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BOOK REVIEWS

SIMPLE JUSTICE. By Richard Kluger.¹ New York: Alfred A. Knopf. 1976. Pp. x, 823.

Reviewed by William L. Taylor²

Richard Kluger's *Simple Justice* is the story of the five cases³ in which the Supreme Court struck down laws which required or authorized racial segregation in public education. The book is a remarkable achievement, breathtaking in its sweep and scope. Kluger was able to build on successful models, Anthony Lewis' *Gideon's Trumpet* (an account of the landmark right-to-counsel case of *Gideon v. Wainwright*⁴) and Bernard Taper's *Go-million v. Lightfoot: Apartheid in Alabama* (the story of the Tuskegee racial gerrymander case⁵). But those were cameo works while Kluger's effort is epic in proportion.

To furnish a context for understanding the *Brown* decision, Kluger ranges over the whole history of American race relations from the moral evasions embodied in our charter documents, which proclaimed equality while countenancing slavery, through the Civil War, Reconstruction and the undoing of the promise of true emancipation aided and abetted by the courts. To provide a deeper appreciation of the subject status of black people before *Brown* and of the spurs to their drive for equal treatment, Kluger takes us on

1. Mr. Kluger, formerly executive editor of Simon & Schuster and editor-in-chief of Antheneum Publishers, is currently a full time author.

2. Mr. Taylor received his B.A. from Brooklyn College in 1952 and his LL.B. from Yale in 1954. He was assistant counsel to the NAACP Legal Defense Fund from 1954-1958 and was staff director of the U.S. Civil Rights Commission from 1965-68. Mr. Taylor founded the Center for National Policy Review, now based at Catholic University Law School, and serves as Director of the Center. Mr. Taylor is the author of a book on American race relations entitled *HANGING TOGETHER: EQUALITY IN AN URBAN NATION* (1971).

3. Consolidated with *Brown v. Board of Educ.*, 347 U.S. 483 (1954) were three similar cases: *Briggs v. Elliott*, 103 F. Supp. 920 (E.D.S.C. 1952); *Davis v. County School Bd.*, 103 F. Supp. 337 (E.D. Va. 1952); and *Gebhart v. Belton*, 33 Del. Ch. 144, 91 A.2d 137 (1952). These four cases are collectively referred to as *Brown I* and were decided the same day as *Bolling v. Sharpe*, 347 U.S. 497 (1954). *Brown v. Board of Educ.*, 349 U.S. 295 (1955), known as *Brown II*, involved the Supreme Court's review of the fashioning and effectuation of the decrees in accord with the principles laid down in *Brown I*.

4. 372 U.S. 335 (1963).

5. 364 U.S. 339 (1960).

a journey from the cotton fields and decaying economy of Clarendon County, South Carolina, to the grain fields of Kansas and the bustling commerce of Topeka, with stops in Prince Edward County, Virginia, Washington, D.C., and Delaware. A novelist by trade, Kluger has the gift of making each setting vivid and of capturing, usually in a few bold strokes, the characters of the several score people who became the *dramatis personae* of *Brown*; people whose mettle was tested and whose lives were made more meaningful by their participation in the legal drama; people whose acts of heroism or meanness contributed in incalculable ways to the ultimate result.

For students of law and government the special fascination of *Simple Justice* is that it is a classic case study of litigation strategy and judicial decisionmaking. Kluger provides a detailed and compelling account of lawyering under pressure by the small corps of attorneys who set out deliberately and against great odds to destroy the entrenched practices of segregation seemingly cemented in law by the "separate but equal" doctrine of *Plessy v. Ferguson*⁶ and subsequent decisions. In retrospect, their effort seems a triumph for the strategy of incrementalism, proceeding from the decision to focus on public education to the building blocks of *Missouri ex rel. Gaines v. Canada*⁷ (a state could not meet its equal protection obligation by financing legal education for blacks in out-of-state law schools) to *Sweatt v. Painter*⁸ (separate law schools within a state could not meet the test of equal protection) to *McLaurin v. Oklahoma State Regents*⁹ (a black graduate student could not be separated from his fellow students in a desegregated state university). These decisions seemed to lead ineluctably to *Brown*, where the Court was presented with elementary and secondary schools which were separate but tangibly equal (or hurriedly being made so)¹⁰—circumstances where there was no pretext for the Court to avoid the central issue of whether racism enshrined in law could be continued. But the progression was neither simple nor easy; the evidence of enduring racism in society and law led the NAACP lawyers alternatively to acts of boldness and caution. Even after *Sweatt* and *McLaurin*, the lawyers faced difficult strategy questions: whether to attack "separate but equal" head on or to temporize

6. 163 U.S. 537 (1896).

