

Reviews

Southern Justice and Southern Liberals

William Henry Leary†

Scottsboro: A Tragedy of the American South. By Dan T. Carter. Baton Rouge: Louisiana State University Press, 1969. Pp. xiii, 431. \$10.00.

Dan T. Carter has written a most reassuring book.¹ Many Southern liberals will say that the Scottsboro story demonstrates the South's remarkable progress in the last one-third of a century; such an incredible travesty of justice simply could not take place in the South today. Surely, it couldn't. In a less important, pedagogical way, *Scottsboro* will help restore the *esprit de corps* of historians of the recent South. It will fortify them against the assaults of those who insist that by the mid-twentieth century little remained to distinguish North from South. Here is one amply documented piece of evidence attesting that as recently as the 1930's the South remained unique in its policies of race relations.

Carter did not intend, however, to write a reassuring book. He sought to describe as fully and objectively as possible "a tragedy of the American South." *Scottsboro* admirably begins the process of filling in the details of that brilliant outline, *The Emergence of the New South, 1913-1945*, written by the author's mentor, George B. Tindall.² Although primarily a monograph, Carter's book is more than a careful examination of the Scottsboro case in Alabama. The author also takes as his subject Alabama during the Depression, Southern notions of justice, and race relations in the twentieth century South.

This almost flawless book has many impressive qualities. The research is full and varied, ranging from interviews to obscure legal opinions. What makes *Scottsboro* more than simply a faithful rendering of a good story is the sensitivity of Carter's extrapolations from

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1. D. CARTER, *SCOTTSBORO* (1969) [hereinafter cited as CARTER].

2. G. TINDALL, *THE EMERGENCE OF THE NEW SOUTH, 1913-1945* (1967).

the evidence. He regularly interrupts his chronicle of the squalid details of Alabama in the 1930's to enrich the reader's understanding of background development or to speculate on the significance of what has happened. Carter's speculations are carefully considered and are almost always sound. Even the secondary details of *Scottsboro*—the index, footnotes, and the photographs—are excellent. Carter's prose does not sparkle, but no matter. The story itself is so bizarre, so fascinating, so fertile in broader implications that stylistic flourishes might hamper the retelling. In sum, an impressive achievement, rare in any work of history—especially a first book.

The ordeal of Scottsboro for nine black men and boys began in Paint Rock, Alabama, on March 25, 1931, when they were charged with raping two white women. According to Victoria Price and Ruby Bates, a couple of two-bit whores, the nine had violated the most sacred and inflexible of all South racial mores. As Carter irrefutably shows, at no time during the legal proceedings did the state present any evidence which could convince a reasonable man that any of the nine accused were guilty of rape.

The first trial in Scottsboro was a grotesque carnival, complete with incompetent counsel for the defense, numerous questionable judicial decisions, and a howling mob kept at bay by a detachment of National Guardsmen. But Alabama officials took sincere and somewhat understandable pride in their performance. They knew how Alabamians traditionally handled such affairs—lynch the niggers and save the state a lot of money and effort. Couldn't the *New York Times* and all those other Northern liberals see how progressive the South was getting? Fortunately, they couldn't. Most liberal elements in the North were outraged, and criticized Alabama officials rather than praising them.

The righteous indignation of certain Northerners might have availed little had not the International Labor Defense, the legal arm of the American Communist Party, entered the case. The ILD got its chance only after the NAACP badly mismanaged the Scottsboro boys' first appeal for assistance. The defense was therefore characterized by an extended period of competition between the ILD and representatives of the NAACP. Carter handles this enormously controversial issue with great finesse. He properly castigates both groups for concerning themselves more with discrediting each other than with the welfare of their confused clients. "To the ILD and the NAACP, the case had become a struggle for vindication."³ Undoubtedly the ILD did occasion-

ally pursue propaganda victories that jeopardized the prospects of acquittal for the Scottsboro boys, but Carter fails to emphasize sufficiently that the NAACP pursued propaganda victories as resolutely and irresponsibly as the ILD.

Walter White and his associates of the NAACP were guided by two basic principles. Twenty years of experience had convinced them that legal appeals to constitutional principles were the most effective tools in seeking a redress of grievances. White also insisted that all legal appeals in the South had to receive the sanction of moderate whites in the area. On the other hand, the ILD stressed the "development of revolutionary mass action outside of courts and bourgeois legislative bodies."⁴ Neither strategy proved totally successful or totally unsuccessful. It should be noted, however, that it was the ILD which finally relented and permitted the NAACP to assume complete control of the case. Carter is justly critical of ILD's earlier refusal to permit any NAACP involvement in the case; but instead of praising the ILD's change of heart in 1935, he belittles the new cooperativeness by stressing the impact of an international convocation of Communists which met in Moscow that same year and called for united fronts.

The haggling between officials of the ILD and NAACP certainly frustrated the Scottsboro boys' chances of acquittal. A hopeful development for the defendants was the decision of Samuel Leibowitz, probably the most distinguished trial lawyer in the country, to take charge of the defense. Beginning in March 1933 Leibowitz defended the Scottsboro boys five times in five years in several Alabama courtrooms, as well as in the Supreme Court of that state and the United States Supreme Court. Despite his brilliance, he persuaded only one juror in all those years to hold out for less than the state demanded. Leibowitz demolished the state's case against his clients, and indeed established the innocence of the Scottsboro boys beyond a reasonable doubt, but a Jew from New York trying to defend black men in Alabama charged with raping white women fights against insurmountable odds.

