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Lawrence Mayberry
Indiana University School of Law

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A Review:

Unequal Justice: Lawyers and Social Change in Modern America

LAWRENCE MAYBERRY

Unequal Justice is a social history of the legal profession from the emergence of The American Bar Association in the 1870's until the 1970's. Auerbach is a professional historian and not a member of the legal profession who writes history, nor is he a sociologist. But before his graduate work in history, the author entered and quickly left law school. The honesty with which he relates the experience and the competent research and analysis manifest in his work demonstrate that he writes this book from a perspective of understanding rather than of bitterness or indifference. In fact Auerbach's unique frame of reference makes for an astute insight into the role of the elite lawyer in our legal system. At the outset the author states, "the subject of this book is the response of elite lawyers to social change . . . it is not therefore, a book about how lawyers practice law, nor is it an exegesis of legal doctrine." (p. 3)

The author focuses upon elite lawyers because, in his view, they constitute "a group able to define the terms of admission to the circle of the . . . influential, terms which may include conformity to standards of wealth, social background, educational attainment and commitment to the elite's interests and ideology." (p. 4) Auerbach gives particular attention to the emergence of corporate lawyers and university law teachers as elites who define and defend professional interests. The book's emphasis on the professional elite also focuses upon the leadership of the ABA, whose influence has been enormous. The focus on the bar and its leaders reveals that until very recently it has been homogeneous in composition. The bar has, "represented identifiable interests and values which have guided the pursuit of certain objectives at the expense of other." (p. 10) Elite lawyers were the ones most often empowered to speak for the legal profession from their positions as bar leaders.

One of the myths of the legal profession that Auerbach labors to dispel is that entry into and success in the legal profession were based on traditional notions of hard work, self-discipline, inductive reasoning skill and academic achievement. To the contrary *Unequal Justice* endeavors to prove that access to and the stratification of the 20th century bar have been based on such ultimate criteria as race, religion, class, sex and social origins. This was achieved through

both direct discrimination and less obviously to limited access to elite legal education. Thus the stratification of the legal profession was based on the social biases of elite lawyers who began to dominate the legal profession around the turn of the century.

The early chapters of the book describe the transition of the legal profession from one which was rooted in the rural and agrarian orientation of the “country lawyer” as epitomized by Abraham Lincoln, to a profession which faced the rapid development of the United States into an urban, industrial nation. Auerbach notes that by 1912 Dean Roscoe Pound of Harvard Law School already considered the legal system to be shackled by principles suitable only to small-town life. (p. 17) The major conflict which emerged during this transition period was between a professional class which had become an enclave for white Anglo-Saxon protestants and the realities of 20th century American society which developed as changing immigration and demographic patterns swelled the cities and the legal profession with the foreign-born and their children.

The response of elite lawyers to this phenomenon was to concentrate their positions in corporate law firms and professional organizations, particularly the ABA. From these positions of power elite lawyers propagated xenophobia. Auerbach states that, “The city and the immigrant frightened respectable, middle class, American-born professionals and business people.” (p. 20) Salient analysis is presented which describes the elite lawyers’ use of the Canons of Ethics as a means of social control of the deviants within the legal profession (i.e. Jews, Catholics and other immigrant class lawyers). (p. 43) With the additional weapons of higher educational standards and more stringent requirements for admission to the bar, an all-out effort was made to cleanse the bar of “undesirables.”

As the stratification of the legal profession began to take shape, it was the corporate lawyer who rose to its apex. The corporate lawyer class showed a propensity for asserting its clients’ interests as professional and national interests. The chapter entitled “Babbitry at the Bar” looks at the rise of the corporate lawyer—particularly during the 20’s. During this period working in private practice in the service of the business corporation became the aspiration of most lawyers.

The age of the “New Deal” opened new vistas for the class of lawyers who had been excluded from entering the corporate elite. Consequently, practice of administrative law by lawyers who supported the reform policies of President Franklin Roosevelt became a visible threat to the prerogatives and values of the professional elite. According to an ABA committee, administrative law was a “fifth column,” a “lurking omnipresence” imported by professors with alien continental ideas. (p. 191)

The birth of the National Lawyers’ Guild in 1937 offered another alternative to aspiring minority group lawyers and others who had been relegated to marginal status by restricted opportunities. Most of the Guild’s membership, which ranged from liberal to radical attorneys, could unite around the liberal issues of the day: the right of workers to organize, civil liberties and minority rights.

Auerbach gives significant insight into the problems which beset the Guild from the outset. As the Guild became more and more politicized it faced

increasing attacks from conservative elements of the legal community. The attacks led to dissension within the ranks as the tenuous liberal-radical alliances which had been formed during the 30's gave way to the "Red Scare" of the forties and fifties.

