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[Review of] Mark Perlmutter, Why Lawyers (and the Rest of Us) Lie & Engage in Other Repugnant Behavior

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Roth’s “Eli, the Fanatic.” This remarkable short story shows a lawyer working to protect religious freedom in a most remarkable way. The story is metaphorical about what lawyers do: lawyers often identify with their clients, and make the clients’ causes their own. But Roth has two twists in store. First, he has the lawyer not only identify with the case, but actually change clothes with the protagonist, walk in his shoes, and become transformed. The second twist is Roth’s attorney is transformed not by his own clients, but by the person on the other side! The lawyer is retained by a group in the community to use legal means to try to convince an orthodox Jew to change his clothing to conform to modern dress. In the course of trying to do so, Roth comes to deep insight into himself and the nature of religious freedom. The attorney becomes the vehicle for solving the problem his clients presented to him by taking actions that educate everyone. Roth is not so tidy in his story as this summary makes it seem—he is much richer, nuanced, and more real.

Understandably, but somewhat regrettably, the book omits some chestnuts like “The Devil and Daniel Webster,” and omits entirely works of drama and poetry. These omissions reflect a conscious choice by the editors to focus on “the human dimension of the individuals caught up in the legal system as practitioners, participants, and sometimes victims.” Also left out are “stories broadly relating to crime and punishment, morality, psychological guilt, or divine justice.” Classics such as Franz Kafka’s *In the Penal Colony* are not included on the grounds that the editors omitted all non-English works, and chose instead to seek more unity of experience based in the common law.

The book offers a glimpse of how nonlawyers as well as attorney-authors think of lawyers and others caught in the web of the law. For teachers or aficionados of the study of law and literature, *Trial and Error* provides an excellent addition to the library. For those whose appetite for law and literature is whetted by the book, a short bibliography is included.

For anyone interested in who lawyers are, what the law is, how it works, and what it does, *Trial and Error* makes for delightful, insightful bedtime reading in nicely sized packets.

**Why Lawyers (and the Rest of Us) Lie & Engage in Other Repugnant Behavior**

*By Mark Perlmutter*

**Bright Books, 1998, $16.95**

Reviewed by Sherman L. Cohn

Professor of Law, Georgetown University Law Center

O f late there have been several books about the legal profession and its problems. Some are valuable academic discussions such as *The Lost Lawyer* by Anthony Kronman of Yale and *A Nation of Lawyers* by Mary Ann Glendon of Harvard. Sol Linowitz’s *The Betrayed Profession*, a description of how it was in the halcyon days of his law practice compared to the problems of today, is in a special category of importance. Michael Kelly’s descriptive analysis in *Lies of Lawyers* should be read by all who are contemplating a career in the law as well as those who wonder what has happened and why.

But *Why Lawyers (and the Rest of Us) Lie & Engage in Other Repugnant Behavior* by Mark Perlmutter stands out as quite different. This book speaks to the individual lawyer about his or her own practice. It is a self-confession by a leading trial lawyer of his own defalcations: of his own lies, of his own standing by as a more senior member of his law firm deliberately destroyed evidence, of his own giving a convincing argument to a court on a motion when all that he really wanted to do was delay. The stories are intriguing and captivating.

Thus, while in a narrow sense, *Why Lawyers Lie* is a lawyer-bashing book, it is also much more. Written by a lawyer out of his own experiences, and drawing upon Sisela Bok’s seminal work, *Lying*, this book describes the actions that many of us have taken, actions that when looked at in the context of lying and engaging in other repugnant behavior make one reflect.

Mark Perlmutter goes beyond the stories, however, to ask why lawyers do these things. Why do we lie? Why do we attempt to pull the wool over the eyes of a judge or jury? And he answers those questions, focusing on our relations with our clients, but also on our internal selves. Thus, he demonstrates that lawyers often act out of fear: fear of losing, fear of humiliation, fear of being shown up. He attributes some of what we do to the motive of greed, but more to the motive of winning the fight. Indeed, his point is that we very often forget the client, and act in a way that is inimical to the client’s interest, as we focus on beating the ”bastard” on the other side. We put bait before the enemy while he or she puts bait before us. Too often we rise to the bait and the battle goes forth—clients and justice be damned.

When examined in this manner, the picture is not a pretty one. Yet it rings true coming from the experience of Mark Perlmutter. But Perlmutter does not end there.

He goes on to pose solutions. While Sol Linowitz and others have proposed solutions on a macro scale properly pursued by the profession as a whole, Perlmutter focuses on the individual lawyer. He describes how he found himself unhappy with the practice of law, and how it damaged his psychological and physical being. Like the story of the alcoholic in *The Lost Weekend*, Perlmutter describes his own depth of despair with the practice of law as he saw and experienced it.

Perlmutter goes on to describe his personal transformation: his finding through seminars in personal development that he need not continue to practice law this way, but that he could transform himself into a lawyer he could like and live with. He allowed himself to “feel” as well as “think.” He developed the courage to act on his convic-

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tions of how law should be practiced, and he describes how this made him both a better and more effective lawyer. He is more effective for his clients in finding solutions to their problems at the least possible cost in dollars, in time, and in emotional capital. He is more effective with opposing clients in working toward solutions, and when a matter must go to trial he is more effective in the courtroom. Perhaps most surprising he points out that in the old days when there was almost always a “bastard” on the other side, the one constant was that he, Mark Perlmutter, was the essential ingredient in the changing picture. As Mark Perlmutter changed and exuded his new self to his opponents, the “bastard” on the other side transformed into a more reasonable lawyer interested in the system working better for all concerned. Keith Evans in a delightful little new book, The Language of Advocacy, reports a similar experience and similar results.