Although Leibowitz never secured freedom for the Scottsboro boys in court, he and others involved in the defense did help to establish several important legal precedents. In *Powell v. Alabama*⁵ the Supreme Court took steps to guarantee defendants in state criminal courts the

4. *Id.* 138 (quoting Haywood, *The Scottsboro Decision: Victory of Revolutionary Struggle over Reformist Betrayal*, 11 COMMUNIST 1068 [1932]).

5. 287 U.S. 45 (1932).

right to adequate counsel. In *Norris v. Alabama*⁶ the Supreme Court ruled that the absence of Negroes from the jury rolls of Morgan County, Alabama, established a prima facie denial of equal protection of the laws. By staying the execution of the Scottsboro boys on several occasions, the Supreme Court undoubtedly gave support to the NAACP's position that the legal, constitutional framework of America offered the best hope of seeking justice for black men, but Scottsboro also partially vindicated the strategy of the ILD: the legal system of America, especially that of Alabama, was not flexible enough to permit the acquittal of nine obviously innocent men.

Undoubtedly, both legal and extra-legal actions were necessary to set the Scottsboro boys free, but pressure exerted outside the courtroom by the ILD and many others achieved more than did reliance upon the courts. Samuel Leibowitz initiated the back room proceedings which eventually freed the nine Scottsboro boys. The extended negotiations also involved Allan Chalmers, the energetic and persistent chairman of the Scottsboro Defense Committee, Grover Hall, editor of the *Montgomery Advertiser*, and several prominent local and state officials of Alabama. Not until July 1937 did the first Scottsboro boy leave his Birmingham jail; the last of the nine, Andrew Wright, was not freed until May 1950. It is easy to understand the reluctance of the ILD in 1931 and the Black Panthers in 1969 to place full faith in the ultimate justice of the American legal system. Nine innocent men had served a total of more than one hundred years in prison, and none could look forward to even that which passes for the normal life of a black man in America.

For concerned Americans the personal tragedy of Scottsboro ended more than nineteen years after it had begun, but the subtitle of Carter's book, "A Tragedy of the American South," suggests more than simply personal misfortune. Most tragically, perhaps, one misses any sign of remorse, any recognition of guilt by those Alabama officials who participated in the Scottsboro case. Without such purgation, there could be little hope for redemptive acts in the future. One figure who did later express guilt qualifies in some ways as the authentic tragic hero of Carter's drama. Judge James Edwin Horton presided at the Decatur trial. Throughout the proceedings he treated the defense with great courtesy and fairness, and he later reversed the jury's conviction of Haywood Patterson. Horton's neighbors rewarded his display of courage by returning him to private life in the election of 1934.

6. 294 U.S. 587 (1935).

While Judge Horton deserves praise for the courage he showed, during the trial he suppressed a crucial piece of evidence for the defense. Dr. Marvin Lynch, who examined Victoria Price and Ruby Bates, swore privately to Horton that the girls had not been raped. The judge neither compelled the apprehensive Lynch to testify in behalf of the Scottsboro boys, nor did he reveal the information to the defense. After the futile effort to save Haywood Patterson, Horton abstained from any participation in the Scottsboro case. He was unwilling or unable to risk everything. Was he, then, less a tragic hero than a pathetic one like Quentin Compson in *The Sound and the Fury*? At a critical moment, Horton, like Quentin, subordinated his love of justice to a concern for the false honor and security of Dr. Lynch. Carter never pretends that Horton was a tragic hero, and any measurement of a good man against such inflexible standards is both contrived and insensitive. But Horton's limitations are so horribly reminiscent of more famous Southern heroes: Robert E. Lee, who pursued so nobly a lost and unjust cause; or Tom Watson, so frustrated by his failure to challenge effectively the evils of Southern society that he became a vicious defender of the worst evil of all; even Thomas Jefferson, the most authentic Southern hero, who compromised his humanitarian principles because he feared that emancipation would totally disrupt Southern society. But Negro slavery did end, immediately and violently, and civilization somehow survived even in the South.

Edwin Horton was not the only white Alabamian to challenge prevailing local opinion on the Scottsboro case. In 1932 Chief Justice John Anderson filed a lone dissent in an appeal to the Alabama Supreme Court, but a year and a half later Anderson bowed to pressure and removed the unreliable Judge Horton from the Scottsboro case. An Alabama Scottsboro Fair Trial Committee was organized in 1936, but after a few months of hesitant activity it was dissolved. Dr. Kenneth E. Barnhart, speaking at a Birmingham rally in support of the Scottsboro boys, had the temerity to suggest that Alabama officials enforce the fourteenth and fifteenth amendments to the Constitution. The following year his contract at Birmingham-Southern College was not renewed. Rabbi Benjamin Goldstein's contention that the Scottsboro defendants were victims of racial prejudice prompted the mayor of Montgomery to accuse him of being a Southern agent for the ILL. The abuse grew to such alarming proportions that Rabbi Goldstein left Alabama for New York. Suppression of dissent reached into the highest levels of Alabama society. Mrs. Craik Speed and her daughter

