BOOK REVIEWS

EDITOR'S NOTE

The winter of 1975-76 saw the appearance of a spate of new and exciting law-related books. Fresh and disturbing ideas found their way into print with pleasing frequency. Of even greater import, these books displayed surprising readability for lawyers and laypeople alike.

The best of these books share a common thread, even if they are not crafted of the same fabric. By and large they seek to reinterpret some aspect of popular legal history. In *Against Our Will: Men, Women and Rape*, Susan Brownmiller painstakingly collected, sifted, and synthesized the many fragments of the history of rape from ancient times to the present in order to present her own original ideas on the proper analysis of rape in contemporary society. Jerold Auerbach took on the ABA, the legal profession in general, and whatever hallowed myths got in his way, in his book *Unequal Justice*. His and Brownmiller's conclusions are unsettling and intriguing, and both books hail the inauguration of new debates, rather than present the final ideological word on their respective subjects.

John Noonan's ambitions in *Persons and Masks of the Law* seem to be less expansive. His attentions are more narrowly focused, and his criticisms less tightly woven. Like Brownmiller and Auerbach, he seeks to reinterpret significant segments of legal history. Unlike them, his method is one of embellishment and explanation, rather than one of winnowing and sifting.

Doing Justice, by Andrew von Hirsch, will never enjoy the broad readership of the above-mentioned three, as it is too clearly the product of a committee. This is unfortunate, as it has much to say. Von Hirsch takes on the rehabilitative ideal, the prominent rationale for our system of incarceration, in a way not unlike Auerbach's challenge of the ABA. Again, it is not a final word —but it is a useful beginning.

All four of these authors urge their readers to re-examine their assumptions concerning various legal topics: society's response to the problem of rape, the inequitable delivery of adequate legal services, the pervasive and unquestioned use of legal precedent, and the utility of incarceration. The value of these books lies in their ability to challenge their readers to look at things in a different way. This is seldom a bad thing to do. Not only is this what the free interchange of ideas is all about, but it is also the first step to a deeper understanding of topics which ought to concern us all.

Into this swirling quartet of heavyweights we have added a review of Helene Schwartz's *Lawyering*. It too is history, albeit a highly personal account. It is an early version of the painful entry of a new generation of women into the ranks of the legal elite. As such, it makes for good reading, and that is no small accomplishment.

AGAINST OUR WILL: MEN, WOMEN AND RAPE. By Susan Brownmiller. New York: Simon & Schuster. 1975. Pp. 472. $10.95.

Every so often an author will emerge on the scene with a book so full of ambition, research and passion as to captivate the attention of a sizable segment of the reading and thinking public. Either by dealing with a subject not handled previously in a particularly comprehensive or thoughtful way, or by treating an old subject in a radically different and provocative way—but more often than not by doing a bit of both—an author may secure a place for him- or herself in the thoughts and conversations of a large number of persons. Susan Brownmiller has emerged as one such author with the publication of her book *Against Our Will: Men, Women and Rape*, and so it is that her book demands our attention.

In choosing rape as her topic, Brownmiller has attempted to elevate the study of rape to the status of a valid intellectual pursuit, thereby rescuing it from the hands of the psychoanalysts, notably Freudian, and their clichéd and distorted pronouncements on the subject. No, asserts Brownmiller, all women do not subconsciously desire to be raped. Rape is not the realization of woman's unarticulated yearning to be dominated by man, but the central vehicle of a conscious process of intimidation by which all men keep all women in a state of fear and domination. It is because of rape, or more precisely because of fear of rape, that society was and is organized according to the principle of male dominance. Such is Brownmiller's conclusion. But before we speak more of conclusions, let us step back a moment and probe the beginnings.

Brownmiller's is a radical thesis. It searches for the roots of rape in society, and begins its quest by means of historical analysis. When man discovered that by virtue of his anatomy he possessed the means by which he could violate a woman's physical integrity—rape her—without her being physically able to respond *in kind* (emphasis is Brownmiller's), he discovered his most basic weapon of force against woman, "the principal agent of his will and her fear." This fundamental and revolutionary discovery, shared by all men, became the common bond by which they could institute a "conscious process of intimidation by which *all* men keep *all* women in a state of fear." It was not necessary that all men rape in order to keep all women subjugated; that all men *could* and some men *did* was enough. Thus was the principle of male dominance established, a state of affairs, according to Brownmiller, in which all men have a stake.

Just as by nature man found his role as ravisher of woman, so woman learned that man might also function as her protector. So that a woman might guard against an open season of rape committed upon her, she sought the protection of one man. Brownmiller argues that it was this fear of an open season of rape that was the crucial factor in the development of a monogamous society, and not, as some would have it, woman's "natural" love of child, home and hearth.

A society so organized, asserts Brownmiller, is one in which a woman is the property of her male protector, be it father, brother or husband. An insult to the woman, damage done to her body, is an insult to her protector, damage done to his goods. Thus rape is a double-edged sword in which the act is conceived of as both a humiliation of the male benefactor through the damaging

of his goods, as well as a means to inflict actual economic loss on the protector. That the act is abominable to the woman is irrelevant. The damage done is not so much in the nature of a crime as of a tort. In earlier times, the rape of a father's virgin daughter required monetary compensation to the father from the rapist. The damaged goods would not fetch what they used to on the marriage market. How was the situation rectified? Either have the rogue marry the daughter (specific performance?), or have him pay the usual measure of damages—the difference in price between the damaged goods and what they would secure on the open market if perfect. Today the notion of economic loss has largely disappeared, but the notion of humiliation of the man through rape of "his" woman remains.

