LAWYERS JUDGE THE WARREN COURT

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One special public which presumably pays a good deal of attention to the United States Supreme Court is the bar. As part of the "company" attached to the judiciary, attorneys may have a philosophic interest — and surely have a bread-and-butter interest — in the activities of the country's highest tribunal. This article seeks to explore that concern.

During the spring of 1970, a sample of lawyers in greater Providence, Rhode Island, was studied. Interviews were conducted with approximately 10% of the attorneys in the area, chosen completely at random.[1]

THE LAWYERS' EVALUATION

Rhode Island's lawyers' evaluation of the Warren Court is presented in Table I: slightly more than half of the lawyers expressed a favorable opinion; one third expressed an unfavorable opinion, and the remaining 14% were undecided.

TABLE I

THE LAWYERS' EVALUATION OF THE WARREN COURT (SPRING, 1970)

Question: Could I ask you for your overall evaluation of the Warren Court? In general terms, would you say you reacted favorably, unfavorably, or that you had no significant reaction to the Warren Court?

Favorable	53%
Unfavorable	33%
Undecided	14%
n.	(93)

It is particularly interesting that only a bare majority of the lawyers interviewed reacted favorably to the Warren Court, even in such general terms as these.

In order to provide a comparative perspective, the public's attitude, as measured by the Gallup Poll, is given in Table II.

TABLE II

THE PUBLIC'S EVALUATION OF THE SUPREME COURT (LATE JUNE, 1969)*

Question: In general, what kind of rating would you give the Supreme Court — excellent, good, fair, or poor?

Rating	National Sample	Eastern Region	Men	College Educated	Professional & Business
Excellent	8%	10%	9%	14%	11%
Good	25%	27%	23%	29%	29%
Fair	31%	31%	32%	24%	31%
Poor	23%	20%	28%	28%	22%
Don't Know	13%	12%	8%	5%	7%

*Source: Gallup Opinion Index, Report No. 49, July, 1969.

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Responses to different questions must be compared with great caution.[2] The condition of the data requires that we proceed modestly and that the following comparisons of the attitudes of the lawyers and the general public be regarded as very tentative.

The Rhode Island lawyers were more dissatisfied with the Court than was the national sample — 33% of the lawyers were unfavorable, contrasted with 23% of the public who gave the Court a "poor" rating — and were also more unfavorable than any of the relevant sub-samples.[3] Of special interest are the undecided. Gallup's data show that the college-educated and business and professional people (presumably there is considerable overlap) were much less undecided than was the general public. Lawyers might be expected to be even less undecided about the Supreme Court. And yet the precentage of lawyers who reported that they had not made up their minds about the Warren Court is a shade greater than the national average, and at least double that of the college-educated, and the professional and business group.

Finally, if one is willing to treat "excellent," "good" and "fair" responses to Gallup's questions as equivalent to a "favorable" response by the lawyers (it is not obvious that this is completely appropriate), we see that the lawyers were substantially less favorable than either the general public or the relevant sub-publics. We can conclude with some confidence that the number of lawyers who were unhappy with the Warren Court was substantial — one third of those interviewed — and that the support which the Court received from the bar was hardly overwhelming.[4]

The lawyers were asked whether there were any decisions of the Warren Court of which they approved or disapproved. The results, grouped by subject matter, are presented in Table

TABLE III

THE LAWYERS' EVALUATION OF SPECIFIC DECISIONS

Question: Were there any particular decisions of the Warren Court which you view as especially desirable? Which ones? Were there any of its actions which you consider particularly undesirable? Which ones?

Rating	Issue				
	Defendants' Rights	Civil Rights of Negroes	Reapportionment	Obscenity-Censorship	School Prayer
Desirable	34%	35%	11%	2%	1%
Undesirable	31%	15%	4%	9%	7%
No Reference	35%	50%	85%	89%	92%
n.	(94)	(94)	(94)	(94)	(94)

III. Of all the issues dealt with by the Warren Court, only two — the rights of defendants in criminal trials, and the civil rights of blacks — were considered to be noteworthy by the bar. The vast majority of the lawyers did not respond one way or the other to such consequential decisions as the reapportionment and school prayer cases. While other studies have demonstrated that the Court's decisions are largely invisible to the average citizen (Murphy and Tanenhaus, 1968a, 1968b; Dolbeare, 1967), we might have expected that a greater portion of the bar would hold opinions about specific decisions than these data reveal.