Reviews

Jane had impeccable social credentials; but they publicly criticized the conduct of the Scottsboro trials, and Jane received a sentence of one hundred days in jail for addressing a May Day rally in Birmingham. The Speed ladies also fled into exile. Commenting on the fate of these Alabama liberals, Carter indulges a rare trace of wry humor: "The fate of Rabbi Goldstein, Dr. Barnhart and Mrs. Speed was ample evidence that there was a limit to the tolerance of Alabamians."⁷

Unfortunately, the limits and impotence of Southern liberalism reaches beyond the 1930's. As Carl Degler's recent essay on nineteenth century dissent in the South brilliantly shows, this malady has deep roots; according to Degler, "the South's position as a minority within the nation was one of the principle influences in determining the 'shape' of dissent within the region."⁸

The most distinctive characteristic of the Southern antislavery movement is that it worried more about the fate of Southern white men than about the slaves themselves. This insensitivity toward the Negro resulted primarily from the absence of "the idealism and the self-criticism that the less isolated and less insulated North displayed at times."⁹ Southern Unionists, considered dangerous radicals by their neighbors, were actually conservative. They strove to preserve the status quo and justified their position by appealing to the classic conservative principles of stability, order, and continuity. Most Southerners also thought treasonous the activities of native Republicans in the late nineteenth century, but their program of industrial development and civil equality for the Negro closely resembled the attitude of conservative national Republicans as well as safe Southern Democrats like Henry Grady. Moreover, the racial program of a man like William Mahone promised more to Southern whites than Southern blacks. As Degler concludes, "Despite their dissent, the great majority of these critics of the South exemplified the narrow realism, the 'concreteness,' the pessimism, and the lack of utopian vision that has long been the hallmark of the southerner."¹⁰

Carter shows clearly that the nature of Southern dissent during the Scottsboro crisis was not fundamentally different than it was during the nineteenth century. The experience of Southern liberals during World War II indicates that the Scottsboro case also did little to

7. CARTER 261.

8. Degler, *The Peculiar Dissent of the Nineteenth-Century South*, in *DISSENT: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM* 112 (A. Young ed. 1963).

9. *Id.* 118.

10. *Id.* 133.

broaden their limited horizons. A "lack of utopian vision" describes very well the characteristic reaction of Southern liberals to challenge and opportunity.

Much as they might have wished to avoid the question in the midst of crisis, the logic of World War II and the forces generated by it compelled educated Southerners, including most of the liberals, to reassess the role of the Negro in Southern society. After all, the Nazis' main crime against humanity, as the American propaganda machine consistently reiterated, was their brutal oppression of a minority race. For those who preferred not to see the parallel, many Northerners, white and black, hastened to make the analogy specific. The challenge was clear: the war for democracy must be fought at home as well.

The war seriously challenged the Southern status quo in race relations. Some disintegration of peaceful race relations in an atmosphere of organized violence was probably inevitable. Most of the 211 significant racial incidents which erupted during a ten-month period in 1943 developed specifically out of wartime circumstances. World War II greatly accelerated industrial production in the South, and as a result, thousands of workers, white and black, migrated to congested metropolitan centers and experienced new racial contacts in industrial employment. Major training camps for the more than ten million troops summoned for the war effort were located in the South. Negro servicemen from the North had numerous conflicts with Southern police officials and civilians, and the added population led to incidents associated with congestion in public transportation facilities. To Negro columnist Gordon B. Hancock it seemed that the anti-Negro movement which followed World War I "was getting under way sooner this time."¹¹

Southern liberals reacted to the increased friction between Negroes and whites in a variety of ways. In addition to making general pleas for tolerance and passivity, concerned Southerners attacked particular factors contributing to heightened racial tensions. In Richmond, the liberal editor, Virginius Dabney, successfully campaigned for the total desegregation of the city's public conveyances, insisting nevertheless that he was following the conservative course in race relations. He argued that the segregation laws did not really achieve their stated objective; they merely promoted dangerous racial friction under crowded wartime conditions.

11. *Norfolk Journal and Guide*, October 31, 1942, at 6, col. 3.

The South's most prominent liberal during the 1940's was Howard Washington Odum, a distinguished sociologist at the University of North Carolina, who sought to reduce the potential for violence in the wartime South by publishing *Race and Rumors of Race* in 1943.¹² He attempted primarily to demolish the bewildering variety of rumors about Negroes and whites which exacerbated wartime tensions. The most notorious of the rumors concerned the "Eleanor Clubs." With the slogan "Every white woman in her kitchen by Christmas," Negro maids throughout the South supposedly awaited a secret signal from the First Lady to abandon their scrub buckets and immobilize the Southern household.

This brief selective survey of the most superficial effects of World War II on Southern race relations suggests two simple observations. First, the war tended to upset the delicately balanced status quo in the South's bi-racial system. Second, Southern liberals did try to alleviate the crisis, but usually with very conservative motives.

