

THE LEGAL PROFESSION AND PUBLIC SERVICE*

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It is a privilege to speak to the National Legal Center for the Public Interest and to be introduced by Bill Webster, whose career, as lawyer, judge, and statesman, is a stellar example of how to serve the public interest. The Center's goal, greater "knowledge about law and the administration of justice," is particularly important today, when the profession projects two very different images.

On the one hand, there is the image implicit in the lawyer jokes and books, such as *Lawyers and Other Reptiles*.¹ My brother, when he was a trial lawyer, found it odd that anyone would buy such a book, for he patiently explained to me that lawyer jokes are not funny, particularly when told by a judge. "But judges are people, too," I would point out. "There is no evidence," he would respond. (Now he is a judge, and he has modified his views.) Regardless, the jokes tell us something about the first, all too popular image of a lawyer: narrow, inward-looking, and ethical corner-cutting.

What is the client's perspective? My friend James's English father-in-law, ruminating by the window of his farmhouse, asked James, "What do you see when you look out that window?" "Beautiful rolling hills," said James. "Well, James, what I see when I look out that window is expense." I am not surprised if that word lies at the heart of the client's point of view.

I was more surprised to learn that lawyers themselves increasingly describe their profession in negative terms. Recent books, Bar Association reports, and other studies report them as concerned about a big firm "treadmill": 2,100 or more hours billed to clients each year (that's about sixty-five or seventy hours in the office each week);² work that is too narrow, too tedious, leading to incivility

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1. JESS M. BRALLIER, *LAWYERS AND OTHER REPTILES*, (Contemporary Books 1992).

2. Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. TIMES, Aug. 17, 2000, at C5 (quoting Esther F. Lardent, director of the Pro Bono Institute at the Georgetown Law Center, to the effect that firms typically require between 2,200 and 2,300 billable hours).

and job dissatisfaction. "Too often," said one lawyer describing the work pace, it "is like drinking water from a fire hose." One study even says that lawyers are 3.5 times more likely than average to be clinically depressed³—though my wife, who is a clinical psychologist, will have to evaluate that one.

I have called to mind the negative contemporary image of the well paid, but narrow, hostile, and detached lawyer in order to contrast it with a more positive and more traditional professional ideal. The second, more positive, ideal is that of the lawyer as a generalist, as a problem solver, as a "statesman," as a productive participant in public life. Roscoe Pound defined a "profession" as a group of people "pursuing a learned art as a common calling in the spirit of public service."⁴ That is the ideal I have in mind.

The lawyer's public service tradition has a proud American history. Thirty-three of the fifty-five delegates to the Constitutional Convention were lawyers.⁵ In the nineteenth century de Tocqueville consequently commented that America, in its legal profession, had created a "natural aristocracy."⁶ The tradition of public service work was the engine that helped reformers, such as Pound and others, to reshape early twentieth century law better to serve modern society's commercial and social needs. That tradition illuminates the lives of many lawyers whom those in my law school graduating class much admired, for example, Burke Marshall, who left Covington to help engineer the civil rights revolution; or whom we had heard about, such as "Wild Bill" Donovan who could found both a major firm and the OSS; or whom we would later come to admire, such as Sol Linowitz, Lloyd Cutler, and, indeed, Bill Webster; and the many others who during their careers have participated effectively in both private practice and public life.

This evening I should like to discuss this second professional image, contrasting it with the first. Is the second image under threat? Can it maintain its traditional place in the new century? I shall describe four different "public service" roles for the profession, emphasizing how and why efforts to fill those traditional roles challenge the contemporary lawyer.

3. William Eaton et al., *Occupations and the Prevalence of Major Depressive Order*, 32 J. OCCUPATIONAL MED. 1079 (1990).

4. Quoted in Douglas W. Hillman, *Professionalism—A Plea for Action!*, 69 MICH. BAR J. 894, 895 (1990).

5. *Id.*

6. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 256 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2000) (1835).

A.
PRO BONO SERVICE

I begin with pro bono service, the provision of ordinary legal services to those who cannot afford to pay high legal costs. I keep the following example in mind. Two summers ago I met a judge from a Southeast Asian country. He told me that most villagers in his nation had never seen a lawyer or a judge. He persuaded a group of lawyers to lend him the use of a small private plane, and he spent each weekend flying to a distant village and listening to disputes, many of which involved the local police. He settled most of the disputes rather quickly, though apparently the police were not always pleased. He justified his pro bono work as a small effort to help the country's legal system work—for everyone—thereby building public confidence, confidence necessary to sustain the legal system itself.

