

## BOOK REVIEW

THE RECURRENT DIALECTIC BETWEEN LEGALITY  
AND ITS ALTERNATIVES: THE LIMITATIONS OF  
BINARY THINKING

JUSTICE WITHOUT LAW? By Jerold S. Auerbach. New York:  
Oxford University Press, 1983. Pp. xv, 182. Price \$16.95.

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*Justice Without Law?*<sup>1</sup> is the first serious attempt to explore the history of disputing in the United States and to assess critically the meaning of the current alternative dispute resolution movement against the background of that history.<sup>2</sup> The author tells us in his preface that

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<sup>1</sup> J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983).

<sup>2</sup> Robert Cover has defined the general contours of the study of dispute resolution:

[T]he term "dispute resolution" is most often used to refer to social scientific work that typically assumes a functional perspective cutting across formal and institutional lines. One writes in the area of "dispute resolution" as soon as one decides that no single institution, rule, technique, or role is the subject of the work, but rather the "dispute" or "disputing" that might confront many different institutions or components of them.

Cover, *Dispute Resolution: A Foreword*, 88 *YALE L.J.* 910, 910 (1979).

When considering the resolution of disputes, it is important to understand the range of procedures available to an individual when a dispute arises. These procedures are best understood according to the number of parties involved in resolving the dispute. Thus, one whole set of procedures involves unilateral action by a party to the dispute. The unilateral action may be referred to either as "lumping it" (the decision of an aggrieved party not to press the claim), avoidance (the decision of an aggrieved party to withdraw from the situation that led to the dispute or to terminate the relationship between the parties to the dispute), or coercion (the decision of one party to impose the outcome on the other party as, for example, when "self help" is employed).

Another mode of proceeding involves only the two parties to the dispute and is called a dyadic arrangement. This procedural mode of negotiation involves the two parties arranging a settlement of the dispute by mutual agreement.

A third set of processes involves the intervention of a third party in the resolution of the dispute. The nature of the intervention differs according to the specific resolution procedure. In mediation both parties to the dispute agree to the participation of the third party who helps them to reach an agreement about the dispute. In arbitration both parties to the dispute agree to the intervention of the third party and also agree that they will accept that third party's resolution of the issues involved in the dispute. In adjudication the third party has authority to intervene regardless of the desires of the disputants and to render and enforce compliance of a judgment resolving the dispute.

he worked to understand both the "pattern of rejection of lawyers and courts" and "why law flourishes at the outer edge of community, where solitary individuals feel the need to protect themselves against each other."<sup>3</sup> Auerbach concludes that when the legal establishment involves itself in the alternatives movement for reasons of justice or efficiency it may be limiting access to law to those who can afford it.

Although Auerbach's efforts are important and are a significant contribution to the study of dispute resolution movements, *Justice Without Law?* fails in a number of ways. By resting his argument on several unexamined assumptions, by underplaying the significance of the relationship between law and the social order, and most importantly, by limiting his analysis to the choice between legal and non-legal alternatives, Auerbach shortchanges his readers.

In this review I will introduce the reader to the history of non-legal dispute resolution presented in *Justice Without Law?* as well as to some of the author's primary concerns and assumptions about dispute resolution in the United States. I will then discuss what I perceive to be the weaknesses in Auerbach's approach, assumptions, and conclusions.

## I. A REVIEW OF AUERBACH'S FINDINGS

### A. Overview

Auerbach's concise history of alternatives to courts in the United States spans 350 years of our history. His short interpretive analysis uses examples drawn from every century since the seventeenth to illuminate the ways in which the processes of dispute settlement express personal choices, cultural values, and power disparities in the United States. The author's objective is to build a model of dispute settlement history that "may provide clues to the current, and recurrent, enthusiasm for alternatives—and to their limitations in our litigious society."<sup>4</sup>

Although Auerbach is a historian and this work deals with materials from the past in a historical sequence, the book is not a pure and simple history. It is, instead, a comparison of a variety of communities based on ethnicity, religion, work, profession, and class, and it attempts to describe the conditions under which dispute settlement preferences are but "shifting commitments."<sup>5</sup> Although the communities Auerbach

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These processes are discussed in more detail in Nader & Todd, *Introduction*, in *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* 8-11 (L. Nader & H. Todd eds. 1978).

<sup>3</sup> J. AUERBACH, *supra* note 1, at viii.

<sup>4</sup> *Id.* at 14.

<sup>5</sup> *Id.* at 7. Many historians have written about dispute resolution at different peri-

has chosen vary in a number of important ways, they are all composed of groups of people who share values, trust, and the desire for harmony. For such communities, "[t]he choice of non-legal alternatives to adjudication never was a decision to replace power with love, or coercion with cajoling. It was the application of power to serve the common interest at the expense of competing individual claims."<sup>6</sup>

The historical part of *Justice Without Law?* deals with the evolution of law.<sup>7</sup> During the colonial period legal institutions played a relatively minor role in dispute settlement because the colonists were hostile to external interference that might contribute to community disorganization or that might challenge the basic community value system. Although commercial arbitration evolved as an important force by the mid-eighteenth century, with the increase in trade and commerce courts played an increasing role in managing disputes. Legislation accelerated with the rise of economic and social stratification, increased immigration, and declining church membership. As communities disintegrated, law replaced the "counter-tradition to legalism"<sup>8</sup> expressed in mediation and arbitration. The culmination of the evolving system came when the state itself began to organize alternative dispute settlement processes in order to allay fears of class warfare and racial discord. The Civil War marked a change from alternative dispute settlement as an ideology of community justice to an argument for judicial efficiency. It also marked the beginning of the use of alternatives as an external instrument of social control.<sup>9</sup> During the post Civil War period the legal-

ods in our history, but Auerbach's work, which is apparently the first history to span the period from the colonial settlements to the present, adopts a comparative approach. For other recent comparative historical works, see R. KAGAN, *LAWSUITS AND LITIGANTS IN CASTILE 1500-1700* (1981); M. SHAPIRO, *COURTS* (1981). Auerbach's use of comparison is more controlled than Shapiro's but less contextual than that of Kagan, who is also a historian. For a discussion of the use of comparison in relation to legal change, see Nader, *A Comparative Perspective on Legal Evolution, Revolution, and Devolution*, 81 MICH. L. REV. 993 (1983).

<sup>6</sup> J. AUERBACH, *supra* note 1, at 16.

<sup>7</sup> Evolutionary studies of law have been sporadic since the work of Sir Henry Maine: H. MAINE, *ANCIENT LAW* (London 1861). More recently, however, there have been a number of studies covering the evolution of legal procedures. See, e.g., Abel, *Western Courts in Non-Western Settings: Patterns of Court Use in Colonial and Neo-Colonial Africa*, in *THE IMPOSITION OF LAW* 167 (S. Burman & B. Harrell-Bond eds. 1979); Aubert, *Law as a Way of Resolving Conflicts: The Case of a Small Industrialized Society*, in *LAW IN CULTURE AND SOCIETY* 282 (L. Nader ed. 1969); Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 *LAW & SOC'Y REV.* 267 (1976).

<sup>8</sup> J. AUERBACH, *supra* note 1, at 4.

