Our country was shaped by some fine lawyers, starting with Thomas Jefferson.

I'M DELIGHTED to have the opportunity to address the members of the J. Reuben Clark Law Society. Your organization's commitment to public service, fairness, and virtue in the law is commendable. ❁ I am here to talk to you about what you need to do to become ETHICAL LAWYERS.

I'm sure everyone in this audience both here and participating through satellite broadcast is already firmly committed to being an ethical, moral lawyer. You do not need any more stories of lawyers who pervert the law for their own ends. And I'm sure I don't need to tell you to avoid unethical, shady situations. Your own commitment to your faith has already counseled you in that regard, and I am sure that no one here would engage in behavior that would bring shame on the legal profession.

Instead, I want to talk to you about the hardest part of being an ethical lawyer. There are at least two important parts to being an ethical lawyer. First, as an ethical lawyer, you must refrain from doing things that are wrong. I trust that all of you who are listening will do that without more encouragement on my part.

I want to focus on the second part of being an ethical lawyer. An ethical lawyer must affirmatively choose to do things that are good. I think you will find out as you enter practice that this second part will pose the greater challenge to you.

As you enter the practice of law, you will find that it is not always easy to figure out what is "right" and what is "wrong." On the one hand, it is your duty to act as a zealous advocate for your clients. You need to look out for their interests and advance them, whenever it is proper to do so. You need to hold their confidences in the utmost secrecy. On the other hand, as a lawyer, you are a professional. You are an officer of the courts before which you practice, and you owe the highest duties of fidelity to justice and the rule of law.

You might think it is easy to navigate your way through that maze. But it won't always feel that way. Let me give you an example of a thorny ethical dilemma that a lawyer recently faced. Some of you may recall the Supreme Court's decision in *Atkins v. Virginia*, where the Court decided that it was unconstitutional to execute mentally retarded defendants. But you might not be familiar with its aftermath.

After the Supreme Court's decision, the Virginia courts decided that Atkins was not mentally retarded and therefore could be executed consistently with the Constitution. A few weeks ago, in late January of this year, he was nonetheless removed from death row. The reason had nothing to do with whether Atkins was or was not mentally challenged, nor did it have anything to do with the litigation that had taken place over the decade since he had been convicted. Instead, it was the result of conduct that took place 11 years ago, before Atkins was convicted.

The crucial point in the prosecutor's case against Atkins was that, out of all the other codefendants who were involved in this case, Atkins was the man who pulled the trigger and killed the victim. If Atkins was the actual gunman, he would have been eligible for the death penalty. If he was not, he could at most have been sentenced to life in prison. The lawyer, whom we will call Mr. Jones, represented a man who testified against Atkins at trial. Mr. Jones' client was one of Atkins' codefendants. The testimony his client offered went to that crucial point at trial: Did Atkins actually shoot the victim?

Mr. Jones had an interesting story to tell. Now, I should caution you that the prosecutor in this case has denied the truth of Mr. Jones' story. But I want to tell you this story for the ethical ramifications. Before Atkins went to trial, Mr. Jones' client gave his side of the story to the prosecutor. The conversation was tape recorded, and the client began by describing the position of the individuals and the firing of the shots.

What Mr. Jones alleges happened when his client started in on that description was that the prosecutor "reached over and stopped the tape recorder." She turned to another individual and said, "Do you see we have a problem here?" According to Mr. Jones, there was a significant problem: Mr. Jones' client's testimony did not match the physical evidence that the police had gathered from the crime scene. The prosecutor realized that the testimony would be damaging to the prosecution. Then, for 15 minutes—off the record, without any tape recording—the prosecutors coached Mr. Jones' client to produce the "right" testimony, that is, testimony that could be used to prove that Atkins fired the fatal gunshot.

Now, if this story is true, and I do not know if it is, there is a problem. No prosecutor should ever attempt to manufacture evidence to obtain a conviction. That obligation is doubly true when the manufactured evidence could spell the difference between life and death for a defendant. I am sure that none of you would ever consider behaving in this manner. An ethical lawyer must, at all times, refrain from doing that sort of wrong.

