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Laura Nader

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Seegers Lecture

THE LIFE OF THE LAW – A MOVING STORY

Laura Nader*

I. INTRODUCTION

This Article argues that the life and death of the law derive from the plaintiff, and that this fact is nowhere more important, perhaps, than in our democratic society. Furthermore, regardless of whether anthropologists have been able to decide on a strict definition of law that is universal, we have been able to document the universal presence of justice forums. The search for justice is a fundamental part of the human trajectory, although the meaning of justice and its form varies. Feelings of wrong and right are ubiquitous, as are feelings of injustice.¹ Indeed, social psychologists have argued that the justice motive is a basic human motive that is found in all human societies and is part of many, if not all, human interactions.

Furthermore, decades of research, mine and others, indicate that the direction of law is in large measure dependent on who can and wants to use the law. In state systems of law, the plaintiff role atrophies because of the monopoly use of criminal cases by the state. Over time, the role of the civil plaintiff is also endangered by the change in relations associated with industrialized wage-labor and the resultant inequities that stand in the way of equal access to law. When predominant users are powerful entities, the law is shaped and becomes hegemonic because their interests are well defined and commonly buttressed by justification or propaganda. The powerful react to challenge. Mass tort cases have increased manufacturers' efforts to reduce the legal protection afforded by trial by jury. On the other hand, lawyers claim that the common law is a dynamic law evolving to meet the changing conditions of society. Yet, when users do not speak from positions of dominance, they also do not command the major instruments of private power – that of the press,

* Department of Anthropology, University of California, Berkeley. This Article is based upon the Seegers Lecture, delivered by the author at Valparaiso University School of Law on October 11, 2001.

¹ See Laura Nader & André Sursock, *Anthropology and Justice*, in JUSTICE: VIEWS FROM THE SOCIAL SCIENCES 205-33 (R.L. Cohen ed., 1986); see also MELVIN LERNER & SALLY LERNER, THE JUSTICE MOTIVE IN SOCIAL BEHAVIORS: ADAPTING TO TIMES OF SCARCITY AND CHANGE (1981).

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marketing companies, and so on. One can, however, speak simultaneously about a "user theory of law" and "hegemony" precisely because powerless users can become a hegemonic force. In 1916, Justice Benjamin Cardozo, in *MacPherson v. Buick Motor Co.*,² signaled the beginnings of a change from a *caveat emptor* society that places the burden of proof on the unsuspecting consumer to a world that places the burden on the manufacturer.

This 1916 decision provoked plaintiff activities in the twentieth century and will continue to stimulate action in the twenty-first, for without the civil plaintiff citizens are only defendants. When the state reigns supreme, we enter into lawlessness, and the legitimacy of law is challenged, particularly in societies that place great emphasis on individual rights and basic freedoms, such as the right of individuals to regulate their own affairs, as in the law of contracts. Litigation can keep a democratic society healthy.³ Class action, or multi-district litigation, is what makes litigation possible in a mass society, and implemented legislation may prevent disputing in the first place.⁴ All of the above and what is to follow means that we need to think about the implications of the contemporary rhetoric of consensus, homogeneity, and agreement and about the contradictions such a rhetoric poses for a society that espouses the ideal of the rule of law as a cornerstone of democratic order, a society whose worldwide expansion and influence touches the lives of so many previously excluded groups.⁵

² *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

³ See generally CARL T. BOGUS, *WHY LAWYERS ARE GOOD FOR AMERICA - DISCIPLINED DEMOCRACY, BIG BUSINESS AND THE COMMON LAW* (2001). Bogus argues that the common law works far better than commonly understood and that it may be more necessary now as an essential adjunct to government regulation because it is not as easily manipulated by the powers that be in big business. *Id.*

⁴ See LAURA NADER ET AL., *NO ACCESS TO LAW - ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM* (Laura Nader ed., 1980). This book was funded by a grant by the Carnegie Foundation to explore possible success in alternatives to courts for solving American consumer complaints. The research covered the span of a decade. This book explores the strategies employed and forums engaged by those who feel disempowered by their lack of effective recourse to traditional judicial institutions in the United States. Stimulated by an analysis of complaint letters written by American consumers, this research explores a range of different responses that shed light on the insufficiency of private and public avenues of redress for individual claims. One factor in the analysis within the book is the legislative restrictions on such legal action and their dissonance with needs within the practical, lived experiences of American citizens. See also David Lukan, *Silence! 4 Ways the Law Keeps Poor People from Getting Heard in Court*, *LEGAL AFFAIRS*, May/June 2002, S4-S8.

⁵ See Laura Nader, *The Globalization of Law: A.D.R. as Soft Technology*, in *PROCEEDINGS OF THE 93RD MEETING* (American Society in International Law ed., 1999). This article traces the

An example from a distant place suggests what can happen when no plaintiff role is allowed. An anthropologist, David Hyndman, gives us an elegant description of contemporary events in Indonesia and Papua New Guinea (PNG) indicating how a state faced with a debt crisis favors investors who plunder natural resources and cast indigenous peoples in the role of subversive criminals, peoples seen by anthropologists as having taken up arms to protect their cultural and ancestral homelands.⁶ The Indonesian state and PNG, in collusion with transnationals, entered New Guinea to mine gold and copper in a process that Hyndman calls economic development by invasion. The cost of resisting invasion is heavy. In New Guinea, local peoples fought the foreign presence, blockaded airstrips, and blew up pipes running from the mines. Lives were lost and property was destroyed. Forced resettlement often followed, and local people became trespassers in their own land. Hyndman's story documents one invasion after another, and he ironically notes that third world colonialism has replaced first world colonialism. Those who resist are considered criminals and are prosecuted under state laws favoring investors. Those left behind are desperate, and unfortunately, the PNG is not the only place where the subaltern plaintiff is starving, as current work on the interlocking of missionary, state, and corporate interests indicate.⁷

