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SOME THOUGHTS ON THE LEGAL PROFESSION'S PUBLIC IMAGE

*Jon R. Waltz**

At the special convocation of DePaul University honoring him, former Chief Justice Earl Warren remarked with a discernible sense of sadness on the number of lawyers involved in the complex web of scandalous conduct now compendiously known as the Watergate Affair. Thus the former Chief Justice joined the swelling ranks of those in and out of the legal profession who believe that the Watergate matter and associated assaults on the democratic process can justly be put at the doorstep not only of President Richard M. Nixon but of the entire legal community.

It is good that giants of our profession, like Earl Warren, are facing the matter squarely because Watergate has set in motion a new wave of criticism of the legal profession by the general public. This wave is too large to be ignored. More to the point, much of the public's renewed criticism is deserved by some of us lawyers and some of it by all of us.

It was therefore appropriate that those planning the program in honor of Chief Justice Warren should suggest that the participants address themselves to the topic, "Law, Lawyers and Ethics." For my part, I wish to consider the general public's image of lawyers and what seem to me to be some of the reasons, good and bad, that lie behind it.

Recently, I had a not unanticipated taste of the public's attitude toward the legal profession. In its November 18, 1973 issue, the *Chicago Tribune Magazine* published an article of mine in which I attempted in a realistic way to catalog some of the reasons why the public finds it easy to belabor the legal profession. For the

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sake of decent balance, a part of this piece was devoted to some of the more obviously admirable aspects of the lawyer's role in our society. I was surprised to receive, in the next few weeks, 146 letters, not to mention a number of telephone calls (some of them being unmentionable), about this article. All but nine of the letters praised the article extravagantly; the nine were, I sensed, unfavorable (one writer said I was "a sick egghead" and another less personal note intimated that anyone who does not see John Ehrlichman as the American Dream come true should not be allowed around young people).

The public's reaction was dispiriting, not exhilarating, because the 137 laudatory epistles praised only those portions of the *Tribune* article that seemed to take lawyers to task. The unfavorable letters either castigated me for insisting that lawyers have some redeeming characteristics or argued that anyone critical of the Watergate operatives should be deported to the country of his choice.

What one perceives in an experience of this sort is that the American public is schizophrenic about the law and its practitioners; it reveres the law and reviles the lawyer. Let Mr. Nixon dispense with the services of Archibald Cox and the air grows steamy with references to the Rule of Law. But let a survey be conducted to measure the public's esteem for those whose days are spent preserving and implementing our legal structure and we lawyers make a sorry showing.

I will suggest to you that we ought not be too surprised by our showing in the polls, and here I will, in part, draw upon what I said in the magazine article to which I have referred. The public's condemnation of lawyers comes pretty naturally. We must face up to the fact that the sources of public criticism of the legal profession spread far beyond the Watergate phenomenon, which only served to reopen wounds long thought to have been lawyer-inflicted. I have been putting together, as I earlier suggested, a partial catalog of the reasons why the public finds it easy to condemn lawyers.

Some lawyers are subject to censure because they are downright incompetent or because they are insufficiently committed to the just causes of their clients. In a lecture at the Fordham Law School a few weeks ago, the present Chief Justice of the United States, War-

ren E. Burger, singled out trial lawyers, saying that "many judges consider a majority of trial lawyers not competent to give effective representation to clients." (As a longtime litigator, I digress long enough to remark that it would be presumptively impermissible for me to suggest how many trial lawyers would characterize a majority of judges.)

Chief Justice Burger's recurrent call, voiced again in his Fordham lecture, for more relevant instruction in the law schools (he even suggested that we say a little something to law students about legal ethics) is a reminder of yet another basis for public criticism of our profession. We have created a self-defined, self-regulating monopoly. By defining the practice of law broadly and then making the unauthorized practice of it illegal, we maintain a firm grip on a good bit of work that could be done competently and more cheaply by nonlawyers. By regulating ourselves and brooking no lay interference in the process, we too often avoid disciplining even the most venal and inept among us.

