BOOK REVIEWS

LAWYERS AND THE PURSUIT OF LEGAL RIGHTS. By Joel F. Handler, Ellen Jane Hollingsworth, and Howard S. Erlanger. New York: Academic Press. 1978. Pp. 272.

Lawyers and the Pursuit of Legal Rights is a detailed and optimistic study of what the authors term "legal rights activities," efforts to expand legal representation to individuals and groups who have been underrepresented in the past. This ambitious book contains both a brief sketch of the history of legal rights activities in the United States and a detailed analysis of a recent survey of professional participation in legal rights work. Answers are sought to three basic questions about contemporary legal rights efforts: Has there been a rise and subsequent decline of legal rights activities, either quantitatively or qualitatively during the past twenty years? What is the present nature of the involvement of lawyers engaging in legal rights activities? What are the implications of the present status of legal rights work for the poor? Overall, the results of the study seem to indicate the existence of a stable community of legal rights lawyers and a potential for expansion of all forms of legal rights work.

A. History

The authors sketch the history of the legal rights movement in the United States. Their overview begins with a discussion of the isolated efforts of some nineteenth-century practitioners to provide the needy with legal services. These sparse, private offerings of legal assistance were supplemented in the first half of the twentieth century by the work of legal aid organizations. Such organizations, characterized by the authors as "paternalistic, moralistic and limited,"[1] carried out non-litigious legal services for individual clients. Law reform work, litigation directed at bettering the situation of entire classes of people, was not undertaken. Service was further restrained by eligibility standards designed both to limit work loads and to assure that the client's cause would be morally proper. Family cases (often excluding divorces) and landlord-tenant cases were the staples of the typical legal aid organization's practice.

Special interest groups willing to press for specific ideological goals by means of test case litigation developed separately from the legal aid organizations during the first half of this century. Organizations, like the NAACP's Legal Defense and Educational Fund, Inc. and the ACLU, provided models of highly successful aggressive law reform activity in the appellate courts. It was this kind of law reform work, especially as applied to civil rights issues, which

1. J. HANDLER, E. HOLLINGSWORTH, H. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 21 (1978).

drew substantial numbers of lawyers into the flowering legal rights activities of the early 1960's.

Yet, as the 1960's waned, reformist optimism was succeeded by radicalism, apathy, or an incremental view of social change. A marriage of legal services work and law reform work evolved, growing out of efforts such as the Ford Foundation's Grey Areas Programs and the militant Mobilization For Youth's Legal Services. The Office of Economic Opportunity's (OEO) Legal Services, a product of the War on Poverty, institutionalized the combined service and reform model into what the authors conceive to be the dominant paradigm for legal rights organizations.

B. Present Nature of the Legal Rights Bar

The authors' analysis of contemporary legal rights activities rests on the statistics derived from lengthy telephone interviews with more than two thousand lawyers, divided into three groups. In breaking down the panorama of legal rights activities, the authors place Legal Services midway on the continuum between the most aggressive and the most traditional. Five hundred forty-six telephone interviews were completed with lawyers who were with OEO Legal Services in either 1967 or 1972. Fewer than five hundred interviews were carried out with lawyers who had worked with any other public interest organizations, either more aggressive or more traditional than Legal Services. One thousand four hundred fifty interviews, however, were carried out in order to sample the activities of the national bar. The basic bar sample group was randomly selected from lists of lawyers in fifteen randomly selected states. Younger lawyers were randomly chosen for interviewing, while attempts were made to contact all older lawyers whose names appeared. Government lawyers, though recognized by the authors as often socially committed, were omitted from the survey due to budgetary considerations and sampling problems.

Legal Services was given special attention as the largest of the original "legal rights" organizations and as an important recruiter and trainer of legal rights lawyers. According to the results of the survey, Legal Services today is doing quite well, despite having been criticized during the Nixon years for persisting in law reform work, and despite having undergone a politicized reorganization culminating in the Legal Services Corporation Act of 1974.[2] The organization has emerged from these difficulties with its autonomy and service capacities intact. Family, consumer, and housing law continue to dominate the program. Law reform work, much of which dealt with welfare, housing, and consumer law, actually increased from 1967 to 1972.

At the aggressive end of the legal rights activity continuum are actively litigating challengers of the legal status quo, such as public interest law firms, mixed public interest and private practice firms, and law communes. These organizations are quite diverse, yet they confer similar benefits and burdens on the small number of lawyers that they employ. These lawyers are depicted as finding great freedom and taking great satisfaction in their work. Financial sup-

2. 42 U.S.C. § 2996 (Supp. 1975).

port is, however, a constant worry. Public interest firms, for instance, are now facing funding cut-backs from the private foundations upon which they depended in the past. Mixed private and public interest firms suffer the difficulties involved in dividing their energies between private paid work and public interest efforts, as well as potential conflicts of interest between their two bodies of clients. Communes are limited in the "straight" work that they are willing to take on for their own support, and suffer allocational problems similar to those troubling mixed firms. The prospects of all three types of public interest organizations were dimmed by the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,[3] which denied the federal courts power to award attorneys' fees to those attempting to exercise the role of "private attorneys general."

