Vanderbilt Law Review

Volume 29
Issue 6 *Issue 6 - November 1976*

Article 5

11-1976

Book Reviews

Paul L. Murphy

Richard E. Ellis

BOOK REVIEWS

Equality in Profession Versus Equality in Belief

SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY. By Richard Kluger. New York: Alfred A. Knopf, 1976. Pp. x, 823. Illustrations, Appendices, Select Bibliography, Index of Principal Cases, Index. $15.95.

*Reviewed by Paul L. Murphy**

Richard Kluger is a novelist and editor who retired to devote his full time to an extensive study of the landmark Supreme Court decision of *Brown v. Board of Education*.[1] Perceiving the *Brown* decision as a watershed with respect to America's willingness to confront the consequences of centuries of racial discrimination, Kluger set out to tell the entire story of the *Brown* decision. Kluger approaches the *Brown* case not as a study of the law and its permutations, but as a study of "how law and men interact, how social forces of the past collide with those of the present, and how the men selected as America's ultimate arbiters of justice have chosen to define that quality with widely varying regard for the emotional content of life itself."[2]

Specifically, Kluger set out to examine fully all published and unpublished documentary sources on the case. He interviewed every living person involved in any way with the case.[3] He then weaves this material into a readable and dramatic chronicle of every conceivable consideration going into the Court's decision. The work is painstakingly detailed. It entails the careers of all the principal figures in the case, including the judges and lawyers in both the lower court decisions and the Supreme Court cases. The work particularly focuses on the legal strategies and techniques used to address the racial issue, the involved courtroom scenes and confrontations that took place, and the final ruling that emerged, which in Mr. Kluger's mind brought to a successful conclusion black America's long struggle for equality.

---

* Professor of History, University of Minnesota. B.A., The College of Idaho, 1947; M.A., 1948, Ph.D., 1953, The University of California, Berkeley.

1. 347 U.S. 483 (1954).

2. R. KLUGER, SIMPLE JUSTICE at x (1976) [hereinafter cited as KLUGER].

3. Kluger appends an extensive list of the interviews and correspondence on which he relied. *Id.* at 796-802.

In order to dramatize the Supreme Court's reconciliation of the nation's law with the basic ideal of equality, Kluger devotes the first quarter of his volume to an exploration of classical developments in the legal history of race relations in America. He begins with the transportation of slaves to the new world and traces the failure of the nation, particularly its courts, to live up to traditional commitments to equal justice under law. Kluger handles this material as a story, moving from landmark to landmark. The cases and examples that the author chooses to compose this narrative enable him, by setting the *Brown* case in a limited historical context, to depict the Court's sharp departure from traditional American practice. The result is the fullest and richest treatment of the *Brown* decision to date. While much has been written on the case, no other author has attempted the breadth of Kluger's presentation.

In some ways, however, the work is peculiarly naive and strangely two-dimensional. Missing from the book is the broader setting of ingrained American values, for example, the conflict between liberty and equality, which so fascinated de Tocqueville in the 19th century, their evolution, and their development through time. *Brown* was attempting to assail and ultimately to alter these traditional values. Had Mr. Kluger explored more carefully the doctrine of equality and America's attitude toward that doctrine, much of the "happy ending" quality of his story might have been tempered. Central to a full and sophisticated understanding of the *Brown* decision is the dilemma of equality as a conceptual value and the dichotomized role it has played historically in the American mind.

The major problem that Richard Kluger fails to confront candidly in his chronicle of the *Brown* decision turns on the unwillingness of modern America to embrace a substantive concept of racial equality. While acknowledging the Supreme Court's reluctance to advance Negro rights beyond a line judged not to be intrusive on white sensibilities,[4] Kluger does not explore carefully the prevailing national attitude toward political and social equality at the time of the *Brown* case. Thus Kluger fails to recognize the critical distinction between the American perception of equality as a doctrine and the actualization of that doctrine in its social institutions.

In his unfortunately brief, and somewhat starry eyed epilogue, Mr. Kluger examines some of the persistent problems of noncompliance with school desegregation orders. While Kluger recognizes the

4. *Id.* at 589. *See also* Lefberg, *Chief Justice Vinson and the Politics of Desegregation*, 24 EMORY L.J. 243 (1975).

positive strides taken with respect to integration,[5] he cites Marshall's dissent in the 1974 Detroit busing case, *Milliken v. Bradley*,[6] for the proposition that the perceived public mood of the nation should not impede the constitutional guarantee of equal justice.

Kluger identifies the fears of the white middle class American and understands his resentment of the federal courts' attempts to enforce their perception of social and political equality. Mr. Kluger argues that because the public behavior of a majority of Americans toward nonthreatening forms of temporary social accommodation does not produce a violent response, there is a general acceptance of doctrinal equality or, at the very least, equality under the law. Yet one simply cannot make this general conclusion solely from sporadic examples of social behavior. Clearly the attitude of such Americans on the larger issue of inherent black inequality has not changed, despite a more benign acceptance of minimal black rights.[7] At this point, Mr. Kluger could have explored more carefully the Warren Court's misjudgment of public attitudes toward the doctrine of equality. Operating under the idealistic assumption that the Court's role in the twentieth century was to find legal ways to harmonize historically professed American ideals and their practice, the Warren Court failed to perceive the disillusioning reality that millions of Americans preferred to maintain a discrepancy between theory and practice. On the one hand, the American people profess their belief in such abstract concepts as freedom, liberty, and equality, and on the other hand, they abstain from implementing these precepts into action.[8]

Clearly a majority of Americans in 1954 did not embrace the idea of legally coercing social and political equality in order to guarantee the rights of minority groups. Yet Mr. Kluger, just like the brilliant team of black attorneys who argued the *Brown* case, cannot understand that once the Supreme Court went on record as endorsing total legal equality, why the majority of American people cannot see the logic, value, and virtue of that position.

