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Review of “Lawyers Before the Warren Court, Civil Liberties and Civil Rights, 1951-1966,” By Jonathan D. Casper

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BOOK REVIEW

LAWYERS BEFORE THE WARREN COURT, CIVIL LIBERTIES AND CIVIL RIGHTS, 1951-1966. By Jonathan D. Casper. Urbana: University of Illinois Press, 1972. Pp. xi, 221. \$9.50.

Literature about the Supreme Court and its work is generally divided into two categories. First, there is the popular literature and newspaper coverage which discusses important court cases in the fashion of important football games. The results are of little interest to lawyers and often misleading to the public. Secondly, there are the scholarly comments in law reviews and working books used by lawyers. Such articles are not read by the public. They are used primarily by lawyers, law teachers, and law students who seek an analysis of specific questions of law.

Neither body of literature has provided useful information or even perceptive discussion of the complex manner in which important issues reach the Court and are thrown back to the public by the Court. Jonathan D. Casper's book, *Lawyers Before The Warren Court, Civil Liberties and Civil Rights, 1951-1966*, is an interesting attempt to explore at least a part of this process. The book is directed primarily at social scientists, but lawyers and the public at large may also benefit from reading it.

The book is based on a study, in interview and questionnaire form, of lawyers who participated in law reform cases before the Supreme Court. It concentrates on the areas of loyalty-security, criminal justice, civil rights, reapportionment, and some first amendment litigation.

The author does an excellent job of summarizing the actions of the Court in these areas in lay terms, understandable but not oversimplified. It is refreshing to see these cases analyzed and presented in a simple and unemotional manner. Casper distinguishes the areas in which the Court has made definite changes in the law from the areas in which it has dealt with issues in an undecided manner, leaving the law in a state of uncertainty. He points out that Supreme Court de-

cisions are not always self-enforcing and that in many instances the main import of a decision of the Court is to open public and legislative debate on issues. He demonstrates that actual enforcement of the precedent by lower courts may lag for many years or may even be avoided because of local community pressures or prejudices of local judges.

For instance, the search and seizure issues are confused by numerous decisions of the Court, which still leave unresolved in many instances the basic question of when a warrant is required and when a search may lawfully be made incident to an arrest. Furthermore, the Court's rulings are not always important in view of the fact that almost all trial judges will go along with the policeman's account of what happened, and the policeman can tailor his story to fit the law. It is healthy that the public begins to recognize that the power of the Court, for good or evil, is not unlimited and that much is left to local vigilance.

Although the book purports to be about lawyers and their involvement in law reform cases, the analysis is made on the basis of the lawyers' perceptions of whom they represent. A lawyer who feels he is simply representing his individual client and who is concerned only with winning the case for that client is called an "advocate." A lawyer who perceives of himself as having a long-range identity with a group from whom, or through whom his client is drawn, and who is representing the client at the request of the group or for reasons decided upon by the group, is described as a "group advocate." Finally, lawyers, such as ACLU panel volunteers who represent the client because they believe that the issue in the case affects the whole of society, are in effect representing society at large and are called "civil libertarians." In many ways the book is more about clients than about lawyers.

The results of the study indicate that:

1. Criminal justice reform cases have been most frequently handled by traditional "advocates" concerned about winning their case.
2. Early loyalty-security litigation, reapportionment, civil rights and civil liberties cases were more likely to be handled by "group advocates."
3. Civil libertarian types were involved predominately in the later loyalty-security cases, and first amendment, freedom of speech, religion and assembly cases.

The explanations given range from the devious to the subtle. It is obvious, for instance, that criminal justice reforms have primarily come about in appeals from criminal convictions. A person accused of a crime faces immediate penalties, and his lawyer, whether a regular practicing criminal attorney or appointed counsel, must concern himself primarily with the effects of the litigation on his client. Secondly, lawyers in this area are generally criminal lawyers, or appointed counsel, *i.e.* regular practicing lawyers or their junior associates. Both groups tend to view themselves in the traditional role of lawyer as problem-solver and officer of the court.

In the other areas discussed, frequently the litigation is initiated by the client or a group. Often this type of client does not have much to lose or gain personally or financially. It is therefore more likely that the attorney will be one who sees more of a connection between himself and the group or the principle involved in the case; and as more of an activist or law reformer, rather than simply an advocate.

Not surprisingly, law reforms in the criminal justice cases were brought about by the Court on its own initiative as often as by the lawyers' suggestion. Law reforms in civil rights cases, on the other hand, were much more often the result of planned strategy of groups such as the Legal Defense Fund of the NAACP with its legal staff and cooperating attorneys. The author is careful to point out for the general reader that even here what the lawyer does primarily is to give the Court attractive opportunities to make law and bring the issue to public attention. There is, of course, no guarantee that positive change will result. In fact, there is often the possibility of negative re-enforcement of existing practices.

It is also apparent that the ACLU-type of operation, which depends on lawyers donating their time, usually on an individual case basis, is more likely to attract the lawyer who is interested in the principle of the case rather than in the client.

Less apparent are the reasons for the shift of loyalty-security cases from group advocates to civil libertarians. The explanation given is that the early loyalty-security cases were primarily defensive actions arising during the period of McCarthyism, when most lawyers did not want to handle these cases and when the only lawyers to be found were themselves close to the group under attack. Such lawyers rapidly found themselves handling such cases on a full-time

basis. Later on, when the pressures of the McCarthy era had died down, civil libertarian-type lawyers, drawn from the ranks of general practitioners, felt less constrained about taking such litigation. In addition, as the pressure became less intense, the cases began to occur more in the form of attacks on loyalty oath requirements and other offensive requirements. Cases could be chosen for law reform possibilities.

The author suggests that the area of criminal justice reform may be increasingly taken over by group advocates, as criminal defendants are increasingly recognized as a group, and as public defenders replace court-appointed attorneys. Caspar believes that such a change might be advantageous in the area of law reform, in that specialized attorneys could seek out the more important cases and give them careful treatment, instead of the hit or miss approach prevalent in the past. This development would be generally to the disadvantage of ordinary clients who do not have "special cases."

The book is only a beginning at exploration of the role of lawyers in law reform cases. I would like to see more work done in this area. Specifically, I noticed the absence of:

1. Any comparison to lawyers representing "the establishment" who, I believe, represent a similar spectrum of individual-centered, group-oriented, or principle-directed practitioners.

2. Any reference to the funding and operational struggles of the groups or persons interested in litigation as a source of social change.

3. Any discussion of the effect which the litigation has on such groups. For instance, it is important for some groups to have successful law reform cases in order to increase their own prestige and ability to draw financial support. On the other hand, many groups formed with different intentions, become involved in social litigation by accident or last resort.

4. Some discussion of the complex motivations of many lawyers which, in addition to the matters referred to in the book, include financial survival, ego satisfaction, and habit. Although the three classifications made by the author are useful, they are somewhat simplistic.

The book is valuable as a start in using the approach of the social scientist toward understanding the things which lawyers and legal institutions do. I believe it is helpful to lawyers and the public to view

themselves in this light. I do not think the study goes deep enough to be of any real help to the reform-minded lawyer in understanding himself. It is more useful to those outside the profession who want to understand something about the processes of reform through litigation.

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