The concept of adversariness—the adversary trial process—generates public antagonism. We no longer settle disputes through trial by ordeal; battling with axes and walking on hot coals as methods of truth-determination have been supplanted by the superficially more painless and polite jury trial. But the adversary trial method, with contending lawyers lined up on opposite sides of the courtroom to champion their clients' causes verbally, is simply a more contained form of combat governed by procedural rules that are a sort of Geneva Convention of litigation.

The animosity inspired by this process does not flow exclusively from the fact that in a contested trial one side has to lose, which hurts. It goes deeper than that. The rhetoric of adversariness—the lawyer's sworn obligation to fight the good fight for his client—tends to legitimize the playing in the trial courtroom of what in Watergate's tired lexicon would be called "dirty tricks." Ask any of our zanier trial practitioners to describe his pet techniques, and one soon realizes that he is being regaled with tales of dirty tricks played on opposite lawyers and their clients. Dropping the law books in time to interrupt the opponent's crucial cross-examination; erasing the diagram that the opposing side's witness laboriously drew on the blackboard—these disruptive stunts echo Watergate.

They do not endear lawyers to anyone who has been on the receiving end of them.

Scoring of lawyers as a group comes naturally because they so often move hand-in-hand with adversity. It is, of course, something we cannot avoid; it is part of our reason for being. We are there soon after death occurs; we appear when there has been an automobile accident or at the onset of an occupational disease. A lawyer is there when the mortgage is foreclosed and when a man's wages are garnisheed to pay a debt. We are there when a family's home is condemned to make way for another freeway. We appear when sentence is pronounced, wresting the defendant from his parents or his wife and children. Little wonder that we are not the beloved of all.

Some lawyers are heartily disliked because their egos have swollen beyond control. Ours is an egotistical profession. We could not function effectively without a reasonable degree of belief in our own powers, but we spend so much time giving advice to others that some of us begin to consider ourselves infallible. Many people find this attitude distinctly wearing.

The entire legal community is subjected to censure because, by and large, only its most reprehensible members are continuously visible to the general public. Many people, possibly beginning with the mistaken assumption that the best-publicized lawyer is bound to be the best, become disillusioned by those lawyers who have flair but not much else, or those who are under indictment or who soon may be. The public rarely sees the legal profession's most competent and most scrupulously ethical practitioners. They are too busy doing what they ought to be doing, and doing it proficiently, to be in the newspapers or on television much. The public is left with our profession's clowns and criminals.

There is the claim that lawyers as a group are excessively conservative and too often opposed to needed reforms. Ralph Nader says this, and the public listens to articulate gadflies unless they are far more irresponsible than Nader. And over the years Nader's claim has more often been true than false.

Another thing wrong with many of us lawyers is that we conduct out professional affairs in an impenetrable idiom, akin to the physi-

cian with his cryptic diagnoses and his inscrutable prescriptions, written in chicken-tracks. The truth, as I once suggested in the pages of this journal,[†] is that the doctor's cryptography is a lesson in lucidity when compared with the lawyer's written and oral hieroglyphics. Like the people encountered by Gulliver in his travels, attorneys have "a peculiar cant and jargon of their own." And never having developed a bedside manner, we lawyers have gradually lost sight of the fact that almost no one is equipped to translate our jargon; we, who ought to be among the world's best communicators, sometimes seem capable of talking only to one another.

Now enters the perplexed layman, perhaps in trouble. He wants to know what is happening. What he gets from his lawyer in response, too often, is a flurry of references to such legal esoterica as the *voir dire*, *res ipsa loquitur*, and the Rule in Shelley's Case. The lawyer assumes comprehension (or is vigorously attempting to prevent it); he has performed in the manner of Stephen Crane's famous "man with a tongue of wood." The layman shakes his head and prays. He grows increasingly fond of such men as Arthur Balfour, who is supposed to have silenced a critic in the House of Commons by shouting in exasperation, "I know that! I am talking English, not law!"

Furthermore, I am advised by a former member of a large bar association's grievance committee that we frequently infuriate the very laymen who pay our fees by failing to communicate with them at all. We grow too busy and soon neglect the letter or telephone call that calms the client's fears.