Only a fraction of those sampled evaluated the Court's work in any detail: 15% of the lawyers expressed opinions about the Court's treatment of three or more issues, the same number as those who expressed no opinions. Fewer than half of the attorneys commented on more than one area of judicial action.

What do the lawyers think of the individual Justices? More precisely, who are their heroes? Table IV ranks the Justices in order of the number of favorable comments they received in response to two open-ended questions. The dead are clearly

TABLE IV

JUDICIAL HIT PARADE

Question: Of the present Justices of the United States Supreme Court are there any whom you particularly admire? Who are they? What about Justices no longer on the Supreme Court? Are there any of those you particularly admire?

Justice*	Percentage of Lawyers Who Expressed Admiration
Cardozo	39%
Holmes	35%
Brandeis	32%
Frankfurter	30%
Black	19%
Warren	19%
Douglas	16%
White	14%
Hughes	6%
Brennan	5%
Harlan	5%

*Justices cited by fewer than five lawyers (5%) have been omitted.

more popular than the living: Cardozo, Holmes, Brandeis, and Frankfurter emerge as a distinct group of front-runners. And this despite the fact that the lawyers were first asked to comment on present Justices. A second group, Black, Warren, Douglas, and White (a name I had not expected to crop up so frequently) enjoyed a limited measure of admiration. Other Justices received scant attention.

Most lawyers mentioned some Justice they admired — only 19% referred to no Justice at all. But 43% did not express admiration for any member of the Warren Court (including Frankfurter).

Table V — which demonstrates the close relationship between diffuse and specific support for the Court — indicates that the defendants' rights decisions were more important to

TABLE V

RELATIONSHIP BETWEEN SPECIFIC AND GENERAL EVALUATIONS

Questions as in Tables I and III.

Evaluation of Specific Decisions	Evaluation of the Warren Court: Favorable	Un-favorable	Un-decided
I. Reaction to all decisions: (a)			
Favorable only	53%	10%	23%
Unfavorable only	12%	55%	0
Both favorable & unfavorable	27%	26%	23%
No decisions mentioned	8%	10%	54%
n.	(49)	(31)	(13)
II. Reaction to defendants' rights decisions: (b)			
Favorable	47%	13%	31%
Unfavorable	20%	58%	8%
No reference	33%	29%	62%
n.	(49)	(31)	(13)
III. Reaction to Negro civil rights decisions: (c)			
Favorable	49%	23%	15%
Unfavorable	8%	26%	8%
No reference	43%	52%	77%
n.	(49)	(31)	(13)

How to read this table. The column beginning in the upper left-hand corner of the Table indicates that of the 49 lawyers who reacted favorably to the Warren Court, 53% had only good things to say about specific decisions; 12% had only unfavorable things to say about specific decisions; 27% had both good and bad things to say about individual decisions; and 8% mentioned no decision of the Court of which they approved or disapproved.

(a) Tests of statistical significance cannot be appropriately applied to these data as presented, since 5 of the 12 cells have expected frequencies smaller than 5. When those favorable to the Warren Court are set apart from all others (combining the unfavorable and the undecided), chi^2 is significant at .001.
In this and all other tables in which the chi^2 test is employed, unless otherwise indicated, all cells have expected frequencies of 5 or more.

(b) Chi^2 is significant at .001, but three cells have expected frequencies smaller than 5. When the undecided are excluded from analysis, chi^2 is significant at .001.

(c) Chi^2 is significant at .02, but three cells have expected frequencies smaller than 5. When the undecided are excluded from analysis, chi^2 is significant at .05, one cell having an expected frequency of 4.7.

the Court's critics than were the civil rights decisions. Fifty-eight percent of those who were generally unfavorable to the

Court noted their displeasure with its defendants' rights decisions, compared with 26% of their number who opposed the Negro civil rights decisions. Conversely, 23% of those who opposed the Court commented favorably about the civil rights decisions, while only 13% of the Court's critics endorsed the decisions dealing with criminal trials.

The data presented in Table V permit us to identify more precisely the attorneys who were undecided about the Warren Court. Indecision can result either from indifference or from ambivalence: the difficulty of resolving conflicting assessments. But only 13% of the attorneys who favored some specific decisions of the Warren Court and opposed others were undecided, in contrast to 50% of those reporting no likes or dislikes.[5] Table V indicates that 23% of the lawyers who were undecided about the Warren Court in general terms reported both positive and negative responses to specific decisions — virtually the same percentage as was true of those favorable to the Court, and those critical of it. But 54% of the undecided cited no decision of the Warren Court, either favorably or unfavorably, in comparison with a mere 8% of those supporting the Court, and 10% of its critics.[6] Similarly, 77% of the undecided lawyers cited no Justice of the Warren Court of whom they approved, whereas only 38% of those with opinions failed to cite at least one Justice.[7] These data strongly suggest that the lawyers who reported that they were undecided about the Warren Court were uninterested rather than torn or confused. "Undecided" appears to be a "non" category, rather than a "Hamlet" category.

