1974

Comment

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By Roger C. Cramton

In talking about the social and ethical responsibilities of the bar to advance the public interest,[1] there is a danger that we may take ourselves too seriously. I am told, on good authority, that the Arkansas Supreme Court recently devoted its attention to a subject which I last encountered in law school some years ago—the rule against perpetuities. One of the judges, carried away with the intricacy and beauty of the problem before the court, inquired of counsel whether a particular variation was well known in his part of the State. "Your Honor," the reply came, "in Booneville we talk of little else."

I recall also the well-known "Daleyism" of the esteemed mayor of Chicago, made during dedication ceremonies of a new building at the University of Chicago in the late 1950's: "together we will rise to new platitudes of achievement."

Abe Krash has made my task a difficult one in two respects: First, he has carefully avoided the unctuous and platitudinous. Second, my agreement with his position is so nearly complete that lively criticism is extremely difficult.

Perhaps it is worthwhile to examine the unarticulated premises that underlie Mr. Krash's view of the adversary system of representation as part and parcel of "the public interest."[2] There is an opposing view that deserves statement, although I do not share it.

You will recall the celebrated confrontation between Ralph Nader and Lloyd Cutler several years ago. Cutler's firm had represented automobile companies that had been charged with conspiracy to impede the development of emission control systems. Settlement negotiations with the Justice Department resulted in a consent decree that ended the antitrust action. Through Nader's promptings, a group of law students picketed Cutler's firm to call attention to the settlement, which they characterized as a sellout of the public interest. Cutler, visibly upset, accused the law students of violating legal ethics by picketing, and asked the $64 question: "Why do you think you have a monopoly on deciding what is in the public interest?"

The traditional view of the bar, implicit in Cutler's statement, is that political and legal processes are fair and open ones which provide orderly methods of participation and change; and that the duty of a lawyer is to represent vigorously the interests of

his client. Whatever you or I may think of the outcome of the pluralistic political process in a given situation, it is the only current expression of the public interest. Thus, if the system operated properly, without favoritism or corruption, the pollution case settlement must have been "in the public interest," since it was the outcome of a process that is open, rational, and fair.

This is an elaboration of the classical view of Bentham, who observed that the public interest could be calculated simply by adding the individual interests of members of the polity.[3] To the calculus of private interests, which are the essence of a free society, must be added an emphasis on the fairness and openness of our mechanisms and procedures for resolving private and public controversies—mechanisms in which lawyers play an indispensable role. Given fair and open procedures for resolving disputes or urging social change, Learned Hand concluded: "[R]ight conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many, this is, and always will be, folly; but we have staked upon it our all."[4]

Objections to the pluralist theory rest upon disagreement with its factual or normative premises.[5]

First, there is the assertion by some that the procedures are not really fair and open because of the existence of widespread bias and favoritism, if not corruption. Thus, for example, it is charged that the case-hardened criminal court judge invariably accepts even the implausible recital of the police officer; or that Southern judges and juries could not be trusted in the 1960's to determine factual issues fairly in civil rights cases. Here the disagreement is one of fact: How pervasive are the warts of our system? To what extent does it fail in practice to live up to its pretensions? All of us would agree, I hope, that imperfections of the system that take this form should be eradicated as completely and as early as possible.

A second objection to the pluralist system—that the cards are stacked against interests that are not economic in character or that lack resources—is one that Abe Krash has identified and discussed as a major concern. I would add only that this problem is far more serious than one merely of representation of the impoverished. Interests other than those of the poor may also be unable to obtain full and adequate representation. Our political process provides great access, leverage, and visibility to the leaders of organized interest groups, whether they be unions, corporations, professional groups, or private associations. But these organizations tend to be organized as hierarchies in which the leadership groups are self-perpetuating. There are limits on the extent to which the rank-and-file can control these organizations.[6] Thus, George Meany does not necessarily represent the views of the ordinary unionist, nor Chesterfield Smith the views of all the lawyers in this room. This limitation of the system operates wholly apart from its bias against unorganized interests and those of poor people.

