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A User Theory of Law - Fourth Annual Alfred P. Murrah Lecture

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A USER THEORY OF LAW

Fourth Annual Alfred P. Murrah Lecture*

by

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ANTHROPOLOGISTS who work in other cultures often return to their own culture and society with a perspective that makes them question the obvious and see things that had they never left home they might never have seen. Having studied in other cultures, I am particularly struck by anomalies within certain observations about the American judicial system and its use: How has it come to be that we have a legal system that is closed to the majority of potential plaintiffs? How is it that the legal system has evolved its business such that most of the lawyers work for a few of the potential users of the system? Why is it that the rank and prestige of a lawyer is associated with working not for the poor and needy, not for the implementation of civil rights, not for the public interest, but for the affluent and for the corporate interest? Why has the role of the plaintiff atrophied in the evolution of legal relations? How is it that so many law professors and students are so uninterested in corporate crime? And how is it that an idealized system of rights has been able to hold together in spite of the absence of remedies? Such observations are in need of continued clarification and explanation.

Two movements are afoot that address some of these observations. One is the dispute resolution movement, which states as its intent the approximation of idealized law by matching rights with remedies provided through alternatives to the judicial system. The other movement is mainly critical and analytic in posture and does not point to reform but to an understanding of law as ideology—perhaps in the belief that the basic changes in inequities of the law are impossible today without changing the economically based ideology of law as a product.

My work spans both the dispute resolution research and the study of legal ideology. Throughout my published work I have argued that law operates in the context of a social order, that it is not independent from that order, that law is not god-given, but created by the dominant users of the law, and that law is a principal instrument of both order and justice in a democratic state. In this lecture I would like to discuss a user theory of

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law, one that describes the growth of law as an organic process that in some societies results from broad plaintiff activity.

In virtually every kind of endeavor today we are witnessing a struggle with issues that determine what kind of a democracy we shall be. In the fields of science and technology, for example, the debates have been fierce. Is science and technology as presently constituted antidemocratic, or as some say, incompatible with democracy as espoused in our Constitution? In the humanities and social sciences, questions are being raised as to the degree to which law is unable to help protect us, or indeed the degree to which law may be part of a movement towards a Brave New World in which indirect, private controls such as standardized testing and standardized workers supersede public and legal controls. In biology, questions of who controls the decisions to carry out bio-engineering technological research erupted first in city governments such as in Cambridge, Massachusetts, or Palo Alto, California, where questions of democratic control were argued. In the law, the contemporary debate over democratic control has been of a different nature and intensity, maybe because law schools today are less places of Commons debate and more technical training grounds. The technical perspective on law is bound to stand in the way of being able to see law as partial to an understanding of the political role of law in a democratic society.

A User Perspective on the Judicial Process

In my remarks today I would like to outline a user perspective on the judicial process. In earlier social science work our analyses of court decision-making has been filtered through the concept of judicial decision-making—implying that law was being made by judges and by judges alone. Others have described the judicial process from the defendant point of view, but for the most part the plaintiff role has not been elucidated in terms of its contribution to the process of the growth of law in the courts. In my work I have used an interactive model for understanding what goes on in courts, one that would include all of the immediate users of the judicial system—the third parties or judges and the litigating parties, which would refer to the defendants or plaintiffs as a minimum participant group.

A user theory of law would embrace the view of law as being made and changed by the cumulative efforts of its users and would argue that the law is being moved in a particular evolutionary direction by the dominant users. Such unconsciously generated cumulative movements may be considered as separate from and yet equally as important as any consciously created ones attributable to legal engineering. The analogy in medicine may make this point clearer: if one hospital decides to receive only cancer patients and another opens its doors to any patients that require medical care, over the decades the two hospitals are going to develop different kinds of expertise, technologies, philosophies, etc.; and so it is with the courts.

