

Lawyer Jokes, Lies, and Name-Calling

Trial lawyers are frequently called sharks, junkyard dogs, and ambulance-chasers. Oddly, these references are not politically incorrect. In fact, no stereotype seems too crude in polite conversation. However, what passes as no more than mischievous name-calling is really a malicious attempt to batter the legal system with sticks and stones.

Lawyer-bashing is not new. But, since 1980, according to University of Wisconsin Law Professor Marc Galanter, the verbal assault on lawyers has become noisier and nastier. In numerous articles and a forthcoming book, *Lowering the Bar: Lawyer Jokes and Legal Culture*, Galanter has established a strong correlation between the prevalence of lawyer jokes in general conversation and Americans' distaste for lawyers. Specifically, Galanter told me in a recent interview, the public is uneasy with legalization, which he describes as law's penetration into areas previously unregulated or governed by custom and tradition. Now, everything from health care plans to frequent flyer awards are governed by what he calls "faux law" or sets of rules that mimic law. The public is uneasy, as he puts it, displacing customary practices with law. Always ready with a joke to make his point, Galanter asked me if I had seen *The New Yorker* cartoon in which a woman extends her ring finger to a man on bended knee and says, "Yes. I'll have my lawyer call your lawyer."

The punch line succeeds because the public has proved susceptible to the message that society is plagued by too many lawyers and too much law. The messengers, among them the tobacco, gun, and oil industries, have convinced the public that legal

accountability is unfair--to them. The inclination to "turn against law," as Galanter characterizes it, is a reaction to litigation in the mid-1960s which raised the level of accountability. Legal victories in civil rights, as well as "enlarged tort liability, the emergence of poverty law, consumerism, and environmentalism all reflected higher expectations of institutional performance by manufacturers, doctors, and government." (81 Tex. L. Rev. 285) Rather than accept responsibility for harmful products, employment discrimination, workplace hazards, air pollution, and other corporate misdeeds, the defendants and their political allies have orchestrated a smear campaign against lawyers, juries, and the civil justice system based on accusations and innuendo.

Myths about the legal system have been repeated so often, they sound true. Among those that Galanter exposed and debunked in his 1993 article, *News from Nowhere: The Debased Debate on Civil Justice* (71 Denv. U.L. Rev. 77), are the so-called litigation explosion; Dan Quayle's factoid that the United States has 70 percent of the world's lawyers; runaway juries that make capricious awards to undeserving claimants; routine and astronomical punitive damage awards; lawsuits that undermine America's ability to compete economically; and frivolous lawsuits that attempt to turn the courts into a forum of first not last resort.

"Ironically," Galanter told me, although businesses "enjoy the greatest benefits of law, they have the strongest interest in weakening certain areas of law." In the public's eye, the overall benefits of the legal system, such as deterrence, prevention, civility and regularity are too subtle to be readily visible. At the same time, negative images of lawyers in recent corporate mega-scandals have been used to paint all lawyers with the same brush.

The result of twenty years of intentional court-bashing is that judges as well as lawyers have become scapegoats, especially for politicians. Just recently my own state legislator, an attorney herself, announced her candidacy for the Montana Supreme Court with these words: "Exercising judicial restraint will be very first and foremost on my list of priorities." News reports of her candidacy said she was "promising not to use the bench to make law or policy." With the code phrase, "judicial restraint," candidates for legislative and judicial office signal voters that they support an anti-lawyer agenda that goes back to the 1994 Contract With America. Since then, legislation in Congress and state legislatures has succeeded in shielding various industries from liability by riding the popular belief that out-of-control lawyers are responsible for stunting economic growth and taking jobs away from average Americans.

With a nod to Ronald Reagan and Newt Gingrich, President Bush relied on these tired assumptions in his radio address on September 20, 2003. He announced a six-point economic plan in which the first two points portrayed lawyers as parasites on the economy. First, he blamed them for "the lawsuits that are raising health care costs." Second, he demonized them for suppressing economic growth by pursuing "frivolous litigation" and siphoning off settlement money in class actions from "those harmed." After dispatching lawyers, he proposed four legal adjustments of his own to tip the scales in favor of his agenda on energy, business, trade, and taxes.

