Book Reviews

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BOOK REVIEWS


Peter Swire*

In this book, Professor Mashaw gives a careful account of the Disability Insurance (DI) program of the Social Security Administration (SSA). After discussing what justice can mean in a bureaucratic context, Mashaw describes three models for making just decisions: bureaucratic rationality, professional treatment, and moral judgment. Mashaw believes the bureaucratic rationality model is and should be the dominant one, and he explores its outlines in a process he calls "searching for the good within the constraints of the possible." Mashaw next compares the recent history of the DI program to this model of bureaucratic rationality. He describes this history in terms of the goals of accuracy, efficiency, and fairness of disability claims adjudication. For Mashaw, these goals not only describe the history of the program, but also provide norms against which to measure proposed changes. He finishes the book with an argument for implementing an "internal law" of SSA centered on the general policy of "cautious benevolence." This law would defend the three norms against the current corruption into objectivity, manageability, and stringency. Such an internal law would eliminate judicial review of DI cases, and would sharply limit the interference by Congress with the more managerial system which Mashaw advocates.

The disability program described in the book rivals the size, at least in number of adjudicators, of the combined judicial systems of the state and federal governments of the United States. Cases begin with decisions by state-employed claims examiners (1,250,000 per year), and proceed to reconsideration decisions at the state level (250,000 per year). Further appeal, at the claimant's discretion, leads to de novo hearings before SSA-employed Administrative Law Judges (ALJs, 150,000 per year), then to final administrative appeal before the Appeals Council.

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2. Id. at 18.
(25,000 per year). Finally, the claimant can appeal to the federal district courts (10,000 per year).\footnote{Id.} Mashaw has written on judicial review of SSA action,\footnote{Mashaw, The Management Side of Due Process, 59 Cornell L. Rev. 772 (1974).} and has led a study of the ALJ and Appeals Council levels.\footnote{J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verruill & M. Carrow, Social Security Hearings and Appeals (1978).} He now completes his lengthy investigation of the DI program with this book, which focuses on the initial levels of decisionmaking. The author's detailed experience with the DI program, combined with a clear yet subtle theoretical framework, makes the book unusually readable, believable, and thought-provoking.

A. Bureaucratic Justice

Throughout the book, Mashaw chooses his language painstakingly,\footnote{See Mashaw, supra note 1, at x, and his comments on the multiple "final revisions" of the text.} and nowhere does this show more than in his central definition of the "justice of an administrative system," that is, of bureaucratic justice: "those qualities of a decision process that provide arguments for the acceptability of its decisions."\footnote{Id. at 24.} In parsing this definition, it is helpful to look at each word and imagine what other terms Mashaw might have chosen instead. This part of the review examines Mashaw's attempt, in effect, to define his title, and thereby his book.

The definition employs ordinary English which any reader might use daily. In fact, throughout the book, Mashaw avoids the temptation to create Greek- or Latin-based jargon. This aspect of Mashaw's style not only communicates well to the reader, but also shows that the writer has understood his own words. For instance, in expanding upon his definition of justice, Mashaw names his three models of justice with words most readers have already encountered: bureaucratic rationality, professional treatment, and moral judgment. Each name goes far towards describing the actors and legitimating values typical of the model. Bureaucrats need a rational decisionmaking process in order to manage large organizations. Professionals, such as doctors, seek to take care of their clients' problems; judges try to find ways to fairly resolve value-conflicts.

These models, in Mashaw's view, compete within SSA. He finds essentially that the bureaucratic rationality model is and should be dominant because it alone can control costs effectively enough to make the program feasible.\footnote{Id. at 37.} Mashaw's task then becomes the description and de-
Bureaucratic Justice

sense of the model as applied to SSA. Bureaucratic rationality, for
Mashaw, follows the idea of bounded rationality developed notably by
March, Simon, and Lindblom. The goal of a just process is "accepta-

bility," not optimality, and in the excellent third chapter Mashaw
guides the reader towards a more "balanced idealism" which incorpo-

rates the limitations of instrumental rationality. He then demonstrates
his belief in the irreducible "qualities" of good decisionmaking, which
allow sensible talk about the importance of process values while simulta-

neously considering the costs of making decisions accurately, quickly,
and with low administrative costs.