The users of courts make the litigation process either marginal or central. When the litigation process is marginal, the process deals only with a limited part of the potential litigating activity. The array of litigating parties is also marginal in that litigation touches the lives of only a few members of the society. As an anthropologist I have worked in a society in which the law might be described as central—in the sense that the courts dealt with a wide range of litigating activity much like the general hospital and in the sense that it personally touched the lives of the many members of that society that used the courts.

The Zapotec Indians that I studied are located in southern Mexico, and it is as a result of my work with them that I have come to be interested in the role of all the users or potential users, and particularly in the way in which active plaintiffs contribute to the organic growth of law, much as Jefferson envisioned our law as growing before modern professionalization had set in. The Zapotec were my laboratory and for present purposes I analyze their situation as a system for the most part closed from the influence of the Mexican state.[1] The place I worked had a population of slightly over 2000 people, and my research material spanned the period of a decade (1957-1968). My attention was focused on case materials collected during this decade and the analysis focused on the court from the perspective of the users—the court, the defendant, and the plaintiff. It was in the active role of the plaintiff that these people most differed from the profile of court use in the United States.

In looking at the case materials I wanted to find out who uses the Town courts and for what, and in the process to determine whether the Zapotec court system could be described as an institution central or marginal in that society. Embedded here is a hypothesis about how law grows or changes. If we observe that the users of Zapotec courts participate in making law, and if the users reflect the diversity in the population, then the law will maintain a generality of function close to the daily round in life. The fit between the court and people's needs will be a close one. In addition, I believed that the legitimacy of law would be ensured by such a broad use pattern. On the other hand, if the array of users and use is by constraint a narrow one, then conditions of social and political stresses might lead to a legitimacy crisis in law that might be reflected in, for example, an increase in violence.

The mountain Zapotec court is a place where resources are gathered and competed for. The spirit of the court is tenacious if anything. The town officials as users see both plaintiff and defendant as potential sources of funds and labor for town projects (fines include money and labor). In addition and by virtue of their mandate to protect citizens from violence and predation, they see the court as a source of legitimation for their authority. The plaintiff uses the court to make people do what he wants—to gain compensation or to dispense punishment. The defendant, although often

1. Nader, *An Analysis of Zapotec Law Cases*, in 3 ETHNOLOGY 404-19 (1964).

an unwilling participant, uses the court as an asylum, a safe place in which to vent his anger, a place for rebuilding a damaged reputation by fair and accommodating behavior, and a place to take away the potential resources of the local court by appeal to the Mexican district court that undermines local authority.

The process of resolving conflict in this town affords room for user maneuverability, and thus controls against the frivolous use of the courts. Individuals may enter a case in the role of witness, but as the case proceeds they begin to add their own complaint to the record, and in this way become plaintiffs. A person or the court may initiate action and be greeted by a counter-complaint that makes him or her the defendant.

In analyzing case samples I looked at sex, age, relationship, and class to find out whether men or women avail themselves of the court's remedies, to discover the ages of court users, to test hypotheses about court remedies among the land-rich and land-poor citizens, and to examine the degree to which repeated use of the courts was a pattern and an issue in deciding cases. The cases furnish us with some sense of the status of citizen uses of government law, and as such enables us to picture more closely the place of the courts in the lives of these people.[2]

The findings on use patterns were relatively straightforward. The patterns of court use by sex were clearcut and consistent—both men and women use the courts as plaintiffs in equal proportion to their number in the population, although men use the courts as defendants in greater proportion than women. Age is a second important characteristic of the user. Among the Zapotec, people seem to get into trouble with their fellow citizens and town officials principally between the ages of thirty and fifty for both plaintiff and defendant. Also, it is in this age range that the litigant users are plagued by both persons and property matters. In general, younger people are involved with litigation over personal cases and older persons over property cases. Along with sex and age, class is popularly assumed to affect court usage. In Western industrialized societies, the law has often been used to promote powerful interests and to control the activities of the poorer classes. Although this Zapotec town is a relatively homogeneous place, it has both rich and poor, and the degree of poverty is usually measured by the amount of land one has. The distribution of landed versus landless litigants suggests that the Zapotec poor probably use the courts as plaintiffs and defendants in proportion to their numbers, in both cases dealing with persons and property, and are uninhibited in exercising their rights to court remedies.