In my study of how Americans complain about goods and services when they have no access to law, I was given the opportunity to examine a large corpus of letters written by people who felt they had been shafted by the system, and I realized that these letters threw a powerful searchlight onto what was happening as Americans faced the evolution of a system of justice in a world in which face-to-face relationships were almost nonexistent in the market place.⁸ The persistence and inventiveness in their pursuit of justice, even after they had seemingly

way in which the domestic discourse on "litigiousness" in America served as the historical precedent for the global trajectory of Alternative Dispute Resolution. Keyed to the preservation of asymmetrical power relations, this trajectory exposes the inadequacy of separating certain legal phenomenon in a myopic "domestic-international" binary.

⁶ See generally DAVID HYNDMAN, *ANCESTRAL RAIN FORESTS AND THE MOUNTAIN OF GOLD: INDIGENOUS PEOPLES AND MINING IN NEW GUINEA* (1994).

⁷ See SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* (2000); see also GERARD COLBY & CHARLOTTE DENNETT, *THY WILL BE DONE - THE CONQUEST OF THE AMAZON: NELSON ROCKEFELLER AND EVANGELISM IN THE AGE OF OIL* (1995). Together these books demonstrate that the effects of this collusion are not felt in economic terms only. Merry shows how courts attempt to reformat cultural ideals in Hawai'i as fundamental as the nature of male and female gender identity and relations. The law thus serves as a crucial entry for analysis into the larger social projects of neo-colonialism.

⁸ See NADER ET AL., *supra* note 4.

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exhausted all avenues, was extraordinary. The extended case histories of these complaints indicated a legacy of frustration, of mistrust, of apprehension. Some people have called this the slow death of justice in the United States. Those complaining were after all, believers in "the system" and as one complainant said, "[t]here's gotta be some justice somewhere."⁹ Our observations are not relevant solely to United States citizens with the global spread of consumerism. There is a disconnect between people in charge of the justice system and those they judge. In the 1960s, when invited to the Nations Judicial College in Reno, Nevada, I had the opportunity to observe judges, unbeknownst to them, participant-observing in a jail cell, and I watched them yelling, "[w]here's a chair, where's a goddam chair?" The purpose of this volatile and now impermissible experiment was to allow the judges to discover the connections between judicial action and its effects on the people who stand before them for sentencing.

Though much has been written about the dark side of law as a tool for domination, the lighter side of law projects possibilities for democratic empowerment. The life of the law is the plaintiff, who perhaps unwittingly makes modern history, whether it is in small democracies found in local communities, or in contemporary state democracies, or in large-scale configurations at the international level. By contesting their injustices by means of law, illegality, or subversions, plaintiffs and their lawyers can still decide the place of law in making history.¹⁰

The erosion of law has been gradual. What are the broad patterns of change that have appeared at the onset of the twenty-first century? It appears that the ADR twentieth-century revolution in civil justice is less a legal innovation concerned with social inequalities, as in the 1960s and early 1970s, than a movement away from justice toward harmony and efficiency models.¹¹ The political concerns of the left and right have

⁹ LITTLE INJUSTICES - LAURA NADER LOOKS AT THE LAW (PBS 1981).

¹⁰ See generally LAURA NADER, *THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS* (2002). The aim of this work is to tie together many functions of law in a variety of historical and geographical contexts, focusing on the way in which law operates on both micro- and macro-social levels. In colonial, state-centered, everyday or globalized contexts, the plaintiff consistently serves a fundamental role as the "user" of the law. The motif of the plaintiff allows for connections to be made between seemingly disparate legal phenomenon such as consumer product grievances and the legitimization of bio-piracy under the intellectual property law.

¹¹ See Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

converged to transform dispute resolution from the rule of law into coercion by judges-for-hire, economists, mediators, therapists, and others. By manipulating multiculturalism, a dispute resolution model is increasingly likely to be unfractured by power differences and increasingly originating from multinational institutions. The justice motive is being replaced by coercive harmony, while at the international level, as well, lawfulness is being replaced by lawlessness. In the more advanced countries, as in major superpowers, withdrawal from the International Court indicates lack of support for an International Criminal Court or the United Nations.¹²

In the United States we are all losing the right to sue. Serious arguments are being made for equal treatment of parties who are not equal, as well as for the reinvention of indigenous law in the midst of international arms dealing and natural resource plundering. We begin to see the formation of the same phenomenon, an antilaw movement, in a number of seemingly unrelated sites. Whereas, in 1906 Roscoe Pound felt that social control was primarily the function of the state and is exercised through law, state law is being taken over by the use of harmony and efficiency paradigms that often originate in private corporate institutions. The study of disputing took me to a small village in Mexico, then to an examination of legal ideologies connected with colonialism in Africa, Latin America, Fiji, New Guinea, only to return to the United States, where the cultural study of harmony control has taken me and my students into workplaces, dormitories, mental health settings, classrooms, and Middle Eastern and African villages, as well as law firms.¹³

Perhaps only a few anthropologists have had the privilege, in one lifetime, of working along a continuum from isolated villages to nation states, then into the global arena. During the past forty years, whether

¹² See generally Laura Nader, *Civilizations and Their Negotiations*, in UNDERSTANDING DISPUTES (1995); see also Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, in 276 RECUEIL DES COURS (1999). These articles chronicle instances of coercive harmony operating in international power disputes. The general trend is for more powerful nations to eschew court-based justice for closed door dispute resolution. The recent and official withdrawal of the United States from the ICC treaty continues this trend.