The chapter entitled "Cold War Conformity" is both highly informative and frightening. It is informative in that it cites important names, dates and legal cases that were intimately connected with America's Red purge. The chapter was frightening because it describes the extent to which reactionary hysteria was allowed to suppress the constitutional rights of United States citizens and to repress those lawyers, among others, who sought to defend those rights and those citizens. The Smith Act trial of 1949 in which five defense counsel were cited for contempt of court in the course of defending *accused* communists was but one example of how mass hysteria reached the hallowed halls of the courts, traditional home of impartial justice. Although the canons exhorted lawyers to defend clients "zealously within the bounds of the law" and despite the Sixth Amendment's guarantee of the defendant's right to counsel, during the Cold War it was the ABA leadership itself which led the charge to repress defendants' rights, as well as the rights of lawyers who defended political dissidents. Use of loyalty oaths, contempt citations, disbarment, exclusion and other more subtle forms of coercion were urged by the high officials of the ABA. Fortunately, many state and local bar associations refused to accept such tactics. As the legal repression of the fifties increased, the pool of lawyers willing to defend unpopular defendants decreased significantly—conformity was the order of the day. Auerbach cites the example of an accused Communist who was denied counsel by over one hundred fifty attorneys nationwide. He finally was forced to defend himself. This surely was a travesty of justice.

As the National Lawyers' Guild began to promote the idea of the need to develop a means to deliver adequate legal skills and services on the basis of need and not ability to pay, it too suffered the extralegal attacks of the Red purge. Guild attorneys urged the appropriation of public funds for legal services for those who could not afford the fees charged by private attorneys. The elite lawyers denounced the Guild proposals as socialistic and led an effort to destroy the Guild as an effective professional organization. Elite lawyers defended the maintenance of a laissez-faire legal system as in the public interest, even though two-thirds of the citizens of the United States were unable to afford legal services. Here it should be noted that *Unequal Justice* does a good job of posing the conflict created by defining the public interest in terms of private and professional self-interests which are narrowly construed so as to exclude masses of people. In retrospect the Guild proposals for the redistribution of legal services must be acknowledged as a progressive vision of the genuine public interest.

In the final chapter of *Unequal Justice* entitled "The Distribution of Legal Authority," Auerbach summarizes the traumatic experiences of the 60's and 70's. The Civil Rights and Black Power movements, the War on Poverty, the Vietnam War and the peace movement and finally Watergate each had an impact on the whole question of legal authority. Auerbach's thesis is that they served to break down legal authority by raising questions about the fairness of legal process. Auerbach states,

Watergate marked the final demolition of credence in legal authority. It revealed that law and order was a mask for illicit repression; that

those sworn to uphold the law had conspired to subvert it; that lawyers, including the chief law enforcement officers of the nation, were deeply implicated in lawlessness; that double standards of professional conduct protected the wealthy and powerful while destroying the promise and possibility of equal justice under the law. (p. 264)

As *Unequal Justice* shows, one positive result of the 60's was the emergence of a class of lawyers who began to question seriously the role of lawyers in society. These lawyers began to explore the contradiction inherent in a legal education which prepared skilled technicians to become "hired guns" for the highest bidder in a society where equal justice for all is the promise. Heretofore elite lawyers had used the legal fiction of the value-free attorney whose technical competence in conjunction with the adversary process would guarantee that justice would be adequately dispensed. In reality, as Auerbach documents, elite lawyers are not value-free; they are advocates for certain interests. The "new breed" of lawyers of the 60's and 70's have begun to define their legal careers not as value-free but as expressions of their commitment to specific values such as equal justice for all who need it but have been historically denied it. The Civil Rights movement and the War on Poverty exposed the need for lawyers to champion the interests of the poor and the dispossessed, and these perceived needs have significantly contributed to the growth of a class of "people's lawyers."

Unfortunately, as we move into the decade of the 80's, there are still some serious questions to be resolved relative to the legal community and its place in democratic society. Many of them relate to the monopolization of scarce legal resources by the ABA and ABA-approved schools. One such question concerns the inability of the legal profession to commit itself to raising the percentage of minority group and women lawyers. *Unequal Justice* cites figures which show that at most there is only a negligible number of blacks, Latinos and other minority group members entering the profession. The exclusionary practices of state bars have been challenged on numerous occasions in many state courts, but so far to little avail. Along these lines the *Defunis* and *Bakke* cases highlight increasing attacks on the right of minorities to equal access to scarce opportunities for legal education. Historically the elite lawyer has been allowed to define the public interest in such matters. Auerbach makes a compelling case for the conclusion that they have failed to administer impartially this trust.

In the end *Unequal Justice* is a significant contribution to the history of the legal profession. Its strengths are that it is not an idiosyncratic approach to the subject. Auerbach portrays the legal profession as developing in a social context which extends significantly beyond the casebook. Because he is not a lawyer he has been able to be more objectively critical of a profession which has all too often been subject only to self-control and self-criticism. His criticisms merit careful reflection, particularly by all those who aspire to join one day the legal profession. The early sections of the book are possibly the weakest because Auerbach spends a number of pages analyzing what he calls the formative stages of the legal profession (i.e. 1905-1925). These early sections do, however, provide good background material. The chapter entitled "Scientific Expertise: The Triumph of the New Professoriat" is an informative analysis of the rise of law school teachers into the elite lawyer class and should be interesting for all law students. *Unequal Justice* should be required reading for all legal ethics classes, and it is important reading for law students, law teachers, practitioners,

and anyone else interested in a candid but objective view of the legal profession, particularly the impact of elite lawyers on our legal system.