

## Book Review

**Unequal Justice.** By Jerold S. Auerbach. Oxford University Press, New York 1976. Pp. 395.

It is surely not worth debating the proposition that the American legal system has failed to fulfill its promise of equal justice under law. The fact that we have legal aid societies and clinics with grave restrictions on the usage of their funds and which nevertheless are grossly overworked certainly substantiates that notion. The more interesting questions today would seem to be whether this goal of equal justice has ever been attained in our history and, if not, why not. Perhaps even more important is the question of whether equal justice can be provided or is just a quixotic ideal. Jerold Auerbach has addressed these issues in *Unequal Justice*. His is certainly not the first book to do so. Nor will it be the last. But it is one of the most readable, intelligent, and well documented works of this genre.

Though he is a Professor of History at Wellesley College, Auerbach's interest in this topic is not merely academic. Upon graduation from Oberlin College, he entered Columbia Law School, with high ideals, in the fall of 1957. Less than a year later, Auerbach left the law school. He felt its inordinate emphasis upon process and methodology was stifling and inhuman. He missed grappling with the more important policy questions which he assumed law school would pose. He, therefore, enrolled in graduate study in history.

This book, then, has its origins in Auerbach's frustration with law school and the American legal system. As such, it is a polemic of sorts. For Auerbach has an axe to grind. But, if it is not a totally detached piece of writing, neither is it a diatribe to be dismissed lightly. No doubt, many lawyers will want to deny its basic assumptions and will, therefore, dismiss it as "mere frustrations of a law school dropout." Others will argue that it is the work of an Eastern Establishment historian and its credence is per se questionable. Still others will feel that because Auerbach is an historian and not a lawyer, he can not and does not understand his subject. Yet these criticisms are, by and large, not well founded. For this book is a fine one and well supported by apt marshalling of evidence. To be sure, it is subject to criticism. But its basic thrust, disconcerting as it may be, seems to ring true.

Auerbach's thesis is that the American legal system, in general, and the elite Eastern corporate law firms, in particular, have abandoned their commitment to equal justice under the law. This abdication of duty corresponds, in Auerbach's view, with the rise and expansion of giant corporations and the concurrent growth of corporate law firms. Implicit in such a view, of course, is the idea that our legal system once did better provide legal services. In fact, Auerbach continually harks back to the small town Abraham Lincoln figure who learned his trade as an apprentice in an attorney's office and then remained in the small town to provide legal services to all on a continuing basis. But this figure is rarely, if ever, found in our modern society. Instead, we see a legal system whose basic ideal is greed and which provides justice only to those who are able to pay for it.

Auerbach would perhaps acknowledge that this development was, in some sense, inexorable. But, he maintains, lawyers have done little to stifle it. In fact, their every move has been precisely opposite. For instance, they raised the standards for becoming a lawyer by requiring both a college degree and a three year legal education whereas apprenticeship had once been acceptable. Ostensibly this was done to protect the American public from unscrupulous and incompetent attorneys. But the more fundamental reasons for this, Auerbach argues, included elitism, racism, sexism, greed, and even xenophobia as the tide of immigration rose. Elihu Root's comments at a meeting of the Washington Conference of Legal Education in 1921 are typical: "I do not want anybody to come to the bar which I honor and revere . . . who has not any conception of the moral qualities that underlie our free American institutions; and they are coming, today, by the tens of thousands.'"<sup>1</sup>

Similarly, the American Bar Association and other organized bars on the East Coast expressed vigorous opposition to lawyers who worked for contingent fees. These attorneys, it was argued, were "milking" their clients. What was not pointed out by the corporate lawyers was that they would not furnish legal assistance to middle and lower middle class persons, whose claims were often "mere" personal injury suits for work-related accidents, for there wasn't enough money or prestige in such business. Nor would the corporate attorneys acknowledge that the "shysters" were often immigrants or Jews who could not obtain employment elsewhere.

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1. J. AUERBACH, *UNEQUAL JUSTICE* 115 (1976).

Auerbach has a whole host of other complaints. He goes to great pains to show how the elite law schools have fostered such conditions rather than ameliorating them. To be sure, there have been instances in which lawyers and legal education have been at odds. For example, lawyers have often argued that law schools are teaching too much theory and are not training students to practice law, as they should. Despite such complaints, however, and despite eras like the New Deal when many law graduates went to work for the Government, the predominant move has been toward the "best" corporate firms.

Another area which greatly disturbs Auerbach is the bar's paranoid and hypocritical reaction to lawyers whom it feels are subversive. Attorneys' reactions to the Red Scare of 1918-19, to McCarthyism, and, most recently, to the widespread demand for loyalty oaths are a disgrace, says Auerbach. Rather than permit lawyers to exercise their Constitutional right of free speech or the right against self incrimination, the organized bar has put a tight clamp on its members' activities, particularly in time of war. Those few who dared differ were often disbarred or subjected to intense humiliation. Often, these people were unable to secure legal representation.