¹³ See generally LAURA NADER & H. TODD, JR., *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (1978); see also PAUL GULLIVER, *DISPUTES & NEGOTIATION: A CROSS-CULTURAL PERSPECTIVE* (1979). Bringing together fieldwork and analysis from across the globe, including the United States, these books highlight the different tactics and forms of dispute resolution employed cross-culturally. These types of work deconstruct claims that there is a universal negotiating culture.

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working in the little village democracies among the Mexican Zapotec where I started my fieldwork, or in the country of which I am a citizen, or in the world in which we all live—these sites are linked by the connections between litigation and social change in contemporary democracies, both local and national. Plaintiffs, defendants, and their purposes have changed in the world where increasing numbers of poor people are affected by a climate in which everything is for sale. Body parts are trafficking from the south to the north, and this is even happening within leading industrial countries. Social distinctions are increasingly the basis for life and death decisions—literally, in the case of the death penalty. The difference between “us” and “them” is being erased, because environmental pollution and infectious diseases know no borders, and neither does terrorism.¹⁴

At the same time, the practices of law are shrinking from the larger purposes, purposes without which law has no legitimacy. Our scholarship is, I believe, increasingly commensurate with the corporatization of universities, not just in the United States, but worldwide. This is a time when big business is in everybody’s business, a time when self-censorship is becoming ingrained, a development that encourages potential critical thinkers to move away from the concrete towards the abstract. Injustice, however, is not abstract. Law cases brought by plaintiffs are not abstract, nor is the precedent of such cases. In this context, we owe it to ourselves and to those we study to recognize the creative thrust of the plaintiff to address the political blindness associated with the assumption that the content of law originates with powerful groups and flows down to the powerless. It is worth remembering that relatively less powerful plaintiffs have been known to challenge the assumption that law originates only with the powerful.

II. JUSTICE THEORIES VERSUS UNJUST PRACTICE OR THE CHANGING ROLE OF THE PLAINTIFF

The ideas that are proven critical for understanding the dynamics of law in everyday life are three. First, the idea that the search for justice is both fundamental and universal in human culture and society, and a “reflex-like” response to an injustice is often so strong that all other considerations are of secondary importance. This observation implies that forums for justice must be ubiquitous, as indeed they are. Notions

¹⁴ See Nancy Scheper-Hughes, *The Global Traffic in Organs*, 41 CURRENT ANTHROPOLOGY 191 (2000); see also Laura Nader, *Controlling Processes – Tracing the Dynamic Component of Power*, 38 CURRENT ANTHROPOLOGY 711 (1997).

of justice are implicit in every culture, and usually operate at the unconscious and semiconscious levels, becoming explicit only when an injustice is confronted. The second idea is that styles of law vary, even within the same place, in relation to the social and cultural environment. As a Sard shepherd points out: "If somebody steals my flock, he steals my flock. He does not offend me. It depends, depending on who he is, he offends me, and how he steals, and why."¹⁵ Context is critical. The third idea is that the direction of law is dependent in large measure on who is motivated to use the law and for what purposes. The role of political ideas and influence in regulating access for potential plaintiffs directs our attention to the larger noble purposes of the law. As we look about us and observe current usage, we may not realize that our legal system has a "slope"; that the changes of the next few years are, in a sense, prefigured in certain tendencies of the present, for example, in the present antilaw movements, such as tort "reform." The direction of law is connected to the development of extrajudicial processes in nation-state societies.¹⁶ For example, judges have pushed ADR as an alternative to adjudication, and states may directly block access to courts for particular kinds of lawsuits, such as class action. In nation-state societies, the state defines itself as user by becoming the plaintiff in criminal cases, while the true plaintiffs become victims. The rise of nation-states accompanied this historical change from plaintiff to victim, from an active to passive role, and also changed the status of the defendant as an object of state action. Today, most defendants in criminal cases are members of the underclass. Individual members of the underclass do not have the power to criticize and resist the definition of crime that rulers justify as needed to reduce disorder.¹⁷ We know also that what is considered criminal does change over time and that the political and economic

¹⁵ Julio L. Ruffini, *Disputing Over Livestock in Sardinia*, in NADER & TODD, *supra* note 13, at 209-46. The dissonance between the ability of the Sard Shepherd to evaluate the social and cultural context of livestock theft and the style of the state-run Italian courts leads the Sard to avoid official courts and opt for local mediation to resolve their differences.

¹⁶ See Laura Nader, *The Direction of Law and the Development of Extra-Judicial Processes in Nation-State Societies*, in CROSS EXAMINATIONS: ESSAYS IN MEMORY OF MAX CLUCKMAN 78-94 (P.H. Gulliver ed., 1997). The growth in power and prevalence of private, non-state legal actors has figured into many of the contemporary debates on the change in national sovereignty with globalization. Globalization, with regards to law, is still an inchoate phenomenon and the future role of the state is still debated. Though most indications point to the strong and continued relevance of the nation state, the role of *lex mercatoria*, the WTO, and other developments in the international legal realm raise serious questions about the place of democratic decision making in the future of any new adaptations of state sovereignty.

¹⁷ See RUSSELL MOKHIBER, *CORPORATE CRIME AND VIOLENCE* 3-14 (1988).

