

THE LAWYER AS PUBLIC CITIZEN

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THOMAS Jefferson was both the pre-eminent architect and also the pre-eminent political theorist of the first two hundred years of American history. Jefferson remains with us; he pervades the spaces of the University of Virginia, the institution that he founded in 1819.¹ Why? It is not because he was a great executive or a brilliant politician or even a completely exemplary human being. Rather, his enduring legacy is a testament to the power of ideas to influence human history. And yet one of Jefferson's most important ideas—the one directed exclusively to lawyers—has been largely ignored in the current debate about the decline in professionalism. A lawyer, Jefferson said, must aspire to be a public citizen. In this single phrase he captured the singular notion that educated citizens, and especially legally educated citizens, can, and therefore must, strive to make a difference in the world. I believe Jefferson's challenge to us as lawyers is more relevant today than at any previous time in our nation's history.

Though the topic is portentous, I intend to make my case in a somewhat unusual manner. I propose to examine one of the most significant cultural phenomena of our times—lawyer jokes. I am interested in the sociology of lawyer jokes. What do they tell us about the way society (including the legal profession) views lawyers and the legal system? And what can we as lawyers do to change some of the undesirable features of the current environment?

First, let us be clear. Lawyer jokes have been with us for a long time. From Shakespeare to Benjamin Franklin, our society has always viewed the legal profession with a mixture of admiration and disgust. But in recent years, the variety and sheer number of jokes about lawyers has exploded, and the favorable images of lawyers as champions or helpers grow fainter as the unfavorable images of the lawyer as shyster or hired gun increase. And so, I decided to conduct some academic research into the matter.

There are all kinds of lawyer jokes I have discovered. Some are not important to my theme; they merely reflect conditions in the marketplace at any point in time. My favorite example is this one.

A lawyer needs to hire a plumber. The plumber comes and fixes a broken water pipe. Thereafter, he sends the lawyer a bill for \$180 for 45 minutes work. The lawyer was outraged—and called the plumber on the phone. "What in the world is going on? I don't charge \$250 per hour." "Well," said the plumber, "neither did I when I practiced law."

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1. It is well acknowledged that Jefferson regarded his role in establishing the University of Virginia as one of his pre-eminent achievements. The epitaph that he wrote for his own gravestone cites the founding of the University (along with the authorship of the Declaration of Independence and of the Virginia Statue on Religious Freedom) as the achievement for which he should be most remembered.

This joke tells us that the market has become saturated with lawyers. As a law school dean, I hear this complaint often (mostly from other lawyers). My response has always been consistent: there may be too many lawyers, but there aren't too many good lawyers.

My principal focus in this essay, however, is not with the quantity of lawyers but with the quality (although the two may not be completely unrelated). Survey data tell us lawyers, and most particularly practicing lawyers, are viewed less favorably than almost all other professions. Teachers (including law professors) have an 84% approval rate, judges are approved by 77%, doctors are at 71%. Lawyers, on the other hand, have an approval rating of less than 40%, beating out only journalists, stockbrokers and politicians. Why is that? Given the high approval granted to law professors and judges, clearly the answer does not lie in a decline in respect for law in general and the American justice system in particular. Rather, the focus seems to be on the way that legally trained people *practice their profession*. The data reveals a significant increase over the past two decades in three negative perceptions about practicing lawyers. First, lawyers lack care and compassion for others. Second, lawyers are greedy. And third, lawyers are rapacious (they will do anything to win).

The good news, if there is such a thing, is that the same surveys report that clients are fairly satisfied with the legal services they receive from lawyers (although many feel the services were too expensive). Competence, therefore, is not the issue. Rather, the issue is the growing perception that there is a fundamental incongruence between what lawyers do and the public good. Thus, my job—to persuade the reader that there is hope in the ideal of the lawyer as a public citizen—is clearly a daunting task.

Let's examine each of those three negative perceptions individually.

