

Michigan Law Review

Volume 82 | Issue 4

1984

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Recommended Citation

David M. Trubek, *Turning Away From Law?*, 82 MICH. L. REV. 824 (1984).

Available at: <https://repository.law.umich.edu/mlr/vol82/iss4/19>

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TURNING AWAY FROM LAW?†

*David M. Trubek**

THE POLITICS OF INFORMAL JUSTICE, VOLUME 1: THE AMERICAN EXPERIENCE; VOLUME 2: COMPARATIVE STUDIES. Edited by *Richard L. Abel*. New York: Academic Press. 1982. \$29.50 per volume.

JUSTICE WITHOUT LAW? By *Jerold S. Auerbach*. New York: Oxford University Press. 1983. Pp. xv, 182. Cloth, \$16.95; paper, \$6.95.

We live in a strange time. High priests of our legal order are questioning the law. At ritual events and in official publications the legal elite has stopped celebrating the law and encouraging its use, and has begun to chastise the public for relying on the law and to condemn lawyers who encourage such popular vices. Where chief justices, law school deans and similar types once celebrated the Rule of Law as the core of American civilization and advocated the expansion of legal rights and legal services, some now rail against the evils of "legal pollution" and warn of the threat of a "litigation explosion."

The picture that is painted is of a people in moral decline. In tones reminiscent of revival meetings, these high priests associate law with images of evil and its use with weakness and decadence. A former law school dean and president of the Legal Services Corporation calls up the foul image of "legal pollution . . . clogging the everyday affairs of all of us."¹ The Chief Justice of the United States chastises Americans for "increasingly turning to the courts for relief from a range of personal distresses and anxieties."²

The nation, we are told, is threatened by the disease of hyperlexis and the litigation explosion it engenders. In a recent article, Mark Cannon, assistant to our Chief Justice, tells us that because Americans react to virtually any problem by bringing a lawsuit, we are in the grip of an unprecedented litigation explosion that is straining our courts, eroding self-government, weakening representative

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1. Ehrlich, *Legal Pollution*, N.Y. Times, Feb. 8, 1976, (Magazine), at 17.

2. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

institutions, and sapping the economy.³ Litigation is evidence of the decline of virtue: "[T]he epidemic of litigation," Cannon thunders, "reflects weakness in American society."⁴ Noting that litigation rates are much lower in Japan than in the United States, he suggests that our greater litigiousness may explain why Japan's per capita income has caught up with ours in the last twenty-five years.⁵ "The legal explosion," he says, "saps the strength of our economy."⁶ If we weren't spending all that time suing, Cannon hints, we would have designed better cars and television sets.

Those who preach against the evils of litigation and the temptations of too much law have a cure in mind. We have sinned, but redemption is at hand. Surely, in the heavenly city there will be less conflict: the priests suggest that all will be better when the populace is more self-reliant, lawyers less greedy, and judges more restrained. But they do not want to ban all conflict; they also want to channel conflict out of the courts and into "informal" institutions. Through the greater use of arbitration, conciliation, mediation, and neighborhood justice centers we will find what is needed to restore lost republican virtues and even revive flagging industries.⁷

These people are not simply telling us to shape up and stop using the law so much; some are suggesting we employ institutions that might be seen as the antithesis of law. Dispute processing institutions are informal, Richard Abel tells us,

to the extent that they are nonbureaucratic in structure and relatively undifferentiated from the larger society, minimize the use of professionals, and eschew official law in favor of substantive and procedural norms that are vague, unwritten, commonsensical, flexible, ad hoc, and particularistic. [Vol.1, p. 2].

So described, informal justice seems to be the negation of the idea of the rule of law. Roberto Unger has identified four attributes that are essential to what he calls a "legal order": for the rule of law to exist law must emanate from the state, be explicit, be applied by independent and autonomous decisionmakers, and apply generally to all persons similarly situated.⁸ Are the current apostles of informal justice advocating the abandonment of law in this sense? Are people who spend their lives litigating or adjudicating (or teaching others to do so) losing faith in the law and urging people to seek other solutions? Just as the people are (supposedly) flocking to the courts in

3. Cannon, *Contentious and Burdensome Litigation: A Need for Alternatives*, 63 NATL. FORUM, Fall 1983, at 10.

4. *Id.* at 12.

5. *Id.* at 11.