According to the authors' analysis, the organized and individual efforts of the private bar may be characterized as traditional legal rights activity. Individual lawyers' efforts are not portrayed as particularly noteworthy. The billed practice of private lawyers was generally not considered to be legal rights work because of its failure to serve poor, small business, or minority clients. Three-fifths of the nationwide sample of lawyers spent less than five percent of their billable hours doing non-billed *pro bono* work. Sixty-two percent did some *pro bono* work during what would ordinarily be considered non-billable hours. The average lawyer committed twenty-seven non-billable hours per year to *pro bono* work. Much of the work done during non-billable hours was counseling of church and community groups. One-third of the lawyers who gave time to such groups were officers of the groups they counseled. The private bar, of course, does sponsor organized traditional legal rights activities structured along the lines of the early legal aid offices. Unusual versions have appeared, with expanded capabilities that include the capacity to undertake some types of law reform work. One of the most notable is the Community Law Office program in New York City. In addition, the private bar supports informational and investigative service councils and clearinghouses.

The *pro bono* departments established by some large private firms distinguish themselves from other private bar efforts by working on behalf of fairly radical groups. These departments, however, do not litigate frequently. Although they make elite lawyers available to the underrepresented on a fulltime basis, the amount of lawyers' time devoted to *pro bono* departments, when divided by the total number of lawyers in the firms, merely equals the national average for individual *pro bono* time.

C. *Legal Services Lawyers*

The most interesting and important part of the study is the examination of the backgrounds and subsequent careers of lawyers who were Legal Services lawyers in 1967. Prevalent characterizations of legal rights lawyers are described and compared to the facts revealed by the authors' survey. The results destroy some commonly held and unflattering images. For example, the composite myth of the legal ingenue, of wealthy family and elite schooling doing his

3. 421 U.S. 240 (1975).

or her part for those less fortunate, is found to be devoid of truth. The study reveals that Legal Services lawyers come from less wealthy families than those of other members of the bar. Legal Services lawyers have, in many instances, attended "better" law schools, but the Legal Services ranks have not included a disproportionate number of law review members or students of high academic rank. The job with Legal Services was a first job for only one-quarter of the 1967 group.

Most importantly, twenty-seven percent of the 1967 Legal Services lawyers were still with Legal Services in 1973. Members of the 1967 group of Legal Services lawyers who graduated in the two years prior to 1967 stayed with Legal Services for an average of three years. Considering the pressures on Legal Services during this time period, the three-year stay seems to compare favorably with the average 3.8 year stay for a comparable group of lawyers in non-Legal Services jobs during the same period. The authors' hypothesis that brevity of service might more reflect the mobility of young lawyers than the dissatisfaction with Legal Services seems justified.

In 1973, twenty-six percent of the 1967 Legal Services group held salaried positions outside Legal Services, many of which the authors categorize as involving legal rights activity. Thirty-eight percent were in private practice, but generally of a sort considered by the authors to represent a continuing commitment to legal rights work. Of the former Legal Services lawyers not in private practice, only thirteen percent were employed as staff counsels for businesses or were working in non-law jobs.

The investigators also attempted to discover common factors in the backgrounds of Legal Services lawyers that might explain their choice of work. No pattern of influences was found that would account for their initial self-selection. The supposed importance of upbringing by politically active parents, the "red-diaper" theory, was rejected. Parents of Legal Services lawyers were actually found to be less likely to have been involved in social reform activities than parents of other members of the bar. A greater proportion of 1967 Legal Services lawyers was found to have been politically active prior to graduation from law school than members of the traditional bar, but those that reported such activity still comprised only fourteen percent of the Legal Services class. Furthermore, no discernible difference was discovered between the later careers of those who had joined Legal Services for explicit social reform reasons and the later careers of those who had joined Legal Services only for personal reasons, such as a steady salary or the opportunity to gain practical experience.

D. Implications for the Future

The authors reached the conclusion that the "radical" reputation of Legal Services is not due to its absorption of lawyers of liberal background and elite social and educational status. Rather, that reputation derived from the tasks assigned to the organization. This conclusion led the authors to posit a theory of alternative career paths in law. The fact that former Legal Services lawyers have continued with legal rights work seems to indicate that if organized sup-

port for more attractive, career-oriented opportunities were provided, a body of lawyers exists which would accept such opportunities and then follow a completely different career pattern than that traditionally pursued by lawyers. If appropriate employment opportunities were offered which succeeded in attracting young lawyers, there would be an ever-expanding body of attorneys committed to serving the needy.

Certain points within the study are open to question. The authors' decisions as to what constitutes legal rights activity and what does not are at times difficult to follow. For example, the use of three client criteria (minorities, small business, poor) to determine if a private practice is or is not legal rights oriented is imprecise and inconsistent with the broad definition of legal rights activity tendered by the authors. Exclusive use of these three indicators resulted in the disqualification of virtually all of the private bar's billed practice from consideration as legal rights activity, but led to the inclusion of the private practices of ex-Legal Services lawyers as legal rights work. Nevertheless, the study considered areas of the law which are not oriented towards class or race, such as environmental law or consumer law, as legal rights activities. This sort of work, which the authors might describe as "non-traditionally aggressive legal rights activity," would not be revealed by the three indicators.

The authors' chosen criteria have a second, related failing. Not every law practice that happens to serve the three indicator groups operates out of commitment to extend legal services to the underrepresented. There is, no doubt, little discernible difference between a law firm committed to a small business practice and a firm with a predominantly small business or low income individual practice that would rather have larger or richer clients. Both deliver legal services to those who otherwise would be without legal counsel.