THE COURT'S FRIENDS AND CRITICS: RELATED ATTITUDES

The interview data indicate other differences of opinion which separate those who approved of the work of the Warren Court from those who disapproved.

Table VI shows the lawyers' responses to three items dealing with their conception of how the Supreme Court should function. The first was a straightforward multiple choice question: Should a Justice act as a law maker, law interpreter, or as a mixture of the two? The question explicitly sought a normative rather than an empirical evaluation. As a follow-up, lawyers were asked, simply, "why?" Many volunteered the opinion that law making should be left to the legislature: the doctrine of separation of powers. The second item in Table VI is based on these responses. These are lawyers who explicitly

TABLE VI

THE LAWYERS' PERCEPTIONS OF THE JUDICIAL FUNCTION

The proper judicial role:[a]	
Law interpreter	50%
Law maker	8%
Mixture	41%
No opinion	2%
n.	(91)
Leave law making to the legislature:[b]	
Yes	42%
No reference	59%
n.	(94)
Favor a "strict constructionist" on the Supreme Court:[c]	
Yes	51%
No	43%
No opinion	7%
n.	(91)

a. Question: Sometimes a distinction is made between Supreme Court Justices as lawmakers, and Justices acting as interpreters of the law. What do you think? How should a judge act?

b. The previous question was followed by: "why?" Lawyers who volunteered the opinion that lawmaking should be left to the legislature — the doctrine of separation of powers — either at this point, or at another time during the interview, are recorded here.

c. Question: Some people say that there is need for a "strict constructionist" on the United States Supreme Court. Would you tend to agree with that?

spoke of a separation of function between the legislature and the judiciary, either at this point in the interview, or in response to other open-ended questions. The third item in the table is again based on a specific question; the lawyers were asked to react to the then recent proposal to put a "strict constructionist" on the Supreme Court.

A sizeable portion of the Rhode Island bar articulated what may be called a very conventional — or traditional or conservative — conception of the judicial function (Table VI). Fully half of those interviewed said that Supreme Court Justices should be law interpreters, as distinguished not only from law makers, but from the happy medium — allegedly the position loved by American pragmatists — of a little of both. Only a handful of lawyers (8%) were prepared to support the position (was it such a radical position in the year 1970?) that the Supreme Court's function is to make law.

The number of lawyers who specifically invoked the doctrine of separation of powers — law making should be left to the legislature — was only slightly smaller. This figure is especially impressive in that it was a volunteered rather than a forced response and undoubtedly underestimates the degree of support for this position among the attorneys. And 51% of the lawyers agreed that the Supreme Court needs a "strict constructionist."

A majority of those who were critical of the Court adopted the conservative or traditional response to each item, as did a majority of those who were undecided about the Court. A majority of those who reacted favorably to the Court opted for the non-traditional position on each item. Thus positive evaluation of the Warren Court is associated with a perception of the judicial role which permits judicial law making; a negative evaluation of the Warren Court is associated with a conventional, mechanistic perception of the judiciary.

However, when we relate the lawyers' perceptions of the judicial role to their reactions to specific decisions of the Court, we find that the picture is more complex (Table VII). Concern with judicial law-making is associated with lawyers' criticisms of the Court's civil rights decisions, but not its defendants' rights decisions. Critics of *Escobedo, Miranda,* etc., were no more likely to endorse a law interpreter role than those who

TABLE VII

PERCEPTION OF THE JUDICIAL FUNCTION AND EVALUATION OF SPECIFIC DECISIONS

	Defendants' Rights Decisions			Negro Civil Rights Decisions		
	Favorable	Unfavorable	No Reference	Favorable	Unfavorable	No Reference
The proper judicial role:						
Law interpreter	47%	48%	57%	31%	77%	55%[a]
Law maker	10%	7%	7%	10%	8%	6%
Mixture	43%	45%	37%	59%	15%	38%
n.	(30)	(29)	(30)	(29)	(13)	(47)
Leave law making to the legislature:						
Yes	44%	41%	39%	27%	71%	43%[b]
No reference	56%	59%	61%	73%	29%	57%
n.	(32)	(29)	(33)	(33)	(14)	(47)
Favor a "strict constructionist" on the Supreme Court:						
Yes	39%	82%	41%[c]	52%	54%	56%
No	61%	18%	59%	48%	46%	44%
n.	(28)	(28)	(29)	(29)	(13)	(43)

How to read this table: The column in the upper left-hand corner indicates that of the 30 lawyers who stated (in response to an open-ended question) that they approved of the Court's defendants' rights decisions, 47% opted for the law-interpreter role, 10% for the law-maker role, and 43% for a mixture of the two.

