CONSUMERISM AND LEGAL SERVICES: THE MERGING OF MOVEMENTS

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The traditional emphasis on individual legal problems and their solution through "access" to legal services is seen here as being inadequate to produce general change in economic and political institutions. The concept of access is explored in the forms of freedom of information, prepaid legal services, and extralegal group action; examples of each are given.

Institutional reform, it is suggested, can be brought about by creating a balance of power between consumers and large institutions. A "checkoff" system is described and put forward as a means of organizing consumers to use the evidence of individual complaints to advocate institutional change, something that legal services, as presently structured, do not do. Monopolies such as the utilities and the post office would be required by state law to solicit voluntary contributions from their customers to support a consumer action movement—"a piggyback ride so they can organize themselves."

The interrelationships between group legal services and these piggyback consumer groups are pointed out: the accumulation of individual case evidence and the promotion of cooperative institutions that would provide legal representation as one of their satellite services. These lawyers could press for government reform of procedural restraints on consumer class actions.

Possible conflicting interests between conservative sponsoring consumer groups and their progressive legal service staff are recognized and ways to avoid them are discussed. One solution offered is to permit lawyers a broader range of activities by relaxing the legal profession's self-restrictions. Law schools are urged to reevaluate what they should teach and to require more analysis and investigation of government and corporate structures in their clinical education. This would ensure a starting point for the continuation of reform in the legal system.

The merger of consumerism and legal services needs to be treated with a sensitivity to the functions of formal legal services, an awareness of the shortcomings of our legal system as presently structured, and with a realization that some problems are amenable to solution only through a redistribution of power and wealth in the society. Such redistribution would necessarily involve group pressure, community and neighborhood changes, changes in the legislature and executive, and the growth of new kinds of civic institutions. We in the legal profession too often tend to see legal problems in terms of individualized justice—in terms of an individual tenant, an individual consumer, or an individual laborer, with a particular grievance that can be resolved by pursuing an individual "case" if only that case can somehow be engaged by the legal system.

The concentration has always been on "access," how do people get access to the legal system. I'm happy to see that some of the papers, particularly Marc Galanter's, go beyond that concept. I find

a great difference between the concept of access and the concept of power. For example, freedom of information is considered one dimension of access to the executive branch of government. Too often, however, it is thought that if access to information is permitted then certain things will flow automatically, namely, that administrative agencies will exhibit greater respect for consumer values. We now have very good evidence that this is not so. The Consumer Products Safety Commission, formed two years ago, is probably the most open commission in federal history. Files are available, meetings are public, all *ex parte* contacts are logged for public review. Yet this commission has produced very little. It has been a general disappointment for many of us who thought that structural openness would lead to changes in the way power is brought to bear on the agency. Indeed, openness became a fetish with the agency. When challenged for not promulgating standards, or for failing to encourage active consumer participation in their formulation, the agency would respond: "We're the most open agency around. How can we not be doing a good job; no secret deals, no backroom contacts?"

That illustrates the difference between access and power. Consequently, we must recognize that providing more traditional legal services is only one means of attaining our goals, and one that may be thwarted by a number of other obstacles. Otherwise, we will raise the expectations of a whole generation only to have people realize that access is a very small part of the mechanism involved in bringing power to bear on institutional behavior.

Another example of the conceptual inadequacy of access can be found in the judicial arena. What does it mean to say that a person has ready access to a lawyer, for instance, in a prepaid legal services program? Here are some of the problems:

(1) Does the person want to take problems to a lawyer who has been made available? For example, the person may be afraid of winning a legal battle because of nonlegal retaliation in the community, or by an employer.

(2) A person may be afraid of having the complaint publicized.

(3) A person may not even know that he or she has any rights.

(4) The judiciary may be corrupt.

(5) A person may not want to wait as long as it takes to solve a problem through an attorney.

I'm sure we could all add to this list.

If we're going to make access meaningful it has to be part of a general redistribution of legal, political, social, and economic pow-

er. I think that the prepaid legal services movement will benefit from having that broad contextual jacket. Otherwise it may well appear to be moving fast, but in terms of making meaningful changes in people's lives it may be standing still. It may be creating expectations that are betrayed when they come up against reality, legal and illegal.

