

## THE CITIZEN LAWYER

W. TAYLOR REVELEY III\*

### I.

The late eighteenth century is never far from us in Williamsburg, the Colonial Capital. Think back many generations to January 1780, when legal education at William and Mary first began.<sup>1</sup> Creating a law school at the College was Thomas Jefferson's idea,<sup>2</sup> which he persuaded William and Mary's Board of Visitors to approve on December 4, 1779.<sup>3</sup> Jefferson also recruited his own beloved law teacher, George Wythe, to breathe life into the new school, beginning the next month.<sup>4</sup> Wythe and his successor St. George Tucker led legal education at William and Mary brilliantly for the next quarter century.<sup>5</sup>

All three of these august beings—Jefferson, Wythe, and Tucker—meant for legal training at William and Mary to produce what we now call citizen lawyers: lawyers who will use at least part of their legal training and experience to work for the common good.<sup>6</sup> As George Wythe put it, in words emblazoned on the base of statues standing at the Law School's main entrance: "Here we will form such characters as may be useful in the National Councils of our country." Jefferson wrote to James Madison:

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\* John Stewart Bryan Professor of Jurisprudence and former William and Mary Law School Dean, now President of the College of William and Mary.

1. See Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 185 (2001).

2. See Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 527 (1990).

3. See W. Taylor Reveley III, *W&M Law School Came First. Why Care?*, 35 U. TOL. L. REV. 185, 185 (2003).

4. *Id.*

5. See, e.g., Carrington, *supra* note 2, at 538-39; Douglas, *supra* note 1, at 203; Reveley, *supra* note 3, at 187.

6. See, e.g., Reveley, *supra* note 3, at 185.

Our new institution at the College has had a success which has gained it universal applause. Wythe's school is numerous. They hold weekly courts and assemblies in the capitol. The professors join in it; and the young men dispute with elegance, method and learning. This single school by throwing from time to time new hands well principled and well informed into the legislature will be of infinite value.<sup>7</sup>

Producing citizen lawyers was William and Mary Law School's original intent.<sup>8</sup> It is an enduring intent at the country's oldest law school even unto the twenty-first century.<sup>9</sup> Against this background, it is quite seemly that a symposium on lawyers and their civic engagement convened in Williamsburg in February 2008.

## II.

I approach our subject—citizen lawyers—from a number of perspectives. For almost three decades I was wholly owned by a large law firm, including nine years as its managing partner. My first year out of law school I was an assistant professor of law and, after a very long hiatus, returned to the legal academy as a dean. For many years, I have been a trustee of academic institutions and of foundations, as well as other not-for-profit institutions. I helped put together an education section of the Virginia State Bar that mates practicing lawyers, academics, and judges to pursue common concerns, high among them those of the citizen lawyer. In short, I have wrestled with the meaning of our subject and the practicalities of its pursuit from a number of relevant perspectives.

Whether we lawyers earn our bread teaching in a law school, practicing law in a firm, a corporation, a government agency, or a nonprofit, or sitting on the bench, the matter ultimately comes down, in my view, to whether being a lawyer is simply a way to make a living or also a calling. Whether a lawyer teaches, practices, or judges, is he willing to work to leave the law better than he found it? Using legal training and experience, is a lawyer willing to work

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7. Douglas, *supra* note 1, at 202 (quoting letter from Thomas Jefferson to James Madison (July 26, 1780)).

8. See Carrington, *supra* note 2, at 529; Reveley, *supra* note 3, at 188.

9. Reveley, *supra* note 3, at 188.

to make a difference for the better in the life of the entity that pays her salary, and in the lives of her community, state, nation, and even world?

To put a practical edge on the matter, do we simply “talk the talk” of the citizen lawyer, think about it, theorize about it, and write about it, or do we actually believe in the concept and have the self-discipline to act on our belief?

### III.

Let me state a conclusion that does not enjoy universal applause in the legal world. In my judgment, we lawyers have an *unusually* strong need to be civic-minded and to work for the public interest. We lawyers should pull our oars as public citizens with more vigor than is expected of the average citizen.<sup>10</sup> There are four reasons why I believe lawyers should be more committed public citizens than most other people.