In her effort to prove her thesis, Brownmiller is relentless. With case history of rape after case history, fact piled upon painful fact, rape is forced to the forefront of one's consciousness after reading *Against Our Will*. If extensive compilation of mounds of data and masses of individual cases of rape in different contexts were all that were required to prove Brownmiller's thesis, then there is no doubt but that she has proved it. If sheer repetition of the notion that rape was the central principle of societal organization made it true, then Brownmiller has made it true. Under the weight of such an assault on her readers, Brownmiller has forced rape to the center of our collective attention, and made us think we were fools to believe it belonged elsewhere. Close contemplation of Brownmiller's thesis is therefore necessary to see if such a belief is justified.

To argue that because all men can rape and some men do, the ones that do rape necessarily reflect or act in the interests of all others is to reach a conclusion not necessarily supported by the argument. A conscious process of intimidation on the part of all men means just that—that all men actively seek to intimidate all women by using the ones who do rape to foster the interests of raping and non-raping men alike. However, there is no more reason to conclude that because some men rape, all men seek to keep all women in a state of fear than there is to conclude that because there is a Ku Klux Klan, all of whose members are white, all white people engage in a conscious process of intimidation of blacks. In one sense, and a weak one at that, it could be true that all white people have a stake in the subjugation of black people in that, say, there would be less competition for jobs if blacks were eliminated from the labor market. However, it is also true that many white people realize that their interests lie not in the subjugation of black people, but in equality for all. To assert as a self-evident proposition that it is in the interest of all whites to keep all blacks subjugated, or all men to keep all women in a state of fear is therefore simply wrong. Exactly why do all men want all women to live in a state of fear? So that men can consolidate and maintain their power over women, answers Brownmiller. Yes, but why do they want this power? Is it power for its own sake they seek? Power for some other sake? Are rapists really taking to a logical conclusion those desires and interests that *all* men share? And what precisely are these common interests that all men seek that depend on a society of terrorized women? Brownmiller never answers these questions. This is most unfortunate for her thesis, for in order to accept the notion that the rapist acts for Everyman, one must be able to identify those common interests that all men share and that the rapist promotes. That all men have a common interest in

a society of powerful men and powerless women *might* be true. That it is *necessarily* true is at best unproved, at worst simply false.

The whole structure of *Against Our Will* exemplifies and reinforces Brownmiller's one thesis. Rape in war is no different from rape in peace time; rape by black is no different from rape by white. Rape is not bound by time, culture or circumstance. Each chapter functions both as an autonomous unit in which to explore the book's thesis—rape in war, homosexual rape in prison, child molestation—and as a background to the heart of the book, the police-blotter rapist.

Brownmiller attacks the myth of the heroic rapist and refutes as well the notion that rapists are either social perverts with psychopathic tendencies, or Freud's timid souls, with uncommonly large doses of pent-up hostilities toward their mothers. Rapists, argues the author, are more like those boys next door who are feeling a bit more hostile than usual toward women. Because some men act on these hostile feelings and rape women, and because all men know it is in their interest that the few do so, argues Brownmiller, men as law-enforcers contrive to see that the rapist is not dealt with too harshly. Because the power structure of the law enforcement network is predominantly male, they are able to accomplish this end.

In support of her contention that rapists are accorded special treatment by the law, Brownmiller traces the treatment of both rapist and victim at the hands of the law. Policemen tend to be unwilling to believe a woman has been raped, and often sympathize with the accused. If a raped woman does manage to get into court, she is often scrutinized more closely than the defendant, with judgment silently rendered on her personal past and her worthiness to claim that she has been raped. Many states permit discussion of the victim's sexual activitites prior to the rape. Further, it must be proved that the woman has not "consented" to the rape, that she struggled against the rapist. Compare this, invites the author, to the situation of one who has been robbed on the street. If the victim is accosted and his money demanded of him has he "consented" to the robbery if he does not engage in a violent struggle with his assailant? No reasonable person would so contend. And what of the ethical nature of the business practices of the robbery victim? Is judgment ever passed on such an issue before the trier of fact determines whether the victim has been robbed? Clearly not. But the case of rape, claims Brownmiller, is different.

Rape *is* different. Even if one accepts as true Brownmiller's thesis that rape is a unique crime because of its central role in insuring the dominance of men over women, that does not necessarily mean that it provides the only answer as to why rapists are treated differently from other defendants. There are other, less monumental, but still plausible reasons why the rapist receives softer treatment than other defendants in many cases. Brownmiller herself suggests one in her discussion of the liberal bias in favor of the defense. The defendant, so the argument goes, is a product of a defective social structure and he must be accorded protection lest an overwhelming prosecution by an all-too-powerful state find him guilty of crimes he did not commit. The victim as prosecutrix, becomes identified with the state, and therefore looks less like victim and more like another hounder of the defendant.

Rape cases are subject to a confusion, a blending of the fixed categories into which accused and victim usually fall. Unless the victim has been perma-

nently maimed, there is generally no *visible* injury to the victim at the time of trial, given the long delay in most criminal cases from time of accusation to time of trial. Thus, the victim does not appear to be a victim at all while in the courtroom. Other crimes tend to generate more tangible evidence that can be pointed to as "objective" proof that a crime has been committed. Witness for example, photographs of the scenes of a murder, or an exhibit of the object stolen in a prosecution for robbery. That the jury does not have any tangible, visible proof that a rape has been committed leads to a curious reversal of roles in which accused looks more like victim, and victim more like assailant. After all, the victim *looks* perfectly healthy now, and the defendant is the one under attack. The tangible evidence that the jury can latch onto is the trial itself. The accused is the underdog in the courtroom. That this leads to a more skeptical attitude toward the woman victim's story is therefore not so much a function of her gender as of an ambiguous courtroom situation. Brownmiller does not attend such subtleties.

