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## THE JUDGE'S ROLE IN EDUCATING THE PUBLIC ABOUT THE LAW\*

*Marna S. Tucker\*\**

The United States is the only civilized nation in which law plays such a dominant role. It is the glue which binds our society together. It is the mechanism through which individual and group relations are defined and adjusted. No other country has accomplished the vast social, economic, and political revolutions the United States has undergone peacefully using the instrument of law.

Increasingly, matters of great public import seem to revolve around the law. One need only mention examples such as abortion, school prayer, desegregation and school busing, crime, government regulation and deregulation, and the great expansion of the administrative law system into myriad forms of business and social activity to recognize how often and how deeply the law and the legal profession are intimately bound up in the great issues of our day.

The central role law plays in our national life is certainly not a new phenomenon. Our independence was precipitated by a legislative dispute over taxes. Our national symbol is, fittingly, not a royal family of ancient grandeur but a code of law—the Constitution—and, in the almost 200 years since that document was created, many of the major domestic crises we have faced have been framed in constitutional issues.

Law and lawyers play an even greater role in American society now than at any time in the past. In the home, the school, the market place, and the office—almost every substance, product, relationship, and activity may be subject to laws or regulations or may involve the government, a lawsuit, or negotiation requiring lawyers. Americans use the courtroom to resolve political, economic, and social disputes to a degree inconceivable even twenty years ago and unheard of in other countries. Elect a President, fire a teacher, trade a pitcher, close a factory—almost anything may produce a

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lawsuit and usually does. No doubt we are the most litigious, some would say "lawyer-ridden," society in history.

At a time when the law is such a dominant factor in our society and the need to understand the law is correspondingly great, it is indeed a paradox that the average citizen remains fundamentally ignorant of the legal system which occupies such an important part of his or her life.<sup>1</sup> The average adult citizen has only the vaguest understanding of the law, how it is made and enforced, what important social values it embodies, and why principle must prevail over expediency and emotion. Examples of public ignorance abound. A recent public opinion poll found that 37% of those surveyed believe a person accused of a crime must prove his innocence, 30% believe that the district attorney is a public defender, and 72% believe the Supreme Court reviews all state court decisions.<sup>2</sup> Perhaps most telling of all is the fact that the Bill of Rights regularly fares poorly on public opinion polls. Unfortunately, it is difficult to think of a field about which the public is more woefully ignorant and where so little is done to educate the average citizen.

Most Americans get their meager understanding of the law from high school civics courses, fragmentary newspaper and television items about controversial decisions and developments, and, second-hand, from the experiences of their friends and neighbors. Regrettably, most exposure is gained from television's idealized or distorted view of the law where the police operate as commandos, the judge is invariably female or black, and the lawyer is better served by street sense than legal knowledge.

In 1979, two enterprising reporters subjected the Supreme Court and its processes to the same type of investigative journalism used in uncovering the Watergate scandal. The result was a best-seller—*The Brethren*<sup>3</sup>—which shocked the profession, even as it titillated the public. It is a tribute to those reporters' skill that a book about the interstices of the law should have been so popular.

However, its popularity is understandable for another reason. Nothing is more intriguing than power and mystery, and no public institution in

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1. A recent major study on "Changes in Political Knowledge and Attitudes" among school children over the years 1969-1976 showed declines in the children's knowledge about the structure and functions of government. National Assessment of Educational Progress, National Center for Education Statistics, U.S. Dep't of Health, Education and Welfare (Mar. 1978) (under contract to the Education Comm'n of the States). A national study which tested the functional literacy and competency of adults in law and government (among other areas) found over half those surveyed at a level below functional literacy. Adult Performance Level Study, Division of Adult Education, U.S. Office of Education (July 1977).

2. Public opinion research poll by Yankelovich, Skelly and White (1978).

3. B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* (1979).

America is as powerful and mysterious as the Supreme Court. The Court has a major influence on the country, yet most citizens do not have the slightest idea what the Court's role and function is. The profession and the bench have worked hard to keep it that way.