The most serious challenge to the limited capacities of Southern liberals came from the righteous voice of reform north of the Mason-Dixon line and this time most of the accusers were black. During World War I, America's Negro population muted its demands for complete equality and "closed ranks" to aid in the war effort. For their faith in American democracy they were rewarded with an outbreak of violence at the end of the war and very little progress toward the goal of full citizenship. In 1941 as America entered another war to make the world safe for democracy, Negro leaders made it plain there would be no indiscriminate closing of ranks this time. "Prove to us, United Nations . . . that you are not hypocrites when you say this is a war for freedom," said Walter White. "Prove it to us and we will show you that we can and will fight like fury for that freedom."¹³ Walter White and others like him saw the war as an opportunity to upset the status quo, to force white America to make "liberty and justice for all" a reality.

Most Southern liberals agreed with Negro spokesmen that the black man deserved absolute equality in the armed forces and defense industries. Dabney and Jonathan Daniels, another liberal editor, regularly assailed discrimination in defense industries and labor unions. And when the pressure exerted by A. Philip Randolph and other

12. H. ODUM, *RACE AND RUMORS OF RACE* (1943).

13. White, *The Negro and National Defense*, in *THE ROLE OF THE RACES IN OUR FUTURE CIVILIZATION* 40 (H. Laidler ed. 1942).

Negro leaders finally resulted in President Roosevelt's issuance of Executive Order 8802 banning discrimination in defense industries, it was another prominent Southern liberal, Mark Ethridge, who served as the first director of the Fair Employment Practices Committee. But the great majority of black men, in the North at least, were not satisfied simply with equal employment opportunities and the right to die in the company of white soldiers. "Jim Crow . . . is a moral, spiritual and intellectual insult to the soul of the Negro," said Randolph, and it must be erased from every corner of American life.¹⁴ Those Southern liberals who constantly worried about what "those Northern extremists" were planning now had their answer from a growing consensus of northern opinionmakers: segregation must go.

In a chorus of time-honored clichés about immutable folkways and the like, mixed with patriotic appeals appropriate to the war spirit, liberal Southerners denounced the crusade against segregation. To a degree liberal Southerners, who followed most closely the trend of liberal opinion in the North, found themselves in the ironic role of official defenders of the faith. From a contemporary perspective it is difficult to understand how men who called themselves liberals could have so adamantly opposed efforts to subvert the system of segregation, but the dilemma faced by Southern liberals was a very real one. On the one hand they saw the pressures of war pushing relations between Negroes and whites from a condition of bad to worse. Those same pressures encouraged a growing number of Northerners to demand drastic changes in the Southern social system which would, Southern liberals felt, almost inevitably heighten racial tension. They also pointed to race riots in various Northern cities and asked with Howard Odum "if with all the efforts of the liberals and progressives and reformers and propagandists the thing cannot be done in New York or Seattle, or Los Angeles, what sort of intelligence is it that reasons that it can and must be done in the South?"¹⁵ Furthermore, while Southern Negro leaders were demanding more than ever before, they generally assured Southern liberals of their willingness to tolerate segregation a little longer.

It is not surprising, then, that few Southerners dared to challenge the concept of segregation in print during World War II. Only two persons did, and it is revealing to note that both enjoyed a measure

14. Quoted in G. MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO AND MODERN DEMOCRACY* 649 (1944).

15. Letter from Howard Odum to Gerald W. Johnson, April 11, 1944, Odum Papers, University of North Carolina.

of independence not shared by their liberal associates. Will Alexander had been out of the South nearly a decade when he wrote a celebrated article for *Harper's Magazine* in January 1945. At no point did he denounce segregation as morally reprehensible. He did conclude, however, that Negroes would not tolerate segregation much longer, that it was time to face the problem, and that abandonment of the old patterns of segregation would reaffirm the nation's faith in democracy.

Lillian Smith had no immediate family obligations, and the literary journal she published in Georgia during those years did not depend upon advertisements for survival. She was also a courageous lady who delighted in attacking inherited shibboleths. In an article for the *New Republic* in September 1944, she urged an uncompromising attack on the system of segregation. "I cannot endure the idea so many liberals hold that segregation must change slowly."¹⁶ In a private letter she eloquently took her stand:

Segregation is spiritual lynching. The lynching and the lynchers are our own people, our own selves. To remain silent while the Negro haters, the fascists, loudly reaffirm their faith in segregation and the spiritual lynching which this way of life inflicts, is to be traitorous to everything that is good and sane in human values. I believe the time has come when we must take our stand.¹⁷

The majority of Southern liberals responded in a rather pathetic way. They met that challenge temporarily by forming the Southern Regional Council to replace the once energetic but now inadequate Commission on Interracial Cooperation. But the SRC was little more than a reinvigorated organization in a traditional pattern. Southern liberals failed to grasp the opportunity provided by the war—to make a dramatic departure and attack the very foundation of racial inequality in the South. Strategically, it may well have been impossible to challenge segregation effectively in 1944. But by refusing to take substantial risks, Southern liberals also forsook whatever opportunity they may have had to prepare the South for the emotional shock which accompanied the *Brown* decision of 1954. They also bolstered the suspicion that simply the recognition of injustice—not the determination or ability to correct abuse—qualified one for membership in that small coterie of Southern liberals.

