Justice Without Law? Resolving Disputes Without Lawyers, by Jerold S. Auerbach, New York: Oxford University Press, 1983. Pp. *xvi*, 182. $11.25 (paperback), $23.75 (hardcover)

'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth Century England, by H.W. Arthurs, Toronto: University of Toronto Press, 1985. Pp. *xvi*, 312. $30.00 (hardcover)

The similarities between these two books do not end with their titles. Both are what literary criticism refers to as mature works — a texture of biography and history in which the questions arise from the experience of time and place and are posed to their particular histories — not to find answers, as it turns out, but to understand the questions themselves. When Jerold Auerbach found that his concerns had no place in the law school of the late Fifties he left in dismay to pursue a career in history. Harry Arthurs, in law school about the same time, has also come to articulate his vital concerns through the medium of legal history. Auerbach tells us in his first influential book, *Unequal Justice* that "Never was there a whisper of a suggestion in law school that law related to choice, to history, to society, to justice."[1] It is now a whisper in most law schools, even in first year. The outcry of the Sixties, even though muted by the false starts and lost battles of the Seventies, which have led to a considerable amount of doubt and confusion in the Eighties, has not gone away. And the old certainties have not returned, to the dismay of students who look for certitude rather than questions. But the truce between the *crie de coeur* and the *trahison des clercs* is now uneasy and brittle.

Both books under review help us understand why this is so. They are a part and — to a great extent — a distillation of recent work relating law "to choice, to history, to society, to justice". And this work has not only developed within the confines of the law school — to which law had indeed been confined — but increasingly in other disciplines, such as history, the social sciences and philosophy. There was, of course, a legal history before but it had largely come to serve the legitimation needs of law with little regard for history. Thus it was of little interest even to lawyers except when they preached the age-old verities of the common law, most of which turn out to be of rather recent vintage in a critical historical perspective. Of course, society has always been taken seriously by law (or it could not persist as an institution); but law had for some time found it unnecessary to give a critical account of its relationship to and workings in society. Even legal realism was largely a realism of legal practices (Law is what the courts do) rather than a social realism (We don't know what the courts do because their account ends with the judgment and not its effects). Law has always prided itself on dispensing justice, which has come to mean conformity with law (due process) and thus largely circular and self-serving: *Justitia, Officium, Patria* — end of explanation.

[1](London: Oxford University Press, 1976) *viii*.

Much of the new critical legal scholarship (and other scholarship which takes law seriously and is taken seriously at least by some legal scholars) turns the basic assumptions to which Auerbach and Arthurs were exposed in the Fifties upside down. Choice, long held at bay by determinism, was re-discovered in the basic indeterminism of the legal process. But it did not have a pretty face; it was the face of power. History became a means of de-legitimizing the autonomy and sanctity of the law. It emerged as a species of politics in the context of society. Justice could not be turned upside down because it had lost its head as well as its feet. It had to be re-assembled as social justice, economic justice, distributive justice, fundamental rights and freedoms and so on. The battle still rages; the battle lines keep changing. Justice is a notion which cannot find coherent expression outside of ideology, be it religious or political.

Neither Auerbach nor Arthurs takes a doctrinaire position. They are hard to place in terms of the shibboleths of contemporary intellectural discourse. Rather, they use and express the constituent parts of contemporary discourse in terms of their search and on the basis of the historical materials they have gathered. Auerbach, the would-be civil rights lawyer of the Sixties who sees unequal justice in law and would rather do without law and lawyers, discovers in his historical materials that it is not just law and lawyers who betray a deeper notion of justice but indigenous forces in culture:

> For law to be less conspicuous Americans would have to moderate their expansive freedom to compete, to acquire, and to possess, while simultaneously elevating shared responsibilities above individual rights. That is an unlikely prospect unless Americans become, in effect, un-American.[2]

And he adds what must be for some a reactionary note: "Until then, the pursuit of justice without law does incalculable harm to the prospect of equal justice".[3] One is reminded of E.P. Thompson's reflections on the rule of law at the conclusion of *Whigs and Hunters*[4]. How does a Marxist historian or a liberal historian in search of social justice, after exposing the sorry performance of law, come to such conclusions? Not without qualifications for sure. Says Auerbach:

> The rule of law usually inspires celebration, not lamentation, especially among the rulers. Their doubts should remind us that while there is much to celebrate in the rule of law, law remains a terrifying, no less than an inspiring, symbol in the twentieth century. Conjoined with bureaucracy and state, it has demonstrated limitless capacity for evil.[5]

And he concludes by reminding us of Kafka's parable "Before the Law" ("[Kafka] was, after all, trained in the law").[6] Thompson is even less equivocal: "But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all intrusive claims

[2] J.S. Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers* (London: Oxford University Press, 1983) 146.