Questions appear in Tables III and VI.

[a] Because of the small number of lawyers favoring the law-maker position, the chi^2 test cannot be applied to this distribution. When lawyers who select the law-interpreter role are contrasted with those permitting some degree of judicial law making (combining law maker and mixture), chi^2 is significant at .02.

[b] Chi^2 is significant at .02.

[c] Chi^2 is significant at .01.

mentioned these decisions favorably. Critics of *Brown* v. *Board* and its progeny were very concerned about the need to separate judging from law making.

Conversely, Rhode Island lawyers who disapproved of the Court's civil rights decisions felt the need for a "strict constructionist" to approximately the same degree as did the supporters of those decisions. But lawyers who disagreed about the defendants' rights decisions differed sharply on the need for a "strict constructionist."

Thus it appears that "judicial law making" and "strict constructionist" are not simple surrogates for one basic reaction to the Warren Court. The questions do not scale.

The call for a "strict constructionist" by the Nixon administration was closely associated with the "law and order" campaign. The post-*Brown* attacks on the Warren Court leaned heavily on the charge of judicial law making (Murphy, 1962). Perhaps it is not surprising that the lawyers make the associations which they do. Those who have opinions about specific decisions of the Court employ language which has come to be associated with those decisions in public debate — but ignore other language which would seem to be conceptually related. The data in Table VII appear to support the hypothesis that opposition to specific policies has become associated with the rhetoric of debate over the role of the Court.[8]

THE ORGANIZED BAR

The American Bar Association is of particular interest to students of the judiciary because it has functioned as a pressure group in a variety of contexts, claiming to speak in the name of the bar (Grossman, 1965). Some have objected that this gives a more conservative element of the bar an inordinately strong voice, for example, in the selection of judges.

Contrary to this hypothesis, attitudes of A.B.A. members in the greater Providence area were generally comparable to those of non-members. A.B.A. members (61% of the lawyers interviewed) were slightly more critical of the Warren Court than non-members, and somewhat more likely to adopt conservative perceptions of the judicial role. But these differences were so slight as to be statistically insignificant; in every case the differences between the responses of A.B.A. members and non-members would be expected on the basis of pure chance at least five times in ten. Of course, this says nothing about the

attitudes of the officers of the organization, whose views may differ substantially from those of the membership. And we do not know whether A.B.A. members in Rhode Island are atypical in this respect.

Insofar as an assessment of the Warren Court is concerned, a markedly conservative bias does not appear when A.B.A. members are compared with other lawyers. Our tentative comparisons with Gallup's data indicate that it may appear when the attitudes of the bar as a whole are compared with those of the general public.

CONCLUDING OBSERVATIONS

At least since de Tocqueville, commentators have pointed to the bench and the bar as a conservative bastion within the American body politic. The Warren Court departed sharply from this image; more than any other branch of government, it consistently supported liberal ends. The present study suggests that in so doing, it estranged itself from a not inconsiderable portion of the bar. There is no objective scale to tell us what portion of the legal profession "ought" to approve of the Supreme Court. And there are no previous survey data reporting the Court's professional reputation in years past. But I, for one, was surprised to discover that only half of the lawyers sampled approved of the Warren Court and that fewer than one fifth of the lawyers expressed admiration for Warren himself. The finding that the high bench derived support from a smaller portion of the bar than of the public — keeping in mind the tentative basis of this comparison — is of considerable interest. And this in a section of the country which is not known for political conservatism, and in which the issue of race would not be expected to mitigate against the Court's popularity.

The number of lawyers who conceived of the judicial process in traditional terms — even if these are taken to be a rationalization of conservative substantive policies — was larger than I would have imagined. More than 40 years after the judicial realists wrote, fully half of the lawyers want the Supreme Court to avoid all traces of law making! Whether this would hold true if the lawyers perceived that the Court was making conservative law is an important question for which we have no answer. Furthermore, a more detailed analysis of lawyers' attitudes would be required to determine whether the lawyers' objections to judicial law making operate at a substantive level or solely at a symbolic level.