Unfortunately, that judge is no longer an active judge, because he chose to resign rather than sign a newly required oath of loyalty to a new government. Nonetheless, the effectiveness of his pro bono work is clear, his commitment striking, and his rationale convincing.

We, of course, live in a far richer nation than does he. It is therefore not surprising to find that American lawyers devote millions of unpaid hours each year to mediating disputes, representing prisoners, advising less affluent clients on family matters, and taking part in other forms of pro bono work. But it is highly surprising to read the *New York Times*'s summary of a study published in *The American Lawyer* revealing that last year the 50,000 lawyers working at the 100 biggest firms worked far fewer pro bono hours than seven years before.⁷ That average apparently fell from fifty-six to thirty-six pro bono hours per lawyer per year, or about eight minutes per day⁸—just twice the time we are supposed to spend brushing our teeth. Simultaneously, average profits at the surveyed firms increased by 34% to more than \$3/4 million per partner.⁹

Why has this decline occurred? It does not seem a statistical fluke. The legal press cite instances in which several major law firms have told associates they cannot count "pro bono" hours to

7. Winter, *supra* note 2, at A1 (citing *The Am Law 100*, THE AMERICAN LAWYER, July 2000, at 161).

8. *See id.*

9. Anthony Perez Cassino, *Large Firm Does Not Always Mean Largesse*, N.Y. L.J., Aug. 4, 2000, at 24.

ward their billable hour quotas.¹⁰ And those who work in pro bono occupations have reported greater difficulty recruiting private lawyers for work, particularly on complex cases.¹¹ Though total pro bono hours provided by major firms has increased, that growth seems to reflect population change including the growing number of lawyers, not growth in each lawyer's pro bono contribution.

Nor does the decline coincide with diminished need. The American Bar Association has estimated that 80% of those with low incomes who need a lawyer in a civil case fail to find one.¹² For example, many of those who need lawyers have had to appear pro se in family law cases.¹³ Other studies make comparable estimates. Our government spends far less on civil legal assistance than do many other nations—about \$2 per citizen here, compared to about \$5 in France (where legal costs are far lower) and \$15 in Britain.¹⁴ Yet the typical British solicitor additionally donates about the same amount of weekly time (thirty-seven hours) as do American lawyers in top firms.¹⁵ Necessary legal assistance in those countries seems more readily available to those who cannot afford to pay.

Neither has the importance of pro bono work diminished. Our legal system today, as in the past, depends upon the public's confidence, and that confidence depends, in turn, upon rights that exist and are enforceable generally—in practice, not just on paper. No one believes that a democracy's legal system can work effectively while reserving its benefits exclusively for those who are more affluent. We often debate who should provide those services, government or the private sector, but few deny that they should be provided.

Some believe that the negative figures reflect the "treadmill" problem I mentioned at the outset. Rising legal salaries mean in-

10. Winter, *supra* note 2, at C5; Stephanie Francis Cahill, *High Starting Salaries Costing Pro Bono Cause*, CHI. DAILY L. BULL., Aug. 9, 2000, at 1; Brenda Sandburg, *Raising Salaries and Billable Hours May Curb Pro Bono Work*, THE RECORDER, Mar. 17, 2000, at 1.

11. Winter, *supra* note 2, at C5.

12. See AMERICAN BAR ASSOCIATION CONSORTIUM ON LEGAL SERVICES, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS—MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994).

13. Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations With Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 125 (1997) (reporting on experiences in Arizona, California, Massachusetts, Oregon, and Washington).

14. Talbot "Sandy" D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 FLA. ST. U. L. REV. 631, 651 (1998).

15. Jeremy Fleming, *Voluntary 40-hour Pro Bono Target Considered by Law Society*, LAW SOC'Y GAZETTE, July 28, 2000.

creased pressure to bill clients, which means a longer work day, which means less time for pro bono work, and which also, for many lawyers, means less job satisfaction. (In one study more than half the lawyers polled said they would not choose law again; "too many hours" was the chief complaint.)¹⁶ Remember the story of the young lawyer, felled by a heart attack, who complained to St. Peter, "How could you take me? I'm only thirty." "Well," St. Peter replied, "I looked at your billing records and thought you must be 95." Perhaps those billing records were accurate. If so, the pro bono problem is related to the "legal image" problem I mentioned at the outset.

