

## SOME THOUGHTS ABOUT CITIZEN LAWYERS

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In his letter inviting people to this conference on the “citizen lawyer,” Professor James E. Moliterno stated frankly that this term, “citizen lawyer,” had no fixed meaning. The phrase could refer, he said, to the lawyer in public service.<sup>1</sup> It could refer to private lawyers who work in the public interest (not an easy term to define).<sup>2</sup> Or, in the “broadest view,” one might say that “all lawyers are citizen lawyers” since they have a “critical role in the justice system or the economic life of the country.”

It seems clear that, under the first two views, most lawyers, past and present, have not been citizen lawyers at all. Whether there are fewer “citizen lawyers” now than before is hard to say, because of difficult or impossible problems of measurement. Personally, I doubt that there has been any serious falling off. Clearly, lawyers who work for the government have always been a small minority. There are more of them today than ever before, for an obvious reason: government is bigger than it ever was.<sup>3</sup> Whether all lawyers who work for the government are “citizen lawyers” is another question. It is hard to say why a lawyer who handles tort claims against the government is in any way performing a nobler task

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1. See James E. Moliterno, *A Golden Age of Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials*, 50 WM. & MARY L. REV. 1261, 1271-77 (2009) (discussing many conceptions of the citizen lawyer); Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1324 (2009) (discussing “the bar’s responsibilities not only to engage in pro bono work, but also to support a system that makes legal services widely available to those who need them most”).

2. See Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1169 (2009) (defining the citizen lawyer as one “who acts in a significant part of his or her professional life with some plausible vision of the public good, the general welfare, in mind”).

3. Cf. Edward Rubin, *The Citizen Lawyer and the Administrative State*, 50 WM. & MARY L. REV. 1335, 1350-77 (2009) (discussing the obligations of the citizen lawyer under the growing regulatory state).

than the lawyer who handles tort claims against a pharmaceutical company.

“Public interest lawyers” in the sense that the term is used today hardly existed before the twentieth century. Of course, there were lawyers who volunteered to help out the poor and the downtrodden. How many of this sort ever flourished is not something we have the figures to document. In any event, the vast majority of lawyers, now and then, have always been, frankly, out to make a buck. In a free enterprise system, this is nothing shameful.

In the third, or broadest sense, I think the situation is more complex, and the questions about citizen lawyers harder to answer. It is pretty clear that the legal profession does have a critical role in the justice system and in the economic life of the country. There are a number of ways in which this is true. Some of them are very obvious. Only lawyers have the right to represent clients in court. Without lawyers, the “justice system” as we know it would not exist. People accused of a crime, or who find themselves on either end of a personal injury claim, could hardly get a fair shake without the help of a lawyer. And the masses of business lawyers must make *some* impact on “economic life.” Indeed, for many businesses, lawyers are quite indispensable; the company could hardly run without them. But other lawyer roles in society are somewhat less obvious.<sup>4</sup> In this brief Article, I want to say a few words about these less obvious roles.

Throughout this Article, I deliberately use the term “legal profession” rather than “all lawyers.” What is important is the role of the legal profession as a whole,<sup>5</sup> especially considering that there are always exceptions to any general statement. Some individual lawyers have played a negative role—in the economy, in the system of justice, in society in general. It would be pointless to deny this. Some lawyers have been out-and-out scoundrels, cheats, or thieves;

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4. See, e.g., Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105 (2009) (discussing the role that citizen lawyers have in protecting the judiciary).

5. *But cf.* Sanford Levinson, *What Should Citizens (as Participants in a Republican Form of Government) Know About the Constitution?*, 50 WM. & MARY L. REV. 1239 (2009) (discussing how nonlawyers act as “citizen lawyers” when knowledgeable and active on legal issues, such as constitutional interpretation); Mark Tushnet, *Citizen as Lawyer, Lawyer as Citizen*, 50 WM. & MARY L. REV. 1379 (2009) (same).

others have even been the occasional murderer-lawyer. A fairly large number, in the past and in the present, have been simply incompetent. And plenty of lawyers have been so grasping and greedy, so intent on where the next dollar is coming from, that it would be absurd to classify them as “citizen lawyers,” no matter how one stretched the term.

The really bad lawyers are (I hope) exceptions. Not that lawyers as a class have any special virtues as human beings—almost all occupations are useful to society in one way or another, including accountants, maintenance people, saxophone players, and hairdressers. The people who do these things have no special gift of goodness; they are just people, like everybody else. Their virtue, such as it is, derives from the fact that they do quite useful things.

