



1980

Book Reviews: Lawyers on Trial

Arnold Rochvarg

University of Baltimore School of Law, arochvarg@ubalt.edu

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Law Commons](#)

Recommended Citation

Rochvarg, Arnold (1980) "Book Reviews: Lawyers on Trial," *University of Baltimore Law Review*: Vol. 10: Iss. 1, Article 10.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol10/iss1/10>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

LAWYERS ON TRIAL. By Philip M. Stern. The New York Times Book Co., Inc., New York, New York. 1980. Pp. 265. Reviewed by Arnold Rochvarg.†

Lawyers on Trial, by Philip Stern,¹ is a book for people who are fed up with lawyers and for lawyers who are troubled about their profession. The author attacks the legal profession for its unresponsive — perhaps even callous — attitude toward the vast majority of Americans who could benefit from legal services, but are not receiving them. Although his comments and criticisms are often one-sided,² Stern does raise some important issues which cannot be ignored.

Probably the most important question which he asks and which lawyers must answer is why ninety percent of the lawyers in the United States serve only ten percent of the people.³ One traditional answer to this question has been that lawyers serve the rich because the rich have more problems that require legal advice than do the poor.⁴ As Stern's vignettes illustrate, however, this explanation is fallacious.⁵ For example, in a dispute between a wealthy landlord and a poor tenant, both face identical legal issues. But, almost invariably, the landlord will be represented by counsel and the tenant will not. The distinguishing feature therefore is not the need for legal advice, but the client's ability to pay. Although legal aid bureaus are sometimes helpful, they are often understaffed and thus unable to meet the needs of the public.⁶ Understaffing will continue to be a problem so long as salaries remain low⁷ and caseloads heavy.⁸

† B.A., 1973, University of Pennsylvania; J.D., 1976, George Washington University School of Law; Assistant Professor, University of Baltimore School of Law.

1. Stern is also the author of *The Rape of the Taxpayer*, a best-seller concerning tax loopholes.
2. Stern admits that he does not attempt to offer a "balanced" presentation, although he states he has "sought to avoid the aberrational." *LAWYERS ON TRIAL* at ix. While the former is true, the latter is not. The retelling of the tale of the \$250,000 bribe paid to federal judges by partners in Wall Street law firms, *id.* at xviii, and the discussion of the \$1.5 billion oil pricing case in which the oil companies were successful, *id.* at 20, are two examples that are extraordinary and not illustrative of the non-aberrational practice of law.
3. *Id.* at xvi.
4. *Id.* at 12.
5. *Id.* at 12-15.
6. *Id.* at 26.
7. In 1979, the starting salary for a lawyer in the government's Legal Services program was approximately \$13,000. *Id.* at 7.
8. *Id.* at 26.

Another explanation for why attorneys serve only ten percent of the population has been that, even when members of the ninety percent group have problems requiring legal advice, they do not know how to contact a lawyer. An American Bar Foundation study indicates that nearly three out of every four persons have never consulted an attorney or have done so only once.⁹ Stern blames this on the organized bar's¹⁰ prohibition against advertising, which has only recently been modified.¹¹ Wealthy clients, on the other hand, have no need for media advertising because they often travel in the same social circles as attorneys.¹² Although the organized bar's anti-advertising position ostensibly was premised on the belief that the public could not spot deceptive lawyer advertisements and therefore would fall prey to needless legal expenses, Stern argues that the anti-advertising stand was actually a deliberate attempt to maintain the high price of legal services and to discourage competition.¹³

Stern also blames the attitude of the organized bar or "lawyers' monopoly"¹⁴ toward solicitation for compounding the problem of unequal representation.¹⁵ The ABA Code of Professional Responsibility does not prohibit attorneys from soliciting close friends. This benefits wealthy clients and wealthy attorneys. Lower and middle class persons, however, are at a disadvantage because they have fewer friends who are attorneys. Moreover, the bar has aggressively enforced the solicitation ban against persons offering unsolicited advice to lower-income persons.¹⁶

The bar's position favoring vigorous enforcement of unauthorized practice of law statutes, according to Stern, is another ploy to deny legal assistance to the majority of Americans. Stern points out that bar associations, not dissatisfied clients, bring most unauthorized practice of law cases.¹⁷ The bar's motive in this area is not to protect consumers, but to keep the cost of legal services high.

Additionally, through the enforcement of unauthorized practice of law statutes, the "lawyers' monopoly" has been able to perpetuate an inequitable — perhaps illegal — fee structure in the probate and real estate fields.¹⁸ Generally, the average American will deal with an

9. *Id.* at 11; B. Curran, *The Legal Needs of the Public: The Final Report of a National Survey* (American Bar Foundation 1977).

10. Stern draws a distinction between the official bar — the various bar associations — of which he is critical and the rank and file members of which he is "sympathetic." *LAWYERS ON TRIAL* at xi.

11. *Id.* at 54–56, 76.

12. *Id.* at 77.

13. *Id.* at 56.

14. *Id.* at x–xi.