#### A.

Reason number one hinges on the notion that our profession is, in fact, a calling as well as a living. Former Chief Justice Rehnquist used to say, “the practice of law has always been a subtle blend between a ‘calling’ such as the ministry, where compensation is all but disregarded, and the selling of a product, where compensation is all important.”<sup>11</sup>

I believe the *calling* aspect of the legal profession is the one *most* important to our happiness and satisfaction as lawyers and to our pride at belonging to the profession. In my experience, most of us do want to believe that being a lawyer is a worthwhile way to use our talents and time. We want to believe that we are using our legal

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10. See also 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 (2009) (arguing that lawyers are in a unique position to understand, and therefore teach, civics); Mark Tushnet, *Citizen as Lawyer, Lawyer as Citizen*, 50 WM. & MARY L. REV. 1379 (2009) (claiming that lawyers are inherently civic educators).

11. William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 157 (1987); cf. Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169 (2009) (discussing how citizen lawyers should reemerge in the private sector).

knowledge and skill to help individuals and institutions improve their lives, to build the economy in productive ways, and to make politics more socially useful. We want to believe that lawyers are, in fact, making a difference for the better.

A great law professor named Karl Llewellyn, now long since gone the way of all flesh, urged the calling aspect of the legal profession on his students at the University of Chicago. To quote an account written by one of his students from the early 1960s, Professor Llewellyn demanded of the class one day, "Have any of you heard of the 'handwriting on the wall' in the Book of Daniel?"<sup>12</sup> Per the student's account:

We studiously examined the spiral bindings of our notebooks. This was no time to risk eye contact.

"What exactly was written on that wall?" Silence, eyes down.

"Mene, Mene, Tekel, Upharasin!?" he roared. Nervous laughter.

"What that means, brethren and sistern, is: 'You have been weighted in the balance and found wanting.' How will *you* measure up at the end of your legal career? When you die (as you will, you know), will you have left the law better or worse than you found it?"<sup>13</sup>

Most of us will be far happier with ourselves as lawyers if we do use our legal training and experience to make a difference for the better before we shuffle off our mortal coils. This reality militates strongly in favor of our being public-spirited.

### B.

My second reason why we lawyers need to attend assiduously to the public interest is that lawyers are unusually important to the health of the United States. American society is strikingly dependent on lawyers.

Think about the three branches of American government. One of the three, the judicial, is all lawyers. There is no branch of govern-

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12. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 18 (1994).

13. *Id.*

ment that is all accountants, or architects, or engineers, or physicians, or teachers.

A second branch of government, the legislative, has traditionally been full of lawyers, and when their numbers decline in the lawmaking branch, the caliber of the laws made often declines, too. A third branch of government, the executive, always has one senior member who is a lawyer, the Attorney General.

In the United States, lawyers have been and are now vital to American government at all levels. To quote Harvard Law School's Mary Ann Glendon:

Lawyer-dominated legislatures and bureaucracies now extend their reach into every corner of contemporary American life—taxing, subsidizing, licensing, attaching conditions, granting dispensations, mandating or encouraging this and forbidding or discouraging that. The positions that lawyers occupy throughout the corporate, financial, and commercial worlds are no less strategic. Judges increasingly seem to have the last word on the most divisive and hotly contested questions of the times.<sup>14</sup>

We cannot avoid how vital lawyers are to the leadership of this country.

Indicatively, it is law—the substance with which lawyers work—that most unites our huge, complex country. Glendon's words are telling again:

Law ... plays a much more central role in American society than in most other liberal democracies. Our nation is rich in diversity, but relatively poor in shared memories, sufferings, triumphs, religious beliefs, poems, songs, heroes, and legends. Yet we do have a remarkable, and widely shared, faith in constitutionalism and law. For better or worse, law is a principal carrier of the handful of values that command broad allegiance among Americans of varied religions, ethnic backgrounds, and economic levels: freedom, equality, fair procedures, and the rule of law.<sup>15</sup>

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14. *Id.* at 12-13.

15. *Id.* at 284.

As Glendon put it:

Law is the silver chain that links contemporary Americans of all ages and origins to eighteenth-century revolutionaries and seventeenth-century colonists. Much of America's uniqueness, in fact, lies in the degree to which law figures in the standard accounts of where we came from, who we are, and where we are going.<sup>16</sup>

The degree to which lawyers are vital to American government and to getting things done in American life, and the centrality of law to how we Americans understand ourselves and how we manage our enormous diversity, all speak strongly in favor of lawyers feeling obliged to serve the public interest.

C.