<sup>9</sup> For a recent analysis of the use of alternative dispute mechanisms as an external instrument of social control, see 1 & 2 *THE POLITICS OF INFORMAL JUSTICE* (R. Abel ed. 1982). Of particular relevance is Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in 1 *THE POLITICS OF IN-*

ization of alternatives became state policy. These alternatives, Auerbach tells us, were disconnected from any one community, and communal ideologies of mediation and arbitration were used to conceal the realities of the unequal power of the disputing parties. Alternatives were used in an effort to legitimate a legal system that had failed to achieve equal justice.<sup>10</sup>

Throughout this history Auerbach argues that although alternatives arise in almost every generation they are destined to fail:

There is every reason why the values that historically are associated with informal justice should remain compelling: especially the preference for trust, harmony, and reciprocity within a communal setting. These are not, however, the values that American society encourages or sustains; in their absence there is no effective alternative to legal institutions.<sup>11</sup>

Rather he asserts that "[t]he American deification of individual rights requires an accessible legal system for their protection."<sup>12</sup> But let me move to a more detailed summary of the book.

### B. *Non-legal Alternatives During Three Periods*

The heart of Auerbach's book is his examination of three different kinds of community and three different periods in American history that "testify to a persistent counter-tradition to legalism."<sup>13</sup> Auerbach discusses a number of different types of communities: colonial, Christian utopian, and immigrant. The colonial communities (Christians, utopians, Dutch settlers in New Amsterdam, or merchants), we are told, preferred to live within a communal framework that Auerbach believes made state law unnecessary,<sup>14</sup> dangerous, or superfluous. The first colonies were self-contained communities that did not see social advantage to individual assertiveness and perceived deviance and conflict as a threat to community stability. Conflict was either suppressed or dealt with through mediation. These communities were characterized by periods of either enforced harmony or open schism. "Puritan

FORMAL JUSTICE 207 (R. Abel ed. 1982).

<sup>10</sup> This period was rich in critiques of the legal system perhaps culminating in Roscoe Pound's 1906 address to the American Bar Association: Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A., pt. 1, 395 (1906).

<sup>11</sup> J. AUERBACH, *supra* note 1, at 145.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 4.

<sup>14</sup> See *id.* at 19 ("The tighter the communal bonds, the less need there was for lawyers or courts.").

religious values provided the primary framework for non-legal dispute settlement,"<sup>15</sup> and "[c]ommunal harmony was the supreme value."<sup>16</sup> Civil and religious functions were fused, and each church functioned as a court for a wide range of disputes from slander and theft to questions of business ethics.<sup>17</sup> In this context, legal dispute settlement was explicitly discouraged.

Dedham, a Massachusetts town founded in 1636, provides an example of such a colonial community. Its residents combined Puritan Christian theology with a utopian experiment built on the ideals of love and harmony. Dedhamites resolved their disputes without lawyers or courts and settled disagreements with neighboring villages "by arbitration, mediation, 'or any other peaceable way.'"<sup>18</sup> In the neighboring community of Sudbury, an English open-field village, communal land ownership, rather than Christian utopianism, provided the framework for a renunciation of legal adjudication that lasted nearly two decades.<sup>19</sup> Auerbach reports that, rather than being unique, the Dedham-Sudbury pattern of non-legal dispute settlement was tried in several colonies beyond Massachusetts, including Connecticut, Pennsylvania, and South Carolina.<sup>20</sup> The best known example outside of New England was undoubtedly the Quakers, who, like the Puritans, "shaped . . . patterns of dispute settlement in the interest of group harmony."<sup>21</sup>

But harbingers of future trends were to be found in the colonial setting as well. Two litigious Massachusetts towns, Plymouth and Salem, provide us with examples of towns where "law not only measured the extent of community fragmentation; it provided the strongest possibility of social cohesion."<sup>22</sup> The ingredients were there: "a high level of commercial activity, religious diversity, and private land ownership."<sup>23</sup> These were towns "impelled toward law, at the risk of an intolerable level of unresolved conflict."<sup>24</sup> Auerbach notes a crucial variable when he writes, "As commercial activity multiplied relationships with the world beyond Plymouth, and attracted a transient laboring population, informal mechanisms of accommodation and compromise were unavail-

<sup>15</sup> *Id.* at 21.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *See id.* at 22-23.

<sup>18</sup> *Id.* at 25. See M. ZUCKERMAN, *PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY* (1970) for an examination of this drive within the religious context of eighteenth century villagers.

<sup>19</sup> *See* J. AUERBACH, *supra* note 1, at 26-27.

<sup>20</sup> *Id.* at 27.

<sup>21</sup> *Id.* at 29.

<sup>22</sup> *Id.* at 37.

<sup>23</sup> *Id.* at 36.

<sup>24</sup> *Id.* at 37.

ing.”<sup>25</sup> Dispute settlement increasingly became a judicial function as individual values and commercial gain became salient and communal harmony weakened. Auerbach believes that “[t]he emergence of a pervasive legal culture, yet the persistence within it of stubborn pockets of resistance to legalization,” continues even in contemporary America to express “a persistent cultural dialectic between individuals and their communities.”<sup>26</sup>

There is a direction to the social development being described: toward individualism, assertive contentiousness, and legalization. To focus on the inevitability of this social development misses the point that Auerbach is making: Although the pattern of use changed dramatically in the nineteenth century, alternative dispute settlement lasted even after social changes of modernization and commercialization encouraged legal development.

In the first half of the nineteenth century more than a hundred utopian communities attracted people who did not wish to participate in the secular and materialistic changes in American communities.<sup>27</sup> Their motives were political, religious, and cultural. Religious utopians belonged to dissenting Protestant sects such as the Shakers and the Seventh Day Baptists. The political utopians preferred a variety of communities—socialist, anarchist, and communist—to a competitive economy and the factory system. Litigation was rejected as violent. The philosophy of dispute resolution emphasized the mutual and consensual, not the individual and adversarial values. Community peer pressure rather than state pressure prevailed. One of the most successful utopian experiments was the Mormon community, which built a socialist commonwealth, a self-governing theocratic state that fused morality, religion, and politics.<sup>28</sup> United States government power, however, was successful in fragmenting Mormonism so that it was reduced to a religion placed well within a secular society. This disruption of Mormon society made its formerly pervasive methods of dispute settlement an issue of relatively minor importance.

In Auerbach’s story, these antebellum utopian communities marked the end of the beginning in the history of American efforts to escape from formal legal institutions. The Civil War was a turning point: “beyond [the Civil War], amid the turbulence of race and labor relations, alternative dispute settlement was reshaped,” and, “in the second half of the nineteenth century, the purposes (if not the forms) of

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<sup>25</sup> *Id.* at 38.

<sup>26</sup> *Id.* at 42.

<sup>27</sup> *Id.* at 49.