The poignant irony of the *Brown* case is that the people who made the legal decision were powerful, white, establishment figures, reacting to the carefully evolved, sophisticated legal persuasion of

5. KLUGER, *supra* note 2, at 774-75.

6. 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).

7. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILOSOPHY & PUB. AFFAIRS 3 (1974).

8. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 76-77 (1976); P. MURPHY, THE CONSTITUTION IN CRISIS TIMES 1918-1969, at 462-63 (1972).

a group of elite black lawyers. In a sense, the Court said, "All right, your case is persuasive. We will finally let your people have their legal rights." Seemingly, the Court was not prepared to acknowledge that despite the presumed magic of such a revolutionary legal step, people would not live happily ever after in perfect political and social harmony. Clearly a review of the wisdom of Zecheriah Chafee and Learned Hand would have been profitable. Chafee, quoting Professor McBain, wrote, "Legal precepts cannot change human nature. And the stuff of courts is human stuff." He further observed, "Nine men in Washington cannot hold a nation to ideals which it is determined to betray."[9] Hand contended that "[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."[10]

In spite of the careful legal development of the *Brown* case, the skill of the lawyers involved, the wisdom of the tactics employed, and the goodwill of the bench hearing the case,[11] *Brown v. Board of Education* did not make the majority of Americans believe that blacks were equal. Thus the important developments in the post-Brown years often have reflected attempts by varying groups to circumvent the *Brown* decision. For congressional leaders, the executive branch, and the judiciary, the name of the game has become one of devising public justifications to persuade people to accept the assumptions of *Brown*. In response, the name of the game for those in opposition to school desegregation is massive resistance and noncompliance with the orders of the federal courts.

That attitude has persisted to the present time. It underlies everything that has occurred in the last twenty-two years in the area of racial conflict—massive resistance, antibusing activities, and the disgrace of Jensen-Shockleyism.[12] In this respect, Kluger's moving and exhaustive chronicle could have been much better had the author been more realistic about probing the national stage and the sentiments and prejudices of the American audience.

Perhaps America's commitment to equality is simply a code

9. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES at xiv (1942).

10. L. HAND, THE SPIRIT OF LIBERTY 190 (2d ed. 1953).

11. C. JENCKS, INEQUALITY (1972).

12. *See* N. BLOCK & G. DWORKIN, THE I.Q. CONTROVERSY (1976); Block & Dworkin, *I.Q., Heritability and Inequality*, 3 PHILOSOPHY & PUB. AFFAIRS 331 (1973). *See generally* I. NEWBY, CHALLENGE TO THE COURT: SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION 1954-1966 (1967); Hodgson, *Do Schools Make a Difference?*, 231 ATLANTIC 35 (1973); Ravitch, *Integration, Segregation, Pluralism*, 45 AM. SCHOLAR 206 (1976).

word for affording to minority citizens a slightly more open opportunity to compete in the white man's world on the white man's terms, and in no way implies the substantial social and political equality that *Brown* sought to foment. Even if that is the case, as this reviewer suspects, Richard Kluger's study is valuable. What the principal characters in the *Brown* case did and the immediate legal success that they attained is essential to an understanding of the problems that still impede black America's struggle for equality.

The Early American Legal Profession

AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876. By Maxwell Bloomfield. Cambridge, Massachusetts, and London: Harvard University Press, 1976. Pp. ix, 397. $15.00.

*Reviewed by Richard E. Ellis**

This book has a number of virtues. It is fluently and, at times, even engagingly written. Its research is wide ranging. It is often suggestive. It is critical of other interpretations without being pretentious and arrogant. Yet, it is also a book with serious flaws. It lacks focus and balance, and it fails to elaborate adequately on its most important points. It frequently offers interpretations that are confusing and questionable, and, despite the promise of the title, it does not relate adequately the legal profession to the changing nature of American society in the hundred years after independence.

Much of the problem stems from the book's organization and content. It is a series of separate essays arranged in roughly chronological order, with no basic common theme or methodological approach to tie them together. The book contains nine chapters, five of which explicitly embrace the biographical approach and examine the responses of significant, but little known, judges to a number of important but disparate events: the Revolution (Peter Van Schaack), the codification movement (William Sampson), the changing economic and social system in Ohio (Frederick Grimké), the Confederacy (William Pitt Ballinger), and the education and training of black lawyers (John Mercer Langston). The four remaining chapters deal with antilawyer sentiment in the post-revolutionary period, the development of family law in the mid-nineteenth century, attempts to upgrade the profession's image, and urban riot control in Philadelphia in the 1840's. Despite the disparate nature of the essays, however, each covers important and interesting aspects of early American legal history and raises a number of significant, if unrelated, questions.