My third reason why we lawyers should be public-spirited is that lawyers know how to pursue the public interest more ably than most other people. By dint of legal training and experience, lawyers are unusually able to lead for the larger good. Compared to most other people, lawyers are better equipped to spot the crucial issues, marshal the important evidence and arguments, sympathetically understand competing positions, and bring people together to deal with difficulties and take advantage of opportunities. Justice William J. Brennan, Jr. once said:

Today, the lawyer is ... the indispensable middleman of our social progress. To him men turn for advice and assistance in their private affairs, for representation in the courts and agencies of government and for leadership in public life.... The complexities of modern society are not confined to the technological and scientific spheres; they infect all phases of social organization. The intricacy and pervasiveness of the webbing of statutes, regulations and common law rules in this country which surrounds every contemporary social endeavor of consequence give lawyers a peculiar advantage in coming to grips with our social problems. They alone—or so it sometimes seems—are equipped to penetrate directly and incisively to the core of a problem through the cloud of statutes, rules, regula-

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16. *Id.* at 258-59.

tions and rulings which ... obscure it to the lay eye.... In threading this maze, the lawyer has inherent advantages not merely of specialized training and experience, but of detachment. He is not involved as principal in the problems that he is asked to mediate and advise on, but as an agent, and as such can afford, emotionally and intellectually, to take a broader long-term view of his clients' needs—whether the client be a private corporation, an individual or a government agency—than can the client himself.<sup>17</sup>

Of another justice, Lewis F. Powell, Jr., it has been said:

Decades of practice and service, both in war and in the ... South during desegregation, led Justice Powell to believe that lawyers are uniquely situated to help civic life flourish, for they are trained to further mutual understanding among people of good will and to devise practical, livable solutions to difficult problems.<sup>18</sup>

Because by training and experience we lawyers know how to be especially useful to the body politic, it is especially incumbent on us to do so.

#### D.

One more consideration, my fourth reason, suggests why lawyers should feel obliged to work for the larger good. This is gratitude—gratitude for what the body politic has given our profession.

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17. William J. Brennan, Jr., *The Responsibilities of the Legal Profession*, in *THE PATH OF THE LAW FROM 1967: PROCEEDINGS AND PAPERS AT THE HARVARD LAW SCHOOL CONVOCATION HELD ON THE ONE-HUNDRED FIFTIETH ANNIVERSARY OF ITS FOUNDING* 88, 89-90 (Arthur E. Sutherland ed., 1968). For other compelling thoughts about lawyers' comparative advantages for leadership in the public interest, see LOUIS D. BRANDEIS, *BUSINESS: A PROFESSION* 331-33 (1914); GLENDON, *supra* note 12, at 102-08; ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 109-62 (1993); Lawrence M. Friedman, *Some Thoughts About Citizen Lawyers*, 50 *WM. & MARY L. REV.* 1153 (2009) (discussing how lawyers are equipped to understand the interaction between legal and nonlegal social institutions).

18. Christina Brooks Whitman, Remarks at the Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of Lewis F. Powell, Jr. (May 18, 1999), 199 *S. Ct.* 284, 290-91.

Without legislatures legislating, administrative agencies regulating, and courts ruling, lawyers would be hard up for the substance with which to work. All taxpayers, not just lawyer taxpayers, pay for legislatures, agencies, and courts. Thus, the substance with which we work as lawyers, whether we are practitioners, academics, or judges, and the contexts in which we operate, are heavily subsidized by the general public. We also enjoy a state-supplied monopoly to practice law, to our significant economic advantage.<sup>19</sup>

In short, the practice of law is not a triumph of the free market in which lawyers single-handedly carve a living out of whole cloth. Lawyers are not self-made entrepreneurs beholden to no one for professional success. Rather, our profession is heavily dependent on government subsidy and protection. In fairness, we owe the body politic something in return. Or, put differently, service to our communities, states, and nation is the “rent” we pay for public subsidy and protection of the legal profession.<sup>20</sup>

In sum, there are compelling reasons for us to be citizen lawyers: first, for our own professional happiness and satisfaction; second, because American identity and government depend so much on law and lawyers; third, because lawyers have comparative advantages at getting things done and leading for the public interest; and fourth, to respond gratefully to the body politic for what it does to support our profession.

#### IV.

Suppose we are, in fact, willing to embrace the notion that lawyers should serve the public interest with special vigor. What does that mean for us? What does being a citizen lawyer entail?