15. *Id.* at 77.

16. *Id.* See *In re Primus*, 436 U.S. 412 (1978).

17. *LAWYERS ON TRIAL* at 59.

18. *Id.* at 33–50.

attorney only when he purchases a home or when a family member dies and assets must be probated. In both instances, attorneys' fees are not measured by the amount of work actually done on behalf of the client (*i.e.*, an hourly fee), but by a percentage of the value of the estate or by a percentage of the price of the house. This means that an attorney's fee would be twice as much for a \$100,000 house as for a \$50,000 house even though the amount of legal work required on the \$100,000 house is about the same as that required on the \$50,000 one.

The organized bar's "monopoly control" over the legal profession is buttressed by its control over legal education and the bar examination. This is owing to the ABA's elaborate law school accreditation procedure and the requirement in the great majority of states of graduation from an ABA-accredited law school as a prerequisite for admission to the bar examination.¹⁹

Stern contends that the legal education system is inadequate because it places a premium on achieving financial success, instills pro-business values in law students, and simultaneously deadens any compassion for humanity. Arguing that appellate courts are utilized by the rich, he criticizes the traditional law school approach, which focuses on appellate court decisions, and he advocates more emphasis on trial skills, because trial lawyers are more apt to represent lower-income Americans than are appellate attorneys.²⁰ Stern also argues that the case method and Socratic approach train attorneys to be "hired guns" devoid of all humanness.²¹ He questions whether students who are encouraged to argue both sides of an issue can develop the moral sensitivity required to deal with clients. Believing that clinical programs remind students that part of being a lawyer is the ability to respond to clients as people, Stern writes that the lack of clinical education makes today's law schools "most wanting."²²

Stern also questions the need for a bar examination, maintaining that they can be justified only if we accept the premise that law schools do not adequately prepare their graduates to practice law.²³ He reasons that if graduation from an ABA-accredited school is the *sine qua non* for bar admission, and if the ABA standards are not meaningless, then the bar examination is merely a tool to keep recent graduates out of the job market for a few months. In addition, Stern

19. Forty-three states and the District of Columbia require graduation from an ABA-approved law school as a prerequisite for taking the bar examination.

20. *LAWYERS ON TRIAL* at 168.

21. *Id.* at 173.

22. *Id.* at 167.

23. *Id.* at 179-80.

argues that the state bar examinations, as presently administered, do not test for those qualities needed to practice law. For example, bar examinations do not test any non-classroom skills, such as client counseling. Moreover, the fact that ninety-eight percent of the candidates eventually pass the bar indicates that the bar examination is not worth the effort and expense it entails.²⁴

Although *Lawyers on Trial* is primarily an attack on the legal profession, Stern does offer suggestions — some modest, some far-reaching. He urges that the law be simplified so that lawyers will be needed in fewer transactions than they are today. His suggestions for accomplishing this goal include simplifying the probate system by reducing judicial supervision,²⁵ requiring that all documents be written in “plain english,”²⁶ and enacting “pure” no-fault insurance laws, which not only would eliminate the need for lawyers in car accident cases, but also would unclog courts’ calendars.²⁷ Stern also favors reducing the cost of purchasing a house by adoption of a registration system identical to the system presently used for automobiles.²⁸

In order to change the focus of law schools from graduating business-oriented students to graduating people-oriented students who would be better prepared to represent average Americans, Stern suggests that law schools require drafting assignments, offer courses in client counseling, and emphasize clinical education.²⁹ He also praises the apprenticeship system of legal education.³⁰

In order to increase the availability of lawyers, Stern believes that all unauthorized practice of law statutes should be repealed.³¹ Entrepreneurs should be allowed to distribute divorce kits; banks should encourage savers to open accounts by offering a free will instead of a free crock pot; and paralegals with an expertise in an area of the law should be utilized. All these devices would help provide legal advice to those who now cannot afford it.

Stern also advocates the facilitation of public interest lawsuits. He suggests that the government pay the fees of lawyers acting as private attorney generals.³² More far-reaching is his suggestion that persons not parties to a controversy should be permitted to buy shares in a class action in return for a percentage of whatever money is recovered.³³

24. *Id.* at 181–82.

25. *Id.* at 39.

26. *Id.* at 66.

27. *Id.* at 112–22.

28. *Id.* at 47.

29. *Id.* at 162–63.

30. *Id.* at 164–65.

31. *Id.* at 206.

32. *Id.* at 211.

33. *Id.*

Stern's boldest recommendation is his call for the establishment of a national legal service comparable to the national health program in the United Kingdom.³⁴ The national legal service would be staffed by full-time attorneys paid by the federal government to provide legal services to all Americans. Moreover, under Stern's plan, lawyers in private practice would be compensated with federal funds whenever a client desired a non-national legal service attorney to handle his case.

Although Stern properly recognizes some of the problems with the legal profession and offers some viable solutions, in some respects, his solutions miss the mark. Stern is correct in arguing that law schools should offer clinical programs to prepare students better for the actual practice of law. He has, however, too negative an attitude of the programs currently available at most law schools — programs which not only are training students but which also are serving community needs. Moreover, most schools have already heeded Stern's call for greater emphasis on client counseling.

