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Looking at the Stars: Why Being a Lawyer Matters

"We are all in the gutter, but some of us are looking at the stars."

—Oscar Wilde,
Lady Wyndermere's Fan, Act III

He was accused of being a criminal and a terrorist. His earlier writings had been ignored by the government, but his latest works were perceived as maliciously and wickedly intending to incite violence toward the government. Charges were brought and a criminal action was instituted.

It was not easy to find a lawyer for the defendant. Finally, one attorney stepped forward and was promptly told by his largest and most important client that he would lose that business if he continued the representation. The lawyer indicated his intent to proceed and was promptly fired by the client.

The terrorist was Thomas Paine. His offense was the publication of volume two of the *Rights of Man*. The lawyer who stepped forward to defend Paine was Thomas Erskine, eventual Lord Chancellor of Great Britain. Erskine came from a family of limited means and after finishing his preliminary education, spent time in the military. While on leave in England, Erskine attended the Assizes Court being held in a country town. The judge was none other than Lord Mansfield. The two ended up having dinner together that evening and, as a result, Erskine, at the age of 25, was entered as a student of Lincoln's Inn.

Erskine's abilities as a trial lawyer soon attracted many clients—one of whom was the Prince of Wales, for whom Erskine was named attorney general. He had reached a level of success many of us strive for, but fail to obtain.

When the prosecution of Paine began, a retainer for Paine was sent to Erskine, but he was urged by his friends and his biggest client, the Prince of Wales, to decline the engagement. When he indicated that he would continue the defense of Paine, numerous attacks were made upon him in various newspapers and the Prince of Wales removed him from his position.

In Erskine's closing arguments in defense of Paine (reprinted in volume one of *Speeches of Lord Erskine*), he acknowledges to the jury the contempt in which he was held by many for accepting the case. In a few short words (which every newly admitted lawyer should commit to memory), Erskine sets forth the fundamental principles that guided his action:

> I will for ever, at all hazards, assert the dignity, independence, and integrity of the English bar, without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, what he may think of the charge or of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.

In his closing, Erskine went on to passionately defend Paine and set forth a principled basis for the liberty of the press and, indeed, for the liberty of an individual to seek "to change the public mind by the conviction which flows from reasonings dictated by conscience." At the end of Erskine's closing, however, the jury foreman indicated to the prosecuting attorney general that a reply was not necessary for them. The attorney general sat down, and the jury gave their verdict on the spot: guilty.

Erskine's explanations to the jury for why he felt compelled to defend Paine are as important today—if not more important—than they were in the time of Erskine. Large corporations and local, state, and the federal governments are more powerful now than ever. The independence of the judiciary is under attack from all quarters. The independence and integrity of the bar, and the willingness of lawyers to step forward to provide representation to unpopular defendants and for unpopular causes, still serves as one of the cornerstones for the maintenance of freedom in this country.

As a group, lawyers have become conditioned to hear public entertainers—even our own friends and neighbors—vilify us in jokes and anecdotes.

> Question: "What's a hundred lawyers at the bottom of the ocean?"
> Answer: "A good start."

No one, not the doctors, not the accountants, and not our friends and neighbors, is going to stand up for us. We have to start doing it for ourselves.

This nation was founded upon the principle of the rule of law. My personal statement of the rule of law is that the protections and prohibitions of our judicial system should apply with equal force to all citizens regardless of their economic status, religious beliefs, gender, sexual orientation, or racial identity. As our society has grown more complex, so has the plethora of statutes and laws that regulate it. It is lawyers who are the guides for the maze that is the American legal system. For our service as guides, we are well compensated. We have access to the courts, to judges, to politicians, and to business leaders. With this wealth and influence, however, our profession must also recognize that certain responsibilities are imposed upon it. One of those responsibilities is the promotion of the rule of law.

There used to be a variety of different social institutions to which our fellow citizens could turn to help them resolve disputes. There were a number of different ethnic, economic, religious, and political institutions within which members could work out solutions to conflicts in their everyday lives. For better or for worse, the evolution of modern commercial society has led us to the 21st century, in which such alternative dispute mechanisms are diminished, if nonexistent. More and more people turn to the civil justice system as the sole method by which they decide their differences.

Because of this societal transition, lawyers have played, and will continue to play, a central role in the functioning of modern commercial life. It is the actions of individual lawyers, in drafting equitable contract terms or in bringing lawsuits, that protect our citizens from abusive commercial practices. It is lawyers who stand between the small business owner and the exercise of raw power by an abusive government. It is lawyers, in honoring their oaths and in paying homage to the history of our noble profession, who represent those among us whom the majority disdains and whom we would just as soon have silenced.

We hear more and more that the practice of the law is a business, and I have been among those in my own firm who have preached the liturgy of profitability and productivity. But we must not confuse the means of a successful practice with the ends of our professional goals and aspirations. We must remember that as lawyers, our activities are circumscribed by an ethical code of conduct not imposed on the ordinary business person. When each of you made the decision to become a practicing attorney, you expressly embraced the notion that a certain moral framework would both serve as an inspiration for your impulses and constrain your appetites.

We are one of the last of the great professions. We are self-regulating. We are well compensated. This autonomy and wealth comes at the price of some service to the society in which we live. Benjamin Cardozo told us that "[t]he final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."

One of the founding members of my law firm, William S. Richards, used to have an old business card which had beneath his name the phrase: "Attorney and Counselor at Law." Bill didn't think much of our new business cards that had dropped from our description the adjective "Counselor." He advised me that it was not simply my job to help my clients accomplish their goals, but—and of equal importance—it was my job to tell my clients when I thought they were making mistakes or were just plain wrong. Lawyers, Bill Richards would tell me, are not just technicians or servants, but are professionals whose job it is to provide an independent evaluation to their clients.

When was the last time you sat around with your partners or other attorney friends and discussed what it means to be a "good lawyer?" I know how to measure dollars-in-the-door. I know how to measure work origination and work distribution. Those factors, however, cannot become the sole criteria for our success or the legal profession will surrender any claim as a force for good in our society. We must begin, as a profession, an internal dialogue among ourselves about all of the attributes that lawyers should demonstrate in our practice of the law.

I acknowledge that the competitive nature of the present legal marketplace has made it an imperative for all law firms to watch the bottom line. We have to be profitable or risk losing our star performers. Law firms have business plans and lawyers have personal marketing plans. We advertise and participate in beauty contests. None of us is exempt from this; we are all of us in the gutter.

All of us can, however, still look to the stars. If, as a profession, we fail to do so, then we will become irrelevant. If we fail to honor the great traditions of our profession, if we forget lawyers like Erskine, then we will continue to suffer disdain and disrespect. If we forget the importance of our profession, then we relegate ourselves to an ignominious corner on the back porch of history.

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