But what would you do if you were Mr. Jones? Mr. Jones was present in the room. He only watched these events transpire. He did not ask his client to change his testimony. He did not take part in the conversation. He was not himself a wrongdoer.

What Mr. Jones did was go to his state bar's ethics counsel and ask for advice. He was told in no uncertain terms that he could not make these events known to Atkins' defense or to the public. After all, he was a lawyer. He had an ethical obligation not to prejudice his own client's case. If he spoke the truth, he could have jeopardized his client's deal with the prosecution.

Mr. Jones did not speak, and Atkins was convicted and sentenced to death.

Year after year, stretching over the last decade, Mr. Jones wrote to the bar's ethics counsel, asking if he could now speak up. Year after year they told him that he could not. Finally, after 10 years of silence, Mr. Jones wrote again, emphasizing that his client's case was over. There was no possibility of retrial and no likelihood of any prejudice to his client if he spoke. Under those circumstances, the state bar's ethics counsel finally relented and allowed him to tell his story.

The prosecutor in this case insists that Mr. Jones' story is false. But if it is not, I want you to imagine the ethical dilemma that Mr. Jones shouldered for the last 10 years. On the one hand, he was bound as a lawyer not to prejudice his client's case. On the other hand, he knew that the evidence he had could literally make a life-or-death difference to another man. There was no easy ethical or moral answer for him.

If you were Mr. Jones, what would you do?

Let me give another example that has been much in the news. Move the clock back several years. Suppose you are one of the bright young transactional lawyers who worked for Enron. You are approached by your supervisors, who tell you that they think they've come up with a

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way to structure transactions in a manner that hides debt and overreports income. Of course, your client and your supervisors both insist that it's all completely—100 percent—within the bounds of the law. You check; you're not sure if they're right. Maybe their actions could be within the letter of the law, but you're pretty sure that what they're suggesting violates the spirit of the law.

But the client did not ask you about either the letter or the spirit of the law. Your client asked you to draw up documents to allow the misleading transactions to go forward. They're not asking you to provide the faulty legal analysis. They're not asking you to fill out misleading reports to the SEC. They're asking only that you write the contract and structure that deal. All they ask is that you do the job you were hired for.

What do you do?

I hope you understand that my point in giving you these examples is to illustrate that being an ethical lawyer is not simple. I hope that none of you are ever faced with these sorts of ethical dilemmas. Being an ethical, moral lawyer can be a tough responsibility.

When you are admitted to the bar of a state, it is not an empty formula. You have to take and pass the bar exam. You must raise your hand and vow to support the law.

Let us look at Mr. Jones' ethical problem. Once he was caught on the horns of his dilemma—once he was forced to choose between keeping his client's case in confidence and allowing a potentially egregious death sentence for another man to stand—there was no good way out. I don't envy him those 10 agonizing years.

But I do want to point out one thing. The account is quite bare. We do not know exactly what happened in that room with the prosecutor. And because they did not tape record those crucial 15 minutes, we will never know. But there is one thing missing from Mr. Jones' version of the tale. When the prosecutor stopped the tape and started prompting Mr. Jones' client to change his testimony, what did Mr. Jones say?

This, you see, was the absolutely crucial moment. I know that this audience intends to be ethical and moral. In order to uphold those standards, you cannot let yourself forget that you are an officer of the court and that you are dedicated first to truth and justice. That moment Mr. Jones experienced in the prosecutor's office is the kind of moment that you need to learn to recognize. If you let it slip by in silence, you will find that events pass you by all too quickly. It is probably one of the hardest moments a lawyer can face. It is a moment when you need to do a lot more than refrain from doing things that are wrong; you need to actively choose to do that which is right.

It would be hard for Jones to interrupt a prosecutor who has promised to deal less harshly with your client in order to say these words: "I am sorry, but I cannot allow you to advise my client to give testimony that may not be true." But that is what Jones should have done.

