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BOOK REVIEW

JUSTICE WITHOUT LAW? By Jerold S. Auerbach.* New York and Oxford: Oxford University Press. 1983. Pp 182.

*Reviewed by William F. Fox, Jr. ***

From the resounding success of *Unequal Justice*, a book which became one of my favorites on first reading, Jerold Auerbach has moved to an analysis of how certain communities within American society resolved disputes without recourse to the traditional majoritarian dispute resolution process—a process which is almost exclusively in the hands of lawyers and almost invariably a matter of litigation. *Justice Without Law?* is an unusual law book. Auerbach is an historian, not a lawyer, and implicit throughout the book is his overriding insistence that the American legal system is too important to be left solely to lawyers.¹ This is a perfectly legitimate assertion; lawyers are far too insular and far too slow to appreciate and absorb the knowledge of other disciplines. When it comes to external commentary on the legal profession, lawyers are rarely receptive and deal with criticisms by simply ignoring the critics. *Justice Without Law?* is good external criticism. I hope that it is not ignored.

The book is neither an anti-lawyer nor an anti-legal system polemic. It is a slim, well-written book with a fairly straightforward message. Boiled down to a few sentences, Auerbach's thesis is this: The United States is

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1. Professor Auerbach endured one academic year at Columbia Law School in 1957 before leaving "in dismay" to enroll in a graduate program in history. He confesses to shattering disillusionment as early as his first week in law school and notes a problem which became familiar to me in three years as an academic dean, charged with approving and processing law school withdrawal requests: "The [law school] experience was paradoxical: The more I learned to think like a lawyer the less I wanted to become one." J. AUERBACH, *UNEQUAL JUSTICE* (1976) [hereinafter cited as *UNEQUAL JUSTICE*].

For all his personal disillusionment he has apparently found the law and lawyers fascinating topics because he is essentially an historian of the legal profession.

exceptionally rule-oriented and litigious;² yet litigation serves primarily the single goal of enhancing and encouraging the narrow purpose of acquisition and perpetuation of capital in the form of private property, and is a mechanism exclusively in the hands of lawyers, the legal system's high priests.³ As a consequence, in the United States alternative systems of dispute resolution such as mediation and conciliation have worked only within closely-knit subgroups in American society. Eventually all such systems have been rendered impotent or eradicated, largely by being absorbed in or excluded from the litigation system. As a society we should be skeptical of any move to reform dispute resolution, whether or not labelled "alternative," because the reforms will not likely displace litigation, and will be quickly captured by lawyers and transformed into something virtually identical to litigation. Worst of all, so-called alternative systems nearly always work to the detriment of justice for all persons in our society. In Professor Auerbach's words:

Our legal culture too accurately expresses the individualistic and materialistic values that most Americans deeply cherish to inspire optimism about the imminent restoration of communitarian purpose. For laws to be less conspicuous Americans would have to moderate their expansive freedom to compete, to acquire, and to possess, while simultaneously elevating shared responsibilities above individual rights Until then, the pursuit of justice without law [i.e., alternative dispute resolution systems] does incalculable harm to the prospect of equal justice.⁴

This conclusion, as I read it, tells us that in a large, pluralistic, acquisitive

2. Auerbach uses the term "rule of law" in a very narrow sense to mean formally established legal principles, e.g. statutes, regulations and court decisions. He specifically disclaims any notion of "law" as being embodied in all social interaction. J. AUERBACH, *JUSTICE WITHOUT LAW?* 148 & n.1 (1983). In his parlance, litigation refers only to formal procedure in courts of law. *Id.* Consequently, these two terms are used in the same fashion throughout this book review.

3. After reading *JUSTICE WITHOUT LAW?* several times I cannot determine Auerbach's position on our economic system. Ordinarily this would not bother me because my view is that our legal system does not necessarily favor one economic system over another, i.e., we could have the same legal system even with a socialist economy. Throughout both *UNEQUAL JUSTICE* and *JUSTICE WITHOUT LAW?*, I have sensed Auerbach's underlying hostility to an economic system that emphasizes capitalism and free enterprise. It is conceivable that his views of our economic system have affected his views of our judicial system. Neither of Auerbach's books are clear on this point. *See generally* *JUSTICE WITHOUT LAW?*, *supra* note 2; *UNEQUAL JUSTICE*, *supra* note 1.

