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HOW CONSUMER REMEDIES FAIL

Bryant G. Garth*

NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM. Edited by *Laura Nader*. New York: Academic Press. 1980. Pp. xxiii, 540. \$30.50.

No Access to Law, edited by Laura Nader, culminates nearly a decade of anthropological research concerning consumer disputes in the United States. Indeed, Professor Nader's writing in this book and elsewhere has helped to create and sustain interest in how disputes are resolved, how lawyers and courts are used or not used by individuals with particular problems, and what alternatives to the courts are available. This book, in particular, makes a major contribution with its richness in descriptive detail and its analysis of a number of representative institutions for handling individual complaints.

The quality of many of the institutional studies, in fact, forces the analysis to go beyond the approach of the original research.¹ *No Access to Law*, in this sense, combines two different analytical frameworks — one rooted in optimistic assumptions about research and reform in the early 1970s, when the work began, and the other more pessimistic and consistent with what the researchers learned (and the intellectual climate today).² This combination leads to some ambiguity, reflected notably in the two general essays, one by Professor Nader alone and the other co-authored by Christopher Shugart. Without diminishing the achievement of *No Access to Law*, this review will suggest that the authors' attempts to resolve the ambiguity ultimately are unsuccessful. The political analysis can be pushed a little further to the realization that the ideal complaint system motivating this research cannot be achieved through foreseeable reforms. The next question, addressed briefly at the close of this review, is whether this discouraging realization means that consumers have no hope unless the balance of power between consumers and business is changed.

Some observations about the organization of the book and the studies it contains can first provide a better picture of the contribution made by *No Access to Law*. While the two chapters following the introductory essays

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1. Professor Nader suggests this change of focus and the ambiguity it creates:

We initiated the study of extrajudicial alternatives expecting to find that alternative mechanisms were meeting the goals of an ideal complaint-handling system. Instead, our conclusions have led us in the opposite direction. We are left with the need to spell out why the systems we studied fail in the long run and how extrajudicial systems might be made to work.

p. 29.

2. I should add that my own research has also compelled me to a more pessimistic stance in the past couple of years. Cf. Garth, *The Movement Toward Procedural Informalism in Western Europe and North America*, in *THE POLITICS OF INFORMAL JUSTICE* 183 (R. Abel ed. 1981).

describe examples of the "voicing" of consumer complaints, the heart of the book consists of nine studies of institutions for handling consumer complaints, including some that are business-sponsored, some within the government, a labor union, media sponsored action lines, and a private consumer action group. Most of these institutions are oriented toward individual disputes and address only problems that are brought to them.

The institutional focus obviously imposes some limit on general conclusions about consumers' access to law or the consequences of any lack of access. We do not learn, for example, how consumers with disputes (or grievances not yet ripened into disputes) proceed generally and what they obtain.³ We only see what happens when consumers do find these institutions. Similarly, we get little sense for the relationship between all the possible activities an aggrieved consumer can pursue, and how they might relate to "law."⁴ Nevertheless, most of the studies provide insights beyond the limits of the workings of one typical or even idiosyncratic institution. While the anthropologist's passion for detail sometimes gets tiring here or leads to repetition, it also helps considerably to reveal what lies underneath these stories of repeated institutional "failures."⁵

The important problems of defining and explaining institutional failures lie at the center of the book. At one level, *No Access to Law* is the story of how we ought to reform deficiencies in design and inefficiencies in execution of institutions for the processing of consumer disputes. This relatively technical, reform-oriented approach seems to have characterized these studies at the outset, and it relies on several basic assumptions that still can be found throughout the book.

First, there are too many disputes: "an increase in complaints and disputes is a sign of disorganized communities" (p. 29). Similarly, unresolved disputes hurt society generally by producing "alienation" and imposing disturbing economic and social costs, including psychological and emotional ones (p. 42); "Our society is at present extremely inefficient in its handling of product failure" (p. 42). Reform, it seems, can benefit both consumers and business; but unfortunately at present "consumers and businesses are unable to communicate to each other their true interest in complaint resolution" (p. 43).