The opening chapter on "Peter Van Schaack and the Problem of Allegiance" during the American Revolution is a good beginning, for the subject is an important one rich in its potential for uncovering the nature of the legal profession in 1776. Yet, what follows is very disappointing. We are given too much biography and not enough analysis of Van Schaack's legal career. We learn a great deal

*Professor of History, State University of New York, Buffalo, B.A., University of Wisconsin, 1960; M.A., University of California, Berkeley, 1961; Ph.D., 1969.

about when he was born, where he grew up, whom he married, his place in the course of the Revolution in New York, his decision to become a loyalist and the difficulties he suffered as a consequence of that decision, his experiences in England, and his Federalist politics. But only passing mention is made of his involvement with the law or the kind of lawyer he was. For example, we learn that he started to lose his sight in 1772 after he was appointed to revise the laws of New York, a revision, Bloomfield tells us, that produced "a masterful synthesis of colonial jurisprudence."[1] But, in the pages that follow, the contents of this "masterful synthesis" are never analyzed, although we are given a running account of his developing blindness. We are tantalized with the revelation that the bulk of Van Schaack's practice involved real estate transactions,[2] but this is never elaborated upon, which is unfortunate because there has yet to be written an adequate account of a real estate practice in the eighteenth century. Moreover, only passing mention is made of Van Schaack as a teacher of the law, although that was the area in which he "exerted his greatest influence as a lawyer. . . ."[3] The purpose of the chapter—the question of allegiance during the revolutionary crisis—is boiled down to the narrow and unexciting legalistic arguments that Van Schaack used against specific anti-loyalist legislation that directly affected him, instead of the more meaningful and broader question of how a lawyer's professional background and training would influence his decisions during such a crisis.

The second essay on "Antilawyer Sentiment in the Early Republic" is more focused. Building upon the ideas and findings of a number of other scholars, and particularly those of several recent unpublished doctoral dissertations, Bloomfield quite satisfactorily summarizes the present state of scholarship on the subject.[4] To be noted particularly is the useful analysis of the contents of Benjamin Austin's *Observations on the Pernicious Practice of the Law* (Boston, 1786) and Jesse Higgins' *Sampson Against the Philistines* (Philadelphia, 1805).[5] Also valuable is the stress that Bloomfield

1. M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 5 (1976) [hereinafter cited as BLOOMFIELD].

2. *Id.* at 4, 24.

3. *Id.* at 25.

4. J. Aiken, Utopianism and the Emergence of the Colonial Legal Profession: New York, 1664-1710, a Test Case (1967) (unpublished dissertation in University of Rochester Library); G. Gawalt, Massachusetts Lawyers, A Historical Analysis of the Process of Professionalization, 1760-1840 (1969) (unpublished dissertation in Clark University Library); C. McKirdy, Lawyers in Crisis: The Massachusetts Legal Profession, 1760-1790 (1969) (unpublished dissertation in Northwestern University Library).

5. BLOOMFIELD, *supra* note 1, at 45-49.

places upon the utopian and arcadian roots of the antilawyer attitudes that existed in seventeenth-century America, attitudes that tended to be overshadowed by the rise of the legal profession in the eighteenth century as the social and economic life of the colonies became increasingly complex, but that were reborn with the republican idealism of the Revolution. He blunts the value of this insight, however, by suggesting that after the Revolution the assault on the legal profession "represented no Marxist struggles between opposing economic groups, no risings of the propertyless masses against an oppressive capitalist order," but rather that the profession's critics were "sturdy middle-class types" and "thrifty bourgeois."[6] The problem here lies in Bloomfield's failure to realize that he is mixing together two different, and in certain ways, incompatible interpretations. The view stressing the republican idealism of the Revolution recognizes that to a large extent the sources of the hostility to the legal profession are to be traced back to the religious, economic, and social values that existed in Europe and America prior to the advent of capitalism. This concept of what might be termed "moral economy" saw lawyers as nonproducers, leeches upon society, and troublemakers. Antilawyer sentiment thus becomes part of the resistance of a tradition-oriented agrarian society to the emergent values of capitalism and modernization, which began to appear in America in the late eighteenth and early nineteenth centuries and which to a large extent manifested themselves in the values both of the law and of the legal profession.[7] To argue that opposition to the legal profession had its roots in middle class discontent, on the other hand, is to suggest that antilawyer sentiment in the early republic developed within the context of an already arrived capitalism and that the critics of the legal profession were, as Bloomfield makes explicit at one point, mainly "malcontents."[8] This argument also reduces the significance of the issues raised by the legal profession's critics. Both points of view are intertwined in the chapter and both undoubtedly existed in post-revolutionary America, but no serious attempt is made to disentangle them, to harmonize them, or, most importantly, to evaluate their relative importance. As a consequence, Bloomfield merely describes the existence of antilawyer sentiment in the early republic without ever coming to terms with its significance for the changes in American society that occurred

6. *Id.* at 44.

7. R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 111-16, 250-66 (1971).

8. BLOOMFIELD, *supra* note 1, at 44.

after independence.

