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77. Murray N. Rothbard, *For a New Liberty*, p. 40.

78. Douglas C. North and R. P. Thomas, *The Rise of the Western World;* A New Economic History, Cambridge, 1973, p. 6.

79. North and Thomas, *Western World*, p. 7.

80. Buchanan, *Limits of Liberty*, p. 6.

81. Buchanan, *Limits of Liberty*, p. 167.

82. Buchanan, *Limits of Liberty*, p. 80.

83. See for an elaboration on these points: Robert J. van der Veen, Property, Exploitation, Justice, *Acta Politica*, jrg. XIII, no. 4, November 1978, pp. 433-465, esp. pp. 443-447.

84. C. B. Macpherson, *The Life and Times of Liberal Democracy*, Oxford, London, New York, 1977 p. 115.

85. Macpherson *Life and Times*, p. 2.

86. It should be noted that on what Macpherson concieves to be necessary for reaching a humane society he is not quite clear. See for instance on the question if Macpherson should be considered a marxist: Victor Svacek, The Elusive Marxism of C. B. Macpherson, *Canadian Journal of Political Science*, Vol. 14, September 1976, no. 3, pp. 395-422. And also: Ellen Meiksins, C. B. Macpherson: Liberalism, and the Task of Socialist Political Theory, in: *The Socialist Register 1978*, London, 1978, pp. 215-240.

> 'If his political philosophy as outlined in *The Life and Times of Liberal Democracy* is intended to embody a socialist programme, that programme is contradicted by its theoretical underpinnings'. (p. 216).
>
> 'He often appears to be self-consciously addressing an audience that needs to be persuaded that socialism – a doctrine which, apparently, must parade in sheep's clothing as something called "participatory democracy" – is the last and best form of liberal democracy . . .' (p. 217).

87. R. Selucky, Marxism and Self-Management, in: Jaroslav Vanek, (ed.), *Self-Management:* Economic Liberation of Man, Harmondsworth, 1975, pp. 47-61, p. 57.

88. As in Grey's case, see note 5.

89. See on how imperative it is to think of how one form of equality is set up in opposition to another: Douglas Rae, The Egalitarian State: Notes on a System of Contradictory Ideals, *Daedalus*, Vol. 108, no. 4, Fall 1979, (The State), pp. 37-54.

90. As argued by Philip Pettit, A Theory of Justice?, *Theory and Decision*, Vol. 4, 1979, pp. 311-324, p. 311.

See also his *Judging Justice:* An Introduction to Contemporary Political Philosophy, London, Boston and Henley, 1980, esp. chapter 16.

The (non-) assertion of welfare rights: Hirschman's theory applied*

Freek Bruinsma

The contribution on the welfare state in the *International Encyclopedia of the Social Sciences* ends as follows: 'In any event, there are no signs, outside of marginal groups mostly centered in the United States, of a disposition to curb the welfare state. It rides the waves of the future.'[1]

A few years later that is no longer the case. Many economists are worried about the growing costs of the welfare state. Most welfare policies cost money. The number of welfare recipients entitled *e.g.* to unemployment benefits, disability claims, old age pensions is increasing, the costs of medical care are growing, and educational facilities are more extensively used than ever before. Can we afford a welfare state? – that is the leading question in the economics of the welfare state.

But the problem is not only one of costs. The very desirability of the welfare state itself is at issue. There is a widespread feeling that the welfare state is not of much value. It is said to be more a promise than a reality: it cannot fulfil its pledge to create a human society. The redistributive effects of welfare benefits are rather minimal. Serious doubts exist about the operation of welfare institutions. Welfare politics impair the working of traditional and highly regarded political institutions. Parliament and other representative institutions have lost power to governmental bureaucracies and private interest groups. Moreover, the welfare state fosters an attitude of welfare consumerism in the public at large: nobody cares individually, since the states cares for everyone, from the cradle to the grave. The welfare state has introduced an explosive mechanism of rising expectations. At the same time there are rumours about welfare chiseling, and by exploiting this sense of discomfort some politicians succeed in unleasing a welfare backlash.