If the treadmill is part of the problem, however, help may be on the way. For one thing, a press survey of the amount of pro bono work performed is itself a positive sign—at least when compared with the pure "profitability" rankings we ordinarily see in the legal press, and which tend to channel lawyers' competitive instincts in that single direction. An improved, *U.S. News and World Report*-type, ranking of "best firms" would rest on multiple criteria, including pro bono work.

For another thing, bar association reports suggest that the "treadmill" law firm life does not necessarily maximize firm profits.¹⁷ Apparently the profit-sharing systems used by some firms provide a greater than economically rational pro bono disincentive. The bar reports also urge firms to take account of the financial losses involved when associates leave a large firm within five years (as two-thirds do).¹⁸ They have pointed out that those who leave, or decide not to become equity partners, are disproportionately women. (Only 13% of the equity partners in large firms are women.)¹⁹ And they blame the treadmill.

Competition among firms for young lawyers, including women, may help. If, as I have read, firms are offering child care, in-office gyms, subsidized vacations, even dry-cleaning, in an effort to attract young lawyers,²⁰ some firms perhaps will compete in a different way by offering the opportunity for a more well-rounded life, involving

16. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 881, 890 (1999).

17. See generally BOSTON BAR ASSOCIATION TASK FORCE ON PROFESSIONAL CHALLENGES AND FAMILY NEEDS, *FACING THE GRAIL: CONFRONTING THE COST OF WORK-FAMILY IMBALANCE* (1999).

18. *Id.*, at 27-28.

19. *By The Numbers*, AMERICAN LAWYER, Mar. 1999, at 79.

20. See, e.g., Phyllis Haserot, *Giving Attorneys What They Want: Perks May Beat Out Big Money As Tools to Recruit, Retain Top Lawyers*, THE LEGAL INTELLIGENCER, June 5, 2000, at 7.

work, family, and community, as well. And associates will find work on a pro bono case interesting and rewarding.

Politics does not matter. In our Court, we receive pro bono or "public interest" briefs on behalf of prisoners on death row, briefs on behalf of property owners, briefs arguing for, or against, strict interpretation of the new habeas corpus act, briefs supporting or opposing restrictive interpretations of federalism. Whether I agree or disagree with the suggested outcome, I read those briefs with admiration for those who wrote them. Thus the firm that maintains a pro bono Web site, that systematically allocates pro bono work to associates, that counts that work toward billable hours, and that takes account of pro bono work when making partnership decisions, should compete strongly for the kind of lawyer who seeks a more diverse and interesting legal career.

Finally, as I have said, some firms in every community are now heavily engaged in pro bono work, helping to settle disputes, providing lawyers for community programs, even offering awards to high "public interest" achievers. Some states, such as Florida, suggest a quota of pro bono hours and have created mandatory reporting requirements to track implementation.²¹ Bar leaders, legal service providers, social agencies, and schools have cooperated in developing specific programs. The American Corporation Counsel Association, for example, recently said it will start a pro bono project Web site for use by in-house counsel.²² Imagination helps. The Eleventh Circuit reaches out to the elderly with "wills on wheels."²³

In sum, there are competing trends. The positive and negative taken together seem to pose a critical question, which firms will have to answer. What kind of professional life do we want to create within our firm? It is not so easy to answer this question or for members of a firm consciously to affect the quality of their own professional lives, for members of a law firm, like other economic actors, face pressures, growing demand for their services, competition for young associates, limited office time, changing social needs, pressure to increase salaries, and increasing costs.

Paraphrasing both Roscoe Pound and Vannevar Bush, I would ask, can lawyers, in these circumstances, find ways to remain well-paid professionals, for whom the law is a "means of livelihood" (that's Pound),²⁴ while avoiding "a mad scramble for riches?"

21. D'Alemberte, *supra* note 14, at 641-48.

22. Elizabeth Amon, *Corporate Pro Bono Gets Boost*, NAT'L L.J., Sept. 11, 2000, at A1.

23. D'Alemberte, *supra* note 14, at 648-49.

24. Hillman, *supra* note 4.

(that's Bush).²⁵ I am not qualified to answer the question. But I believe it important that lawyers ask it. And, of course, I suspect that any satisfactory answer will include a fair ration of pro bono work.

