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Hard Questions About "Soft Skills": A Celebration of Deborah Rhode's Scholarship

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Introduction

In the fall of 2016, I started teaching my first Professional Responsibility class as a junior tenure-track professor at the University of California, Davis School of Law. In many ways, I had been primed for mentorship by Professor Deborah Rhode. I had completed a three-year teaching fellowship at the University of California, Los Angeles School of Law where I explored more about legal ethics and the legal profession with another titan of legal ethics, Professor Scott Cummings. Deborah and Scott worked closely on a number of projects including a Legal Ethics casebook that I used to teach that very first class.[1] But my reliance on Deborah's work actually began many years before that, to a degree beyond my realization.

Over a decade earlier, I began my education as a first-year law student at Stanford Law School. Although, as a Stanford Law student, I was to learn about the law under the guidance of many esteemed professors, including Deborah, I had enrolled rather cautiously. There were many things I expected to learn as part of the Stanford community, but I was uncertain about how my enrollment would help me develop the skills I felt were necessary to adequately represent the marginalized populations that most concerned me. Fortunately, the Stanford intellectual community was up to the task of teaching about the law in a way that respected its existence as both ever-

* Thanks to Deborah Rhode for her mentorship and friendship.

1. *See* DEBORAH L. RHODE, DAVID LUBAN, SCOTT L. CUMMINGS & NORA FREEMAN ENGSTROM, LEGAL ETHICS (7th ed. 2016). Professors Rhode and Cummings were frequent collaborators. *See, e.g.*, Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010); Deborah L. Rhode & Scott L. Cummings, Commemorative Contribution, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485 (2017).

present and meaningful yet reflective of systemic bias and capable of being abused and disregarded. One thing the community could not prepare me for, however, was the frustration that often arose as I practiced as a public defender in New Orleans.

Frustration as a public defender is a frequent story, but much of my experience with that sentiment related to institutional decisions about how best to provide services for indigent defendants. When I later became an academic, hoping to explore these frustrations further and examine whether there were legal rules that could prevent such frustrations for future practitioners, Deborah quickly became a mentor. Her mentorship included written scholarly feedback and numerous conversations—at various conferences where scholars gathered to workshop ideas—as I tried to puzzle through a certain research claim. It continued over meals at various Palo Alto restaurants and in her home in Stanford, California. Our conversations covered a wide range of subjects, from what it meant to be a young Black female academic trying to learn and present ideas about how to improve the criminal process, to whether the system was really built to advance the type of justice we both hoped to see. Deborah's remarks always centered on how we might think about legal ethics and the role these rules should play in supporting, or cementing, the important work public interest attorneys attempt to achieve.

This Essay describes two of the primary conversations I was fortunate enough to have with Deborah and the scholarship that undergirds them. Part I describes our conversations about why character matters in the criminal process. Her work advanced critical conversations about both how character fits into evidentiary rules and theories about punishment as well as the role that character plays in the decisions of institutional actors such as the judge and prosecutor. This Part includes a recitation of one such story we discussed as part of her exploration of the type of character we would want prosecutors to exhibit and the formal role the legal profession needs to play in limiting certain character traits from presenting themselves in that practice of law. Part II turns to Deborah's work on leadership in the legal profession. In this Part, I describe conversations with Deborah on the different types of leaders I had the good fortune of working with as a criminal defense attorney and how we might identify the type of leadership necessary for differently situated institutions. A central theme of both Parts of this essay is that Deborah's work, indeed her entire motivating philosophy, arose from a space of deep concern for the experiences of the marginalized in our national institutions for justice. Her own experience navigating legal institutions as a female was only buttressed by her education as a law clerk to Supreme Court Justice Thurgood Marshall and her commitment to the advancement of minority interests. Her work reflected fresh ideas and a dedication to advancing the needs of those

most victimized by our institutions. Her impact cannot be replicated but requires a constant attempt on our part to do so.