6. *Id.*

7. Burger, *supra* note 2, at 276-77; Cannon, *supra* note 3, at 12.

8. R. UNGER, *LAW IN MODERN SOCIETY* 47-127 (1976).

droves, they are told: do not enter these dark and dismal halls; take your cares elsewhere.

This seems like a paradox. Shouldn't lawyers be proud of the formal processes that underlie our concept of the rule of law and thus the liberal vision of politics and society? Informalism could be seen as a threat to the idea of law itself. If law cannot be separated from community norms or immediate purposes and thus stand beyond politics, if norms are not applied by any specialized decisionmakers enjoying some measure of autonomy, how can rights be preserved? If there are no ways to restrict bias in judgments by insisting on detachment, and limiting what may be heard at trial, if no standards exist by which judgments can be reviewed and discretion curbed, what then remains of the liberal concept of law? Yet if informalism is so much at odds with our common notions of legal order, why are some who claim to speak for the legal profession and the judiciary so eager to turn away from formal justice and so ready to adopt dispute processing techniques that rely little, if at all, on the application of pre-existing rules, use lay rather than professional decisionmakers, seek accommodation rather than the definition and enforcement of rights, and arguably provide less protection against bias and discretion?

One way to resolve this apparent paradox is to view the interest in informalism not as a preference for this approach, but as the reluctant acceptance of a second-best solution. Imagine that these lawyers, wedded to the formal system, but concerned about an impending litigation catastrophe, decided that triage was essential and that the less desirable but cheaper solution of informalism had to be adopted in the crisis. This account would resolve the paradox but it is not an accurate picture of what happened. The preference for informalism and the push for "alternatives" to litigation did not emerge after careful study of existing litigation practices or the thoughtful weighing of any evidence of a catastrophe. The diagnosis and the cure emerged at the same time. Indeed, one could argue that the purported litigation crisis was invented to justify the solution of informalism, rather than the other way around.

The case that things are so bad that we must settle for second-rate justice has never really been proven. Marc Galanter has conducted a meticulous analysis of the literature that predicts disaster if litigation trends continue, a field he calls "hyperlexology."⁹ He shows that the claims made in this literature rest on scant evidence. Frequently-made statements about the propensity of Americans to litigate and allegations that we are the world's most litigious society

9. 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. 4, 7 (1983).

were based on scant data.¹⁰ Claims that litigation rates are soaring and have reached unprecedented levels rely on selected statistics and projections of short-run trends.¹¹ Further, one can dispute such claims by taking account of more of the available evidence. For example, my colleagues in the Civil Litigation Research Project and I have shown that only a small percent of the disputes Americans engage in become lawsuits, that most of our lawsuits are settled, and that most cases are modest in scope.¹² Galanter's data suggest that our litigation rates are neither higher than those in other industrial countries nor higher than they have been at other times in our past.¹³

Little evidence has yet been offered to support the view that, like it or not, we must turn away from law to stem the flood of lawsuits. But that is not really the point. For the advocates of informalism do not just offer "alternative" dispute processing institutions as a second-best solution. Quite the contrary: the literature is replete with statements that informal justice is preferable. Such processes are pictured as fairer and more accessible, as well as quicker and cheaper than the courts.¹⁴ The advocates of informalism do not think they are promoting an inferior brand of justice.

So the paradox remains. The elite lawyers' interest in informal, non-legal dispute processing is not a thoughtful, tragic response dictated by a well-understood and irrefutable catastrophe. The turn to alternatives, at least in the ritual rhetoric of many elite spokesmen, must be something more — or less — than that. To understand this turn of events we must look beneath the surface. That is what the two books under review help us to do. Both Jerome Auerbach, a historian and critic of the legal profession, and Richard Abel, a lawyer and sociologist of law, take the current passion for informal dispute processing as a puzzle to be unraveled, and seek to place the discussion in historical, comparative, and theoretical contexts.

These books help us to understand current paradoxes in elite rhetoric because they relate ideas about the administration of justice to broader visions of society and the political movements they reflect or engender. Both authors are concerned with the roots of informalism. They recognize that ideas about resolving disputes involve more than technical questions of judicial management. Both want not only to describe the emergence of the views that mediation is preferable to adjudication, that community norms are better than of-

10. *Id.* at 10-11.

11. *Id.* at 37.

12. Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72 (1983) (summarizing the findings of a national survey which explored the use and non-use of courts, the costs of civil litigation, and related matters).