B. LAW CREATOR

The lawyer's second public service role is that of law creator. Learned Hand pointed out that, in fact, neither judges nor legislators create the law. Rather, he said, it "is the bar that makes the statutes," and which "fabricates the judgments" that the courts "express."²⁶ Law "becomes incorporate" in "thousands of chambers, committee rooms, and lecture halls;" it "lives in the consciousness of the profession as a whole."²⁷

I sense the truth of Hand's remark daily, particularly when we face an important, difficult, open-ended question of law. Like my colleagues, I immediately turn to the briefs for help. And often the most helpful brief is the brief that reveals something more than pure, legally specialized, technical knowledge.

For example, does the Constitution provide a terminally ill patient a right to physician-assisted suicide? When our Court faced this question, we received, read, and were helped by, nearly seventy briefs, most of them filed *amici curiae* by, for example, associations of doctors, nurses, psychiatrists, hospice workers, scientists, clergy, and the disabled.²⁸ The lawyers who wrote those briefs had to understand more than the details of medical regulation. They had to canvas legal, medical, and social aspects of the issue. They had to explain the complex relationship of the constitutional question to a long-standing public policy debate, which was taking place both here and abroad. Above all, in making the relevant experience of the interested groups accessible to generalist judges, the lawyers had to translate relevant predictions about potential social consequences into proposed rules of constitutional law.

The answers to more technical sounding legal questions often call for similarly broad skills. For example, has the scientist who creates, say, a gene fragment useful as a probe for locating genes,

25. Vannevar Bush, *What I've Learned About the Art of Management*, THINK MAG. (Sept.-Oct. 1967), at 15.

26. Learned Hand, *To Yale Law Graduates*, in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 88-89 (Irving Dilliard ed., 1952).

27. *Id.*

28. The question was raised in two recent cases: *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksburg*, 521 U.S. 702 (1997).

“invented” a patentable way to use a small part of the body to perform a useful function or has he simply “discovered” how a non-patentable portion of the body functions? An answer to this question, either in a court or before a legislature, may well require an understanding of how patent law ought to treat the fruits of genetic research. That understanding, in turn, requires reference back to the most basic concerns of intellectual property law: providing financial incentives that will promote discovery and disclosure without undue restriction upon dissemination or use of an idea or inhibition of scientific advance. And determining what kind of financial incentive is appropriate to that end calls for more than a technical understanding of patent law. Answers will grow out of ongoing policy conversations among scientists, the biotechnology industry, economists, and lawyers. And the lawyers who contribute most to the formation of emerging public policy will understand and translate for the generalist legislators (or judges) experience and understanding drawn from those other fields as well as from their own.

The lawyer’s prominent role in the law-creation process reflects the fact that in America law is not so much decreed from the top down as it arises from the bottom up. Debate, discussion, and exchange of information among interested groups drives the public policy process, and the lawyer’s participation helps. But that participation requires a broad outlook and broad experience.

Of course, it also calls for specialized legal knowledge. When my father went to law school, he learned five basic subjects: property, torts, contracts, criminal law and procedure. I studied tax and administrative law as well, along with a few other subjects mostly growing out of New Deal regulation. But much of today’s law is written in specialized agencies by specialized regulation writers to be understood and applied by other specialists. And understanding the narrow specialty subject, keeping up with changes, and offering specialized advice, threatens to take up much, if not all of, a practicing lawyer’s time.

But the creation of new law, whether patent law or human rights law, requires considerably more. My examples seek to show why and how creative legal specialists must have generalist skills as well. They must understand how the specialties fit within the broader human picture. Charlie Wyzanski made the point when he quoted, as he often did, Salvador de Madriaga: “He who is nothing but, is not even.”

The challenge, of course, is to combine specialized knowledge with a broader outlook. However difficult it may be to do so, law

increasingly demands it. Today's legal world is a world of law creation. Changing technology, the Internet, genetic research, and the like, are already forcing legal change. "Globalized" commerce has brought about rapid change, for example, in much relevant foreign commercial law—to the point where (as a British lawyer recently told me) major law firms sometimes leave a business contract's "choice of law" clause blank awaiting the most recent development. The number of international adjudicative bodies making legally binding decisions has proliferated. For example, the European Court of Justice, the World Trade Organization, NAFTA, the World Bank Inspection Panel, its regional counterparts, other regional economic tribunals, and several international human rights courts, including the European Court of Human Rights, have the power to issue binding interpretations about, for example, the interaction of the Internet and basic principles of free expression.