The range of complaint found in these courts is broad and indicates that the courts function not as specialized courts, but rather in a more general sense as institutions that handle the daily life problems of a rural mountain agricultural community. The range of complaints among the different users of the courts indicate the range of rights and duties that are shared

2. L. Nader, To Make the Balance—A Study of Zapotec Law and Order (unpublished manuscript).

and about which there are conflicts: debts, slander, land, and physical abuse. In the majority of cases the finding is most commonly against the defendant; the next most frequent decision is reconciliation and agreement. In the three town courts decisions against the plaintiff are rare; the court here seems to be biased in favor of the plaintiff.

The overall view of the judges in these courts is of people who are operating within the same set of norms as are the folk in the general population. The users operate in the courts with a high degree of know-how and familiarity and likely as not they are repeat players. For these mountain Zapotec the court has been central rather than marginal in terms of the array of complaints and people who use the courts. In particular, the plaintiff users in Zapotec courts are a rights-conscious people who push hard for remedy. Important insights about how the law "grows" are derived from treating all the participants in the disputing process as deserving of sociological attention: The court reflects the developmental cycle of its users.

USERS IN AN INDUSTRIAL SOCIETY

In discussing U.S. legal history Willard Hurst observed that in the nineteenth century state court business involved only limited sectors of American society.[3] He also observed that the array of litigating parties changed little from the nineteenth to the twentieth century. In both centuries people of small means were not often plaintiffs except in tort or family matters. The ideology of triviality and of the extraordinary case reigned supreme. Such observations have at times led to reform movements in the United States, legal reform movements that is. Over the past ten years such a reform movement has been stimulated from the offices of Chief Justice Warren Burger of the U.S. Supreme Court. Burger's influence on law school faculty who train legal professionals has been considerable. The subjects of attention were the potential and actual users of the courts who for a number of reasons have not traditionally had access to law—the consumers, the minority groups, blacks, women—for the redress of their grievances. The interest of the legal profession in dispute resolution and alternatives to the judicial system came at a time when consumers, women, blacks, and American Indians were beginning to make headway in courtroom litigation. Just when the move to make the courts central to what had been marginal concerns was gaining momentum, the alternative movement was developing to remove these newcomers from the courts.

The policy to develop alternatives to the judicial remedy has been explained in various ways. The most popular explanation was that alternatives were more efficient. Unloading cases from the courts became of importance to the Chief Justice in particular to make room for those cases that could not be sent to alternatives. Others saw the state as expanding its

3. Hurst, *The Functions of Courts in the United States: 1950-1980*, 15 L. & SOC. REV. 401 (1980-1981).

control over the populations that had been marginal to court use and at the time creating a dual system of law. Still others saw the movement as a response to mounting corporate criticism of the high cost of lawyers and the inefficiency generated by the increasingly legalistic context in which businesses were operating.

In an industrialized nation such as the United States, there has been increasing contact between strangers of unequal power, for example, between a buyer in Iowa and a seller in Detroit. This situation has not been experienced by human beings before the communications revolution. It appears that when most of the actual and potential disputes are between strangers rather than between parties who know one another, certain structural changes occur both in law and other social control systems. For example, we observe that courts decline in personnel relative to population growth and need and their function, as several scholars have shown,[4] shifts from dispute settlement to facilitating economic transactions; access to public complaint institutions decreases. From an evolutionary perspective the plaintiff role atrophies and the true plaintiff becomes the victim; the state becomes the plaintiff in criminal matters. In addition, the law becomes a business, and users are selected from payors, especially in relation to economic grievances.[5]