Auerbach has more to say. But these sorts of criticisms set the general tenor of the book. And its tone is an angry one. Yet, despite this, the book is well documented. His examples are not the ravings of some half-cocked historian. His research lends great credence to his arguments. Yet the book has its faults. It would be simplistic to say the book goes too far, too fast. For this would not do justice to his work. In fact, there is at least one instance in which I feel Auerbach's criticisms are not far reaching enough.

For instance, I disagree with Auerbach's fundamental, if semi-implicit, belief in the idyllic Lincoln figure who typified the rural attorney of this country's earlier days. Such a belief in the "good old days" seems a bit naive. Whenever any era of American history is examined more closely, faults precisely like those Auerbach finds only in modern times become more apparent. Raymond Williams, writing in the context of the pastoral ideal in British fiction, has demonstrated the error of this recurring fallacy in *The Country and The City*.<sup>2</sup> His argument is equally valid in this context. Moreover, the evidence would seem to show that lawyers as a group have always incurred the wrath and opprobrium of laymen. In Shake-

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2. R. WILLIAMS, *THE COUNTRY AND THE CITY* (1973).

spere's *Henry VI*, Part 2, we hear the Butcher's famous line, "The first thing we do, let's kill all the lawyers." Two hundred and fifty years later Dickens echoes similar sentiments in *Bleak House*. Lest it be thought that this is a peculiarly British problem, we need only look to Shays' Rebellion in the late eighteenth century in this country or to de Tocqueville's astute analysis of the American legal system in *Democracy in America* in which he demonstrates that Jacksonian egalitarianism notwithstanding, American lawyers formed, by and large, an aristocracy.<sup>3</sup> And more recently, Professor Harry Cohen has shown that the rural lawyer of both yesterday and today was never quite the equal of his image.<sup>4</sup>

I might also quarrel with Auerbach's implicit notion that if the large corporate firms hired more minority law graduates, the basic policies of the firm would change. Certainly, the hiring of women and minorities is long overdue and is good in and of itself. But I suspect that they would either be co-opted into "the system" or be asked to leave (*i.e.*, would not make partner). Aside from this, Auerbach sometimes forgets that they, too, are now trained in the same classrooms as their white protestant male counterparts, where methodology is still stressed above goals. They, too, are taught that a good lawyer can and should be able to argue any side of a case with equal vigor.

Sometimes, it also seems that Auerbach lacks a very complex understanding of the American legal system. If courts were always result oriented (as I sometimes believe them to be), our self-professed reliance upon *stare decisis* would be empty. A more fundamental problem arises when Auerbach and others implicitly and sometimes explicitly argue that perhaps corporate clients are not as deserving of a strong defense, particularly in public interest lawsuits. At times, I find this argument appealing. It certainly has a strong emotional pull, but it is troubling. Monroe Freedman, in *Lawyer's Ethics in an Adversary System*,<sup>5</sup> argues that it is inherently dangerous to decide that one side is somehow more worthy of a legal defense than another. He thinks this might lead to Thomas Hobbes' *Leviathan* government. Instead, Freedman argues, the American system of zealous advocacy for both sides is vital. The

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3. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 283-90 (P. Bradley ed. 1945).

4. Cohen, *Confronting Myth in the American Legal Profession: A Territorial Perspective*, 22 ALA. L. REV. 513, 531 (1970).

5. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).



trouble with Freedman's argument, however, is that it assumes that both sides have an equal amount of representation and equally competent legal advice. In practice, of course, this is often not true.

Perhaps the most troubling aspect of *Unequal Justice* is my sense that Auerbach himself seems to share some of the elitism he so viciously indicts. He accepts as a given the traditional notion of the power and influence of Ivy League Law Schools. I suspect he is at least partly correct. These schools have, no doubt, funneled many of their top graduates to Wall Street. But I wonder if Wall Street is viewed by the entire American bar as the grand ideal. Admittedly, Auerbach has expressly limited the scope of the book to the elite Eastern bar. But he seems to equate their ideals with those of the bar in the rest of the country. I think we hear too little of and from the "less influential" members of the bar.

Auerbach also seems to accept uncritically the notion that the "best" attorneys are those who make the best grades and earn a spot on their law reviews. In other words, his conception of the "best" lawyers seems to match that of the elitist law schools he takes to task.

But these criticisms are not meant to raise questions about the book's basic validity or worth. For *Unequal Justice* is a fine work. It is not a book which lawyers and law students should forget soon. One can only hope that its message is heard and that its criticisms are heeded.

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