

*The Leon Jaworski
Public Program Series*

Program v

Representing the American Lawyer as Citizen

April 27, 2004

4:45p.m. - 7:15p.m.

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James Madison Building

Montpelier Room

Washington, D.C.



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*Representing the American
Lawyer as Citizen*

Framing Questions

- 🍷 Thomas Jefferson argued that the American lawyer must aspire to be a “public citizen.” This phrase is echoed today in the language of the profession’s ethics codes, such as in the preamble to the ABA Model Rules of Professional Conduct. What does the “lawyer as citizen” mean?
- 🍷 Is the attribute of “citizen” essential to a lawyer’s identity—professional, cultural, ethical, political?
- 🍷 How does, or should, the American lawyer act as a citizen?
- 🍷 To what extent are American lawyers and judges political actors? How does this affect their standing as citizens and their professional roles as lawyers?
- 🍷 Are lawyers civic minded? Should they be?
- 🍷 Do lawyers’ civic dispositions enhance or diminish their responsibilities as advocates and representatives of clients?
- 🍷 Who exemplifies the American lawyer as citizen? How has the American lawyer as citizen been depicted?

Series Overview on Page 12

PROGRAM

PRESIDING

Robert Grey

President-elect, American Bar Association

WELCOMES

Rubens Medina

Librarian, Law Library of Congress

David Collins

National Law Day Chair, American Bar Association

MODERATOR

Lincoln Caplan

*Knight Senior Journalist, Yale Law School and
Editor and President, Legal Affairs Magazine*

PANELISTS

Philip K. Howard

*Vice-Chairman, Covington & Burling and
Founder and President, Common Good*

Wendy Kaminer

Contributing Editor, Atlantic Monthly

Austin D. Sarat

*William Nelson Cromwell Professor
of Jurisprudence and Political Science
Amherst College*

and

L. Douglas Wilder

*Distinguished Professor of Public Policy
Virginia Commonwealth University and
Former Governor, Commonwealth of Virginia*

The Leon Jaworski Public Program Series
Representing the Lawyer in American Culture
Program V

Moderator

Lincoln Caplan is Knight Senior Journalist at Yale Law School and founding editor and president of *Legal Affairs* magazine. Affiliated with Yale Law School but editorially independent, *Legal Affairs* aims to serve as “the magazine at the intersection of law and life” and engage its readers in challenging, vibrant conversations about diverse legal topics. Before coming to Yale Law School in 1998, Mr. Caplan was editor of special projects at *U.S. News and World Report* and previously served as a staff writer for the *New Yorker* and the *New Republic*. He has also written for the *New York Times*, the *Washington Post*, and many other newspapers and magazines. He is the author of five books, including *Skadden: Power, Money & The Rise of a Legal Empire*, *The Tenth Justice: The Solicitor General and the Rule of Law*, *The Insanity Defense and the Trial of John W. Hinckley Jr.*, and *Up Against the Law: Affirmative Action and the Supreme Court*. Mr. Caplan served as a law clerk to Connecticut Supreme Court Justice Charles S. House, is a former White House Fellow, and was a Guggenheim Fellow. He received his B.A. and J.D. from Harvard University.



Panelists

Philip K. Howard is Vice-Chairman of Covington & Burling, where he is a senior corporate advisor. Mr. Howard is the author of *The Collapse of the Common Good: How America's Lawsuit Culture Undermines our Freedom* and *The Death of Common Sense: How Law is Suffocating America*. In the recently published *Oxford Companion to American Law*, he contributed the section on American law since 1968. Mr. Howard speaks frequently before judicial, government, and professional organizations around the country and is a periodic contributor to the op-ed pages of the *New York Times*, the *Wall Street Journal*, and the *Washington Post*. He is the founder of Common Good, a national bipartisan coalition organized to “overhaul America’s lawsuit culture and restore the role of common sense in American institutions.” Mr. Howard is also a prominent civic leader in New York. He is chairman of the

Municipal Art Society of New York, a leading civic group that spearheaded initiatives to preserve Grand Central Terminal and to construct a new Penn Station in the Farley Post Office Building. Mr. Howard also recently served as chairman of a committee to install the “Tribute in Light” interim memorial for the World Trade Center tragedy. He grew up in small towns in the south and is the son of a Presbyterian minister. Mr. Howard received his B.A. from Yale College and J.D. from the University of Virginia School of Law.