Also debatable is Bloomfield's claim that hostility to the legal profession was less intense in the South than it was in other parts of the country. The danger here is that Bloomfield may be reading backwards into the early national period the tensions that caused the Civil War and the circumstances that made the post-Civil War South different from the rest of the country. In other words, he does not perceive that it was the rise of the slavery issue after the 1830's and the loss of the Civil War that made the South different from the rest of the country and that in the years after independence the South was really quite similar to other regions.[9] To a certain extent, Bloomfield recognizes this when he observes that "vigorous antilawyer sentiment flourished in . . . North Carolina . . . as well as in post-revolutionary Georgia."[10] What then does the author mean by the South? Presumably, it is Virginia and South Carolina. How intense or pervasive it was in Virginia is hard to say on the basis of the existing secondary sources, but there is no doubt that some antilawyer sentiment did exist in the Old Dominion. For example, a candidate for the Virginia general assembly in 1800 noted "that being a lawyer was with some a fatal objection, their taking it for granted that a lawyer was interested in multiplying the laws and making them more complex."[11] The South Carolina situation is more complicated. A recent study of post-revolutionary legal developments in the state, based mainly on an examination of legislation actually passed, seems to confirm the view that antilawyer sentiment was not very important in South Carolina.[12] This approach, unfortunately, looks only at the results of the struggle, that is, the specific laws passed during the 1780's, and not at the nature of the struggle that took place over the passage of these laws. Moreover, it runs counter to the findings of the most recent scholarship on the years immediately following independence, which strongly indicates that while the eastern ruling group of planters and lawyers in South Carolina remained in control throughout the 1776-1787 period, the demands of the small farmers of the western portion of the state were becoming both increasingly vociferous and closer to being achieved.[13] In short, the conditions that created antilawyer senti-

9. *Id.* at 50-51, 84, 92, 96-97. *See also* Ely, Book Review, 55 B.U.L. REV. 153 (1975).

10. BLOOMFIELD, *supra* note 1, at 50.

11. Letter from William Brockenbrough to Joseph Cabell, June 9, 1801, on file in University of Virginia Library.

12. Ely, *American Independence and the Law: A Study of Post-Revolutionary South Carolina Legislatures,* 26 VAND. L. REV. 939 (1973).

13. J. MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 21-28 (1961); J. MAIN,

ment in states such as Massachusetts and Pennsylvania also existed in South Carolina. This, in itself, of course, does not prove the actual existence of such sentiment in the Palmetto state, but strongly suggests that the problem has not been studied adequately in South Carolina and that much the same divisions that existed in the New England and Middle Atlantic states also existed in the South.

Bloomfield next turns his attention to the codification movement by analyzing the career of William Sampson, a colorful Irish émigré lawyer. As in the opening essay on Van Schaack, too much space is devoted to extraneous biographical detail, and the most interesting part, an analysis of the codification movement itself, is too compressed to be really meaningful. The main point of the essay is to disassociate Sampson's brand of codification, which is viewed as a movement within the legal profession and not one against it, from that of the radical followers of Jeremy Bentham.[14] The point is well taken, for reformers like Sampson were interested in a digest that would rationalize the law rather than a code that would change fundamentally the nature of the law as it was evolving.[15] Nevertheless, as Bloomfield is forced to admit, Sampson's rather conservative attempt to reorganize and clarify the law was not the main thrust of the codification movement, which, as the 1820's and 1830's wore on, increasingly took on the rhetoric of Jacksonian democracy with its antilawyer and agrarian overtones.[16] Unfortunately, the relationship between the two movements is not explored adequately and, as in the preceding essay on "Antilawyer Sentiment in the Early Republic," the reasons for their development are confused.

Particularly open to question is Bloomfield's assertion that the kind of codification endorsed by Sampson came from "liberal practitioners with no political axes to grind" who "sought to close the gap between legal dogmatism and the changing needs of a democratic society."[17] In point of fact, the kind of codification endorsed by Sampson and his friends was highly "political" in its implications, for it was supported by those lawyers who not only were con-

---

POLITICAL PARTIES BEFORE THE CONSTITUTION 269-95 (1973); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 367, 399, 482 (1969). Both Main and Wood use newspapers along with other sources to obtain this understanding of South Carolina society. Ely does not use any newspapers.

14. BLOOMFIELD, *supra* note 1, at 77, 80-81.

15. *See* G. DARGO, JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS 169-70 (1975).