16. Smith, *Addressed to White Liberals*, *NEW REPUBLIC*, September 18, 1944, at 332.

17. Letter from Lillian Smith to Guy Johnson. Lillian Smith file, Southern Regional Council Office, Atlanta, Georgia.

Many limitations of Southern liberalism result of course from the central place that race has in the Southern reality. Ulrich B. Phillips made that point clear a half-century ago when he argued that the determination of white Southerners to preserve white supremacy was the central theme of Southern history.¹⁸ Other historians of the South have stressed the centrality of everything from demography to hedonism. Many stimulating efforts to explain the distinctiveness of the South embellish or qualify Phillips rather than denying the validity of his contribution. George Tindall warns us not to ignore the influence of several Southern myths in shaping real policy and attitudes. Most of those myths, however, were created to permit Southerners to hide from themselves the many barbarities of slavery and segregation.¹⁹ In 1958 C. Vann Woodward concluded that, given the decreasing vitality of the doctrine of white supremacy, the Southern uniqueness within America lies in a shared historical experience, a heritage of defeat, poverty, and moral guilt.²⁰ Francis B. Simkins insists that the South rejects national ideals of democracy because most Southerners like it that way and they have no intention of changing.²¹ Howard Zinn utilizes insights of the civil rights movement to conclude that there is no fundamental difference between North and South. The South merely exaggerates and mirrors national patterns of racism.²²

Dan Carter has enriched our understanding of the persistence and pervasiveness of white supremacy in the South. As Zinn and others remind us, racism extends far beyond the borders of Dixie, but one factor which distinguishes relatively progressive societies from relatively reactionary ones is the ability of an enlightened minority in progressive societies to restrain the majority's evil impulses. Enlightened minorities in the South have rarely demonstrated that ability, and certainly not in opposition to the travesty of Scottsboro in the 1930's. Carter's contribution to the debate concerning the central theme of Southern history gives his definitive study of the Scottsboro case an added importance. Historians will eagerly await his next book.

18. Phillips, *The Central Theme of Southern History*, 34 AM. HIST. REV. 90 (1928).

19. Tindall, *Mythology: A New Frontier in Southern History*, in *THE IDEA OF THE SOUTH* 1 (F. Vandiver ed. 1964).

20. Woodward, *The Search for Southern Identity*, 34 VA. Q. REV. 321 (1958).

21. F. SIMKINS, *THE EVERLASTING SOUTH* (1963).

22. H. ZINN, *THE SOUTHERN MYSTIQUE* (1964).

Discrimination in Transportation Rates

James R. Nelson†

Competition and Railroad Price Discrimination. By Jordan Jay Hillman. Evanston: Northwestern University Press, 1968. Pp. xii, 164. \$7.50. *The Dilemma of Freight Transport Regulation.* By Ann F. Friedlaender. Washington: The Brookings Institution, 1969. Pp. 209. \$6.75.

In fairness to the authors of the two books under review, I must state at the outset that they are not being reviewed with evenhanded justice. The Hillman book, like this review, is particularly concerned with price discrimination; the Friedlaender book deals with it only in part. The imbalance thus created may be offset by the fact that I saw the Friedlaender book in other incarnations several times before it assumed final form. Whether this extra familiarity dulls or sharpens my critical faculties I cannot say; but it must impart a bias of some kind to this review.

Chapter twenty-seven of Norman Douglas' *South Wind* began with the sentence: "The funeral was a roaring success."¹ The Hillman book starts with a sentence which is almost as arresting, and a great deal more relevant to the discussion which follows it than the funeral of Miss Wilberforce was to the body of *South Wind*:

In an economic setting, a central problem in the regulation of price discrimination is found in the need for accommodating what often appears to be the irreconcilable claims of efficiency, as an economic value, and equality, as a political value.²

Although the "appears" may be [sic], the sentence as a whole bursts with health. It clearly states the theme of the entire book.

A near-replica of Hillman's statement appears far along in the Friedlaender book:

. . . if the railroads were free to pursue a more rational form of price discrimination and abandon capacity accordingly, resources probably would be allocated more efficiently than they would be under a policy of cost-based rates.³

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1. N. DOUGLAS, *SOUTH WIND* 323 (1917).

2. J. HILLMAN, *COMPETITION AND RAILROAD PRICE DISCRIMINATION* 1 (1963) [hereinafter cited as HILLMAN].

3. A. FRIEDLAENDER, *THE DILEMMA OF FREIGHT TRANSPORT REGULATION* 135 (1969) [hereinafter cited as FRIEDLAENDER].

But the agreement between the two authors may not be as complete as these two quotations would indicate. Elsewhere, Mrs. Friedlaender says: ". . . price discrimination can be justified only when there is excess capacity"⁴—again practically an echo of the Hillman statement, but not an echo of the previous Friedlaender comment, ". . . and abandon capacity accordingly." At still another point, Mrs. Friedlaender quotes other sources: "Much has been written about the probable misallocation of traffic caused by a discriminatory rate structure based on the value of the commodity."⁵ This passage—although it represents a summary, and not an endorsement, by Mrs. Friedlaender—seems to indicate that price discrimination necessarily produces *inefficiency*. In her longest and logically most complex passage dealing with pricing, regulation, and efficiency, Mrs. Friedlaender has this to say:

. . . Government regulation is usually justified as an effort to promote economic efficiency or to further some goal concerning income distribution. It generally has the following purposes: (1) to prevent unreasonable prices and earnings in situations where technological and demand conditions create natural monopolies; (2) to prevent discrimination among groups with unequal bargaining power; (3) to maintain certain types of services considered to be in the broad public interest; and (4) to ensure sufficient profits for the development and expansion of an industry in situations where competition and large divergences between average total and average variable or marginal costs make it profitable to cut rates to the floor of variable costs and thus foster rate wars and instability.

Of these purposes, only the last is concerned solely with economic efficiency. Regulation appears, therefore, to be aimed primarily at prohibiting the antisocial exercise of monopoly power or at promoting uneconomic but socially desirable services. . . .⁶

Mrs. Friedlaender's fourth point in the first paragraph of this quotation seems, indeed, to establish at least an inferential relationship between price discrimination and efficiency. But beyond this general relationship, the reasoning is entirely different from either the Hillman or the later Friedlaender arguments. Price discrimination may enhance efficiency, as a method not of getting more use out of excess capacity, but of raising more funds from given capacity to permit

4. *Id.* 80.

5. *Id.* 65.

6. *Id.* 7.

“development and expansion of an industry.” At first glance, this approach would seem to be a flat contradiction of her later contention that “price discrimination can be justified only when there is excess capacity.”

The first step in sorting out these statements must be to point out that both authors show a premature preoccupation with an adjective when they should first have defined a noun. The words in question are “justifiable discrimination.” To concentrate on “justifiable” is to plead self-defense when in fact it is not at all clear that there has been an overt act. In short, there is no point in talking about “justifiable” until “discrimination” has been proved.

It is perhaps easiest to begin to define price discrimination by examining what it is *not*. Price discrimination is *not* price differentiation. In simpler terms, it is not charging different prices to different buyers or for different units of sale. The reason for the distinction is obvious, for example, in the concept of “cost justification” under the Robinson-Patman Act.⁷ It is also obvious to most experts on transportation most of the time. But the amount of intellectual slippage which persists in dealing with a concept so old and so familiar is quite surprising. To cite examples from successive paragraphs in Mrs. Friedlaender’s book:

Personal price discrimination exists whenever two shippers are charged different prices for identical services. . . .⁸

Price discrimination is probably a necessary aspect of the transportation industry. Different shippers have different elasticities of demand and are faced with different marginal costs for their shipments. . . . Without price discrimination all shippers would be charged the same rate. . . . Thus price discrimination enables the railroads (or other modes) to capture the consumer’s surplus of the low-elasticity shipper to enable him to carry the goods of the high-elasticity shipper. . . .⁹

The first sentence quoted above is entirely correct if “identical services” can be defined from the cost standpoint or the carrier’s point of view. But the phrase is nevertheless ambiguous, because the implication of “identical services” is that the services are viewed from the standpoint of the consumer. There may be more or less costly ways of providing the same service, as viewed by the consumer (e.g., the provision of freight service between two points by two or more

7. 15 U.S.C. § 13 (1964). Cf. C. EDWARDS, *THE PRICE DISCRIMINATION LAW* (1959).

8. FRIEDLAENDER 63.

9. *Id.* 63-64.

competing railroads); there may be ways of providing a more or less desirable service at the same cost; and there certainly are ways of varying demand and cost attributes—and of varying these attributes in ways other than in strict proportion. To quote Mrs. Friedlaender, “Different shippers . . . are faced with different marginal costs of their shipments.” This need not be true; but it may and often is. To the extent that it is true, then it cannot be true that “Without price discrimination all shippers would be charged the same rate.” For this sentence to be correct, all relevant costs (marginal costs? if not, what costs?) would have to be identical, per appropriate unit of shipment (and what, again, might be meant by “appropriate unit of shipment?”).

Two familiar examples will illustrate the critical distinction between “differentiation” and “discrimination.” It is commonly said—although not, be it noted, by either Mr. Hillman or Mrs. Friedlaender—that the railroad freight earnings problem has been created by the fact that the trucks have “skimmed the cream” off rail freight traffic. What is meant is that trucks have been attracted to those items of freight, usually included within the general rubric of “manufactures and miscellaneous,” which in the past bore the highest freight rates. The assumptions in the “skim the cream” viewpoint are two-fold: (1) that commodities bearing the highest rail freight rate per ton-mile are, *ipso facto*, the most profitable commodities to the railroads—without specification, incidentally, as to the denominator used to measure “most profitable” (tons? ton miles? car miles? train miles? track miles?); (2) that commodities bearing the highest rail freight rates per ton-mile can also be induced to bear the highest truck rates per ton-mile—and therefore be most profitable to the trucks. Each of these arguments involves a *non sequitur*, and some of the assumptions lying behind the arguments are manifestly contrary to fact. Why, for example, should truck costs have any relationship to rail costs? If they do not, and even assuming that the highest-rated commodities produce the highest rail profits, why should they necessarily produce the highest truck profits? The argument is doubtless valid in a general sort of way. But its general validity must be called into some question in view of its carelessness in lumping together the concepts of discrimination and differentiation.