Think about all the things you may lose for your client by speaking up. If your client does not have useful testimony to give at trial, he may not be able to bargain for a lower sentence. His own version of events could be called into question; perhaps the prosecution might try to pin that fateful shot on him instead. By speaking up, you may well hurt your client's future.

The hardest thing you must accept as an ethical, moral lawyer is that it is not your job to win for your client at all costs. You are an officer of the court; that means that one of the costs you must never pay is to put the law to one side. No matter how much it may prejudice your client, you must never advise him—either through action or inaction—to break the law or tell an untruth.

Now, I don't want to judge Mr. Jones too harshly. His repeated efforts to bring this matter to light show that he is a strongly ethical man who was deeply troubled by the events he witnessed. What this story shows is that if you are not vigilant about those crucial moments, if you let silence reign when you must speak up, even the best-intentioned of us might find ourselves in an unspeakable dilemma.

It is a heavy responsibility that is placed on your shoulders when you become an officer of the court. We ask for your vigilance, not only in the courtroom but out of it. We ask for your constant fidelity to the law. We ask you to do and say things that could make you very unpopular, perhaps with the people who are paying your salary. We demand that each and every one of you stand for truth and the rule of law, no matter the personal consequences.

Now let us look at the matter of the young Enron attorney. You can see that it is similar to the example of Mr. Jones. Even if there is nothing wrong in the duties you perform, you have a duty to your client and to the law to speak up against shady practices. These days, that duty is codified in statute. But even before it was written as law, an ethical lawyer had an obligation to affirmatively do what was right and tell her superiors that she believed that their plan was inconsistent with the obligations imposed on them by law. I think you can all also see in the case of Enron that what might have appeared as "zealous advocacy" for the client in the short term did not serve the company well in the long term.

I bring up the matter of Enron to emphasize to you that when you become an officer of the court, you cannot pooh-pooh the meaning of that term because you plan to become a transactional attorney. Some of you will never stand before a court or address a jury. You may never enter a courtroom. But that does not mean that the obligations imposed on you are in any way lessened.

As a lawyer you are not just an advocate for your client. You are a representative of the law. It is your duty not only to act according to the highest ethical standards but to make sure that you speak up when others intend to do otherwise. Your highest fidelity is to the law; you serve your clients best by making sure that they understand the duties imposed on them both under the letter and under the spirit of the law.

Now, I've spent a lot of time telling you about how hard it may sometimes be to be an ethical lawyer. Hopefully, none of you will face the kind of situation that I've detailed today. But if you do, you must make up your mind well in advance that you will speak up instead of being silent. I know you are all capable not only of refraining from wrongdoing but also of doing and saying what is right.

What I have just asked you to do is very difficult. But I'm going to ask you to do something in addition. There is another extremely important aspect to being an ethical, moral lawyer. Not only must you be sure that your actions with your client meet the highest ethical standards, but you must also strive to be an outstanding citizen lawyer.

Today we do not often use the term *citizen lawyer*. Most Americans today rarely have a favorable opinion of lawyers in general. They are most often thought of as hired guns.

But our country has been shaped by the work of thousands upon thousands of citizen lawyers who have tirelessly labored to make this world a better place. These lawyers have

been citizens first. Their role has not been that of just the navigator. Instead, their contributions have been closer to the visionary and the architect. Instead of maneuvering about the law, they have chosen to use the law to build vibrant communities.

As lawyers you also will have the power to shape communities. However, more and more in recent years I have heard that young lawyers often have very little time to act as citizens. You've all heard the statistics, I'm sure. Law firms are increasingly worried about "billable hours." Even jobs spent working for the government, in an era where cash-strapped local, state, and federal officials pull out all the stops to make every dollar go as far as possible, are beginning to turn into heavy workloads. Lawyers today work more hours than lawyers in years past.

But it is also true that our civic need for lawyers has increased at an unprecedented rate. By some estimates, almost 80 percent of the need for pro bono services in our communities goes unmet. Boards of civic organizations claim they see fewer young lawyers volunteering. As a result, our communities are suffering.

I hope to inspire you not only to do right but also to do good. In addition to being an ethical advocate for your clients, I urge you to become advocates for your communities.