Further, the best way to resolve consumer disputes is through law or "alternatives" that have the "force of law" (p. 30). Thus, a critical problem in the United States is that consumers do not have an effective right to counsel or a right to obtain redress in the courts (p. 49). Unfortunately, "access to purveyors of justice is more readily available in some underdeveloped parts of the world than it is in this country" (p. xix).

3. See, e.g., Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC. REV. 525 (1980-81).

4. For a description of empirical research designed to measure what consumers do with a particular kind of dispute, see J. Ladinsky, S. Macaulay & J. Anderson, *The Milwaukee Dispute Mapping Project: A Preliminary Report* (unpublished Working Paper, University of Wisconsin Law School, Disputes Processing Research Program, 1979).

5. One of my favorite examples is the description of the differences between various department stores, the changes that are taking place in the culture of the department stores, and how the handling of consumer complaints is affected. See Karikas & Rosenwasser, *Department Store Complaint Management*, p. 283.

Finally, the development of appropriate judicial remedies, or efficient alternatives, has been hindered by the tendency to "treat each case in isolation" (p. 19) and focus on "individual complaint handling" instead of "organizational change or prevention" (p. 21). Efficient consumer remedies will use individual disputes to identify and correct patterns of abuses in business and government.

Most of the institutional studies proceed along these general lines, and end up emphasizing the necessity of thoroughgoing reform. Consumers do not do well at all in industry or business sponsored systems of complaint resolution, such as the Major Appliance Consumer Action Panel (MACAP) and the Better Business Bureau, and even relatively pro-consumer department stores, while helpful, "failed to serve the mass of individuals who make up their consuming public" (p. 314). Governmental agencies are also unable to measure up. Even the extraordinary system of the late William A. Barrett, a Congressman who handled some 700 complaints per week in his Philadelphia office, is deemed unsuccessful: "Barrett's system fails simply because it does not provide for lasting change and improvement" (p. 375).

The most successful institution from the consumers' point of view turns out to be a private one, San Francisco Consumer Action (SFCA), which evolved "from a small consumer complaint switchboard to an organization involved in a wide range of activities from public relations work to education, advocacy, and complaint handling by geographically scattered committees" (p. 458). Unfortunately, by early 1980, financial shortages prevented SFCA from continuing to handle consumer complaints. Success was short-lived.

This kind of analysis appears to point to a relatively precise reform agenda to resolve disputes better. This agenda can be consistent with the interests in efficiency and in minimizing social costs shared by business, consumers, and the government. One conclusion might thus be that other institutions should emulate the successful traits of SFCA. This message of overcoming remediable defects through reforms in the interests of all can be found in many of the chapters of *No Access to Law*. But other aspects of the book argue that the nonpolitical approach is naive and unproductive. In particular, the introductory essays and several others point strongly beyond an easy reform agenda. Indeed, these studies in the end seem to lead to a very different conceptual approach.

Two examples can illustrate the problem involved in any effort simply to "fix up" the institutions discussed in *No Access to Law*. The chapter on the Better Business Bureau (BBB), by Marian Eaton, makes clear that the Bureau's efforts on behalf of the consumer *must* be subservient to a number of other interests. As the author shows in some detail, the BBB depends on the good will and financial support of business. Indeed, it exists in order to promote the image of business and forestall governmental regulation:

To convince the public that government interference is unwarranted, some degree of control is exerted over business practices, and to that degree the public interest is served. However, in striving to maintain that favorable image, the Bureau necessarily imposes limits on the quality of assistance that it gives to customers. [P. 268.]

There are clear limits, in short, as to how far the BBB can go toward being what it calls "the voice of the people in the marketplace" (p. 234).

The chapter on three complaint-handling institutions in the inner city of Washington, D.C., by David Greenberg, is equally persuasive. The institutions vary, including an "easy credit" ghetto retail store; an antipoverty, multiservice center; and a Mayor's inter-agency committee; but the chapter shows that, while each institution differs in aims and in commitment to consumer rights, the results are quite similar: "Complaint handling serves the needs of ghetto stores, the social agencies, and the city departments rather than those of low-income people" (p. 411). Furthermore, any suggestion of practicable reforms is dismissed as largely beside the point: "[i]n all these complaint-handling relationships, problems are not accidental, but rather they are logical and predictable outcomes of the nature of the merchant, the welfare agencies, and the city departments" (p. 413).