With open season declared on lawyers, juries are vulnerable to attack. Tirades against medical malpractice lawsuits, on the basis that they have caused skyrocketing premiums, are often aimed at juries. In Billings, Montana, attorney Elizabeth Halverson penned a column for the *Billings Gazette* in response to a local doctor's criticism of jury

awards. Citing several studies, she reminded the good doctor and the public that medical malpractice premiums increased as the result of insurance companies' financial mismanagement, not jury awards; and that the total cost of malpractice (premiums plus damages paid) is less than one percent of total health care costs. Placing blame on juries is, she wrote, "an insult to our friends, neighbors, and peers, to all of us who set aside family and work commitments and serve on juries."

Trashing lawyers has spawned a new genre in the book industry with titles like *The Case Against Lawyers* by Court TV's Catherine Crier, a former judge, and two books by attorney Philip K. Howard, *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*. Howard is one of the founders of Common Good, a "legal reform coalition dedicated to overhauling America's lawsuit culture." These authors and others have convinced many Americans that those who go to court have, in Crier's words, "abdicated personal responsibility." To put it another way, malcontents among us feel compelled to invoke their legal rights rather than stoically suffer the consequences of others' negligence. Crier argues, "Students' rights, taxpayers' rights, patients' rights, passengers' rights, parents' rights, and more emerge fully formed from the minds of lawyers and politicians....Litigation increases to enforce them. Tax dollars must sustain these efforts. Costs soar to pay awards for violations. The spiral goes on." Corporate rights are noticeably missing from her list.

Galanter anticipated these diatribes twenty years ago in an article titled, *Reading the Landscape of Disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society* (31 UCLA L. Rev. 4, 1983). Anti-law

rhetoric, he said, characterizes litigation as a destructive force that undermines social institutions. As evidence, anti-law proponents rely on horror stories about sue-happy Americans, examples of massive antitrust cases that take years to resolve and cost millions of dollars, and groundless allegations that too many law school graduates are infecting society. Galanter counters that litigation, while "not necessarily optimal" for resolving disputes, is successful because the results, such as protecting individuals from lethal products and monopolies, are incredibly important to society as a whole. He sees litigation is an "instrument" for testing public consensus and a "forum" for bringing issues into the "realm of public accountability."

Criticism aimed at lawyers reverberates not just from the bully pulpit, corporate board rooms, and bookstores, but the Supreme Court. Justice Antonin Scalia, dissenting from last term's decision upholding the right of privacy for gay Americans, wrote: "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda...." Indicting the legal profession as a whole, Scalia wrote: "So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream'...." Scalia blamed the court's majority for inviting the culture war into the Supreme Court, while he deftly invoked the war on lawyers.

Lawyer name-calling is dangerous because it poisons the atmosphere in the public square and ultimately unravels the legal system. Nasty judicial campaigns sully the prestige of the courts, just as negative political campaigns demean the electoral process and turn off voters. Jury-bashing discredits verdicts and makes it seem acceptable for

citizens to avoid serving on juries. Worst of all, court-wacking opens the door to defying court orders and, ultimately, violence in place of governance. Two recent examples come to mind. In Alabama, Chief Justice Roy Moore defied a federal court order to remove a stone monument of the Ten Commandments he had installed in the rotunda of the Alabama Supreme Court. In a Florida case, the legislature and the Governor overturned a court order allowing a woman's husband to take her off life-support. Judge Moore has been removed from the bench for violating his oath of office and the Florida woman remains in a vegetative state against her wishes.

These overt examples of disrespect for the judiciary were made possible, in part, because of a growing atmosphere of scorn for the legal system. What other explanation is possible when a judge and a governor flagrantly disregard a judge's order? One need only look as far, or perhaps as close, as Iraq, Iran, and Colombia to find situations where contempt for the judiciary is used as a weapon against democracy. On December 10, 2003, shortly before Saddam Hussein was captured, *The Wall Street Journal* reported that insurgents had murdered Iraqi Judge Muhan Jabr al-Shuweilly, "a powerful jurist who had vowed to investigate the crimes of the Hussein regime." Disdain for legal processes--anywhere--undermines democracy.

In Marc Galanter's taxonomy of lawyer jokes, he devotes a section to "object of scorn" jokes. He told me one to make his point succinctly. *What's the difference between finding a dead skunk and a dead lawyer in the middle of the road?* Pause. *There are skid marks in front of the skunk.* I laughed. But, on second thought, this may be the last time I repeat a lawyer joke.

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