4. *See* *JUSTICE WITHOUT LAW?*, *supra* note 2, at 146. As Professor Auerbach notes, a similar conclusion has been reached by another non-lawyer and legal anthropologist, Laura Nader. *See, e.g.*, L. NADER, *NO ACCESS TO LAW* (1980); Nader, *Disputing Without the Force of Law*, 88 *YALE L.J.* 998 (1979).

society, the system of litigation, while imperfect, may be as good as we can do for resolving disputes.

I believe most people, lawyers and non-lawyers alike, can live with that. In my recent seminar on alternative dispute resolution techniques, I urged students to give as much attention to the defects and disadvantages of the alternative systems as they devoted to the problems of litigation. My sense of the seminar's consensus is that many of the students became more appreciative of litigation and less willing to jump uncritically on the bandwagon of, say, arbitration or mediation to solve our problems. The sentiments of twenty-one seminar participants are not scientific proof of the worth of litigation. Both the students and I have a stake in the present system and in preserving much of a lawyer's exclusive access to that system. It is for this reason that the similar conclusions set out in *Justice Without Law?* are so important and so powerful. Auerbach is a non-lawyer voicing many of the same qualms as my law students.

Justice Without Law? is first and foremost an intensive and sympathetic analysis of a number of specific systems of alternative dispute resolution that have existed in certain times and within certain groups in the United States since colonial days. Auerbach looks closely, for example, at mediation in the 17th century utopian communities in Dedham and Sudbury, Massachusetts. He examines similar systems in Quaker societies in Oneida, New York and New Harmony, Indiana, as well as dispute resolution among the Mormon communities in Utah in the 19th century. More recent systems fully explicated in the book include dispute resolution in the Chinese and Jewish communities.

Auerbach's data show that many of these groups appear to have established successful, workable, nonlitigious dispute resolution systems that apparently satisfied that group's sense of fairness and justice. But these systems seem to have worked only within small, closely-knit groups that deliberately sought as little contact and assimilation with the majoritarian society as possible, and which were particularly interested in keeping internal conflict from the attention of outsiders. As a result, these alternative systems failed to address *inter*-group dispute resolution problems. Nevertheless, because utopian spirit in the United States waned, most of these systems did not survive the Civil War.

Of the various alternatives, Auerbach is clearly fascinated by and spends the most time on the dispute resolution systems that developed in the Jewish communities in New York after the Civil War.⁵ The impetus behind the Jewish systems appears to have been similar to the motivation within

5. JUSTICE WITHOUT LAW?, *supra* note 2, at 67.

the utopian communities—i.e., an interest in staying somewhat apart from the community as a whole. In addition, certain Talmudic admonitions prohibited contentiousness and adversarial conflict within the religious community. As Auerbach explains, the interest in a separate forum for dispute resolution is directly traceable to the concept of Kehillah, the Hebrew word for “community.”

In the United States, the Kehillah included virtually every component of Jewish society—Zionists, socialists, new immigrants and long-time residents, workers and wealthy employers and both Reform and Orthodox rabbis. The Kehillah was viewed as the basis for a comprehensive dispute resolution system, equally useful for commercial as well as religious disputes within the community.⁶ Out of the general idea of Kehillah emerged a number of more formal tribunals, including the Jewish Arbitration Court and the later-organized Jewish Conciliation Court (now known as the Jewish Conciliation Board). These systems quickly became viable alternatives to litigation within the community but were not themselves free of controversy. For example, the Jewish Arbitration Court began to be seen as having a pronounced Orthodox bias. As an alternative to the arbitration court, a conservative rabbi established the Jewish Conciliation Board.⁷ The differences between the proponents of each program were sharp and led to considerable bitterness on the part of each programs’ supporters. These controversies and the increased assimilation of the Jewish community into the American mainstream eroded the once-considerable influence of the alternative dispute resolution systems.