Brownmiller very skillfully does explore the subtleties and ambiguities of the relationship between racism and sexism. Drawing from her own past views as a member of the liberal upper crust, she exorcises her own demons while pointing out fundamental inconsistencies between current liberal thinking on rape and her own feminist analysis. Refusing to consider the rape of southern women as synonymous with persecution of the black male, Brownmiller is adamant about dealing with the experience of the raped *woman*. Not all southern women who claimed they were raped were vengeful racists. Too easily was their plight manipulated by men to politicize a trial for one purpose or another. Whether it was the Ku Klux Klan, or liberal defense lawyers representing accused blacks, the victim was always secondary and a caricature, either of deflowered white Womanhood, or an hysterical southern bitch, given to bouts of neurotic overreaction.

To demonstrate her point, Brownmiller undertakes an unflinching re-evaluation of the case that is perhaps most symbolic to American liberals in its embodiment of black persecution at the hands of southerners—the Scottsboro case. The canon in this case, according to liberals, reads that lying and scheming white women who cried rape were directly responsible for the unspeakable penalties inflicted upon black men. Brownmiller sees things differently.

The author's departure from liberal orthodoxy is not that she denies black men were the victims of an often shamefully racist American past, but that it was the "lying and scheming" white woman who was responsible for it. Carefully examining the chronology of the accusations and recantations, as well as exploring the psychological pressures and motivations assaulting the two prosecutrices, Brownmiller argues that it was the white men involved in the case, as arresters and judges, who maneuvered the two accusers into telling their story of rape. They were merely filling the roles that had been allotted them before they had any notion on their own to cry rape. As for the liberal defenders of the accused black men, it was most convenient for them to place the blame on the "po' white trash" as the parties directly responsible for the miscarriage of justice. After all, asserts the author, was it not a matter of common knowledge that women of that sort were prone to make false accusations of rape given the slightest provocation, or indeed, no provocation at all? In this way were the two women "accusers" manipulated by both the defense and the

prosecution for each side's particular purposes. Thus Brownmiller argues that there was indeed a terrible miscarriage of justice done in the Scottsboro case, but it did not stop with the convictions of the black men on false charges. The injustice continued in the liberal champions' of the case declaring to the world that it was and is the "lying and scheming no-good woman" who is responsible for such injustices, and not white men. By making the vilification of white women who accuse black men of rape acceptable liberal dogma, white men conveniently shift the guilt for past injustices to the shoulders of white women.

One may legitimately ask, however, is not Brownmiller's version of Scottsboro a bit too contrived, a bit too neatly fitting into her own particular theoretical analysis? Perhaps so. It is quite difficult to distinguish fact from fiction in a case such as Scottsboro, burdened as it is with emotional complexities, and elevated to the realm of the symbolic. Whether or not Brownmiller's is the "true" version of Scottsboro, she has extracted a significant insight into male/female-black/white relations that transcends the facts of any particular case. The author's analysis extends to the predicament of the white woman who has been active in liberal causes and is raped by a black man, but refuses to prosecute out of feelings of guilt. Out of her liberal past comes the name Scottsboro and its associations of the cry of rape as the equivalent of persecution of the black man in a racist society, and the woman holds her tongue. She will excuse her black assailant because he is the victim of a racist society. She for one will not participate in his persecution. Brownmiller vehemently condemns this method of thinking. Rape is never excusable, she cries. It is the white male who has engineered an oppressive social structure, and white women do not have to bear the guilt for it. It is simply not acceptable that women be the "inevitable" victims either in the maintenance or dismantling of a racist society.

Once Brownmiller has developed her views on the correct context in which to analyze rape, she outlines a solution to the problems rape poses. Her solution lies not in proposing a radical change in the social structure, but in advocating changes while still operating within the present social system. Thus we come to the curious situation in which one whose pronounced politics are radical feminist advocates solutions which sound curiously middle-American conservative. First, the author favors a tough law and order stance. This includes an expansion of the definition of rape to cover different kinds of bodily invasions, as well as forced sexual intercourse between husband and wife. Further, she advocates the "normalization" of the treatment of rape within the criminal law. This consists of lowering the penalty for convicted rapists by placing rape between assault and robbery in terms of severity of punishment. Vigorous prosecution of rapists is necessary, Brownmiller asserts, with prison terms of between six and twenty years imposed, depending on the seriousness of the charge. By this suggestion, Brownmiller is advocating the *lowering* of the usual rape penalty so as to encourage more convictions. Jurors, she reasons, will be more willing to convict if the punishments are not so overwhelming. In addition, the author favors altering and expanding the concept of rape to accommodate cases of acquiescence produced by terror or social conditioning.

The second aspect of Brownmiller's solution for dealing with rape calls for full integration by women of the law enforcement network, which is currently

overwhelmingly male dominated. The author contends that this will promote the reporting of more rapes as well as the convicting of more rapists.

The third aspect of the author's solution calls for a general reconditioning of societal attitudes. Teaching women self-defense and banning pornography are important to improve the attitude of society toward its female members. Whatever degrades and humiliates women must be eliminated as tending to encourage rapists in justifying their own acts.

