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Book Review [Lawyers on Trial]

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BOOK REVIEW

LAWYERS ON TRIAL. By Philip M. Stern. New York, N.Y.: Quadrangle/The New York Times Book Co., Inc. 1980 Pp. vii + 265. Hardbound. $12.50.

Reviewed by John J. Holly, III

Lawyers On Trial is a provocative critique of American law, lawyers and legal institutions. No reader will be left feeling complacent about our legal system. The book criticizes the entire legal establishment, from law schools, to legislators, to bar associations. It is not merely a propoganda tract. The author's challenging stance is supported by reference material and Stern is, himself, an attorney. The fundamental problems discussed are: 1) that the vast majority of Americans do not have access to the legal system; 2) access to the legal system is controlled by a professional monopoly; and 3) this monopoly is accountable only to itself. These problems are mutually reinforcing and self-perpetuating. Mr. Stern describes a rigid system which operates to the detriment of American society.

Constructive use of the legal system is an inaccessible luxury for most Americans. Stern documents that nearly seventy-five percent of the population has never consulted with a lawyer, or has consulted with a lawyer only once for a serious legal problem.[1] The author quotes an admission of the American Bar Association that "the middle seventy percent of our population is not being reached or served adequately by the legal profession."[2] In comparison, in 1979 England spent three times as much on civil legal aid as America, and Sweden spent four times as much.[3]

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1. P. STERN, LAWYERS ON TRIAL 11 (1980).
2. *Id.* at 12.
3. *Id.* at 27.

Stern suggests that this state of affairs has developed because the "Organized Bar"[4] has abused its monopoly power. The lawyers' monopoly is the result of a four-step process which begins with lawyers defining those acts which constitute the practice of law.[5] The process continues as lawyers control the licensing procedure for entry into such practice; next they use the state courts to enforce these definitions and procedures.[6] To complete the chain, lawyers then become the judges who sit on state court benches.[7]

One prominent feature of lawyers' abuse of power is the "apathy [and] outright hostility"[8] of lawyers toward disciplining their profession. "The American Bar Foundation's most up-to-date study (covering 1974) reported . . . that between 91 and 97 percent of all client complaints were dismissed by bar associations without any investigation."[9] As Stern points out, the one reason for this inaction is that "client complaints are . . . disposed of *entirely by fellow lawyers.*"[10] Such disregard for public grievances ought to be unacceptable in a profession which "is a branch of the administration of justice and not a mere money-getting trade."[11]

Another feature of the lawyers' monopoly is that the cost of legal services is not always reasonably related to consumer benefit. The author examines probating a will, buying a home and collecting compensation for personal injuries as examples of his point. In all three areas, the common practice is to charge a percentage of the transaction value *without regard to the difficulty of the case.* Therefore, legal services will often add to costs without providing commensurate value. As Mr. Stern chronicles, since most wills pertain to estates of modest size, the probate work involved is relatively simple. A family member could follow printed instructions to complete the

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4. Stern uses the term to refer to "the various bar associations, national, state, and local, as distinct from the rank-and-file members of the bar." *Id.* at x-xi.

5. *Id.* at 58.

6. *Id.* at 52-53 (quoting speech by Joseph Sims to Federation of Insurance Counsel in Scottsdale, Arizona (Feb. 17, 1977)).

7. *Id.* at 69.

8. *Id.* at 83 (quoting ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (Chicago, Ill. 1970)).

9. *Id.* at 85.

10. *Id.*

11. *Id.* at 3 (quoting ABA CANONS OF PROFESSIONAL ETHICS, CANON XII).

paperwork. Similarly, in transferring title to a home, the procedures need be no more difficult than transferring title to a car. Yet, because legal rights are involved, lawyers place themselves in the middle position and collect a toll.

The most controversial example of economic waste concerns personal injury litigation. Twenty-three cents of every dollar spent on automobile accident insurance pays for legal fees to determine who is "at fault" in an accident.[12] In this way, personal injury trial attorneys earn about two billion dollars every year.[13] Stern advocates an alternative system which is based upon compensation rather than "fault." This "no-fault" system exchanges the opportunity to sue for pain and suffering damages in return for prompt payment of medical expenses and lost wages. It has recently been adopted in New Zealand to cover all types of accidents[14] and is used in America in the form of Workmens Compensation.