A parallel problem exists in assessing the aims of individuals who follow alternative career paths and their long-term satisfaction with those paths. A primary question and one unanswerable by a study encompassing only five years is whether or not legal rights lawyers are effectively trapped in what the authors acknowledge to be traditionally low-status jobs. The authors do submit that three years in Legal Services will not result in the same career options as three years of experience with a large law firm. In order to ascertain whether Legal Services lawyers are selecting their subsequent jobs in different areas than other lawyers, the authors compared the positions taken by ex-Legal Services lawyers with those chosen by newly graduated law students. Such a comparison may not be useful. The truth may be that the Legal Services lawyer has even fewer options than the new lawyer. It is conceivable that some legal employers, particularly those with practices oriented towards wealth and power, would be reluctant to hire one who has already indicated an active interest in legal rights work.

The authors themselves raise many questions critical of their own work. They have obviously taken pains to point out junctures where potentially controversial judgments as to methodology or analysis have been made. Though as literature it is decidedly dry, the study is a highly positive effort to inject reality into the public image of a segment of the legal profession which has an im-

portance completely out of proportion to its size. Not only does it provide a map of legal rights activities, it brings the welcome message that, whatever the underlying motivations, a segment of the legal community is devoting itself to the energetic fulfillment of the profession's historical responsibility to facilitate social change.

JOSHUA D. COHN

THE MALPRACTITIONERS. By John Guinther. Garden City, N.Y.: Doubleday & Co., 1978. Pp. 347. $10.00.

The United States is deeply entrenched in a medical malpractice crisis; every physician lives in constant fear of a medical malpractice suit. In 1972, a federal study of malpractice revealed that two-thirds of all Americans did not know that a malpractice problem of any kind existed. But just three years later, a Gallup Poll revealed that ninety percent of the people it sampled now "knew" the nation was facing a "malpractice crisis." John Guinther, an award-winning investigative reporter, set out to find the causes of this malpractice crisis and the effects of this crisis on physicians and consumers of medical care. He studied over fifty case histories, analyzed numerous medical malpractice surveys, and interviewed physicians, attorneys, hospital administrators, nurses, insurance company executives, and other professionals involved in the field. Guinther presents his research and personal conclusions in *The Malpractitioners* by combining an extensive amount of statistical data with fascinating descriptions of actual medical malpractice cases. As a result, the layperson as well as the medical or legal professional will find *The Malpractitioners* interesting reading.

The Malpractitioners begins with an excellent explanation of the major legal aspects of a medical malpractice suit. Although it has always been possible in the United States for patients to sue their doctors for iatrogenic (physician-induced) injuries, there is technically no such legal offense as "medical malpractice." Rather, a defendant in a malpractice suit is said to have committed a "civil trespass" or, as it is more commonly known, a tort. As most iatrogenic injuries are unintentional, over ninety percent of medical malpractice lawsuits are simply claims that the defendant has committed a negligent tort.

In a medical malpractice action, the plaintiff must prove that the defendant was at fault. There are two reasons for this requirement: to force a defendant to pay for an injury which the defendant did not cause would be unjust and would not deter similarly situated persons from exercising reasonable care under similar circumstances in the future. The traditional tort system is not a no-fault system; it is not a form of social insurance, compensating every injured plaintiff and spreading the cost among all users of medical care. Consequently, under the current medical malpractice system, each malpractice claim is treated separately, and virtually identical malpractice claims are not likely to be similarly compensated because not every plaintiff will be able to prove fault. Furthermore, the tremendous variance in judgments awarded by juries throughout the country exacerbate the unequal compensation of malpractice claims.

Before a court can determine if a malpractice defendant acted negligently, the court must first determine the acceptable standard of care required of the defendant. Medical doctors are held to a high standard of care due to both their expertise and the nature of their profession. The typical patient must rely totally on the physician's expertise because individuals (normally) have no personal knowledge with which to judge the adequacy of the medical care rendered. In addition, the consequences of substandard medical care are great and may often involve the loss of life.

The principal way of determining the acceptable standard of care in medical malpractice actions is through the testimony of other members of the profession. But, for years both the locality rule and the "conspiracy of silence" made it virtually impossible for a malpractice plaintiff to obtain expert testimony against a physician. Under the locality rule, only doctors who practice in the community in which the alleged negligent act took place are qualified to testify as to the acceptable standard of care in the community. The "conspiracy of silence" refers to the reluctance of physicians to testify about their colleagues' competence. As the nation became increasingly urbanized and mobile, there was less and less justification for different standards of medical care in different parts of the country. As a result, Guinther concludes, courts began to respond favorably to challenges to the locality rule and today it only remains in effect in a few rural, isolated communities. At the same time, the "conspiracy of silence" began to dissipate as physicians became willing to travel great distances to testify at malpractice actions for a fee. The locality rule and the "conspiracy of silence," therefore, no longer pose an impenetrable barrier to the malpractice plaintiff desirous of obtaining expert testimony against a physician.

