqueer law students

37. *Id.* at 1239–45.

38. *Id.* at 1235.

39. Jefferson, *supra* note 9.

40. *Id.* at 1301.

41. *Id.* at 1305.

42. *Id.* at 1306–09.

43. *Id.* at 1290, 1292.

44. *Id.* at 1292–93 (citing TOMIKO BROWN-NAGIN, *CIVIL RIGHTS QUEEN: CONSTANCE BAKER MOTLEY AND THE STRUGGLE FOR EQUALITY* (2022)).

45. *See id.* at 1298.

46. RENEE KNAKE JEFFERSON & HANNAH BRENNER JOHNSON, *SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT* (2020).

47. Swethaa S. Ballakrishnen, *Law School as Straight Space*, 91 *FORDHAM L. REV.* 1113 (2023).

48. *See* Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* 1731 (1991); Deborah L. Rhode, *Whistling Vivaldi: Legal Education and the Politics of Progress*, 23 *N.Y.U. REV. L. & SOC. CHANGE* 217 (1997); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 *STAN. L. REV.* 1547 (1993).

experience a contemporary iteration of this “‘no-problem’ problem.”⁴⁹ Drawing on students’ accounts, Swethaa describes how law professors’ use of “Ms.” and “Mr.,” rather than students’ first names, when calling on law students in class, is distressful (at the very least) for students who do not identify with either title, evoking varying reactions.⁵⁰ Similarly, expectations conveyed in law school about how students should dress in professional settings are a challenge for students who feel uncomfortable in traditional, gendered clothing.⁵¹ Swethaa argues that law schools do not acknowledge how teachers’ forms of address, and schools’ advice about how to dress, embody normative expectations—in this case, cisnormative expectations—about who are the “ideal inhabitants of the legal profession.”⁵² This is a failing. Recognizing that taking normative binaries for granted is oppressive for some students, and seeing this as a problem, are essential steps toward transforming law schools from straight spaces to hospitable settings for all.

Deborah’s scholarship also targeted the way in which the legal profession impedes entry by implementing empirically indefensible ideas about character and fitness. Her pathbreaking article, *Moral Character as a Professional Credential*,⁵³ led to other works on this theme.⁵⁴ The title of Professor Leslie C. Levin’s contribution says it all: *Rhode Was Right (About Character and Fitness)*.⁵⁵ Leslie updates Deborah’s critique, which “remains remarkably relevant today” largely because of courts’ inertia.⁵⁶ The committees that inquire into bar applicants’ character and fitness still work secretly, without public or professional accountability, or ordinary judicial oversight, which are necessary to ensure that they make decisions “in a consistent, defensible, and nondiscriminatory manner.”⁵⁷ Social science evidence casts doubt on the committees’ ability to carry out their assigned task of predicting who will practice competently and ethically.⁵⁸ Recent cases in which courts reviewed challenges to the committees’ decisions reinforce this and other troubling concerns.⁵⁹ Leslie calls on courts to “insist on character and fitness standards that require reliance on scientific research rather than intuition when assessing an applicant’s fitness to practice.”⁶⁰

Finally, returning to where Deborah’s legal scholarship began, my own contribution to this collection addresses the challenge of securing access to

49. Ballakrishnen, *supra* note 47, at 1117–18.

50. *Id.* at 1127–29.

51. *Id.* at 1129.

52. *Id.* at 1133.

53. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).

54. See Leslie C. Levin, *Rhode Was Right (About Character and Fitness)*, 91 FORDHAM L. REV. 1311, 1312 (2023) (citing Deborah’s writings, and stating that “[t]he bar’s moral character inquiry—and moral character in general—were topics that she returned to throughout her career”).

55. *Id.* at 1311.

56. *Id.* at 1332.

57. *Id.* at 1318.

58. See *id.* at 1321–23.

59. See *id.* at 1319–21.

60. *Id.* at 1332.

justice for those who cannot afford a lawyer, and builds on Deborah's 1976 student work and her later writings on the way in which UPL laws impede access to justice.⁶¹ Like many of her other writings, this scholarship remains relevant because of institutional inertia. Although there will never be enough publicly funded and volunteer lawyers to match unmet legal needs, many people are denied capable nonlawyers' help because of UPL laws. A half-century ago, Florida's high court invoked their UPL law to stop a secretary from helping customers complete fill-in-the-blank divorce petitions. Since 2022, New York's attorney general has defended UPL rules to stop a reverend in the South Bronx and others like him from being trained to advise community members—without compensation—on how to complete court-approved, check-the-box answers to debt complaints.⁶² The justifications for applying UPL laws so restrictively do not withstand scrutiny. Evidence shows that nonlawyers can help fill the justice gap to a much greater extent than now allowed. More experimentation will produce more evidence. It is past time for courts, if only on a trial basis, to enlarge nonlawyers' authority to help the unrepresented, who would be better served with nonlawyers' advice than with no advice at all.

Deborah would not have agreed with everything in the writings collected here and she would have had advice for improving them. I miss her critiques. I miss collaborating with her in organizing programs and projects (at which she was politically adept); I miss listening with awe to her keynote speeches (always elegant and impassioned); and I miss her presence at colloquia, schmoozes, and other gatherings of legal ethics scholars (at which she was typically the best prepared and most incisive commentator, but also among the most generous). I especially miss Deborah's friendship. But I take some consolation in knowing that my colleagues and I will continue to engage with Deborah's compendious scholarship for as long as we continue teaching and writing about the legal profession. Doing so will not only be a privilege and a pleasure, but also an inevitability, given the scope and ongoing significance of Deborah's scholarship. The writings in this issue make it evident why, for many years to come, it will be virtually impossible to write about the legal profession without returning to Deborah's work.

61. Bruce A. Green, *Why State Courts Should Authorize Nonlawyers to Practice Law*, 91 FORDHAM L. REV. 1249, 1252 (2023) ("Many legal scholars question the UPL laws' utility, regarding them as an overly restrictive, protectionist impediment to low-income individuals' ability to secure necessary help with their legal problems. Professor Deborah L. Rhode led the charge, beginning with a 1976 empirical study that she coauthored as a law student and continuing throughout her academic career." (footnotes omitted)).

62. See *Opinion & Order, Upsolve, Inc. v. James*, No. 22-cv-00627 (S.D.N.Y. May 24, 2022), ECF No. 68; see also Andy Newman, *They Need Legal Advice on Debts. Should It Have to Come From Lawyers?*, N.Y. TIMES (Jan. 25, 2022), <https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html> [<https://perma.cc/F5RA-LKYP>].