There are additional savings for society from a no-fault system, primarily involving judicial economy. In Massachuetts, where no-fault has existed since 1971, the proportion of all court cases involving motor vehicle accidents "dropped from about 35 to about 6 percent at the district court level, from 66 percent to 25 percent at the superior court (appellate) level."[15] "New Jersey Chief Justice Joseph Weintraub has estimated that . . . auto cases occupy eighty percent of all the civil . . . court trial time."[16] Stern quotes an ironic source to sum up his argument. Benjamin Marcus, first president and co-founder of the American Trial Lawyers' Association has said "No fault is the only way out of the wasteful, irrelevant, burdensome and exasperating procedure now employed . . . . No Fault will be speedier, less wasteful and more fair than our present system."[17]

The author analogizes pain and suffering lawsuits to gambling lotteries in which the only real winners are trial attor-

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12. *Id.* at 112 (quoting U.S. DEP'T OF TRANSPORTATION, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE U.S. 52 (1971)).

13. *Id.* at 115 (quoting *No Fault and Trial Lawyer's Lobby*, The Washington Post, March 25, 1976 (editorial) at A18).

14. *Id.* at 121. *See* Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977); The Wall St. J., Sept. 16, 1975, at 1.

15. *Id.* at 117 (quoting 123 CONG. REC. 109 (1977) (remarks of Rep. Eckhardt)).

16. *Id.* at 116-17 (quoting O'CONNELL, THE INJURY INDUSTRY 290 n. 38 (1971)).

17. *Id.* at 122 (quoting letter from Benjamin Marcus to Sen. Hart (June 28, 1971), *reprinted in* 117 CONG. REC. 463 (daily ed. July 29, 1971)).

neys. These same attorneys are seen as the major obstacle to passage of no-fault legislation.[18] This intense opposition seeks to keep trial lawyers involved in the accident compensation process even though they drain off monies which would go to the victims.

Stern's view is that justice in America is for sale to the highest bidder. After two-hundred years as a private, self-regulating profession, the legal profession is like "a turnstile at the door of our courts . . . charging citizens for their use."[19] Such a system perpetuates injustice based on class, race, gender and political differences. The foundation of this system is set in law schools. The author presents a compelling case against the current methodology and philosophy of legal education. First, legal education is impractical, and second, students are taught to serve the "haves" at the expense of the "have-nots." The fact is that the impracticality of legal education and its elitist character are related phenomena. Only the affluent in America can afford to subsidize the practical education of lawyers which occurs after graduation because it did not happen in law school.

Legal education is impractical because students study law as a collection of abstract principles without any reference to its impact on individual people or social groups. Typical students study Contracts without ever writing a contract, practice appellate argument without learning how to conduct a trial. Two out of three students will graduate without any clinical experience at all.[20] Students are taught to serve the "haves" because law school cultivates an attitude of moral detachment. According to the author, the roots of this attitude spring from the intense competition for grades, the lack of contact with clients and the emphasis on a business oriented curriculum. Stern conveys the image of law school as a fortress of abstraction, detached from human contact, where people are known only by numbers and where winning at all costs is a virtue.

Stern contends that there is a fundamental tension between a social order based on law and access to the law based

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18. *Id.* at 117.

19. *Id.* at 196.

20. *Id.* at 167 (speech by William Pincus, President of the Council on Legal Education for Professional Responsibility, to the Conference of Chief Justices, Atlanta, Georgia (February 12, 1979)).

on wealth.[21] This tension provides fertile ground for the growth of the problems described in the book. The author's solution is to make lawyers public servants of the justice system in the same manner as judges, police and bailiffs.[22] In effect, legal services would be removed from the marketplace, not to be sold as a commodity similar to furniture or an automobile. No longer would an attorney be a "hired gun," a mercenary for whomever paid the bills. As a matter of highest priority, Stern advocates creation of a National Legal Service (NLS), similar to the National Health Service in England,[23] which would provide free legal help to all citizens. The NLS would be integrated with private sector attorneys in the same way that the Public Defenders Office exists along side private defense counsel today. The NLS would be the civil law counterpart to the public defenders. No one would be deprived of competent legal help because of the inability to pay for it. The cost of the NLS would be borne by the entire society.