I. On Character in the Criminal Process

In her work, Deborah amplified issues of character and how the integrity of the criminal process could be undermined by the character of its institutional actors.[2] Decisions about what character traits are ideal in any human population can be complicated, but Deborah sought to identify how character traits that minimized the value of other human beings would be most damaging in the criminal process. She described how our concept of character has reinforced mass incarceration and racial injustice in the criminal process as it "misinform[s] our judgments about criminal responsibility."[3] According to her, this failure on our part requires the legal profession to pursue paths of reform.[4]

I recall discussing with Deborah some of the interactions I had with prosecutors and judges during my time as a public defender. One story in particular struck her as indicative of the lack of clarity around the moral character necessary for lawyers in the criminal process. I represented "Timothy"[5] on an enhanced felony that carried a sentence of life imprisonment without parole. Timothy had been convicted of committing similar crimes in the past and, at the time of the instant arrest, had been released on parole. As the arrest implicated a violation of his parole agreement, Timothy remained incarcerated throughout my representation of him. Early in our interactions, Timothy insisted to me that he did not commit the crime, emphasizing he had been in the area and provided his contact information to a person he perceived to be the victim so he could serve as a witness to the event. Timothy was confused about how he had been identified as the perpetrator by an individual he had never met. The state offered Timothy a plea agreement for a much lower term of years than the life sentence he risked by proceeding to trial, but Timothy could not understand how any term of imprisonment could result from his attempt to help.

I described the stress of preparing that case to Deborah, detailing how I was not fully sure I believed Timothy myself as the current crime was very similar to the past crimes he had pleaded guilty to. I nevertheless committed to

2. Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 355-57 (2019).

3. *Id.* at 355.

4. *See id.*

5. Name changed to protect privacy interests.

Timothy's case and worked as hard as possible to try to uncover proof of his innocence. Despite my efforts, the proof never arrived, and I remember feeling relieved every time the prosecution asked for a continuance of trial dates. Although Timothy remained incarcerated on charges he kept assuring me he was innocent of, the delays of the trial always gave me more time to try to find some evidence I could use to successfully counter what I expected to be the state's case against him. The delay also meant more time could pass where Timothy would not be sentenced to life in prison as I was still uncertain about how I could win his case. Eventually, we reached a point in the case where the court informed us that there would be no more continuances. I told Deborah how I spent the night before Timothy's trial in prayer, hoping that somehow a jury would see through what seemed like a mountain of evidence and find Timothy not guilty.

Imagine my surprise when I received a phone call from the prosecutor the night before the trial informing me that they would be dismissing the charges. The prosecutor offered to allow Timothy to plead to a much lower-level offense that carried a maximum sentence of thirty days in prison. As Timothy had already been incarcerated for more than a year, he would be released once the guilty plea was entered. When I inquired why they were offering such a change in plea, the prosecutor confessed that the alleged victim had admitted they had not actually been a victim of the reported crime. The complainant had only presented Timothy's name and information after receiving his information from an individual who had actually been present at the scene and accepted Timothy's offer to help. The prosecutor let me know, however, that she would pursue another continuance of the trial if my client did not choose to plead guilty to the lesser charge. The prosecutor justified this move by saying they would need to conduct more investigation to see if the alleged victim was being truthful or had been subject to some sort of undue influence to change her story. According to the prosecutor, Timothy's plea to a minor misdemeanor offense would have little consequence for him going forward.[6]

I spoke to Timothy the next day and he was remarkably grateful for the opportunity to get out of jail. I felt we should report the prosecutor to the state bar association. The prosecutor had been, at best, grossly negligent and, at worst, intentionally harmful in not investigating the alleged victim's story

6. This mistaken and costly assessment of the value of misdemeanors is wholly incorrect. *See* Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. Rev. 738, 758-66 (2017) (detailing the direct and collateral consequences of misdemeanor convictions). *See generally* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) (describing the life-changing impact of being charged with a misdemeanor offense, especially for the poor); Brave New Films, *Racially Charged: America's Misdemeanor Problem*, YOUTUBE (Apr. 1, 2021), https://perma.cc/FXN4-JX83 (same).

earlier on in the process. Additionally, given the presence of evidence that the alleged victim had made up the entire claim and involved the state in an attempt to unjustly incarcerate a Black man, I felt the prosecutor should have felt a duty to correct the injustice. Timothy told me that could be a fight for me to have on my own time, but he wanted no part of it. He reminded me he would be the one to most suffer by remaining incarcerated while the relevant complaints were made and the issues litigated.