13. Galanter, *supra* note 9, at 36-60.

14. *E.g.*, Burger, *supra* note 2, at 277; Cannon, *supra* note 3, at 13.

ficial law, or that face-to-face interaction is superior to the cold and distant routine of the courts: they also seek to explain why such views are expressed and sometimes take hold.

Although they share an interest in the roots of informalism, these authors approach the question in different ways and evaluate phenomena differently. Auerbach is deeply attracted to informal justice because it is the expression of a communitarian vision of society he favors and a rejection of a competitive individualism he decries. Deeply skeptical of American liberalism and the legalism that it engenders, Auerbach seeks to show that throughout our history there have been groups whose alternative vision of society led them to seek "justice without law": to define norms and settle conflict through community interaction and face-to-face mediation rather than by adversarial conflict and detached adjudication. He sees the legal profession as the principal obstacle to successful realization of this ideal of justice without law.

Abel shares Auerbach's distrust of lawyers and some of his enthusiasm for true community and informal processes of dispute resolution. Abel, however, sees the primary obstacle to genuine informalism not in the professional interests of the bar, but in the needs of a capitalist economy and the operation of the capitalist state. Moreover, Abel's focus is extremely broad. While Auerbach is content to survey debates about modes of dispute processing throughout American history, Abel goes even further in his search for the roots of informalism. Assembling essays by numerous authors in two large volumes, Abel offers us a survey that covers many cultures and times. The two volumes of *The Politics of Informal Justice* include general theoretical essays and specific empirical and historical studies. The quality is mixed, but they form an impressive whole. Abel includes studies that confirm Auerbach's claim that dissenting movements in America like the Knights of Labor have found the idea of informal justice attractive. But *The Politics of Informal Justice* also examines the importance of informal justice in the political programs of movements and regimes as disparate as the Nazis in Germany, traditional modernizers in pre-World War II Japan, and socialists in Allende's Chile, Communist China, contemporary Portugal and post-colonial Mozambique. These volumes show that the rhetoric of informal justice has been used by modernizing elites seeking to preserve some of the hierarchical structure of traditional society during industrialization, and by radical socialists whose apparent goal is a decentralized and egalitarian society.

The authors in these books are not promoting the use of alternative dispute processing in the United States today. Auerbach doesn't think that experiments in arbitration, mediation, and neighborhood justice currently supported by our legal elite will do much good;

Abel and some of his colleagues think they could do great harm. Neither book tells us in detail how alternative techniques work or how alternative institutions actually function. One would not consult these books to learn how to be a mediator or set up a neighborhood justice center. Indeed, they contain relatively little information on actual projects and procedures. The focus is not on how to do it or on who is doing it, but on why everyone seems to be talking about it and what that means.

These books raise important questions about the role of images and institutions of justice in American life. Auerbach sees a permanent tension between formal and informal conceptions of justice and explores oscillations between them throughout our history. Abel asks whether the move to informalism presages a major turning point in the American legal system: even his comparative studies seem to be designed to shed light on that question.¹⁵ Both see that the move towards mediation, arbitration, and the neighborhood justice centers is a move away from courts and the ideal of formal justice. They are as interested in explaining why we might be moving away from our core legal institutions as in knowing what we are moving towards. They seek to give an account of the apparent turning away from law as a central source of justice in America.

To do that, one must have a theory about relationships between cultural ideals, political movements, and legal institutions. These volumes suggest not one theory but several. The authors Abel has assembled do not share a common perspective. Several participated in a Conference on Critical Legal Studies panel which gave birth to this book, and most share a general left-wing orientation, but their work is otherwise quite diverse. Auerbach shares Abel's skepticism about some of the current rage for alternatives but not his analytic framework, which draws heavily on the Marxist tradition. Read together, these volumes do not offer a single explanation for the paradox I have alluded to — or any other questions that arise when we consider the contradictory nature of the discourse on informalism in America today. Rather, the books provide a series of theoretical starting points, interpretative approaches, and concrete hypotheses. Since the perspectives set forth are rich and the historical and sociological analyses quite provocative, these books will be of use to scholars of law in society long after the ill-starred and misnamed "neighborhood justice center" (which wasn't in a neighborhood and dispensed relatively little justice) is thankfully forgotten.