The historical events that have resulted in the present economic grievance process in the United States are a necessary part of any contextual descriptive theory of complaining. 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 activity changed from subsistence agriculture to industrialization, and as the roles of consumer and producer became separated, the balance of power shifted between potential users of a judicial system. The absolute power that consumers had previously enjoyed diminished with the separation of consumer-producer roles. By the latter part of the nineteenth century the greater power of producers over consumers could be measured by their organization of personnel and resources, effective political lobbying, the number of complaints received and left unsettled, and the number of social institutions created to remedy this power shift, such as the small claims courts, the regulatory agencies, and legal aid. In the evolution of legal relations concerning the expression of grievances about products and services, there was a movement from dyadic to unilateral procedures, from disputing to actions of voicing complaints or resorting to avoidance or self-help strategies. As the social gap between parties to economic grievances widens, the aggrieved are compelled to seek out their adversaries and, as we shall see, to do battle using weapons designed by the latter.

By the twentieth century both organized producers and organized government have considerably more power than dispersed consumers, and the

4. *See* authorities cited in Nader, *From Disputing to Complaining*, in TOWARD A GENERAL THEORY OF SOCIAL CONTROL (1984).

5. *Id.*

strength of each of these parties varies in part with legal services. The state, however, did not become active in mediating issues raised by consumers until the latter part of the nineteenth century and into the twentieth. The Hatch Act of 1887 was aimed toward the maximum contribution by agriculture to the welfare of the consumer. Food and dairy commissions emerged in order to control the quality and price of agricultural produce. The Food and Drug Administration was created in 1906. The rise in prices during the first decade of this century spurred government investigations, as did the issues of distribution and truth in advertising. These issues were viewed by the government as a set of concerns common to a class of people, the consumers. They were addressed not as individual problems but as class problems to be remedied by legislative and regulatory means.[6]

Presumably the consumer movement of the 1960s developed because public law enforcement services were not keeping pace. Procedures set up by the political government were not structured to handle minor economic complaints; alternative procedures set up by what we might call the economic government were based on an ideology and structure designed to minimize long-term gains for the complainant.

With the increased erosion of the consumers' status and influence occurring alongside further government bureaucratization, the one-by-one approach to complaints gained widespread favor in the popular culture. The question was no longer class justice but individual justice, for as producers became distanced from consumers, so too consumers became distanced from one another. It is no accident that the dispute resolution model came to be used by reformers and social scientists at a time when concerns of microjustice superseded the interests of macrojustice.

As we know from many studies now, most complaints about goods and services have no place in the judicial system. The so-called minor injustices are the very stuff that is moving the potential court user population in the direction of increased complaining or resort to informal justice mechanisms. And as I have argued elsewhere,[7] the informal justice mechanisms may be adequate responses to grievances between people of equal power, but not between those of unequal power. The work we did on alternative complaint mechanisms revealed a rather discouraging pattern for grievances dealing with economic justice: the trade association consumer panels that operate under the constraints imposed by conflicts of interest cannot act as neutral parties. If the party settling the case is also the party being complained against, the complainant has little chance of success. And in general we concluded that although voluntary organizations and department stores had developed some successful forums, without the intervention of the judicial system to enforce settlements as a last resort, third-

6. P. Sampson, The Emergence of a Consumer Interest in America 1870-1930 (1980) (Ph.D. Dissertation, University of Chicago).

7. L. NADER, NO ACCESS TO LAW, ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (1980).

party complaint handlers are of limited use.[8] In other words, the system of hearing consumer complaints in the United States, regardless of its manifest form, is at best a system of negotiation between parties of dramatically unequal status and power, and at its worst, a system that receives unilateral complaints. As the plaintiff role has atrophied, we have moved from disputing to complaining.[9]

Most extrajudicial complaint mechanisms are based on a model designed to serve producers' needs in several ways: first, they aid producers in meeting their short-term goals, which are essentially to increase profits as measured quarterly; and second, they enable producers to maintain and legitimize their position of power, rank, and prestige because they permit them to circumvent complainants' requests without fear of sanction. The absence of true dispute handling systems in or out of the judiciary renders the dispute paradigm useless for purposes of analysis, and at this point I turn to research on ideology.