Karl Llewellyn, a lawyer and legal scholar who found it possible to say it all in English, once suggested that the great thing about the legal profession is not that it is a learned one but that it is made up of practical problem-solvers. He was right, and yet this idea, wrongly dealt with by those of us who try to teach new lawyers, can produce an intolerable trait. In the halls of legal learning there resides the conceit that lawyers are never-failing problem-solvers; that altho every issue has two or more sides, all of them defensible, still there must be a pragmatic and final solution to every problem—

[†] See Waltz, *Foreword, Medico-Legal Symposium*, 21 DE PAUL L. REV. 1 (1971).

from the dropping of bombs in Cambodia to the rear-end automobile collision case.

Just as it is the lawyer's love of jargon that permits a Watergate witness to dilute felonies by designating them "covert operations," it is his all-things-solvable attitude that lets him authorize burglaries to ensure election of the right candidate. But nonlawyers know, and expect a few lawyers to comprehend, that some problems can have no resolution except on the basis of decency and morality; that solutions must from time to time be ethical rather than tactical.

This last point leads me to one of the letters I received after the *Tribune* piece appeared in print. The writer of it is a lawyer, and for fairly obvious reasons, I shall not name him. It is enough for me to say that I think he is candid and articulate. He said, to preface his thoughts, that "lawyers are the conduits of their clients' basest instincts." This is how he elaborated on the theme:

Clients come to lawyers to get something or to avoid giving something up. Our charter, if not our duty, is to be a partisan mechanic. The client sees us slip, slide and slither past self-created obstacles to reach his, her or its ends. And in the end (with the possible exception of an adoption proceeding or name-changing ceremony and . . . I wonder even about those), someone invariably loses because of a lawyer and someone else may get too much ("All that money because of the doctor that shyster sent me to—once!") or not enough ("The scoundrel's fee was a third, plus a third in expenses for that doctor he sent me to—once!").

Either way, we excite the client's avarice or whatever other passion is appropriate to the cause, bringing out the basest more often than the best in everyone we serve. The mirror up to humanity, as it were.

Painted with a broad brush, perhaps, but with a painful perception.

It may be that it is only a variation on my correspondent's theme for me to add that I believe lawyers are objects of public suspicion, fear, and disapproval because they have so much more power than the average citizen. It is not possible in a limited time to describe the meaning of "law" in any all-inclusive way, but it can rightly be said that power is one of the things that law is. The man or woman who knows the law and how it works has the ability to manipulate the power process, for good or ill.

A highly-placed lawyer can frustrate a grand jury's investigation of the killing of four students on a university campus, at least for a time; one less elevated can get your traffic case advanced to the top of the docket so you need not lose half a day's work waiting around a crowded and smelly courtroom. A lawyer knows how to get the

layman clear title to the home he has dreamed of owning; some lawyers, conversant with the law's fine print, know how to take his dream house away from him by paying the one neglected tax installment. A lawyer can deflect the Internal Revenue Service's hot breath; in some places he can get meritorious criminal prosecutions delayed again and again until the complainant sighs and goes away. We can settle an estate, create a corporation, convert an apartment building into a condominium, fight a sewer assessment. We lawyers have power in an increasingly complex and frightening world. But not everyone loves the powerful, especially if they exact a fierce price for their services.

It is quite an ugly picture, all in all. What is wrong with us lawyers? Mainly, it is that the worst among us paint our portrait, so that we are viewed as avaricious and egomaniacal, all style and no substance, seeking and wielding power without having the strength of character to wield it well. Lost to the public is the portrait of most lawyers.

I have been proud for twenty years to be a lawyer and Chief Justice Warren has graced the legal profession for many more rich years than that. When I survey my brothers and sisters at the Bar, I see, in the main, men and women who, like Earl Warren, appear to have been drawn to the profession of the law because it gives them the chance to help other people. I hope I am right about that, because that is the portrait that I wish we lawyers, in honesty, could paint for all to see.