In short, there is growing criticism of the welfare state: it is said, *that it does not work, that it is too expensive for what it does do, and too destructive,*

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even when it does work. And this fundamental criticism comes not only from the right wing of the political spectrum, but from the (extreme) left as well.[2]

Legal competence and non-assertion

Until very recently, sociologists of law did not have very much to say about the welfare state, and thus about the future of our society. However, interest in the welfare state among legal sociologists has been awakened by the revival of the legal aid issue. Beginning in the mid-sixties a number of lawyers in different countries started practising legal aid for the poor. Since the rights of the poor are mainly to be found in fields of law where the welfare state is very active, such as labour law, social security law, landlord-tenant law, and consumer law, the lawyers for the poor and the students of legal aid got interested in the welfare state.[3]

The welfare state may be described as 'the institutional outcome of the assumption by a society of legal and therefore formal and explicit responsibility for the basic well-being of all of its members'.[4] What differentiates the welfare state from other types of states is that dire personal circumstances are not seen as the result of personal failure, but as an outcome of social processes. This public concern for individual welfare is expressed in the legal form of entitlement, in terms of rights which are assured to everybody in specified positions, such as employee, tenant, consumer, patient, etc.[5] Common to these different positions is a relationship of *dependency*: there is a stronger, more powerful party and a weaker, less powerful party. The stronger party controls a commodity which the weaker party needs, such as a job, a house, consumer goods, welfare benefits, or medical care: bij virtue of a need for these commodities, the weaker party is dependent.[6]

The legal programme of the welfare state can be outlined as the search for this kind of situation of dependency and the attempt to counteract the power of the stronger party by granting rights to the weaker party. Putting it in sociological terms, the welfare state creates roles under rules.[7] The human being is divided into different roles, which specify his rights in different situations of dependency: he may be an employee, a tenant and a consumer, all at the same time. The relationship of dependency and the protection of the weaker party by granting rights justifies use of the term 'welfare situations and welfare rights' as a general way of referring to the rights of the consumer over the producer, the citizen over the polluter, the welfare recipient over the social agency, the employee over the employer, the tenant over the landlord, the patient over the doctor, and so on and so forth.[8]

Helping the underdogs against their stronger opponents, the lawyers became aware that the problems would not be solved, even if there were an

optimal legal counsel, an equal access to the courts, and special procedures for dispute settlement. The movement of bringing the poor their share in the cake of justice was bound to fail, due to a lack of legal competence among them, legal competence defined as 'the ability to further and protect one's interests *through active assertion of legal rights*' (italics in original).[9] It was discovered that most of the poor do not like the law and its officials (lawyers, judges, *etc.*). In the eyes of the poor the law and its officials cause more problems than they solve, and therefore it is better to stay as far away as possible.[10] Whatever the reason the result of this lack of legal competence is legal inaction. Since the welfare state cannot go on issuing new welfare rights, without concern for their actual use, it was hoped that the state would take measures to overcome the aversion of the poor against law. The concept of legal competence served to explain underutilization of rights, and at the same time suggested implicitly that the poor would be better off by making more use of their rights.

I am not quite happy with this result. Hearing the critical sounds of most economists and others in and outside the academic community – which are summarized in the introductory remarks – I have the uneasy feeling that legal sociologists are mistaken in their optimism about the welfare state. What is the basic problem of the welfare state: do we have too much of it or too little? While the others are worried about the overconsumption of welfare benefits and are stressing the negative aspects of the welfare state, most of us sociologists of law and lawyers for the poor are concerned about the underutilization of welfare rights and look to the welfare state for help.

Rethinking our position, I am struck by the *medical* character of our approach to welfare rights. So far we have been arguing as if we were legal doctors: the poor are legally ill and stand in need of treatment by legal specialists whose job it is to care for their problems. In order that their problems may be cured the patients lose their rights to the doctors, who administer their conflicts by the application of rules. The medical approach analyzes, diagnoses and cures, all from above, from the official point of view.

What is needed, however, is a *legal* approach to the welfare rights, from the perspective of the individual consumer.[11] Why?