There is no question that the legal profession has problems. This is demonstrated by every survey and by the fact that politicians find political capital in bashing the profession. As we see the ethical and criminal defalcations of lawyers in large, white-shoe law firms—many of them senior and managing attorneys who are graduates of the best law schools—we can no longer put the matter solely on the marginal attorney, the graduate of the trade school, or the young beginner. Solutions are proposed on every side. The law schools have been ordered to teach ethics—for so long eschewed by the “better” schools. A national examination in the ethics of the profession is now required for admission to the bar of most states. The Canons of Ethics gave way to the Code of Professional Responsibility. The code gave way to the Rules of Professional Conduct, and the rules are now being reexamined by the ABA’s Ethics 2000 Commission.

We have also redone our disciplinary rules, establishing in most states professional investigatory and prosecutorial staffs to pursue ethical breaches and discipline those involved. The number of those disciplined appears to have climbed appreciatively in most places. We have adopted codes of conduct by the score if not the hundreds. Of course, we have been careful to call these codes merely aspirational, should some layperson be so unthinking as to try to hold us to these aspirations. Yet, the number of legal malpractice cases grows as disgruntled clients seek redress for our perceived breaches of ethical and fiduciary duties, with an uncomfortable number of those cases resulting in recoveries for the plaintiffs. The number of legal ethics experts grows, not only as witnesses in court cases, but as consultants to law firms on the handling of ethical problems that the firms have noted but that have not yet hit the fan.

As noted earlier, we have also seen a plethora of writings within the profession. There are books by academics dissecting the profession. Every respectable law review has had at least one symposium on the profession. The Georgetown Journal of Legal Ethics regularly provides incisive analyses of the ethics of the profession.

The American Inns of Court was created, in part, to deal with these problems. That it has found a responsive cord is clear from the fact that it has been the fastest growing organization of lawyers and judges in the nation, as they seek to put meaning and enjoyment back into the practice of law.

Yet, the problems and the perception persist. The canons, the codes, and the rules prescribing a minimal standard of conduct, the accompanying reforms in the disciplinary system, the mandatory education in ethics in the law schools, and the increase in CLE ethics offerings have hopefully educated lawyers who otherwise would not have known how to act and intimidated some who would have gone astray but for the disciplinary club. Yet, public unhappiness with the profession does not abate. The codes of aspirational conduct seem to have proven little more than self-congratulatory paraphernalia by the organized profession.

Perlmutter’s book adds to the literature in a special way: it is personal, it is real, and it prescribes a way that each of us can make a difference by focusing on our individual professional selves.

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Why Lawyers Lie does not call for another systemic reform, but for the individual lawyer to own up to his or her contribution to the problem. It provides a way for the individual lawyer to do something concrete by reforming himself or herself. In this way Why Lawyers Lie makes a contribution made by no other book known to this writer.

But why should any of us care? If Perlmutter found himself unhappy with the practice of law and sought a solution that made him feel more comfortable with himself, why should that be of interest? The answer lies in the surveys that show how unhappy many lawyers are. Deborah Aaron’s seminal work, Running from the Law, was just the beginning of the literature that showed that many, perhaps most, lawyers are very unhappy with the
profession as they see and practice it. Perlmutter is not alone; he speaks for many, perhaps, most of us.

Yet, there is a larger reason. Abraham P. Ordover’s “The Lawyer as a Liar,” an article that appeared in the American Journal of Trial Advocacy in 1979, made the telling point that lawyers have a special responsibility to our system of legal justice and to its preservation. (This point was made again recently by Roberta R. Katz in Justice Matters.) Ordover makes clear that our system of legal justice itself is frustrated when its principal participants act so as to effectuate its perversion. He makes the important point that when lawyers lie, they act to pervert the system that justifies their existence.

Today the United States preaches to the world the advantages of the rule of law. The Central and Eastern European Law Initiative, sponsored by the American Bar Association, attempts to bring to the former Soviet bloc the advantages of the rule of law as preached, if not practiced, by the United States. Trial lawyers of every persuasion have demonstrated the adversary and jury systems to audiences on every “disadvantaged” continent.

Yet, if we persist in acts in ways that pervert the rule of law through our own personal conduct, we can, and should, be accused of hypocrisy. Judges and jurists have roles that depend on the participation of lawyers. But that participation must be honorable in order to effectuate the system that we so justly proclaim. As Sisle Beal and Abraham Ordover make clear: truth is very difficult to ascertain, but truth-telling is not. When lawyers countenance lying by clients, and when we lie ourselves, we act to destroy the system that we proclaim.

Thus, while Perlmutter is right in describing the damage that each of us causes ourselves and often our clients when we act as Rambo perverters of justice, the damage we cause is even greater when viewed in the broader context. Perlmutter’s contribution is twofold: he makes clear that such action makes each of us odious to ourselves, and he provides a way out that is personal and obtainable by each of us. For that reason, Why Lawyers Lie is a significant book that should receive wide circulation in the profession.

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