In Philadelphia there is a highly visible grass-roots consumer organization called the Consumer-Educative-Protective Association (C.E.P.A.) which handles individual complaints of the very poor. They get major press and TV coverage by holding very colorful demonstrations at retail establishments that have not satisfied complainants. If there are complaints about automobiles, for example, they picket auto dealers. With that kind of support, access to the violator has real meaning because it's connected with extralegal publicity and group support. In order to maintain the organization's élan, C.E.P.A. says to the complainant: we'll help you with the complaint but you in turn have to help other people. You must become part of the movement if you want to benefit from it. That very modest buildup of institutional power is generated by increased access. Interestingly, it is not access to a formal court-oriented system; indeed, C.E.P.A. eschews ths formal process of dispute resolution. What it is doing is saying that the auto dealer has sold this man a lemon, and yet will not even sit down and discuss the facts; therefore, we are going to publicize our perception of the abuse and build up economic pressure through picketing and other means so that this grievance will be given due consideration. Members of C.E.P.A. are very, very impoverished themselves, but by simply aggregating people's grievances and attaining visibility, they have developed an extralegal access to power which, without being illegal, is effective. Indeed, they have many victories to their credit.

We need increased access not only to purely informal dispute resolution mechanisms, but to all branches of government, especially the I.C.C., the F.P.C., and the many other federal and state administrative agencies. Those institutions usually do not deal with individuals, nor do people go to a legal services attorney and say, for example: "I've got a complaint against the I.C.C." Yet poor performance by the I.C.C. has produced millions of individual complaints involving moving companies that have cheated and defrauded householders. So if a legal services program is going to attempt to deal with such matters, it will get nowhere without going to the administrative agency, to the Congress, to the White House and to other relevant bases of power including the media and the people.

Expanded access to legal services therefore requires the capacity to use the evidence of individual complaints to achieve more generalized change. Legal services are not presently structured to move in that direction. That is the gap that the consumer movement can begin to fill. Let me illustrate this in the area of public utilities.

We receive many complaints from people concerning electric companies, telephone companies, gas companies, and the like. Utilities, for all practical purposes, are legal monopolies with guaranteed return. They do not suffer the inherent insecurity of many nonregulated companies. Power that is insecure tends to be more responsible, so these companies are even less responsible than most businesses. The utilities' complaint handling systems are based on what my sister, Laura Nader, has so aptly called "no-jobs," that is, positions held by people who are skilled at saying "no" in a thousand different ways to the person who filed the complaint. These people are trained to shift responsibility, to say they don't know, to suggest you write the company—in other words, to turn off the complainer. This is an intriguing area for research. Get someone, who has a probing mind and can ask sequential questions, to register a complaint by phoning the various companies and recording verbatim everything that is said. See how many questions have to be asked to obtain one simple answer from the telephone company or the gas company. That's *really* data; it's fabulous reading, too.

Getting back to the utilities, the individualized cases which are the grist of the legal services mill are also good evidence of the need for broader change. But how do we go from legal services to consumer power? A group of us are trying to institute what will undoubtedly be the single most effective innovation in the history of the consumer movement: the consumer checkoff. During the next year we will be pressing twenty states, some by initiative, to adopt consumer checkoff laws for utilities. If adopted, state law would then require all regulated utilities to have a checkoff box on every bill permitting customers to volunteer any level of contribution that they wish in any month. That contribution, under strict audit, would be transferred every month to a state-wide consumer action group, with a charter, recognized procedures, and a council of directors elected by localized constituencies of contributors to the checkoff fund, according to the principle of one contributor, one vote. The council of directors would hire attorneys, economists, accountants, physicists, engineers, health specialists, organizers, writers, and anyone else necessary to the representation of consumers before all branches of government on issues relating to utility policy. They would be active in the courts, the commissions, and the

legislature. They would organize meetings and develop materials and newsletters to keep in touch with the contributors who are, in effect, a private electorate. Notice that this does not increase taxes, nor does it create another governmental organization. This is a mode of building a civic institution. It is the only way governmental or corporate power is going to be held accountable because accountability implies a return to the electorate for revalidation, rejection, or deflation. Although we have recognized this in the political arena, elections every two or four or six years provide very little real accountability. What we are seeking to develop instead is a multiplicity of specialized electorates, each with full-time advocates and analysts, which will focus their collective power in an organized way on the institutions that affect them. For these institutions can lose a lot of individual cases in the courts and yet persist in socially detrimental behavior unless there is some countervailing organized consumer power.

If the checkoff system works for public utilities we are going to advocate it elsewhere. For example, the postal service allows no representation for household users; the unions, management, and the mass-mailers are represented, but the millions of people who put that first-class letter in the mail have no voice whatsoever. So the checkoff system would require the postman to distribute an appeal card six times a year seeking contributions for a national household user action group, which would likewise be open and democratic.

Our goal is to use these new organizations to secure significant reforms of economic and political institutions more quickly than could be achieved by successive individual law suits. The law rarely achieves cumulative reform. Isolated victories are not enough. Organizations are needed to bring about large-scale change.