Of course, alternative dispute resolution proposals have not been confined to religious and ethnic communities. Auerbach describes the evolution of secular proposals as well. From the turn of the century until sometime after the Second World War, the American business community attempted to extricate itself from litigation by establishing a process of commercial arbitration. This system was largely divorced from lawyers and courts. In this instance, the lawyers reacted to the alternative system by simply taking over the entire process. This takeover was accomplished largely by insisting on elaborate judicial review of the decisions of any

6. *Id.* at 80. Auerbach notes a “defensive” impetus to the development of the Kehillah. It was “consistent with the traditional Jewish preference not to display dirty linen before a hostile Christian public. Squabbles must be contained within the community lest outsiders suspect division and weakness, or draw unsavory conclusions that might fuel anti-Semitism.” *Id.*

7. Both the Arbitration Court and the Conciliation Board were relatively casual proceedings. They both expressly dispensed with technical rules of evidence and procedure. The clergy was heavily involved in the early years, but Auerbach discovered a pronounced trend toward the use of lawyers as advocates and judges over time. *Id.* at 81.

arbitrator or arbitration panel. This led one writer, in the course of reviewing Professor Wesley Sturgis' classic volume on commercial arbitration,⁸ to decry that "irony [is] the fate of one who takes precautions to avoid litigation by submitting to arbitration and who, as a reward for his pains, finds himself eventually in court fighting not on the merits of his case but on the merits of the arbitration."⁹ Eventually, Auerbach notes, "the similarities [between arbitration and litigation] were more conspicuous than the differences."¹⁰

Apart from these problems, Auerbach views recent attempts to move certain disputes out of the mainstream legal system with a great deal of trepidation. The alternative systems, in his view, almost always seek to remove those groups who are newly exercising judicial power, such as the elderly, juveniles, prisoners and consumers. He contends that the drive to set up alternatives for these groups is almost always motivated by hostility to their claims and grievances rather than by interest in speed and efficiency. The consequent removal of these claims into alternative forums, in his view, merely perpetuates the imbalance of social power and implies that such grievances are only worthy of second class justice. I think most lawyers would recognize at least a grain of truth in these assertions even if they would not subscribe to Auerbach's entire argument.

But what of *Justice Without Law?* in the overall framework of dispute resolution? The reader should be aware that the book is not prescriptive. Auerbach has not created the perfect dispute resolution system, nor does he purport to have many answers for our current problems. The book is worth reading for the excellent description of the individual attempts at setting up alternatives and for his well-founded message of skepticism and pessimism. But one must go beyond the book for answers. As I see it, there are essentially four possibilities or models for a dispute resolution structure (obviously, a system could have a blend of all four models, as does the United States):

Model 1 Lawyers engaged in litigation.

Model 2 Non-lawyers engaged in litigation.

Model 3 Lawyers who manage systems other than litigation such as arbitration or mediation.

Model 4 Non-lawyers who manage systems other than litigation.

The first model is simply the present system—referred to by Auerbach as the rule of law/litigation—and consists of the resolution of conflicts by

8. W. STURGIS, TREATISE ON COMMERCIAL ARBITRATION AND AWARDS (1930).

9. JUSTICE WITHOUT LAW?, *supra* note 2, at 111.

10. *Id.* at 114.

licensed attorneys on behalf of clients within the traditional system of litigation. This model has come under a great deal of criticism from groups within and without the legal profession. Most of the criticism is fully justified. It remains, however, our preeminent conflict resolution device.

The second model, non-lawyers engaged in litigation, may be quickly dismissed as a plausible alternative. While an occasional pro se litigant may make it safely through the various twists and turns of our courts, litigation, like open-heart surgery, is really feasible only when undertaken by trained professionals.

