



Book Review: Unequal Justice, by Jerold S. Auerbach

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Book Review

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UNEQUAL JUSTICE, JEROLD S. AUERBACH, New York: Oxford University Press, 1976. Pp. 308. (\$13.95).

The realization that law and justice are not synonymous is often a matter of concern to students of law, but for Jerold Auerbach it constituted a traumatic experience from which he has yet to recover. While attending Columbia Law School, the author became incensed that the legal education on which he had embarked "was designed to evade precisely those questions which in my naïveté, I believed that lawyers should contemplate: Is it just? Is it fair?"(ix). Unwilling to accept a dichotomy between law and justice, Auerbach felt compelled to indict the American legal profession for the presence of unequal justice in a purportedly just society. At 12 he states that "in the United States justice has been distributed according to race, ethnicity and wealth, rather than need. This is not equal justice under the law, but unequal justice under lawyers." Based upon this premise, the author has produced an historical critique of the American legal profession from its noble inception in the backwoods of America to its downfall in the aftermath of Watergate.

Unequal Justice commences by lamenting the passing of the country lawyer who dared to ask whether an action was right or wrong. The simplicity of small town life insured that the country lawyer would not be tempted by large fees to "turn his head toward a favored few." However, the golden age of the legal profession was soon eclipsed by the emergence of the corporate law firm. For those lawyers that possessed appropriate social, religious and ethnic credentials, the proliferation of corporate law firms at the turn of the century provided an opportunity "to secure personal power and shape the future of their profession." Having attained the apex of power, Auerbach claims that corporate lawyers became obsessed with maintaining their elitist position. The Professional Code of Ethics, and entrance requirements to law schools, bar associations and Wall Street law firms were geared solely to excluding Jew, Black, immigrant and radical; in fact, all who were not of W.A.S.P. background.

During the 1930's with the growth of the regulatory bodies under the New Deal administration, the professional elite shifted from the staid corporate lawyers of New York to the liberal minority group lawyers that flocked to Washington. Auerbach contends at 233, that the advent of the Cold War provided the leaders of the bar with the opportunity to eradicate these pretenders to the throne from their professional culture. "The legal elite, encouraged . . . by the House Unamerican Activities Committee . . . attempted to purge the profession of lawyers whose political and professional commitments deviated from Cold War orthodoxy."

The author outlines how, during the Warren Court years, these legal conservatives advocated the use of "neutral principles," so as to dilute the effectiveness of the progressive Realist school of thought that had emerged during the New Deal years. The writings of Hand-Wechsler-Hart, quoted at 260, insisted that courts make principled decisions which rest upon reasons that "in their generality and their neutrality transcend any immediate result that is involved."

What respect there had been in the past for legal authority, Auerbach claims, was irrepressibly shattered with the onslaught of the civil rights and anti-war demonstrations of the 1960's and the Watergate proceedings of the 1970's. The injustice that permeated these activities opened the eyes of the American public to the stark realization (or at least in the author's opinion) that legal authority had ceased to embrace equity and justice, and thus had lost a substantial measure of its legitimacy. As the perpetrator of this degeneration of justice into legalism, the legal community must now humbly accept the indictment of its crimes that Auerbach has so thoroughly prepared.

Unfortunately though, the indictment that *Unequal Justice* presents is misdirected. The author's critique of the American legal profession can be compared to an examination by a physician who correctly diagnoses all the symptoms of lung cancer, but concludes that the patient is dying of a chronic cough. Auerbach is perturbed that law is not synonymous with justice and that process rather than substance has become the key factor in an ever growing legal bureaucracy. The author pounces upon the legal profession as the obvious villain in this evil scenario and then attempts to establish his thesis by documenting in chapter after chapter just how elitist and bigoted the American bar was and may still be. However stratified the profession has become, it is grossly naïve to suggest that the serious conflict between law and justice in America is a function of the lawyer's greed for power. If Auerbach is concerned with the dilemma of unequal justice, his efforts would have been better spent in an analysis of western jurisprudence than in a dissection of the American lawyer.

The truth of the matter is that the jurisprudence upon which the American legal process has been founded has not viewed justice as an integral aspect of its theory of law. Analytical Positivism, the school of thought that has dominated legal philosophy from the time of Austin, states that a legal maxim derives its validity from the fact that it exists as a sanction and not whether it is just or unjust. Even the writings of the American Realists tend to concentrate more on balancing interests in society than on the integration of law and equity. Thus, if Auerbach believes that the decline of legal authority has occurred because the citizen of the 1970's is less willing to permit a system of law which exists independently of moral values, then he should lead his readers into a discussion of the causes of this dichotomy as is found in western jurisprudence, rather than a description of the symptoms as manifested by the legal profession. Realistically, all that the legal community should be indicted for is a charge that it has helped in persuading laymen that the profusion of laws and procedures has contributed to a just society.

Not only is *Unequal Justice* founded upon a faulty premise, but it also lacks the impartiality that is a prerequisite to any serious work of history. Auerbach states in the preface at xii that "the historian, unbound to the past, writes fiction. My preference is . . . for history, not fiction." Having set for himself this lofty standard of objectivity, it seems incredible that in the next sentence he could admit that "I cannot, however, claim to be a neutral observer. In any case, neutrality is no less partisan than engagement; it is merely an expression of different, but equally partisan values." Somehow,

Auerbach has convinced himself that by admitting his bias against the legal profession at the outset he has justified his feelings of animosity.

Having dispensed with the need for historical neutrality, Auerbach feels little guilt in judging the actions of the legal community during the last 100 years by the values of the 1970's. As a result, the lawyer's guild consistently appears to the reader as a bigoted elite, driven by an unquenchable lust for power and money. What the author chooses to ignore is that the profession, like any other group of citizens, reflected rather than caused the prejudice and evil existing in their society. For instance, Auerbach denounces the exclusion of Jews from corporate law firms during the first quarter of this century, but a proper historical perspective would show that there were few if any professions that did not practice anti-semitism of one sort or another. In another instance, Auerbach at 149 laments the fact that during the 1920's "the best graduates . . . moved inexorably into Wall Street law firms," but the business aspirations of these young lawyers become more understandable when one considers that even the President of the United States heralded that "the business of America is business."

Notwithstanding its numerous and readily apparent flaws, *Unequal Justice* is nevertheless a book that deserves recognition. If nothing else, the author has presented what could easily be tedious material in a very readable format. But the real merit of the book lies in the fact that it forces the reader to evaluate the legal profession in relation to the goals and values that are presently held in the community. This should be of particular interest to the law student; for too often, in a desire to become members of the bar, he or she forgets to ask or is unable to answer the question of what is the function of the lawyer in society? As Auerbach states at 296, "despite a flood of applications for admissions, students demonstrate continuing confusion about the role of the lawyer in society and concern over the impact of professional training upon their personal values." These are serious questions that go to the root of both the American and Canadian legal systems. At the very least they deserve to be dealt with in greater depth than is presently being done in law schools, and at best such questions should motivate an investigation into the possibility of formulating a theory of law that would eliminate the division that now exists between law and justice. While Auerbach may be simplistic in suggesting that the solution to this dilemma lies in the regulation of the legal profession, he has succeeded in articulating that such a dichotomy exists and for that, at least, he should be commended.

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