Consider the example of A. T. & T. Through its member companies, it sends out 1.3 billion bills a year. You can get a very, very low response to a voluntary checkoff and still have a very sizeable telephone users consumer action group in each state. This mechanism solves the problem discussed years ago by Mancur Olson in his book, *The Logic of Collective Action*—the problem of linking vast numbers of people with small similar grievances into a cohesive force. The difficulty has always been the high cost of bringing people with similar interests into communication with each other. This cannot be done by individual reformers or groups. The advertisements needed to link consumers or other groups are prohibitively expensive. The checkoff plan recognizes the significance of monopolies and oligopolies. Given the imbalance of power in their favor, they can be required to help rectify it by giving the other

side—the consumers or users—a piggyback ride so they can organize themselves. We intend to piggyback the post office, the utilities, consumer finance companies, the insurance industry, and many other marketing enterprises in order to facilitate the organization of buyers. This will create an enormous number of career positions in public interest law, economics, engineering, and so on, providing an outlet for the enthusiasm and idealism of our professional school graduates, who might otherwise be channeled into mainstream professional careers against their wishes.

If we can establish such piggyback organizations, then we must ask what happens when they get a significant share of power. What is their social vision? Will they have the knowledge or sensitivity to use their access and power to shape a better society? This is a great challenge for our legal system and a warning that our vigil has to be ceaseless.

There are essential interrelationships between group legal services and these new consumer groups. I mentioned one earlier: the accumulation of case evidence justifies the growth of consumer organizations. Through cases, information is brought to public light which demonstrates the existence of systemic problems. A second connection can be found in the cooperative movement. Consumer cooperatives, in my judgment, are heading for a major resurgence. Greater awareness of deteriorating food quality is leading to more food coops. Furthermore, a bill that has the President's approval and is pending in Congress would establish a national consumer cooperative finance bank to extend credit and technical assistance. This bill would go far to remedy a historic imbalance on the side of the private banks. But consumer owned, community based organizations can greatly increase their attractiveness over investor owned corporations by providing satellite services. One very important service is legal representation, provided in the form of group legal services.

Group legal service lawyers are also likely to cooperate with consumer organizations by pressing for reform of the procedural restraints on class actions. It is frustrating to win case after case and yet not make a dent in the system that leads to the abuses out of which the cases arise. Consumer action groups need to develop a constituency of lawyers who will press the Congress to overturn the Burger Court's restrictive decisions on consumer class actions.

Consumer groups can also help strengthen group legal service plans. Who is going to monitor the evolution of those plans? Who is going to help the more progressive elements in group legal services? Who is going to fight the bar associations that are constantly pushing for open panel plans which cost consumers more and

frustrate their wishes? Who is going to deal with the sponsoring group itself? That's a real problem. The sponsoring group may be an inhibiting, conservative force upon the group legal service staff. Consider the hypothetical example of a union with a group legal service program. As long as the attorneys are dealing with divorce and landlord-tenant cases, there are no conflicts, but suppose the lawyers want to take up a problem that involves the company, or the union itself. The union may wish to restrict law reform, or even simple litigation, because of its conflicting interests. But, if the workers are also part of consumer organizations, the latter may be able to bring to bear countervailing force to lessen the union's ability to control what the legal services organizations can do. Consumer organizations give the legal services people a broader community power base.

We have to ensure that reform groups which serve particular memberships are sensitive to the more general underlying interest. Otherwise they may act as if they have fulfilled their potential when they meet only the most immediate needs of their members. Credit unions, for example, successfully serve their members with low interest loans, but they have never become an institutional complex able to counter the power of the banking industry. Similarly, if group lawyers attempt only to resolve problems on an individual basis they will fail others, both within the group and without, who might have been spared the problem had a more fundamental solution been chosen. I am thinking here of class actions, structural reform, and those other activities that drove Mr. Nixon up the wall when he looked at what O.E.O. Legal Services was trying to do.

Similar effects may be achieved by broadening the range of activities permitted to lawyers by the Code of Professional Responsibility. Even if lawyers are available, people don't know what their rights are. Being unaware of their rights, they don't even think of going to lawyers. It is not just a matter of tenants being unfamiliar with their rights against their landlord; ignorance is a more pervasive barrier to change. For instance, somebody goes into a grocery store and finds that the price of bread is up three cents. He asks the person behind the counter the reason for the price rise and is told only that the cost of living is up all over. Well, the price of bread may be up three cents because back in Washington the I.C.C., acting as the indentured servant of the trucking or railroad industry, has granted a massive freight increase that rippled right back to the price for a loaf of bread. The people have no idea where the increase came from, and they have no idea that they might be able to do something about it. Lawyers must advise the public about the widespread impact of governmental agencies on their daily lives,

and must be able to tell the public how to promote reform in these areas.