Lawyers, like people in other occupations, dearly love to pat themselves on the back. I remember a speech a prominent lawyer gave to an entering law class many years ago. He told the group of eager young people that justice and the public good, not money, were the main goals of law practice. I doubt whether anybody believed him. Or whether he believed it himself.

The general public certainly has no illusions about the profession. Indeed, quite the contrary: according to survey data, people have a very low opinion of lawyers. A December 2006 Gallup poll asked people to rate the “honesty and ethical standards” of different occupations.<sup>6</sup> Eighty-four percent of the respondents rated nurses “high or very high,” and dentists received 62 percent. Lawyers, by contrast, received a dismal 18 percent.<sup>7</sup> In a Harris poll that asked whether various types of people could be trusted to “tell the truth,” lawyers did even worse; at 27 percent, they were at the very bottom of the list, outranking only actors at 26 percent.<sup>8</sup>

I might cite here, too, Marc Galanter’s wonderful and careful study of lawyer jokes.<sup>9</sup> Hundreds and hundreds of jokes about lawyers have circulated both now and in the past. They are

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6. PollingReport.com, Values, Gallup Poll Dec. 8-10, 2006, <http://www.pollingreport.com/values.htm> (last visited Feb. 27, 2009).

7. *Id.* Congressmen, at 14 percent, did even worse, and car salesmen were at the bottom, with a miserable 7 percent. *Id.*

8. *Id.* at Harris Poll July 7-10, 2006.

9. See generally MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (2005).

overwhelmingly negative; the best that can be said is that some jokes show lawyers as charming and clever schemers.<sup>10</sup> In most jokes, lawyers are depicted as rapacious, dishonest, and even as creatures of the devil.<sup>11</sup> In the 1997 Al Pacino film *The Devil's Advocate*, the devil *was* a lawyer. In addition, there is currently a powerful, and rather successful, "tort reform" movement that treats lawyers as arch-villains; their foul work is wrecking the economy, bankrupting whole cities, and driving gynecologists out of business. Many people are convinced that trial lawyers foster a culture that permits greedy people to bring crazy lawsuits while the rest of us lose out. The political point of this campaign is quite obvious: to blunt the force of twentieth century tort law and shield businesses from the impact of lawsuits.<sup>12</sup> But its success suggests that it taps into widespread norms and ideas.

Moreover, Galanter studied jokes about *American* lawyers. Are there jokes about Russian lawyers, or about Bolivian lawyers? Apparently not, or at least not many. Daumier's caricatures of French lawyers and judges are well-known, and quite scathing. But in general, the sheer volume of jokes about lawyers in the United States seems to be unusual, even unique.

Why lawyers have such low esteem is not an easy question to answer. In an oblique way, of course, the jokes testify to the importance of lawyers. In public life, lawyers seem to be everywhere at once. And their work is incredibly *salient*. Not a day goes by without news, on TV and in the press, about lawyers, judges, lawsuits, trials, and related matters. One would have to be completely tone-deaf not to hear the constant voices of law and lawyers all over the airwaves, and completely blind not to see lawyers everywhere on television and in the movies. Cop shows and crime shows seem to dominate prime-time television. On daytime television, a positive epidemic of programs presents imitation judges

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10. See, e.g., *id.* at 176.

11. See, e.g., *id.* at 17, 97-100.

12. For details about this campaign, and its effect on the media, see generally Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony, and the Great American Liability Insurance Famine of 1986*, 11 *STUD. L., POL., & SOC'Y* 95 (1991); Michael McCann, William Holtom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 *U. MIAMI L. REV.* 113 (2001).

deciding cases in front of a studio audience and a home audience of millions.<sup>13</sup>

This is also a country that has an enormous *number* of lawyers: over a million at the moment and rising rapidly, like floodwaters after a vicious storm. We are to lawyers what Saudi Arabia is to oil. The American legal profession, however, has been big and getting bigger for quite some time. During the colonial period, to be sure, there were rather small numbers of lawyers.<sup>14</sup> But after independence, the profession began to grow very rapidly. In Massachusetts, for example, there were only about fifteen lawyers in the middle of the eighteenth century; by 1840, there were 640.<sup>15</sup> The trend continued during the nineteenth and twentieth centuries. There have been a certain number of zigs and zags over the years—during the Great Depression, for example, the profession quite naturally failed to grow. But on the whole, the profession has gotten bigger and bigger over the years, rising at a pace much faster than population growth in general. The pace may be more rapid today than ever before. Every year, many thousands of future lawyers pour out of the law schools and cram for the bar.