If we look for a way to explain the turning away from law I have

15. Abel sets forth his goals in the Introduction to Volume 1. He asks if recent "tirades against the expansion of . . . rights, . . . professional legal services, and . . . formal legal institutions" presage a major transformation of our legal system, or are just a lot of talk. The goal of the two volumes is to explore that question. Vol. 1, pp. 1-2.

described, if we think of these books as aids in the interpretation of a discourse in which some elite spokesmen for the American legal profession decry the overuse of law and call for non-legal solutions to conflicts and problems, what do we find? Naturally, in a collection this heterogeneous there are numerous competing and even conflicting explanations. However, at the end of Volume 1 of *The Politics of Informal Justice* Abel includes an excellent essay of his own on "The Contradictions of Informal Justice" (vol. 1, pp. 267-320) which serves as a summary of the major themes explored. This, read along with Auerbach's thesis, helps us identify several core ideas. While these are tentative and overlapping, there are five accounts of the "turning away from law" that strike me as especially fruitful. They suggest it could be:

- (i) a tactic designed to accomplish a concrete set of political goals;
- (ii) a defensive move by the legal profession to co-opt and control popular movements which threaten the profession's economic interests;
- (iii) a response to the need to legitimate the legal system by offering new ideals that hold out new promises of fairness after others have been exposed as shams;
- (iv) an effort to create an atmosphere in which the role of law in America could be altered; and
- (v) a way to introduce a new form of social control that is more pervasive and powerful than formal law.

If we wish to probe the motives behind the move toward informalism, the tactical explanation is the most obvious. There are concrete situations in which people may think that handling certain kinds of disputes in informal settings will lead to different results than would be had in the courts. In these situations the rhetoric about the general virtues of informalism may simply mask an effort to favor *X* over *Y*. The Abel volumes include several examples of this rather focused, tactical use of informalism. One of the most interesting is Mark Lazerson's account of the introduction of an informal Housing Court to handle landlord-tenant cases in the Bronx (vol. 1, pp. 119-63). Lazerson shows that this effort was, at least in part, motivated by desires to weaken tenant groups who, with aid from legal services lawyers, had successfully used the regular courts and formal law to secure a better bargaining position *vis-à-vis* slumlords. Another is John Haley's intriguing story of the decision by the Japanese during the inter-war period to introduce mandatory conciliation in landlord-tenant, family and similar disputes (vol. 2, pp. 125-47). Haley shows that the Japanese elite pushed for conciliation as an alternative to litigation because of rather concrete political goals: they feared the impact of litigation under the new civil code on the traditional structure of Japanese life and wanted to ensure that the political inroads on family and local authority which litiga-

tion could engender would be curbed. In both cases a rhetoric that stressed the general virtues of informal over formal dispute settlement actually justified changes designed to benefit a specific group.

A second explanation for the newfound interest in informalism is that lawyers may be trying to control a movement that threatens their professional interests. Auerbach tells us that at an earlier stage in our history lawyers felt threatened by business and popular dissatisfaction with the legal system, a dissatisfaction that included pressure to set up dispute processing systems that did not use lawyers at all. One among many fascinating stories he tells is that of the "legalization" of commercial arbitration, in which the legal profession managed to take control of and shape a movement for commercial arbitration that had started as an effort to create truly informal, non-legal dispute processing institutions and ended up constructing a parallel system of relatively formal justice dominated by lawyers and employing many elements of the adversarial process and the judicial method (pp. 96-97, 101). Certainly to some degree similar concerns animate current calls for informalism emanating from the legal elite. Aren't law schools taking an interest in divorce mediation, for example, because they fear students will not be equipped to compete with non-legal professionals trained in non-adversarial techniques? Such concerns play some role in the current scene, but it is interesting that none of these authors identify any strong or broad-based pressures for informal justice that might be forcing lawyers to try to preempt the rhetoric and practice of alternatives. Indeed, Auerbach calls the most recent period "The Legalization of Community" (p. 115), suggesting that the images of "community" associated with informal justice are being used primarily by lawyers who have taken the lead in the current movement. The only "grass-roots" pressures he finds in recent years are the efforts of some reformers to use informal dispute processing as part of a "community empowerment" strategy (pp. 116-17). But these efforts, which after all were initiated by elite lawyers like Jean and Edgar Cahn, came to very little. As Paul Wahrhaftig points out in his contribution to the Abel book (vol. 1, pp. 75-97), few of the recent American alternative dispute processing experiments were really organized around viable communities, fewer were oriented to community empowerment, and most that were did not succeed. Although efforts at co-option and preemption may play a role in the story, they seem less important than other factors.