The third model, lawyers involved in alternative systems, has been seen before and we now know that lawyers quickly turn such systems into a species of litigation, complex, intricate and workable only in the hands of knowledgeable, trained professional advocates. Auerbach spends a great deal of time on the example of the capture of commercial arbitration by lawyers. Another compelling example not discussed by Auerbach is the takeover by lawyers of dispute resolution within federal agencies, even though those same agencies were established because courts were not handling regulatory disputes adequately.

The fourth model, non-lawyers managing alternative systems, is also not unknown. Auerbach's utopian communities rejected both lawyers and litigation, but failed to survive themselves.¹¹ Nevertheless, today there are numerous proposals for model four systems in circulation. One such proposal permits social workers to mediate family disputes; another appoints real estate professionals to serve as arbitrators in land transaction controversies.

Model four systems are usually much cheaper and are almost always quicker than litigation, although neither the cost nor the speed components have been subjected to what I would consider legitimate empirical analysis. Model four systems also have a superficial attraction in that they usually dispense with the services of lawyers, although lawyers are *prohibited* only occasionally from participating. Model four systems, however, accomplish their purposes. Cost savings are achieved because there is rarely a provision for expensive prehearing discovery (even though the element

11. Because I recognize our society as being one of limited resources, I could also live with alternative systems for a few, narrowly-defined categories of disputes even if, as Auerbach contends, this would condemn these disputes to second class justice. Small monetary claims are, by definition, small in absolute dollars although they may represent a significant percentage of one party's income. I am not sure that such claims require the full panoply of litigation. Also, certain disputes which occasionally occur within families when none of the parties are interested in severing the family relationship do not lend themselves well to a public, adversary proceeding. Such disputes might well be handled by a mediation and conciliation service not involving lawyers.

of surprise at such hearings can be devastating) and because social workers generally are not paid as much as lawyers and judges. Model four systems save time because mediation and conciliation proceedings are often nothing more than negotiating sessions between the principals, albeit in the presence of a third-party "facilitator."

Nevertheless model four systems are riddled with imperfections. Model four systems almost always lack finality. In many settings the parties are merely admonished to carry out the promises made during the session. Frequently, the parties do not live up to their promises. Thus, it is often necessary to require either additional mediation sessions or to resort to some other dispute resolution process. In addition, model four proceedings rarely impose a truly enforceable solution. For example, when a domestic relations mediation session concludes that one spouse should stay away from the other spouse, often the only way to compel such behavior is to secure a court-issued restraining order, a matter which requires a wholly separate judicial proceeding. Model four systems, insofar as they are anti-lawyer systems, also fail to recognize lawyers as perhaps the only trained dispute resolvers in our society. Unlike social workers or real estate persons, lawyers have subject matter expertise and training in settling disputes. If non-lawyers are given dispute resolution training equivalent to that of lawyers, they may become just as expensive as attorneys. While not useless, model four systems are far from satisfactory.

This conceptual analysis confirms Auerbach's central thesis: lawyers and litigation are here to stay and most alternative systems have so many inherent defects that they are probably doomed to fail. But merely because Auerbach is correct is no reason to throw up our hands. The solution, as I see it, although it is not adequately addressed in Auerbach's book, is to improve litigation. For example, additional constraints on pre-trial discovery illustrate one reform that would be welcomed by most observers of the litigation system. Commissioning more judges and spending more money on the courts would improve our judicial system. In a country of approximately 235 million people, we have a federal judiciary composed of fewer than 1000 judges. Most court budgets are appallingly low, preventing courts from implementing even the most elementary data processing and communication techniques that are now common in business. The dispute resolution skills of lawyers could be improved in many ways, making the entire system much more efficient.

These last comments may be somewhat unfair to Professor Auerbach. *Justice Without Law?* does not pretend to be a prescription for a better system; but still, the lack of much in the way of a prescription may have

made Auerbach more pessimistic than need be. Auerbach seems to regard the rule of law and litigation as a necessary evil, inextricably tied to a less-than-acceptable social and economic system. I would prefer to paraphrase Winston Churchill's comment on democracy: litigation is the worst possible system, except for all other systems, for resolving disputes.