Why do we have so many lawyers? The short answer is, because lawyers were, and are, extremely useful people.<sup>16</sup> And they have been particularly useful in the United States, as this was the first middle-class society. By this, I mean it was the first society in which ordinary families owned a piece of land, a shop, or some assets. In a state like Illinois, in the mid-nineteenth century, the typical family lived on a farm of respectable size. The farm might be subject to a mortgage, but at least there was no landlord, nobody to whom to pay rent, nobody equivalent to the English landed gentry.<sup>17</sup> So, unlike England, masses of people in the northeast and

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13. Judy Sheindlin, more commonly known as “Judge Judy,” is only the most famous of this bunch.

14. See GERARD W. GAWALT, *THE PROMISE OF POWER: THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840*, at 7 (1979) (stating that in 1765, there were “fewer than fifty” lawyers in the American colonies).

15. *Id.* at 14 tbl.1.

16. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 54 (3d ed. 2005) (noting that “when society became more complex—and more commercial—[l]awyers became essential”).

17. *Id.* at 24.

midwest had a real stake in society. These were people, then, who needed at least a little bit of legal help from time to time. They needed somebody who understood public land law, for example, or the laws of inheritance. At times, they needed help collecting a debt or resisting collection.

The widespread ownership of land shaped many aspects of American life, and consequently shaped many aspects of American law. And it dramatically affected the legal profession. There were many books published in the nineteenth century with titles like “Every Man His Own Lawyer” or “The American Lawyer.”<sup>18</sup> These books told the average farmer, citizen, and businessperson how to cope with those parts of the law that might touch their lives.<sup>19</sup> No doubt these books were helpful to ordinary people—actual lawyers were even more helpful.

The widespread ownership of land helps explain why the legal profession grew so fast.<sup>20</sup> Politics was another factor. Government in the United States was radically decentralized. In the nineteenth century, the federal government did not amount to much, but there were state governments, county governments, and city governments. Lawyers were the dominant political class. They were the men who knew their way around the statehouse, the city hall, and the county seat. Politics was good for their business, and their business was good for politics. Law was the path to the top for ambitious young men and very little blocked that path. While becoming a British barrister took time and money and was, in essence, limited to the top levels of society, no such barriers stood in the way of American lawyers. The typical lawyer of, say, 1850, was a bright young man who came from a good family, though not necessarily a rich one. Maxwell Bloomfield studied the obituaries of lawyers who died between 1830 and 1860. Some were children of lawyers or judges or doctors, but about half were children of ministers, farmers, or mechanics.<sup>21</sup> Very few lawyers in the first

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18. See, e.g., DELOS W. BEADLE, *THE AMERICAN LAWYER, AND BUSINESS-MAN'S FORM-BOOK* (1860).

19. See, e.g., *id.* Beadle's book, according to the preface, was “emphatically a manual for the guidance of any and every man in business transactions.” *Id.* at 3. But it would also be useful to “the Farmer,” “the Mechanic,” “the Emigrant,” and, in fact, “every Man.” *Id.* at 3-4.

20. See FRIEDMAN, *supra* note 16, at 237.

21. Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-*

half of the nineteenth century studied law in a law school; apprenticeship was the norm.<sup>22</sup> The budding lawyer typically spent a year or two in somebody's law office, running errands, copying documents, and learning by osmosis.<sup>23</sup> At the end of this period, he was, in theory, equipped to practice law; nothing like a modern bar examination stood in the way. When the young sprout felt ready, he went to a local judge, answered a few questions, and was promptly sworn in.<sup>24</sup>

That the profession—if we can call it that—had no fixed boundaries<sup>25</sup> was another significant fact. In this emerging society, it was hard to tell the difference between a legal issue and a business, personal, or any other kind of issue. Lawyers did courtroom work, of course, but they did all sorts of other things as well. They told small businessmen what to do. They collected debts. They advised people about land, and speculated in land themselves. They were great generalists. They oozed into any niche of the market where there was money to be made. They made sure that they were useful. They followed every twist and turn of economy and society.