Finally, Brownmiller opposes the notion of legalized prostitution. To legitimize the practice is to support the notion of women as chattel. Instead, it is the man who frequents prostitutes who ought to be punished, and not the prostitutes, according to the author.

Interestingly, one need not accept the validity of Brownmiller's thesis in order to accept most aspects of her solution. With the possible exception of banning pornography, her suggestions would be appropriate given a theory of rapists as deviants. Be that as it may, Brownmiller's solution does perform the important function of underscoring the criminal aspect of rape and firmly denying its tortious nature. To do so is to confront squarely the special problem rape poses for women. Further, "normalizing" the treatment of rapists through lowering the penalty to fit between robbery and assault is to encourage more convictions. To deny rape a place next to murder in terms of severity of punishment is to discourage close connection with rape's highly charged political past, and to see it more clearly for what it actually is, a crime against women.

On the minus side of her advocated program, however, there is some question as to whether a maximum sentence of twenty years adequately protects against rapists. With the parole system operating the way it does, how many rapists will actually serve full terms? And how many will be out on the street again after six years? Two years? Two months? And if there is no change in overall societal attitudes toward women and rape, what good will prison do at all?

As far as the notion of expanding the concept of rape to include relations between husband and wife is concerned, careful consideration is necessary. Certainly marriage should not be used as a shield to protect brutal and sadistic men from victimizing their wives through what can only be called rape. Just as some states are reluctant to use the cloak of intra-family immunity any longer to deny prosecution of parents who batter their children mercilessly in the name of "discipline," so courts should not allow brutal rape of husband upon wife. But as other states are quick to point out in intra-family immunity cases, it is extremely difficult to draw the line in such cases. The complexity and range of emotions in a marital situation, and the diversity of styles and tastes make it extremely difficult to determine whether or not rape has occurred. Nor is it altogether clear that the courtroom is the appropriate place for this particular aspect of the human drama to be played out. Courts are not equipped to deal with the subtleties and nuances that are the core of relations between people as intimately involved with one another as husband and wife. Again, this is not to say that obvious cases of brutality are to be sanctioned, but rather that courts may not be the appropriate vehicle to deal with the vast middle ground.

Brownmiller runs into her most serious trouble with her suggestion to ban

pornography. The history of free speech is a long and involved one, with values being constantly weighed and measured so as to protect scrupulously the dictates of the first amendment. To suggest that it is easy, as well as desirable, as Brownmiller does, to ban all pornography is either to misunderstand the command of the first amendment, or to sacrifice it wholesale without a proper amount of consideration. The author's "pornography is not protected by the first amendment" stance is far too simplistic a position to take on such a complex issue. Brownmiller offers the reader nothing beyond this simplistic statement in order to show some sensitivity to the problems that her suggestion poses for constitutional law. In light of Brownmiller's subtle and perceptive handling of the delicate racism-sexism issue, the reader expects—no—is entitled to more than her over-simplified pronouncement on pornography. As far as other suggestions are concerned—to expand the definition of rape and insure prostitution remains illegal—careful consideration will be necessary as a result of *Against Our Will*.

Where does Susan Brownmiller leave us after all is said and done? She has left us with the understanding that even if we do not accept her thesis in its entirety, the study of rape is still a necessary one for us to take up as a society. Brownmiller has legitimized the study of rape, elevated it to an important concern that demands our collective attention. She has also produced a book that is compelling to read. That is no mean feat. One must admire Susan Brownmiller's book, but even more importantly, one must read it.

M.S.M.

UNEQUAL JUSTICE. By Jerold Auerbach. New York: Oxford University Press. 1975. Pp viii, 395. $13.95.

I do not wish to speak
ill of any man behind his back,
but I do believe he is a lawyer.[1]

Throughout history, the public has exhibited a contradictory attitude toward the legal profession. On the one hand, lawyers frequently have been subject to derision and discredit; in the past, attempts were made following the French and Russian Revolutions and in colonial America to abolish the profession as the enemy of egalitarianism. On the other hand, lawyers often have been seen as the bulwark of the democratic state, praised for their adherence to a professional standard of zealous advocacy of the unpopular cause. Unfortunately, Jerold Auerbach's book, *Unequal Justice, Lawyers and Social Change in Modern America*, gives little illumination to the forces behind society's ambivalent view of the lawyer. Instead, the reader of his book comes away with the impression of having heard it all before—and perhaps in a more honest and provocative manner.

1. Attributed to Samuel Johnson, in McKay, *Legal Education: Law, Lawyers, and Ethics*, 23 DE PAUL L. REV. 641, 643 (1974).

Mr. Auerbach's premise is that the emergence of an urban industrial society in the first two decades of the twentieth century caused stratification within the American legal profession along socioeconomic lines which has endured to this day. A group of "professional elite," who possessed the appropriate social and ethnic credentials, early on aligned itself with large corporate interests. These same lawyers became spokesmen for the major professional associations and arbiters of professional values, legal education and even law school admissions. As a result of their bias, the author concludes, there has emerged a disparity in the quality and quantity of legal services afforded to the rich and the poor, an "unequal justice . . . distributed according to race, ethnicity and wealth, rather than need" (p. 12).