These developments, easing availability of expert testimony, directly precipitated the current medical malpractice crisis. Recognizing that plaintiffs had an improved chance of winning malpractice actions, malpractice insurers became increasingly willing to settle. Negligence attorneys, in turn, became more interested in handling malpractice cases; acceptance of a settlement guarantees at least some payment and saves the huge amount of time involved in litigation. The abandonment of the doctrine of sovereign immunity after World War II gave an additional impetus to the malpractice crisis by making municipal hospitals vulnerable to malpractice suits. As a result, by the 1970's a medically injured patient was a welcome visitor in a negligence attorney's office.

After analyzing the legal considerations which precipitated the malpractice crisis, Guinther explores three dimensions of the problem: first, the amount and type of iatrogenic injury occurring in society; second, the percentage of incidents which result in malpractice claims; and third, the dramatic increase in malpractice insurance premiums.

In 1972, the Department of Health, Education and Welfare (HEW) Malpractice Committee conducted a study to determine the number of iatrogenic injuries occurring in hospitals. Such injuries range from minor allergic reactions to a drug to blatant surgical mistakes. Many iatrogenic injuries are completely unpreventable or result from one of the acceptable risks entailed in medical and surgical procedures. The HEW investigators discovered that seven out of every 100 persons who were admitted to a hospital were injured by the treatment they received while patients. A second HEW study of each incident concluded that

twenty-nine percent of all medical accidents in hospitals were caused by negligent care on the part of a physician or attendant. A 1977 study published by the California Hospital Association identified the iatrogenic risk rate for a hospital patient at 4.65 per 100 admissions and the negligence rate at about twenty percent of that. Balancing the two estimates, it appears that by the late 1970's, upward of two million iatrogenic injuries were occurring in hospitals annually, with about forty thousand of them caused by negligence. Since both studies confined themselves to treatment-related injury rates which are discoverable from medical charts, however, neither revealed adverse results caused by misdiagnosis, itself the cause of twenty percent of all malpractice suits. Neither study, furthermore, depicted injuries which occur during hospitalization but only come to light after the patient is discharged. Consequently, the actual iatrogenic injury rate in hospitals is much higher than this estimate.

Neither of these studies revealed the amount of iatrogenic injury which occurs in nonhospital settings. In 1977, while forty million patients were treated in hospitals, approximately 175 million were served by outpatient clinics and approximately 900 million physician-patient contacts took place through office visits or house calls. Projecting injury from hospital studies and known litigation rates, it appears that more than five million patients are harmed by iatrogenic injuries outside of hospitals each year, and more than one million of such injuries are the result of negligence. While the amount of negligently caused iatrogenic injury per year may seem low according to these figures, a consideration of several additional factors indicates the true significance of these findings. Many of the 900 million contacts at the office level are merely repeated treatments for the same illness. If the physician initially misdiagnoses the illness and renders improper care, therefore, the incidence of negligent events is multiplied by the number of improper treatments. In addition, these figures include routine procedures such as annual physicals and checkups. Consequently, assuming that seventy percent of all medical treatment is routine the injury rate in the remaining thirty percent is as high as one in four and the negligence rate about one in twelve. To a person with a complex illness requiring intensive medical and surgical care, this iatrogenic injury rate is quite ominous.

The various causes of this high rate of iatrogenic injury reflect severe flaws in our medical delivery system. One of the most serious causes of iatrogenic injury is unnecessary surgery. Seventy-seven percent of the eighteen million operations performed on Americans each year are elective. A 1976 study of unnecessary surgery published by the New York Times, based on several reliable sources, analyzed the frequency of contraindicated operations in various elective situations. The study found that contraindicated procedures resulted in 12,500 fatalities, or more than one-sixth of the 70,000 deaths that occur each year following elective surgery. A study published in 1977 by the American College of Surgeons suggests that few of these fatalities could have occurred without negligence. If we compare surgeons who work on a fee basis, as most American surgeons do, with surgeons who are salaried, the incidence of unnecessary surgery appears to be even higher than these estimates suggest. Three studies have been conducted which use the surgery rate in Health Maintainence Organizations (HMO, prepaid health plans) as their base surgery rate. The ultimate conclusion

reached by these studies is that HMO members are fifty percent less likely to undergo surgery than those who went to fee-for-service private physicians. It therefore appears that if American doctors worked on a salaried basis rather than the traditional fee-for-service basis, the number of unnecessary surgeries in the United States would drastically decrease, along with many of the iatrogenic negligent injuries. Given the great power of the American Medical Association (AMA) and its devotion to the free enterprise system, however, abandonment of the fee basis is highly unlikely.

Drug therapy appears to produce an even greater amount of iatrogenic injury than surgery, yet it results in far less lawsuits. This is because drug related injury is both difficult to perceive and often non-negligent, as drug reaction is highly unpredictable. At the present time, drug related injury is moving on an upward spiral due to the recent advancements in chemotherapy, overprescription of dangerous drugs, and overuse of antibiotics. In fact, Guinther suggests that improper use of drugs may be the principal reason that the United States continues to have an alarmingly high infant mortality rate. Many of these drug related injuries are resolvable through closer monitoring of the medical profession, yet the AMA has failed to take any meaningful action despite the increasing prevalence of drug oriented malpractice suits.