At bottom, *The Brethren* was little more than a peek through the key hole, supported by law clerk gossip. Now that judicial feathers are smooth again, we should recognize the central lesson of the book's success—there is a vast public hunger for knowledge about the legal system which the profession must address.

The American Bar Association has, during the past decade, instituted some major programs designed to promote constitutional and legal literacy among the general public. Notably, the Special Committee on Youth Education for Citizenship has served as a national catalyst and coordinator for the development of programs and materials in elementary and secondary schools. More recently, the ABA Commission on Public Understanding About the Law was established to help the adult public understand its rights and responsibilities under the law, to foster an appreciation of the role of law in society, and to assist individuals in dealing more effectively with their personal legal problems. In addition, there is Law Day which has received substantial support for many years. But the legal profession does not do enough to explain itself and what it does. More importantly, it does not do enough to explain the law, its processes, and its significance.

One reason for the paucity of effort to educate the public about the law is that the legal profession has traditionally been more comfortable fostering an aura of mystery. Perhaps there is no better illustration of this than how we have sought to elevate and isolate our judges.

Judges embody the law. If the law is august, majestic, mysterious, impersonal, objective, above party or ideology, and immune to fear or favor, our judges must be the same. On the bench, we cloak them in black, raise them above litigants and lawyers, and equate them with the court itself. Off the bench, the judges are anonymous, and some critics would cloister them in a social, economic, and professional monastery, allowing them to talk only to other lawyers or perhaps only to other judges.

The legal profession has furthered this image of isolation to enhance the judicial office with dignity, to foster the moral authority and suasion of the law, and to protect judges from controversy or involvement off the bench which might pose a threat to these objectives. The idea that the myth of blind justice, the office not the person, or the disinterested judge renders judgment in a case lends legitimacy and credibility to the judiciary.

Decade old controversies have pushed to extremes the effort to divorce judges from personal and professional involvement outside of strictly defined, judicial functions. At the height of this period, United States Supreme Court justices were criticized for articles and talks about their avocations and personal interests, where their articles were published, and even the art-work elsewhere in the magazine;<sup>4</sup> for writing popular books on the law;<sup>5</sup> and even for participating in judicial training seminars.<sup>6</sup> Respected public figures, such as Dean Acheson, have urged that judges be prohibited by statute from nonjudicial or even judicially-related outside activities.<sup>7</sup> Others have argued that judges should not lecture on the law before professional groups or write books or law review articles because to do so inevitably suggests views concerning disputes or principles that may come before them. The rationale for these views is that cases and opinions should stand by themselves; judges should avoid the temptation to participate in legal discussions better left to others in the profession. Justice Brandeis personified this view of proper judicial conduct. He made no speeches, wrote no articles, and accepted no honorary degrees while on the Court. He is the very model of judicial Olympian aloofness.

This may be extreme, but it is a belief with many adherents. However, it is not the only accepted tradition of judicial conduct. A long line of judges, from John Jay to Earl Warren, have felt it important and obligatory to lend their stature and talents to perform vital national business while on the bench. These judges have always been criticized after the fact for their extra-judicial activities, but it cannot be said that the service they performed did not ease the nation through critical times. Other judges, such as

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4. The sputtering efforts to organize an impeachment movement in the House of Representatives during the late 1960's and early 1970's regularly focused on Justice Douglas' articles and interviews about the outdoors as they appeared in *Playboy Magazine* and the *Evergreen Review*, both extremely "liberal" in artwork and language.

5. Justice Fortas authored a book in 1968 entitled CONCERNING DISSENT AND CIVIL DISOBEDIENCE. It was a thinly-veiled effort to set constitutional and political limits to anti-war activity, and was generally regarded as a defense of the war policy of his former client and partner, Lyndon Johnson. Fortas was criticized for engaging in political activity, trading on the prestige of his office, and discoursing on issues certain to appear before the Supreme Court. The book sold 750,000 soft-paper copies in six months. See *Non-Judicial Activities of Supreme Court Justices and Other Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 757 (1969) [hereinafter cited as *1969 Senate Hearings*].