Deborah and I spoke about how the Model Rules of Professional Conduct do not provide adequate answers for such circumstances. She noted that in the absence of formal rules on the types of character we require of prosecutors, there needed to be better accountability measures for identifying and addressing the character faults of attorneys with such power. In our conversation on this topic, Deborah and I also considered whether the professional rules do an adequate job of addressing the warring responsibilities for the defense attorney in similar situations. My duty as a member of the legal profession to report another lawyer who I believed had performed improperly conflicted with my client's request that I not continue the process. Deborah reminded me of her work establishing that the profession has a duty to weed out lawyers such as that prosecutor who appeared to have acted improperly in advancing the criminal prosecution of Timothy. She also prodded me to think about what the right answer should be for the public defender in that situation. For Deborah, the larger question was whether the Model Rules could even establish a rule that would capture the justifications one might have in not reporting that incident while also ensuring such attorneys were properly disciplined for such misbehavior. In other words, whether the decision not to report would actually be the type of character we would desire and should support in our defense attorneys.

Our conversation led to a larger discussion of whether "justice" had occurred in that situation. The innocent client had been released from incarceration, but he had received another criminal conviction: a misdemeanor carrying its own long-term serious consequences—consequences that have received far too little attention in criminal justice reform conversations. Deborah noted how stories such as these were disappointingly too frequent in the legal academy and were one of the reasons she had chosen not to pursue a career in criminal defense. Little did she realize, her work advancing ideas about how we might operate in this field was a pivotal way of contributing to the national discourse around criminal justice reform—a method that could not be matched by others.

II. On Leadership in the Criminal Process

Another frequent conversation with Deborah involved what leadership looks like in the legal profession. Deborah was the foremost expert on

leadership in the legal profession and had written the first coursebook on the subject.[7] She identified the core concepts of leadership and the key role diversity plays in leadership decisions. In advancing this discussion, Deborah had identified an important consideration for practitioners that had thus far remained under the surface in discussions about unstable representative systems. Indeed, it was the vacuum of the right type of leadership that could hinder an organization's ability to meet its goals for its client population.

When Deborah and I discussed this significant idea, we evaluated the different types of leadership I had experienced as a legal practitioner. I was fortunate enough to start my career as a fellowship attorney under Bryan Stevenson at the Equal Justice Initiative of Alabama (EJI). EJI is a nonprofit organization, and the attorneys in leadership positions are all practitioners. They each have varying degrees of significant legal experience representing people on death row. As a professor and a practitioner, Bryan himself is uniquely situated to be the executive director of such an office. He has both the experience doing the work and the skills to write and speak persuasively to those who could provide the office with the resources and support it needed to continue to meet its obligations. Having spent many years educating students and preparing them to become licensed attorneys, he was also well-positioned to lead recent law graduates, such as myself, as we assumed responsibility for cases with such extreme consequences.

Soon after completing my fellowship at EJI, I moved to New Orleans to be part of a brand new full-time public defender office. Like EJI, the public defender office also consisted of recent graduates tasked with representing indigent people in the criminal process. However, determining who should lead the Orleans Public Defenders (OPD), and other similar offices involved in rebuilding post-Hurricane Katrina, was a complicated process. New Orleans had not had a full-time, client-centered public defender office in the past, and the newly formed Louisiana Public Defender Board had to determine what leadership should look like with few local models to fully consider in their decision-making process. The first few attorneys who assumed leadership of the New Orleans office were senior public defenders from well-respected public defender offices in other jurisdictions—namely, Washington, D.C. and New York. Eventually, the Board chose to hire a leader, Derwyn Bunton, with significant experience representing juvenile defendants and ties to the local New Orleans community who also had substantial policy experience. Because the Board was effectively building the OPD from the ground up and would rely on substantial support and goodwill from the local decisionmakers, it made sense to have a leader with significant experience persuading policymakers to see the value in justice-oriented endeavors. This was a strategic and important

7. DEBORAH L. RHODE, LEADERSHIP FOR LAWYERS (3rd ed. 2019).

choice as it meant office leadership would also not be in a position to provide guidance to the attorneys on the specific litigation skills necessary for representing adults facing criminal charges. Instead, leadership would be primarily skilled in, and tasked with, articulating the underlying rationales and justifications for the office to operate in the way it deemed it should operate to provide the effective assistance of counsel.