First of all, because of the typical way in which the welfare state protects the weaker party, namely by granting rights. As long as the welfare state adheres to this strategy, we cannot avoid taking an upside down point of view, since the consumer himself decides whether he will assert his rights or not: *there is no assertion of rights, which is not an outgrowth of the consumer's perspective on law.* Moreover, the bottom-upwards point of view sheds another light on the notion of legal competence. Reasoning from the perspective of the individual consumer can demonstrate why and when certain welfare

rights will not be used, regardless of the many, well intentioned efforts of the legal doctors. An assertion of his rights is quite often simply not in his interest, and therefore an individual with some good sense will refrain from using his rights.

Whereas in the medical approach legal inaction is a sign of a lack of legal competence, from the consumer perspective it is often the most preferable course of action, and thus an evidence of legal competence in the legal approach. At this stage I restrict myself exclusively to the perspective of the individual; thus, I am not yet discussing the consequences of rational legal inaction for the system at large (see *infra* Voice, exit, and justice).

Consumer perspective

Since I am not writing a detective story I can state my main point clear from the outset. With regard to many welfare situations we should not expect the weaker party to assert his rights against a more powerful opponent, whether it be his employer, his landlord or his doctor. The argument to be presented here is that *the power position of the stronger party prevents insistence on rights by the weaker party*.[12] If this is true, neither the strategy of the welfare state to provide the weaker party with rights, nor the medical approach to treat the poor for their legal incompetence are of much use.

Let me start the analysis by pointing out the possible reactions of the weaker party in relations of dependency.

First of all, the dilemma of the (non-)assertion of welfare rights arises only in welfare situations, in which some legal action by the weaker party is possible. To take a clear-cut example of how the game of law starts, assume that the stronger party abuses his power or infringes upon the rights of the weaker party. In these conflict situations the weaker party has a choice between: a) *legal action*, defined as the assertion of rights, the articulation of grievances through the invocation of one's rights; and b) *legal inaction*, defined as the non-assertion of rights, the avoidance of conflict through refusal to make use of one's rights. There is no gainsaying that the assertion of rights is a special form of Hirschman's concept of 'voice', which he describes as: 'nothing but a basic portion and function of any political system, known sometimes also as "interest articulation" '.[13]

Legal inaction might coincide with Hirschman's alternative to voice, *i.e.* 'exit':

> 'Note for instance, the unexceptional nature ... of consumers switching their trade from one retail merchant to another after a dispute, of casual workers (gas station attendants, waitresses, dishwashers, gardeners, housekeepers) quitting jobs because of problems with employers, of children moving out their parents' houses because of unreconcilable values'.[14]

What would you as a weaker party do in conflict situations? The first reaction of most people is to try to escape, to run away. Not only do you avoid conflict with your stronger adversary; you try to escape his powerful grasp.

Not all welfare situations are alike, however: some such as those indicated in the quotation, offer an occasion to make one's exit. Others do not, or do so to a lesser degree, at least from the consumer's perspective. How does one find another job with the same security of tenure in times of high unemployment? And there is no chance of escape at all for patients in hospitals, for immates in homes for mentally retarded or for indigent old people. Therefore we have to draw a distinction between welfare situations with a real exit-option and those which offer no possibility of escape.

Since the weaker party may do nothing at all, legal inaction does not necessarily mean exit. By the same token, there is room for a fourth course of action: exit *and* legal action. The two distinctions are simply not mutually exclusive[15], and we can bring them together in one diagram (see fig. I). Faced with a conflict-laden welfare situation, the weaker party can choose one of the following four options (I use the terms here in a strictly neutral sense, without any moral overtone of good or bad):

1 – *revenge*: assertion of welfare rights, with at the same time, an exit from dependency. For instancy, the employee after a row quits his job but then sues his former employer.

2 – *flight*: conflict avoidance by escaping from the situation of dependency. For instance, the employee quits his job, but does not take any legal action.

3 – *fight*: assertion of rights within the situation of dependency. For instance, the employee engages in conflict and stands on his rights, but without quitting his job.

4 – *acquiescence*: conflict avoidance by resigning oneself to the situation. For instance, our hypothetical employee does not undertake any action whatever; he declines to stand on his rights and yields to the power of his employer.