The position attacked in the previous paragraph is admittedly not a position taken by either of the authors under review. Therefore, a reader may complain that if the attack does not involve flogging a dead horse, it nevertheless whips an animal not racing under the Hillman or Friedlaender colors. But variants of the “skim the cream”

argument nevertheless appear in both the Friedlaender and the Hillman books.

For example, Mrs. Friedlaender says that:

. . . Because the trucking rate structure follows rather closely that of the railroads, there should also be some losses associated with truck pricing. . .¹⁰

This passage successfully avoids the "skim the cream" idea that a truck rate copied from a rail rate necessarily produces a high truck profit: indeed, Mrs. Friedlaender properly implies that identical rates superimposed on non-identical cost structures may leave the trucks with a good deal of skim milk. But it belongs to the same family as "skim the cream" in two separate ways. First, it implicitly assumes that the rail rate structure reflects the rail cost structure. In the absence of this assumption, truck copying of rail rates might not produce truck losses on particular shipments regardless of discrepancies between rail and truck costs. Second, the quoted passage assumes that the trucking rate structure "follows" that of the railroads. On less-than-truckload shipments, which produce the bulk of the revenues of truck common carriers, it is perfectly clear that truck rates have been largely independent of rail influences for a long time now. Even for truck-load rates, the modern causal sequence must often run from the costs of private trucking to the rates of common carrier trucks to the rates of railroads. So, in the process of reversing the "skim the cream" argument to concentrate on the other part of the centrifuge, Mrs. Friedlaender has not been able to free herself from all of the implicit assumptions which lie behind the whole "skim the cream" idea.¹¹

The period covered by the Hillman book had ended before the truck assumed any importance as a competitor of the railroad and long before the Interstate Commerce Commission had gained any power over common carrier barge rates. Hillman thus avoids the "skim the cream" fallacy because he is writing about a period before the fallacy had adequate means of entry into the corpus of regulation, though of course he may perceive its perils. Nevertheless, an occasional phrase points to possible difficulty. On page fifty-one, for example, Hillman begins a paragraph by saying, "If the underlying

10. *Id.* 74.

11. Other indications of this tendency are available. "Since trucking rates are largely based on the structure of railroad rates, it seems likely that truck tariffs would not reflect costs." *Id.* 116.

problem of demand induced and marginal cost justified price discrimination. . . ." There can be no such thing as "marginal cost justified price discrimination," because if differences in marginal cost "justify" differences in price (i.e., if price differences reflect, or bear a constant ratio to, marginal cost differences), then "discrimination" simply does not exist—by definition. Once the word "discrimination" is forced to do both its own work and that of the word "differentiation," our pastoral friend the cream skimmer may be free to creep in unobserved.

Thus we find that both the Hillman and the Friedlaender books have a tendency—consecrated by long transportation usage, and paralleled by quotations from the most eminent economic as well as legal authorities—to confuse "differentiation" and "discrimination." When the nouns are at sea, even an adjective like "justifiable" cannot anchor them against the waves.

But making fun of the experts partakes more of *Schadenfreude* than of thought. Why, at this very late date in the history of transport regulation, should the elementary distinction between "differentiation" and "discrimination" still be so elusive for the very best legal and economic writers?

One possible reason is the malign influence of premature pragmatism. Somehow, in the early history of railroads, the idea that price differences did not necessarily imply discrimination was joined, in common-law marriage, with the different idea that discrimination might under certain circumstances be justifiable. Each idea is readily defensible; and both can claim important places in determining regulatory policy. But the two are not identical.

Second, one must acknowledge survival of a false unimodal analogy into a multi-modal world of transport regulation. That famous lion and lamb of the railroad era, the strong and the weak road, combined to threaten the very existence of "differentiation" as a separate concept. Instead, attention had to be focused on clear cases of discrimination such as those immortalized in the phrase "long-and-short-haul." Now that the problems revolve around the characteristically different cost structures of transport modes which provide characteristically different services, issues of differentiation and of justifiable or unjustifiable discrimination are both more far reaching and more subtle than they were in the simpler railroad universe.

Third is the prevalence, among economists, of naive notions of single pricing, and, among lawyers, of naive notions of egalitarian equity. The early railroads introduced their customers to dramatic and sys-

tematic forms of price discrimination *and* price differentiation—with a vengeance. Prices differed radically from each other, and differed also from even the crudest estimates of possible cost ratios. The pre-railroad world was certainly not a world of non-discriminatory pricing, by any definition of that term. But it was also not generally a world of discriminatory pricing combined with highly differential and imperfect competition, whereas the world of the railroads did involve exactly this combination. Moreover, the idea that costs may differ radically for different shipments, or for different customers, or under different circumstances, is not one that can be easily derived from most businesses outside the transport sector. Railroad rates were admittedly highly differentiated and highly discriminatory; consequently little effort was made to separate the two.