7. 305 U.S. 337 (1938).

8. 339 U.S. 629 (1950).

9. 339 U.S. 637 (1950).

10. Last minute efforts were made by some school districts to avoid court orders which threatened to, and eventually did, overturn the legal sanction of racial segregation. These efforts included substantial expenditures to improve the teaching facilities at black schools, even to the point where, in some instances, the newest schools were those reserved for black children.

by challenging the doctrine only as it had been applied in the South; whether to rely on social science evidence as a counter to *Plessy's* callous dictum that if enforced separation stamped black people with a badge of inferiority it was "solely because the colored race chooses to put that construction upon it."¹¹

From the late 1920s until his death shortly before *Brown*, Kluger reports, the dominant legal figure on the civil rights landscape was Charles H. Houston. It was Houston as litigator for the newly established Legal Defense Fund who served as principal architect of the strategy for undoing "separate but equal." And it was Houston as educator and administrator who transformed Howard University Law School into a professional institution and civil rights laboratory, bringing to the faculty William Hastie and James Nabrit, and helping Thurgood Marshall, Spottswood Robinson and Oliver Hill to acquire the skills and discipline that would enable them to lead the legal struggle. Either accomplishment standing alone should have earned him a preeminent place in legal annals. It is testimony to the continuation of blind spots in American race relations that Houston remains largely unknown outside the civil rights bar where he is a revered figure.

Ultimately, Kluger's account takes us from the community meeting halls, lawyers' offices and courtrooms in the South and Midwest to the cool chambers of the Supreme Court for one of the longest judgment days in history. Again, the usual historian's account stresses the favorable terrain that had been created for a reversal of *Plessy*—the New Deal's movement toward opportunity, the breaking down of barriers of provincialism during World War II, and the war's exposure of the hypocrisy of doctrines of racial supremacy in whatever guise. But Kluger reminds us of some of the complicating factors. Having retreated only relatively recently from its role of active defender of property interests against the political forces of social reform, the Court was not yet prepared to give practical application to the principle that personal liberty had a preferred place in our constitutional framework, even during a cold war era when personal freedoms were under attack. Moreover, the Court was without effective leadership and riven by factionalism.

With the aid of Justice Harold Burton's notes on the three conferences the justices had on *Brown*, along with contemporaneous memos and later interviews with surviving members of the Court and law clerks, Kluger is able to give us rare insight into the Court's deliberative processes. Justices Frankfurter and Jackson, apostles of judicial restraint, were troubled by the

11. 163 U.S. at 551.

legal basis for striking down school segregation laws which were not clearly within the intended reach of the framers of the fourteenth amendment and which were sanctioned by judicial decision. They and the other justices agonized over whether a decision effectively reversing *Plessy* would be obeyed or whether it would squander one of the Court's most precious assets, acceptance by the public of the tribunal's role as the legitimate arbiter of the nation's most serious disputes. As the author notes,

[t]he Justices stood at the very interface of man's susceptibility to destructive private impulse and his longing for reasoned social order. . . . Law in a democracy must contend with reality. It has to persuade. It has to induce compliance by its appeal to shared human values and social goals. (p. 742).

Doubt was finally allayed if not dispelled by "the arrival of the Super Chief," Earl Warren, whose commanding presence and quiet leadership produced a single decision without dissents or equivocating concurrences, a feat which had seemed impossible. After years of discussion and indecision, the process moved with astonishing rapidity, a bare 10 days elapsing between the time when Justice Warren circulated his draft opinion and the decision day of May 17, 1954. Speed may have had its costs. It remains a puzzle that the basis for the decision most compelling to the justices—that segregation laws were suspect racial classifications which restrained liberty and were not reasonably related to any proper governmental objective—was set forward explicitly not in *Brown* but in the companion decision of *Bolling v. Sharpe*.¹² But, taken separately or together, the *Brown* and *Bolling* opinions stand as simple compelling testaments to the link between law and reality and to the integrity of the judicial process.