Figure 1: WELFARE RIGHTS

WELFARE SITUATIONS		assertion	non-use
	with exit	(1) revenge	(2) flight
	without exit	(3) fight	(4) acquiescence

In the terms set out in this diagram my argument consists of two propositions:

I *The welfare state is based upon the assumption of fight, whereas often from the consumer perspective flight is preferable and in fact preferred.*

If we take the welfare state seriously, then the granting of rights to the weaker party in relations of dependency is meant to neutralize the differences in power, but: 'The authoritative declaration of a right is perhaps best viewed as the beginning of a political process in which power relationships loom large and immediate.'[16] Most consumers of law prefer – and reasoning from their perspective they *should* prefer – the private reaction of flight to the public reaction of fight.

II The corollary of proposition (I) is that *the welfare rights, which can be used as an instrument in revenge, are the most effective; the least effective welfare rights are to be found in situations of dependency with no exit-option at all.*

The effectiveness of rights is to a large extent dependent on the consumer demand: if people do not use their rights, these remain 'law in books'. If power differences do prevent the use of rights – my main thesis – then we may expect the effectiveness of welfare rights to be at its maximum, when a relationship of dependency has ceased to exist. For different reasons, which I will explain later, we may expects rights to be less effective in all other cases.

In order to prove or disprove these propositions, we have to fill in the boxes of the diagram. It is a difficult, almost impossible, task to come by empirical data, comparing the frequency of these four different courses of action. There are scattered figures available about the assertion of certain rights in specific welfare situations; I will refer to these quantitative data. But how to obtain data about the *non*-assertion of rights, especially about acquiescence, where there is no overt action?[17] One possibility is that tried by legal need studies: the strategy of asking people, why and when they do not use their rights. Although respondents do not always say what they think and how they act, this type of research, and in particular its qualitative variant, offers valuable insights into the mechanism of non-assertion. What goes on in the mind of the individual who decides not to use his rights is our black box. If we are more interested in the typical reaction of individuals in welfare situations than in aggregate data and wholesale statistics about the under-utilization of welfare rights in general – in fact the outcome of the processes to be explained – then we have to resort to qualitative methods. Therefore, I will refer to research by others along these lines.

However, I think that a real understanding of the mechanism of (non-) assertion of welfare rights calls for a different methodology, namely that of interpretative sociology *(verstehende Soziologie)*.[18] I do not want to argue

about the scientific status of this type of sociology in general, but let me explain why Weberian methodology is so suited for the analysis of the effectiveness of welfare rights. By putting ourselves imaginatively – as interpretative sociology demands – in the place of the individual in a certain welfare situation we perceive the reality through the eyes of the actor. With a similar subjective interpretation of the situation, we can understand his actions, his interventions and his refraining from intervention. Empathetically we can construct what Weber called 'a theoretically conceived pure type of subjective meaning'.[19] This is not a description of a concrete course of action, taken by a particular actor, but a quite possible, and, given the circumstances, the most sensible action. To put it another way, the pure or ideal type is not identical with the concrete individual reality – that would be the subject matter for a psychology of law – but it is an approximation thereof.

Thus, I will use empirical data of different kinds to keep me on the right track, to correct my views, which are obtained by the method of interpretative sociology. By showing the interconnection of the *most frequently preferred* course of action with the *most preferable* one, I hope to kill two birds with one stone. First, to develop a critical analysis of welfare rights, something which has been lacking up to now due to predominance of the medical approach; and secondly, to undermine the underlying idea of the medical approach, that people, and especially the poor, are foolish not to make use of their rights; it may be they cannot help it – and the legal doctors ought to help them – but they are stupid, nevertheless. I think that as regards his private interests the weaker party is more often than not quite right not to make use of his rights.

Let us start, for once, with the course of action people prefer in most welfare situations, *i.e.*: flight.

Flight: 'I don't want no trouble'

The customer, who dislikes the bread sold in a supermarket, does not complain, but try to buy better bread in an old-fashioned bakery; the free lance worker, who has a row with his temporary employer, leaves his job without saying anything. These are examples of a most common reaction of the weaker party in conflict situations. What can be said for flight? The rationale of flight is that it is the line of least resistance. The potential avoider has to take into consideration only the costs of substitution, if necessary. In the case where a substitute is readily available, flight is the most economic and convenient manner of conflict regulation, at least from the perspective of the consumer.