<sup>28</sup> *See id.* at 54-56.

alternative dispute settlement were redefined."<sup>29</sup> Fears of racial hostility and class warfare encouraged arbitration as a remedy for the congestive breakdown of the court system and as an externally imposed deterrent to social conflict. Until the Civil War, alternative dispute settlement had expressed an ideology of community justice. Thereafter, according to Auerbach, it became an external instrument of social control and a way of increasing judicial efficiency.<sup>30</sup>

### C. *Non-legal Alternatives as an Arm of the State—The Precursors*

After the Civil War, the Freedman's Bureau was established to manage the transition from slavery to freedom. This government agency was confronted with a large volume of civil disputes between former masters and their newly freed slaves. Arbitration tribunals for labor-contract disputes involving less than \$200 were devised to deal with the volume. Given the unequal bargaining power, Auerbach contends that this diversion to arbitration in the main served the interest of the planters, with little benefit to the freeman: "Informality, in a social setting of disparate power relations, inevitably served the interests of the dominant group."<sup>31</sup> Alternative dispute settlement ultimately expressed the values of the White power structure, not of the Blacks who seldom participated as equals in these settlement procedures.<sup>32</sup> In this example, Auerbach exposes the vulnerability of non-legal dispute settlement without community autonomy. "The freedmen, shunted from law courts to arbitration tribunals . . . were powerless in both settings . . . . Neither legality nor informality could remedy the effects of racial discrimination or economic inequality."<sup>33</sup>

A similar use of alternative dispute settlement appears during the period of labor-management conflict at the end of the nineteenth century, when there was a "search for a peaceful alternative to industrial violence."<sup>34</sup> The impetus was the railroad strikes and riots during the violent summer of 1877. "Without arbitration of industrial disputes

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<sup>29</sup> *Id.* at 57.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.* at 59. The observation that informality serves the interests of the dominant group has been documented repeatedly. *See generally* NO ACCESS TO LAW (L. Nader ed. 1980). But this observation is consistently ignored in policy recommendations. As Richards Adams has observed, Americans are uncomfortable with the notion of power inequality "because of our long emphasis on the fundamental legal equality of man under [our Constitution.]" Adams, *Power in Human Societies: A Synthesis*, in THE ANTHROPOLOGY OF POWER 407, 409 (R. Fogelson & R. Adams eds. 1977).

<sup>32</sup> *See* J. AUERBACH, *supra* note 1, at 59-60.

<sup>33</sup> *Id.* at 60.

<sup>34</sup> *Id.*

[proponents] feared the national disaster of another civil war, this time between capital and labor."<sup>35</sup> Industrial arbitration tribunals were to be the answer to class conflict—a solution that was at first considered suspect by both workers and employers, but which was embraced by middle-class reformers. Auerbach contends that “[i]ndustrial arbitration remained a panacea offered by anxious middle-class professionals who felt dangerously squeezed between capital and labor.”<sup>36</sup> The solution was limited, however, because “[p]roponents of harmony through arbitration persistently evaded the basic issues of unequal wealth and power.”<sup>37</sup> As in the case of arbitrations between Blacks and Southern White property owners, “[t]he rampant inequalities that pervaded labor-management relations molded the industrial arbitration process.”<sup>38</sup>

The road had forked; alternative dispute settlement, once a voluntary expression of communal cohesion, now became an instrument of external regulation and control. In both of Auerbach’s examples, the resort to arbitration capitalized on the values of harmony that were associated with non-legality and a pre-urban, agricultural society.

At the close of the nineteenth century, however, in the midst of rapid industrialization, class conflict, economic recession, political instability, and unprecedented immigration, the rule of law provided a way of binding these new diverse interests. The use of law thus became an indicator of absorption into American society. At the same time, the new immigrants lived in a context where personal relationships were based on continuing relations that would be sabotaged by the intrusion of a legality that promoted new, inconsistent values.

For new immigrants, the forms of dispute settlement varied. Italian, Greek, Turkish, and Bulgarian immigrants used the *padrone* system in which a powerful authority figure provided employment-brokering and social services.<sup>39</sup> The same person also arbitrated disputes—at least until conflict worked its way out of the enclave into the wider society of court law. These and other immigrant groups moved away from their traditional forms of dispute settlement to the legal norms of the state as they gradually became acculturated.

On the other hand, Scandinavian immigrants, who had a long history of conciliation, maintained their conciliation proceedings, as did the Chinese within Chinatowns and the Jews on the Lower East Side of New York. Chinese mediation and Jewish arbitration proved to be

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 64.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 65.

<sup>39</sup> *Id.* at 70-71.

particularly resistant to acculturation. The Chinese preference for mediation was strengthened by the poor treatment they received in the American legal system as defendants or victims. It was not until after World War II that traditional Chinese mediation began to show signs of breakdown. As the elders became less able to solve more systemic problems, disputes were increasingly resolved through the rule of law.<sup>40</sup>

In the case of American Jews, we are told that the retention of disputes within the Jewish community was motivated in part by the desire to maintain their distinct identity as a community within the state.<sup>41</sup> Arbitration was the means by which both commercial and religious disputes were resolved in the Lower East Side in New York, and in Baltimore. At first community leaders looked to harmony through arbitration; later, dispute settlement was to function as an instrument of acculturation. Jewish arbitration tribunals faded in importance after World War I under the pressure of the "wrenching transition from the Old World to the New"<sup>42</sup> and were "overwhelmed by a new agenda of international issues relating to Zionism and statehood."<sup>43</sup> By 1930, the Jewish Conciliation Court of America was incorporated "to preserve harmony, achieve respectability, and prod immigrants along the road to Americanization,"<sup>44</sup> until finally "acculturation decisively rearranged their commitment to law."<sup>45</sup> Children of immigrant Jewish parents entered the legal profession in great numbers, with the select among them like Felix Frankfurter moving into the highest positions in the legal establishment.

Auerbach believes that all of these immigrant groups tried to replicate earlier models of community; the Scandinavians, the Chinese, the Jews, and others believed that conflict among community members should be resolved within the community. With the disappearance of community (and I might add with the increase in conflict between strangers) litigiousness became acceptable behavior. Conflict was to be resolved in American institutions rather than in exclusive communities.

#### D. *Professional Interest in Non-legal Alternatives*

With the turn of the century, criticism of the American legal system accelerated. Roscoe Pound, professor of law at Harvard University, criticized the judicial system for its congested courts, endemic delay,

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<sup>40</sup> For a discussion of this history, see *id.* at 73-76.

<sup>41</sup> *Id.* at 77.

<sup>42</sup> *Id.* at 83.

<sup>43</sup> *Id.* at 81.

<sup>44</sup> *Id.* at 84.

<sup>45</sup> *Id.* at 89.

expense, lack of access, and a substantive law that was obsolete.<sup>46</sup> By the second decade of this century legal reform was visible: Small claims courts, public defenders, legal aid societies, industrial accident commissions, and the like, plus an expanded regulatory apparatus were formed. Legal reform had its limits, however, as Roscoe Pound warned in 1916,<sup>47</sup> who reflected a dissatisfaction with legal institutions that would increase over the next two decades.