I hope to impress upon you the vast difference that individual citizen lawyers have made in this country. Today we live in a country that just celebrated the 400th birthday of Jamestown. That settlement brought us the English common law and the rule of law. It was critically important.

Our country was shaped by some fine lawyers, starting with Thomas Jefferson. Jefferson, as we all know, lived in a period of political upheaval. Instead of seeing himself as a mere navigator of law, Jefferson was brave enough to envision a country in which law, rather than reinforcing a centuries-old social order, could be used to bring about change. Using his skills as a lawyer, he drafted the Declaration of Independence. That document was not composed of dry legalese, detailing the rights and obligations of citizens. It did not hide the details of American independence in fine print. Instead, it contained a startling vision of the future of this great nation. That document stated not only that all men were created equal but that "[g]overnments . . . deriv[e] their just powers from the consent of the governed."

Madison built upon the vision of Jefferson: He explained and educated the community about how the Constitution created a government that would be ideally situated to serve the people. . . . Madison, like Jefferson, was a citizen lawyer.

In Jefferson's time, those truths were far from self-evident—they were revolutionary. The Declaration of Independence that Jefferson drafted was not merely a legal document informing Britain it had lost 13 of its finest colonies. Instead, Jefferson's work set forth a vision for our fledgling nation: Our challenge was not just to win independence from taxation but also to forge our country into a refuge from monarchy and tyranny, a place where all citizens could strive to attain life, liberty, and happiness.

That vision, articulated by Jefferson, epitomizes what it means to be a citizen lawyer. There is no question that the Declaration of Independence is a lawyer's document: it sets forth grievances, details the appropriate remedy, and prays for relief. But it did so in a way that created community. At the time it was written, it unified thousands of Americans around the common themes of freedom and equality. Even today the promise of that document inspires citizens to make a positive difference in our world.

After the Americans had won their freedom from British tyranny, they faced a bigger challenge: How were they to enshrine the ideals represented in the Declaration of Independence in their government? The founders of our country knew better than to believe that their government would automatically respect the rights of the people just because they had fought and won a war. They were wary of governmental power, and so when it was time to build our new nation, they knew that the structure of the government had to resist tyranny. They needed to build a structure that was flexible enough to survive the ravages of time but strong enough not to fold under the first great blow.

It is obvious to us now that the solution to this problem is to write a constitution that divides power among those various branches of government. In a nation that is committed to the rule of law, our Constitution establishes what law rules. But when our nation was first conceived, the notion of a federal constitution was not the first thought that occurred to the newly independent states. In fact, the first form of government after the Revolutionary War was the ineffectual Continental Congress, which governed under the Articles of Confederation that left the national government far too weak.

When it became clear that a new form of government was necessary, it was again to lawyers that our nation looked. At the time, it was by no means clear what sort of government we should establish. Most of the states were deeply wary of national government and were loathe to give up the tiniest bit of their power to a potentially tyrannical federal power. It was James Madison who helped to build a legal document that bridged those concerns. Madison proposed establishing three independent branches of government, each of which would act as a check on the others; he restricted the potential reach of the federal government.

After the Constitution was drafted, Madison, along with Alexander Hamilton and John Jay, campaigned tirelessly for its adoption by the states. Instead of hiding the powers of government behind legal maneuvers, he explained the simple provisions of the Constitution and set forth the operation of government. In so doing, Madison built upon the vision of Jefferson: He explained and educated the community about how the Constitution created a government that would be ideally situated to serve the people and bring about the ideals of our young nation.

Madison, like Jefferson, was a citizen lawyer. He envisioned a future and acted to bring that future to fruition. He educated and inspired others to believe in that future.

All good lawyers act as zealous advocates for their clients. Early citizen lawyers acted as zealous advocates for the future, and, in so doing, they shaped our fledgling nation. They defined what it meant for "law" to rule, and they established the necessary conditions for law: democratic consent of the governed and independent executive, legislative, and judicial branches. Without the contributions of those early citizen lawyers to this country's future, the ideals of the American Revolution may well have perished despite our success in gaining independence.

