Book reviews

UNEQUAL JUSTICE. LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA, by Jerold S. Auerbach, Oxford University Press, 1976, xiii + 395 pp. including index. Paperback. New Zealand price $5.75. Reviewed by Roger S. Clark.*

This is an angry book. Its aim is to evaluate the efforts of 'elite' lawyers to cope with the forces that have transformed social life in modern America — industrial capitalisation, urbanisation, immigration, war, economic depression and social ferment. It finds them totally lacking in ability or even in desire to deal with social change in a way that is consistent with the public interest.

Crucial to an understanding of the way in which Auerbach sees the legal profession is a grasp of his concept of a legal elite and of the way in which the American legal profession became stratified. As he sees it (and the facts are pretty hard to dispute), about the turn of the century the legal profession in the United States became highly stratified. "Corporate lawyers and university law teachers emerged . . . as self-appointed guardians of professional interests as they defined them . . . . A paramount objective of this elite was to structure the legal profession — its education, admission, ethics, discipline, and services — to serve certain political programmes at a time when social changes threatened the status and values of the groups to which elite lawyers belonged and whose interests they wished to protect".[1] There were various losers in this struggle. The categories are not, of course, mutually exclusive, but one might list immigrants, especially those who were not Anglo-Saxon Protestant, blacks, night law students, and women.[2] The winners were the corporate law firms dominated by white Anglo-Saxon Protestants, the "malefactors of great wealth" whom they served, and the established university schools of law like Harvard and Yale whose tuition fees and restrictive entrance requirements kept the tide of new lawyers relatively "pure".

Auerbach is not so naive as to see all of this in simple conspiratorial forms. The founders of the first large law firms were not deliberately setting out to subvert law and society or even to divert the seas of change. But they did capitalise on the social and economic forces that were transforming America.

As good an example as any Auerbach gives of the elite at work was its response to demands early in the century for a code of professional ethics. The canons of ethics produced by the organised bar were mostly influenced by corporate lawyers who were disproportionately represented in the councils of the bar. Struggling metropolitan practioners, often Italian and Jewish, without the connections necessary to obtain corporate clients, found their techniques of client procurement under close scrutiny. Canons relating to acquiring an interest in litigation, stirring litigation, contingency fees, and division of fees made it difficult for the newcomer

* Professor of Law, Rutgers University.

1. Page 4.

2. Women were not admitted to Harvard until after World War II.

who specialised in negligence work and relied upon client volume for economic survival. A Wall Street firm which represented Standard Oil did not need to advertise for clients, but the canons of ethics 'restricted' it from advertising, just as they restricted the solo negligence practitioner. Demands for greater ethical standards may have been made of large and small practitioners alike but it was the corporate lawyer who least felt the impact of the constraints he had devised.

The main challenge to the dominance of the elite came in response to the depression of the thirties and the later exigencies of war. Economic catastrophe momentarily weakened the grasp of the elite. An energetic regime in Washington opened new careers for ethnics who would otherwise have not made it into the influential ranks of the profession. New conceptions of professional obligation to the public and to the impoverished emerged. As I understand Auerbach's argument, this event was not as cataclysmic as it first appeared. The elite had simply agreed to share power a little more widely. Corporate clients still obtained the best legal services but the identity of the providers of those services changed somewhat. The young ethnics eventually left the government to use their expertise for New York and Washington corporate firms serving the industrial giants they had once regulated. It was business as usual during the Cold War when, "with few exceptions, professional leaders not only permitted, but encouraged, the sacrifice of the rights of politically unpopular lawyers and defendants to public (and professional) hysteria".[3] Similarly, he sees the widespread involvement of lawyers in the Watergate mess not as an aberration but as just another example of the chicanery and venality of the profession.

Auerbach's analysis accepts that there were further efforts to upset the traditional stratification of the profession in the 1960s. These efforts occurred in response to the pressures unleashed by the civil rights movement, the war on poverty, and the war in Vietnam. In particular, there was a new desire to defend the unpopular, to attack racism and sexism within and without the bar, and there were the efforts of the federal government's Office of Economic Opportunity to provide structured legal services for the poor. Most of these efforts seem to have fizzled out. Nixon did his best to dismantle the Office of Economic Opportunity, the best students are again heading for Wall Street, women as well as blacks and other minorities, like the American Indians, are still vastly under-represented in the profession. There is a backlash in the courts against affirmative action programmes.