16. BLOOMFIELD, *supra* note 1, at 84-85.

17. *Id.* at 60.

cerned by the proliferation of law reports, but also by the inconsistency between many of the opinions published by these reports and the particular doctrines that many members of the legal profession wanted to see adopted.[18] This kind of concern was evident in the years immediately following the panic of 1819, when an intensive rebirth of precapitalist concepts of moral economy took place and deeply worried many lawyers who feared popular pressures would undercut the uses to which the law was being put in order to foster economic development. Codification, in the form of digests of the law, if controlled by the right people, offered an opportunity to eliminate or at least effectively to limit the antidevelopmental doctrines in the form of just price and usury laws, certain kinds of replevin acts, and debtor legislation that manifested itself in many states in the 1820's. Failing, however, to maintain their control over the codification movement, many of its advocates, Joseph Story being the most notable, began to write legal treatises.[19] In this endeavor, they were more successful, though just how successful is hard to say, for no adequate study exists of the numerous treatises written in the second third of the nineteenth century, of the doctrines they stressed and those they de-emphasized, and of their application by the many judges and lawyers who were overwhelmed by the numbers of cases reported and were hampered by the difficulties involved in finding copies of the cases when they rode circuit. As the most articulate spokesman of these groups pushing for the dominance of market-oriented and capitalist values, these lawyers hardly can be said to have had "no particular axes to grind," and their relationship to the democratic process, especially in their surreptitious efforts to undercut the role of legislative bodies in the lawmaking process, is at best equivocal and in many ways insidious.[20]

The fourth essay deals with "The Family in Antebellum Law" and is the only chapter of the book to treat substantive legal developments. A whole range of topics is covered: marriage and divorce; relationships between parents and children, masters and servants, and masters and slaves; the treatment of the elderly, the indigent, and the poor; and the general status of women and children in society. The subject is extremely important and has not received the

18. *See, e.g.*, Letter from Jeremiah Mason to Joseph Story, Jan. 8, 1822, in MEMOIR AND CORRESPONDENCE OF JEREMIAH MASON 261 (G. Hilliard ed. 1873).

19. R. POUND, THE FORMATIVE PERIOD OF AMERICAN LAW 138-72 (1938); C. WARREN, A HISTORY OF THE AMERICAN BAR 508-62 (1911).

20. *See* Horowitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975).

attention it deserves, even with the recent rebirth of activity in legal history. It is also a particularly difficult subject to cover well because it is as much social history as it is legal history, and the social history of America between the Revolution and the Civil War is still very murky. As a consequence, Bloomfield does not receive much help from the existing secondary sources, and the ones he does use frequently have dated and questionable points of view.[21] To be regretted even more is Bloomfield's tendency throughout the chapter simply to describe the law and a number of important decisions without ever coming to terms with the various conditions that led to the creation of certain laws and doctrines and that brought about changes in them. Never, for example, does Bloomfield confront the crucial question of the relative importance of economic considerations on the one hand, such as the wide distribution of property, the dislocation created by the spread of the market economy, and the increase in mobility brought about by the physical expansion of the country, and the role of humanitarian and religious impulses on the other hand, in bringing about alterations in the legal relationships among individuals in the diffuse areas that he covers under the rubric of family law.

The following chapter on "Upgrading the Professional Image" takes issue with the point of view presented by Charles Warren, Roscoe Pound, and others that the legal profession went into serious decline during the 1830-1870 period. Bloomfield downplays not only the significance and the radical nature of persistent antilawyer rhetoric, but also the lamentations of professional deline by elite members of the bar such as Joseph Story and James Kent. Instead, he stresses the role played by middle class reformers within the legal profession who responded to what was in many cases the just demands of an ever expanding bourgeoisie for a more efficient system of justice.[22] To support his argument, Bloomfield launches into an extensive examination of contemporary writing, especially law journals and novels, which tended to present the lawyers' role in a favorable light and to picture them as hard working representatives of the people in a society becoming increasingly responsive to popular pressures.[23] The argument is well taken. It is a useful counterweight to the Warren-Pound approach and it reflects the growth of

21. Important exceptions are: L. FRIEDMAN, A HISTORY OF AMERICAN LAW 179-201 (1973); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM, SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971).

22. BLOOMFIELD, *supra* note 1, at 136-42.

23. *Id.* at 142-90.

middle class values in mid-nineteenth century America. It is also overstated; other problems also exist with this analysis. Much of the antilawyer rhetoric in the post-1830 period was not middle class, but continued to have agrarian and precapitalistic overtones. Bloomfield actually recognizes this earlier when he observes that the codification movement involved "damning not only the common law but the common lawyer as well."[24] Care also must be taken not to de-emphasize too much the role of elite lawyers like Kent, Story, and David Hoffman, for their influence continued to be great, especially with the most important members of the legal profession during the Civil War era. In addition, Bloomfield never really confronts the sticky question of the extent to which the legal profession really came to think of itself as the servants of the people and the extent to which it merely opportunely followed the dominant thrust of the political culture of the second third of the nineteenth century in which everyone projected the image of a public servant. The problem here is that Bloomfield neither places his argument in its proper context nor does he effectively explore its implications.

Perhaps the most disappointing essay is the one on "Riot Control in Philadelphia." The actions of "the crowd" or "the mob" (depending on how you view them) in the eighteenth and nineteenth centuries have attracted considerable attention in recent years from both European and American historians.[25] As a result, very sophisticated questions have been raised about the role of social violence and its relationship to the legal process. Unfortunately, Bloomfield does not pick up on any of these insights and instead gives a highly narrative—indeed annalistic—account of nativistic activities in the 1840's, with occasional references to the pressures that the growth and changing social makeup of Philadelphia placed on law enforcement problems.

The final three essays on Frederick Grimke, William Pitt Ballinger, and John Mercer Langston, are valuable pieces because they deal with personalities and problems that generally have been ig-

24. *Id.* at 84.