Lawyers took on new jobs and new functions as time went on, surviving even as old jobs disappeared. Title companies, in the late nineteenth century, took over one of the standard tasks of lawyers. Debt collection, too, gradually slipped from their hands. Trust companies robbed lawyers of another facet of their practice. But the growth of big business and heavy industry provided lawyers with roles, jobs, and opportunities they had never had before. The profession continued to be malleable, open-ended, supple—and successful.

During all of this time there were, of course, “citizen lawyers.” There were governors and secretaries of state and high court judges. Many American presidents were lawyers—Thomas Jefferson and Abraham Lincoln, for example. Successful lawyers were often leading citizens in their communities. They were also captains of

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1860), 12 AM. J. LEGAL HIST. 306, 313-14 (1968).

22. See FRIEDMAN, *supra* note 16, at 56, 238.

23. See *id.*

24. See *id.* at 237.

25. See *id.* (noting the lack of defined standards for the legal profession in the nineteenth century).

industry. Still, the primary business of lawyers was business—making money. The “citizen lawyers” were never more than a small percentage of the active bar.

### I. THE LEGAL PROFESSION IN THE TWENTIETH CENTURY

The legal profession, then, had become large and, on the whole, successful in the nineteenth century. In the twentieth century, the profession grew even more rapidly. In 1951 there were about 220,000 lawyers in the country; by 1991, that number had risen to more than 800,000; and by 1994, to nearly 900,000.<sup>26</sup> And by the end of the century, the profession had reached and passed a kind of milestone: there were more than 1,000,000 lawyers.<sup>27</sup> Indeed, in 2007, there were apparently over 1,100,000 active lawyers.<sup>28</sup> The profession had also changed dramatically in demographic terms. By 2000, it was no longer a white male profession. Women made up over a quarter of the bar,<sup>29</sup> and almost half of all law students.<sup>30</sup> Apprenticeship was dead, replaced by the modern law school.<sup>31</sup> And more and more lawyers were no longer solo practitioners; instead, they worked for large firms. In 1900, a firm with twenty lawyers was large—probably no firm was larger.<sup>32</sup> In 1950, a firm with fifty lawyers was immense.<sup>33</sup> By 2000, firms with over a thousand lawyers were far from rare, and the largest firm had over 3000

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26. BARBARA A. CURRAN & CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S*, at 1 (1994).

27. CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000*, at 1 (2004).

28. AM. BAR ASS'N, *NATIONAL LAWYER POPULATION BY STATE (2008)*, available at <http://www.abanet.org/marketresearch/resource.html#Lawyers>.

29. CARSON, *supra* note 27, at 3.

30. According to the American Bar Foundation, during the 2003-2004 academic year, there were 137,676 students enrolled in J.D. programs; nearly 49 percent of them were women. AM. BAR FOUND., *FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER (2008)*, available at <http://www.abanet.org/legaled/statistics/charts/stats%20-%206.pdf>.

31. There is a huge body of literature on the history of legal education. The standard text is ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983); see also WILLIAM P. LA PIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 7 (1994).

32. See FRIEDMAN, *supra* note 16, at 537.

33. See *id.*



lawyers.<sup>34</sup> Some of these megafirms have branches throughout the United States as well as in cities all over the world, from Paris to Bangkok.<sup>35</sup>

What are all of these lawyers doing? Many things, of course. They have become, if anything, even more useful for businesses and individuals than in the past. In today's world, lawyers are in many ways indispensable. Many people think of lawyers as troublemakers—people who stir up disputes—and no doubt there are lawyers who fit this description. But far more lawyers spend their time trying to avoid disputes, and trouble, for their clients. This last statement, I think, puts what lawyers do in too negative a light. Lawyers actively help their clients get on with their work and their lives. They “assist their clients in minimizing transaction costs, circumventing regulatory constraints, escaping encumbering liabilities, and pursuing various strategic objectives.”<sup>36</sup>

Businesses and businesspeople do resent lawyers at times, and often grumble about them and what they do. But they also know that they need these lawyers. You cannot start a business of any sort—or carry it on, for that matter—without help from a lawyer. If you want to patent an invention, you need a lawyer. You even need a lawyer to go bankrupt. And, of course, anybody arrested for a crime desperately needs a lawyer; the one phone call allowed is likely to be to a lawyer. Anybody facing a lawsuit wants legal help. Couples who decide to get divorced, but cannot agree on who gets the dog, the car, or the kids, will feel lost without lawyers at their sides. Ignorance of the law may be no excuse in a murder trial, but most people would think it is a valid point to make about the Wool Products Labeling Act, or the Clayton Act, or the Internal Revenue Code, which is thousands of pages long and written in an impenetrable jargon. Businesses need advisers who can thread their way through the labyrinth of laws. And the same is true, though maybe to a lesser degree, for people on Medicare, for a niece appointed executor of Aunt Elsa's estate, or for a parent trying to get custody of a child.