Auerbach provides two significant examples from the early twentieth century of dispute resolution outside of the judicial system. The first example is the conciliation movement, begun in Cleveland in 1913 and intended to make justice more available to those unable to afford the high costs of legal services.<sup>48</sup> Conciliation was most importantly different from the judicial system in two ways: its procedures were informal and its jurisdiction was limited to claims with a low value.<sup>49</sup> Conciliation, however, did not develop from within the communities it was intended to serve. Rather, it was established for low-income communities by the legal establishment itself in order to remove trivial claims from the judicial system.<sup>50</sup> Auerbach concludes that conciliation resulted in "a two-tier justice system, with conciliation as an alternative for those who could not afford to buy the protection offered by the legal system."<sup>51</sup>

The second example of non-legal dispute settlement was commercial arbitration, which flourished during the early twentieth century because commercial interests preferred arbitration in forums where businessmen could resolve disputes according to trade practice rather than legal principle. Commercial arbitration, therefore, differed significantly from conciliation because arbitration, rather than being externally imposed, was "revived as the indigenous demand of powerful economic groups who formed their own consensual communities of profit."<sup>52</sup> Arbitration was unable, however, to function independently of the legal system. A compromise of sorts was reached between the business and legal communities first by establishing binding arbitration agreements that "combined the benign fiction of voluntary consent with the strin-

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<sup>46</sup> *Id.* at 95. See Pound, *supra* note 10; Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302 (1913).

<sup>47</sup> J. AUERBACH, *supra* note 1, at 96 (citing Pound, *The Limits of Effective Legal Action*, 3 A.B.A. J. 55, 55-57 (1917)).

<sup>48</sup> J. AUERBACH, *supra* note 1, at 97.

<sup>49</sup> *Id.*

<sup>50</sup> See *id.* at 99-100.

<sup>51</sup> *Id.* at 100-01.

<sup>52</sup> *Id.* at 101. Auerbach's discussion of the dynamics of this commercial community is reminiscent of his discussion of colonial religious communities. Compare *id.* at 101-05 (commercial community) with *id.* at 20-32 (colonial religious communities).

gent reality of legal enforcement"<sup>53</sup> and, in 1926, by the formation of the American Arbitration Association, an organization staffed largely by lawyers and committed to legalizing the arbitration process.<sup>54</sup> Concluding that such legalization has become "inexorable in our modern culture," Auerbach states that commercial arbitration "could not have flourished without legal support, which simultaneously constricted its potential as an alternative dispute-settlement system."<sup>55</sup>

By 1958, Auerbach continues, the centrality of law in American society was complete, but once again law reformers began to worry about the capacity of the American legal system to provide equal justice.<sup>56</sup> The classic reforms of the early twentieth century—small claims court, legal aid, and administrative agencies—had failed to solve the problems of access to justice. Once again reformers looked to alternative dispute resolution processes for solutions. Auerbach discerns two different approaches in this later reform movement. The first had a populist orientation and sought to empower people within a community setting.<sup>57</sup> The second promoted speed and flexibility and was advocated by a legal community that hoped to reduce popular dissatisfaction by improving management of the legal system.<sup>58</sup>

Auerbach argues that "[t]he decisive moment in the legalization of informal alternatives" came in 1976, at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice,

<sup>53</sup> *Id.* at 105.

<sup>54</sup> *See id.* at 108-11. The American Arbitration Association actually was formed with the merger of two groups: the Arbitration Society of America and the Arbitration Foundation. The Arbitration Society had been founded by prominent members of the bar, while the Arbitration Foundation was founded by people interested in *non-legal* commercial arbitration. *See id.* at 106-08. The merger was clearly a victory for the legal profession. *See id.* at 108-11.

<sup>55</sup> *Id.* at 114.

<sup>56</sup> *Id.* at 115. The terms "centrality" and "marginality" are used in different ways in the literature. It appears that Auerbach uses the term centrality to refer to increasing controlling power of the law. Professor Hurst uses the term marginality in another context where he says: "Nineteenth-century litigation involved only limited sectors of the society in any bulk. This relative marginality of the litigious process also characterized the years after 1950. . . . [L]awsuits . . . touched only limited parts of the dense, diverse activity of the business world." Hurst, *The Functions of Courts in the United States, 1950-1980*, 15 *LAW & SOC'Y REV.* 401, 420 (1980). Furthermore, the array of litigating parties differed little after 1950 from that of earlier decades. Thus Hurst notes that in the nineteenth-century United States, there were no more merchants suing fellow merchants than there were in the twentieth-century dockets, and people of small means were not often plaintiffs in other than tort or family matters. *Id.* at 421.

<sup>57</sup> The following reform proposals are examples of this first approach: the neighborhood "reconciliation boards" of the Office of Economic Opportunity, the American Friends Service Committee plan, and Richard Danzig's proposal of an African tribal moot system. *See J. AUERBACH, supra* note 1, at 116-19.

<sup>58</sup> *See id.* at 123.

when Chief Justice Burger declared that alternative dispute settlement was an idea whose time had come.<sup>59</sup> This interest in alternatives to adjudication focused on disadvantaged citizens who recently had begun to litigate successfully: consumers, prisoners, and those disadvantaged by race, class, age, or national origin were made to trade legal redress for speed and efficiency. In fact, Auerbach argues forcefully that informal dispute processes were encouraged as a result of victories in court by disadvantaged groups.<sup>60</sup> Auerbach contends finally that "[t]he poverty line largely determined [the] clientele" of the new informal justice.<sup>61</sup> Informal justice was to be for the underclass, and community fragmentation, not community cohesion, was the primary criterion.

The alternative projects that developed in response to the Pound Conference were essentially extensions of the existing justice system:<sup>62</sup> Local courts and prosecutors often determined the claims that would be heard in the alternative projects,<sup>63</sup> and lawyers were often the decisionmakers.<sup>64</sup>

#### E. *Conclusion: Beware of Non-legal Alternatives*

In his conclusion Auerbach summarizes and elaborates his basic findings:

[W]e are possessed of vastly more laws and lawyers than any other society; we are also more concerned with lawlessness than any other people. The more laws we have, of course, the more laws will be broken; the more we then need the services of lawyers and courts; the more congested the legal system becomes; the more we yearn for alternatives; but the less they are able to survive independently of legal institutions.<sup>65</sup>

<sup>59</sup> *Id.* at 123-24.

<sup>60</sup> Auerbach makes this argument with regard to Native Americans, *see id.* at 128-29, and, implicitly, with regard to the elderly, *see id.* at 127.

<sup>61</sup> *Id.* at 135.

<sup>62</sup> *See id.* at 130-31. There is a good body of literature on alternative projects as extensions of the judicial system. *See* Freedman & Ray, *State Legislation on Dispute Resolution*, 1 A.B.A. MONOGRAPH SERIES (1982). *See generally* R. TOMASIC & M. FEELEY, *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* (1982).

<sup>63</sup> J. AUERBACH, *supra* note 1, at 131.

<sup>64</sup> *See id.* at 132. Such projects did not follow the counsel of Edgar and Jean Cahn, two early proponents of alternative dispute resolution, who had distinguished between intra-community disputes, which are best considered in a local mediative setting and grievances involving external actors or forms of control which require a court for a forum and a judge for a decisionmaker. *Id.* at 116 (citing Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927 (1966)).

<sup>65</sup> J. AUERBACH, *supra* note 1, at 141-42.