The introductory essays by Nader and Shugart also develop these themes. The inability of these institutions to serve consumers well does not appear to be remediable.⁶ Moreover, the point is not just that these institutions do not and cannot work well:

We can see why third-party complaint handlers are of such value to the complainee organizations in our society. Cooling out is best performed by third parties, for otherwise the complainant would be too ready to suspect that he is being manipulated. The consumer is made to believe that his problem does not result from personal or corporate inadequacy. Possible solutions retreat from view, and he comes to accept the difficulty as a fixed aspect of the world to which he must resign himself. [P. 40.]

The institutions may work very well indeed, serving the social control interests of the complainee organizations.

Given the actual functions served by these institutions in our society today, it is not surprising that the authors are pessimistic. Nader and Shugart finally reach the point where they say it all boils down to a question of power:

Despite the fact that we have posed consumer rights and remedies as a legal problem, and one with legal solutions, we know that consumer complaint problems are but symptoms of larger societal problems and that the problem as well as the solution may be played out in other than the legal arena. [p. 101.]

This quotation raises the question of why we even bother to discuss institutional reforms. It is difficult to reconcile this approach with passages quoted earlier that suggest a general efficiency interest in reforming consumer-complaint-handling institutions.

On the one hand, as noted before, there are the suggestions that disputes are bad, and should be resolved; that society as a whole, including business and government, has an interest in effective consumer remedies; and that the twin problems of no access to law and no successful alternatives to law

6. It is true that complaint handlers often suffer from poor management, careless organization, inefficient operating procedures, and lack of concern, but these factors are only superficial causes of ineffectiveness. The fundamental cause is that the forces controlling many complaint intermediaries are not interested in creating effective mechanisms for consumer as well as producer.

account for this ineffectiveness. Now we see, however, that there is no consensus to promote reform; that the "resolution" of disputes — sometimes just a "cooling off" — is not always a good idea from the consumers' point of view; and, above all, that many of these "unsuccessful" institutions may be quite "successful" after all. They preserve the legitimacy of business and the market system without in any way threatening the power of business and the logic of the existing economic system.

The coexistence of the legal-reform-oriented design of the institutional studies and the pessimistic, more political, conclusions thus leads to some ambiguity in the general analytical approach of the book. Why are we worrying about "no access to law" or effective alternatives to law when real reform appears highly unlikely and amounts to a question of political power? Nader and Shugart's pessimism, however, does not prevent the offering of a reform agenda designed in part to confront the problem of power along with the problem of designing effective remedies. They emphasize, in particular, the need (1) to develop a right to counsel and access to court (p. 49), (2) to promote consumer class actions and collective legal remedies instead of making a "fetish" of individual due process (p. 85), and (3) to encourage consumer organizations — "securing funds for independent consumer groups that operate as complaint intermediaries becomes a top priority" (p. 75). This thoughtful effort to be constructive and also realistic merits some attention, and it may be the best we can do.

It might be suggested, however, that these remedies also could not survive the scrutiny of the political analysis that emerges as one component of *No Access to Law*. A right of access to counsel, first, does not by itself lead beyond individual cases toward group solutions to consumer problems. Even for individual consumer cases, moreover, the empirical evidence we have suggests that lawyers also perform a compromising and cooling-off function very much akin to that practiced by other institutions examined in the book.⁷

Second, permitting more class actions in the consumer protection area may help consumers, but offers no guarantee that class representatives and lawyers will investigate many consumer abuses and bring litigation. A class lawsuit, we must recognize, will be brought and benefit consumers only when the interests of the class lawyer converge with those of the class. Moreover, a consumer class will not necessarily overcome the problem of power. Law enforcement, as the example of SFCA shows, may require more than litigation; it may require extensive investigative resources, lobbying at various governmental levels, and the monitoring of the actual results of apparent victories from legislative, administrative, and judicial agencies.⁸ The easing of restrictions on class actions, therefore, might also fare poorly before the kind of power-oriented skepticism in this strand of *No Access to Law*.⁹ Class actions are not going to give consumers equality with business.