1. *Law Is Not a Caring Profession*

Here is a typical joke:

A man is on his deathbed and he summons his three best friends, one is a minister, one is an accountant and one is a lawyer. "Some years ago," the man says, "I lent each of you \$5,000." Each nodded in agreement. "All I need in order to die in peace," he says, "is the knowledge that each of you will repay the obligation when I die." Each of his friends solemnly promised to do so. Shortly thereafter, the man died and his three friends came to the funeral. One by one they approached his casket. First came the minister. He laid \$4,000 in cash on the casket and said, "Dear friend, I promised to repay the full \$5,000 but I know you will understand. I gave the remaining \$1,000 to the poor." Then came the accountant. He placed \$3,000, in cash, on the casket and he said, "Dear friend, I promised to repay the full \$5,000 but I know you will understand. You owed me \$2,000 and so I offset your debt against mine." Finally, came the lawyer. He said, "Dear friend, I apologize for the others. I intend to fulfill my obligation in full. Here is my check for \$5,000."

Lawyers like this joke, because it reveals the skill and craft and gamesmanship of lawyering. But it also reveals a fundamental problem with many lawyers. We fail

to appreciate and account for the moral and emotional, the human dimension. Too often we present ourselves as insiders who can manipulate the system. In short, if given the choice we prefer to be seen as clever but slick rather than to be seen as dull but reliable.

2. *Lawyers Are Greedy*

This is an old perception, but once again its incidence is on the rise.

"Before I take your case," said the counselor, "you will have to give me a \$200 retainer." "All right" agreed the client, handing over the money. "Thank you," the lawyer replied. "This entitles you to two questions." "What! \$200 for just two questions! Isn't that awfully high?" "Yes, I suppose it is," said the lawyer. "Now, what is your second question?"

Most lawyers believe that this is one a bad rap. In fact, the evidence is that lawyers as a group are more honest and more philanthropic than any other professional group. The perception of greed stems from the belief that lawyers do not contribute to social productivity; that we are a parasitic lot that always take our slice of the pie but don't make the pie any larger. This perception ignores all the planning and transactional work that lawyers do and focuses too much on litigation and its attendant costs even though over 75% of what lawyers do consists of transactional assistance. But nevertheless, that begs the question: Why does this misperception persist (and grow)? To answer this question, we need to realize that both of the preceding perceptions are, in reality, only different aspects of the third; and here is, finally, the heart of the matter.

3. *Lawyers Are Predatory—i.e., They Are Excessively Partisan and Manipulate the Legal System Without Any Concern for Right or Wrong*

Here come the shark jokes.

A lawyer and his wife were taking an ocean cruise. The ship hit a storm and the lawyer fell overboard. Almost immediately, eight sharks formed a two-lane escort for the lawyer and helped him all the way back to the boat. "It was a miracle," the lawyer told his wife as he was hauled back on deck. "No dear," she replied, "Just professional courtesy."

The perception that we are rapacious is one for which both sides are to blame. In fact, the public is deeply conflicted on this point. While in general it feels that lawyers are too partisan, when people are asked what is the most *positive* aspect of lawyers, the leading response is that "their first priority is to their client." A lawyer friend of mine explains the contradiction this way: law is the only profession where there is another lawyer on the other side trying to prevent you from accomplishing your goal. Imagine how you would feel about doctors, he says, if, during open-heart surgery, there were another doctor trying to ensure that the operation failed. In other words, lawyers are applauded for satisfying their own clients interests, and

condemned when they are seeking to satisfy the interests of the other side. The question here is this: how can lawyers and their clients teach each other about the nature of the social system that produces these profound contradictions?

I have a tentative prescription to offer; one that requires changes both from lawyers and from the clients that we serve. This prescription starts with Jefferson's ideal of the lawyer as a public citizen. I have marveled at the power of this singular notion for more than 25 years. As with all ideas, the commitment to civic virtue that lies at the core of our professional identity can be easily discounted (and often is), but, nevertheless, I believe it remains our greatest collective responsibility. But to make this idea work in the world, it cannot be just a conceit; it must remain a challenge to each of us.