Few would argue today with Auerbach's assessment of the maldistribution of legal care in the nation. In the mid-1960's, surveys of the use of private attorneys in the nation indicated that about two-thirds of lower-class families had never employed a lawyer, compared to about one-third of upper class families.[2] The disparity between these figures has grown during the 1970's as the rising fees of the private bar have priced out the middle income family, and the budgets of most legal aid organizations have been seriously reduced.[3] The American Bar Association, organized in 1887 to promote the twin objectives of professional improvement and public service, as well as the later established state bar associations, must assume some responsibility for the present failures of the legal system. However, apart from indicting the leaders of the professional bar early in the book, Auerbach makes little attempt to define what the goals of the organized bar ought to be. The author lapses into superficialities and fails to explain adequately why it was, if indeed it was the case, that a small conservative group of lawyers could manage to prevent expansion in the delivery of legal services.

At the beginning of such an inquiry, notice must be taken of the paradoxes inherent in the profession of law. The definition itself suggests one conflict: "A profession is a line of work in which so long as he who professes it can eat, his job is service."[4] The reasonable expectation of basic economic reward might be at odds with the public desire to provide legal services for all who may need them, regardless of ability to pay. Moreover, the procedural characteristics of law are by nature conservative, relying on the restraining influence of legal precedents, and judicial stability. The dominant client group and area of specialization for most lawyers is in business, where the need for cautious decision-making may at times be acute. The lawyer must balance these values against the urgent pressures for reform and change created in the urban community. Finally, the lawyer's primary duty is one of advocacy and devotion to his client's interests. As one underlying premise of the legal profession is that *everyone* is entitled to a fair and vigorous defense, a lawyer's course of representation, in the criminal area particularly, may lead him to a direct clash with public notions of decency.

Because of these tensions within the lawyer's practice, bar associations

2. Carlin & Howard, *Representation and Class Justice*, 12 U.C.L.A.L. REV. 381, 383 (1965).

3. Tunney, *Is the Bar Meeting its Ethical Responsibilities*, 12 SAN DIEGO L. REV. 245, 246 (1975).

4. K. Llewellyn, *The Bar Specializes—With What Results?*, 162 ANNALS, May, 1933, at 177, 190.

have been seen by commentators as necessary forces to advance the public good. The individual lawyer resolves the moral dilemmas of his or her daily practice as best he or she can, but the professional organizations exist to improve the system without regard to the special interests of a client group. Unfortunately, the history of the bar associations' activities shows that the organizations have themselves been caught by the same conflicting forces as have their individual members. The picture which emerges of the ABA over the years is startling not because of a conspiracy of the aristocracy, as depicted by Mr. Auerbach, but rather because the ABA has failed to develop a coherent program to meet its central objective of improving the system of legal services.

Mr. Auerbach points out, for example, the inadequacies of provisions in the ABA *Canons of Professional Ethics*, and the present *Code of Professional Responsibility*, which are viewed as impediments to the growth of legal services for the poor. Yet his criticism of the lack of ethical standards is entirely in the context of its benefit to upper class metropolitan practitioners. Such tunnel vision neglects to examine the fact that the most ardent supporters of the *Code* position on such subjects as advertising and prepaid legal services are the "marginal" practitioners within the bar who often employ the *Code* as a defensive instrument against competition.[5] In his simplistic attempt to portray the elitism of many *Code* provisions, Mr. Auerbach fails to describe a valid concern of the organized bar, which is to deter misleading advertising and fraudulent legal practice. While the author devotes some pages to the ABA restrictions on contingent fee arrangements, which he views as a suppression of the interests of lower-class litigants, he fails to indicate that quite early on, the ABA's Ethics Committee created broad exceptions to its ban on advertising in favor of public interest and civil liberties groups.[6]

These examples are but a few of the instances in which the ABA has attempted to walk a thin line between responsibility to the public and protection of the economic interests of its members. Until the present decade, the organization had failed to accomplish either objective very well. During its early years, it was characterized by the apathy and inactivity of its membership, by the fact that a small, unrepresentative group were more vocal than the disinterested rank and file. There was no universal statement by the organized bar concerning pro-bono work. Many of the lawyers who were concerned with the evils of urban poverty and decay turned to work in the government, thereby further isolating the private bar from important social and political issues. Indeed, it was not until the social revolution of the 1960's and its pressure to eliminate racial discrimination that the ABA exerted leadership in support of legal aid work. When it did begin to fund public interest programs and to expand its membership, it was hampered too frequently by unclear standards for the corresponding responsibilities of private lawyers to meet its objectives. For example, little pressure was exerted by the ABA on private law firms to establish pro-bono departments. As a consequence, even though some special departments were established, they were given scant attention by many law firm members. Ironically, "non-paying" work was often discouraged by the

5. Comment, *Group Legal Services: From Houston to Chicago*, 79 DICK. L. REV. 621, 627-28 (1975).

6. Comment, *Advertising and Solicitation by Public Interest Law Firms*, 51 TEXAS L. REV. 169, 172-74 (1972).

very same law partners who unequivocally supported ABA public interest activities.

Mr. Auerbach makes mention of many facts surrounding the ABA's development. Yet, because of his emphasis on the petty prejudices of the ABA leadership, the reader is left with the impression that these men had an inalterable influence in historical periods when conservatism and nativism dominated social thought. Although he does state at one point that "the legal profession all too accurately mirrored American society," he implies throughout that it was the legal profession with its selfish conservatism that molded social opinion, rather than vice-versa (pp. 163, 306). Moreover, by stacking the deck in this fashion, Mr. Auerbach does not fairly recognize the changes within the ABA in recent years. One has only to compare the public pronouncements of the ABA against the appointment of the liberal Louis Brandeis to the Supreme Court in 1916 (described fully by Mr. Auerbach) with the statements of protest against the appointment of Judge Carswell to the Court in 1970 (unmentioned by the author), to appreciate the shift in temperament within the organization. The last few years have seen a change in the ABA *Code of Professional Responsibility* in the areas of prepaid legal services, commercial advertising, and in ABA funding of public interest projects, all designed to redress the imbalance in legal services.