A striking aspect of the author's definition of justice is the claim that
justice involves "providing arguments" for decisions. Justice, for
Mashaw, has no explicit link to the substance of the decision. The focus
is on the "decision process." Mashaw's concern with "providing argu-

ments" resembles the emphasis on "dialogue" in his former colleague
Bruce Ackerman's Social Justice in the Liberal State. The participants in
the two dialogues differ, however. Ackerman investigates the result
when an individual challenges the legitimacy of another individual's
power; Mashaw examines the challenge to institutions—it is the legiti-
macy of SSA's decisions which must be justified.

The definition of justice leaves one crucial matter unspecified: who
must "provide arguments" to whom in order to legitimate the process?
Mashaw never explicitly answers this question, and this failure consti-
tutes a notable limitation of the book. Without clearly saying so in the
text, Mashaw combines description with prescription in an attempt to
justify SSA to the reader. In adopting the model of bureaucratic ration-

ality, Mashaw takes on the guise of the impartial policy scientist inter-

ested in assuring program implementation. Mashaw imagines himself
an administrator concerned, as the book's subtitle states, with "Managing
Social Security Disability Claims." As I discuss below, this viewpoint generates several interesting suggestions for change, but it suffers
from too much discussion of SSA divorced from the context of politics,
the courts, and comparison with other agencies. As Mashaw at one
point observes, SSA increasingly cannot exist in an era of budget cuts as
an entity apart from the political world. In all fairness, Mashaw does
recognize links between SSA and the external world in some instances,
such as the conflicting loyalties of claims examiners both to their own

9. Id. at 51, n.1.
10. Id. at 78.
11. Id. at 79 et seq.
13. Mashaw, supra note 1, at 19.
state agency and to SSA.\textsuperscript{14} His managerial focus, however, leaves out much that a reader concerned with deciding on and achieving change in SSA would want to know.

\textbf{B. Judicial Review and the Need for Internal Law}

In looking for ways to effect his management changes, Mashaw first attacks the belief that improvement can result from tighter external control by the courts. He finds such control, and similar control by Congress, to have been largely "irrelevant" and "impertinent" and suggests several changes within the program for further study.

Mashaw makes a strong case for the elimination of judicial review of disability cases. According to Mashaw, judicial review can recognize the complexity and subtlety of the administrative system and exercise a restrained review having little or no statistical impact or precedential significance [irrelevance]; or it can wade in with the tools at its disposal, producing sometimes unanticipated and negative dynamic effects on quality, sometimes formal but insubstantial obedience, and sometimes a simple transformation of administrative into judicial process [impertinence].\textsuperscript{15}

Mashaw sees this impertinence as having led to a corruption of SSA's subtle balance of values. Partly as a result of such judicial meddling, the historical goal of accuracy has turned into objectivity, which fails to allow use of the considerable experience of administrators. Efficiency in the processing of claims has turned into manageability, which emphasizes the following of "correct" procedures even when they are inappropriate. Finally, fairness has turned into a preoccupation with stringency, which skews the carefully wrought balance between caution and benevolence. Together with the Congressional oversight discussed below, intensive judicial review of SSA claims (10,000 per year), and the many remands for further development of cases (about a third of those cases), have forced SSA toward more tamper-proof processes. The result is what I might call "defensive" claims adjudication, similar to the defensive medicine employed by malpractice-shy doctors. SSA increasingly relies on objective criteria, fostering our worst fears of impersonal bureaucracies.\textsuperscript{16}

Convinced of the limited ability of adjudicatory hearings to make accurate, efficient, and fair decisions, Mashaw favors the complete elimination of both ALJ hearings and judicial review of disability cases. He

\begin{itemize}
\item \textsuperscript{14} Id. at 161-63.
\item \textsuperscript{15} Id. at 189.
\item \textsuperscript{16} Mashaw makes the interesting aside that Kafka worked in a disability administration before writing THE TRIAL'S description of bureaucracy gone amuk, Id. at 91, n.9.
\end{itemize}
Bureaucratic Justice

makes two types of suggestion for internal reform, both coupled with the insistence on careful testing characteristic of his systems management perspective. Mashaw's worry is that "systematic rationality may play out a progressive logic of control and objectivity that satisfies the Nietzschean definition of the ultimate stupidity—forgetting what it is we were trying to do." His answer to that logic of bureaucratic control is the creation of counterforces in the form of: (a) claimant interviews at the reconsideration stage, and (b) representation at that stage by government employees similar to the Veterans' Administration claims representatives. Testing of the proposal would include careful attention to: (1) the accuracy of the decisions, that is, the truth or falsity of the claim to disability; and (2) the claimants' perceptions of the fairness of the process. These reconsideration decisions apparently would be final, thus eliminating the delay and expense of the higher levels of appeal.