Wendy Kaminer is a lawyer, legal scholar, cultural critic, and writer. She has served as a contributing editor of the *Atlantic Monthly* since 1991. Ms. Kaminer also is a columnist for *Free Inquiry*. She has served as a senior correspondent for the *American Prospect* and as an affiliated scholar for public policy at the Radcliffe Institute for Advanced Study. Ms. Kaminer writes about law, liberty, feminism, religion, criminal justice, and culture. She is the author of seven books, including *Free for All: Defending Liberty in America Today*, *Sleeping with Extra-Terrestrials: The Rise of Irrationalism and the Perils of Piety*, and *Im Dysfunctional, You're Dysfunctional: The Recovery Movement & Other Self-Help Fashions*. In addition, Ms. Kaminer has written numerous articles and reviews for such publications as the *New York Times*, the *Wall Street Journal*, *Newsweek*, *Dissent*, and, of course, the *Atlantic Monthly* and the *American Prospect*; and her commentaries have aired on National Public Radio's “Morning Edition.” Ms. Kaminer has served as president of the National Coalition Against Censorship and is a member of the National Board of the American Civil Liberties Union. Prior to becoming a full-time writer, she was a staff attorney for the New York Legal Aid Society and the New York City Office of the Mayor.

Austin D. Sarat is William Nelson Cromwell Professor of Jurisprudence & Political Science at Amherst College. He co-founded the College's newest academic department in Law, Jurisprudence, and Social Thought. A member of the Amherst faculty since 1974, Prof. Sarat teaches courses on the Social Organization of Law; Murder; Secrets and Lies; and Punishment, Politics, and Culture. He is the author or editor of more than 40 books and over 100 scholarly articles and review essays. Among his books are *When the State Kills: Capital Punishment and the American Condition*, *Cause Lawyering and the State in a Global Era*, *How Does Law Matter?*, *Law in the Domains of Culture*, and *The Rhetoric of Law*. Prof. Sarat's writings also have appeared on the op-ed pages of such newspapers as the *Los Angeles Times* and in magazines such as the *American Prospect*. He has appeared on “The O'Reilly Factor” on the Fox News Channel and has provided commentary for National Public Radio's “The Connection” and MSNBC News. Prof. Sarat's teaching has been featured in the *New York Times* and the *Boston Globe* and on National Public Radio and “The Today Show” on NBC. An active leader and past president of the Law & Society

Association, he also has served as president of the Association for the Study of Law, Culture, and the Humanities since 2001. In addition, Prof. Sarat has served as a member of the Advisory Commission to the ABA Standing Committee on Public Education and the Beyond Ethics Task Force of the ABA Section on Litigation. He received a B.A. from Providence College, M.A. and Ph.D. in Political Science from the University of Wisconsin and a J.D. from Yale Law School.

L. Douglas Wilder currently serves as Distinguished Professor at Virginia Commonwealth University, holding appointments in the Center for Public Policy and the Department of Political Science. In 1990 he was elected to a four-year term as the 66th governor of the Commonwealth of Virginia, becoming the first elected African American governor in U.S. history. Gov. Wilder previously served as lieutenant governor and as a five-term Virginia state senator. In 1992 Gov. Wilder was a Democratic candidate for president of the United States. During service in the Korean War, Gov. Wilder received the Bronze Star for heroism in ground combat for rescuing wounded GIs and capturing enemy troops. After graduating from the Howard University School of Law, he established the law firm that came to be known as Wilder, Gregory, and Associates and developed a reputation as a top criminal trial lawyer. Gov. Wilder is the founder and chairman of the Board of Directors of the National Slavery Museum, which will be located in Fredericksburg, Virginia. The museum's mission is to bring to life and interpret "the human drama and toll of slavery in America." In addition to his service with the museum, he also is a trustee of both of his alma maters, Howard University and Virginia Union University, where he received a B.S. in Chemistry in 1951. Gov. Wilder is a long-term active member of the American Bar Association, the National Bar Association, the Virginia State Bar Association, and the National Criminal Defense Lawyers Association. He also is Board Chairman of Trustees of Medunsa Trust of the University of Southern Africa, a member of the Board of Virginia Commonwealth University Foundation, and a life member of the NAACP.



Perspectives on Program Theme

Three Ideas Essential to the Legal Profession

Roscoe Pound

Historically, there are three ideas involved in a profession: organization, learning, and a spirit of public service. These are essential. The remaining idea, that of gaining a livelihood, is incidental.”