To be sure, the change in position of the ABA on these issues has been brought about through intensified public consciousness rather than through any change in leadership value orientation. For example, a series of Supreme Court decisions on freedom of association and possible antitrust violations was the real impetus behind the ABA's recent support of "open panel" legal service plans.[7] Similarly, it was not until the Supreme Court decision in *Goldfarb v. Virginia State Bar*,[8] that minimum fee schedules promulgated by state bar associations were abolished. Yet this evidence only suggests that one cause of the failures of the organized bar to date has been the failure of American society to utilize existing grievance procedures to challenge inequitable social and economic patterns. The "elitist meritocracy" that Mr. Auerbach condemns in *Unequal Justice* is a structure as old as civilization, and merely reflective of it. To imply that the legal profession is solely responsible for its perpetuation is to obfuscate the real issues which must be examined.

These issues focus on whether the organized bar can ever effectively resolve the conflicts of the legal profession which seem as irreconcilable as society's view of the lawyer as charlatan and hero. Taking one example of a recent dilemma facing the profession, how can the bar association work to structure a model for prepaid legal services by the use of a strict fee schedule which does not violate the antitrust laws? If the only manner of avoiding a charge of price-fixing would be non-lawyer supervision, do we then face an unavoidable problem of the unauthorized practice of law?[9] Mr. Auerbach, in

7. *E.g.*, United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); UTU v. State Bar, 401 U.S. 576 (1964). *See* Comment, *Prepaid Legal Services, Ethical Codes and the Snares of Antitrust*, 26 SYRACUSE L. REV. 754 (1975).

8. 95 S. Ct. 2004 (1975).

9. *See* Comment, *Advertising Solicitation and Prepaid Legal Services*, 40 TENN. L. REV. 439 (1973).

his historian's role, asks no such challenging questions for the present and future. The oversight of his methodology does the reader and the profession a great disservice.

L.D.M.

PERSONS & MASKS OF THE LAW. By John T. Noonan, Jr. New York: Farrar, Strauss & Giroux. 1976. Pp. xiii, 206. $10.00.

At the beginning of his legal education, this reviewer was disturbed by the tendency of the profession in general, and of case study in particular, to strip the participants in the judicial process of their humanity and to reduce them to abstractions. He was also bothered by the tendency of appellate courts to swallow up the participants in the rules, by the common elevation of form over substance (even under such "innovations" as the Federal Rules of Procedure and their ilk), and by the easy acceptance of legal constructs as reality. Such concerns faded into the background after the reviewer's first year of law school, both because he had learned to manipulate the rules, and because his legal studies revolved around statutory material. John T. Noonan's *Persons & Masks of the Law* resurrected all of the reviewer's earlier doubts.

Professor Noonan's basic point is that the emphasis both in legal study and in jurisprudence on legal rules and constructs, often to the exclusion of the real persons involved in the cases, has resulted in a dehumanization of the legal process and, many times, in a denial of a fair resolution of the issues. Such a result, so contrary to what may have been intended by the term "ordered liberty"—that is, the safeguarding of liberty and justice by a careful adherence to the rules—has in part been brought about by the use of legal rules and constructs behind which the decision-makers (such as judges, legislators, and scholars) avoid taking personal responsibility for decisions that conflict with their personal beliefs or ideals. The book is basically an extension and illustration of this primary point.

Persons & Masks of the Law is composed of five chapters. In the first chapter, "The Masks of the Participants," Noonan sets out his thesis and calls for an integration of rules and persons in the study and practice of law. In the next three chapters, he illustrates his principle by taking three examples from history. The first of these, "Virginia Liberators," describes how Thomas Jefferson and George Wythe institutionalized slavery as a property concept in the Commonwealth of Virginia, despite their personal dislike of slavery, and despite knowledge of the aversion to the institution manifested by such English legal thinkers as Blackstone and Mansfield. The author explains that it was the mask of the property concept that trapped both Jefferson and Wythe into perpetuating the slavery system and enabled them to avoid confronting the humanity of the slaves they dealt with officially.

The next chapter, "The Overlord of American Law," describes how Oliver Wendell Holmes upheld the dismissal of American Banana's suit in *American Banana Co. v. United Fruit Co.*[1] on the grounds that an American court could not challenge a binding decision of a Costa Rican court. There,

1. 213 U.S. 347 (1909).

Holmes would not see beyond the mask of sovereignty to the reality of Costa Rica's control by the United Fruit Company.

In the last of these chapters, "The Passengers of *Palsgraf*," Noonan goes behind the reported opinion in *Palsgraf v. Long Island Railroad Co.*[2] to describe who the litigants really were and how Cardozo arrived at his decision. Again, it was the mask of plaintiff and defendant that prevented the court from seeing the real parties in the case.

In the final chapter, "The Alliance of Law and History," the author attempts to balance a blind veneration for precedent and an abstract jurisprudence shaped exclusively to contemporary problems. He concludes that the past does have something to teach, but that one must look for the real motivations behind legal rules.