What has happened to our profession? Quite clearly, within the span of our professional lives, the practice of law has evolved from a "professional calling" to the efficient delivery of skilled services in a competitive market. This evolution has had several effects. Most notably, it has caused the attributes of wise judgment, civility, and tolerance for the views of others to seem less valued both by clients and by lawyers alike. A first step, therefore, is for all of us to elevate as a role model the lawyer who promotes the public interest by the *manner* in which he or she practices law. The style of practice I have in mind is a patient and thoughtful style. A style in which the lawyer takes the time to educate the client about the nature of the legal process with which the client is interacting, about the reasons for the complexity and uncertainty of the process, about the competing social interests involved and how all this relates to the particular situation and needs of the client. Such a lawyer educates the client about the nature of civic community and enhances the willingness of the client to accept and contribute to the rules of that community.

I would contrast this style (at the extreme) with a second style: the lawyer who takes a highly partisan view of the client's cause, who explains all adversity as due to corruption or stupidity, who denigrates the legal system, and who generally takes the side of the client in all matters versus "them," whoever they are.

The first lawyer performs an enormous public service in contributing to the ability of the collective enterprise to function. The second lawyer contributes to its dissolution. The problem, of course, is that many clients may prefer the second lawyer to the first, so the lawyer who practices in the first style may suffer loss of income and opportunities over the short term.

But not for long, in my view. The first lawyer will be the one who is truly successful in a community, not only because of the style of his practice but because that style leads the lawyer to adopt a broader understanding of what it means to lead a professional life. He or she will be successful because the community will come to understand that this lawyer is a person who speaks with the public interest in mind. (That is, who speaks the truth to clients and should be taken seriously when advocating a position in the affairs of the community). This is a quality most really successful lawyers have.

It is not always easy to practice law in this manner. There are many temptations along the way to practice law in the second style, to tell the client what the client wants to hear. As a profession, we must make it clear, therefore, that a lawyer serves the public interest simply by resisting the temptations to practice in a way that creates short-term advantage. Even as we promote the value of a commitment to pro

bono services and public service careers, we must assert as well the importance of a commitment to a professional life well lived; a life whose satisfactions come in the knowledge that day after day, even in the performance of “routine” tasks, a good lawyer can and does promote the public good.

We can and must reinforce this model of the citizen lawyer in the modern law school curriculum. We have tried to do that at Virginia through our Ethical Values Seminars that are available to all third year students (who have already completed a required two hour course in Professional Responsibility). These seminars aren’t about rules; they are about values. Each seminar is team taught with a professor and a practicing lawyer or judge in the professor’s home. Readings may include *Antigone* or *A Civil Action* or *A Man for All Seasons*. And what do students learn? Hopefully, they learn some of the qualities of character that sustain a professional life. Hopefully, they learn what the often repeated phrase “the rule of law” really means: It means that the mechanisms people choose to regulate their affairs—ranging from the mundane to the majestic—are among the most precious commodities of a civilized society.

We must continue to create these kinds of opportunities in which mentoring relationships and other intimate learning experiences can flourish. Mentoring must begin in law school, but it must continue with young lawyers in practice. The one consistent plea I hear from young lawyers is their wish for more of the mentoring relationships that used to be the backbone of professional training. I have been an educator all my professional life. If I have learned one thing about how people learn, it is this. One person can teach the lessons of the Uniform Commercial Code or “Recent Developments in the Law” to a large group of students or practitioners. But you can only teach the lessons of life one on one. I grew up in India where my father worked with one of the great pioneers of world literacy—Frank Laubach—whose motto was “each one teach one.” If each of us adopted that motto as our mantra for fulfilling our professional responsibility, we would be well on the way toward changing the course of our profession.

Will these efforts solve the problem entirely? Of course not. Popular attitudes toward lawyers will always be profoundly contradictory. Popular culture wants to view law as the overarching principles of a just and harmonious society. Popular morality thus views the lawyer’s craft-oriented and client-oriented perspective as an abandonment of the lawyer’s duty to justice. But the popular view is simplistic. It fails to recognize the unpleasant reality that our society is not neatly ordered by a spontaneous and coherent system of values. Ours is a wildly pluralistic culture in which individuals and groups struggle to achieve recognition for their private perspectives. As lawyers, we have no answers to these larger social conflicts, rather we can only speak for specific sides of these struggles. But, at the end of the day, each of us can continue to take great pride in one bedrock truth: lawyers are the essential actors in transforming this bubbling social conflict into peaceful change—a change that is fashioned by lawyers into institutions that are irritatingly human but also are miraculously durable.