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Review of Justice without Law?

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Justice Without Law?
By Jerold S. Auerbach.

Oxford University Press. $16.95. 182 pages.

Reviewed by Whitmore Gray, professor, University of Michigan Law School and member, Arbitration Committee, A.B.A. Section of Litigation.

The title of this book refers to the striving of communities of various types in different circumstances to develop "patterns of conflict resolution that reflected their common striving for social harmony beyond individual conflict, for justice without law." The author wants to document what he calls the search through three and a half centuries of American history for "justice beyond law, without lawyers or courts."

Readers familiar with Auerbach's earlier book, *Unequal Justice* (62 A.B.A.J. 838 (1976)), will correctly assume that this is not a sympathetic view of the influence of bar and bench on the development of alternatives to litigation. Auerbach laments that their influence has led to "legalization" of these alternatives, and he questions the motives of many of the reformers.

To a great extent the book represents one more addition to the substantial body of almost romantic writing by nonlawyers yearning for simpler justice in complex modern societies. From Engels on, many revolutionaries have looked forward to the day when society will be liberated from the grip of complex legal systems, but our experience belies this pattern of evolution. To take only the Soviet Union and China as examples, each of them, after a period of flirtation with "simple" justice—much longer in the case of China—has simply developed "new" institutions and substantive rules, recognizable to people familiar with pre- or nonrevolutionary legal sys-

tems. In our society, as in theirs, the proper task of reformers, to which scholars can certainly contribute, is to work out an optimum set of institutions, formal and informal, based on as much information as can be gathered about the disputes to be resolved and the techniques that might be used to resolve them.

Auerbach thinks our culture is "so thoroughly legalized that it is difficult for Americans to imagine how any society could be otherwise organized and justified." While this is a little surprising in view of his extensive citation of the ample literature dealing with alternatives, his own interest, as an American historian, is to contribute to the lack of knowledge "of the patterns that American history may encourage, or foreclose."

The principal part of his brief book is devoted to anecdotal treatment of a variety of communities, ranging from the Pilgrim founding fathers, Dedham (a 17th-century Christian utopian community in Massachusetts), and the Quakers in Philadelphia to the followers of John Humphrey Noyes at Oneida (a 19th-century utopian commune), the Chinese in San Francisco, the Scandinavians in Minnesota, the urban Jewish communities, and businessmen in their chambers of commerce.

While he concludes that these communities "used identical processes because they shared a common commitment to the essence of communal existence: mutual access, responsibility, and trust," his text gives the impression of substantial variation in the means chosen. His survey, in fact, illustrates the opposite — namely, the wisdom of choosing a technique for resolving a dispute that is individually tailored to suit the community to which the disputants belong, and which will be most likely to implement their common standards. In this his evidence supports many of the current efforts in developing alternatives to formal litigation.

Serious readers will be disappointed by his impressionistic approach. Even with the help of encyclopedic footnotes, his presentation is too thin to support his conclusions. For example, in explaining the reasons behind the present attempts within and outside the organized bar to develop alternatives to litigation, his personal economic and political preferences lead him to conclude, "They may, in the end, create a two-track justice system that dispenses informal 'justice' to poor people with 'small' claims and 'minor' disputes, who cannot afford legal services, and who are denied access to courts. (Bar associations do not recommend that corporate law firms divert *their* clients to mediation . . .)." In fact, as persons familiar with the practice know, corporate counsel regularly steer their clients into alternatives, and even come up with imaginative innovations such as the minitrial.

The recurring theme of Auerbach's comments is that when the sense of

community is strong, internal resolution is preferable and possible. He observes that it is not only the ability to agree on procedures and to accept admonition from the group that is important, but that within the group there can be a resulting sense of "justice," based on shared fundamental beliefs and assumptions. He makes little contribution, however, to the provocative task suggested by his book, namely, how it might be possible to develop systems and substantive rules that could create this sense of justice in the heterogeneous society with which our legal system must deal.