American lawyers must be "present at" this "creation." Are they? The rarity of comparative citations to foreign law in the many briefs I read has left me uncertain. More to the point, will American lawyers continue to garner the broad professional and human experience and knowledge needed to help create new law, internationally as well as domestically, that works well for all citizens? Is the treadmill the enemy? Or will firms, by making non-billable hours available, encourage their lawyers, particularly younger lawyers, to maintain contacts with other professionals, with those in other fields, with other members of their communities? Lawyers, said Bob Meserve, love meetings, including bar association meetings, for example, of the ABA with its 600,000 members and 800,000 committeees, for it is in those committee meetings that law reform begins. A senior teaching colleague once told me, "Go to those meetings." For any lawyer who intends to participate in the creation of sound public policy, that is good advice. And that advice remains part of the "public service" challenge.

C. "CITIZEN-STATESMAN"

The lawyer's third role is that of the "citizen-statesman," the classic example being Cincinnatus. Twentieth century examples include Dean Acheson, Henry Stimson, Cyrus Vance, and others I mentioned earlier. Lawyers looking for interesting government work, however, need not search only at the top. There is plenty of room in the middle and at the bottom.

I can speak firsthand about one of the most satisfying episodes of my own career—working in 1974 as a staff member of a some-

what obscure Senate subcommittee—the Subcommittee on Administrative Practices and Procedures—charged with organizing hearings on airline deregulation. The work was fascinating; the experience, invaluable; and the opportunity to participate in the making of public policy, inspiring. At one point, a woman from East Boston interrupted a hearing to ask the Chairman, Senator Kennedy, “Senator, why are you holding hearings on airlines? I’ve never been able to fly.” “That,” said the Senator, “is why I’m holding the hearings.” The hearings did help bring about deregulation; and airfares on balance have dropped, leading to more flights—and also to greater congestion, I concede. But my object is not to defend airline deregulation. I simply want to underscore the value for any lawyer of a few years of publicly-oriented work. I am reasonably certain that my colleagues on the Judiciary Committee staff, who have entered, or returned to the private sector, for example, David Boies, Ken Feinberg, and Tom Susman, would agree.

Indeed, when I left law school, graduates often began their careers by working in government for several years, entering government service directly or after working as a law clerk for a judge. There they might help enforce not only civil rights laws, or the then-equivalents of environmental law, but also tax law or securities law. Many believed that government experience, say in the Tax Division or at the SEC, would train them, in part by quickly providing them with major responsibilities, thereby making them better tax or securities lawyers, valuable in both private and public sectors.

Given my own experience, I was unhappily surprised, when a member of a top law school’s visiting committee showed me figures about that school’s recent graduates. In the 1970s between 10.4% and 12.4% of graduating law students entered (directly or after clerking) either government or non-government-public-interest work. By 1998 that number had fallen to a minuscule portion of the graduating class, 3.3%.²⁹ This recent number seems consistent with the views of many who have served in government, that recently it has become harder to attract private lawyers into government service at all levels but the very top.

Why the change? Some believe that “conflict of interest” laws, concern about the “revolving door,” and less attractive government working conditions play a role. Others point to huge differences between private and public starting salaries. In constant dollars that difference has more than doubled since the early 1970s; the

29. Personal communication from Daniel Coquillette, Assistant Professor of Law, Harvard University.

difference between private firms and public interest law firms has more than quadrupled; and the typical burden of law school debt has increased even faster.

But can, or should, these factors make so much difference? “Conflict of interest” laws do not prohibit government service; job interest can lead professionals to tolerate low salaries or difficult working conditions, at least for a while; and many schools have debt forgiveness programs that permit graduates to take low-paying public interest jobs without financial penalty. At the same time, the need for interchange, for a mix of career experiences, would seem greater than ever. Government benefits from the first-hand experience of those who have worked successfully elsewhere. The individual lawyer brings to private sector work a knowledge of how government works. And that lawyer’s professional life will be enriched by an understanding of the problems that face, say, the environmentalist, consumer advocate, securities regulator, prosecutor, or public defender.

