

## FOREWORD: THE LEGAL PROFESSION AND SOCIAL CHANGE

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Fordham University School of Law’s Stein Center for Law and Ethics has collaborated with the *Fordham Law Review* every year since the late 1990s to encourage, collect, and publish scholarly writings on different aspects of the legal profession, including its norms, regulation, organization, history, and development—that is, on themes relating to what law schools loosely call “legal ethics.”<sup>1</sup> The legal profession is an important subject of study for legal scholars, among others. Although one U.S. Supreme Court Justice, himself a former law professor, airily derided legal ethics as the “least analytically rigorous . . . of law-school subjects,”<sup>2</sup> we dispute this characterization and share pride in the scholarship collected over more than a quarter of a century.

Recent societal developments, including mass protests, responses to racial injustices, the growth of social movements, greater awareness about climate change, and rapid development in technology, have all had profound impact on society, including the establishment and modification of laws and regulations, the establishment of new programs and policies in the private and public sectors, changes in the use of social media, and changes in institutions and professions.<sup>3</sup>

This year, the *Fordham Law Review*’s collection of Essays on the legal profession addresses a broad theme that encompasses these changes: The Legal Profession and Social Change. One might not reflexively associate the legal profession with social change given its historic conservatism, but the

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\* Our thanks to the authors and to the other participants in the colloquium where drafts of these writings were discussed. Our thanks as well to the *Fordham Law Review* staff and editors, and especially Executive Symposium Editor John Tsimis, for their extensive editorial contributions and general good cheer. This Foreword was prepared for the Colloquium entitled *The Legal Profession’s Response to Social Change*, hosted by the *Fordham Law Review* and co-organized by the Stein Center for Law and Ethics on October 20, 2023, at Fordham University School of Law.

1. See Bruce A. Green, *Deborah L. Rhode’s Access to Justice*, 73 FORDHAM L. REV. 841, 848 n.61 (2004) (collecting Essays from the first decade of collaboration).

2. *Holland v. Florida*, 560 U.S. 631, 670 (2010) (Scalia, J., dissenting).

3. See generally Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565 (2008); Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307 (2023); Atinuke O. Adediran, *Disclosures for Equity*, 122 COLUM. L. REV. 865 (2022); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021).

profession is not a monolith. Today, there are over a million lawyers.<sup>4</sup> Different slices of the profession have different relationships to social change. Some lawyers resist it, but others adapt to it or assist clients in adapting to it or promoting it. Some seek to be at the vanguard of changing society for the better. Particularly given the many ongoing changes we are experiencing and the other changes that some hope to see, one can take the theme of this collection in various directions, as its contributors do.

We invited scholars to ponder how these social changes are influencing the legal profession and consider the role of lawyers, legal institutions, and the legal profession in addressing and responding to these changes as they occur. We were privileged to receive responses from esteemed scholars who write in the areas of criminal law and justice,<sup>5</sup> antidiscrimination law,<sup>6</sup> and access to justice.<sup>7</sup>

Two contributors, Professors Ray Brescia and Olatunde Johnson, focus on lawyers advocating for law reform.<sup>8</sup> What role can they play at a time when federal courts—and especially a supermajority of the Supreme Court justices—are unsympathetic, if not hostile, to progressive advocacy efforts? One might think of civil rights lawyers' advocacy leading to *Brown v. Board of Education*<sup>9</sup> and despair about the lack of similar achievements today.

Professor Brescia's Essay, building on theoretical work on law reform advocacy, does not despair.<sup>10</sup> Challenging Derrick Bell's idea that constitutional change is achieved only when reformers' interests align with those of the powerful elite,<sup>11</sup> Professor Brescia argues that there is a plethora of institutions—courts, other public entities at different levels of government, and businesses—that are susceptible to reform efforts and that, collectively, may be influenced to bring about progressive social change.<sup>12</sup> He gives the example of state courts and legislatures that were moved to support marriage equality in the lead-up to the Supreme Court's decision in *United States v. Windsor*.<sup>13</sup>

Professor Johnson equally envisions a role for progressive advocates seeking to achieve social reform in the face of a resistant federal bench.<sup>14</sup>

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4. See *ABA Profile of the Legal Profession 2023*, AM. BAR. ASS'N, <https://www.abalegalprofile.com/demographics.html#> [https://perma.cc/U43B-DXCD] (last visited Feb. 9, 2024).

5. Irene Oritseweyinmi Joe, *Regulating the Public Defender Identity*, 92 FORDHAM L. REV. 1335 (2024); Alexis Hoag-Fordjour, *Community Responsive Public Defense*, 92 FORDHAM L. REV. 1309 (2024).

6. Olatunde Johnson, *(How) Can Litigation Advance Multiracial Democracy*, 92 FORDHAM L. REV. 1353 (2024); Ray Brescia, *Aligning the Stars: Institutional Convergence as Social Change*, 92 FORDHAM L. REV. 1243 (2024).

7. Tonya L. Brito & Daniela Mia Campos Ugaz, *Asymmetry of Representation in Poor Peoples' Courts*, 92 FORDHAM L. REV. 1263 (2024).

