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Staying Out of Court

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JUSTICE WITHOUT LAW? By Jerold S. Auerbach. 182 pp. New York: Oxford University Press. $16.95.

IN recent months an alert citizen may have detected a breeze blowing fitfully through our litigious society and pushing some disputes out of court and into the private sector for resolution. Divorcing couples are no longer necessarily committed to the care of lawyers who dedicate their professional lives to the adversary ethic, making husband and wife hate each other the more for litigating their troubles; a new breed of professional, the divorce mediator, has begun to damp the fires of contention and arrange a meeting of the minds. In California, Pennsylania and a few other states, commercial lawsuits up to a certain dollar amount must be referred first to arbitration; the statistics suggest that few thereafter are appealed to judges. Some corporate executives have learned that they can save up to a million dollars in legal fees and years of pretrial and court time by discussing disputes with other companies' executives rather than judges. Seminars on how to negotiate have become a lucrative business across the country. And in criminal courts in most states, thousands of minor crimes, such as breaches of the peace, are not prosecuted but referred to mediators, who usually succeed in persuading feuding neighbors to cool it.

Within the legal profession, these developments are being summed up in a new phrase, alternative dispute resolution. A.D.R. has come to signify any means of resolving disputes other than through litigation in court. Its ardent supporters (it has many) hail it as an immensely important "movement," one that promises to magically save American courts from overloaded dockets and the American people from a proceduralism that profits only querulous lawyers. And with astute timing, Jerold S. Auerbach, chairman of the history department at Wellesley College and author of the acclaimed "Unequal Justice," has written a history of alternative dispute resolution in America.

More an extended meditation on the meaning of community than a historical narrative, Mr. Auerbach's compact and often austere "Justice Without Law?" examines several periods in our past when disputes were resolved nonlitigiously, beginning with the earliest colonial settlements. It may seem odd that this has happened at all, much less repeatedly, in a nation where the rule of law - and with it dispute settlement by adjudication - has won the day. The institutional history of America is largely the history of increasing "legalization," the pervasive notion that right and wrong are defined by law, as rights and freedoms are protected and justice secured by it. Nevertheless, Mr. Auerbach writes, "in many and varied communities, over the entire sweep of American history, the rule of law was explicitly rejected in favor of alternative means for ordering human relations and for resolving the inevitable disputes that arose between individuals."

The rejection began with the the Puritan settlers in Massachusetts. In Dedham and Sudbury and even for a while in Boston, religious conviction held that it was unchristian to litigate; all disputes within the community were subject to mediation or arbitration. Those few who persisted in quarrels with their neighbors could be and were excommunicated. Nor was this attitude confined to the stiff-necked men of Massachusetts; like norms applied in Connecticut, New Jersey and Virginia. In Pennsylvania, the Quakers were equally insistent that disagreements be resolved not by ''hot contests'' but with ''love, coolness, gentleness and dear unity.'' These beliefs, Mr. Auerbach says, amounted to more than a strongly held antipathy toward lawyers. They constituted the essence of community, an intense sharing of common values and goals that could not long stand contention resolved by law, a system of thought that made themuncomfortable. The exception that proved the rule was the Quakers, who abhorred litigation in their own towns but were not troubled about turning to the law in cases involving non-Friends.

DESPITE the intensity of feeling among the early settlers, the law conquered the land before the 17th century was done as other, more characteristic American values came to the fore - ''opportunity, mobility, acquisitiveness.'' Tightknit community bonds dissolved as towns and business grew, private ownership of land developed, strangers arrived, and younger generations rejected the cohesiveness of their elders. The resulting pluralism demanded law. ''Courts replaced churches and town meetings as dispute-settlement institutions; disputants turned to lawyers, not ministers or mediators.'' A hundred years later, ''the older ideal of communal harmony yielded decisively to an ideology based on liberty and property,'' an ideology that culminated in an explicitly legal document, the United States Constitution. The common law of England, the ''rights of Englishmen'' suitably modified for the New World, would be the birthright of Americans.