Can we avoid a growing career compartmentalization that would increasingly isolate private, governmental, and “public interest” experience, each from the other? Can we communicate to the next generation both the excitement and the professional value of a varied career experience? That, it seems to me, is our profession’s third “public service” challenge. To meet it, the law schools may have to consider ways to alleviate further the burden of law school debt, legislators may have to focus ethics laws carefully upon the evils they seek to avoid, both government and the profession may have to face the problem of salary differentials, and the private practitioners may have to consider the true value, in both professional and human terms, of encouraging the career flexibility that will permit younger practitioners to work for a time in both private and “public interest” sectors.

D. TEACHER

The fourth “public service” role for lawyers is that of teacher—a teacher of our most basic legal and constitutional values. I would illustrate the role’s importance with three constitutional cases.

The Supreme Court decided the first case, *Worcester v. Georgia*, in 1832.³⁰ At the time the Cherokee Indian Tribe was living in northern Georgia on land guaranteed to them by treaty. Unfortunately, the Georgians found gold on Cherokee land; they tried to

30. 31 U.S. 515 (1832).

seize the land and evict the Cherokees; the Cherokees hired a lawyer; and the Supreme Court decided, in *Worcester*, that the Cherokees were right, the Georgians must leave them alone. Georgia announced it would not obey the Court. And, legend has it, President Andrew Jackson responded by announcing, "John Marshall has made his decision; now let him enforce it." Jackson eventually sent troops, but the troops evicted the Cherokees. And the Cherokees followed the Trail of Tears, thousands dying on the way to Oklahoma, where they live to this day.

The Supreme Court decided the second case, *Cooper v. Aaron*,³¹ more than a century later. In that case nine Justices signed an order making clear that southern States would really have to desegregate their schools; *Brown v. Board of Education*³² meant what it said. This time the President, President Eisenhower, sent troops to enforce, not to defy, court orders. He sent them to Arkansas where the Governor was standing in the schoolhouse door. And those black children entered that white school.

The Supreme Court decided the third case last Term, a Term in which we considered highly controversial questions, including, for example, abortion, aid to church schools, and discrimination based on sexual orientation.³³ You may take as my third case any one of those very difficult cases. However controversial or unpopular the decisions were, we all believe today that the law will be enforced and that generally the public will follow it.

The point these cases illustrate is that the constitutional system that protects our liberties consists not simply of fine words on paper, but also of habits, customs, expectations, settled modes of behavior engaged in by judges, by lawyers, and by the general public. And those habits and expectations have developed gradually over 200 years of a history that has included a civil war and many years of racial segregation. I see the result illustrated in our courtroom every day, as men and women of all races, religions, nationalities, and every possible opinion come to settle under law matters that elsewhere might be settled in the streets. That is a legal heritage, a treasure, which we must work to preserve.

John Marshall pointed out, however, that the "people made the Constitution and the people can unmake it. It is the creature of

31. 358 U.S. 1 (1958).

32. 347 U.S. 483 (1954).

33. See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (abortion); *Mitchell v. Helms*, 530 U.S. 793 (2000) (aid to church schools); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (discrimination based on sexual orientation).

their will, and lives only by their will.”³⁴ History makes clear that the Constitution can work only with the understanding, active support, and participation of millions of ordinary Americans. And here there is enough evidence of indifference to, or distrust of, government by those ordinary Americans to provide cause for concern.

I am not concerned when I read that fewer Americans can name three Supreme Court Justices than can name the Three Stooges. But it does bother me that more teenagers can name the Three Stooges than can name the three branches of government; or that three times as many know that “90210” stands for Beverly Hills than know that “Philadelphia” stands for “The birthplace of the Constitution”; or that only half as many know the first three words of the Constitution, “We the People,” as know the first three letters after “http:”.

It worries me even more that “trust in government,” as measured by statistical surveys, has headed steadily downward since 1964, with 76% trusting government then compared to about 25% in the year 2000 (though this has changed recently).³⁵ And I think it should be of great concern that twenty-one states do not require any high school course in government or civics, while the Department of Education reports that three-fourths of all elementary and secondary school students are not proficient in that subject.