Quoted from “What Is a Profession: The Rise of the Legal Profession in Antiquity” by Roscoe Pound (Harvard Law Dean, 1916–1936), 19 *Notre Dame Lawyer* (1944).

The Lawyer’s Public Service Roles

Stephen Breyer

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”....

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

Excerpted from “The Legal Profession and Public Service” by Stephen Breyer (Associate Justice, U.S. Supreme Court), Gauer Distinguished Lecture in Law and Public Policy sponsored by the National Legal Center for the Public Interest, New York, September 12, 2000.

The Country Lawyer

Robert H. Jackson

The law [to the country lawyer] was like a religion, and its practice was more than a means of support; it was a mission. He was not always popular in his community, but he was respected. Unpopular minorities and individuals often found in him their only

mediator and advocate. He was too independent to court the populace—he thought of himself as a leader and lawgiver, not as a mouthpiece.... Often his name was, in a generation or two, forgotten. It was from this brotherhood that America has drawn its statesmen and its judges. A free and self-governing Republic stands as a monument for the little known and unremembered as well as for the famous men of our profession.

“Tribute to Country Lawyers: A Review” by Robert H. Jackson (Associate Justice, U.S. Supreme Court and chief U.S. prosecutor at Nuremberg), *American Bar Association Journal*, 30 (136–139), 1944.

The Corporation Lawyer and the People’s Lawyer

Louis Brandeis

The legal profession does afford in America unusual opportunities for usefulness. That this has been so in the past, no one acquainted with the history of our institutions can for a moment doubt. The great achievement of the English-speaking people is the attainment of liberty through law. It is natural, therefore, that those who have been trained in the law should have borne an important part in that struggle for liberty and in the government which resulted. Accordingly, we find that in America the lawyer was in the earlier period almost omnipresent in the State. Nearly every great lawyer was then a statesman; and nearly every statesman, great or small, was a lawyer....

Although the lawyer is not playing in affairs of state the part he once did, his influence is, or at all events may be, quite as important as it ever was in the United States; and it is simply a question how that influence is to be exerted.

It is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the “corporation lawyer,” and far too little of the “people’s lawyer.” The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.

Excerpted from “The Opportunity in the Law,” an address delivered by Louis Brandeis (Associate Justice, U.S. Supreme Court, 1916–1939) before the Harvard Ethical Society, May 4, 1905.

Cause Lawyers

Stuart A. Scheingold

The common bond among [cause] lawyers is a commitment to use their legal skills to promote social and political causes they believe in. It is this commitment that distinguishes them from, and puts them ethically at odds with, the vast majority of lawyers, who see their primary responsibility as serving individual clients, not causes. Whereas service to clients is an end in itself for conventional lawyers, cause lawyers view clients more as a means to achieve broader social and political goals.

Conventional and cause lawyering ordinarily entail contrasting styles of representation. Conventional representation calls on lawyers to serve clients in a vigorous but neutral and detached fashion, whereas cause lawyers tend to identify closely with their clients. According to conventional ethical precepts, such identification with clients compromises the attorney's professional judgment and therefore imperils effective representation. Cause lawyers reject this claim—arguing that an alliance with clients, rooted in common values and interests, enhances the kind of mutuality that is conducive to authentic and resolute representation. Critics of cause lawyering counter that a preoccupation with causes can tempt cause lawyers to give priority to the cause itself at the expense of the client's interest. Whatever the truth of these claims and counterclaims, cause lawyering emerges as an ethically suspect mode of legal practice with a relatively low standing among conventional practitioners....

It is important to realize that cause lawyering is not entirely unwelcome to *mainstream* professionals. The mainstream includes the leadership of the organized legal profession as well as the vast majority of lawyers who are themselves indifferent, at least as lawyers, to political and social causes. The bar leadership sees cause lawyers as fortuitous allies in the defense and enhancement of the profession's social capital. To the public, after all, lawyers typically appear to be no more than hired guns—using suspect means to defend sometimes unsavory clients, and profiting handsomely from doing so. Accordingly, cause lawyers, with their penchant for doing good, can add some luster to the often-tarnished public image of the legal profession. There is also a kind of tacit quid pro quo between cause lawyers and conventional practitioners. Cause lawyers generally represent the impecunious, and in so doing assume a burden that mainstream professionals are, according to their own ethical precepts, supposed to shoulder but are more than happy to leave to others.