To return to the matter at hand, what can one say about the grasp of the cost ideas lying behind the term “discrimination” as exemplified by each of the books under review?

Unfortunately, not many favorable things are available for mention.

. . . Where it is possible, however, for another form of transportation to accomplish a particular movement at a total cost below the marginal cost of the added traffic to the rail carrier, then overall transportation efficiency could be enhanced by a regulatory decision against the fuller utilization of idle railroad capacity. . . .¹²

This passage has the rigidity of an ingot mold. To attain the proper flexibility, it might first be altered to read: “below the *short-run* marginal cost of the added traffic to the rail carrier,” but even this emendation would not make it flexible enough. For one thing, this short-run marginal cost is in part determined by trainload movements, and is certainly not adequately expressed on a pure tonnage basis—and moving in one direction, at that. The appropriateness of the train as a cost parameter depends on the likely volume of shipments, which in turn depends to a greater or lesser degree on the rate itself—which brings us, full circle, back to the starting-gate for the problem to be solved. Even beyond this problem of circularity, which may be hidden behind linear cost formulas but certainly not solved by them, is the further fact that “short-run” conceals chronological, technological, and even geographical problems. If a rate is not just to stay in force overnight, some attention must be paid to the impact of replacement or improvement outlays on the cost structure. But, in a mature or declin-

12. HILLMAN 4.

ing industry, the familiar economic concept of "opportunity cost" of new capital undoubtedly exaggerates the importance of return on capital investment. There is a good deal of room here for common sense—with special reference to the unimpeded common sense of railroad management, in contrast to the common sense of regulatory bodies.

In the Friedlaender book, cost problem is piled upon cost problem. This appears, in clearest form, in the following paragraphs:

In defining costs for policy purposes, the proper costs on which to base rates and the proper horizon of these costs must be determined. There seems to be reasonable agreement on the second point: long-run costs are the relevant costs since they encompass all adjustments in plant and equipment. However, it is not clear whether the appropriate long-run costs are marginal or average costs. . . .

. . . it seems reasonably clear that rail rates should not be set equal to marginal costs. Since prices are generally greater than marginal costs throughout the economy, setting rates equal to marginal costs in the rail industry would lead to an overutilization of rail facilities and a misallocation of resources in the transport industry. Moreover, since marginal costs always lie below average costs if average costs are falling, setting rates equal to long-run marginal costs would impose permanent losses on all railroads of less than optimal size that operate on the falling portion of the industry's long-run average-cost curve. . . .¹³

It may be easiest to list some of the cost problems contained in these two paragraphs, or implied by them:

(1) For railroads, "long-run" costs, in the sense of costs of expansion of plant and equipment, may be largely irrelevant.

(2) Whether prices do or do not exceed marginal costs "throughout the economy" is of limited interest for a regulator of railroad rates: what matters most, and indeed almost exclusively, is the relationship of prices to marginal costs, as well as the level of actual to lowest possible marginal costs, *among competitive transportation undertakings and modes*. The special importance of this relationship is not limited to common carriers. In fact, the cost characteristics of private carriers may in some cases provide the economic basis for appropriate regulatory policy.

(3) In view of the pervasive excess capacity in railroad way and structure, the idea that "overutilization of rail facilities" might ensue

13. FRIEDLAENDER 131-32.

from marginal cost pricing of rail facilities is hard to take very seriously.

(4) As for "permanent losses," as matters now stand, practically all American railroads earn subnormal rates of return on their investments, whether their asset values are measured on the basis of original or reproduction costs. Thus it is misleading to say that marginal cost pricing would impose permanent losses on them, if losses are defined in their economic sense to include rates of return below the opportunity cost of the capital employed.

(5) Mrs. Friedlaender tends to identify losses with small size. Most writers on railroad problems would identify losses either with density of use of permanent facilities or with traffic mix and trends. But, even if losses are a product of "less than optimum size," the answer would seem to lie in merger and not in pricing.

One must conclude, then, with the observation that the legal use of "justifiable discrimination" is mired in confusion because economists have not provided lawyers with an unambiguous definition and description of what discrimination is and how it may be detected. In particular, the economists are not even clear on the nature of decreasing costs in railroading: does a condition of decreasing costs arise as existing capacity is more fully utilized? Must it arise because existing capacity will always be more than adequate? If so, why? If this is true, may the redundance be explained by traffic trends within the industry which rates changes are powerless to alter fundamentally? Are the railroads' decreasing costs mainly a function of density of use of facilities, or are they simply a function of size of firm? Even complete clarity on this prior question of decreasing costs would not provide a golden key to unlock all questions of discrimination. There would still remain questions relating to the time horizon, and shape, of rail marginal cost curves. There would still remain the problem of strong and weak roads, with the differences in both average and marginal costs thereunto appertaining. Indeed, more than in the past, there would also be the problem of how to treat discrimination when yesterday's strong becomes today's weak, and vice versa. Above all, there would remain the essential regulatory conundrum of how to relate today's rates to tomorrow's applicable costs, when existing cost data lie mainly under the shadow of history. None of these problems will be easy to resolve. But they are not to be evaded by inadequate or erroneous definitions of discrimination.

