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Crossing the I

UNEQUAL JUSTICE: Lawyers and Social Change in Modern America. By Jerold S. Auerbach. Oxford. 395 pp. \$13.95.

By **ARTHUR S. MILLER**

AMERICANS AS HAS often been noted, are the most legalistic of all people. Washington in particular is awash with lawyers. There is something dispiriting about the chasm between the ideal of "equal justice under law" and the reality of unequal or at times no justice at all.

Unequal Justice is an impressively documented book — there are 70 pages of notes and bibliography — but it does not live up to its title. Professor Auerbach, an historian at Wellesley College, attempts to

show that in this country "justice has been distributed according to race, ethnicity, and wealth, rather than need." This he blames on the elite members of the bar. But he does little to illustrate the lack of legal services to the public at large.

His focus is upon the leaders of the legal profession, plus university law professors (Felix Frankfurter is his prototype) who identify with them. Auerbach traces the way in which the bar adapted to the corporate economy and the growth of giant corporations in this century, so much so that leading lawyers have become

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deprofessionalized and mere minions of the corporate rich.

As corporations grew, law firms ballooned into law factories. Corporation law became the mecca for aspiring law students, in the main from Ivy League schools. Corporate lawyers were, and are, the hired guns of the corporations. They exemplify what Theodore Roosevelt said in 1905: "Many of the most influential and most highly remunerative members of the bar in every center of wealth make it their special task to work out bold and ingenious schemes by which the very wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interests of the public the use of great wealth."

For a time, the New Deal changed the desire of elite lawyers to wax wealthy and powerful by being *apparatchiks* to the corporate managers. This Auerbach discusses, going on to show that it was merely a temporary detour (as is, more recently, the public-interest movement). Law students today flock, when they can, to the large firms, there to toil and spin for their corporate masters.

The legal profession does not satisfy the reasonable needs of the general public. There is no present way by which the mass of the American people can get adequate legal service at a decent price. The rhetoric has exceeded the capability of our institutions.

For this, Professor Auerbach merely mentions, but does not develop, possible remedies: "substantial federal subsidies supplemented by an excess profits tax on corporation law firms" to make legal services generally available. But he does not indicate how to get there from here. Nevertheless, *Unequal Justice* should be

read as an introduction to a study of what might be done to bridge the gap between ideal justice and social reality. Legal aid will not do the job, for it is merely a salve for the conscience of elitist lawyers. "Public interest" law in recent years for a time showed promise of providing necessary services and of adapting the legal system to the needs of the people generally, but it has dwindled in

attraction and importance.

Perhaps Auerbach should not be faulted for the inadequacy of his proposed remedies. Possibly it is enough to show that the profession, speaking generally, has not fulfilled its public responsibilities. Surely, however, he should have discussed social change—what it was, what generated it, and the directions it is taking.

Had Auerbach done so, then perhaps he would have perceived a sociological truism—that a legal system, including members of the bar, does not operate in a political vacuum. Lawyers, most of all the self-styled elite, reflect the dominant drives and values of the entire nation. Their faults revolve, in simplest terms, around the fact that they are the willing servants of a corporation-dominated society.

Most Americans cannot afford to hire a lawyer, just as most Americans still find it difficult and often impossible to obtain medical services. But the federal government has, in health services, established Medicare and Medicaid. These are imperfect but they are better than nothing—and they far exceed what has been done to fulfill the nation's legal needs. In recent years "Judicare"—the counterpart to Medicare—has been discussed, but, even with the establishment of the Legal Services Corporation, only the barest beginning has been made to make up for obvious shortcomings.

These matters are not mentioned by Professor Auerbach. He contented himself with a sharply written critique of the bar in the 20th century. Even given the massive documentation, his was a relatively easy task. What emphatically is not easy, and what equally emphatically is not being done (save by a few public-interest lawyers), is to make law and the legal system not the privilege of the rich but the right of all.

Achievement of that goal will require major social change—precisely what the legal system is not equipped to do. Moreover, a counterrevolution against public-interest law has already set in, led by the so-called "neoconservatives" like Harvard sociologist Nathan Glazer, who in a recent essay in *The Public Interest* attacked judges for being too "activist" and public-interest lawyers for being overly litigious (and thus representing the heretofore unrepresented). Like Edmund Burke after the French Revolution, the neoconservatives fear what they perceive as a latter-day Jacobin movement toward egalitarianism.

The counterrevolution helps to pose in starkest terms the need, as Auerbach says, of a new legal morality of "purpose" rather than of "process." The neoconservatives plump for "process"; to them, the system is self-correcting. This Auerbach doubts. Lawyers to him *have* social responsibilities, as well as responsibilities to their clients. It is a pity that he failed to show *what* those responsibilities are and *how* they could be fulfilled. □