Auerbach wants to document this trend and suggests that we must be skeptical about new alternatives to the legal system which are not the result of the social patterns of a cohesive community, but rather have been developed and imposed by the legal system itself:

Alternatives are designed to provide a safety valve, to siphon discontent from courts. With the danger of political confrontation reduced, the ruling power of legal institutions is preserved, and the stability of the social system reinforced. Not incidentally, 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 enforce or protect them. It is, therefore, necessary to beware of the seductive appeal of alternative institutions.<sup>66</sup>

Like legal dispute resolution, non-legal alternatives are neither inherently just nor unjust. Only by looking at "social context and political choice" can we determine whether the dispute resolution systems are meeting the needs of the clientele.<sup>67</sup>

Finally for Auerbach "[t]he historical progression is clear: from community justice without formal legal institutions to the rule of law, all too often without justice. But injustice without law is an even worse possibility . . . ."<sup>68</sup> And there he leaves us.

## II. A CRITIQUE OF AUERBACH: THE LIMITS OF BINARY ANALYSIS

By documenting the historical patterns of resolving disputes without lawyers Auerbach has performed a service to many audiences. For the reformer the findings should be instructive. If Auerbach is correct (and his book is convincing) that the movement to alternatives follows a cyclical pattern allowing us to predict the movement from mediative or arbitration alternatives to the promise of justice with law, then we might think twice about non-judicial alternatives being the panacea for many of our ills that are based on inequality. For reformers of the future an awareness of this short-cycle pattern should dampen enthusiasm for solving problems by a simple change of menu, in or out of the

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<sup>66</sup> *Id.* at 144.

<sup>67</sup> *Id.* at 144-45. In considering our own social context, Auerbach seems to conclude that both formal and informal methods of dispute resolution are bound to reinforce the social and economic inequalities already extant in America. *See, e.g., id.* at 136 (informal methods); *id.* at 143-44 (formal methods); *see also supra* note 31 and accompanying text.

<sup>68</sup> *Id.* at 146.

courtroom.

For scholars, the book enables us to develop a deeper understanding of how legal culture becomes central to patterns of resource distribution—to the maintenance of inequalities as well as to the playing out of competitive tensions between individualistic pursuits and communal ideals.

The book is deceptively simple, and could only have been written by a scholar deeply steeped in the materials on the varieties of religious, ethnic, and class-based communities throughout our history. Auerbach is committed to a perspective informed by several disciplines. In this sense the book is an important contribution, but it is not a work without problems: problems that result from an ethnocentric acceptance of questionable assumptions, and from falling into the grips of binary thinking. The analytic framework of *Justice Without Law?* is binary: solving disputes with or without lawyers, individualistic pursuits versus communal ideals, the Haves versus the Have-Nots, litigious Americans versus non-litigious others. As a result Auerbach moves only to and fro, hesitantly moving away from alternatives toward judicial reform, away from a community-determined view toward a law-centric view of the path to justice. Unfortunately, he never quite jumps off the teeter-totter and onto the playground.

### A. *Unexamined Assumptions*

Let me start by suggesting how a comparative perspective could have been used to examine the assumption that is perhaps most central to Auerbach's analysis of dispute settlement reform movements in the United States.<sup>69</sup> This assumption is that Americans are more concerned with the preservation of individual rights than with community values and so are "the most legalistic and litigious society in the world."<sup>70</sup> For

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<sup>69</sup> It is also interesting to note how a comparative perspective would inform an understanding of access to law in society.

From a comparative perspective, it is clear that access to law, access to publicly supported forums, is not available in all societies. The notion that people in all primitive societies have access to forums for justice is a romantic one, nothing more. In studies of villages from New Guinea to Turkey to Sweden where no forums are locally available, self-help predominates, rather than resort to third party remedy agents.

Nader, *The Direction of Law and the Development of Extra-Judicial Processes in Nation State Societies* in CROSS-EXAMINATIONS: ESSAYS IN HONOR OF MAX GLUCKMAN 92 (P. Gulliver ed. 1978).

<sup>70</sup> J. AUERBACH, *supra* note 1, at 3. The assumption that Americans are, to quote Chief Justice Warren Burger, "inherently litigious" rarely is challenged. See R. KAGAN, *supra* note 5. *But see* J. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981) (concluding that we are not litigious and that litigation in a democracy is necessary to promote

Auerbach, "the essence of communal existence" is "mutual access, responsibility, and trust."<sup>71</sup> The loss of these values in modern America is then directly related to its large amount of disputing<sup>72</sup> as well as to its problems of inadequate access to justice.<sup>73</sup> Auerbach contrasts America where "individualism" has allowed "the freedom to compete, acquire, possess, and bequeath" with "traditional societies . . . [where] mutual responsibility is encouraged."<sup>74</sup>

Unfortunately, even a cursory examination of the literature on disputing would show that Auerbach's central assumption is simply wrong. First, nothing requires that individualism and competitiveness be coupled with disorder and contentiousness. Anthropologists have studied both contentious and noncontentious small communities; some are based on trust, others on mistrust.<sup>75</sup> Usually, explanations of what makes people litigate are not single stranded. For example, the noncontentious, but rights-conscious Zapotec could also be described as individualistic, competitive, and commercially minded. Yet they are also communalistic and cooperative. Fully persuasive explanations of the urge to litigate, therefore, have to be found in a society's social order.

More important, however, is Auerbach's failure to document the second part of his assumption, which is that Americans suffer from hyperlexis and belong, in fact, to the world's most litigious society.<sup>76</sup> This assertion is not supported by any primary or secondary sources. Actually, substantial evidence, including an important new study, suggests that litigation, taking a dispute to a third party, is not great in proportion to the population and the need in America.<sup>77</sup> For example,

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change).

Corporate America, however, might be litigious. The American Bar Association has estimated the annual cost of intercorporate litigation and discovery at eighty billion dollars. Moreover, newspaper articles indicate that corporate America is using in-house counsel and is exploring alternatives to court with reckless abandon. See *Kill All the Lawyers? Maybe There's an Alternative*, Wall St. J., Dec. 13, 1982, at 30, col. 1; *Putting Litigation on a Budget*, N.Y. Times, Apr. 2, 1982, at D1, col. 3.

<sup>71</sup> J. AUERBACH, *supra* note 1, at 4.

<sup>72</sup> *Id.* at 3, 7-8.

<sup>73</sup> *Id.* at 140.

<sup>74</sup> *Id.* at 10.

<sup>75</sup> There is ample evidence of the range in community style—from antagonistic and hostile to cooperative. See *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (L. Nader & H. Todd eds. 1978). Auerbach's use of the term community vascillates. At times he apparently sees all communities as based on the harmony model, yet he also recognizes that the comparative study of communities indicates a tremendous range of community style.

<sup>76</sup> J. AUERBACH, *supra* note 1, at 3.