Lawyers On Trial focuses on serious disfunctions of the American legal system. The book taps a deep vein of dissatisfaction shared by those within and without the legal system.[24] The author's bold plan for change, however, left this reader feeling frustrated and desiring more ideas for less costly alternatives. Stern briefly sketches several ideas for shortrange reform, such as increased use of paralegals, easing the notice requirement for class action litigation and bringing non-lawyers onto Bar disciplinary committees. These ideas, however, receive cursory treatment compared to the emphatic proposal to create a National Legal Service. Therefore, the book has less impact than it might have had. Many readers will become concerned enough to work for change but, very likely, few will accept the NLS as the most reasonable alternative.

Stern's account *does* point out the need for attitudinal changes within the legal profession. Such changes are occurring, both in response to the public interest and in response to business competition among lawyers. One important move is

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21. *Id.* at 196-97.

22. *Id.*

23. *Id.* at 199.

24. *Id.* at 33 (Speech by Chief Justice Burger to the American Law Institute, Washington, D.C. (May 21, 1974)). *See* San Jose Mercury News, Sept. 20, 1981, at 1. (Gallup Poll shows 27 percent rate lawyers low or very low concerning "honesty" and "ethical standards.").

toward the idea that lawyers are *service* professionals. Emphasis on service transforms legal problems into human problems. When legal services are designed to meet client needs, instead of to meet the needs of the lawyers, the seventy percent of the population being inadequately served becomes a vast new market segment for lawyers. In order to secure a share of this market, lawyers must listen to their clients and fulfill their role as counselors. The idea is that lawyers have something to learn from the general public, and more specifically, that clients know best about the problems in their lives. The lawyers who listen and understand will be better equipped to provide help.[25]

Giving more power to the client in the attorney-client relationship may help alleviate growing mistrust of lawyers and thus attract a larger volume of clients. As such, it correlates well with ideas to increase productivity and minimize costs, such as legal clinics, pre-paid legal insurance, greater use of electronic office machines and expanded roles for paralegals. Lawyers who adopt these new ideas in order to provide greater access to the legal system will benefit themselves as well as American society.

There are further alternatives which Stern does not advance. For instance, complementing the classic adversary system with a system of mutual advantage would precipitate changes in lawyers' attitudes and align the legal system more closely with societal needs. The basic premise of the adversary system is that there will be a winner and loser in every case. Adhering to this premise perpetuates a system of justice which exacerbates social instability and personal animosity. Lawyers trained exclusively in this system are likely to adopt an adversary position even when compromise is possible. In contrast, the system of mutual advantage is premised on the idea that resolving conflicts to the satisfaction of both parties is preferable to satisfying just one of the parties. Certain advantages appear immediately.

Negotiation is a much less expensive process than litiga-

25. This approach is taken from the Humanistic School of Counseling Psychology associated with Carl Rogers. "A person-centered approach is based on the premise that the human being is basically a trustworthy organism, capable of evaluating the outer and inner situation, understanding herself in its context, making constructive choices as to the next steps in life, and acting on those changes." C. ROGERS, ON PERSONAL POWER 15 (1977).

> tion and for this reason is especially attractive when the amount in question is small. . . . In a courtroom the parties are intentionally polarized . . . . Negotiation, however, will often consider the needs and relationships between the parties in the conflict to the end that the parties are working toward a mutually beneficial goal rather than a determination of who is right.[26]

The major conclusion to be drawn from Stern's book is that the legal system does not deliver appropriate services to enough people. When lawyers become client-centered service professionals oriented toward negotiation and compromise, legal services will reach more people at reasonable cost and facilitate social cohesion in America. This change should begin in law schools with greater emphasis on client counseling skills, clinical experience and ethical standards. It should continue in the legislature and the judiciary with the creation of alternatives to the adversary process.

The process of implementing these ideas is a political process in which lawyers should play prominent roles. "Political" in this sense means "the process of gaining, using, [and] sharing . . . power [and] decision-making."[27] Most lawyers entered their profession knowing full well the pivotal role of the law in American history and culture. As such, they have a special responsibility to create a more responsive legal system. Fortunately, this special responsibility is accompanied by the power to inaugurate positive change. If lawyers make a commitment to providing greater access to the justice system, they have the power to deliver on that commitment. In fact, if changes are not made, it would be *prima facie* evidence of a lack of commitment. Are lawyers an in-bred elite, trained to write and enforce the rules to help themselves and their friends? Or are they public servants, performing tasks essential to a democracy?

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26. Coleman, *Teaching the Theory and Practice of Bargaining to Lawyers and Students*, 30 J. LEGAL EDUC. 470 (1980).

27. Rogers, *supra* note 25, at 5.