Saint Mary's University of San Antonio

From the SelectedWorks of David Dittfurth

Dittfurth_UnequalJustice.pdf

David Dittfurth, *Saint Mary's University of San Antonio*

Available at: https://works.bepress.com/david-dittfurth/2/

bepress™

HEINONLINE

Citation: 9 St. Mary's L.J. 174 1977-1978

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Thu Apr 21 12:12:54 2016

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0581-3441

BOOK REVIEW

UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA. By Jerold S. Auerbach.[1] New York: Oxford University Press, 1976. Pp. xiii, 359. $13.95.

Reviewed by David A. Dittfurth[2]

In *Unequal Justice* Jerold S. Auerbach attempts to prove that the legal profession has failed to adequately pursue what is ostensibly a central goal of our legal system — equality of justice. He finds little evidence that the legal profession or its dominant factions have made an adequate effort to assure the provision of legal services according to need. On the contrary, most of the historical evidence presented in this book leads one to believe that the legal profession has accepted profit as its real goal.

The author details the growth of large law firms, which developed to serve the legal needs of large corporations and wealthy individuals. Because of their organization, wealth, and the advantages provided by this wealth, these firms were able to achieve the status of an elite within the profession by promoting the notion, already accepted with regard to businessmen, that the worth of a lawyer was to be determined by his level of income. Law schools, anxious to point to their well-employed and "elite" graduates, reacted by adjusting legal education to focus primarily on the legal problems encountered by the monied segment of society. In assuming elite status the large law firms also took control of the American Bar Association and, as spokesmen for the profession and through their influence over legal education, were able to institutionalize their rationalizations for choosing wealthy, rather than needy, clients. Equality was presumably satisfied because everyone had the ability to be heard in court, and justice was satisfied if established procedures were followed in the litigation. In this way, the author reasons, the function of the adversary process was distorted so that lawyers came to view it as a mechanism that assured equality of justice.

If these were the prevailing attitudes, then lawyers could avoid dealing with the moral or social implications of their choice of clients. One simply assumed that institutional processes maintain justice, and this assumption removed all considerations but profit from the determination of career

1. Professor of History, Wellesley College.

2. Associate Professor, St. Mary's University School of Law, B.A., 1965, J.D., 1967, LL.M., 1973, University of Texas.

choices. Acceptance of this rationalization process, as Mr. Auerbach sees it, caused lawyers to become the "hired guns" of popular folklore, serving anyone who is willing to pay their price.

Notwithstanding these rather unsavory observations, the author recognizes that the legal profession is essentially a reflection of the society of which it is a part. He contends, however, that the legal profession cannot rest on this fact since it is responsible for formulating and applying law in a very legalistic society. Because of this important societal function, the legal profession must stand ready to resist periodic popular movements, such as "McCarthyism," that are bent upon depriving "unpopular" citizens of their legal rights. Lawyers must also be ready to work for the realization of constitutional principles when society is ignoring or refusing to act upon existing deprivations, such as the civil rights movement of the sixties. The historical episodes in *Unequal Justice* are presented to emphasize the failure of the legal profession to fulfill these responsibilities in the twentieth century.

In the latter part of the book Mr. Auerbach focuses on those legal scholars who criticized the activism of the United States Supreme Court under Chief Justice Earl Warren. These scholars were concerned that rapid change in law effected by the Supreme Court might undermine the respect for its decisions and perhaps disturb the balance of powers between the branches of the federal government. In essence Mr. Auerbach sees their arguments as little more than theoretical rationalizations for the contrived legalisms which kept minorities and minority viewpoints from a fair hearing. He insists upon correction of law so as to rapidly provide justice for minority groups. Mr. Auerbach assumes that his liberal view of justice is the only valid one and that the main hindrance to its immediate realization in law is the legalistic emphasis on "neutral" standards which masks a conservative preference for the *status quo*. This assumption causes a serious weakness of the book, for Mr. Auerbach fails to recognize at least two legitimate problems impeding legal change.[3]

First, few would argue that, as a general proposition, minorities should not receive justice; however, courts do not enjoy the luxury of simply deciding in favor of the "good guys" and against the "bad guys." Even Justice William O. Douglas, a forceful liberal activist while on the Supreme Court, observed that "the eternal problem of the law is one of making accomodations between conflicting interests."[4] Restrictions upon the power of the federal judiciary arising from the demands of separation of powers confine the federal judiciary to the determination of conflicts

3. Although he has not made any distinction between the different law makers, his contentions relate primarily to the making or changing of law by federal courts, especially the United States Supreme Court.