IDEOLOGIES AS THEY AFFECT USERS

Let me return to a previous observation that producers, not consumers, create and determine the shape of extrajudicial complaint mechanisms in a way that affects the use of dispute mechanisms more generally. In working with the American complaint materials, I noticed that various controlling ideologies curtail the development of bilateral or consumer structured complaint mechanisms. These controlling ideologies stand in the way of finding block solutions for classes of complaints that are either preventable or remedial, and create an environment of secrecy, intimidation, and distancing. In addition, such controlling ideologies preclude the use of the experience that business has accumulated from product and service complaints. Government law provides a process that may be used to distribute or centralize power or to legitimate and maintain present power groups; in the complaint arena the law tends to maintain existing power groups and extrajudicial processes do the same.[10] In disputing, the cost advantage is on the side of the business group; for example, business legal expenses are tax-deductible, consumer legal expenses are not. While fines can inflict painful wounds on real persons, they do not have the same effect on the corporation. The ideologies that I have barely begun to sketch seem to interrelate in various ways, reinforcing the dominant users of the judicial system and rejecting its potential users. The drift of law moves with the dominant users.

The relation between controlling ideologies and use patterns is complicated, or at least not a simple affair to unravel. For example, many people would probably say that in the American legal system it is the proper role

8. Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 *passim* (Special Issue on Dispute Resolution 1979).

9. Nader, *supra* note 4.

10. R. ABEL, THE POLITICS OF INFORMAL JUSTICE (1982); J. AUERBACH, JUSTICE WITHOUT LAW? (1983).

of the attorney general or the district attorney to act on the public's behalf and that private parties should concern themselves only with furthering their own interests. Such a view echoes the traditional legal doctrine of most Western nations, which permits only the state to bring legal action to protect the welfare of the general public. It is an accepted principle today that private individuals may not sue to restrain a public nuisance; such suits can only be brought by the state. When Aileen Adams of Washington, D.C., felt that advertisements claiming that Excedrin was two times as effective as aspirin were false and misleading, and she sued Bristol Myers Corporation to stop their ads, arguing, among other things, that they amounted to a public nuisance, the court did not have to decide whether the ads were in fact a public nuisance. It answered Adams by reminding her that she, as a private person, had no right to bring action for a public nuisance.

By contrast, in England and on the Continent before the twelfth century, private parties were the sole avengers of wrongs committed against them. In thirteenth century England representative bodies of the public could initiate nuisance actions in some of the courts, but these forums went into decline in the fifteenth and sixteenth centuries in response to the growth of royal institutions. Self-help, the oldest method of dealing with public nuisances, was a lawful extrajudicial remedy in England until the middle of the nineteenth century. The California Supreme Court relied on those doctrines as late as 1851. *Gunter v. Geary*[11] held that since a common nuisance is an injury to the whole community, "every person in the community is aggreived [sic] and consequently every person has the right to abate the nuisance."[12] The mountain Zapotec would agree. As the state developed, criminal prosecution came more and more under its control; the European Renaissance was a crucial period in this shift. The state monopolized social control both by denying private parties the right to sue and by prohibiting individuals from taking the law into their own hands.

The division between public law and private law received a special justification within the nineteenth century ideology of liberal democracy and the free market. The public welfare was to be promoted by the cumulative effect of individual self-interested activity in the market, private individuals being restricted to the pursuit of their private interests. The state was to play only a limited role in furthering the public interest.

The emergence in this century of new public or collective rights, consumer protection, labor relations, and urban development is one of the most remarkable of recent legal developments. This growth springs partly from a realization that the market economy cannot by itself prevent economic oppression and misallocation of resources in the modern world. The outstanding problem for the individual today is how to cope with large scale organizations. The laissez faire market system was never expected to control government organizations, and in the private sector mar-

11. 1 Cal. 462 (1851).
12. *Id.* at 467.

ket pressures are effective only when products and services are simple and do not change rapidly, when firms are numerous and well known, and when information flows freely among consumers so that the mistakes of some can guide the purchase of others. These preconditions can no longer be taken for granted, if they ever could be.