The authors suggest that the discourse on informalism may serve ideological functions as well as protect concrete interests. Because they show how images of dispute processing play a role in diverse political ideologies, these books draw our attention to the ideological dimension of discourse on the administration of justice. Is there an ideological function behind the new interest in informal and non-adversarial modes of dispute processing? Abel and Auerbach think

so. Both suggest that the turning point away from law may be a response to legitimation needs. Informalism may distract attention away from the flaws of the legal system while reducing potential threats to social stability that could result from our taking law too seriously.

Legitimation is a central theme of Auerbach's book and a major topic of the analysis offered by several authors in the Abel collection.¹⁶ The central argument (when applied to the United States) is that in practice American law must always disappoint those to whom it offers a promise of freedom, equality, and justice. For Auerbach, the struggle to legitimate American society through law is "Sisyphian" (p. 146), for an ideology that relies on legalism seeks to reconcile the irreconcilable. While law promises freedom, equality, and neutrality, our legal system is embedded in a society that denies effective liberty to many, encourages inequality, and subverts any genuine effort to construct a system of control outside the structures of power and hierarchy that we all live in. In this analysis, since the promise of American law must always exceed its performance, the legal elite is constantly struggling to find ways to cover over flaws or generate new utopias to preserve the illusion that these flaws will be resolved in short order.¹⁷ Informalism, in this sense, is just the latest answer to the perennial problem of justifying a system that denies its own ideals. Proposals for informalism make it easier for the elite to forestall the widespread criticism that American law is inaccessible, that high costs ration law and favor haves over have-nots, and that the law offers no solution to many of the most immediate problems of daily life. By promising the institution of some new solution to these age-old problems, in the form of arbitration, mediation, neighborhood justice centers, and the like, lawyers can preserve the legitimacy of the legal system, itself a central part of our national creed.

This analysis could explain why we have turned to informalism as a new solution and at the same time done so little to implement it. For it is important to recognize that despite all the talk about alternatives, very little has been done to create any. The Dispute Resolution Act, which was supposed to put federal money behind the movement for alternatives, was never funded.¹⁸ The neighborhood justice center program has been abandoned by the federal govern-

16. See e.g., Abel (vol. 1, pp. 267-320), Santos (vol. 1, pp. 249-66), and Reifner (vol. 2, pp. 81-123).

17. For further discussion of these aspects of American legal ideology, see Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC. REV. 529-69 (1977); Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. — (1983) (forthcoming).

18. The Dispute Resolution Act of Feb. 12, 1980, Pub. L. No. 96-190, § 2 (b), 94 Stat. 17 (1981), was passed "to assist the States and other interested parties in providing to all persons convenient access to dispute resolution mechanisms which are effective, fair, inexpensive and expeditious." Auerbach notes that while Congress approved the bill, and it was signed into

ment. Foundation interest has waned. As the rhetoric of informalism grows in intensity, less is done to turn the rhetoric into reality.

The nature of the rhetoric, however, provides an additional clue that may help us solve our original puzzle. Even if we accept the legitimacy theory which I have distilled from Auerbach and Abel, we are led to ask: why *this* form of legitimation? Even if we accept the view that American legal thought must contain a utopian element that resolves the contradiction between the law's promise of escape from inequality and domination and the reality that the law is just part of an unjust and hierarchical system, we are still led to ask why informalism has become our new utopia. For if there has been any real change in the last ten years, it is not in the organization and structure of the legal system but in the utopian images that the legal elite employs. Ten years ago our elites had an answer to the "unfulfilled promise of American law," but it was the answer of more law, not less. Ten years ago those who participated in the high rituals of the legal order — honorary lectures, commencement addresses, and the like — often used these events as opportunities to call for the extension of rights, expansion of legal services, creation of public interest law, and improved "access to justice." Why is it that today these images are thrown aside and we are told of the delights of informalism, the wonders of the indwelling community, the promise of mediation?