4. Estin v. Estin, 334 U.S. 541, 545 (1948).

between litigants who assert personalized, mundane interests.[5] If broad policy issues are implicated, they are decided in light of, and indirectly through, these more ordinary human conflicts. Also, a litigant who carries his contest all the way to the Supreme Court will rarely have the audacity to arrive without a valid general principle supporting the justness of his cause. The Court, therefore, does not choose in favor of principle but must choose between principles, each of which would legitimately serve as a definition of justice in the abstract. In seeking justice, the Court is compelled to accomodate these principles primarily because of the ideal of providing justice for everyone. "Justice" cannot be provided to society at large by choosing a favored group; but if there is a bias, it should at least be toward the majority's perception of justice. If a change in the law is involved in a Supreme Court decision, it will tend to represent incremental rather than fundamental change and a shift in priority as to principles rather than the choice of one and the total disavowal of the other.[6]

Secondly, the emphasis on "neutral" standards relates primarily to the requirement that courts justify their decisions through the reasoned use of judicially accepted rules of law. By compelling a judge to use these established precepts, in his justification if not in his decision making, society is assured some minimum level of stability and predictability of law, as well as some minimum protection from judicial arbitrariness. Such control is necessary since federal judges are not subject to direct control by the electorate.[7]

It is true that courts, especially the Supreme Court, do often change law with the policy consequences in mind. To an extent this is acceptable since legal precedents are always susceptible of differing interpretations and a change of conditions may have clearly robbed a precedent of its legal justification.[8] The problem with expecting a court to effect fundamental change is that the obligatory reliance upon precedent, and the accepted use of it, tends also to circumscribe legally acceptable reasoning. To the extent an interest has not previously been considered by courts, the assertion of that interest in court will be without "reasoned" justification and judges will tend to view that interest as untenable or even absurd. This

5. This is a reference to the requirement that a litigant have "standing to sue" before federal courts may exercise judicial power over the case.

6. As an example, the Supreme Court, through a rather ingenious system, accommodated the interest of a pregnant female in choosing to have a physician-performed abortion and the interest of a state in protecting maternal and fetal life. Roe v. Wade, 410 U.S. 113 (1973).

7. Federal judges are appointed for life and their compensation may not be diminished during their continuance in office. U.S. CONST. art. III, § 1.

8. This flexibility arises from the case by case method of judicial decision making. Even though rules established in prior cases are to be used, these rules must constantly be reexamined and reinterpreted in light of new cases which are not ordinarily brought to trial and appeal unless they involve some difference in facts or in the perception of relevant facts from prior cases.

reaction, however, is not unique to the law. What, for instance, would have been the reaction of the majority of people during the Second World War to a decision by the Supreme Court that men could not constitutionally be drafted into the army unless women were also drafted? Prior to the women's movement and the extensive social consideration of equality of rights and obligations between the sexes, this announcement would have been greeted not only by disagreement but by shock at its "absurdity"; and more importantly, the decision may well have been ignored.[9] An examination of this problem with new viewpoints might have led the author to provide better advice for those who are interested in changing law. Since judges, like people in general, operate primarily on the basis of common experience and awareness, they must be made aware of new issues and new reasoning that arises outside of their experience. For instance, few judges are nonwhite or female, and therefore they tend to have less experience with and sympathy for the special needs and concerns of these groups. Social action movements have in recent times provided the needed awareness of the difficulties of racial groups, women, and even the environment. As these new viewpoints became understood and more acceptable, both social and legal change resulted. It must be stressed that this is a process of acceptance and change, and the courts can only be a part of the process.

Mr. Auerbach would have judges making direct value choices without resort to legalisms, but in assuming that justice can be interpreted only in his way he does not consider that most judges might be conservative and that their unfettered value choices would be unacceptable to him. A permanent change of perspective by the judiciary as to any group will occur only when members of that group are placed by political appointment on the bench. He is correct in insisting that for equal justice persons without funds must be provided representation and that members of minorities must be allowed into the profession. He is wrong, however, to the extent he argues that the law must relax its adherence to the pursuit of neutral standards. Neutrality in decision making is an ideal, not a status, and encompasses a pursuit of a broader perspective and understanding of the just accomodation of conflicting interests. The standards are constantly modified and changed reflecting this pursuit. Since little in the law is completely black or white, there can be divergence from this orderly process in exceptional circumstances, but the exception does not invalidate

9. The Constitution confers upon the popularly elected members of Congress the power to directly make broad policy decisions by enacting legislation. Congress also possesses the taxing and spending power necessary to implement its decisions. The federal judiciary operates without taxing or direct enforcement powers (held by the executive) and so must depend to a greater extent upon respect for its decisions by the other branches so that they will cooperate in implementing or abiding by those decisions. Herein lies the reason that the Surpeme Court is hesitant to directly make broad policy decisions — such action is likely to be viewed by Congress as usurpation of its powers.

the rule—it only shows that the rule is a product of imperfect human beings. Whatever may be the imperfections in the adherence to neutral standards, this obligation stands as the only force in law, independent of popular opinion, toward clarification and realization of equal justice through the courts.