25. D. HOERDER, PEOPLE AND MOBS: CROWD ACTION IN MASSACHUSETTS DURING THE AMERICAN REVOLUTION, 1765-1780 (1971); P. MAIER, FROM RESISTANCE TO REVOLUTION (1972); G. RUDE, THE CROWD IN HISTORY (1964); E. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1963); G. WILLIAMS, ARTISANS AND SANS-CULLOTTES (1969); Grimsted, *Rioting in its Jacksonian Setting,* 77 AM. HIST. REV. 361 (1972); Lemisch, *The Ridiculism of the Inarticulate,* in DISSENT: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM (A. Young ed. 1968); Schlessinger, *Political Mobs in the American Revolution, 1765-1776,* 99 PROCEEDINGS OF AM. PHIL. SOC'Y. (1955); Wood, *A Note on Mobs in the American Revolution,* 23 WM. & MARY Q. 635 (1966).

nored by scholars. It is a poor way to end the volume, however, for we are never given any kind of overview of what the legal profession had evolved into by 1876, the closing date given in the title of the book. Indeed, in addition to its lack of focus, the most serious problem with this book is the author's inability to come to terms with the very thing he promises to do in the title: to discuss American lawyers in the context of a changing American society between 1776 and 1876. Although the significance of the first date is obvious, the meaning of the latter date is unclear. Does it signify the end of reconstruction? The triumph of big business and the beginning of the rise of the corporate lawyer? The start of legal formalism? Or was something else occurring at this time? Despite the existence of a conclusion, no attempt is made to explain why the book ends when it does. As a result, the reader is left uncertain both of the book's purpose and its accomplishments.

The Stratification of the American Bar

UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA. By Jerold S. Auerbach. New York: Oxford University Press, 1976. Pp. xiii, 395. $13.95.

*Reviewed by Sanford Levinson**

Jerold Auerbach, professor of American history at Wellesley College, has written an extremely valuable, but vexing, study of the social and political attitudes of America's legal elite during the twentieth century. Its value lies in Auerbach's demonstration of the social conservatism, at times sliding over into abject bigotry, that motivated many venerable leaders of the American Bar. Any image of the Bar as genuinely committed to meritocracy—the linking of Bar membership and leadership to attributes other than proper racial, religious, or social background—must collapse in the face of the evidence collected by Auerbach. Insofar as one value of historical understanding is simply the chastening of our tendency toward idealization of the past, Auerbach has performed a real service.

The book is vexing, however, because Auerbach is less clear than he might be both about the historical background of American lawyering and about the specific ideological framework within which he intends his study to be interpreted. His book is justifiably critical of the actions of the Bar; it is, however, just at the point when one begins to seek solutions to the problems outlined by Auerbach that certain ambiguities, if not indeed contradictions, appear in his argument.

I

Auerbach's book embraces the following central thesis: Prior to the turn of the twentieth century, the American Bar, although "[s]tratified by education, wealth, power, and style" and divided into both "aristocratic" and "country lawyer" elements, "nonetheless belonged to one society, one culture, one past. But by 1900, lawyers no longer could inhabit such a homogeneous national and professional culture because it no longer existed."[1] Concerned about the loss of status facing the Bar, a loss in part generated by the entry of recent immigrants and other "non-traditional" Americans into the ranks of lawyers, the organized Bar mobilized against the inter-

* Assistant Professor of Politics, Princeton University. B.A., Duke University, 1962; Ph.D., Harvard University, 1969; J.D., Stanford University, 1973.

1. J. AUERBACH, UNEQUAL JUSTICE 19-20 (1976) [hereinafter cited as AUERBACH].

lopers in a variety of ways, ranging from changes in codes of ethics to the creation of much stiffer educational requirements.

As Auerbach points out, the ethical injunctions against solicitation present a severe handicap to obtaining legal business for new lawyers who are not well-connected socially. A lawyer entering a Wall Street firm, even though without prior contact with New York City, has no worries about finding ways to keep himself (and until the very recent past it was *only* "him") occupied and paid. A solo practioner from a socially disfavored background cannot rely on the "invisible" (because concealed) hand of the social market place to provide clients. Some self-promotion is necessary, and Auerbach shows how the denizens of the Bar, almost invariably ensconced in corporate law firms, moved to make such self-promotion unethical.[2] In a striking analysis, Auerbach demonstrates how the Canons of Ethics represented the transmission of essentially small-town norms—in which public "reputation" was crucial—to an urban environment. The Canons "presupposed the vanished homogeneous community whose lawyers were known, visible, and accessible and whose citizens recognized their own legal problems and knew where to turn for assistance." The only aspect of urban culture fitting this framework was the world of the corporate bar, with its "small homogeneous community whose members enjoyed shared values, ease of communication, and a network of mutually reinforcing educational, religious, and social ties."[3] Excluded from this cozy small community within the city were all of the poor as well as many non-poor with unacceptable pedigrees.