But again and again, as Mr. Auerbach shows, disparate groups sought to restore the older vision of a community that could resolve conflict without resort to legal process. The utopian communities of the first half of the 19th century explicitly exalted Christian (and communist) precepts over law. Aurora, an Oregon community of German immigrants, ''went 19 years without resort to the courts.'' Others did as well. But the sense of community rarely lasted beyond the first generation and the charismatic presence of the communities' founders. When law came, it was because the communal norm had collapsed.

The immigrant experience was similar. Greeks, Scandinavians, Chinese and Jews all clung fiercely to community resolution of disputes to preserve their sense of ethnic identity against the tug of assimilation. No less important, for the Chinese and the Jews especially, community dispute resolution offered protection from the rank discrimination that white or Christian justice often meted out.

FOR the 17th-century colonists, the 19th-century utopians and the immigrants of the 19th and 20th centuries, the nonlegal resolution of disputes served the cause of justice as each group defined it. But modern alternative dispute resolution stemmed from a different, more ominous set of concerns, Mr. Auerbach argues. "Until the Civil War alternative dispute settlement expressed an ideology of community justice. Thereafter, as it collapsed into an argument for judicial efficiency, it became an external instrument of social control. That momentous shift still pervades the use of alternative dispute settlement more than a century later."

Mr. Auerbach cites the Freedmen's Bureau, which imposed the white man's arbitration on disputes between former slaves and masters; labor tribunals in the days before unions were legalized; and smallclaims courts for the poor in the early 20th century. His examples suggest that when true community is absent, dispute resolution outside the formal bounds of legal process can result in second-class justice. Mr. Auerbach worries that in our own time, as the courts have reached out to aid the underprivileged, the A.D.R. movement will similarly snuff out the prospect of equality that has so long eluded many of our citizens:

"Alternative dispute settlement was an idea whose time had come, but no longer as an instrument of community empowerment. In practice (whether or not by design), it was most enthusiastically prescribed for disadvantaged citizens who only recently had begun to litigate successfully to protect and extend their rights. Alternative processes suddenly became a panacea for the resolution of consumer complaints, prisoners' grievances, problems of juveniles and the elderly, and the claims and disputes of Indians and Eskimos. As a result, citizens disadvantaged in American society by race, class, age, or national origin - those who most needed legal rights and remedies -faced the prospect of reduced possibilities for legal redress, in the name of increased access to justice and judicial efficiency."

The problem, as Mr. Auerbach sees it, is that alternative dispute settlement can work only when true communities exist, and the dispossessed of our time are dispossessed most significantly of just that sort of community that can render justice outside law. For them, as for most of us today, only law can provide the justice that is consonant with our values as free and equal individuals.

IF there is a flaw in this admirably succinct and lucid book, it is a failure to answer some crucial questions. Did the pioneer communities achieve justice or only a conformism that stifled freedom and sacrificed individuals to a numbing social order? Is the justice sought by litigants pressing constitutional claims of the same order as that of the defendant who seeks relief from an oppresive contract signed in ignorance? Are alternative forums in present-day America doomed to fail in all instances because they do not let judges

vindicate legal rights, or are others besides judges capable of providing justice? What has been the range of A.D.R.? Are mediation and arbitration the only possibilities, and have they persisted unchanged? Are all disputes of the same intensity, gravity and kind, or can some be resolved by trained mediators who are not the tools of patricians and commercial interests? Unfortunately, Mr. Auerbach's analysis stops short just here, where answers would have made the history he provides even more useful.

Nevertheless, in a time when alternative dispute resolution is being pressed by some as a cure for many of the major ills of society, it is good to be reminded that, like law, alternatives have their own ideology. Mr. Auerbach is surely right in stressing that law and courts are essential in a highly individualistic society that proclaims fidelity to formal equality. The solution to the problems caused by crowded, inefficient courts cannot be only to divert cases outside the legal system; it must also be to remold the legal process itself. In showing why this must be so, Mr. Auerbach renders a signal service.