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forces behind the creation of criminal law are revealed in history, culture, and society.¹⁸

Nevertheless, in the global context it can be said that the plaintiff has gradually moved from a position of relative power in community courts, which allowed for face-to-face disputing, to a relatively powerless role that allows room for complaining only in the context of face-to-faceless disputes. The new role of the consumer as complainant rather than disputant in the global marketplace not only renders consumers relatively anonymous, but also may be accompanied by the increasing absence of the consumer voice. Changes in the potential litigant's role seem to have followed the change in relations that came with the industrialized wage labor system, as well as with the elongation of the product distribution chain and current globalization of such changes. As Karl Llewellyn once noted: "If there be no official voices of rebuke, much that deserves rebuke goes unnoticed."¹⁹

In non-state societies of the sort studied earlier by anthropologists (and even in isolated pockets today), the plaintiff is motivated to secure a certain kind of justice, because he or she is plaintiff as well as victim. This observation is often ignored when western law is transplanted elsewhere, although the implantation of western law models has been the cause of major unrest in developing nations around the world. In Zambia, for instance, the state as plaintiff began punishing defendants convicted of cattle rustling by sentencing them to jail. Under traditional law, compensation, not punishment, is a central interest for the true individual plaintiffs. In such situations, plaintiff energy is frustrated. In the Zambian instance, the frustration caused major riots and precipitated a local demand that cattle rustlers be tried by the local court rather than taken out of the community into state courts.

It is in the role of the active plaintiff that litigation in other societies differs from ours. In Sardinia, cattle theft is regarded not as a crime, but as a dispute that should be settled without resort to the state. In both Zambia and Sardinia, the state views the plaintiff as lawless; the plaintiffs view the state as unresponsive, or more likely, as corrupt.²⁰

¹⁸ See Laura Nader, *Crime is a Category*, in 19 WINDSOR ACCESS TO LAW (2001). See generally William Chambliss, *Toward a Radical Criminology*, in THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE 230-41 (David Kairys ed., 1980).

¹⁹ NADER, *supra* note 10, at 168 (citing KARL LLEWELLYN & E. ADAMSON HOEBEL, CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1961)).

²⁰ NADER & TODD, *supra* note 13, at 209-81.

Just what group constitutes the users of law is significant because when the actual law users reflect a broad spectrum of society, the larger culture can be transformed. Using United States historical legal data, Willard Hurst noticed that although there have been changes over the nineteenth and twentieth centuries in what people have chosen to litigate and in procedural style, in another sense there has been no significant change at all. According to Hurst, the users have not changed. He noted:

Nineteenth century litigation involved only limited sectors of the society in any bulk. With the exception of New Deal administration agencies, there are today no more merchants suing fellow merchants in court than there were in the nineteenth century dockets, and people of small means were not often plaintiffs except in torts or family matters.²¹

In this context the 1960s were unusual, because cases involving Blacks, Hispanics, Native Americans, consumer groups, environmental workers, and women began to push their way into litigation. Before proceeding further, I would like to note that contrary to media representation, Americans go to great lengths not to litigate. The Harvard School of Public Health reports that fewer patients bring claims in medical malpractice than they are entitled to.²² But as in the 1960s and 1970s, when new faces with new cases appeared as civil plaintiffs, the alarms went off among powerful potential defendants.

Again, my work among the Zapotec provides a contrast. Mexican state law may be said to have a bias against defendants, while village law has a bias toward plaintiffs. The state restricts the plaintiff's role while monopolizing the defendant's role. In Peru, as in the New Guinea case discussed earlier, indigenes have to deal directly with the nation-state and with corporations that are sometimes larger and richer than nation-states. For example, in the Peruvian Amazon, the territorial rights

²¹ James Willard Hurst, *The Functions of Courts in the United States, 1850-1980*, 15 LAW & SOC'Y REV. 401, 401-71 (1980); see also JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950).

²² See generally HARVARD MEDICAL PRACTICE STUDY GROUP, *PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION IN NEW YORK* (1990). This report's analysis included the fact that only one in eight patients damaged by medical negligence litigates, and further, that of this small percentage, just one in sixteen is compensated. *Id.*

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to indigenous land have become increasingly precarious.²³ Although the state has granted property titles to native communities, the state still owns the subsoil resources, and these lands are now under threat of occupation and misuse by transnational oil corporations who, with the full cooperation of the state, are there to exploit hydrocarbon resources.²⁴ Some communities acquiesce and assimilate to the bottom of the ladder. Others fight for real rights by negotiating issues concerning the impact of development in their environment. Such situations often make for instability, especially if users feel that state law is not serving their interests.²⁵ In an overgeneralization, Lawrence Friedman argues that before the Industrial Revolution and the coming of modern machines, redress for bodily injury was difficult to obtain.²⁶ He notes that in the first part of the nineteenth century, the law of torts moved in the direction of rules that put serious obstacles in the way of personal injury awards by workers, passengers, and pedestrians, so that "[t]he rules favored defendants over plaintiffs, businesses over individuals."²⁷ He speaks of a period of enormous economic growth and expansion, at a time in which there was, as yet, no large and organized industrial workforce to secure workers' rights.²⁸ The legal framework included legal principles of liability, fault, negligence, and the "reasonable man," and put persons who were injured in industrial accidents in factories, railroads, and mines at a disadvantage.²⁹ A servant employee who was injured on the job could not sue his or her employer—that is, if the employer was the abstract personage, the corporation.³⁰

Twentieth century tort law, on the other hand, insists that those who are liable must accept responsibility. In making the contrast, Friedman attributes the shift to the growth of the insurance industry. According to Friedman and others, compensation has been the central purpose of twentieth-century law. What is interesting about Friedman's discussion of tort, compensation, and insurance, a discussion littered with terms like "total justice" and "total redress," is the lack of a comparative or macrohistorical perspective that breaks away from the limits of

²³ P. Urtega-Crouetto, *Territorial Rights and Indigenous Law: An Alternative Approach*, in *THE CHALLENGE OF DIVERSITY: INDIGENOUS PEOPLES AND REFORM OF THE STATE IN LATIN AMERICA* 275-92 (1999).