In his well-known study of the *Law on Housemaids* in Norway, Aubert,

using the method of interpretative sociology, makes flight understandable:

> 'It is especially to be noted that their best means of sanction, if they (the housemaids, FB) are at all aware of being exploited, is to leave their job at short notice and seek new employment, which will not be hard to find. Thus, a legal solution must have appeared to the thoughtful housemaid to be a costly, cumbersome, unpleasant and ineffective way of achieving good working conditions, when realistically compared to available alternatives.'[20]

The universality of flight can be explained by its relative advantages over any kind of voice. Voice is expensive in terms of money, time, and energy.[21] In personal relationships, such as that between the housewife and the housemaid, the assertion of rights will be more often than not detrimental to their familiarity: making use of your rights is seen by the opponent as an act of hostility. In impersonal relationships of dependency the assertion of rights is often considered by the weaker party as likely to be ineffective: these are the numerous situations of 'little me' against the 'big it'. One might mention the concentration of private power in companies – the weaker party being the individual employee and customer –, and of public power in governmental agencies – the weaker party being the unemployed, the old-age pensioners, the sick and the invalids –. In the field of law and power Galanter correlates this contraposition of institution versus individual with a distinction between 'repeat-players' and 'one-shotters'. Private or public organizations are repeat-players in the game of law and litigation and as such have some strategic advantages over individuals who play the game once or only a few times. Therefore, '(w)e would expect litigation . . . by OSs against RPs to be relatively infrequent'.[22]

Flight is a sensible response to conflicts over minor problems in short-term relationships. That is the reason why the individual enforcement of consumer rights is precarious. A recent consumer poll, for instance, inquired into the reactions of consumers who believed that they had been cheated by a merchant. Only 2% of the respondents complained to a consumer organization or publication, and a statistically negligible number went to a lawyer to litigate.[23] Where the stakes are higher, as is the case with the purchase of expensive, durable goods, the assertion of rights is taken into consideration; but even then the enforcement costs in terms of money, time, and energy often exceed any potential benefit. Caplovitz concludes, on the basis of his survey of the reactions of low income families, confronted with major consumer problems:

> 'The families who reported that they had been cheated were asked what they did about their problem. *Half of them did nothing at all*; they did not even complain to the merchant. Another 40 per cent tried to deal with the merchant themselves. *Only 9 per cent sought professional help*.' (italics in original)[24]

Flight is perhaps the most prevalent reply to the purchase of defective merchandise, to the offer of inferior repairs or replacement parts and to overcharging, but it is not restricted to consumer problems: a mere separation can be as useful as formal divorce, moving out is often better than staying and fighting for tenants who live in the same building as their landlords; and why make a fuss about your job, if you can get another which is just as good?

Finally, the amplitude of flight as a typical reaction in welfare situations can be demarcated in relation to the other courses of action. Flight becomes less adequate as the costs of substitution rise – an equivalent job or house may, for instance, be difficult to find – that points in the direction of fight or acquiescence. Or escape turns out to be an attractive possibility, but mere flight may be unbearable: the stakes are too high to remain silent. Revenge is required.

Revenge: 'I'll get my rights after all'

The reaction of revenge is the top of the iceberg, that popped up above the sealevel since the late sixties, and so has caught our attention. The lawyers for the poor have been helping the weaker party to take its revenge. When they accuse the legal profession of ignoring the welfare rights, they are in fact talking about this type of retaliative action by the weaker party. The strong point of the legal aid movement is that the top of the iceberg concerns major legal conflicts, which the weaker party considers important enough to justify action, but which had been disregarded by the legal profession. It hardly needs saying, that the weak point of the legal aid movement is that it does not bring the rest of the iceberg to the surface.