These volumes offer several possible answers to this question, all of them chilling. One is that our elites have recognized that the promise of more law is too dangerous: when we promised to overcome dissatisfaction with the legal system by improving representation for the have-nots and strengthening their rights, these promises actually made a difference. Cases were brought and rights never before taken seriously had to be respected. These changes challenged powerful groups who look to the law to protect their interests, not to limit their power. If the vice of perfected legalism as a utopia is that it might be taken seriously, then the solution is to offer a new utopia, an alternative vision of society and conflict resolution that downgrades the idea of rights, undercuts the rationale for extending legal services to the poor and unorganized groups, yet at the same time strengthens traditional bonds and authorities and discourages the sort of conflict that might lead to substantive justice. Is that what underlies the current passion for informal justice?

A second suggestion is equally disturbing. The idea that informalism is a way in which the state expands its power, while cloaking it in the garb of "community," forms a *leitmotif* in the Abel volumes. Abel and several others suggest that while informalism ap-

law by President Carter, no funds have been appropriated under it and the Act remains a dead letter. Pp. 136-37.

pears to be a way to return power to neighborhoods, communities and private organizations, it really serves to facilitate expanded state intervention in our lives.

In his essay on "The Contradictions of Informal Justice" (vol. 1, pp. 267-320), Abel speculates on what might come about if the move toward informal justice were successful. Today, he suggests, we have a situation in which social control is exerted partly by private structures with some relationship to genuine communities, and partly by state institutions which are circumscribed by formal law. The growth of informal justice, he argues, threatens both to weaken genuine forms of community and to undermine the protections granted by the formal system.

While the apostles of informalism routinely invoke the rhetoric of a "natural" community (which is contrasted with the artifice of law), and suggest that alternative forms of dispute processing are a way to return justice to the community, Abel's study shows that the projects which implement this idea actually depend on state resources and state personnel. Neighborhood justice centers, for example, were primarily funded by government grants and associated with courts, not neighborhoods. As Christine Harrington points out (vol. 1, pp. 35-71), most centers depend on referrals from courts and prosecutors for their case load. So, Abel suggests, the proponents of informalism don't actually want to strengthen real communities: rather they will substitute new forms of state control which lack both the spontaneity of civil society and the minimal protections of formal law. Since alternative institutions are supported, directly or indirectly, by the state they will supersede any "genuine" community structures that do exist. Since alternative institutions are pictured as non-coercive (despite the fact that they often need coercion to work) they can dispense with the sort of due process protections which are built into our formal system.

The critics tell us not to believe in the chimera of justice without law. But they also tell us they do not believe in justice through law. We seem to be left with no way out. Auerbach and Abel denounce legal formalism almost as vigorously as they condemn informalism. Auerbach's book contains a strong polemic against liberal legalism and the legal profession, as well as a passionate condemnation of the sort of society and culture which makes formal law seem either necessary or desirable. But he recognizes that we live in just such a society. Since he believes that any alternative vision of justice will be a delusion unless the society itself is changed — a possibility that he seems to discount — Auerbach counsels us to reject the turn away from law. The book ends on a note of stoic resignation: legal formalism, however hollow and terrifying, is still all we have to cling to. The values of informal justice and the vision of community they em-

body, he suggests, are the ones we should espouse, but anyone who thinks they can be realized in America today is a chump, and anyone who proposes trying to do so must be trying to fool us.

In a sense, Abel's volumes strike the same stoic note. It is true that Abel himself clearly relates both the flaws of formalism and the pitfalls of informalism to the operation of the capitalist system, thus implying that transformation of the system may be a way out. Moreover, some of his collaborators emphatically embrace socialism and point to socialist experiments in informalism as exemplars. Thus Abel, more than Auerbach, points us toward a transformative politics. But the nature of this struggle is unclear. While Abel and his colleagues survey a wide range of experiences and demonstrate some enthusiasm for popular justice in other times and other places, one gets the feeling that the closer they get to our reality, the more trouble they have deriving political lessons or an affirmative vision from their analysis. As a result, they can only condemn the dangers of false informalism and are, like Auerbach, forced to hold onto legal formalism, however diminished and hollow it may be.

So the ultimate paradox in this story is that no one really seems to believe in law anymore. The elites who champion alternatives question the law's efficacy, but so do the critics. Auerbach sees legalism as the antithesis of community and humane values; Abel and his colleagues see formal law as at best a weak reed that the poor can occasionally hold onto and at worst the very heart of oppression. The high priests celebrate an informalism they don't believe in, while the critics reluctantly champion a formalism they distrust.