Noonan writes with eloquence and quiet outrage. His book is eminently readable, but it has several major weaknesses. For one thing, the book lacks cohesiveness. Noonan often is unable to make up his mind as to whether he is making an expository argument or describing historical personalities and events. Closely related to this problem is the fact that the different chapters lack a causal connection, and are only bound together by a thematic connection. That is to say, all the chapters are connected in that they are at least partly concerned with the same theme, but they have no necessary and inevitable link to one another. It is true that the author tries to use each of the historical chapters as an example of his primary argument, and to tie everything together in the last chapter, but it takes close scrutiny to realize this. More important than these stylistic failings is Noonan's failure to provide a solution. A logical extension of his exposition might be to advocate a doing away with legal rules, yet the author specifically disavows that solution. Perhaps such an answer is too much to expect now.

Despite its faults, *Persons & Masks of the Law* is an important book. Its argument, as far as it goes, is valid and has to be faced, and the historical chapters are thoroughly researched and fascinating to read. This book ought to be required reading for everyone in the legal profession, theorists as well as practitioners.

K.R.

DOING JUSTICE: THE CHOICE OF PUNISHMENTS. Report of the Committee for the Study of Incarceration. By Andrew von Hirsch. New York: Hill & Wang. 1976. Pp. xli, 179. $9.95.

The Committee for the Study of Incarceration was created in 1971 and funded by the Field Foundation and the New World Foundation. Chaired by Charles E. Goodell, former United States Senator from New York, the Committee was composed of scholars drawn from the fields of law, philosophy, history, psychiatry, theology, sociology, economics, and criminal justice. *Doing Justice* is the report of the Committee. It was authored by Andrew von Hirsch, the Executive Director of the Committee and presently Associate Pro-

2. 248 N.Y. 339, 162 N.E. 99 (1928).

fessor of Criminal Justice at Rutgers University, and Senior Research Associate at the Center for Policy Research.

The Committee considered its approach to be revolutionary. Rather than accepting the propriety of incarceration and focusing upon reform measures within that context, it addressed itself to the question, "Should society ever incarcerate the criminal offender, and if so, when, under what conditions, and for how long a period of time?"

The Committee rejected both the philosophy and methodology of our present system of imposition of criminal sanctions. Rehabilitation, the study concluded, is at once an unobtainable objective and an illusory justification because the courts and penal agencies cannot accurately assess the possibility of rehabilitating a given offender, or tailor a program of correction to meet the individual's needs. Consequently, the indeterminant sentence, seen by some as a necessary mechanism for imparting the temporal flexibility required for individualized correction, becomes instead a cause of baseless disparity and manifest injustice in sentencing.

Despite a disconcerting lack of statistical proof of the efficacy of incarceration as a means of deterring crime (both on the part of the particular offender and others similarly inclined), the Committee chose not to advocate its abolition. However, the Committee would significantly restrict the frequency of its imposition and duration once imposed.

To replace the rationale of rehabilitation, the Committee advocated a concept of "deserts." In other words, society should recognize that the purpose and effect of a criminal sentence is punishment, and should mete out a sentence neither greater nor lesser than that which the offender, on the basis of his prior conduct as judged by the mores of society and considered without regard to the seeming likelihood of rehabilitation or the perceived need for particularized deterrence, *deserves*. In evaluating the seriousness of an offense for the determination of appropriate punishment, both the harm or harmful potential engendered by the act and the offender's prior criminal record are factors to be considered.

Offenses should then be categorized and arrayed on the basis of the seriousness of the offense, with the seriousness of the individual's record serving as a variable within each sentence level. The Committee suggests five sentence levels: minor, lower intermediate, upper intermediate, lower range serious, and upper range serious. There would also be, the study suggests, four record ratings for each level.

For each different gradation of the crime and the prior record of the offender there would be a presumptive sentence, variable by the judge only in extraordinary circumstances. As a general principle, the Committee would recommend incarceration only for serious offenses. Even then, the typical maximum sentence would be three years, with five years, except perhaps in the case of murder, being the uppermost limit imposed for any particular combination. Rehabilitative programs would be a matter for voluntary selection and participation, and could not extend the uniform period of incarceration.

Nevertheless, abandonment of the rehabilitative ideal and the embracing of the punishment-oriented model as a lesser evil suggests a despair born of frustrated ambitions, ambitions perhaps too readily sacrificed to the vision of a new and better correctional morality. Admittedly, the noble objectives of our

penal system have been infrequently attained (and perhaps rather inactively pursued). Does this fact, however, necessarily imply the moral and practical bankruptcy of the rehabilitative model? Stated otherwise, could we not incorporate many of the valuable reforms suggested by *Doing Justice*, yet avoid the disadvantages inherent in a punishment-oriented system?

As a prominent example, the deterrent force and fairness of sentences extending beyond a certain period of time can still be examined, and if current maximum sentences are determined to be ineffectual or unjust, they can be appropriately reduced. Equally important, greater usage of non-incarcerative methods of correction, such as warnings, weekend detention, and work release, is entirely harmonious with a rehabilitative ideal, since these methods impress upon the offender the wrongness of his conduct and encourage him to become or remain an active, contributing member of the community.

Von Hirsch vividly exposes the arbitrariness and bias which can lurk behind and contaminate the vast range of judicial discretion in sentencing. Concededly, offenders frequently receive highly disparate sentences for little or no apparent reason. However, this inequity can be minimized while still retaining the flexibility beneficial to a rehabilitative approach. The range of possible sentences can be restricted, and standards for sentencing within that range can be formulated. Sentences could be made reviewable by an appellate court or an agency with particular expertise. Likewise, standards can be formulated to regulate the decision-making of parole boards, and their decisions subjected to some form of scrutiny. Furthermore, at specified intervals the offender's file accumulated subsequent to conviction could be given to the sentencing court or other body for possible reconsideration (downward). The Committee's conclusions regarding the present capacity and potential of courts or agencies to determine who is probably amenable to rehabilitation and the appropriate program for that individual seem altogether too sketchily reached. Von Hirsch cites little statistical support for such conclusions and cursorily dismisses recent innovations without explaining why the Committee feels them doomed to failure.