Let us reflect a bit upon this course of action: what is the rationale behind it, where is it to be found? 'It usually represents the attempt of some OS to invoke outside help to create leverage on an organization with which he has been having dealings but is now at the point of divorce (for example, the discharged employee or the cancelled franchisee).'[25] Galanter refers to an empirical study, which found that 'more than 3/4 of the reported cases in which individuals have sought legal protection of their rights under a collective agreement have arisen out of disciplinary discharge.[26] In their analysis of the cases, brought to court by the tenant against his landlord, Koch and Zenz discovered the same combination of exit first and voice afterwards: 91% of the cases were about money with the tenant claiming the repayment of a deposit or rent, *where there was no longer any tenant-landlord relationship*.[27]

Revenge as a last resort may be expected in particular, when people are cut off from the public assistance rolls, when requests for welfare benefits such as disability payments are refused, when compensation for illness and unemployment is withheld. The common denominator here is what Reich called

the 'new property', that is those welfare rights, which represent claims to public 'largesse'.[28] The disallowance or the expropriation of new property awakens the desire to repay the public body in the same coin; there is only something to win and nothing to lose.[29]

People choose revenge in matters of vital concern: the conflict is important for them, not only because of the eventual concrete benefits, but in emotional terms as well. If there is not a good chance of tangible profit, most lawyers consider revenge to be an irrational response. That is due to the medical approach, which does not like conflicts and believes law to be a valueless and emotionally neutral system of rules. The consumers of law, however, often desire to take vengeance, because they are morally indignant about what they perceive as injustice. To put it very strongly, revenge is from the point of view of the customer an emotional and moral crusade of justice. The vengeful vindicator of rights believes in the legal approach: law is warfare. The assertion of rights does not lessen the importance of the conflict, on the contrary, the conflict is carried on at a higher level of rights and principles, with an eye on the ideals of justice. Revenge has a flavour of all or nothing, and loss is seen as a moral failure.

Whereas flight is a conflict-avoiding course of action, revenge presupposes willingness to engage openly in conflict. It does so probably even more than is the case with fight, the other form of assertion of rights. Compared with the fighter, the avenger has the advantage that he can go on to the bitter end; full insistence on his rights is possible, since he is no longer dependent on the stronger party.[30]

The vindictive feelings such as 'it serves them right' or 'he can't walk all over me' serve as the fuel which enables him to endure the legal contest. He is convinced he is in the right and therefore tends to overestimate his chances of success.[31, 32]

The costs of revenge are high: apart from substitution, there are the costs of the conflict to bear. In accordance with the logic of collective action,[33] however, the costs can be shared and the risks can be pooled in organizations. Individual revenge actions can be subsidized (not only in terms of money, but also in terms of energy and time involved) by consumer organizations, labour unions and tenant associations, or made collective legally by means of a class action.

To put it briefly, revenge is a valid answer in conflict situations where the stakes financially and/or emotionally are high and the weaker party has little to lose. The ex-patient, for whom medical care has resulted in permanent invalidity, the tenant, who has been evicted, the employee, who has been dismissed and the new proprietor whose rightful share in welfare payment has been denied, they are all seeking revenge.

Fight: 'I don't take it any more'

Fight is where this all started, I remind you of my argument that the welfare state is premised upon the assumption of fight, whereas people with common sense properly prefer one of the other options. There is a continuously growing body of welfare rights to protect the weaker party in situations of dependency – employee's rights, patient's rights, tenant's rights, prisoner's rights, consumer's rights – but there is something fundamentally wrong, if we may not expect that a reasonable human being will make use of these rights.

Nevertheless, there are welfare situations, in which fight is the right answer to conflict. These cases are dramatic illustrations of the interplay of law and power on the micro-level of the individual.

> '(O)ne cannot have power in a vacuum, but only in relation to someone else ... (T)he successful excercise of power is dependent upon the relative importance of conflicting values *in the mind of the recipient* in the power relationship. (italics in original)[34]

Power makes itself felt in the decision-process of the weaker party, in the form of pressure to refrain from voicing objections, contrary to the wishes of the stronger party. The reaction of fight means that the impact of power was not sufficient to suppress the voice of protest, *i.c.* the assertion of rights.