In 1977, over forty thousand doctors were named in malpractice claims, or about one out of every nine in active practice. At first blush this figure appears to be very high; given the alarming amount of iatrogenic injury, however, the claims rate indicates only a remote likelihood of a physician being called to account for causing a negligent injury. The malpractice claims frequency rate is low for several reasons: first, many people who are clearly injured by malpractice simply do not want to become involved in the legal system and are content to collect from their insurance companies; second, many people do not understand the legal aspects of a malpractice suit and are afraid they will have to pay a lawyer regardless of the judgment; third, not all medical injuries are serious enough to warrant a malpractice claim; and finally, many patients are unaware that an injury has occurred as they were already ill when the iatrogenic event took place.

The prevalance of malpractice insurance and the recent rise in malpractice insurance premiums are also crucial aspects of the medical malpractice crisis. At one time, most doctors took out insurance policies under which the insurer agreed to pay $5,000 per claim but no more than $15,000 during the course of a year. Today, the normal policy is $100,000 per claim and $300,000 total in one year. Many doctors and almost all hospitals, however, carry insurance which pays $1,000,000 per incident and $3,000,000 total in one year. The insurance company, under a malpractice policy, not only pays up to the face value of the policy on any claim resulting in payment to a plaintiff but also investigates and defends all claims at no cost to the insured.

A doctor's insurance rate depends on the amount of coverage received, the doctor's "specialty rating," and the geographic area in which the doctor practices. Until the 1950's, each insurance company charged all its medical clients a flat rate. At that time, studies revealed that surgeons were most likely to be sued and caused the highest payout per claim. As a result, the insurance rate for sur-

geons began to increase, and by 1966 surgeons were paying quadruple the amount charged nonsurgeons. By 1975, in some cases surgeons were paying twenty-five times the rates charged nonsurgeons. Additionally, insurers found that some surgeons were more likely to be sued than others. Doctors therefore were divided into five rating classifications for the purpose of determining malpractice premiums. These classifications range from doctors who perform no surgery to surgical specialists who perform high risk procedures. In 1977, insurance premiums for these classifications ranged from $1000 per year to $18,000 per year. Premium rates also vary from state to state and from rural to urban areas.

During the early years of the 1970's, there was no evidence of the "crisis" in insurance cost and availability that was to occur by 1975. The reasons for this crisis are complicated and worthy of analysis. The HEW Malpractice Committee Report of 1973 concerning the prevalance of iatrogenic injuries scared many insurers. Between 1973 and 1975, the number of companies writing statistically significant amounts of insurance declined from twenty-five to no more than twelve. At the same time, those companies that remained in the field demanded and received rate increases that brought the insurers one billion dollars annually in new premium income over a two year period. The need for the high rates was justified by statistics which indicated tremendous underwriting payouts. These statistics, however, are of doubtful significance. Insurance companies derive profit from the excess of premium income over claims payments and administrative expenses (insurers aim for a five percent underwriting profit) and from the investment of premium income. A combination of the various studies canvassed by Guinther reveals that between 1970 and 1976, industry profits from underwriting alone reached over one million dollars or almost thirty percent of premium income, compared to the five percent profit margin the industry itself says it tries to maintain. The best evidence available reveals, therefore, that malpractice underwriting is profitable for insurance companies.

Guinther concludes that the flight of insurance companies from the market in 1973 was merely the result of an unreasonable fear of unlimited claims growth. There was, however, another factor at work during the 1970's which may have provided the most significant reason for the flight of some companies and the demand for rate increases. During the 1960's and 1970's, casualty insurance companies commonly invested an amount equivalent to their legal surpluses in common stocks. By 1971, some companies owned stock worth 1.6 times their legal reserves. By 1974, the Dow Jones Average which was over 1000 in 1972, dropped to 607. Some casualty insurers suffered losses that reached eighty percent of their surplus. In 1974, the combination of rising claims and inflation caused casualty underwriting losses estimated at $1.8 billion, while the total stock market losses for that year alone reached $3.3 billion. Among those hardest hit were insurers in the malpractice business; many were forced to "throw in the towel." It was during the year that the stock market crisis was at its worst that malpractice premium income rose from $500 million to one billion dollars, and in the year following climbed another $500 million. The connection is obvious, and Guinther is quick to recognize it.

After discussing the various statistical dimensions of the malpractice crisis, Guinther examines the contribution of negligence attorneys to the current situa-

tion. Malpractice attorneys are commonly accused by both insurance and medical sources of both ambulance-chasing and acting unethically by accepting tort claims which lack legal grounds for recovery. Guinther points out that these critics fail to recognize that negligence attorneys work on a contingency fee basis and therefore have little motive to accept a malpractice claim unless there is a basis for recovery and the defendant has "deep pockets," *i.e.*, money to pay for large verdicts. As most providers of medical services carry malpractice insurance and most juries do not consider insurance company money "real money," malpractice suits are extremely attractive to negligence attorneys. Under this "deep pocket" theory, it is primarily the insurer's ability to pay and the likelihood of high jury verdicts, not the negligence of medical providers, which has created the recent boom in malpractice claims. Malpractice attorneys, of course, dispute these allegations. According to the Americal Trial Lawyers of America, the malpractice suit is a positive force for the public welfare as it forces doctors and hospitals to implement additional safety techniques. A study of 4000 practicing physicians found that eighty percent of the doctors interviewed could name at least one precautionary step they had implemented due to the fear of a malpractice suit.