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34. *See id.*

35. *See id.*

36. Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679, 681 (1996).

Many societies have been without lawyers. Indeed, most societies—all pre-literate societies, for example, and most of the societies of antiquity—were without lawyers. But no developed modern societies can do without lawyers—even Japan, which has a pitifully small legal profession. Many Americans may find this Japanese trait admirable, and wonder why we cannot be so lucky. But though Japan has only a small number of men and women who have been admitted to the bar—men and women who are authorized to argue in court—it has thousands and thousands of people who studied law in college, and who work for large companies. They are, in part at least, the functional equivalent of lawyers, and at any rate, they have had some training in law. Moreover, the Japanese, in recent years, have come to the conclusion that they must get themselves more lawyers after all. They have changed the system of legal education, and made at least modest steps to beef up the size of the bar.

## II. THE LAWYER AS THE DOUBLE AGENT

In complex modern societies, then, there is no way to avoid the use of lawyers (or at least some functional equivalent). These societies have big governments, regulate a lot, prohibit a lot, and have on their books thousands and thousands of rules. The wilderness of these rules is the business of lawyers. Ordinary citizens simply are not equipped to cope with rules, regulations, and red tape, without enlisting a specialist. In the United States, that specialist tends to be a lawyer. The lawyer, however, as she helps her clients, is also helping the government. The lawyer, in fact, is a kind of *double agent*. She works both for the client and for the government.

Consider, for example, the Internal Revenue Code. This is perhaps the longest, dreariest, and most complex statute the human mind has ever devised. It is also a statute that affects most people and businesses. Like all complex statutes, it embodies many different policies, not always consistently. It tries to discourage certain kinds of behavior while encouraging others. On the one hand, the country depends on tax money to keep its programs going. Millions of people, on the other hand, hate paying taxes, and will

wriggle and squirm to find ways to avoid as much of the burden as they can. There is a kind of arms race between Congress—or rather, the people who draft the statutes and the rules and regulations—trying to close up loopholes, and tax accountants, tax lawyers, and taxpayers, who are at the same time exerting all their brain power trying to open up new loopholes. The lawyers are, of course, on the side of their clients. Nonetheless, despite themselves, and without even knowing it, they are also on the side of the government. This is because without them, nobody could understand the law, let alone follow it or avoid it.

Laws, rulings, and doctrines aim to control, change, or channel behavior in some way. To do this, they have to reach their audience. *Communication* is the very essence of legal efficacy—a law that nobody knows, or understands, changes nobody’s behavior. And the public is sublimely ignorant of law. True, a certain amount is taught in school. A certain amount (not especially accurate) is delivered through the media—newspapers, magazines, TV cop shows, and movies. But all of this is a drop in the bucket. Without help, the vast bulk of legal matter has no way to reach its audience. It is communicated, to be sure, but only to lawyers. The lawyers receive it, absorb it, store it, and then pass it on to clients if and when needed. Divorce lawyers teach their clients about divorce law; corporate lawyers teach clients about corporations law; patent lawyers instruct about patent law.

The lawyer, of course, is trying to help her clients. Sometimes the help consists of finding ways around some law or ruling, but more often the issue is learning how to comply.<sup>37</sup> This is the sense in which the lawyer, unwittingly, acts as a double agent. Her service to clients makes it possible for modern states to expand the legal edifice enormously. Without these experts acting as middlemen and brokers of information, the legal systems of welfare-regulatory states could not survive. I like to compare lawyers, in this regard, to the tiny organisms that live in a termite’s gut; the termite by

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37. See Bruce A. Green & Russell G. Pearce, “Public Service Must Begin at Home”: *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1212 (2009) (“The conception of the lawyer as civics teacher directly addresses the lawyer’s role as client counselor in the daily practice of law.”).

itself cannot digest the wood, but the organisms inside break it down into usable bits of food.

Lawyers are also trained experts in what I like to call the *structural variable*. This is the second nonobvious function of lawyers that I want to mention. Lawyers understand how things work in society; how the various structures in society, both legal and nonlegal, interact. They understand structures much better than laypeople, and this understanding affects their attitudes in important ways.