Regretfully, *Doing Justice* does not explore the possible costs or disadvantages of the "deserts" system. What, as an important example, will be the effect on offenders? Will knowledge of a definite release date imparted at the time of sentencing console a troubled mind, or dull individual initiative to acquire some form of training? Will such knowledge facilitate dealing with emotional problems, or relearning how to live lawfully in the community? A rehabilitative system would permit a reduction in time spent in jail as a reward for the display of proper behavior, or occasional brief release to permit gradual readjustment. Further, is it necessarily fairer to incarcerate all offenders an identical period of time where it could be demonstrated that, in an individual context, incarceration no longer served any purpose other than that of statistical equality? Finally, even were society to reject the rehabilitative approach, must it necessarily choose a punishment-oriented model?

In conclusion, *Doing Justice* is a fascinating yet incomplete critique of the existing system for the dispensation of justice and examination of its proposed replacement. It is an engrossing and valuable work, one which should be read by anyone at all interested in the operation of the criminal justice system and its effects upon our society and many of its citizens.

G.A.M.

LAWYERING. By Helene E. Schwartz. New York: Farrar, Straus & Giroux. 1975. Pp. x, 308. $10.00.

Lawyering is one of those books about professional life that will interest laypersons, law students and lawyers alike. A straightforward chronicle of Helene Schwartz's rise in the legal profession, the book begins with the author's letter of acceptance to Columbia University Law School in the early 60's (which welcomed a "Dear *Mr.* Schwartz") and continues through some important civil rights cases in which Schwartz figured prominently. There is interspersed some complex personal history and involvement with feminist issues in a courtroom and law office context. One says "feminist issues" and not "the woman's movement" here because the author's objective is, in her own words, to write a book "not about a woman who is a lawyer but about a lawyer who happens to be a woman." If the movement affected her at all, it was toward an awakening of what she wanted to do *as a lawyer*, and no more. At least, that is all that can be garnered from the book itself since the connection between the author's touted "feminism" and her success as one of a new wave of women professionals "aware of [her] own abilities and unintimidated by [her] own ambition" is never fully elucidated. She admits that, in the beginning, she had no idea she was being held back because she was a woman, but she is also candid about her lack of professional drive:

> My decision to apply to law school resulted more from elimination than from any deep desire to be a lawyer. I couldn't think of anything better to do. In its favor was the fleeting thought that if I got married, my degree wouldn't be wasted, because I could always do free legal work instead of the usual club work married women did (p. 82).

How then did Schwartz come to break away from the (shared) attitude of some of the professors she so disliked for their feeling "that any woman would marry as soon as she could find someone willing to take her off the wallflower line"? The answer lies not, it seems, in the type of firm she worked for or the political points of view of clients she represented. From her first job in a Wall Street firm working as a member of the defense team in a libel suit brought by Nobel chemist Linus Pauling against the publisher of *National Review* and William Buckley, through her work on the Chicago Eight appeal, Schwartz describes men on the basis of their manners, and not their politics. The absence of any real "political" discussion makes it hard to understand what motivated her professional journey from Wall Street in 1966 to her 1972 defense of two Zippies arrested at a GOP convention for carrying non-existent firearms. Buckley was a grateful and generous client who shared his brown bag lunch with her one Sunday when they had to work downtown and restaurants on Wall Street were closed. (Her prose here runs to expressions like, " 'Gosh,' I thought, 'he really does make those faces, maul that pencil, and talk through his nose, even in private.' ") What one learns of Leonard Weinglass (of Chicago Eight fame) is no more instructive, for according to Schwartz, he "turned out to be a warm, sensitive person with a lovely sense of humor, who looked like a cuddly, vigorously sloppy teddy bear with flying hair." Can a lawyer so obviously talented and determined (she's one of a few active women litigators) have merely been passed from polite sponsor to polite sponsor? For substance, we are treated

to complaints about snippy remarks from the bench and snubs at the office and the author's parrying them off with fast repartee. If, as she claims, her being a woman is merely a *leitmotif* of her book, and not a central theme, where is this lawyer's sense of pride in her qualifications, and why are there only "cute" descriptions of her falling into jobs?

This is not to say that her descriptions of what it is like "to lawyer" and her views on the strategy of winning a case are not very well done, for they are the real heart of the book and will fascinate the reader. One sees the legal issues spelled out lucidly and succinctly as only a real professional can do. Her teaching style (she criticizes the abstract and theoretical mode of the "national" law schools) must be marvelous if she does implement her philosophy of teaching her Rutgers-Camden students "not only what the law is but how to use it on behalf of clients" (p. 87). This is something she does as well as the best, as her own story tells.

This book is quite a good professional memoir, not depending upon any particular interest in "lawyering", but upon general interest in the larger world of the American court system and some of the personalities in some very topical cases. Much is implied about certain interpersonal disputes among top litigators and conflicts with judges, disputes which will highlight political and philosophical differences involved in some important social issues. If the topic of women as lawyers were not even included, there would still be sufficient substance here, as well as enough entertaining anecdotes, to leave most readers satisfied.

S.M.