The praise of class actions, in addition, comes with the condemnation of too much emphasis on individual due process; yet the watering down of

7. See, e.g., Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC. REV. 115 (1979).

8. See, e.g., J. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978).

9. See, e.g., Brill, *The Uses and Abuses of Legal Assistance*, 31 PUB. INTEREST 38 (1973).

individual due process has many dangers and probably favors business and government more than consumers. Consumer defendants, for example, while not the subject of *No Access to Law*, must be remembered, and their individual due process rights often provide the only power they have in withstanding pressures to give up potential defenses.¹⁰

Additionally, while strengthening consumer organizations is no doubt important, there are some problems here as well. The first problem is how to do it.¹¹ The SFCA experience shows the difficulty of staying alive as a private and independent organization. It is not clear that governmental policy holds out much hope for support, and if governmental funds are provided directly to such organizations, we will then have the problem of making organizations accountable to their membership. The experience of state-supported consumer groups in Western Europe is not very promising.¹²

Finally, it can be asserted consistently with Nader and Shugart's political approach that consumer organizations are congenitally incapable of transcending the market system that creates the status of consumer. Even a very powerful, independent consumer organization cannot force companies to forego the profit motive for a long period of time.¹³ Benefits can be obtained only so long as business and consumer interests are essentially in harmony.

If applied consistently, therefore, the rather pessimistic political tone found in *No Access to Law* leads to little hope for the "ideal complaint-handling system" (p. 28) sought by Professor Nader. Such a system, as elaborated in the introductory essay,

would, with speed and fairness resolve grievances and would be part of an early alert to head off future similar complaints by providing public agencies with data with which to do their jobs better. An ideal system also would disclose aggregate patterns of abuse or injustice and would provide people with a competitive number of private and public avenues and forums within which to pursue just treatment. It would work for prevention and deterrence. [P. 28.]

While not free from ambiguity, *No Access to Law* suggests that no realizable reform could come even close to this ideal system in a society organized around the profit motive and dependent on the status of consumers — as distinct, for example, from producers.

One plausible response to this dilemma would be that, since it is all a

10. See, e.g., Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48 (1976).

11. Mancur Olson reminds us of the difficulties of organizing such diffuse groups in M. OLSON, *THE RISE AND DECLINE OF NATIONS* (1982). Somewhat critical of Olson but reaching a similar conclusion is A. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* (1982).

12. See N. REICH & H. MICKLITZ, *CONSUMER LEGISLATION IN THE EC COUNTRIES: A COMPARATIVE ANALYSIS* 2-10 (1980).

13. In fact, several of the chapters in *No Access to Law* document how "effective" consumer protection works in favor of large enterprises and to the disadvantage of smaller enterprises operating at the margin and unable to pass on costs of effective consumer remedies to consumers. See, e.g., Eaton, *The Better Business Bureau: "The Voice of the People in the Marketplace,"* p. 269.

question of political power, reformers should concentrate on increasing consumer power as much as possible, even if it appears that it can never approach anything near what it would take to implement the "ideal" system. This Galbraithian compromise,¹⁴ favoring as much countervailing power as possible, might be the final message of *No Access to Law*. Political sophistication counsels pessimism, but consumer power offers hope.

As appealing as the consumer power approach appears to be, however, we might consider whether it asks for both too little and too much in the area of consumer remedies in the United States. If it is true that consumer organizations cannot realistically gain enough power to place consumers on equal terms with business, then the power analysis may lead to little in the way of improved consumer remedies. We simply wait for external forces to change the balance of power somehow. On the other hand, if our concern really is politics — *e.g.*, affecting decisions about corporate priorities — we probably should work to strengthen political movements transcending the narrow focus on consumer rights and remedies. Social change is unlikely to result from organizations of consumers.¹⁵

Thinking less grandiosely, however, and even if the political analysis is correct, we ought not succumb to the conclusion that no progress can be made. Consumer complaint processing can be analogized to the problem of waste disposal, which also has not proven to be easily solved in our society.¹⁶ One way to handle waste disposal is to regulate companies, but the regulations tend to be developed and enforced with more sensitivity to the companies than the public. Monitoring and enforcement can no doubt be strengthened if environmentalists gain some countervailing power through their own organizations, but here, too, there are perceptible limits. A more moderate, less exciting, approach is to encourage the development of private enterprise and technology to recycle waste products at a profit. The "waste" is taken care of by turning it into a potentially productive resource within the market economy. While not the same as broad social change, this market solution does provide some benefits that cannot be ignored.