Herbert McClosky and Alida Brill published an important study of public opinion and civil liberties in 1983.<sup>38</sup> Their book gives the results of quite a few surveys of attitudes about these subjects in the United States.<sup>39</sup> Some of these surveys distinguish between the opinions of three groups: the general public, civic leaders, and lawyers.<sup>40</sup> On issue after issue, lawyers turn out to be more liberal than civic leaders, and *much* more liberal than the general public.<sup>41</sup> Take, for example, the issue of whether prayers could be recited in public schools. The Supreme Court said no,<sup>42</sup> but the public, on the whole, thinks this was a terrible decision.<sup>43</sup> This is understandable. Americans (including lawyers) are quite religious.<sup>44</sup> Most people apparently feel that the Supreme Court decisions on this subject (if they know about them) are against religion and must be just plain wrong.<sup>45</sup> Lawyers, however, think

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38. HERBERT MCCLOSKY & ALIDA BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES (1983).

39. See generally *id.*

40. See, e.g., *id.* at 55-56 tbl.2.2, 246 tbl.6.1.

41. See, e.g., *id.* at 55-56 tbl.2.2, 419.

42. *Engel v. Vitale*, 370 U.S. 421 (1962), was the leading case banning government-sponsored prayers in public schools.

43. A November 2005 FOX News/Opinion Dynamics Poll asked, "Do you favor or oppose allowing voluntary prayer in public schools?" Eighty-two percent of respondents were in favor, while only 14 percent were opposed (5 percent were unsure). PollingReport.com, Religion, FOX News/Opinion Dynamics Poll Nov. 29-30, 2005, <http://www.pollingreport.com/religion.htm> (last visited Feb. 27, 2009).

44. A May 2007 Gallup Poll asked, "How important would you say religion is in your own life...?" Fifty-six percent of respondents replied "very important," while 26 percent responded "fairly important." *Id.* at Gallup Poll May 10-13, 2007.

45. An August 2005 Gallup Poll asked whether respondents favored "a constitutional amendment to allow voluntary prayer in public schools." Seventy-six percent of respondents were in favor, while only 23 percent were opposed (1 percent were unsure). *Id.* at Gallup Poll Aug. 8-11, 2005.

otherwise.<sup>46</sup> What about laws banning pornography? Same kind of results.<sup>47</sup> Should atheists be allowed to teach in public schools? The public says no; the lawyers say yes.<sup>48</sup>

Why do lawyers seem so liberal on issues of civil rights and civil liberties? In fact, lawyers are wealthier than the general public. Many lawyers in their work life advise businesses, defend businesses, act in the best interests of businesses—especially big businesses.<sup>49</sup> On economic issues at least, probably very few lawyers are on the far left. Why are issues of civil rights and civil liberties so different?

One obvious answer is that lawyers simply know more about these subjects. But exactly what is it that they know? Lawyers are much more likely to know about the actual decisions of the courts.<sup>50</sup> But that is not really the point; the point is that the lawyer understands structures, and thinks in terms of the structures. Prayer in the schools? Sounds like a good idea. But *what* prayers? And what do we do about people who do not want to pray? How do we handle religious diversity? And so on. There are so many practical problems of implementation that in the end, many lawyers probably just shake their heads and say, “Well, it’s just not a good idea.”

The same thing is true about other issues: censorship of pornography, for example. Many people might say it is a good idea (some of them are lying, of course).<sup>51</sup> The lawyer might also think censorship is a good idea in principle. But she starts wondering, how is this to be done? Are we going to have a censorship board? Who would be on it? How would the board operate? How can we prevent the board from trying to censor or ban unpopular viewpoints, or deciding that the writings of Mark Twain are obscene? In the end, the lawyer might come to the conclusion that on second thought, a censorship board, like school prayer, is just not such a

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46. Cf. MCCLOSKY & BRILL, *supra* note 38, at 132-33 (noting that lawyers tend to be more accepting of “differences in religious orientation” than the general public).

47. *Id.* at 197 tbl.5.5.

48. *Id.* at 130-32 & 132 n.\*.

49. See LAWRENCE M. FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* 272-73 (1998).

50. MCCLOSKY & BRILL, *supra* note 38, at 419.

51. *Id.* at 207 tbl.5.9.

good idea. Knowledge of *structural variables* was what led her to this conclusion.