²⁴ *Id.*

²⁵ LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 53 (1985).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

traditional legal history to encompass an outside perspective. In most human societies, those who have been wronged, or who feel that they have been wronged, expect compensation and believe that injury must stand redressed and that the wrongdoers must assume responsibility. According to Friedman, victims "earn" compensation as a result of what happens to be a current social norm, the norm of total justice.³¹ "Law responds, unconsciously, to the climate of opinion around it."³² It is important to recognize that the general expectation of justice that he speaks of is not just American, but most likely universal.

I could tell this story another way. The difference in the telling is at the heart of the life of law and at the heart of the naiveté in academic legal scholarship. The changes in law in the past two centuries did not just happen, nor did the law respond unconsciously. The changes came because of the cumulative sense of injustice by individual plaintiffs and plaintiffs' lawyers (among others) who argued cases or wrote legislation governing litigation. The movement in law came from the experience of total injustice rather than from the demand for total justice and the rise of expectations. As the jurist Edmond Cahn observed: "The response to a real or imagined instance of injustice is . . . alive with movement and warmth."³³ Justice is contemplative. Injustice is dynamic. A complaint about the production of Ford Pintos is about individuals being engulfed in flames owing to defective design, an injustice experienced in terms of the absence of remedy for the victim of the assault. A sense of injustice may be the force that keeps industry creative and innovative. After all, how did we get seat belts and airbags? A sense of injustice also may be the force that, given its location in the intersection between the state and civil society, keeps the law alive. Thus, the goal of the plaintiff is not simply compensation but also deterrence, prevention, regulation, and punishment for conscious wrongdoing, legitimacy.³⁴

Legitimacy was what the legal system won in the Buffalo Creek Disaster that happened in February of 1972 when a massive coal-waste pile that was damming a stream in the mountains of West Virginia collapsed and unleashed more than 130 million gallons of water and

³¹ FRIEDMAN, *supra* note 25, at 53.

³² *Id.*

³³ EDMOND NATHANIEL CAHN, A SENSE OF INJUSTICE 13 (1949).

³⁴ See generally THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW (2001). Koenig and Rustad systematically argue that from the eighteenth century to the present, tort law has been the public's guardian against the abuse of power in numerous arenas: medical malpractice, industrial accidents, gender justice, products liability and more. *Id.*

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black coal waste into the Buffalo Creek Valley below.³⁵ More than 125 people died, mostly women and children. Many of the 4000 surviving residents were injured, and many lost their homes. What made this coal-mining disaster unique was that, this time, it was not the male coal miners, but mainly, the miners' wives and children who died. In past disasters, the small settlements offered by coal companies were usually accepted, but this time a few hundred of the survivors banded together to sue the company, to make them pay, to make them admit their responsibility, and to make sure such an accident never happened again. The disaster was alive with the sense of injustice that Edmond Cahn wrote about.³⁶ The legal system responded, and the plaintiffs won not only a settlement, but also a new sense of dignity and self-worth. The survivors in the valley had reacted violently to the company's attempt to blame God for this human-made disaster. Had they not been able to go to trial, it is anyone's guess as to whether there would have been a settlement of \$13.5 million. It is also relevant that the pro bono lawyer in this case had been a civil rights activist and lawyer.

The terms we use shape the direction of our thoughts—justice philosophers or injustice specialists, rights specialists or wrongs specialists, departments of justice or departments of injustice. Perhaps we should say injustice, for that concept is the life of the law. Injustice is at the heart of dissatisfaction with the law and must be recognized as the motor of change. When corporations manufacture human and environmental toxins, federal and state agencies, medical and epidemiology experts, scientific researchers, attorneys, juries, and judges become participants in the drift of law. The way in which environmental cases (civil and criminal) are litigated, the presentation of information, the arguments about causation and harm, the process of judicial management, and the case outcomes reflect and reveal how the numerous participants come to understand law.

The cluster of leukemia cases in Woburn, Massachusetts in the 1970s was just such a case. The case was not about total justice, nor was it solely about compensation. It was about a group of American families who saw their children die of cancer as a consequence of environmental pollution. It was about the persistence of one mother, whose youngest son was diagnosed with leukemia in 1976. She discovered that the incidence of leukemia in the area was eight times the national average and that there was a cluster of more than a dozen other children in the

³⁵ See generally GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976).

³⁶ See *supra* note 33.

neighborhood who also had been stricken. The plaintiffs had the burden of proving that the contaminants in the well water had caused the children's leukemia, a connection that had not been scientifically demonstrated. A writer, Jonathan Harr, described this case in *A Civil Action*, centering his story on the lead lawyer who enlisted experts in over half a dozen fields.³⁷ What originally looked like a medical problem became a public health problem and then a problem of law. In the final analysis, instead of a verdict declaring the corporations guilty of pollution, each family got half a million dollars. The settlement reflected the goals of an efficiency model. Some time after the settlement, the EPA concluded that both Grace and Beatrice Foods were responsible for contaminating the aquifer and the city wells. The judge's dismissal of the EPA report blocked the appeal. The judge in the Woburn case strongly favored the out-of-court settlement and went on to specialize in mediation after retirement, as did the leading plaintiff lawyer, Jan Schlichtmann. The public might not have known about the Woburn case if confidential negotiating procedures were the primary remedy. Since Woburn, the ADR dispute resolution approach has been employed in two important environmental lawsuits on Long Island, New York, and in Toms River, New Jersey.