But who should be able to use the legal system to enforce these rights? In the decade of the 1970s there was a push to permit consumers, for example, to sue government agencies for not enforcing the laws or to force them to comply with the existing laws. But the traditional model lingers on. The state still has a monopoly over many areas of public interest law; the awarding of adequate attorneys' fees to private attorney generals is disfavored or prohibited; class actions continue to be regarded as aggregated private actions; and most importantly, the legal system underrates the importance of minor consumer claims because it views them as merely private affairs.

A tradition in our law favors the handling of legal complaints one by one. An institutional fit exists between such a tradition and the manner in which lawyers have evolved their businesses and, indeed, the way that Christopher Columbus Langdell, the first dean of the Harvard Law School, imagined the teaching of law would most profit its students. The case method of legal education is predisposed to the custom treatment. It also has a functional fit with the individualistic spirit of our culture and the pursuit of economic self-interest in the market.

The consequence of such an ideology is that legal thinking has been preoccupied with microjustice, a focus on particular plaintiffs and defendants, rather than with macrojustice, a perspective in which cases are viewed in the aggregate and the broad consequences of law and legal institutions are analyzed. Eric Steele's description of a state consumer fraud bureau that was set up to deal en bloc with the problem of consumer fraud and over a ten-year period conducted most of its business by righting the wrongs of individual customers, illustrates how strong the ideology of custom treatment is.[13] The Federal Trade Commission during the 1950s and 1960s concentrated on individualized complaint resolution to the neglect of corrective action and law revision. Also, at the national level, Congressmen deal with most of their constitutents' complaints individually. So deep is this custom treatment ideology that we insist on it even when the chances of users achieving justice are hampered, as they may be in a search for a pattern of fraud that can emerge only when cases are viewed together. At a time when interest groups and the Chief Justice were complaining about congestion in the courts, the same groups were unfriendly to the idea of class action suits or other aggregate solutions. Part of the control inherent in liberal ideology is solving cases one by one rather than making structural changes, such as mandating simplicity in product design when possible.

13. Steele, *Fraud, Dispute, and the Consumer*, 123 U. PA. L. REV. 1107 (1975).

The ambiguities in the sentence, "Everyone is equal before the law," are a source of user control. Intrinsic to our idea of the rule of law is the premise that the law should be applied impartially, with no exceptions made for parties with high status or special power. But in our culture we concentrate attention on rights often to the exclusion of remedies. When it comes to remedies, concepts such as *caveat emptor* rest on the assumption of equality in buyer-seller relations both outside and inside the courts. Although there are exceptions such as in the California Consumer's Legal Remedies Act,[14] most aspects of the complaint process, in both the extrajudicial and judicial spheres, claim to treat the consumer and business as basically equal, with the result that business is given an advantage whenever time, resources, or know-how are required, as in filling out forms, gathering evidence, learning the law, securing expert factual information, going to hearings, and presenting a case. The result often discourages the potential user. The consumer bears the burden of initiating each step of the complaint process; in small claims it falls upon the plaintiff to collect on a judgment; in arbitration it is up to the plaintiff to go to court to enforce an award if the defendant does not pay.

There are other examples of ideological controls that constrain use, which I describe in my book *No Access to Law.*[15] *Caveat emptor* is one such control. In medieval England the doctrine of *caveat emptor* was held in little regard, and despite its Latin name the term first appeared in law reports only at the beginning of the seventeenth century. In the early days of the United States, *cavear emptor* gained a secure place. Because buyer and seller were presumed to have equal bargaining power, the judicial system thought it best to avoid any interference with what it regarded as "freedom of contract." The courts reasoned that because the buyers could seek out exactly what they want in the competitive market, they should be allowed to take their own chances. The courts ignored the fact that buyers were having an increasingly difficult time judging the rapidly changing goods in the market. In *The Folklore of Capitalism*[16] Thurman Arnold wrote a chapter on the personification of the corporation. Arnold's point was that our system of symbols had allowed the corporation to fit neatly into the creed of "rugged individualism": "The laissez faire religion based on a conception of a society composed of competing individuals, was transferred automatically to industrial organizations with nationwide power and dictatorial forms of government."[17]