The SSA administration recommended nationwide interviews at the reconsideration stage in 1976, but the idea never succeeded in the Department of Health and Human Services. Mashaw has high hopes for his reconsideration proposals, believing they would improve upon both the traditional adversary process model and the existing model of bureaucratic rationality. From his account, the proposals appear plausible, and should be tested.

The same cannot as easily be said for what Mashaw calls his "more radical proposals" for internal reform, namely, examination by two or three doctor panels, and examination by groups of up to six multidisciplinary professionals. In this era of stringency it is difficult to imagine that even encouraging tests of these proposals would result in change. Mashaw himself speaks earlier in the book of the strong tendency toward runaway costs that comes with programs dominated by professional treatment instead of bureaucratic rationality.

In order to help "provide arguments" for his reconsideration or other similar proposals for internal law, Mashaw concludes the book with a brief description of a "superbureau" which would fill the symbolic and functional gap left by the removal of judicial review. The superbureau would both oversee SSA's implementation of its legislative mandate, and provide "a symbol of ideal administration" in order to help us accept the absence of the imposing, black-robed symbolism of the courts.

17. Mashaw, supra note 1, at 198.
18. Id. at 200.
19. Id. at 202.
20. Id. at 37.
21. Id. at 226-7.
Even should he come up with some way to make the superbureau administratively workable, Mashaw would still have to face the grave political difficulty of forming a centralized, powerful bureau in today's world of the New Federalism and continuing distrust of "those people in Washington." Many people of differing political persuasions do not share Mashaw's faith in his symbol of ideal administration.

In his discussions of the superbureau and the reconsideration proposals Mashaw views SSA from an internal perspective. He offers no account of the politics of changing SSA or other agencies, and he does not explain how his proposed changes would help meet the needs of important external actors, particularly the Congress. Drastic redesign of the disability claims process and creation of a superbureau would require strong Congressional backing. But Mashaw does not even mention how his proposed process would affect the widespread Congressional support for the program. After all, such support is very likely tied to the ability of Congress to take credit for the voluminous SSA casework. Nor does he explore how banishment from the single largest administrative program would affect either the status of the other agencies' ALJs or the status of judicial review of those agencies. It is important to keep in mind that internal reform seldom remains internal.

C. The Democratic Connection

Mashaw does have a few favorable things to say about Congressional attempts to reform SSA. He credits the continual oversight of the last decade with hastening the trend toward effective SSA management, and he praises the controversial "grid regulations" which have answered Congressional prodding for speedier and more objective claims examinations (though he does condition this finding upon the need for SSA to individualize treatment fairly frequently under those regulations). This part of the review argues, however, that he substantially underrates the continued importance of this democratic connection to society.

Mashaw has harsh words for recent Congressional initiatives: "In addition to being insensitive to the complex goals and subtle dynamics of the disability program, these initiatives may only deflect costs into different governmental units and into different time periods." In as-

22. Id. at 172-73.
24. MASHAW, supra note 1, at 224. As an example, he gives a convincing explanation of how Congressional insistence on high termination rates on Continuing Disability Investigat-
Bureaucratic Justice

sessen this remark, the reader must appreciate Mashaw’s tendency to combine positive and normative claims. In his preface, Mashaw mentions his hope “to integrate the normative concerns of administrative law with the positive concerns of organizational theory.”25 Mashaw attempts this integration, and the reader must be alert to the implications of that approach. When Mashaw writes about his preferred goals of accuracy, efficiency, and fairness, he describes how the SSA system has historically defined itself. At the same time, he asserts that those three goals are normatively correct. As external action pushes toward objectivity, manageability, and stringency, Mashaw attempts to document how the apparent savings are merely shifted to other times or other agencies. But he also wants the reader to share his vision of a successful, internal law. For Mashaw, a certain dose of the newer values is important, but a SSA freed from constant external control can better make the sorts of judgment we actually want.

Mashaw would attack the recent Congressional initiatives even if they turned out, all things considered, to save money. He argues: “[W]e should be concerned that the system may be becoming too manageable. A loss of perspective at the top might rather too quickly reshape examiner behavior. The value complexity that results from an internal competition among visions of justice might be in danger of being lost.”26 Even a burning Congressional desire and ability to save money does not answer such criticism. Mashaw here moves beyond mere description. Accuracy—the telling of true from false claims (and whose “truth” is applied?)—becomes an ideal to strive for, even against explicit Congressional urgings of stringency.