But, in contrast to revenge, fight has to be carried on within the relationship of dependency: the fighter remains within reach of the stronger party. If the power of his opponent means anything, then the weaker party has to take into account all the retaliatory countermeasures to which the stronger party may resort. Speaking in plain language, these include a notice to leave the building in answer to a tenant's claim to repair the roof, a notice to leave the job in answer to an employee's claim for safer working conditions; or more often, covertly by making the weaker party's life unpleasant through minor nuisances such as cutting off gas and electricity, withholding favours such as promotion, better payment, and fringe benefits. The fighter cannot give his best performance, his voice sounds suffocated by the fear of reprisal. His strategy is to minimize the probability of maximum loss (eviction and dismissal, for instance) and his tactics are to play it cool.

Fight is a risky option compared to the others. Only the costs of conflict are involved, but these are much higher than in the case of revenge. The willingness to bear the burden of a conflict with an powerful adversary, on whom you are still dependent, implies that the stakes are high. Fight differs from the foregoing options of flight and revenge by the absence of exit. Fight is often chosen precisely because substitution is impossible or very difficult. With respect to the costs of substitution we have to realize that it is not only a

problem of finding another house or another job (which, parenthetically, can be hard enough), but substitution means also a loss in terms of friends and neighbours, security of tenure, senority rights, and prospects. And for many 'new proprietors' there is no alternative to the state budget to stay alive. This lack of substitution-availability significantly impairs the position of the weaker party. It deprives him of one of his main weapons: the threat to exit.[35] On the other hand, the stronger party does not usually have many substitution problems; on the contrary, he would not mind getting rid of vocal and voice-minded dependents.

Let's explore in detail the fiction of fight, which is implied in the notion of welfare rights. Imagine the situation of a mother and two children, dependent on public assistance. Suppose she is told by the social worker that she should look for a job. She is reluctant to leave her children and has a right to refuse.

> 'One of the critical facts to realize is that at the point where the case-worker tells the mother that she must take a job, the mother is still in the program. She and her family are currently receiving assistance and she will probably not be able to support her family with her earnings; besides she does not want to leave her children. She knows that tomorrow and the next day the same case-worker will be making other decisions that affect vitally her level of living and style of life. . . .
> In short, in calculating whether to fight the decision about working, the mother has to weigh the costs to her on-going relationship with the local agency; what will happen to her tomorrow if she disagrees with the case-worker this time and 'goes over his head'? She is now beginning to think that in the 'long run' it would be 'better' for her family if she agreed the case-worker and went to work.'[36]

Analogous reasoning holds true with most welfare rights, which have to be asserted within a relationship of dependency. The rights claimable by the weaker party degenerate into favours done by the stronger party, since the weaker party does not see any way out of dependency and fears retaliation should he voice his complaints. But let's return to fight instead of anticipating acquiescence.

Relationships of dependency vary in what has been called *density*.[37] There is a continuum from, at the one end of the scale, the situation of the customer who buys a particular piece of merchandise only once and, at the other end, the situation of the patient who has been living for a decade in a mental hospital. Both are welfare situations of dependency where the weaker party has rights but there is a decisive difference in the time period and range of human behaviour, to which the power of the stronger party extends.

Here I am interested in the impact of density on the chances of fight. Somewhere in the middle of the continuum relations of dependency harden

into institutions of dependency. At this point I would place, for example, factories and offices. From here to the extreme point of no return (the most enduring and the most inclusive institutions, *total* institutions[38], such as mental hospitals and prisons) one can speak of an internal culture of the institution, which exists apart from the world outside. Often a physical barrier (a gate, barded wire, etc.) symbolizes the borderline of 'in' and 'out'. I suspect that this inner culture, the *couleur locale* or the house style of the institution almost always hampers voicing from within.[39] Making use of your rights is not done, and therefore, voice is too soft to be taken seriously by the stronger party, and too low to be heard outside. In institutions of dependency power makes itself felt in the way you think[40], which is in the same manner as your powerful counterpart.

> 'Legal competence requires a certain degree of autonomy, a detachment of the person from the system of social relations that determine his position and interests. The more dependent a person is on his ties to others, the more he is involved in some going concern he needs to preserve, the less capable he is of assuming the principled posture legal action requires. Dependency makes the person insecure and captive of his social situation, it encourages passive acceptance and accomodating compromises, rather than moral assertion.'[41]

To prevent representatives in workers' councils from becoming captives of management, collective action is required. A trade union or another organization not only reduces the risk of retaliatory action (countervailing power), but functions as a source of countervailing loyalty as well.