Guinther concludes *The Malpractitioners* with the suggestion of some remedies for the malpractice crisis under the traditional tort system as opposed to the imposition of a no-fault system. Among these are nonbinding arbitration for resolution of malpractice disputes, a provision for free medical evaluations in malpractice disputes, adding the attorneys' contingency fee to the jury award, providing malpractice insurance to all providers on a flat rate basis, and the provision of malpractice insurance to doctors and hospitals by a national company operating under federal guidelines. All of these suggestions are approaches which, if adopted, are most likely to create a manageable, noncrisis atmosphere in which final judgements can be arrived at through reason rather than through panic.

The Malpractitioners is an excellent analysis of the causes for the malpractice crisis, the dimensions of the problem, and the possible solutions. Guinther canvasses an overwhelming amount of information yet manages to present his findings in a highly readable and interesting format. *The Malpractitioners* is highly recommended for any individual who is at all interested in medical malpractice, either from a consumer or professional standpoint.

MINDY A. BUREN

A HYMNAL: THE CONTROVERSIAL ARTS. By William F. Buckley, Jr. New York: G.P. Putnam's Sons, 1978. Pp. 511.

Even those wholly committed to sweeping social reform must at least consider the tightly constructed arguments of the leading modern American conservative mouthpiece. With this collection of essays, columns, and letters, William Buckley keeps his liberal readers off balance with creative expressions of time-worn tenets of conservatism. Indeed, it is likely that even the more conservative-minded readers will be chagrined at the innovative routes the au-

thor has pursued before reaching the familiar conclusions: less government, less taxes, and less detente; more defense, more freedom, and more profits.

Buckley chose the title of the book because the views presented purport to be the most illuminating "in current circulation." Although he refers to his crusade to "bring the world around" to his thinking with self-parodying irreverence, the sacred tone of *A Hymnal* also probably reflects the author's devout Catholicism, which resounds throughout his polemics. Not only does Buckley believe that abortion is a legitimate political campaign issue, but that the abortion question and similar ethical dilemmas may be central to determining the moral fiber of the candidates, and hence their qualification for office.

Expressing similar adherence to traditional sexual mores, Buckley found an opportunity "to say something nice about my friends in Mormonland" for ousting an incumbent Utah Congressman because of his arrest for soliciting two undercover policewomen. Likewise, he is very uneasy about the willingness of more sophisticated communities to separate a politician's private morality from his public capabilities. Buckley was disappointed when then-First Lady Betty Ford admitted on national television that she would not be surprised to discover that her teenage daughter was having a premarital affair. Ironically, Buckley's recent spy thriller, *Saving the Queen*, concerns a CIA agent who has more than simply a professional relationship with the British monarch. Such incidents of promiscuity are evidently best left to fiction, or at least kept discreetly beneath the royal bedsheets.

With respect to foreign policy, devotion to Christianity apparently induced Buckley to give the benefit of the doubt to our "born-again" President Carter and his announced crusade for international human rights. Buckley, however, refuses to divorce the cause of human rights from general international policy, and particularly scorns as contradictory a policy of detente with those world leaders whom he believes are the most notorious oppressors of human rights. Thus, he will forever condemn Richard Nixon for his friendly overtures to Brezhnev and Mao. Yet despite his moral intransigence, he has little trouble forgiving the former president for his Watergate misadventure. After all, Buckley reasons, what Republican could be more abusive of the executive office than FDR, HST, JFK, and LBJ? In Buckley's cosmology, American foreign policy should not reflect only self-serving utilitarianism, especially when it is so poorly calculated by the State Department. In contrast, the domestic economy should solely be a function of the opportunistic mechanisms of free enterprise. Presumably this apparent inconsistency in Buckley's philosophy demonstrates only that the goals of our domestic economic policy may, and probably should, be divergent from the aims of American foreign policy. Nevertheless, Buckley's reprimands act as nagging reminders that on the world stage there may still be white hats and black hats; if so, he aims to set us straight as to who wears which.

In more than a few cases, Buckley dauntlessly, almost cheerfully, cuts against overwhelming public sentiment to defend some of our liberal society's more castigated villains or to blaspheme many of our contemporary heroes. He recreates Ferdinand Marcos' bloody heroics in World War II to encourage us to tolerate the Philippine president's current abuses. He reports that J. Edgar

Hoover was an effective FBI director, even in his investigation of Martin Luther King, Jr., before succumbing to opportunism and senility near the end of his life. With disconcerting conviction, Buckley defends the bulk of the work of the McCarthy Committee, regardless of the idiosyncratic improprieties of its chairman. Even the dubious Whittaker Chambers earns a sincere pat on the back by Buckley for patriotically returning to the fold.

On the other hand, Buckley questions readmitting Alger Hiss to the bar, and challenges President Ford's decision to honor the scientific achievements of Linus Pauling because of Pauling's long and cordial association with the Soviet Union and world socialism. He refuses to glowingly eulogize another Communist "world traveller," Paul Robeson. Outraged by the trend toward normalizing relations with China, Buckley does not pay homage to Chou En-lai upon his death, but instead recites the atrocities he committed to consolidate the Communists' power.

Buckley reserves the deadliest portion of his venom for "America's leading woman playwright," Lillian Hellman. At a time when Jane Fonda is portraying her on the silver screen and other liberal celebrities read her letters on the Broadway stage, Hellman to Buckley is little more than a self-righteous befuddler of the McCarthy Era. He will always remember her only for saying so many kind things about Stalin after her trip to the Soviet Union in the late 1930's.