Mashaw loses a good deal of his persuasiveness when he continues past his careful description of the system into this normative realm. The internal law of SSA that Mashaw proposes would lack any tie to the familiar democratic symbols of legitimacy. Further, that internal law would lack any effective check on its power. Mashaw has a lot more talking to do before he can convince me to abandon so completely our tradition of checks and balances.

It is important to see that the Congress Mashaw would limit has actually been quite effective in its oversight of SSA. Oversight by the Subcommittee on Social Security of the House Ways and Means Committee

25. Id. at ix.
26. Id. at 221.
has been intense. Individual Congressional staffs have developed considerable knowledge of the agency through their constant DI program casework. By Mashaw’s own account, Congress has forced many of the improvements in management of the last decade.

Limiting this Congressional oversight runs the risk of fraying too much the democratic connection of SSA to the rest of society. The surge of social welfare programs which peaked during Johnson’s Great Society led to the birth and growth of the DI program. The past decade has seen a substantial retrenchment of such programs. The current emphasis on stringency may be part of a long-term change in societal attitudes toward the DI program. Even if Mashaw could assure us of adequate internal checks on the arbitrary use of power, and of the impertinence of current Congressional oversight, he would still face a difficult task. To create his brand of internal law he would still have to convince us that Congress should not attempt to legislate even the broad swings in SSA policy. Congress sets the budget, and Congress is the only connection left (assuming the cut-off of judicial review) to the changing views of non-SSA actors. If Congress wants stringency, it will require more of an argument than Mashaw has provided to show us why SSA should instead pursue accuracy.

D. Conclusion

The criticisms made above should not divert the reader’s attention from the many virtues of the book. Mashaw shows a great sensitivity to the difficulties of balancing competing world views, and their accompanying values, within a bureaucracy sharply constrained by costs. He familiarizes the reader with the practical workings and theoretical challenges of a dauntingly complex system, and does so without lapsing into jargon or needless details.

Earlier, I asked the question: “Who must provide arguments to whom in order to legitimate the process?” In adopting the perspective of an SSA administrator, Mashaw himself attempts to legitimate the process, with which he is in broad accord, to each reader.

Who ought those readers be? I can imagine several audiences who would benefit from the book. The clear language makes the book suitable for an undergraduate class. At the same time, Mashaw maintains a sophistication which will well serve professional students of subjects such as administrative law, political science, and the sociology of large organizations. The book sensitively traces for people within SSA the competing tendencies toward accuracy and stringency which increasingly characterize the agency. Finally, the book will inform all readers, in-
Bureaucratic Justice

cluding members of Congress and their staffs, of the difficulty yet possibility of achieving pertinent democratic oversight of the massive DI program. While the program may not fulfill Mashaw’s hope of creating an ideal symbol of administration, the book goes far toward showing the reader how well SSA has indeed managed its difficult task of searching for the good within the constraints of the possible.
Jerold S. Auerbach does not like the law and distrusts lawyers, a pair of prejudices not unknown to our society and not entirely debilitating for the student of alternative methods of dispute settlement. In the preface to *Justice Without Law?* the law is dismissed as being more likely to sustain domination than to equalize power.\(^1\) It is also characterized as threatening, inaccessible, and exorbitant for the least powerful members of society.\(^2\) As for lawyers, they tend to reinforce legal norms, thus blocking any effort to escape the law’s tortuous proceedings.\(^3\) And while lawyers practice a profession that is “astonishing” in its attractiveness as a career choice,\(^4\) they themselves turn out to be technicians for whom justice inheres in form and process rather than “substantive content.”\(^5\) A final characteristic of lawyers is the tenacity with which they resist the implementation of any new form of dispute settlement until they are assured a role in the revised system.\(^6\)

Despite the drawbacks to law and the limitations of lawyers, *Justice Without Law?* finds legal piety to be paramount in America. Law is our national religion; lawyers are our priesthood; the courtroom is our cathedral; and the analogy is concluded with a final turn of the screw: “In the twentieth century it is justice, the secular equivalent of salvation, that is sold for a fee.”\(^7\) Though Auerbach occasionally seems petty or personally motivated in his animosity towards lawyers and the law,\(^8\) his most basic premise is valid: our culture is so thoroughly linked to its legal institutions that we may have trouble imagining any other possible organization.\(^9\) The goal of *Justice Without Law?* is to discover whether any system other than the present one can handle our society’s disputes.
Justice Without Law?