Stern also fails to recognize that the teaching of corporate law, a required course in most law schools, does not necessarily indicate that students are being trained solely to work for rich and powerful corporations. Most corporations in the United States today are small incorporated partnerships run by the type of persons that Stern complains have not been receiving adequate legal representation. Even if all corporations in the United States were oligopolistic, as Stern apparently believes, consumer-oriented attorneys would have to learn about the workings of large corporations in order to be more responsive to consumers' needs.

Stern's call for a return to the apprenticeship system of legal education is a bad idea. ABA accreditation requirements have brought the quality of legal education to the highest level in history. Under an apprenticeship system, an unskilled or perhaps unethical practitioner could pass on those attributes to his pupil without any oversight. It also would be unrealistic to expect an overburdened practitioner to spend as much time with his apprentice as is possible in law school with the ABA's emphasis on full-time law professors. By providing a variety of courses taught by professors with different backgrounds and teaching techniques, the modern law school offers a richer learning experience than an apprenticeship system could offer. Moreover, Stern ignores the fact that many law students work part-time while attending law school. The ABA has recently increased the number of hours a full-time student can work from fifteen to twenty.³⁵ Although in great part this rule change recognizes

34. *Id.* at 199–206.

35. See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS (1981) (standard 305 (a)(iii), which defines "full-time student," is interpreted to mean that a full-time student may not work more than 20 hours per week).

economic realities, it also appears to be premised on the view that working in a law office complements, rather than competes with, the law school education.

The weakness of Stern's attack on the ABA accreditation system for law schools is underscored by his concomitant attack on bar examinations. The fact that bar examination passage rates have been high is perhaps partly owing to the high quality of legal education, which has reduced the need for a comprehensive bar examination. Although the trend in most states has been to rely greatly on the multi-state bar examination, which tests general principles of law, perhaps the states should begin to place more emphasis on testing local law. The bar examination would then be a better complement to law schools which are not geared to teaching local law. In addition, the barriers to interstate practice should be lowered. It appears that the primary reason for requiring out-of-state attorneys to take the complete bar examination (*e.g.*, to repeat the multistate exam) is to protect the local bar, not the consuming public. Requiring familiarity with local law, especially local court rules, is justified, but this should be accomplished by a special practicing attorneys examination testing only local areas. Also, local bar associations should become more concerned with the quality of the attorneys presently admitted by requiring continuing legal education courses for the renewal of licenses.

Stern's call for the abolition of unauthorized practice of law statutes is also misguided. Abolition of those statutes would make available more persons willing to perform legal services, but the consuming public would lose the benefit of standards of quality control over those doing the offering. Although the marketplace would eventually drive out the incompetents, it is wiser to prevent mountebanks from entering the market than to try to remove them once damage has been done.

There are also many dangers inherent in Stern's proposal to allow persons to buy equity shares in litigation, gambling for a return on their investment from a recovery. First, this would increase vexatious litigation by speculators most of whom would be rich, the class of people Stern attacks almost as much as attorneys. Second, investors seeking a return on their investment could be a disruptive force in any settlement talks.

Stern is correct, however, in advocating the "delawyerization" of our society. The enactment of plain english laws should be encouraged. There is no reason why lawyers must write in "legalese." The use of legalese is not a sign of expertise or training, but rather a sign of laziness or uncertainty of the law or language.

Stern's proposal for a national legal service funded by the federal government is applaudable but unrealistic. A national legal service would strengthen our legal system by providing counsel for those faced with an immediate problem and either unaware of where

to go or unable to afford an attorney. It would also decrease the amount of litigation by emphasizing preventive legal counseling. The proposal is unrealistic, however, because of the present political climate. A Congress that would not enact even a modest national health care bill is not likely to enact any type of national legal service. Moreover, the recent election of conservative Republican senators precludes any serious consideration of Stern's suggestion. Although Stern's national legal service is not the solution, attorneys must respond to the arguments that Stern presents in his book which led him to the conclusion that such a service is needed. Perhaps each bar association should require that thirty-five percent of all hours billed be at sharply reduced rates or pro bono. This would not only increase the availability of representation for lower-income people, but also would increase the quality and experience of attorneys doing legal aid work.

Although *Lawyers on Trial* reads more like a political speech than a study of the legal profession, the concerns expressed by Philip Stern cannot be dismissed as political rhetoric. Lawyers have created a system in which only a few can afford legal services. This must be changed. But, there is a troublesome paradox with this problem. As Stern points out, the law is not a lucrative profession.³⁶ The vast majority of attorneys work very long hours yet do not make much money. And, to make their relatively modest incomes, lawyers must charge fees out of the reach of the average American. Stern has no solution to this paradox. Perhaps this is the area that needs to be understood before continuing the attacks on lawyers.

36. *LAWYERS ON TRIAL* at xi.