Excerpted from "Cause Lawyers" by Stuart Scheingold (Professor of Political Science, University of Washington) in *The Oxford Companion to American Law*, Kermit L. Hall, ed., Oxford University Press, 2002.

Lawyers, Historical Memory, and the Sense of Professionalism

Deborah L. Rhode

Most bar discussions of the decline of professionalism proceed with a highly selective historical memory. In this “golden age of legal nostalgia,” heroic lawyer-statesmen ruled, if not the earth, at least the profession. Then came the Fall and our own Dark Age of crass commercialism, uncivil tactics, and amoral advocacy. When exactly this transformation took place remains unclear, because few commentators are interested in historical details. Those who are cast doubt on conventional assumptions. For example, although legal practice earlier in this century generally is painted in rosy hues, there is much to dislike about what then passed for professionalism. As Harvard professor Mary Ann Glendon notes, some of the bar’s best and brightest made their reputations “using every tactic in the book (and many that were not) to help bust unions, consolidate monopolies, and obtain favorable treatment” from corrupt judges.

Virtually every historical era that modern commentators applaud attracted its own share of critics with concerns similar to those heard today. In 1903, Supreme Court Justice Louis Brandeis warned lawyers that they were losing public respect because they were also losing their commitment to public service and their moral independence from clients. Several decades later, Supreme Court Justice Harlan Fiske Stone worried that the economic pressures of practice had transformed more attorneys into “obsequious servants of business...tainted with the morals and the manners of the marketplace in its most antisocial manifestations.” More and more, Stone noted, “the amount of [a lawyer’s] income has become the measure of his professional status”....

In some respects, however, current problems are more acute. Although commercialism and long hours are scarcely novel concerns, their meanings have changed, and not for the better. But on other issues of professionalism, such as lawyers’ honesty or pro bono work, we lack evidence for the impressionistic assertions that bar commentary often presents as self-evident truths. “The spirit of public service is not what it once was,” announces a New York Commission on the Profession. But we have no adequate records of what it used to be. Nor can we be sure whether many other commonly cited problems are getting worse or just more visible in a world with more lawyers and more publicity surrounding their conduct....

The term *profession* has its origins in the Latin root “to profess” and in the European tradition of requiring members to declare their commitment to shared ideals. The American bar has maintained the form but lost the substance of that tradition. Entering lawyers may still profess to serve justice as officers of the court, but that

declaration has little moral content in contemporary practice. Efforts to revive a richer sense of professionalism have foundered on the lack of consensus about what that concept should require and how to reconcile it with more worldly interests. In this context, it makes sense to view professionalism not as a fixed ideal, but rather as an ongoing struggle.

Excerpted from *In the Interests of Justice: Reforming the Legal Profession*, by Deborah L. Rhode (McFarland Professor of Law, Stanford Law School), Oxford University Press, 2000.

The Dying Ideal of the Lawyer-Statesman

Anthony Kronman

A disproportionate number of America's political leaders have always come from the legal profession. If lawyers are especially well equipped to play a leading role in politics, however, it is not because of their technical legal expertise. It is because their training and experience promote the deliberative virtues of the lawyer-statesman ideal. As this ideal fades and these virtues come to seem less important within the profession, they will be less consciously cultivated by lawyers themselves. And as that happens, the ability of lawyers to provide sound political leadership must eventually deteriorate too. In the future, the legal profession will continue to supply a large percentage of the country's political leaders. But the demise of the lawyer-statesman ideal means that the lawyers who lead the country will be on the whole less qualified to do so than before. They will be less likely to possess the traits of character—the prudence or practical wisdom—that made them good leaders in the past. Like ripples on a pond, the crisis of values that has overtaken the legal profession in the last twenty-five years must thus in time spread through the whole of our political life with destructive implications for lawyers and nonlawyers alike....

Excerpted from *The Lost Lawyer: Failing Ideals of the Legal Profession* by Anthony Kronman (Dean, Yale Law School), The Belknap Press of Harvard University Press, 1993.

Lawyers Serving Society?