Auerbach begins by arguing that various methods of non-legal dispute settlement have been utilized successfully at different moments in American history. He identifies the first such use as coming during the colonial period. Unfortunately, this experience with non-legal forms, while beneficial for each settlement involved, reveals itself to be inappropriate for modern America. Our nation’s roots are in the colonial era, but the current structure of our society belies its origin.

During the colonial era disputes were channeled into various institutions, many of which were removed from the reach of courts and lawyers. The Puritans of New England relied on a framework of communal dispute settlement made possible by their shared religious values. In this system, civil and religious authority were somewhat fused, and each church acted as a court for a wide variety of disputes, including not merely religious offenses but also commercial and property disputes. While church proceedings differed throughout the Puritan’s domain, typically the entire congregation participated in the reaching of a decision. This decision was enforced only by the sanctions of admonition and excommunication, but Auerbach considers these to have been adequate because church and community were virtually congruent for the Puritan and because the danger of expulsion was real.

Quakers resolved their disputes according to a procedure called the “Gospel Order,” which was based on the New Testament. If an individual attempt at persuasion of the other party to a dispute failed and if one or two other Quakers were unable to resolve the difference, the problem was arbitrated by impartial Quakers. In the case of a total refusal to accept arbitration, the monthly meeting of Friends could expel the stubborn troublemaker.

Arbitration was relied on by settlers tied together by bonds other than religion. In their ethnic enclave of New Netherland the Dutch established a nine man board of arbitration, comprised of elites alone, which resolved disputes whenever possible without recourse to the courts. In 1768 New York merchants, a community defined by a shared interest in trade, established America’s first private tribunal for the extra-judicial settlement of commercial disputes. Finally, communal land allocation
in Sudbury, Massachusetts expressed a commitment to the cooperative principles of English open-field farming which seems to have carried over to this region's decision to resolve disputes through discussion rather than adjudication.\textsuperscript{17}

Auerbach's survey of non-legal dispute settlement in colonial America indicates a historically-based countertradition to legalism in our country. Yet the colonial alternatives also serve to make the modern rule of law seem more rather than less attractive.

The colonial reliance on arbitration is illuminated by the discussion in \textit{Justice Without Law}? of Mrs. Hibbens, the refractory wife of a prominent Bostonian.\textsuperscript{18} In 1640 Mrs. Hibbens objected to both the initial fee a carpenter charged her for work and the revised fee set by a pair of arbitrators. The influence of church elders could not convince her to accept the revised fee, and when a second arbitration attempt failed the dispute moved into the First Church of Boston. Here the discussion centered not on the appropriate amount due to the carpenter, but on the refusal of Mrs. Hibbens to respect the community and Christ. After two meetings in the church, held five months apart, a decision was made in favor of full excommunication.

The treatment of Mrs. Hibbens is not very convincing proof of the value of the Puritan method of dispute settlement. From a modern perspective the shortcomings of this system are the harshness and unfitness of the penalty imposed and the institutional rigidity caused by a limited range of sanctions. Indeed the full story is worse than first appears. Such is his zeal for the colonial use of consensual decision-making that Auerbach neglects to tell the ultimate fate of Mrs. Hibbens: two years after the death of her politically influential husband, in 1656, Mrs. Hibbens was indicted and convicted of the charge of witchcraft. This time the alternative method of dispute settlement decided on a sentence of death.\textsuperscript{19}

Even if we suspend any lurking twentieth century biases and admit the merit of the colonial system for those able to benefit from it, this option remains unsuitable for present-day America. Auerbach admits as much. The colonial societies he surveys opposed conflict or individual deviance because these were forces which might threaten a settlement.\textsuperscript{20} Hence, Mrs. Hibbens' greatest fault was not her refusal to honor a debt but the way her individual, adversarial attitude was out of

\textsuperscript{17} \textit{Id}. at 26.
\textsuperscript{18} See \textit{id}. at 23-24. Auerbach's source is \textbf{JOHN DEMOS, REMARKABLE PROVIDENCES:} 1600-1760, 221-239 (1972).
\textsuperscript{19} \textbf{DEMOS}, supra note 18, at 221.
\textsuperscript{20} \textbf{AUERBACH}, supra note 1, at 20.
Justice Without Law?