6. Justice Brennan resigned from further participation in the New York University Law School Appellate Judges Seminar in 1969 because of the criticism against outside activities by judges. Edwards, *Commentary on Judicial Ethics*, 38 *FORDHAM L. REV.* 259, 275 (1969).

7. See Acheson, *Removing the Shadow Cast on the Courts*, 55 *A.B.A. J.* 919 (1969). See also *1969 Senate Hearings*, *supra* note 5, at 116.

Edward Lumbard, Henry Friendly, Jerome Frank, and Irving Kaufman, also combined outstanding judicial careers with notable contributions in educating the public about the law.<sup>8</sup> In earlier days, great judges combined careers in teaching while serving on the bench.<sup>9</sup> As Judge George Edwards said years ago in a speech to fellow judges: "Legal writing, lecturing, teaching, and studying are antidotes to judicial atrophy. So long as time spent on them does not interfere with the judge's proper performance of his direct judicial duties, I think it is in the public interest to encourage them. . . . [t]he notion of leaving legal writing exclusively to law professors leaves me aghast."<sup>10</sup>

Despite this dual tradition, the legal profession has tended more to the cloistered view in recent years. As the concept of the proper judicial role has become progressively circumscribed, we have not only made the position of judge more of a sacrifice to undertake, but we have also deprived the public of perhaps the single most useful and beneficial instrument for education about the law and the legal process.

I submit that the legal profession should embark on a comprehensive program of public education and that judges should play the leading role in this effort. It no longer suffices, if it ever did, to leave written judicial opinions and the Chief Justice's speeches, diluted and distorted through many intermediaries, as the major contribution judges make to public knowledge of the law. Rather, judges should accept, as part of their professional and social obligation, the responsibility to educate the public about what they do and why, what the law is, and what it is not.

This is the new role for judges in the 1980's. Yet, it is not so much a new responsibility as the resumption of a function long honored in history: the judge as teacher and instructor.

Judges, of course, are already on the lecture circuit, attending meetings and conventions, writing articles and visiting schools. But this is almost exclusively within the legal profession. Judges should also speak at colleges and high schools, the PTA, the Junior League, and the Elks. They should write articles for the Sunday supplements and *Reader's Digest*.

There are two traditional objections to more public outreach by judges. The first is that judges should not take time away from their primary professional obligation to decide cases. The answer to this concern is simple: it is not that judges should spend less time on the bench, but that they should devote more of their off-bench professional activities to public education.

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8. *1969 Senate Hearings*, *supra* note 5, at 50.

9. *Id.* at 140 (comments of Professor Alexander Bickel).

10. Edwards, *supra* note 6, at 275.

The second concern is rooted in the precept that judges should avoid public controversy. This is a guide for behavior, however, not a justification for total noninvolvement. We must recognize that judges cannot, and do not, remain immune from controversy. For example, one can turn on the radio and hear editorial comment and public response to a judge's setting of low bail in a notorious case. Judges do not escape controversy. We do not immunize the law, or the bench, or particular judges, from controversy when bail and sentencing practices or other elements of the law are left unexplained. Instead, we receive calls for unreasonable laws, a high level of public emotion, and crusades of ignorance against fundamental principles of law.

Similarly, judicial dignity and authority are not enhanced when the public blames crime on judges who appear to coddle criminals and who release individuals because of what the public perceives are legal technicalities. Excluding judges from a role in public education does not protect them from controversy. Instead, it simply ensures that legal issues will be debated at the lowest possible levels of public discourse.

The answer to the furor over a bail decision or an acquittal in a highly-publicized case is a continuing effort to explain that arrest is not the same as guilt, that bail is not punishment, and that conviction follows due process, not the editorial page—all contrary to what the public generally thinks. Judges can and should perform this educational role. No one else now does. No one else can do it as effectively.

Certainly, public education by judges will not end the controversies over these and other issues; they are the proper subject of widespread public debate. But, judges can raise the level of debate if they invest their prestige and learning in an effort to educate the public about the laws they administer, the boundaries of their authority, and the handicaps, both avoidable and unavoidable, under which they function.