8. See Johnson, *supra* note 6; Brescia, *supra* note 6.

9. 347 U.S. 483 (1954). The classic account is RICHARD KLUGER, *SIMPLE JUSTICE* (1975).

10. See generally Brescia, *supra* note 6.

11. See *id.* at 1244–45.

12. See *id.* at 1260.

13. 570 U.S. 744 (2013); Brescia, *supra* note 6, at 1259–60.

14. See Johnson, *supra* note 6.

She argues that progressive lawyers' courtroom role is now to oppose conservative groups' litigation efforts to undermine "racial equity, environmental regulation, abortion rights, LGBTQ rights, and more."<sup>15</sup> She also suggests that progressive litigators consider other strategic possibilities for litigation—for example, how "defensive litigation might lead to productive forms of mobilization that engage constituents and institutions outside of the courts."<sup>16</sup> For the moment, progressive movements cannot replicate successes of civil rights lawyers in the 1950s and 1960s, but the courtroom may remain an important field of battle.

Lawyers whose everyday work is to assist individual clients may not be movement lawyers, but when they are confronted daily with evidence of social inequality, they may be moved to pursue social change. Two other contributors, Professors Alexis Hoag-Fordjour and Irene Oritseweyinmi Joe, address this possibility from the perspective of public defenders and their offices, who serve a large proportion of indigent individuals in criminal cases.<sup>17</sup>

Drawing on interviews with leaders of four defender organizations that "strive to combat the structural forces that result in mass criminalization," Professor Hoag-Fordjour describes "a distinct model of indigent defense advocacy" that grows out of "social movements challenging injustice and the racial disparities within the criminal legal system."<sup>18</sup> Sharing various features with other innovative public-defender models, this one "involves engaging with the community; building authentic, sustainable relationships; and responding to the community's needs," including by seeking legal and procedural reforms to benefit these organizations' clientele and the community generally.<sup>19</sup> Professor Hoag-Fordjour addresses various aspects of these organizations' work, including the challenge of setting priorities, and closes by observing how this community-oriented model, although having potential limitations, benefits not only the community but also clients individually.<sup>20</sup>

But what about public defender offices that lack a clear direction—how should they employ their limited resources, and where should they find guidance on this question? Professor Joe describes different ways in which public defenders define their roles, depending on their motivations.<sup>21</sup> Public defenders might envision themselves as warriors challenging state power, as social workers helping their clients improve their lives, or as movement builders seeking "larger systemic or societal change."<sup>22</sup> Professor Joe takes the American Bar Association (ABA) to task for failing to give adequate

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15. *Id.* at 1359.

16. *Id.* at 1368.

17. *See* Joe, *supra* note 5.

18. *See* Hoag-Fordjour, *supra* note 5, at 1311, 1315, 1318.

19. *Id.* at 1315.

20. *See id.* at 1316, 1331.

21. *See* Joe, *supra* note 5.

22. *Id.* at 1345–46.

guidance to public defenders and their offices on which approach to take.<sup>23</sup> The ABA has aggregated authority to influence lawyers' professional conduct and their professional identity through its adoption of Model Rules of Professional Conduct and Criminal Justice Standards, but, Professor Joe argues, the ABA's existing guidance is inadequate to help public defender offices decide how to most effectively assist those whom they defend.<sup>24</sup>

Two other essays focus on the plight of poor people who are unrepresented in civil proceedings. After noting the breadth of this problem, the Essay coauthored by Professor Tonya Brito and Daniela Mía Campos Ugaz zeroes in on unrepresented parents who encounter the state's lawyers in family court cases involving the enforcement of child support payments.<sup>25</sup> Their study shows, among other things, that unrepresented parties are confused about the state's lawyers' role, in part because these parties do not understand the process, in part because the lawyers confusingly explain their role, and in part because the lawyers are themselves confused.<sup>26</sup> The state interests served by the lawyers are not necessarily aligned with those of the parents, and although judges may pressure the lawyers to help unrepresented parties, the lawyers may resist partly because they are subject to ethical restrictions on giving legal advice to unrepresented parties. They may also give ostensible help that proves misleading and disadvantageous.<sup>27</sup> Professor Brito and Campos Ugaz add to the body of literature demonstrating, unsurprisingly, that poor, unrepresented people get a raw deal in our nation's courts.

Finally, one of us contributed an Essay suggesting that state supreme courts can make state civil adjudication fairer for unrepresented parties in civil litigation by expanding opportunities for nonlawyers to assist them.<sup>28</sup> It argues that "unauthorized practice of law" provisions needlessly impede nonlawyers from helping unrepresented parties and proposes that state supreme courts authorize state trial judges to expand nonlawyers' roles in trial court proceedings subject to trial judges' oversight and evaluation.<sup>29</sup>

As always, the collected writings do not offer the last word but, ideally, add to the literature regarding the legal profession and move conversations forward.

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23. *Id.* at 1349–50.

24. *Id.* at 1336–37.

25. *See* Brito & Campos Ugaz, *supra* note 7.

26. *See id.* at 1278.

27. *See id.* at 1280.

28. Bruce A. Green, *Should State Trial Courts Become Laboratories of UPL Reform?*, 92 FORDHAM L. REV. 1285 (2024).

29. *See id.* at 1305–06.