Our Constitution creates a certain form of government, a democracy with basic guarantees of human freedom. It is an enabling document that does not dictate substantive policy choices but foresees those choices being made by “We the People.” How can that document work if “We the People” are indifferent to, ignorant of, or cynical about, the very governmental system it creates? The answer is: it cannot work without the public’s trust and its participation.

As judges and lawyers we have a related special responsibility, that of helping to preserve the traditions, habits, and expectations of behavior that make the Constitution’s guarantees of freedom a reality. Two summers ago, I met the Chief Justice of Tanzania. He discussed his own nation’s fairly recent transition from a more authoritarian to a more democratic society. And he described how he, and other judges, had held meetings in their courthouses with ordinary citizens, where they would discuss what government was and what it ought to be. The courthouses had become school-

34. *Cohens v. Virginia*, 19 U.S. 264, 389 (1821).

35. *All Things Considered* (National Public Radio, July 28, 2000) (transcript available at 2000 WL 21471369) (reporting on the results of a Kaiser Family Foundation poll).

houses—schools for democracy. In Boston, both bench and bar have made an effort to bring inner-city school children to the court houses, to learn how their government works. Indeed, educational programs, involving bench and bar, exist across the country.

The best way to teach, however, is through example. Every time we represent a client, argue in court, participate in a public or professional meeting, or take on pro bono work, we set an example. With every action—and inaction—we send a message to our peers and, more importantly, to the next generation. That message can say that standards matter, that law matters, that civic life matters, that participation matters. The lawyer's role as teacher is his most important role in public service, for it encompasses all the others.

CONCLUSION

I have tried to describe the legal profession's four traditional public service roles: the lawyer as unpaid attorney, as law reformer, as statesman, and as teacher. At the same time, I have pointed to certain trends in contemporary professional life—an inwardness and a narrowness—that threaten the lawyer's ability to fill those roles. And the threat is a serious matter in a world that more than ever needs a legal profession that, to return to Roscoe Pound, pursues its calling "in the spirit of public service."³⁶

The different ways in which lawyers may embody that spirit suggest various ways in which different branches of the legal profession may have to respond. It suggests to law schools the importance of efforts, such as debt-forgiveness, that help to redress the skewed economic incentives that high tuition helps to create. More importantly, it indicates the need to communicate to students more clearly the many different kinds of career choices that can affect in the long run the quality of their professional lives. It suggests to private-sector lawyers the importance of participating in pro bono work (turning on the "corporate counsel pro bono" Website), in bar association programs, or in other "broadening" activity. Moreover, it indicates the importance of creating a workplace culture that takes account of the lawyer's personal needs and professional needs as broadly defined. It suggests to young lawyers how important it is to decide consciously what kind of career they want and what they want the story of their lives to say. And, most immediately, it means that more young lawyers may have to speak up, tactfully of course, in an effort to help the firms create the workplace environment that they will need. Implementation is not easy, but the ideal is

36. Hillman, *supra* note 4.

clear. The ideal is not public service added on to other career obligations, but public service as part of an integrated professional life.

Yet there are reasons for optimism—reasons I need not explain to those here. Some rest upon pure self-interest. Symbols are important. The lawyer jokes hurt because, the more they reflect what the public believes, the more they threaten the way we think, and want to think, of ourselves. The “spirit of public service” casts a very different, and far more satisfactory, image. After all, when Holmes said that he had spent much of his life trying to prove to his father that a lawyer could be a great man, he did not have the treadmill, or purely financial rewards, in mind.

Other reasons rest upon necessity. Public confidence in the law depends upon widespread provision of legal services. Sound law—law that works properly for those whom it affects—requires the lawyer’s participation in its creation. Government benefits significantly when lawyers from the private sector spend at least a portion of their careers as public servants. And our constitutional democracy, built on assumptions of public confidence and participation, also presumes that members of our profession will act as teachers, at least through example.

Not least, there are those reasons of enlightened self-interest that we call ethics. You each may have your own preferred ethical references. Mine is Rabbi Hillel’s: “If I am not for myself, who will be for me? If I am only for myself, what am I? And, if not now, when?”³⁷

Finally, I want to report that my law clerk has checked with Amazon.com. *The Federalist Papers* ranks number 2,453 on Amazon’s best seller list. That is not bad. *Lawyers and Other Reptiles* ranks number 107,916. Now, if that isn’t cause for real optimism, what is?

37. THE TALMUD, *The Wisdom of the Fathers*: 1:14.

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