[3] *Id.*

[4] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon, 1975) 258 *et seq.*

[5] *Supra*, footnote 2 at 146.

[6] *Ibid.*, at 147.

seem to me to be an unqualified human good."[7] Even the most conservative lawyer can live with that.

Arthurs re-states the problem right in his title: *Without the Law*.[8] The important word is the definite article, which makes his title an answer to Auerbach's question. He shows that although it is unsafe to leave legal history in the hands of lawyers, it is equally unsafe to leave it in the hands of historians. They are engaged in historical analysis, but it is analysis of the effects of law rather than analysis of the changing conceptual structure of the law itself. It should not surprise us that Thompson finds — from the perspective of advanced Marxism — not only that law has indeed been part of the superstructure, an instrument of the ruling class, but also that its rejection may leave us with uncontrolled arbitrary power. It is also not surprising that Auerbach, who is dismayed by law's silence concerning civil liberties and social justice in the Fifties, should go to history to find forms of justice outside the law and come back with serious reservations. Arthurs, the lawyer, on the other hand, starts with a problem within the conceptual structure of law. As the historian uses the accounts of legal actors and institutions to shed light on the historial process, Arthurs goes to history for insight into the nature and definition of the legal process:

> I suppose I began writing this book in my first week as a law student, during a class in contracts. I could not understand why an arbitrator's award should be set aside by a court because it was based on a perfectly practical trade custom rather than on an unworkable rule of contract law.[9]

Between this beginning and the present book there is a body of legal work in labour, administrative and commercial law, the legal process, and the legal profession. A structural and institutional analysis of legal education is largely contained in the report on *Law and Learning*.[10] The conceptual analysis is largely contained in the book under review.

In "Rethinking Administrative Law: A Slightly Dicey Business", Arthurs illustrates his quest succinctly by starting with a quotation from Lord Hewart: "Between the 'Rule of Law' and what is called 'administrative law' (happily there is no English name for it) there is the sharpest possible contrast. One is substantially the opposite of the other."[11] We have no trouble today capitalizing Administrative Law and recognizing it as a province in the realm of law. Arthurs shows in his book that this shift has not just taken place since 1929 when Lord Hewart wrote what he tellingly called "The New Despotism". He demonstrates convincingly that the "Rule of Law" too can be seen as a new despotism, or as he quipped — "A Dicey Business". He begins the book with a quotation from William Hutton, Court of Requests 1787: "If the Commis-

[7] *Supra*, footnote 4 at 266.

[8] H.W. Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985).

[9] *Ibid.*, at *ix*.

[10] Can., *Law to the Social Sciences and Humanities Research Council (Arthurs' Report)* (Ottawa: Queen's Printer, 1983).

[11] (1979), 17 *Osgoode Hall L.J.* 1.

sioners cannot decide *against* the law, they can decide without it. Their oath binds them to proceed according to good conscience."[12] This logically leads into a discussion of what we mean by "law". In "Paradigms of Law" (Ch.1) Arthurs goes on to show that legal pluralism — the co-existence of different understandings of law, of different paradigms — was alive and well during the early part of the nineteenth century. He then examines the "Attack on Pluralism" (Ch.2) between 1830 and 1850. In spite of the rising despotism of the rule of law which had decimated the earlier "Courts of Local and Special Jurisdiction"[13], legal pluralism had in fact survived and was gaining new ground. Survival is demonstrated in "Commercial Relationships and Disputes" (Ch.3) and the new ground in "The New Administrative Technology" (Ch.4) and in "The Emergence of Administrative Law: The New Pluralism" (Ch.5). After reviewing these changes in "The English Legal System 1830-1870" (Ch.6), Arthurs returns to his initial questions concerning "Legal Pluralism and Administrative Law in Contemporary Perspective" (Ch.7).