Throughout the broad range of subjects covered by these essays, from gun control to men's clothing styles, Buckley sustains his crusade under the banner of conservatism. As our collective conscience, he laments the massacre of our former friends in Saigon. Speaking out for unpopular international causes, Buckley asserts the property rights of white South Africans and defends the legitimacy of executions ordered by Franco. Even in discussing his wife's interior decorating of their home, Buckley professes a decided preference for the traditional over the chic. At the same time he is protecting the time-honored institutions from impetuous change, he also clearly derives pleasure from shaking the moderate-minded out of their complacency.

The legal profession is one area, however, where Buckley advocates reform. He indicts lawyers for the very fault often attributed to himself: obscuring a simple meaning with abstruse language. Buckley calls on the future attorneys of this country to deliver the Constitution from casuistry and to reduce the law to clear, basic terminology within the ken of the general public. What he really means is courts should not be so receptive to attorneys who are trying to stretch the scope of the Constitution to promote their liberalizing campaigns.

In the same way that Buckley may be underestimating constitutional lawyers, his critics may be overreacting to his comprehensive vocabulary. Because he is after all a journalist, Buckley writes in a lucid style that succinctly expresses his unnervingly logical arguments. But as a conscientious protector of the King's English, Buckley insists on precision in word choice and bravely refuses to abide by the glaringly improper guidelines suggested by the National Council of Teachers of English as a means of eradicating sexism in language. Facing the onslaught of attempts to substitute "their" for "his" or "ordinary

people" for "common man," Buckley stands resolute. He would never take the politically expedient step of capitulating to overzealous feminists when centuries of linguistic refinement are at stake.

Although Buckley promised to include only articles that express controversial thoughts, occasionally he indulges in intimate anecdotes of purely personal interest. Often, however, these are as engaging as his political invective, particularly his reckless adventures as a novice pilot and the hazards he encounters in pushing his books on the talk show circuit. Buckley's self-indulgence in selecting essays for the book peaked with his inclusion of his introduction to his republished *God and Man at Yale*. The year following his graduation from college, he wrote this book as a plea to conservative alumni to rescue their beloved institution from the socialist faculty that was, in his view, preaching nothing but Marxist atheism. At the time, his call for reviving American free enterprise and Christian morality evoked impassioned cries of "educational fascism" from many academicians. But now that the furor has subsided to a whimper, Buckley persists in defending himself against his critics of a generation ago.

In spite of such an excessive eagerness to engage in intellectual repartee, Buckley's lengthy reply to the criticism is understandable, because his detractors are legion and, as he happily points out, often inaccurate and illogical. Certainly few contemporary writers, regardless of the strength of their positions, can confront Buckley in a verbal duel on an equal footing. While the conservatives desperately need Bill Buckley as an erudite voice that can speak in terms somewhat deeper than simply "balance the budget" or "keep the canal," the liberals can rely on him to point out the logical inconsistencies in their rhetoric, the moral contradictions in their policy, and the utopian mirages of their economics. Even fence straddlers can benefit by learning to pay closer attention to the issues and to meet their social obligation to take a stand.

C. ROBERT PAUL

CRIMINAL VIOLENCE, CRIMINAL JUSTICE. By Charles E. Silberman. New York: Random House, 1978. Pp. 540.

The statistics are frightening. Between 1960 and 1976, the chances of being the victim of a major violent crime such as murder, rape, robbery, or aggravated assault nearly tripled.[1] At least three people in every 100 will be the victim of a violent crime this year.[2] One house in ten will be burglarized.[3] One robbery victim in three will be injured.[4]

Even more disturbing than the increase in the number of violent crimes is the change in the nature of the crimes committed. Although most murders still

1. C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 3 (1978).
2. *Id.* at 4.
3. *Id.*
4. *Id.*

involve victims and murderers who know each other, the number of murders committed by people who were strangers to their victims has increased nearly twice as fast as murders committed by friends or relatives of the victims.[5] Similarly, two-thirds of all rape victims are now attacked by strangers; ten years ago people known to the victim accounted for nearly half the rapes committed.[6]

The United States appears to be experiencing a crime wave of unprecedented proportion and viciousness. As Charles Silberman points out in *Criminal Violence, Criminal Justice*, however, crime and violence have been "recurrent themes throughout American history."[7] From the 1700's, when Britain "solved" its crime problem by sending convicted felons to the colonies; through the nineteenth century, with its rise in urban crime, the appearance of the vigilante movement, the "hero bandits" such as Jesse James, and the growth of a "new breed" of professional criminals; to the twentieth century's explosive increase in violence associated with organized crime, criminal violence in America has been the rule rather than the exception.

In spite of this history of criminal violence, most people have been shocked at the upsurge in crime that began in the 1950's. Silberman notes that because people had become accustomed to domestic tranquility as the result of a period between the 1930's and 1950's when the crime rate declined from previously high levels, the increase in crime in the 1960's and 1970's was perceived as an aberration rather than a return to a violent norm. Silberman thus explodes the myth that criminal violence is a phenomenon which has appeared relatively recently in our history.