The result of such negotiated settlements, that the defendant settles without admitting liability, is that the defendant pays the money, cleans the site so that it meets minimum state standards, and then relocates. The corporation does not take social responsibility for its conduct, and the legal connections between the industrial and pesticide chemicals and cancer are often not tried, tested, or explored. In the cases cited, negotiation ideologies deflected product and service complaints in such a way as to benefit the business group. Here, the drift of law moves with the dominant users, in this case, corporate users. Yet, there have been surprise factors.

After Jonathan Harr's book on Woburn was published the question was asked why the Woburn case was a civil complaint to begin with? It could have been a criminal trial, but the state of Massachusetts did not prosecute anybody. In two recent Massachusetts cases, however, there were criminal charges. There have been a dozen or so such cases from Massachusetts and elsewhere, and the *Corporate Crime Reporter* continues

³⁷ See generally JONATHAN HARR, *A CIVIL ACTION* (1995). Jonathan Harr's 1995 book stimulated a Hollywood production by the same name and also inspired law school debates across the country. Within these debates, *A Civil Action* is often cited with both admiration and disapproval, usually correlated with the speaker's position on tort reform.

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to report a string of corporations and executives that have been prosecuted for workplace deaths in recent years.³⁸ Prosecutors did not file charges like this decades ago.

Lawsuits over the harms caused by tobacco use bring to the forefront different dimensions from those of the Woburn case, because of the visibility and pervasiveness of smoking, both in the United States and elsewhere. There have been waves of anti-tobacco litigation and settlements since the 1950s, having been preceded by anti-tobacco movements since the nineteenth century. The literature encompasses stories of plaintiffs whose family members have died of lung cancer, plaintiffs themselves dying of lung cancer, lawyers crusading against the tobacco companies, purloined documents that provide evidence of tobacco executives' untruthful testimony, scientists who research possible connection between tobacco and cancer, as well as those who defend smoking as exercise of free will and the anti-smoking movement as authoritarian, and condemnations of the American military for encouraging the addiction of young servicemen who later indicted tobacco companies for their part in causing teenagers to become addicted to cigarettes. The story culminates in the great tobacco cases of the 1990s, the verdicts, the settlements, and concerns about what this tobacco litigation has meant. Some forty states have sued the tobacco industry. California was the thirty-seventh to file suit and had a very strong case for years of false advertising, deceptive practices, and anti-trust violations.³⁹ Having failed at the national level, the tobacco industry decided to negotiate with eight states of its own choosing ... a settlement after litigation (a public affair) is not the same as a secret, non-trial settlement, as illuminated by the Judiciary Committee of the California State Senate. No wonder law professors like Owen Fiss have written against settlement.⁴⁰ California got a raw deal. The tobacco industry is still in the driver's seat.

³⁸ See, e.g., MOKHIBER, *supra* note 17. Mokhiber is the editor of the Washington D.C. based Corporate Crime Report. His other books are also illuminating. See, e.g., RUSSELL MOKHIBER ET AL., *CORPORATE PREDATORS: THE HUNT FOR MEGA-PROFITS AND THE ATTACK ON DEMOCRACY* (1999); RUSSELL MOKHIBER & ROBERT WEISSMAN, *ON THE RAMPAGE: CORPORATE POWER IN THE NEW MILLENNIUM* (forthcoming 2002).

³⁹ The literature on tobacco litigation is immense. See, e.g., PETER PRINGLE, *CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE* (1988); see also DAVID PHELPS, *SMOKED: THE INSIDE STORY OF THE MINNESOTA TOBACCO TRIAL* (1998).

⁴⁰ See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Owen suggests that litigation has societal benefits not realized through settlement. *Id.*

III. THE ROLE OF THE MEDIA

Trends are not just continuous, nor are legal traditions point-counterpoint. The law is part of everyday life, as are the users of law, and in the late twentieth and early twenty-first centuries, image is part of the process, a part that needs to be more recognized by scholars. There has been a serious effort among socio-legal researchers to assess quantitatively the impact of media coverage on product liability cases. A recent United States study titled "Newspaper Coverage of Automotive Product Liability Verdicts" was initiated on the premise that "[b]eliefs about the world of tort litigation [can] . . . affect legal, social, political and economic outcomes."⁴¹ The authors of this study were referring to the beliefs of citizens, attorneys, judges, juries, legislators, and business decision-makers. What they found after examining newspaper coverage for product liability verdicts involving auto manufacturers between 1983 and 1996 might surprise: of the 259 verdicts for defendants, there were almost no articles in the press; whereas, of the ninety-two verdicts for plaintiffs, sixteen of which included punitive damages, all were covered. The authors underscored the need for systematic data gathering about the life of the law that might accurately inform citizens, attorneys, and others about the frequency, nature, and outcomes of lawsuits. Media coverage tends to focus disproportionately on trials "where plaintiffs prevail and where jury awards are larger than is typical of the system in general."⁴²

Civil justice "reform" (or what critics call "tort deform") in the United States has not been a legal or state originated effort, although lawyers and state officials are implicated. The reform movement has been a disciplined one, well orchestrated with powerful images, or what people once called propaganda. The refrains in the media are familiar because they are ubiquitous, like any advertisement – a litigation explosion, an insurance crisis, and high jury awards. A civil justice system run amok is blamed for everything: competition in the global economy, loss of jobs and downsizing, lack of personal responsibility, and more.