If Kluger skimps anywhere, it is in his treatment of the two decades after *Brown II*.¹³ He provides only a kaleidoscopic view of the major events: President Eisenhower's refusal to lend moral support to the decision which invited massive resistance; President Kennedy's bold rhetoric which raised black aspirations and spurred mass protest led by Martin Luther King when progress did not come; the violent response to protest which stirred the national conscience and at last produced a consensus leading to effective congressional and executive action.

The tortuous course of events since *Brown* carries with it lessons in humility for lawyers who fancy themselves architects of social change. It lends force to the observation of John W. Davis, whose skilled defense of segrega-

12. 347 U.S. 497 (1954).

13. 349 U.S. 295 (1955).

tion laws in *Brown* provided his last testament. In Davis' view, a lawyer is simply a highly skilled technician

who does not build or paint anything. He does not create. All he does is lubricate the wheels of society by implementing the rules of conduct by which the organized life of men must be carried on. (p. 526).

But one caveat is in order. For Davis, the lawyer's implementation of the rules of conduct meant a defense of the status quo with all of its inequities. For the civil rights lawyers and jurists in *Brown*, there was a higher function, in Cardozo's words "to establish the true relation between conduct and profession" and "to raise the level of prevailing conduct" when prevailing practices "do not stand comparison with accepted norms of morals."¹⁴

Ultimately, *Brown*, albeit in ways not wholly foreseen, accomplished the aims of all those who had made it possible. It served as a vehicle for empowering black people (even some who later proclaimed the virtues of racial separation) by enabling them to use the law to make major changes in their own lives. It compelled white Americans to conform their conduct to their professed beliefs of equality and freedom and ultimately to become a more human people. While the promise of *Brown* itself has yet to be fully realized, especially for the poorest black citizens, it ushered in a new age beyond slavery and beyond legalized caste systems. From the beautiful irony of his chosen title through his exhaustive labors in making vivid the manifold relations between law and life, Richard Kluger has earned his place as chronicler of the dawning of that new age.

14. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 108-09 (1921).

UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA. By Jerold S. Auerbach.¹ New York: Oxford University Press. 1976. Pp. 395.

Reviewed by Maxwell H. Bloomfield III²

"In 1957 I entered Columbia Law School as a first-year student," notes Auerbach in his preface. "Although mine was the silent generation, and I embraced its values (silently), I nonetheless intended to become a civil liberties lawyer who would vindicate constitutional principles for embattled defendants who were noisier than I could be. . . . Within a week disillusionment shattered my aspiration beyond repair" (pp. vii-viii). To his dismay he found that the curriculum was overwhelmingly slanted toward the needs of business and that vital questions of policy and social justice were evaded through an adherence to professedly "neutral" principles of legal adjudication. In time he dropped out of law school to begin graduate training in history. Today he teaches American history at Wellesley College and is the author of an earlier impressive study of civil liberties in the 1930's, *Labor and Liberty: The La Follette Committee and the New Deal* (1966). His continuing interest in civil liberties lawyers led to the present volume, which indicts the 20th-century bar for generally ignoring the needs of the middle and lower classes.

Auerbach traces this dereliction of professional duty to deep-rooted attitudinal and organizational factors. Between 1905 and 1925, he argues, the American legal profession was decisively transformed as a result of changing societal conditions. As the nation experienced the disruptive effects of large-scale urbanization, industrial growth, and the influx of "new" immigrants from southern and eastern Europe, native-born practitioners closed ranks behind elite bar leaders in a successful effort to preserve Anglo-Saxon hegemony within the profession. New *Canons of Ethics*, bar admission standards, and educational requirements discriminated against members of ethnic minorities, and the resulting professional stratification further served to restrict legal services to those who could pay for them.

In analyzing these developments Auerbach focuses exclusively upon the role played by elite lawyers: "For my purposes elite lawyers are more salient

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than others because their professional status and power afforded them special opportunities to articulate, and often to implement, solutions to the problems they perceived" (p. 3). Although a reader often has some difficulty in determining who is properly to be included within the "elite" category, Auerbach does make clear that these influential figures owed their position in large part to their embodiment of certain widely accepted class and ethnic values. "Ethnicity" is the key term here, for Auerbach insists that the 20th-century bar was deliberately restructured by WASP leaders to prevent ethnic competitors from ever rising above the level of a professional "underclass."