place in a society based on communal values.\textsuperscript{21} In our society, individual rights and individual pursuit of wealth are enthroned; and perhaps the most valuable point of *Justice Without Law?* is that community-centered arbitration and consensually-derived justice have an inherently uneasy place in such a world. Lawyers, although a tempting target for blame, are the creatures and not the creators of an order which uses litigation to insure a degree of stability amid what Auerbach has elsewhere termed, “the expansive freedom to compete, acquire, retain and bequeath.”\textsuperscript{22}

In a sense then arbitration was an easy choice for colonial societies because they were able to rely on a set of shared values missing today. Even New York merchants shared a sense of purpose two and a half centuries ago! Having overestimated the difficulty of the colonial choice, Auerbach goes on to misunderstand the nature of the present reliance on law. He confuses law with litigation.

Since law is said to begin only where the community ends, justice is only possible without law when there is congruence between individuals and their community.\textsuperscript{23} Yet even in a community where all values are shared, a community where the meaning of justice is clear, there would be a need to use law—the systematic exercise of power to protect the most important values of society. The way Mrs. Hibbens ruffled Puritan feathers proves that the meaning of justice is never clear enough to every member of a community to make law unnecessary. So all communities are eventually forced to use law—if not litigation. Colonial cultures rejected formal adjudication or tried to limit it, but they did use arbitration and other devices to enforce their most cherished values. We rely on a law that depends upon litigation and we have discovered its limitation.

II

*Justice Without Litigation?* is a more precise title for Auerbach’s book. For litigation is what he confuses with law. And litigation is what he deems a less than satisfactory device because of his idealistic yearning for an America which cares more for community strength than for individual advantage.\textsuperscript{24} Yet the crowning irony of his book is his final advocacy of litigation as the best system now available. This acceptance of

\textsuperscript{21} Id. at 23.
\textsuperscript{22} AUERBACH, Burger’s Golden Calf, New Republic, 9 (March 3, 1982).
\textsuperscript{23} AUERBACH, supra note 1, at 16.
\textsuperscript{24} Id. at 139.
formal adjudication is caused by the way alternative dispute settlement is currently institutionalized.

To understand the way alternative dispute settlement is employed, we must first perceive the causes of litigation's disfavor. A major source of this dissatisfaction is the fantastic growth of lawsuits before state and Federal courts. Civil case filings in Federal courts alone have increased fivefold between 1940 and 1981. This "avalanche" of lawsuits has led Warren Burger, no utopian himself, to agree with Auerbach in general belief that the adversarial procedure of our legal system is expensive, time-consuming, and tends to leave "a trail of stress and frustrations." For the Chief Justice the fitting solution to these shortcomings is a supplementation of the present system by employment of arbitration, mediation, and conciliation. In addition to the need for institutional efficiency, the new popularity of alternative dispute settlement is helped by conservative opposition to judicial activism. It is no accident, claims Auerbach, that alternative dispute settlement is most enthusiastically prescribed for the disadvantaged citizens who have started to use litigation to guard and extend their rights. By diverting grievances from the courts, the forum which can most powerfully redress them, informal proceedings lead to reduced chances for legal adjustments for those citizens who most need legal rights and remedies—the citizens disadvantaged by race, class, and national origin. The lamentable result of alternative dispute settlement forces Auerbach to advocate a traditional system of litigation.

At this point, *Justice Without Law?* rewards the diligent reader with a designation of the sphere in which litigation serves a useful purpose. When a dispute occurs among unequal strangers a court, by extending the formality of equal protection to the weaker party, can rectify this imbalance. By warning against "the seductive appeal of alternative institutions," *Justice Without Law?* sounds an unexpected note, which is then extended by a caution that "alternatives prevent the use of courts for redistributive purposes in the interest of equality, by consigning the rights of disadvantaged citizens to institutions with minimal power to
Justice Without Law?

enforce or protect them."

It is an all or nothing proposition Auerbach leaves us with. In the absence of a new vision of community, we are better off with litigation than a shabby alternative system that combines the worst features of legality and informality and that limits a day in court to those able to afford it. Auerbach fears nothing short of an abdication of responsibility: "Legal institutions may not provide equal justice under law, but in a society ruled by law it is their responsibility." The search for ways to improve our legal institutions will continue and should continue; the contribution of Justice Without Law to the search is its gloomy warning that we may end worse off than before. Alternative dispute settlement all too easily becomes a trick performed to the detriment of the disadvantaged.

34. Id.
35. Id. at 145.