Ideologies such as *caveat emptor* can provide continuity of power by effectively blocking reform and by discouraging the organic growth of law by means of a wide array of users. The ideologies that we are tracing interrelate in various ways, forming a thick net. *Caveat emptor* is based on a belief in equality between buyer and seller; protection of confidentiality

14. CAL. CIV. CODE §§ 1750-1757 (West 1973 & Supp. 1984).
15. L. NADER, *supra* note 7.
16. T. ARNOLD, THE FOLKLORE OF CAPITALISM (1937).
17. *Id.* at 188-89.

is connected with the personalization of the corporate entity and contributes to a reliance on the custom handling of complaints; handling individual cases one by one encourages the belief that public rights should be in government hands, and so on. Together, the ideologies induce a passivity that helps reinforce marginal use and a marginal array in the courts.

Because these and connected ideologies have not been examined and questioned, movement in new directions seems not only difficult but contrary to the nature of things. Organizational reforms are weakened from within by the assumptions on which they are based. But causation moves in both directions; incremental changes in the user system should make themselves felt in ideology, as shifts in thought and symbol work their way into the structures of the system. It may in addition take re-professionalization (being taught by the users) or de-professionalization for any changes to appear in law school curriculums.

DISCUSSION

One cannot understand or develop a user theory of law, a theory which states that a law drifts in the direction of its dominant user, without an understanding of the relationship between law and the socioeconomic order. An understanding of the different modes of dispute resolution will only be possible if dispute resolution structures are seen as a subset of a larger system of control. The real dilemma of dispute processing is the search for alternatives to the official legal system while keeping the system of relations untouched. A user theory of law carries us beyond the expectation that law can serve only those that pay and pushes out of the framework the idea that a user is a payer. If law is an instrument of justice we have to go beyond the fees and retainers.

When law is a product, like a product it meets a demand and law viewed as a product is commercialized. Money then dictates who the users of the system are to be. If law is to respond to justice—to human needs and the distribution of rights, opportunities, and remedies—then the manner of practicing law is different. What if the user cannot be a payer? New institutions are appearing: the consumer utility boards, nonprofit charters, consumer groups who hire their own lawyers, the Lawyers for Public Justice (donating $1000 a year each for nonprofit purposes), the litigation group dealing with the issue of polluted waters of Woburn, Massachusetts, and the Equal Justice Foundation idea of tithing new graduates; income can mean that lawyers can contribute beyond the corporate and business firm.

Lawyers have a contribution to make—to contribute to negotiating the end to the arms race, to eradicate discrimination, to clean up polluted waters that are violations of law, to protect federal trust and maintain safety standards, and to examine the consequence of an atrophied plaintiff role.

Legislation is presently in Congress that further restricts plaintiff rights. The move is to codify state common law, to standardize product liability law. Such a standardized code will be unable to grow or expand and will be susceptible to political influence rather than be protected by the courts.

There is massive lobbying by corporations for this act. Under the guise of promoting uniformity the Uniform Product Liability Act places further burdens on noncorporate litigants. The courts have increasingly not been used for disputes since the nineteenth century. Today there is a growing attack on the contingency fee and punitive damages, part of a trend to further strip plaintiffs of user remedies and then to ignore them as victims.

An analysis of legal ideologies shows them to be interwoven with economic and political realities and shows them to operate to manage or control the disorder that may arise from those realities. We should be concerned about the consequences of plaintiffs opting out of the system. Litigiousness is hardly the problem. It may be, to use the medical analogy again, that suppressing the symptoms is putting us seriously out of touch with the signals of the state of health of our society.