In addition to judges getting out on the hustings and speaking on general topics of the legal system, I suggest that a further step be taken. The public might profit greatly from more information and a better understanding of what went into a judge's decision in a particular case. As members of the legal profession, we know that very few legal and factual issues are simple. Generally, the questions are close and merit lies on both sides. However, the public gets a distilled view of court decisions through a press which is usually unschooled in the law and which suffers from a tendency to over-dramatize. Most directly in need of this understanding are the parties and groups affected by particular court decisions. When important social, economic, and political disputes get translated into lawsuits for

resolution, we place a heavy burden on the law and the judges who have to resolve these disputes. That burden is increased immeasurably when what appear to be important considerations are rejected and the reasons are not communicated clearly to the parties affected.

Judges write opinions for other judges, for the attorneys, or perhaps for posterity. By the time a judge's decision reaches the people it directly affects, it will have gone through many hands. The parties know the result—that they won or lost—but they have only a vague notion, if any, of why. They will accept the decision because we are uniquely a law-abiding society, but they will most likely see it as the result of bias, misunderstanding, or simply stupidity or unreasonableness by the judge. Judges should make a point to explain their decisions to the groups affected: they could appear before the teacher's union to explain why the strike was enjoined; they could tell the Police Benevolent Association why illegally-obtained evidence had to be excluded; and they could address the Jaycees to explain why women have to be admitted.

This is admittedly a risky undertaking. Judges wince enough from editorials and politician's attacks. The thought of having to put the reasons behind a complicated case into lay language will seem daunting. Yet judges are essentially laymen. Rarely do they have scientific background for a nuclear siting case, or the economics necessary for a utility rate challenge. Nevertheless, by the time the case is completed, they have a very good grasp of the issues and the essential facts to which they apply the familiar tests of balancing and reasonableness. There is no doubt judges can explain these cases to the environmental group or the local consumers or the business interests which are affected.

Elected judges have a special responsibility to explain their decisions. An elective system presupposes that what a judge does is worthy of public judgment. The political impact of judicial decisions is an accepted factor in their decisionmaking. By educating citizens about their decisions, elected judges do not leave the total responsibility to others like the press and their opponents.

There should be little worry that judicial prestige will be tarnished. Judges are generally earnest, serious, hard-working and honorable people. They carry their dignity with them, and they are respected. There is no reason to believe that these qualities will not come across from the podium as well, if not better, as from the bench. The judge's discussion may not persuade many partisans that they were wrong, but it will go far towards convincing them that their arguments were understood and seriously con-

sidered. Respect for judges, for their decisions, and for the legal system will increase.

At least two other beneficial results will flow from moving judges out of their cloisters and into the role of direct teachers of the public. First, we will enhance and sharpen public debate about the legal issues of our time, and elevate it beyond slogans like "pointy-headed judges," "soft on crime," "strict constructionist," and "social reformers on the bench." The public will begin to understand how far we have translated questions of public policy into a judicial framework because we are afraid to decide them as political issues. Americans will begin to appreciate how ill-equipped courts are to deal with many social and political disputes, and perhaps they will conclude that the best way to resolve most disputes is to keep them from going to court. The better the public comes to understand the purposes and limitations of the judicial process, the better it will be able to assess the true strengths and weaknesses of our legal system.

The second advantage will be a heightened appreciation by judges of the ways in which the law does not serve the public well. The profession may realize that legal processes have become divorced from real human needs. We may discover ways to simplify the legal system, to make it more accessible, understandable, and responsive to the ordinary person and to society. Many aspects of the legal system may be the result of habits that have outlived their usefulness. The "plain language" movement may be useful for more than warranties and insurance policies. Direct interaction between judges and the public may be very educational for judges and for the entire legal profession.

Our profession will probably find increased public knowledge and sophistication very uncomfortable. It will undoubtedly create new pressures and pulls on our traditional methods of resolving disputes through legal machinery. But public understanding of all fields of human endeavor is a requirement of democracy. The public and the profession will be better served when that understanding applies to the law, for the law is our ultimate security.