Much of the appeal and importance of *Criminal Violence, Criminal Justice* lies in its careful dismantling of the myths which color the views that both lay people and lawyers share of the American criminal justice system. Behind the myths, criminal violence and society's responses to it present extraordinarily complex problems involving race, poverty, and social class.

Silberman notes that most street crime is committed by poor young men. For these people, the American ideal of success is unavailable through conventional channels of college and career. Faced with daily evidence of the relative affluence of the middle class, these youths choose what is often the only route open to them. Their environment provides encouragement in the form of role models, education, and opportunities for crime. Thus, lower-class adolescents often choose crime as an occupation in much the same way that middle-class youths choose law, medicine, or business, and for similar reasons: to make money, to succeed, and to create a sense of self-worth.

In his chapter on black crime, Silberman notes the "uncomfortable fact" that "black offenders account for a disproportionate number of the crimes that evoke the most fear,"[8] and explains that black crime is in part due to the breakdown in family and social controls which has led "black adolescents and

5. *Id.*
6. *Id.*
7. *Id.* at 21.
8. *Id.* at 118.

young men . . . to act out the violence and aggression that, in the past, had been contained and sublimated in fantasy and myths."[9] In connection with this explanation, Silberman offers a fascinating look at the role of black culture, particularly the use of myths, songs, and stories as a psychic safety-valve for black anger and frustration.

The second part of the book explores the institutions of the American criminal justice system: the police, the courts (including the juvenile courts), and the prisons. Silberman theorizes that the actual operation of these institutions "bears little resemblance to the image that people, even criminal justice professionals, have of them."[10] For example, though both public and the police themselves, perceive the role of the police to be that of preventing crime and catching criminals who commit crimes that cannot be prevented, the fact is that police do not know what to do about crime. While most criminals are eventually caught, the reason is not that the police are efficient but that criminals are incompetent, and that victims or other informers usually tell the police who committed the crime. Silberman further contends that changes in police methods, such as placing more uniformed officers on patrol or employing more modern technology, would have little effect on the number of crimes committed and on the number of crimes "cleared," or solved.

Regarding the courts, the author is a bit more optimistic. He presents a novel thesis, given the current belief of many people that the courts have failed to punish criminals. Silberman concludes that the courts are *not* more lenient than they formerly were, that plea bargaining does *not* distort the judicial process, that sentencing of criminals is *not* haphazard, and that the guilty do *not* escape punishment—in short, that the courts generally are doing an effective job. The problem, however, is not that the courts do not do justice, but that they *appear* not to do justice. Courts are in part educational institutions, supposedly teaching respect for law in addition to dispensing punishment. The dilapidated physical environment of most criminal courts, the insensitivity of most court personnel, and the callousness and greed of the criminal bar, however, combine to undermine the public's respect for the law.

Criminal lawyers, whose practice is seen as only "a little above shoplifting,"[11] come under special scrutiny. According to Silberman, most members of the urban criminal, or "cop-out," bar plead their defendants guilty, collect their fees, and run. Most defendants, particularly the poor, are thus denied effective representation. Pointing to the public defender programs in Washington, D.C., Seattle, and Contra Costa County, California as models of effective and concerned representation, Silberman advocates upgrading public defender services throughout the country as a way of improving the perception that most poor people have of the criminal justice system.

The problem with the juvenile court system is not merely one of perception or appearance. Although based on a commitment to rehabilitation rather than punishment, the juvenile courts spend too much time dealing with minor

9. *Id.* at 152.
10. *Id.* at 173.
11. *Id.* at 303.

offenses, such as truancy, running away from home, and other such "status offenses," and not enough time on more serious crimes. In addition, juvenile court judges tend to punish young people irrationally. Runaways and other "incorrigibles" (the catchall phrase for those juveniles who defy parental authority) are much more likely to be jailed than are burglars. Young people are sent to juvenile detention centers and training schools that offer little in the way of training or rehabilitation. This ambivalence toward young offenders is inherent in the juvenile justice system, says Silberman. Juvenile courts are expected to protect the young against society, and to protect society against young offenders. The juvenile courts are doing neither.

A similar ambivalence pervades the problem of prison reform. For two hundred years, prison reform advocates have attempted to create prisons that could punish offenders without brutality, and could offer rehabilitative services as well. The challenge clearly has not been met.

The chapter on prisons is perhaps the most difficult to read. The author describes in vivid and graphic detail the degradation, humiliation, sexual violence, and dehumanization suffered by most prisoners. No prison reform is possible, says the author, until order is restored to the prisons. Order and reform *are* possible, judging from the experience at one Illinois prison which Silberman describes as attractive and humane.

Silberman, director of the Ford Foundation's Study of Law and Justice, spent six years and a one-half million dollar Ford Foundation grant researching and writing this book. The expenditure of time and money shows not only in the detailed descriptions of the structure and dynamics of the institutions of criminal justice, but in the thoroughness with which he explains how people become criminals and why crime is such a pervasive force in American society.

The value of *Criminal Violence, Criminal Justice* lies less in its suggested solutions to the problems confronting the criminal justice system than in its clear description of the problems. Silberman's solutions are in fact somewhat less than comprehensive. Nevertheless, by stripping away the myths surrounding crime and criminal justice, the author has provided criminal justice professional and lay people with a more rational starting point for discussing criminal justice reform.

NEIL E. SALOWITZ