The descriptive accounts which Arthurs draws from English sources and Auerbach from American ones are in many ways complementary. But because Auerbach's concept of law is a more static one, he ends up with a historical determinism. Arthurs, on the other hand, demonstrates the dynamic relationship between doing justice and *the* law, which amounts to a "struggle for law" as Jhering long ago called it. In the end Arthurs does not give us a blue-print for the future either: "It is difficult to speak of the prospects for administrative law, or pluralism in general, without becoming platitudinous."[14] But whereas Auerbach seems to have forgotten that law indeed relates to choice as well as to history, society and justice, Arthurs reminds us that the essense of choice is not just in what choices we make, but in what we make of our choices. Even Marx concedes that "Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past".[15] The province of jurisprudence is by no means determined by a set of commands as Austin had it — a conception which has isolated law from its living sources, its living relations and its lived expression. C.K. Allen told us:

> [I]t is still necessary for every student of jurisprudence to define his attitudes towards these conflicting views. In the one, the essence of law is that it is imposed upon society by a sovereign will. In the other, the essence of law is that it develops within society of its own vitality.[16]

The concept of law we have received is built on the former and tries to ignore the latter. Thus the efforts of critical legal scholars to disclose the indeterminacy of even the formal legal processes, and the efforts of Arthurs and

[12] *Supra*, footnote 8 at *v*.

[13] (1984), 5 *J. Leg. Hist.* 130.

[14] *Supra*, footnote 8 at 214.

[15] *The Eighteenth Brumaire of Louis Bonaparte*, para. 2.

[16] *Law in the Making*, 7th ed. (London: Oxford, 1964) 1.

others to make again visible and legitimate a legal pluralism which partakes in the vitality of society, are essential for the survival of law. Both Auerbach and Arthurs are refreshingly free of doctrinaire positions, jaded ideologies and short-lived theories which mar many new efforts. Even if Auerbach ends on a pessimistic note, his search provides startling insights (as do the tales of Kafka). Even if Arthurs appears to be less convinced about the future than he is convincing about the past, he invites us to think differently about law which touches our lives in the tension between the desire for justice and the hegemonic resistance of *the* law.

Looking at these two books and reflecting on what they have opened up for me, I wonder how one could get a wider audience to pay the kind of attention to them they deserve. Both are literary events. I had the opportunity to follow the gestation of Arthurs' work and to observe the infinite care expended on it, not only in terms of content but also in terms of form and expression. In preparing this review, I read Auerbach twice; the second reading was still a pleasure. Auerbach is available in soft-cover and has the enticing sub-title *Resolving Disputes Without Lawyers*, which may make it attractive not only to non-lawyers but also to lawyers who are increasingly involved in dispute resolution outside the formal process. Arthurs' book is available only in hard-cover and is of much wider importance than law books generally are. If we lived in a time in which law was other than either a narrow technical specialty or blatant mythology, a sub-title like *Administrative Justice and Legal Pluralism in Nineteenth Century England* would be of interest to the many rather than the few, inside as well as outside the profession, because persons who recognize themselves as members of a community or as citizens of a state would also be aware that they are legal persons — bearers of law in search of justice and bearers of justice in search of law — a responsibility which can never be delegated. It is not just a question of disputes arising daily in family, work-place, neighbourhood and particular communities, which only come to the attention of formal systems (legal *or* non-legal) when they are not attended to at an early stage. It is a question of "ad-ministering" (ministering to) justice in the plurality of human interactions which are particular and often peculiar because they are constituted by character and conscience rather than general principles. Even the lawyer's daily work does not consist primarily of litigation. It is preoccupied by ordering relations.

Arthurs gives many examples of human agency which administer justice according to good conscience. As we are living in an increasingly commercialized and administered world, he uses these two areas to show that even there indigenous law is constantly formed and formalized so that the formal legal system cannot ignore it without losing its business. Readers will find it stimulating to apply these examples to their particular area of interest. I have learned more about criminal justice and the family from his writing than from most devoted to the specific subject matter. It is a pity that Arthurs had to go to English sources to demonstrate what arose from his Canadian experience.

When one speaks of pluralism the particularity of historical experience becomes important. Auerbach, for example, is unashamedly ethnocentric. One can only hope that the state of Canadian legal historiography will soon

allow us to show both the similarities which can be taken for granted in the colonial experience and the differences upon which we can build. Without the kind of examination Auerbach and Arthurs give us — an examination replicated in terms of our own history — we will never be able to shake off our colonial attitudes towards natives, for example, simply because that was the English experience. It is in this sense and on these grounds that we have to extricate ourselves from *the* law to make legal relations possible, which signify justice in our lived relations.

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