Similarly, the move against non-elite law schools in the 1910's and 1920's, made in the name of upgrading the standards of the Bar, effectively limited entry into the profession to those who both could afford the costs and could cross the social hurdles established by American colleges and universities. Auerbach quotes effectively from the debates surrounding the 1920 Root Commission report to the American Bar Association, which called for a two-year college requirement before one could enter law school. Root was concerned "by the tens of thousands" of new lawyers who purportedly had no "conception of the moral qualities that underlie our free American institutions."[4]

2. For a contemporary analysis of the problem see M. FRIEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 113-25 (1975).

3. AUERBACH, *supra* note 1, at 42.

4. *Id.* at 115.

Auerbach convincingly depicts the mood of status insecurity pervading the elite bar and shows that active moves were made to limit the access of disfavored groups—often, but by no means exclusively, Jews—to membership in the Bar. He also explores the resulting limitation, intended or not, on the access of many ordinary citizens to lawyers, given the economic and social constraints preventing Mr. Abramowitz of Delancy Street from being represented by John W. Davis or Elihu Root.

Auerbach is less convincing in his argument that the American Bar enjoyed traditionally high status threatened only at the turn of the century by the new entrants from the great unwashed classes. He seems to accept the notion that American culture historically had held "popular affection"[5] for lawyers. This is surely a debatable point, and Auerbach should have placed his particular study more carefully within the framework of American social and legal history. Maxwell Bloomfield, in his recent study, *American Lawyers in a Changing Society*, shows very clearly that American culture, at least from the time of independence, featured a great deal of anti-lawyer sentiment. The comment of citizens of New Braintree, Massachusetts, is typical.

> With regard to the Practitioners of the Law in this Commonwealth, daily experience convinces us of the horrid extortion, tyranny and oppression, practised among that order of men, who, of late years, have amazingly increased in number, opulance, and grandeur, . . . and we think there is much to fear from so powerful and numerous a body of men as the practitioners of the law are now become, if they are suffered still to proceed on, without any check or controul.[6]

Bloomfield summarizes the results of his research by stating that "at no time in their history have the American people shown much disposition to revere their lawyers."[7] One wonders if the popular esteem for Lincoln, who is mentioned by Auerbach on several occasions as exemplary of the "country lawyer," arose because of or despite the fact that he was a lawyer.

One also would like to see comparisons, for example, of the Yankee response to the Irish immigration of the 1840's and the concomitant entry of Irish-Americans into the Bar with the later response to the Eastern European immigration and entry into the legal profession. The purpose of such a comparison lies not in lessening our anger at the bigotry revealed by Auerbach's research, but

5. *Id.* at 15.
6. M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 1776-1876, at 42 (1976).
7. *Id.* at 39.

rather in evaluating the extent to which such behavior was a recent development or was typical of persisting social strains in American life. I confess to being more than a little dubious about Auerbach's assertion that American society, or even its legal branch, was characterized prior to 1900 by "one culture [and] one past." Bloomfield, for example, notes that nineteenth century Irish lawyers faced a "vicious caste system."[8] Writing of the conservatism of the Boston Bar, James Banner concluded that "[a]ll in all, the legal community in Massachusetts was able to enforce appreciable conformity upon its members,"[9] who themselves were drawn from a select part of Massachusetts society.

Auerbach, moreover, is ambiguous as to the actual power of his legal elites in shaping the legal system. Thus, after showing that the American Bar Association adopted the Root report, he notes that its call for two years of college and a law degree as prerequisites to the practice of law was adopted by no state. "Elite lawyers did not succeed in excluding undesirables—state legislatures were an insurmountable obstacle—but they did maintain professional stratification to correspond to their own ethnic and social preferences."[10] The leadership of the organized Bar undoubtedly was confined to certain social and religious groups; almost undoubtedly, this had at least some effect on the shaping of the American polity, insofar as American government always has featured a movement back and forth between elite law firms and public office. Yet, by his own evidence, the patterns of American politics were much more variegated than his simple emphasis on elite dominance would allow. Thus, for example, Woodrow Wilson took on practically the entire leadership of the American Bar Association in his nomination of Louis Brandeis to the Supreme Court. Felix Frankfurter earlier had begun his spectacular career as an aide to Henry Stimson. Both examples are mixed, of course; it was scarcely unimportant that both men had had remarkable success at Harvard Law School. Neither could be compared in educational background to the struggling graduate of a night law school. Nor does mention of Frankfurter and Brandeis negate the massive evidence brought forth by Auerbach of the anti-Semitism that pervaded the highest reaches of the organized Bar, including its academic branches. (He notes, for example, that Abe Fortas was excluded from consideration for a faculty position at

8. *Id.* at 303.

9. J. BANNER, TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS 1789-1815, at 187 (1970).

10. AUERBACH, *supra* note 1, at 118.

Northwestern specifically because he was Jewish.[11]) Nonetheless, it is essential to remember that the "elites" often did not prevail.

The focus of Auerbach's concern shifts toward the end of his book from the social and religious discrimination noted above to the political capitulation of the organized Bar before the "red scare" of the late 1940's and the 1950's and to the general nonparticipation in, if not hostility to, the social reform movements of the 1960's. Castigating the views of men like Learned Hand, Herbert Wechsler, and Alexander Bickel, he argues that academic lawyers joined in the move toward conservatism through their exaltation of certain "process" values at the cost of closing their eyes to the social results thus tolerated. According to Auerbach, "[c]onsensus replaced Constitution as the arbiter of judicial decisions,"[12] and, since the definition of a "consensus" is always biased in favor of socially dominant groups, this in effect ignored the just demands of less favored groups. Thus we have the perpetuation of "unequal justice."