In a book published by the American Bar Association—*Civil Juries and the Politics of Reform*—the authors, Daniels and Martin, subject to penetrating analysis the images of juries and civil justice that stimulate

⁴¹ Steven Garber & Anthony G. Bower, *Newspaper Coverage of Automotive Product Liability Verdicts*, 33 LAW & SOC'Y REV. 93, 93 (1999).

⁴² *Id.* at 120.

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so-called tort reformers. They argue that the politics of ideas, rather than the best available evidence, informs the rhetoric of reform and the stuff of image making.⁴³ Their analysis of the most reliable empirical data on jury verdicts in medical negligence, product liability, and punitive damages from numerous United States jurisdictions refutes the notion of a litigation "explosion" and the sweeping generalization that juries are increasingly pro-plaintiff, generous, and anti-corporate. Like Garber and Bower, the authors conclude with a complex picture fundamentally different from that presented in the newspaper accounts of civil justice. They put it carefully; most simply, the rhetoric of the reform movement is a "weapon in a battle for the public mind. . . . Ideas and images in the political realm are marketed just like products in the commercial realm; citizens, like consumers, are treated as a passive audience receiving messages about issues as the marketers define them."⁴⁴ We must understand the marketing process before we can demonstrate the gap between what academic researchers learn by empirical research and the reactionary claims, for example, that juries are to blame for the "litigation explosion," that the size of awards has increased substantially along with the frequency with which plaintiffs win, etc. All are allegations to justify immediate "reform." They cite other researchers who conclude that the reform effort is "built of little more than imagination created out of anecdotes and causal assertions."⁴⁵ They do not argue that the civil justice system has no problems, but they show that the manufactured "problems" do not square with the data. The McDonald's coffee case is a classic example of how evidence is manufactured in an age of media and image making.⁴⁶ Start any casual conversation with Americans or Europeans on tort reform and the McDonald's case will come up. People remember that an elderly woman bought a cup of coffee at a McDonald's drive-in, set the cup between her legs, and when she drove off the coffee spilled on her and caused third degree burns. The woman supposedly sued McDonald's and received millions of dollars—or so the story goes.

In fact, the car was not moving, but the woman did spill the boiling coffee on herself. The resultant burns required \$20,000 worth of medical expenses for grafting that she asked McDonald's to pay. McDonald's refused. Her lawyer was hesitant to sue until he learned that between

⁴³ STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995).

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 17.

⁴⁶ *Liebeck v. McDonald's Rests.*, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994); see also RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 266-73 (1996) (discussing the *Liebeck* case).

four and five hundred complaints had already been lodged against McDonald's for serving coffee that scalded customers—complaints the corporation had ignored. The jury eventually found the plaintiff twenty percent negligent and McDonald's eighty percent negligent because the chain had been unresponsive to consumer complaints. The plaintiff received damages substantially reduced by the judge to \$640,000 from newspaper reports of \$3,000,000, and then the case was concluded in private settlement. Punitive damages were set at the level of two days profit from McDonald's coffee sales.

There are those who would restrict civil plaintiff access. According to a Rand Corporation study, nine out of ten persons who are wronged in product defect cases do not file a claim or even consider seeking compensation.⁴⁷ Legal scholars have repeatedly and convincingly argued that the problem is too few claims, not too many. Richard Abel made the argument regarding the tort crisis more generally in an essay "The Crisis is Injuries Not Liability" noting that:

Asserting tort claims and helping others to do so is a vital civic duty The failure of victims to claim erodes the norm against injuring others, allows anger and resentment to fester, leaves the most disadvantaged victims uncompensated and often impoverished, and tolerates—indeed encourages—dangerous behavior.⁴⁸

Slowly, there is appearing in the media some realization of the changes that have crept in on us. A March 2001 article appeared in *The New York Times* with the headline – *Juries, Their Powers Under Siege Find Their Role is Being Eroded*.⁴⁹ The journalist observed in the first paragraph, "[t]he role of the American jury, the central vehicle for citizen participation in the legal system, is being sharply limited by new laws, court rulings and a legal culture that is moving away from trials as a method for resolving disputes."⁵⁰ More recently, I was astonished to find that in the middle of reporting on the events following September 11, 2001, that the *San Francisco Chronicle* had a front page story, devoting in the Sunday, October 7 paper front page headlines: *Private Justice:*

⁴⁷ NADER, *supra* note 10, at 203-04.

⁴⁸ See Richard L. Abel, *The Crisis is Injuries, Not Liability*, in NEW DIRECTION IN LIABILITY LAW 31-41 (W. Olsen ed., 1988); see also Richard L. Abel, *The Real Tort Crisis – Too Few Claims*, 48 OHIO ST. L.J. 443 (1987).

⁴⁹ William Glaberson, *Juries, Their Powers Under Siege, Find Their Role is Being Eroded*, N.Y. TIMES, March 2, 2001, at A1.

⁵⁰ *Id.*

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*Millions are Losing Their Legal Rights – Supreme Court Forces Disputes from Court to Arbitration – a System With No Laws.*⁵¹ Actually, it was a three part series by Reynolds Holding, a *Chronicle* staff writer: the first about lost rights referring to fine print mandatory arbitration clauses that deprive people of their legal rights with the approval of the United States Supreme Court; the second, on conflicts of interest about some arbitration firms like American Arbitration Association that have financial interests in their clients, conflicts that would never be tolerated in court; and the third, on compromised judges and their temptation with potentially high paying jobs as arbitrators.⁵² This headline was laid out in larger print above an article in smaller print headlines titled: *Targeting Terrorism.*⁵³

I recently received a thoughtful letter from a practicing lawyer who had read some of my papers critiquing ADR. He said:

I have a difficult time finding the need for judicial intervention in issues such as traffic accidents, slips and falls and a plethora of other legal claims flooding the court system. . . . Many legal claims are factually dependent. The involved parties are not interested in Locke, Plato, the Constitution, or Thomas Paine. They want their property fixed and life to be the way it was before the problem arose . . . ADR provides the means wherein the parties can both solve their dispute and move toward a healing.