<sup>77</sup> See Best & Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 *LAW & SOC'Y REV.* 701, 713 (1977) ("Households used third parties as complaint handlers in 1.2 percent of all cases in which consumers perceived problems with purchases, and 3.7

Friedman and Percival examined the case load of trial courts in two counties in California between 1890 and 1970.<sup>78</sup> The study documented the relative disappearance of dispute settlement from the courts and the increasing use of the same courts for handling routine administrative cases.<sup>79</sup> They suggest that routinization accompanies a lowering of the public demand for settlement of disputes in formal courts. Their findings do not describe a country that is hyperlexic, but rather one that is characterized by an expanding business community for whom disputing may mean interruption in the flow of trade. The demand for disputing mechanisms increases with an expanding society and with increasing centralization of economic control. In the United States, the demand was met through an expansion of extrajudicial mechanisms rather than through an expansion of adjudicative courts or a massive effort at prevention.<sup>80</sup>

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percent of all instances in which consumers who noticed problems voiced complaints.”); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 3 (1983).

Most disputes in the United States are dealt with by negotiation. See Johnson & Drew, *This Nation Has Money for Everything—Except Its Courts*, JUDGES J., Summer 1978, at 8. Johnson & Drew report that the United States spends proportionately more on police and prosecution than on courts (in contrast to seven other industrial nations), and that United States judicial manpower is smaller than all but two of the countries studied (USA, Canada, England, Wales, France, Italy, Sweden, and West Germany). Litigiousness, they say, cannot explain why public investment in judicial systems is inadequate.

Comparative studies of divorce rates are also interesting to consider. During the 1950's, when American family specialists were worried as to what they thought was the precipitous rise in divorce, anthropologist G.P. Murdock examined marital stability in several dozen societies. The United States fell about midway on a cross-cultural sample—well within the range of normal according to Murdock.

<sup>78</sup> Friedman & Percival, *supra* note 7.

<sup>79</sup> *Id.* at 296, 301. The authors define routine administration in the following way:

*Routine administration* means the processing or approving of undisputed matters. Courts make and keep records, register formalities, stamp their approval on claims or on changes of status; they handle uncontested divorces; render judgment in cases of petty debt; probate uncontested wills; handle petitions for change of name. In these matters there is almost never any real dispute—at least none that comes before the court. When husband or wife files for divorce, there has usually *been* some dispute; but the court does not resolve it. Typically, the parties do not go to court at all, until they have worked matters out and are ready for the rubber stamp.

*Routine administration* is not a characteristic of the social harmony courts described by anthropologists. It is a modern, Western phenomenon. Societies that are bureaucratic and busy need this kind of formalization far more than hunters and gatherers do.

*Id.* at 270-71 (footnote omitted).

<sup>80</sup> Friedman and Percival implicitly raise the question why an expansion of adju-

The inaccuracy of Auerbach's central assumption has important consequences both for this work and for the future of non-legal alternative dispute resolution. It must be recognized that the assumption that American society makes too many demands on the judicial system was also crucial to the Pound Conference's conclusion that alternative dispute resolution ought to be encouraged.<sup>81</sup> Proponents of this assertion have simply not met their burden of proof. Nevertheless, general acceptance of the assertion has encouraged us to think that somehow we as a nation are suffering from some disease that needs to be treated. Before we proceed with a "cure," however, we should be sure the disease exists.

### B. *The Relationship Between Law and Social Order*

In the face of the questions raised by the studies mentioned above and Auerbach's failure to refer to any supporting evidence, at least we should be able to agree that there is presently no way of knowing whether litigiousness is out of control in the United States. Regardless of whether non-legal alternatives are actually necessary to deal with an explosion of litigation, however, we still need to explain why there has been an effort to shift dispute resolution from the courts to non-judicial settings that are still under the control of the legal system. The standard rationale—that the courts are overburdened—is simply insufficient.

What is missing in Auerbach's conclusion and in much of the literature on disputing is an explicit statement on the interrelation between law and the social order. Once we describe alternating cycles between adjudication and mediation we need to ask when do changes in the legal order arise out of changes in the social order? It is not enough to center on relationships (communal or individualistic). Instead, we must ask what social, economic, and political forces work in the creation of a marginal law that plays a central role in this society? What kind of a society provides the background for Auerbach's questions about the recurrent enthusiasm for alternatives? Where is the context which might give us a clue as to the theories necessary to explain the phenomena that he isolated?<sup>82</sup>

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dicative courts was not considered as an option. *See id.* at 298. One could also ask why we have opted for alternatives instead of watering down rights.

<sup>81</sup> *See* J. AUERBACH, *supra* note 1, at 123.

<sup>82</sup> These are questions that Auerbach might have raised had he approached his work from a more clearly defined theoretical perspective. For example, Poulantzas and Habermas have both developed theories of the state which include the notion of the relative independence of the state. The legitimacy crisis which Habermas notes in late

Let me offer two examples of this kind of analysis. When Vilhelm Aubert described the shift in the use of courts over a 100-year period in Norway, he also noted a movement away from the use of the courts toward the use of administrative agencies. Aubert sought an explanation for this change in the structure of the Norwegian welfare state.<sup>83</sup> Similarly, in developing African countries, Elizabeth Colson and later Richard Abel described the change in courts from their traditional function in maintaining law and order to "development," leading to a decline in tribal litigation.<sup>84</sup>

Auerbach does hint at the relation between law and social order. When he speaks about a major break in the way in which alternatives were perceived and used during the post-Civil War period, a time when alternative dispute resolution was undergoing a legalization process, he tells us something about the role of the legal profession and of the state.<sup>85</sup> But where is the analysis of alternative dispute resolution in relation to the economic forces of the period, the power differentials, and the massive effect of ideologies that colored the period? Those of us who have worked on disputing processes often get so tied up in the legal processes themselves that we forget the importance of the social and cultural structure that produces the problem in the first place.<sup>86</sup>

My own research on complaining in the United States covered much of the same ground as the latter half of Auerbach's book.<sup>87</sup> My questions were about relations, power, and economics: Is there something about the way an industrial society handles so-called minor disputes that is organizationally and structurally different from the handling of similar problems in the small face-to-face societies that anthropologists have traditionally studied? Are the differences linked to variables such as stranger relations, stratification, the movement from status to contract, economic development, and a certain type of industrialization? Are the similarities linked by type of relationship (equal/unequal, consumer/producer, face-to-face/faceless) or to the limits in-

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capitalist society develops as the state assumes greater importance without having the power to change the direction of the society. The result is that the state, and presumably the legal system as well, is constantly reacting to change rather than initiating change. The oscillations between formality and informality described by Auerbach can be viewed as movements within this crisis situation. See J. HABERMAS, *LEGITIMATION CRISIS* (1973); N. POULANTZAS, *STATE, POWER, AND SOCIALISM* (1980).

<sup>83</sup> See Aubert, *supra* note 7.

<sup>84</sup> See Abel, *supra* note 7; Colson, *From Chief's Court to Local Court*, *POL. ANTHRO.*, Mar. 1976, at 15.

<sup>85</sup> See J. AUERBACH, *supra* note 1, at 57-60.

<sup>86</sup> See M. FURNER, *ADVOCACY AND OBJECTIVITY* (1975) (describing the nineteenth century process of professionalization of American social science that led to centralized power and control over complex economic and social processes).

<sup>87</sup> *NO ACCESS TO LAW* (L. Nader ed. 1980).

herent in certain modes of complaint handling? And do conditions of the presence of state law, growing industrialization, and changing production and consumption patterns have durable effects on dispute resolution?