Lawyers and their organizations have argued that, as professionals, they are particularly well qualified to participate in the selection of judges. The present analysis presents some evidence that one consequence of granting this claim is to introduce a systematically conservative bias into the selection process. One would want to know how other elite groups reacted to the Warren Court — the nation's senators, governors, and legislators, for example — before drawing conclusions as to the probable policy implications of different methods of judicial selection.

Another group whose assessments of the Supreme Court are of great importance are the lower court judges, most of whom, after all, were lawyers before they donned the robe. Is it possible that only half of the nation's judges reacted favorably to the Warren Court? If so, the Supreme Court's ability to secure willing compliance with its decisions might well be significantly weakened.

Can the disapproval of a substantial portion of the bar impose behavioral constraints on the Court? The Warren Court's history was marked by a number of attempts to reverse particular decisions, to pressure the Court to change direction, and to limit the Court's power. These efforts enjoyed some degree of success (Murphy, 1962).[9] Attacks on the Court usually seek to employ either constitutional amendments, federal statutes, or the appointment process, and thus require action by Congress, state legislatures, or both. American legislatures are dominated by lawyers. Lawyers occupy important positions in the business and civic organizations which have varying degrees of legislative clout. Lawyers in the Justice Department, and outside it, have the ability to influence the selection of federal and state judges. A Supreme Court which could rely on the widespread support of the bar would be in a better position to resist future Becker or Dirksen amendments, or Carswell nominations.

On balance, the Supreme Court's position is probably not threatened. Our system affords it considerable protection and, after all, not even one third of the lawyers expressed displeasure about any one group of opinions. Nevertheless, it seems clear that behind the polite facade of "court and company" lies considerable tension and the potential for future strife.

FOOTNOTES

[1] Interviews in the attorney's offices were conducted by members of my graduate seminar in judicial behavior at Brown University, employing a highly structured questionnaire, between March and May, 1970. The

interviews lasted between 30 minutes and one hour each. Providence is the capital of Rhode Island. It contains a federal district court, the state supreme court, state trial courts, and the family court, as well as the state legislature and numerous government agencies and business enterprises. It seems reasonable to say that the lawyers who were interviewed have access to a wide variety of legal situations and experiences. I do not claim that this sample adequately represents the national bar.

[2] Gallup's question may be taken to ask for a current assessment of the Supreme Court, while the lawyers were asked for an overall evaluation. The fact that we forced a dichotomous response to the Court (where Gallup offered a range of four substantive answers) may have increased the number of undecided lawyers. Gallup's respondents were not given a "no opinion" option; they had to volunteer that response, and this may further deflate the "don't know" category. And having "no significant reaction" is not necessarily the same thing as having no opinion at all. While the comparison of a national and a local sample is problematic in and of itself, the responses of Gallup's eastern subsample differ only slightly from those of the national sample.

[3] Of the several sub-groups, the extent of opposition among the college educated most closely approximated the extent of opposition among the lawyers. The difference between the two is statistically significant: chi^2 is significant at .001.

[4] When a number of demographic variables were related to the lawyers' evaluations of the Court (including party affiliation, which seems to be irrelevant), religion emerged as the most powerful ordering category. Jewish lawyers were almost unanimous in their support of the Court (96%), Catholic lawyers were more likely to react favorably than unfavorably and were more undecided than either the Protestants or the Jews. Protestant attorneys were overwhelmingly unhappy with the Court: slightly more than one quarter of them gave the Court a favorable rating.

While Jewish lawyers comprise 27% of the sample, 47% of those who reacted favorably to the Warren Court were Jewish. *If the Jews are excluded from the analysis, only a minority of the Rhode Island lawyers gave the Court a favorable rating*: 38% of the Christian lawyers were favorable to the Court, 44% were unfavorable, and 18% were undecided. Since Jews constitute a very small segment of the national population, it is appropriate to compare the responses of the Catholic and Protestant lawyers with those of the national sample reported in Table II. Whereas 44% of the Christian lawyers had unfavorable opinions of the Warren Court, the Court was given a "poor" rating by only 28% of the men, 28% of the college educated, and 22% of the professional and business group in Gallup's sample.

[5] Chi^2 with Yates's correction is significant at .10.

[6] When those with opinion are compared with those without opinion, chi^2 with Yates's correction is significant at .001.

[7] Chi^2 with Yates's correction is significant at .02.

[8] I regard this conclusion as particularly tentative. A much more sophisticated analysis would be required to confirm this hypothesis.

[9] For a near miss, see Beaney and Beiser (1965).

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