Another problem of representation concerns the diffused interest, whether it be an economic or ideological one. If I, as a consumer, am concerned about the safety of tires, on which I spend no more than $50 a year, there

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is very little that I am inclined to do when it comes to legislation, regulation, or court proceedings involving such issues. The expense of effective participation is so great that I have to be a crank or a zealot to devote the required energy and money to such participation. On the other hand, one can be sure that interests that have a great deal at stake, such as the tire companies, will be fully and ably represented. Of course, it is possible for small interests to combine in supporting an institutional representative; and the burgeoning number of consumer and environmental groups demonstrates that this can be done. But the costs of combination are large; and the "free rider" problem is serious. Why should I contribute to a consumer organization concerned with tire safety when others may do it anyway? It is imperfections of this sort that lead thoughtful people to argue in favor of public financing of consumer or environmental advocates. But this approach, with its departure from traditional attorney-client relationships, also has difficulties, and I agree with Mr. Krash that we are a long way from seeing the clash of private interests become sufficiently even handed so that the outcome routinely may be said to be in the public interest. New and better devices for more adequate representation of those now underrepresented are badly needed.[7]

My comments thus far have been fully consistent with the basic premises of the pluralist system, and have merely emphasized its imperfections. In the pluralist view, all competing claims are merely subjective value preferences—and Lloyd Cutler can play the "public interest" game with as much authority as Ralph Nader (although he may have greater difficulty in attracting the attention of the media!).

The radical critique of American society, however, does not accept the premise that decisions made in accordance with the procedures of the system will produce the best results for the whole society. Herbert Marcuse and others argue that the pluralist system produces irrational and undesirable results.[8] The competing institutions of modern industrial society, Marcuse claims, concur in a common interest to defend and extend their established position, and to solidify the "power of the

whole over the individual." The irrationality of the whole goes unnoticed and unprotested—growing productivity for little or no purpose; technological advances used to produce instruments of death or the plastic products of a consumer society; increasing affluence resulting in moral emptiness and environmental devastation. The radical critique, in short, does not accept the assumption that ultimate values can be determined by the conflict of private interests. The radicals have discovered truths, not self-evident to the rest of us, that do not depend upon the votes of the political process or the advocacy and rationality of the legal process. While the value choices that are asserted are subjective, it is also true that the preferences of the rest of us for a procedural definition of ultimate values is also ultimately subjective. The difference for the moment is that the vast majority of our society, and nearly the entire universe of lawyers, accept the premises and values of the pluralist system. It is the accepted truth of our time. The radical critique, unable to muster a coherent and sustained vision of the good society, but riven by discordant and partial visions, is at present merely a voice crying out in the wilderness.

FOOTNOTES

1. There is a substantial literature dealing with the concept of "the public interest." See generally, G. Schubert, *The Public Interest* (1960); Barry, The Public Interest, in *The Bias of Pluralism* (W. Connolly ed. 1969).
2. See Riley, The Challenge of the New Lawyers: Public Interest and Private Clients, 38 Geo. Wash. L. Rev. 547 (1970); Comment, The New Public Interest Lawyers, 79 Yale L. J. 1069 (1970).
3. See Bentham, *An Introduction to the Principles of Morals and Legislation* 3-4 (1948).
4. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y., 1943).
5. In this part of my discussion I have relied heavily on an excellent student comment, The New Public Interest Lawyers, 79 Yale L. J. 1069, 1070, n.3 (1970).
6. See H. Kariel, *The Decline of American Pluralism* (1961).
7. I have discussed this problem at greater length in a recent article, The Why, Where and How of Broadened Public Participation in the Administrative Process, 60 Geo. L. J. 525 (1972).
8. H. Marcuse, *One-Dimensional Man* xiii (1964); Moore, The Society Nobody Wants: Beyond Marxism and Liberalism, in *The Critical Spirit* 418 (1967).

Discussion

Q. I think that what we are missing and what we really need today is the example of a Louis DeBrandeis, who a generation ago set out very intentionally to become a successful and wealthy lawyer for one purpose—that was to become an independent spirit and turn his abilities to the representation of the public interest in Massachusetts. I think it would be great if some of our successful and prestigious lawyers, having established themselves, would follow Mr. Brandeis' example and resign from private practice and turn around and represent some of the public interests that otherwise do not have the funds to have representation. I'd be interested in any comment the speakers would like to make regarding that.

MR. KRASH: Some of the great figures in the law have been men who have stood up in moments of great difficulty and argued and handled unpopular causes. That was certainly true during the 50's, at the time of the loyalty and security program. I think, however, that many of the really admirable things are done by people