Fred Rodell

Harold Laski is fond of saying that in every revolution the lawyers are liquidated first.... The reason the lawyers lead the line to the guillotine or the firing squad is that, while law is supposed to be a device to serve society, a civilized way of helping the wheels go round without too much friction, it is pretty hard to find a group less concerned with serving society and more concerned with serving themselves than the lawyers.... I confess that "serving society" is a slightly mealy phrase with a Sunday school smack to it. There are doubtless better and longer ways of expressing the same idea, but it should still convey some vague notion of what I mean. I mean that law, as an institution or a science or a high-class mumbo-jumbo, has a job to do in the world.

Excerpted from "Goodbye to Law Reviews" by Fred Rodell (Professor, Yale Law School), 23 *Virginia Law Review* 38-45, November 1936.

Law as a Business v. Law as a Profession

Bruce Graves

"Lawyers kept saying that the law had lost much of its distinctly professional character and had become a business... [M]any lawyers were convinced that their profession had declined in its intellectual standards and in its moral and social position.... That the dignity and professional independence of the bar had been greatly impaired became a commonplace among lawyers and well-informed laymen."

Sound familiar? This is from a study of the legal profession in the '80s and '90s. But here's the catch: not the 1980s and 1990s, but the 1880s and the 1890s! (R. Hofstadter, *The Age of Reform*, 158-159, 1960) The more things change, the more they stay the same. The standards of professionalism have long enjoyed a distinguished heritage, a rocky present, and an uncertain future.

Excerpted from "The President's Letter" by Bruce Graves, *The Iowa Lawyer*, November 2000.

A Lawyer Is a Public Citizen

ABA Model Rules of Professional Conduct

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice....

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest....

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious.... In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a living.

Excerpted from "Preamble: A Lawyer's Responsibilities" in *ABA Model Rules of Professional Conduct*, amended 2003.



The Leon Jaworski Public Program Series

Representing the Lawyer in American Culture

SERIES OVERVIEW

The series is devoted to an examination of how lawyers have been represented in American culture. The premise and orientation of the series is that because of the seminal role that law, lawyers, and judges play in American culture, exploring fundamental legal identities and attributes will help elucidate who we are as Americans. In considering “law” culturally as an integral part of the humanities, the series focuses on how we can better understand these representations and the meaning they have for us. Ultimately, the frame of reference is how these subjects explicate American mores—what Tocqueville characterized as the habits of heart and mind that represent “the whole moral and intellectual state of a people.” With respect to the five different attributes explored by the series, each of the public programs consider how the American lawyer has been represented in art, literature, legal and other texts, artifacts, and media culture. The panelists reflect on legal identities and attributes drawn from both historical and contemporary cultural practices.



Programs

Program I: Representing the American Lawyer as Reformer (May 1, 2001)

Moderator: Bernard Hibbitts

Panelists: Maxwell Bloomfield, Lani Guinier, Ronald Rotunda

Program II: Representing the American Lawyer as Celebrity (August 4, 2001)

Moderator: Roger Cossack

Panelists: Douglas Kmiec, Richard Sherwin, Patricia Williams

Program III: Representing the American Lawyer as Judge (May 1, 2002)

Moderator: Marcia Coyle

Panelists: Christine Corcos, Paul Kahn, David Tatel

Program IV: Representing the American Lawyer as Rhetor (May 1, 2003)

Moderator: Jeffrey Toobin

Panelists: Danielle Allen, Steven Lubet, Ken Starr, Seth Waxman

Representing the American Lawyer as Citizen

PROGRAM PARTNERS

ABA Standing Committee on Public Education mobilizes the resources of the American Bar Association to promote public understanding of law and the legal profession.

Federation of State Humanities Councils is the membership and advocacy organization of the 56 state and territorial humanities organizations.

Library of Congress, established in 1832, provides research and legal information to the U.S. Congress, federal courts, and executive agencies and offers reference services to the public.

ABA Standing Committee on the Law Library of Congress supports efforts to maintain and enhance the collection, functions, and services of the Law Library of Congress and helps it to best meet the needs of the legal community.

Friends of the Law Library of Congress, a nonprofit membership organization founded in 1934, aids the Law Library by supporting educational programs and fellowships and by purchasing rare books.



About Leon Jaworski

As president of the ABA in 1971, Leon Jaworski established the special committee that became the genesis of the Association's Division for Public Education. In 1983, a bequest from his estate generously established the Leon Jaworski Fund for Public Education, which continues to support annual public programs, such as this one, devoted to furthering public understanding of law and the legal system.

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