Of course, since those early days, our country has been pushed forward by a great many citizen lawyers who have made important contributions to our society.

One of our great citizen lawyers was Justice Louis Brandeis. Before his appointment to the Supreme Court, Brandeis was famous for submitting a brief to the court that detailed the damaging effects of a lengthy workday on women. Oregon had mandated a maximum workday of 10 hours for women who worked in manufacturing positions. Up until that point, the Supreme Court had regularly struck down similar legislation. But Brandeis submitted a brief that detailed the ill effects of striking down the legislation and convinced the Court to let the Oregon law stand.

As a Supreme Court justice, Brandeis often spoke out for those who were unpopular. He and Justice Oliver Wendell Holmes Jr. regularly spoke out in favor of the free speech rights of political dissidents in the First World War. He favored an expansive view of the Fourth Amendment, one that protected privacy and property rights of U.S. citizens. His service on the Supreme Court drastically altered the character of that institution. Although his views on the First Amendment were first expressed in dissent, today they are recognized as the law of the land.

No discussion of citizen lawyers would be complete without reference to Thurgood Marshall. From the very beginning of his career, Marshall was dedicated to a higher ideal. While he served his clients zealously, he did so with an overarching goal in mind: ending racial segregation. Soon after graduating from law school, Marshall found himself in the thick of the fight for racial equality. In one of his very first court cases, Marshall challenged the University of Maryland's refusal to enroll an African-American student in its law school. He argued that the "separate but equal" mandate of *Plessy v. Ferguson* was inapplicable because there was no law school available to African-Americans. Marshall won his case before the Maryland Supreme Court.

Thurgood Marshall takes a moment to reflect after presenting the NAACP's case to the Supreme Court in the momentous Little Rock school integration case in 1958. Behind him is a portrait of Supreme Court Justice Louis Brandeis.

He continued to win victories for black Americans through the years. Of course, his civil rights work culminated in his most famous case. Marshall argued the case for the African-American Kansas schoolchildren before the Supreme Court in *Brown v. Board of Education*. A unanimous Supreme Court agreed with Marshall, and, with that decision, a momentous change was wrought in our country. School districts across our nation desegregated, and the words of Brown soon worked their way into the vision of our nation. We had been told for two centuries that all men were created equal. Now Thurgood Marshall unified that vision of equality with a picture of integration: one in which the racist mantra of "separate but equal" became a contradiction in terms. Thurgood Marshall's exemplary service to the community did not, of course, stop with this monumental change. He was eventually appointed to the Supreme Court, where he continued to work as a tireless champion for individual rights and equality.

Nor was Justice Marshall alone among Supreme Court justices in his service to our legal community. Before his appointment to the Supreme Court, Justice Lewis Powell oversaw school integration efforts in Richmond, Virginia, and served as president of the American Bar Association. Justice Ruth Bader Ginsburg was a staunch advocate for women's rights who cowrote the first law school textbook on sex discrimination.

If we look across our nation today, we will find innumerable lawyers who are dedicated to a vision of the future in which the rule of law brings freedom and equality to all. These people work on issues that range from international affairs down to local interests. They are involved in civic organizations. They sit on corporate boards. They serve in state government and in the judiciary. I am sure that they all serve their clients zealously. But good citizen lawyers undoubtedly know that, in the long run, their clients will be best served by zealous advocacy for the future as well.

I encourage you all to remember that the challenge of being an ethical, moral lawyer is much greater than merely refraining from doing what is wrong. Instead, I expect each and every one of you to do both what is right and what is good in this world. You can act as a powerful force for change, and I expect to hear in the coming years that every one of you has done so.

In that vein, I would like to leave you with the wise words of John Wesley:

Do all the good you can,
By all the means you can,
In all the ways you can,
In all the places you can,
At all the times you can,
To all the people you can
As long as ever you can.

Sandra Day O'Connor served as associate justice of the Supreme Court of the United States from 1981 to 2006, the first woman to hold that office. She is currently the chancellor of the College of William and Mary in Williamsburg, Virginia.

ART CREDITS

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