II

Perhaps my central frustration with Auerbach's argument comes from the ambiguity latent in the above quoted comment. He veers back and forth between a "liberal" position and a "radical" one, without always recognizing that they cut in fundamentally different directions.

The "liberal" position contains the basic premise that the Constitution establishes a fundamentally decent vision of the polity. The problem is either that the Constitution is ignored (in the name of "consensus") or that certain groups are deprived of their constitutional rights because of breakdowns in the legal market which result in insufficient access to the lawyers who otherwise could vindicate their rights. A "liberal" analysis thus almost always concentrates on problems of access and defines inequality in terms of insufficient supply of an artificially scarce good—lawyers. Lawyers, acting in accordance with their "professional" norms, thereby will help to establish the "rule of law," which is roughly synonymous with a decent society.

The "radical" position, on the other hand, holds that the polity always will be dominated by those groups with the closest ties to the ownership and control of the essential economic means of production. A class will try to establish its hegemony over the society in

11. *Id.* at 187.
12. *Id.* at 259.

part by clothing its class-specific interests within the universalist rhetoric of "law," but the substantive content of the law always will reflect the interests of the dominant class. Therefore, from this perspective, the problem of access is relatively unimportant, for the legal system is fundamentally biased against the disfavored classes. Change in the legal system can come only after fundamental change in the external society.[13]

Auerbach often plays on our continued receptivity to the rhetoric of "liberalism." His reference to the presumed strength of "the Constitution" is one example. Elsewhere he is critical of the Bar during World War I for being "unaware that their patriotism intruded upon their professional obligations" to defend unpopular persons.[14] Similarly, he argues that the Bar failed during the Cold War to live up to its "special responsibilities—to promote the administration of justice and to provide equal justice under law." As a result of this failure, he asserts, "the legal and judicial processes tilted toward 'political justice': the use of legal procedures for political ends."[15] I certainly do not mean to suggest that Auerbach is "wrong" in his descriptions, but I would argue that only a "liberal" can be surprised that the legal system is one of "political justice" or suggest that reinvigoration of "the Constitution" would help resolve fundamental social problems.

Auerbach is not naive, and he exhibits awareness of the extent to which the legal system simply reflects many of the structural inequalities in American society. He similarly recognizes that access alone will not resolve the problems of inequality so long as the substantive law emphasizes the interests of specific classes or groups. Nevertheless, he seems to believe that the answer to class-biased justice is recourse to the "public interest" as the test for substantive law.[16] There is no widespread agreement, however, on what constitutes such "public interest." Auerbach again echoes the American past, particularly the Progressive movement with its emphasis on the public good.

Again, though, it is this very emphasis on "commonality" that is attacked by a "radical" analysis, with its contrary focus on fundamental *conflict* as the social norm, and thus the necessity to choose

13. For a rich discussion of the radical analysis of "rule of law" see E. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 258-69 (1975).

14. AUERBACH, *supra* note 1, at 105.

15. *Id.* at 257.

16. *Id.* at 280-81.

forthrightly *which* class will be allowed to dominate the others through the aegis of the legal system. According to this analysis, the prerequisite for a legal system structured around the "common interest" is the elimination of social class entirely and the rule by a single universal class. In any case, recourse to "professionalism," the "rule of law," or "the Constitution" would be equally rejected as extremely limited solutions.

I do not mean to argue that the "radical" analysis is necessarily correct or the "liberal" approach necessarily wrong. I do mean to suggest that it is confusing to combine them within a single critique of the American legal system. It is probably true, given the nature of American society, that attempts at reform are best couched within "traditional" American rhetoric like "the Constitution" and "rule of law." Nonetheless, if our primary concern is intellectual analysis, such rhetoric may be less than helpful. The notion of "rule of law" is derived from an entire pre-eighteenth century intellectual framework within which "law" was generated by abstract principles of reason and justice and "discovered" by lawyers and judges using the "artificial reason" of the law.[17] It is not clear that we can continue to use the eighteenth-century language unless we share the assumptions underlying the language, and I would argue that the overwhelming majority of us do not share those assumptions.[18] In addition, one can certainly question the extent to which "the Constitution" speaks with clear and unequivocal meaning. If it does not, then what exactly would fidelity to the Constitution entail?[19]

Auerbach has brought much valuable information to our attention. He has raised a variety of important questions. He lets us down, however, in his suggestions of answers to these questions by failing to make more precise arguments and failing to recognize some of the ideological tensions within his own approach. One hopes that he will return to the questions and will participate in the important debate that his book should help to generate.

---

17. *See* Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in 5 PERSPECTIVES IN AMERICAN HISTORY 287 (D. Fleming & B. Bailyn eds. 1971).

18. For an elaboration of this argument see Levinson, *Fidelity to Law and the Assessment of Political Activity (Or, Can a War Criminal Be a Great Man?)*, 27 STAN. L. REV. 1185, 1194-97 (1975).

19. For a brilliant examination of this problem see P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (1975).