He continued, "I see ADR as just another choice of resolving conflicts." What was remarkable about his letter was the total lack of distinction made between mediation and compulsory mediation, between voluntary arbitration and mandatory arbitration. There is no "choice" when it is mandatory, and there is also no appeal. There is no ADR review as there is judicial review.⁵⁴ Perhaps the most startling observation in these and other exchanges is a lack of understanding of how the common law

⁵¹ Reynolds Holding, *Private Justice: Millions are Losing Their Legal Rights, Supreme Court Forces Disputes From Court to Arbitration – A System With No Laws*, S.F. CHRON., Oct. 7, 2001, at Gd. 8. The holding examines the problems surrounding arbitration clauses by breaking them down into the following issues: (1) Lost rights; (2) Conflicts of interest; and (3) Compromised judges. *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See J.R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 J. DISP. RESOL. 3 (2001).

evolves. If ADR happened 150 years ago, there would likely be no compensation for pain and suffering today. Court cases contribute to an evolving system. If clients don't realize this, that is one thing, but when it passes the lawyer by, one knows that law schools need to return to a wide-angle in legal education. The choice may be between the growth of law or its termination.

IV. THE NOBLER PURPOSES OF LAW

The direction of law, for the moment at least, seems to be evolving in similar ways worldwide, although with different consequences in places where social and cultural structures are different, where modernities are made local, as in the PNG example. In industrial states, most actual and potential disputes are between strangers; the true plaintiff becomes only secondarily important, as access to courts decreases relative to population growth and need. Although many non-Western countries are at different points of the industrialization process, in highly evolved industrial countries, a struggle is occurring over the fact that most claims involve people of greatly unequal power who do not reside together in any community in which indirect controls such as public opinion might deter illegal behavior.

In pre-industrialized locales, even under conditions of unequal power, the underclass pursued their needs through law. In eighteenth-century Aleppo, Syria, Muslim women, although segregated, were wheeling and dealing in real estate cases, one of the more available avenues for investment used to improve their social standing.⁵⁵

In a recent study of Muslim women in Kenya, an anthropologist finds that, in spite of community norms of silence for women, they take their family complaints into the public arena, one way of organizing public opinion and destabilizing male authority.⁵⁶ By means of court appearances, they contest the image of the persevering wife and the pronouncing husband. Courts are complex sites in patriarchal Islamic societies and often function as social justice beachheads for women litigants, who generally win their struggles for justice.⁵⁷

⁵⁵ See ABRAHAM MARCUS, *THE MIDDLE EAST ON THE EVE OF MODERNITY: ALEPPO IN THE EIGHTEENTH CENTURY* (1989).

⁵⁶ See generally SUSAN F. HIRSCH, *PRONOUNCING AND PRESERVING: GENDER AND MALE DISCOURSE IN AN AFRICAN ISLAMIC COURT* (1998).

⁵⁷ *Id.*

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Even more legal assertiveness has been reported in the West Indies making one ponder the hubris of current modernities.⁵⁸ "In the English-speaking West Indies, law made slavery possible and yet provided a way out of that condition . . . issues of law and justice were as crucial to slaves as they were to masters."⁵⁹ "Slaves made a variety of courts integral to their lives."⁶⁰ Litigants help construct the law by supplying issues and aggressively pursuing claims. The anthropologist, Minde Lazarus Black, indicates that some contemporary views of the law ignore the agency of lay people in legal change by consigning them primarily to the role of supplicant. On the contrary, she argues, lay people play a role in the construction of legal rules. Her examples are of law, its form and substance—being constituted by disputes brought by litigants who made the courtroom an arena for defining social relations and capturing the public mind . . . none of which could happen in private and mandatory mediation or arbitration where confidentiality rules the record.

V. CONCLUSION

The path of the subaltern plaintiff is not an easy one and, therefore, he or she needs to be driven by a strong sense of injustice. For the analyst, it is easy for the abstract to prevail. For the plaintiff, it is different. When the function of law as power equalizer diminishes, the role of law in everyday life decreases and in the absence of enforcement, lawlessness prevails. Indeed, the absence of prosecution has encouraged an escalation of lawless behavior among those who capitalize on the inability of the justice system to handle individual claims and the contemporary unwillingness to support the use of class action or preventative measures. That this situation is now covered with "political ideas" or propaganda complicates the possibilities for otherwise re-imagining the situation.

Our country has contributed some of the greatest legal decisions the world has ever known. Yet, as we start into the twenty-first century, we are exporting ADR as equivalent to democracy throughout the world by means of ADR missionaries. At the same time, our arms dealers export conditions for lawlessness. Numerous authors and pundits note that the world wants some of what they consider great about the United States, a

⁵⁸ See generally Mindie Lazarus-Black, *Slaves, Masters and Magistrates: Law and the Politics of Resistance in the British Caribbean, 1736-1834*, in *CONTESTED STATES: LAW, HEGEMONY, AND RESISTANCE* 253-81 (1994).

⁵⁹ *Id.* at 259.

⁶⁰ *Id.* at 268.

country governed by law, without which the possibilities for dictatorship and fascism are greatly enhanced.⁶¹ The yearning is no less for our own citizens.

⁶¹ See generally CHALMERS JOHNSON, *BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE* (2000).