During the Revolutionary and early National Eras in our country, serving in government was what people like Thomas Jefferson and George Wythe had in mind when they began training lawyers at William and Mary to help sustain the new republic.<sup>21</sup> Today

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19. *See, e.g.*, VA. CODE ANN. § 54.1-3904 (1950) (“Any person who practices law without being authorized or licensed shall be guilty of a class 1 misdemeanor.”).

20. The suggestion that service is the “rent” we lawyers owe society comes from a leading citizen lawyer, John C. Tucker. His autobiography, JOHN C. TUCKER, TRIAL AND ERROR: THE EDUCATION OF A COURTROOM LAWYER (2003), is a classic account of a lawyer paying his rent to the body politic while also doing well in a major law firm.

21. *See supra* notes 6-8 and accompanying text.

when we talk about citizen lawyers, we often focus on pro bono representation, helping people or institutions with legal needs but insufficient money to pay for legal assistance.<sup>22</sup> While the concept of the citizen lawyer certainly includes work in the government and pro bono representation,<sup>23</sup> however, it also ranges far beyond these two ways of meeting a lawyer's civic responsibilities.

It is often suggested that having certain sorts of legal jobs makes it far easier to be a citizen lawyer than having other sorts of jobs. Yes, it is true that jobs of high social value and low pay do provide a more congenial context for citizen lawyering than jobs focused more on the private interest and elegant compensation. But do we by definition become citizen lawyers when we earn our living as legal aid lawyers, public prosecutors and judges, elected officials, or even law professors? Absolutely not! Nor, by definition, are we precluded from serving the public interest when we belong to law firms and corporate legal departments, even the most lucrative. *Every lawyer can be public-spirited.*

#### A.

What counts, in the first instance, is *how* each of us does our job. Do we do our job with integrity, with civility, with a willingness to spend time and energy teaching those coming behind us, and with courage to say "no" when no is the right answer (even when we have to rebuff people whose goodwill we acutely wish to keep)? Do we also do our job with awareness that lawyers provide the most crucial line of defense for the rule of law?

Whatever our job, each of us has constant opportunities to be a citizen lawyer by being trustworthy and collegial, by mentoring others, especially those coming along behind us, and by having the courage to say no when it is important to the larger good. We also are citizen lawyers when we see the rule of law threatened and come to its aid, even at personal cost. Some days we rise to the occasion in these regards better than others, but the opportunities are ever

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22. The American Bar Association has stated that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay," and encouraged lawyers to "aspire to render at least (50) hours of pro bono publico legal services per year." MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

23. See, e.g., Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323 (2009) (discussing the need for lawyers to engage in pro bono work).

present for each of us. How we respond to these opportunities constitutes our defining moments.

*B.*

Then, for those of us not judges, do we use some of our legal time and talent, amid the demands of earning a living, to represent clients who need legal help but cannot pay for it (someone living in poverty who needs a no-fault divorce, a neighborhood association struggling with a zoning issue important to the stability of the community, a local symphony orchestra caught in difficult labor negotiations with a national union)? In other words, are we willing to devote some of our legal time and talent to classic pro bono representation?

Some years, it will be realistic for us to do a lot of pro bono work, other years much less. But it is the rare lawyer whose other commitments flatly preclude any pro bono efforts whatsoever, even a few hours, over the course of twelve months.

*C.*

Beyond pro bono work, are we willing to pull our oars in other nonprofit settings—bar, community, cultural, educational, political, religious? Here our comparative advantages as leaders can be so very helpful. Are we willing to step out and lead in these settings at some cost to our professional progress (billable hours foregone, law review articles not written), at some cost to our scarce leisure time, and perhaps even at the cost of receiving the personal attacks that often accompany leadership? Every year each of us sees nonprofit settings where our leadership could make a difference for the better. All we need to do is pick a setting and get involved.

*D.*

Are we open to a job change every now and then—to taking a job that pays less or has less security than our current job but carries an opportunity to do some serious good (a big-firm partner becoming a judge at enormous cost to his or her compensation; a lawyer in a comfortable corporate law department becoming a city attorney despite the uncertainties of municipal politics; a tenured law

professor becoming the general counsel of a nonprofit entity doing great things in the community but not financially stable; any attorney leaving his job to run for political office). Lawyers as public citizens think about these sorts of job changes and struggle with whether they are called to take the plunge. Sometimes the call becomes irresistible.