As indicated in this research, various dimensions of social change occurred over the past 150 years: the relational (from a society based on primary relations to one where relations between strangers characterize the majority of real and potential disputes); the procedural (the direction of change toward more law and fewer remedies);<sup>88</sup> the political (state monopoly on social control atrophies public opinion as control and places remedies beyond the reach of complainants); the economic (the directions described above have been triggered by an economic revolution, the center of which has been the changing relation between consumer and producer), and the ideological (the crystallization of an ideology that legitimizes the concentration of power and authorizes the dominant powers).<sup>89</sup> The crucial relationship is between economic modes of production and consumption and the organization of social control mechanisms.

### C. *Limiting the Scope of Analysis*

*Justice Without Law?* also fails as a sophisticated analysis because it, like other works, does not treat power as a central variable in its study of the disputing process.<sup>90</sup> Students of the dispute resolution process need to recognize that in any particular dispute one party may be of higher rank and power than another, and that such differences may

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<sup>88</sup> Auerbach recognizes this shift toward a law more concerned with procedure than substance in a number of places in the book. See, e.g., J. AUERBACH, *supra* note 1, at 11, 143. Auerbach also believes that non-legal alternatives are moving in the same direction. See *id.* at 15 ("while the forms of alternative dispute settlement still flourish, its substance recedes to the vanishing point").

In another context I argued that:

A nation such as the United States which is dominated by contract relationships and which also pays less attention to the ethical implication of cases, is developing a law that is predominantly mechanical and that may be moving in the direction of a law which is no longer pertinent to the needs of the many.

Nader, *supra* note 69, at 95.

<sup>89</sup> The importance of ideology is discussed below. See *infra* note 95 and accompanying and following text.

<sup>90</sup> See Nader, *From Disputing to Complaining* in TOWARD A GENERAL THEORY OF SOCIAL CONTROL 71 (D. Black ed. 1983). Indeed, Felstiner has argued that social conditions determine forms of dispute processing for reasons of good fit. See Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 76-85 (1974).

be determinative.<sup>91</sup> They must also recognize, however, that some parties are so powerless in terms of economic and political resources and procedural access that their grievances are never voiced and consequently are not processed, resolved, managed, or settled.<sup>92</sup> A focus on the different modes of dispute resolution will only be marginally productive in terms of theory building, unless those dispute resolution structures are seen as a subset of a larger system of controlling processes which has to include the unilateral resolution of complaints.<sup>93</sup> Auerbach's book neglects the crucial necessity of placing dispute resolution within the context of the society in which it exists.

It is from history that the model of controlling processes is best illustrated. The historical events that have resulted in the present system of processing economic grievances in the United States are a necessary part of any contextual, descriptive theory of alternatives. Three hundred years ago most people living in what is now the United States were both consumers and producers; dependency was not a critical variable. As the country's primary economic activity changed from subsistence agriculture to industrial production, and the roles of consumer and producer diverged, the balance of power shifted. The absolute power that consumers had previously enjoyed diminished. By the latter part of the nineteenth century, the disparities in power between producers and consumers were reflected in the former's superior ability to organize personnel and resources, and to conduct effective political lob-

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<sup>91</sup> Auerbach is sensitive to the importance of this dispute-specific power differential. See J. AUERBACH, *supra* note 1, at 125 (uneven distribution of economic power between a customer and a company serves the company's interests in small claims court); see also *supra* note 67.

<sup>92</sup> Felstiner has identified this response of large numbers of individuals as "lumping it":

Between outsiders who have some contact with a large organization and the organization, a significant amount of dispute processing may be a special form of avoidance termed "lumping it." In lumping it the salience of the dispute is reduced not so much by limiting the contacts between the disputants, but by ignoring the dispute, by declining to take any or much action in response to the controversy. The complaint against the retail merchant or the health insurance company is foregone although the complainant's grievance has not been satisfied, or even acknowledged, and although interaction between the individual and the organization is not altered. It would be uncommon for such grievances to be mediated since there is little incentive for the organization to change its posture. Because of the discrepancy in size and power even the threat of withdrawal by the individual is futile to coerce compromise by the organization. And no adjudication short of the government courts may be possible because no other power exists to coerce decisions against the organization.

Felstiner, *supra* note 90, at 81 (footnote omitted).

<sup>93</sup> Unilateral complaint resolution includes lumping it, avoidance, and coercion. See *supra* note 2.

bying. Moreover, the number of complaints received and left unsettled, and the number of social movements created to remedy this power shift—for example the small claims courts, the regulatory agencies, and legal aid—all testify starkly to the power of producers over consumers.

Although the battle between producers and consumers was well underway in the nineteenth century, the state did not become an active participant in mediating issues raised by consumers until the latter part of that century, and then took an interest that extended only to the protection of society's basic needs. Adulteration in food stuffs, false advertising, and the precipitous rise in prices were all issues that were viewed by the government as a set of concerns common to a class of people. They were addressed by government not as individual problems but as class problems to be remedied by legislative and regulatory means.

By the twentieth century, the absolute power positions of consumers, producers, and government had changed. Now, both organized producers and organized government have considerably more power than dispersed consumers. This great disparity in power was caused by the departure of producers from the immediate social field of consumers which destroyed the latter's informal social control system. The almost total dependency of consumers on producers that accompanied this change created a new role for government. In this sense, modern industrial nations (of whatever political persuasion) are generically different from the face-to-face societies we have studied in the past.

In the evolution of legal relations concerning consumers' expressions of grievances about products and services, this history was reflected in a movement from dyadic to unilateral procedures: from disputing to actions of voicing complaints or resorting to avoidance or self-help strategies instead. As the power differential between parties to economic grievances has widened, aggrieved consumers are compelled to seek out their adversaries and do battle using weapons designed by producers. It is producers, not consumers, and not the government, that determine, support, and use the majority of complaint alternatives in the United States.

During this period of change, ideology played an important role in diverting attention from the problems of unequal power, in insuring continuity, and in glossing contradictions. The ideology expressing the value that everyone is equal before the law obscures the reality that the consumer occupies a role with inherently weaker bargaining power.<sup>84</sup>

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<sup>84</sup> Auerbach mentions the problem of ideology. See J. AUERBACH, *supra* note 1, at 142-44. Although the analysis is not fully developed, Auerbach does state that:

The idea that confidentiality protects us all is also part of a producer-oriented complaint system; the control of information is an important basis of power. Confidentiality of complaints, known only to the producer, in a market where it is impossible for consumers to be adequately informed, prevents them from learning from the experience of others and from seeing themselves as part of an offended group. The idea of *caveat emptor* (let the buyer beware) meant that the sale of goods was to be a private affair between the parties. The concept of *caveat emptor* is based on the assumption that a buyer and seller have equal bargaining power. The ideology that complaint cases should have custom treatment has encouraged legal scholars to be concerned with the conditions of microjustice—a costly focus on particular plaintiffs and defendants—rather than with macrojustice—in which cases are viewed in the aggregate and through which the broad consequences of laws and legal institutions are analyzed.<sup>95</sup> A producer ideology includes a view of the complainant as malcontent and deviant<sup>96</sup> and a conception of the state and only the state as the guardian of public rights, with a mandate to bring legal action to protect the general welfare, as, for example, when it sues a drug company for selling harmful drugs. The same ideology is reflected in vesting corporations with many of the rights and privileges of “persons.” The very nature of a corporation, however, reduces the effectiveness of the sanctions imposed against “natural persons.” A corporation, for example, cannot go to jail.<sup>97</sup>

The ideologies that I sketch here are interwoven with the economic and political realities which I described earlier, and operate to manage or control the “disorder” that may arise from those realities. From this

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Throughout the twentieth century, as judges and lawyers have monotonously conceded, legal institutions have defaulted on their obligation to provide justice to all. This is surely because the ideal of equal justice is incompatible with the social realities of unequal wealth, power, and opportunity, which no amount of legal formalism can disguise.