Consumer disputes can also be seen as waste in our society. *No Access to Law* shows that individuals for the most part pay the costs of disposal: "the present set of institutions reflects our society's decision to place the burden of many valid grievances on customers themselves" (p. 86). There are limits to what the customers will bear gracefully, but businesses receive help from complaint-handling institutions which are subsidized by business or government to cool off consumers and thus bear some of the costs of complaint disposal. Professor Nader eloquently describes this process by which "[i]ntermediaries save the organizations the cost of processing disputes themselves" (p. 38).

14. See J. GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 108-53 (1956).

15. See, *e.g.*, M. WIEVIORKA, *L'ÉTAT, LE PATRONAT, ET LES CONSOMMATEURS* (1977). Cf. Cain & Kulcsar, *An Essay on the Origins of the Dispute Industry*, 16 *LAW & SOC. REV.* 375 (1981-82).

16. Recent criticisms of regulation, even if too sanguine about what can be accomplished within the market, include: Halgren, *Recycling and Resource Recovery: State and Municipal Legal Impediments*, 7 *COLUM. J. OF ENVTL. LAW* 1 (1980); Lanza, *Municipal Solid Waste Regulation: An Ineffective Solution to a National Problem*, 10 *FORDHAM URBAN L.J.* 215 (1982).

The obvious question is whether the technology is available to turn this waste into a resource that can be developed profitably in a manner that will lead companies to remedy more consumer problems in a way more consistent with consumer interests. There are hints in *No Access to Law* that consumer complaints in this sense can at times be a marketable resource, despite the fact that the existing lawyer-client market for small claims and consumer complaints is not well-suited to lawyer profits coupled with consumer satisfaction. The consumer action lines, for example, sometimes do very well in helping individual consumers while recycling consumer complaints at no cost to consumers into profits for newspapers and television.¹⁷ San Francisco Consumer Action, it can be pointed out, took advantage of a law firm's willingness to reduce legal fees to provide legal services to SFCA members (p. 426). The class action also can be seen as a device to encourage lawyer entrepreneurs to find disputes and process them for a profit.¹⁸

Consumer disputes are a resource that can be exploited by certain kinds of creative entrepreneurs. The profit may be votes or political influence, as in the case of Congressman Barrett. Indeed, the Mafia may be seen as an organization that sells effective dispute resolutions. This is not to say that any of these entrepreneurial innovations will bring about anything approaching the consumers' ideal, or substitute for broad-based political action. They do not challenge an economic system that imposes limits — well-documented in this book — on how far we can go toward consumer complaint utopia. But it will be useful nevertheless to see what kinds of market approaches can be taken to harness the profit motive in the interest of benefits to consumers. The ultimate emphasis in *No Access to Law* on the structural and political impediments to consumer equality, while essential, has perhaps impeded the examination of how far consumers might go without structural and political change. It can be suggested, therefore, that we should look more carefully at how the market for disputes — so far not offering much to consumers — is developing and might be affected in a way that is more helpful.¹⁹

The detail and analyses in *No Access to Law* provide a wealth of information about consumer disputes. Regardless of whether the suggestions for research offered in that review prove fruitful in analyzing consumer disputes, the point is that readers will find much to stimulate thought in this book. And while the book's message suffers somewhat from an ambiguity

17. It is interesting how one such action line, Call for Action, Inc., began to market chapters to television stations, even if the arrangement did not last over time. See the essay by Mattice. P. 517.

18. The entrepreneurial function of the class action is emphasized in the classic article, Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 715-21 (1941).

19. I recognize that it may appear that my suggestions are an effort to revive the reformism that has been shown to be ineffective. My point, however, is to acknowledge that Nader's ideal consumer complaint system is unattainable and to try to avoid either simply exhorting institutions to do better or exhorting consumers to become more powerful. If neither of those approaches looks hopeful, it is worth at least asking if there are ways that the complaint processing market can develop — through new "technologies" or otherwise — to make it profitable for someone to provide some better assistance to individual consumers.

about the social and political dimensions of consumer complaint handling in the United States, Professor Nader and her collaborators are to be commended for confronting the political dilemmas and looking beyond easy solutions.