The legal profession has itself created the most subtle and sophisticated ways to ignore most of its potential customers. The ban on advertising is one way. Another example which comes to mind is the doctrine of standing to sue. Can you imagine—first you create a democracy and a constitution and you say, this is equality under the law, and then you say, well, on many of the most fundamental issues 99.99 percent of the people don't have the right to go to court because "they don't have standing to sue"—a phrase that doesn't have any meaning for most nonlawyers. What is standing to sue? It is a rationalization of the principle that if you are wealthy enough to be injured economically, you can go to court. But if your health, emotions, social relationships, or other intangible goods are damaged, you don't have standing to sue and cannot get a court to hear your arguments. Thus, because no individual suffered a unique economic injury when the Nixon White House converted tax money to use in reelecting the President, the two hundred and ten million Americans did not have standing to sue, according to the Supreme Court. That is why there have to be full-time consumer organizations, funded not by government but by the people themselves, which can alert them to government abuse and bring pressure to bear upon the legislature to change those doctrines that prevent people from vindicating their most fundamental rights.

Another means of subverting the public interest is the immunity of civil servants to direct public accountability, that is, responsibility to the people they are supposed to serve—the citizens. Currently agency bureaucrats, insofar as they are accountable, are vertically responsible to the governor, the cabinet secretary, the agency chief, or the President—but not to the persons aggrieved. The law has developed the sophistical distinction between ministerial and discretionary activity: agents and agencies are not responsible for their discretionary activity; only if their acts are ministerial, routine or automatic can the agency or its bureaucrats be held to account for any damage they have caused.

We have completed drafting a Civil Servant Accountability bill and hope to find legislators who will sponsor it. I think it should be the focal avenue for government reform during the next decade. The bill is designed to make agency officials accountable to citizens as well as to their bureaucratic superiors. It attacks some of the features that insulate agency officials from public dissatisfaction.

A parallel question is what to do about corporate irresponsibility. The history of the last fifty years demonstrates that state corporation law does virtually nothing to guarantee accountability.

Delaware, of course, has led the way. We advocate federal chartering of corporations, not only to deal with the jurisdictional problems that arise when major corporations operating in many countries are governed by state law, but also to restructure the relationship between corporations and their different constituencies: shareholders, creditors, taxpayer-subsidizers, consumers, workers, and neighborhood residents, to name a few. We seek to make the practices and policies of these institutions more susceptible to challenge and thus to generate the kind of deterrence that would prevent many abuses from occurring in the first place.

Imaginative thinking is also needed on the design of effective sanctions against institutional violations. How, for example, do you control the president of a steel company that owns a coal mine where there are systematic violations of health and safety rules which have resulted in injuries to the workers? Traditional remedies are limited to injunction, damages, fine, or imprisonment. But is quite clear that the sanctions of the criminal laws do not reach the people behind the institutions, and recent disclosures have shown that lesser sanctions are ignored. We must devise behavioral sanctions less draconian than imprisonment but more effective than fines. Suppose, for example, that the head of the steel company had to spend five weeks in the mine with the workers.

These kinds of proposals are rarely discussed and debated. But it's important to keep the broader objectives of a legal system in mind. The system must be designed to encourage the nonlegal resolution of disputes, and public participation in planning processes, as well as more traditional legal activity like litigation. One must know the limitations of the legal system in order to understand what it can accomplish. If we don't have such long-range objectives, we can expect that the forces dominating our sociopolitical system will absorb the legal services movement, trivialize it, bureaucratize it and disillusion another generation of those who hope to be served by it.

We must ensure that the legal services movement is not subverted. One starting point for reform is the law schools. Today's law students have fallen back into a 1950s' slumber. They have been scared out of their wits by the difficulty of finding jobs, and are hewing to the straight and narrow. At a period in our history when disclosures of corporate and governmental crime show it to be systemic, not just episodic; when such crime is at an all time high; and when the criminal behavior is not just charged but admitted—at such a time why aren't law schools pondering it, discussing it, responding to it, using it to reevaluate what they are teaching? Teachers and students don't have to wait for the next volume from

the West Publishing Company in order to deal with this subject. The best law books for law schools right now are the newspapers. Clinical legal education is presently too narrow to extend the horizons of law students, for it does not study the power structure. Rather, it deals with helping indigents and accused. This is very important, but the effort is too often characterized as an act of legal charity, something students do before they go on to the more important jobs at the corporate firms. When clinical education begins to challenge corporate or government action, and requires students to do the analysis and investigation necessary for success, then law school will begin to fulfill its promise.