Leadership for the individual public defender office was not the only leadership-related question the brand-new public defender system had to answer. The state Board also had the task of populating its own leadership staff. In filling out those positions, the Board again had to answer questions regarding which skills would be best suited to help the new statewide regulatory agency meet its objectives. Recently, the Board hired an individual whose primary legal experience had been in the role of assistant district attorney. In his new role, this Chief Public Defender would oversee the entire sixty-four-parish public defense system in Louisiana. This public defense system represents almost 88% of all persons accused of crimes statewide. In other words, the leader of the statewide agency tasked with providing defense services to the vast majority of defendants in the state's criminal process would be an individual whose primary criminal law experience involved prosecuting defendants. In making their decision, the Board determined the best leader for the statewide public defender system was an individual who had not only identified primarily as a prosecutor in their legal career but had also received legislative appointments on various criminal justice committees. This was a remarkable shift as the two previous chief public defenders primarily identified as public defenders or criminal defense lawyers in their legal career.

In our exchange about how leadership had differed in my experiences at EJI and the OPD, Deborah noted there is a story to be told that would benefit greatly from the foundational work she had done on the topic of identifying the leadership qualities that should be sought for differently positioned organizations. As Deborah identified in our conversations and in her scholarship, leadership challenges are omnipresent in every institution tasked with providing defense services to those facing such significant criminal punishments. Deborah noted, however, crisis situations such as those involving the development of a new public defender system in a state recently devastated by a natural disaster presented very different types of leadership considerations than one would expect to see in a well-respected and more established office like EJI. Part of that was because of the innovation necessary in creating a brand-new office. Another part, however, involved recognizing that a larger state office like the OPD would have different "client populations" sometimes with slightly conflicting primary goals. In other words, according to Deborah, we would first need to do the work of identifying what "success" looks like for the public defender as the office has several "client populations."

For the public defender, the most significant client base is those facing criminal charges, as their existence and the difficult circumstances of their current lives are the very reason for the public defender's involvement. But the public defender leader has two other constituent populations they must be concerned about in their legal practice. Like any leader of an office, the leader must be concerned about their line attorneys or staff. Establishing success with them will involve assessments about how supported they feel in doing the work and perhaps even their tenure working with the office. A third constituency would be the legislative entity that funds the public defender institution. The first category and the third category of the public defender's "client population" are similar. Both represent the community the public defender serves. In other words, the office leadership represents the poor citizens of the community who are charged with a criminal offense. Those same leaders also have to fulfill the requirements of the funding agent, which consists of legislative officials elected to represent the interests of the same community. Because the office was publicly funded, office leadership also had to concern themselves with the needs of the duly elected state legislature, and those appointees it designated were responsible for the provision of services.

As Deborah noted, only upon fully discerning these three populations and their competing interests could a public defender office determine the appropriate leadership structure and style of leadership. Although the EJI model had been laudable, it would not necessarily hold its esteem in the fertile environment that existed in creating an office from a state of nonexistence. Similarly, as the office grows, its leadership urgencies and style should grow to reflect any new needs. Deborah admonished both the lack of interest in developing and studying leadership and the one-size-fits-all approach to institutions that depend on leaders for guidance. She presented us with a new way of thinking, one necessary to fully creating the type of system worthy of praise she felt we were both capable of and had a duty to achieve for those most at risk in our communities.

Conclusion

In her time, Deborah Rhode encouraged us all to think about justice and the intangible traits of leadership and character in promoting and advancing access to justice. Her work, although transformative in and of itself, leaves much to be considered for the future. My experiences with her are but a small drop in the bucket of the effect she had on both practitioners and the scholarly enterprise. Both the legal academy and the legal profession will draw heavily on her foundation as they grapple with these issues and continue to identify answers and solutions to these important questions.