*Id.* at 143-44.

<sup>95</sup> Auerbach also is aware of the process of the disaggregation of claims, particularly by requiring that individuals proceed with non-legal dispute processing. *See id.* at 126 (“compulsory consumer arbitration undercut the threat of class-action litigation”). There is a suggestion that this disaggregation was brought about to serve the interests of the legal community. *See id.* at 135-36.

<sup>96</sup> Auerbach states that dispute settlement processes “isolate[ ] disputants” and “likely” result in “dependency and passivity.” *Id.* at 12. This feeling of isolation or deviancy is related to the status of the individual: “[U]sing a third party seems to have some stigma associated which decreases with increased education and income. This means that households of low socio-economic status receive less than their fair share of remedies for purchase failures.” Nader, *supra* note 69, at 89 (citation omitted).

<sup>97</sup> *See* Stone, *Stalking the Wild Corporation*, 4 WORKING PAPERS FOR NEW SOC'Y 17 (1976); *see also* Nader & Shugart, *Old Solutions for Old Problems in NO ACCESS TO LAW* 57 (L. Nader ed. 1980).

broader perspective, litigiousness as suggested by Auerbach is hardly the problem.<sup>98</sup> Rather, we should be most concerned about why people opt out of the legal system. If Marc Galanter's argument, that the American legal system is operating to fulfill the interests of the organizations, the Haves, the repeat players, as against the interests of the Have-Nots, is correct, then one would expect that the Have-Nots would not turn to the legal system.<sup>99</sup> So, too, it may be sociological savvy that discourages people from using extra-judicial alternatives for dispute resolution which at best allow negotiation between parties of dramatically unequal status and power. Business corporations benefit from resolving disputes in non-judicial settings possibly to an even greater degree than they benefit in the courthouse.<sup>100</sup>

In a manuscript, "Changing the Law, Changing the Society—Toward an Explanation of the Dispute-Settlement Process in the American Legal System," Egyptian law professor M. Nour Farahat has stated the problem most cogently. He argues that "the real dilemma of the disputing process literature in the United States, is its search for a convenient alternative to the official legal system while keeping the whole system of socio-economic relations untouched." He asserts that this swing to alternatives in search of justice will fail because "in order to change the law, it is necessary to change the society."<sup>101</sup>

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<sup>98</sup> In fact, even if Americans were overly litigious, this broader perspective would continue to urge that our real problem is that the important claims of individual consumers are not being properly resolved, either legally or non-legally.

<sup>99</sup> See Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Although Felstiner also argued that people do not use third parties to resolve disputes (they prefer to lump it) he believed that this non-use results from a better fit with such individuals' needs. See Felstiner, *supra* note 91. Felstiner's argument lacks an awareness that such individuals may also recognize that the Haves come out ahead and therefore have decided not to bother with the disputing systems.

<sup>100</sup> See J. AUERBACH, *supra* note 1, at 125 (small claims court benefits companies); *id.* at 128 (housing courts serve landlords' interests).

<sup>101</sup> Farahat, *Changing the Law, Changing the Society—Toward an Explanation of the Dispute-Settlement Process in the American Legal System* 16-18 (1983) (manuscript on file at the *University of Pennsylvania Law Review*). The theory Farahat uses to explain the phenomenon of alternatives combines the theories of Maine, Pound, Kant, and some of the contemporary authors mentioned in this paper. He posits:

[W]hen the society undergoes relative social stability . . . , where there is conformity of the relations of production with the powers of production . . . and where the equilibrium is prevailing between the sociableness and unsociableness of men . . . , the legal thought tends to be a mere justification of the formal valid legal system . . . . On the other hand, when the society undergoes a period of social change . . . , where a major contradiction occurs between the relations of production and the powers of production . . . , and where the unsociableness . . . is affecting the social relations . . . , the legal thought tends to trespass on the official legal rules, to

To address the problems in dispute resolution in this society, or in any other, I believe that it is necessary to follow Farahat's advice. We must recognize disputing for what it is: a piece of a much larger society. A debate that is limited to the choice of legal or non-legal alternatives divorced from the political, social, and ideological background of the problem is of limited value. To address the problem effectively will require more than a debate among lawyers centered on concerns of judicial efficiency. It will require an approach that considers disputing in the context in which it is embedded. This approach will obviously entail expanding the limits of the debate to include concerns not normally the fare of legal scholars. But it is only with an approach that unites the different fields involved that we can hope finally to provide meaningful analysis of the justice problem.

### III. CONCLUSION

As an interpretive critique of the "dispute resolution industry's" failure to remedy the problems associated with the justice system in America, Auerbach's *Justice Without Law?* is a good summary of how this industry is currently being judged. As an exploration of recurrent oscillations in the treatment of disputes between parties in the United States over a 350-year period Auerbach's work is original. As an analysis providing explanations why dispute resolution processes are evolving in particular directions, it is missing the depth of either a jurisprudential interpretation or a socio-anthropological approach that would reveal that the oscillations he describes are part of the political and economic history of the United States. If Auerbach had taken this approach his policy recommendations might have taken a different turn, not toward a judicial solution, and not toward individual justice, but toward aggregate solutions that join the remedy for particular cases with prevention.<sup>102</sup> It is prevention, not dispute resolution, that will resolve the contradictions between producer ideals (for example, "we

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criticize them, and to look for another legal system which may be more responsive to the changing social needs: in such periods, the legal thought becomes less formal and more substantive.

*Id.* at 11-12.

<sup>102</sup> Karl Klare has noted that "[t]he preeminent characteristic of modern legal consciousness, transcending all political battlelines, is its unreflective and uncritical quality, its attempt to accommodate yet obscure the contradictions of legal thought, which reflect the contradictions of social life in late capitalist society." Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 336 (1978). The reliance on judicial and individualistic solutions is an inherent feature of the "modern legal consciousness." It reflects the use of law to divide and separate competing power structures.

are all equal before the law”) and consumer realities (for example, unequal bargaining power). In this context the oscillation from judicial to non-judicial becomes another attempt to “cool out the mark” in hopes of things getting better as a result of the latest reform direction. I myself once said that disputing without the force of law is a lost battle.<sup>103</sup> At this point I would go further to argue that a judicial remedy is not possible without bringing the economic system in line with judicial ideals.

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<sup>103</sup> Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 (1979).