While he concedes that lawyers in the 19th century also faced stratification "by education, wealth, power, and style," he tends to minimize the problem by assuming that a shared sense of ethnic homogeneity was sufficiently strong to maintain intraprofessional harmony. So, in a bar divided between urban-based Tocquevillean "aristocrats" and Lincolnesque "country lawyers," the pull of an Anglo-Saxon racial and cultural heritage provided "the cement that held otherwise disparate attorneys fast to each other" (p. 19). Such a picture ignores the vigorous efforts made by Anglo-Saxon practitioners to democratize the bar in the 1830's and 1840's, as well as the continuing conflict over admission standards and internal policies that plagued the profession during the rest of the century. Nor does Auerbach acknowledge the existence of professional discrimination against ethnic minorities prior to the 20th century, although such discrimination may be documented as early as 1806. In that year, the New York Supreme Court, after reluctantly licensing the Irish refugee lawyers Thomas Addis Emmet and William Sampson, ruled "that hereafter no person, not being a natural born or naturalized citizen of the *United States*, shall be admitted as an attorney or counsellor of this court."³ Further examples of discrimination against 19th-century racial (especially blacks) and sexual minorities abound, and a strong case can be made that Auerbach's professional underclass had developed by the 1870's, if not before.

All of this is not to deny his allegations concerning the repressiveness of latter-day programs for "cleansing the bar," but to point out that these modern patterns of discrimination did not emerge, as he suggests, solely in response to 20th-century conditions. Rather, they followed a line of precedents that stretched back to the beginnings of professionalization in colonial America. But if the policies themselves offered nothing new, the specific problems confronted by the bar around 1900 were undeniably unique; and Auerbach is at his best in assessing the reactions of bar leaders to these problems.

3. 7 N.Y. Sup. Ct. (1 Johnson) 528 (1806).

He distinguishes between two groups of elite lawyers: a corporate elite that dominated the bar associations and combined innovative technical skills with a hidebound cultural conservatism, and a "new professoriat" composed of full-time teachers at Harvard and other elite law schools. While these rival power groups at first jealously guarded their autonomy, they joined forces after World War I to put down a common enemy: "marginal" and night law schools, which had become a breeding ground for immigrant lawyers in metropolitan areas. This is an important story, and Auerbach does a superb job of disentangling the complex motives and strategies of his protagonists. He is equally adept at probing behind the bland facade of the ABA's first *Canons of Ethics*, adopted in 1908, to show how the drafters shrewdly penalized urban solo practitioners by defining unethical practices in terms appropriate only for a vanished rural America.

Later chapters carry these themes forward to the present and confirm the continuance of ethnic discrimination and elitist values within the profession. In a fascinating discussion of the Depression years, Auerbach chronicles the rise of a "New Deal counter-elite" among minority lawyers, as federal agencies offered Jews, Negroes, and others a unique opportunity to bypass the legal establishment and to employ their professional skills at the highest levels of government. Yet this "underclass rebellion" posed no serious challenge to the prevailing power structure:

New Deal lawyers, once they were certified as securities or anti-trust experts, moved with relative ease into the Protestant corporate professional establishment, leaving behind the ideal of committed service in the public interest as their abandoned legacy. . . . When the dust kicked up by their professional rivalry finally settled, the old structure was greatly strengthened by its newest inhabitants, who were, by their presence, its newest defenders.

(p. 229).

Of much greater significance in providing an alternative model of professional responsibility and service to neglected social groups was the formation of the National Lawyers Guild in 1936. Auerbach offers a sympathetic assessment of this organization's checkered career and pays a deserved tribute to the courage of Guild members in defending political dissidents during the Cold War era. He also takes note of more general reform trends observable within the profession since the 1960's, such as the creation of public interest law firms, but remains skeptical of their long-range effectiveness.

Despite its relentlessly prosecutorial tone, this study can not be dismissed as another ill-tempered lay diatribe against the bar. Auerbach's arguments are all supported by careful research into bar association reports, law review

articles, and the private papers of elite practitioners. While one may quibble with the sufficiency of his evidence or his interpretation in specific instances, there is no denying the force and authenticity of the general picture that he presents. Like the classic muckrakers of the early 20th century, he has performed an important service by calling public attention to the abuses perpetrated by a major American institution. Whether one agrees with him or not, this book should be mandatory reading for law students, law teachers, practitioners, and all others interested in improving the American system of justice.