Sensitivity to structural variables is a product of legal education, and it shapes the way lawyers think; it also affects, perhaps, their behavior. Awareness of these variables makes the lawyer who serves on a board of education, or on a city council, or simply votes in elections, more receptive to ideas and positions in which structure makes a difference. It is not that the lawyer has more virtue than other people, or that lawyers are flaming liberals. Rather, lawyers understand, because of their legal training, the importance of structure in making judgments about policies.

I have said that citizen lawyers are a minority today, in the narrow sense of the word; and they have always been a minority. But they are now, as they have been in the past, a vital minority. They make up the small band of men and women who fight against injustice. The lawyers for the NAACP are not better human beings than the nonlawyers who run the organization. But they have skills that the nonlawyers lack. At the moment, we are living in a period in which constitutional rights, in my opinion, are in grave danger. Questionable things are being done in the name of the so-called war against terror. Government surveillance, the use of interrogation techniques that come close to torture (or cross the line), “extraordinary rendition,” Guantanamo Bay—these are only some examples of practices that seem to represent an assault on civil liberties. The public, on the whole, tends to accept almost anything that is done in the name of national security. But there *is* vigorous opposition to these inroads on constitutional democracy—and very strikingly, opposition from lawyers. Certainly, there are lawyers on both sides of the issue. But what could the opposition accomplish, without the work of *its* band of lawyers? The Supreme Court has (rather feebly, to be sure) said no to some of the worst offenses against due process. But the Supreme Court does not act on its own. It does not set its own agenda. It depends on others to do that.

Is the assault on civil liberties new, and unprecedented? Alas, not at all. In every period of crisis, and in some periods without crisis, there is some sort of attack on norms of due process. And a small band of lawyers, in each period, stands up and says no to injustice. During the period of the first World War, Congress

enacted a radical, and unnecessary, Sedition Act.<sup>52</sup> The statute made it a crime to spread “false statements” that might hinder the war effort, or to print or write anything “disloyal, profane, scurrilous or abusive” about the government or the Constitution. Quite a few people fell victim to this vicious law, and to the “Red Scare” that followed on its heels.<sup>53</sup> But lawyers like Harry Weinberger fought desperately on behalf of some of the victims.<sup>54</sup> The McCarthy period was another period of witch hunts, loyalty oaths, and worse. The Supreme Court (and the courts in general) did not exactly cover themselves with glory. But a handful of lawyers fought the good fight against the persecution of people who held unpopular opinions, against the smear campaigns, and against the national hysteria over alleged Communists and fellow travelers.

Probably the most important, most sustained violation of civil liberties in American history was the treatment of African Americans, especially in the South. First, there was slavery; then there was Jim Crow, segregation, and lynch law.<sup>55</sup> This oppressive system, in one form or another, lasted through the Civil War and well into the twentieth century;<sup>56</sup> racism, of course, is by no means extinct. The civil rights movement owes an enormous debt to the Reverend Martin Luther King, and to other leaders who struggled on the streets against segregation and white supremacy.<sup>57</sup> But the movement also owes a great deal to the NAACP, to Thurgood Marshall, and to his cadre of civil rights lawyers.<sup>58</sup> Additionally, the ACLU since its founding in 1920 has defended the rights of minorities and people on the fringes of society through a litigation strategy. A number of famous lawyers took on such causes—Clarence Darrow, for example, or William Kunstler.<sup>59</sup> Dozens of other lawyers, who never made the headlines, have done noble work

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52. See JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 432 (1956).

53. See ANN HAGEDORN, *SAVAGE PEACE: HOPE AND FEAR IN AMERICA, 1919*, at 225 (2007).

54. See *id.* at 366-75.

55. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 3-4 (2004).

56. *Id.*

57. See *id.* at 379-81 (describing the combination of litigation by the ACLU and direct action campaigns started by King and others).

58. See *id.* at 284-85.

59. See DAVID LANGUM, *WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA* 140 (1999).

for Human Rights Watch, Amnesty International, the Natural Resources Defense Council, and many other public interest groups.

We know that litigation is not the solution to the world's problems. We know that it cannot move mountains. We should not exaggerate what these "citizen lawyers" can accomplish. But neither should we minimize their work. According to Jewish legend, in every period, there is a small hidden band of the just—thirty-six individuals for whose sake God refrains from destroying the world. In modern times, some of these people, these soldiers of justice and truth, have surely been lawyers.