It is all very depressing. Perhaps I have even understated how depressing it seems to Auerbach, for his last chapter is called "The Distintegration of Legal Authority". In it he argues that "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 . . . ."[4] Given this "disintegration", I found it a little difficult to know where Auerbach would have us go from there. I take it that he is not a complete pessimist, that presumably he hopes that we may start to build up confidence from the ground level. Indeed, in a brief "Afterword" he offers a prescription with a broad sweep of the pen

3. Page 7.
4. Page 264.

> If the practice of law is to become a public profession, not remain a private club, new values and voices are necessary. Justice should be defined not only by process but by product: is the result, measured by the interests of clients and the needs of society, fair? Legal services should exist by right to all citizens, not as a privilege to some. Substantial federal subsidies, supplemented by an excess profits tax on corporate law firms, can make this possible. But the prerequisite to reform is public regulation of the legal profession in the public interest. Otherwise, equal justice under law will remain subservient to unequal justice under lawyers.

I suppose that it is dangerous to criticise the author for the chapter he did not write but one might have hoped for a little more guidance than this from the historian who so confidently explains the past.

The author turns a nice phrase; he marshalls a mass of fascinating detail about the personalities, views, utterances and material success of the 20th century elite. The myth of the American melting pot is again shattered. At times the tone is too strident. The writer seems obsessed with ethnicity. The bad guys are too bad — I kept thinking of the wicked Simon of Legree of *The King and I*. In spite of this, it is a very unsettling book and one that deserves a wide audience for that reason alone. It is a fine correction to the smug mouthings of Bar Presidents on ceremonal occasions.

One wonders what a similar study of the New Zealand profession would turn up. New Zealand lawyers, of course, have a much more minor role in the body politic than do their American counterparts, but one suspects that they have made plenty of their own efforts to retard social change. Has the New Zealand profession discriminated against Catholics and Jews as it surely has against women? How many women, Catholics and Jews have made it in the big firms and on the bench? Why are there so few Maori practitioners? What has been the effect on the profession of the universities moving from predominantly part-time to predominantly full-time legal education? (Of course the minimal cost of a New Zealand university education, compared with one in the United States, needs to be considered in this context.) What stratification of the profession is represented by the large Auckland and Wellington firms? What has been the effect on New Zealand justice of the profession's resistance to the provision of a decent system of legal representation for the Pacific immigrants and other urban poor? Do the New Zealand rules of ethics bear down more severely on certain parts of the profession than others? The New Zealand profession awaits it Auerbach.

GOING TO COURT — a guide to practical litigation, by Michael Rosser, Law Foundation of New South Wales, 1976, vi and 97 pp. including notes, references and index. Reviewed by C. G. Pottinger.*

Mr Rosser's book is designed essentially for the student or newly qualified lawyer as a practical guide to civil litigation. It is concise, clearly written and well annotated. Starting with a discussion on the objective of litigation, it outlines the practical steps in taking a case to court and the role of the solicitor in advising the client, preparing the case and seeing the matter through to a conclusion. The author has been trained in England and is writing for Australian students. In New Zealand, where personal injury cases are a thing of the past and where the strict separation of the professions of barrister and solicitor is not known, despite the development of a separate bar, some of the material has little or no practical application. Despite this the book is of value particularly in outlining the responsibility of a solicitor in advising his client on costs and on settlement of actions before trial. Down-to-earth advice is given on making notes of interviews and telephone calls during the course of a claim being brought, advice that is easily forgotten by those in practice. This particular chapter also deals with letters to the client and other solicitors and emphasises the need for clarity in all communications coupled with politeness and firmness. The later chapters discuss arbitrations, advocacy and professional negligence.

The book does not aim to be a treatise — thank goodness. Its aim is modest and it succeeds in that aim. Until a similar work is produced for our particular situation in New Zealand, it will serve as a useful practical introduction to be read, marked and learnt by all intending to enter practice.

* Lecturer in Office and Courtroom Practice.