*E.*

Finally, are we willing to put some of our charitable dollars to work in places where they can help? Needless to say, the greater our financial resources, the more we should give. It is the rare lawyer, however, who is so poor as to lack the capacity to share even a few dollars.

IV.

So what does all this mean for law schools? Four quick thoughts: First, a law school must be willing to “talk the talk” of the citizen lawyer in the classroom, on ceremonial occasions, and at every congenial opportunity if the concept is to thrive in its halls. If the school feels uncomfortable saying that being a lawyer is not just a living but also a calling with a concomitant duty of service, or if the school does not make clear that lawyers have comparative advantages at leading for the larger good and thus a responsibility to do so, then the concept will fall on barren soil.

Second, a critical mass of professors and administrators at the school must have the self-discipline to be citizen lawyers themselves in at least some of the ways just sketched. If professors and administrators refuse to pull their oars as citizen lawyers in any of myriad ways open to them, their students will be hard-pressed to take seriously the school’s rhetoric about service.

Third, the school must help its students find opportunities to serve while in school. This is often most effectively done, in my view, when schools make common cause with law firms, corporations, agencies, courts, and the communities in which they live.

Fourth, schools should use their convening power to bring together on a regular basis influential judges, law firm leaders, corporate and agency general counsel, and interested law professors to craft realistic ways of getting the legal profession to move beyond

simply talking about its need to serve to actually making a robust difference for the better.

The fact that practicing lawyers, judges, and law professors, as well as their professional organizations, often talk far more about being good citizens than they actually are is neither news nor a reason to give up.<sup>24</sup> Lawyers are people, and people often have a hard time getting themselves to do what they very much wish they would do, whether it is spending enough time with the children, getting some exercise, or working for the public interest. Often action itself must be preceded by a great deal of talking about the need to act, followed by a few episodic steps that, over time, evolve into a course of conduct.

Being a citizen lawyer is not about being perfect; it is about getting started and doing the best we can amid all the other demands on our time and energy. Being a citizen lawyer is rarely about being a transcendent political leader who saves the galaxy. It is about the countless ways, most of them small and mundane, in which any lawyer can make a difference for the better, drawing on the comparative advantages for leadership inherent in legal training and experience. Most days, being a citizen lawyer is not hard, it just takes doing.

Joseph A. Califano, Jr., the Secretary of Health, Education, and Welfare in the late 1970s, pulls these threads together in a rousing call to action:

[I]n a turbulent democracy, lawyers are key to nourishing freedom and protecting it when it is threatened. Lawyers bear responsibility to craft ways for individuals to ... receive justice in a society that threatens to swallow citizens in ever larger and more impersonal ... bureaucracies. Lawyers are key to prosecuting criminals and protecting law abiding citizens.

Without lawyers, equal protection is a phrase carved on a federal building. Without lawyers, legal segregation would still

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24. Cf. GLENDON, *supra* note 12, at 128 (“All the great classical judges were openly resigned to the fact that total objectivity is an unattainable goal. But they also knew (to borrow Clifford Geertz’s analogy) that a doctor who cannot have a completely sterile operating field does not need to perform surgery in a sewer.”). Of course, the rhetoric of lawyers and their associations about service usually outstrips lawyers’ actual service, and lawyers do have feet of clay (like everyone else). Neither of these realities should occasion surprise among legal scholars, nor should they be a reason to stop the rhetoric about service or give up trying to clothe the ideal in concrete substance.

be a way of life in the nation's capital. Without lawyers, corrupt government will become the customary way of doing the public's business. Without lawyers, tenants' rights would be subject to the whimsy of landlords, the First Amendment would be more rhetoric than reality, battered spouses and abused children would have little recourse. It is lawyers who must devise processes to assure that our scientific genius supports individual freedom and does not suppress it; and lawyers who must shape ways to cushion the harsh blows of free market forces on the individual.

Lawyers should be the most reliable life preservers for a people tossed in a sea of powerful government and private institutions, slammed by tidal waves of scientific discovery and technological revolution.<sup>25</sup>

Let's do it!

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25. Joseph A. Califano, Jr., Address at the District of Columbia Bar Annual 1997 Mid-Year Conference Luncheon (Feb. 26, 1997) (on file with the New York University Law Review), *reprinted in* Harry T. Edwards, *A New Vision for the Legal Profession*, 72 N.Y.U. L. REV. 567, 576-77 (1997).