

‘We Can’t Escape Responsibility’

by Gene R. Nichol, President, The College of William and Mary

President Nichol delivered the following remarks at a meeting of the Bar Association of the City of Richmond on March 16, 2006. They are reprinted here with his permission.

Think, for a second, about a set of facts that we all know, at least in the back of our minds, to be true. Lawyers cost money. Some have it. Lots don’t. Yet unlike some industrial nations, we recognize no general right to representation in civil cases. Less than one percent of our total expenditure for lawyers goes toward services for the poor. Legal aid budgets are capped at levels making effective representation of the poor a statistical impossibility. Even at that, they’ve been cut by about a third over the last decade.

We have one lawyer for every 380 people generally, and one legal services lawyer for every 6000 persons living in poverty. We fence folks out even further by categories of unworthy poor; and placing restrictions on the most efficient avenues for representation. Study after study shows about 80 percent of the legal need of the poor is unmet. The circumstance is almost as bleak for middle-income Americans. New York’s state bar study a couple of years ago found that we leave the poor unrepresented on the most crushing problems of life — divorce, child custody, domestic violence, housing and benefits disputes. We think it natural that a commercial dispute between battling corporations takes six months to try while the fate of a battered child is determined in a few minutes. What passes for civil



President Nichol (L) applauded Justice Sandra Day O’Connor, the new chancellor of the College of William and Mary, during their joint investiture/inauguration ceremony at the Wren Building on April 7. (Photo by Nick Kelsh, courtesy of the Office of University Relations.)

justice among the have-nots is stunning.

On the criminal side, we trivialize the right to counsel that we have declared. Public defenders can have crushing caseloads. Rates of compensation for appointed lawyers are often laughable. Thousand-dollar caps in felony cases are common. Competitive bid schemes can make it worse — leading to what has been accurately described as “meet ’em, greet ’em, and plead ’em” defense regimes.

We’ve developed embarrassing rules of constitutional effectiveness — what Deborah Rhode calls a “jurisprudence of dozing” — ruling not only that inexperienced lawyers, but drunk lawyers, drugged lawyers, mentally ill lawyers and sleeping lawyers can pass muster. One court explained that “the constitution does not say

a lawyer has to be awake”; another ruled that sleeping “might have been a strategic ploy to gain sympathy from the jury.” This must have provided only modest consolation to the convicted client.

We enthuse about access and equality rhetorically. But we don’t make sufficiently serious efforts to give them practical content. Average citizens are effectively priced out of the justice system. They are also typically barred from participating in the closed regulatory scheme that excludes them. The system we have is powerfully, dramatically, and fundamentally at odds with who we say we are.

In studying the literature — as best a university president can do — I learned that “the best available research indicates that the American legal profession averages less than half an hour of

work per week on pro bono services.” Most lawyers do no pro bono work at all. Recent affluence has eroded rather than expanded support for pro bono programs. Over the past 12 years, the average revenue of the country’s most successful firms increased by over 50 percent, and pro bono hours dropped by one-third.

Nationally, service to the poor represents less than one percent of lawyers’ working hours.

In law schools, issues of access to justice are either missing or marginalized in our curricula. Relatively little of our research focuses on what passes for justice among the have-nots. Our curriculum takes the present deployment of legal resources as a given. Who uses the system is unexplored. Law firms are not topics of study or critique. Despite all the marvelous outreach and pro bono and varied clinical programs expanding in law schools across the country, unequal access to justice has not made it to the core of legal education. The greatest shortcoming of American law schools may be the failure to explore and articulate a theory of the just deployment of legal resources.

When we survey this landscape I think we’re compelled to say that we would have hoped for more from our nation’s justice system. More from our country. And I think we would say at the same time that we refuse to believe the charge of equal justice is beyond us — beyond our capacities, or beyond our desires. Because if we reject that, we reject our best selves.

So it’s my hope that our future efforts — in the broader legal community and the academy — will point more powerfully in these directions. The flight from equality is as great a barrier to the administration of justice in each of our communities as other matters that have received far greater attentions-matters like the erosion of ethics and professionalism, the

loss of civility, the abuses of discovery and the like. The flight from equality is a greater barrier to justice than any of these matters.

It is also, of course, an even more difficult problem to solve. But that’s not a reason to turn away. If the problem is great enough, the violation of our constitutive ideals strong enough, the threat to our democratic standards real enough, the gap between our words and our deeds massive enough, then surely we decide to go at it full bore. We experiment, we try, we fail, we regroup, we try again. We try again because we know that what we are, what we believe in is at stake.

Last year I read Ralph Ellison’s novel *Juneteenth*. There, Ellison’s main character says this: “We are a nation born in blood, fire and sacrifice. Thus we are judged, questioned, weighed — by the ideals and events which marked [our] founding. These transcendent ideals interrogate us, judge us, pursue us, in ... what we do, or do not do. They accuse us ceaselessly, and their interrogation is ruthless, scathing ...until, reminded of who we are, and what we are about, and the cost[s] we have assumed], we pull ourselves

together. We lift our eyes to the hills and we arise.”

Our constitutive call to equal justice surely interrogates and accuses us. It judges us and finds us lacking. The answers we offer do not satisfy. Not if we are what we claim to be. We can’t escape responsibility for the system of justice we create. I close with a statement of Lord Brougham — a 19th century Scottish lawyer and statesman — a charge that is more essential today than even when he spoke it:

“It was the boast of Augustus that he found Rome brick and left it marble. A praise not unworthy of a great prince. But how much nobler would be our sovereign’s boast when he shall [say]... that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.” **VBA**

* The access to justice statistics cited and rehearsed here rely heavily on Deborah Rhode’s terrific works. See, particularly, Deborah Rhode, *IN THE INTERESTS OF JUSTICE* (2004).



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