In total institutions the voice from within is silenced by its moral captivity – and criticism from outside is often rejected. Deep silence in total institutions which are seemingly smooth functioning conceals more often than not the sullen acquiescence of the inmates.

Acquiescence: 'nothing to be done'

We started with the preferable reaction (flight) and now we end with the course of action, that is most often adopted: acquiescence. Acquiescence is not apathy.[42] Apathy means 'not caring', whereas acquiescence is uncomplaining passivity resulting from resignation: there is no meaningful course of action for the weaker party to take in face of conflict with his powerful adversary. That is the reason why flight is preferable: flight has the flavour of freedom and independence rewon, whereas acquiescence implies submission to power. In the latter case the weaker party tolerates an infringement of his rights without doing anything about it. What remains is the uncomfortable feeling that there is something rotten in the situation. Power is something that one feels and acquiescence therefore hurts. Acquiescence is

not the most popular, but it is the most common reaction.

While, as was said before, minor problems in short-term relations result in flight, in long-term relations they end mostly with acquiescence. The correction of insignificant injustices in landlord-tenant and employer-employee relations would be too expensive. One leaves it at that; no problem.

The medical approach, however, found acquiescence to be a frequent reaction among the poor in important legal conflicts as well, and attributes this to a lack of legal competence. 'The dependent poor, we are told, are bewildered, confused, and have a deep sense of helplessness; many suffer from mental illness'.[43] My concern here is to point out that passivity can be, especially for the poor, the only rational answer to conflicts, even when the stakes are high. All the other options are simply a waste of time, energy, and money.[44]

The basic problem, with which the poor in many situations of dependency have to cope, is that neither exit nor voice make much difference. That is due to, what in labour economics is called the *dual market*; but also outside the labour market it accurately describes many situations of dependency, in which the poor find themselves.

Poor workers are to be found in the lower part of the dual market, which has its own structure of injustice. Migrant workers, low-skilled workers, workers on the assembly line, casual and free-lance workers, workers in small enterprises in marginal sectors of the economy all form the *Industrieproletariat* of the 20th century. In times of high unemployment, there is a growing industrial reserve army to fill their places. Most violations of labour rights – underpayment, withholding of fringe benefits, violations of collective agreements, illegal firing – are to be found in the lower part of the labour market and they remain mostly unredressed. Fights are dangerous since countermeasures (dismissal, referral to disability compensation, for instance) are very likely. There is not a substitution problem for employers, as there is for the employees. Flight is however still a regular answer of the weaker party to labour conflicts as exemplified by the high job turnover in the lower part of the market, but it is not a real exit-option. There is no possible escape from the lower part, although it is sometimes possible to find another job with more or less the same unjust working conditions.

A similar dual market exists in housing. The poor tenant cannot escape the city-slums, by paying a higher rent in the suburbs, as his richer neighbour can. Repairs are not carried out, and improvements are not made, since there is no economic incentive to do so for the landlord. The power differential which is inherent in a landlord-tenant relationship (the tenant being more dependent on the landlord, because of his immediate and constant need for housing, than *vice versa*), is emphasized in situations of poor tenants in poor dwellings.

> 'The tenant has one power leverage – the threat to move. While they carry the threat out with considerable frequency, this manoeuver is relatively weak and both they and the owners know it. With their limited resources, they cannot hope to do appreciably better. Their mobility is largely restricted to the immediate area.'[45]

The poor have at least the, mostly theoretical, possibility of changing their present bad working or housing conditions for others slightly less bad.[46] That possibility they do not have when they are dependent for their income on state agencies. This state proletariat consists of all those who are dependent on welfare payments, such as the indigent, the aged, the unemployed, the disabled, *etc.* For most of these new proprietors there is no living outside the control of the state.[47]

The sensation of being dependent on a formal and indifferent bureaucracy leaves almost no room for the assertion of rights by the client. And where the assertive attitude is lacking, the welfare recipient is at the mercy of the welfare agencies, just as in former times he was dependent on private charity and philanthropy.

At first glance, fight and acquiescence seem to be opposites, but examining their relationship in greater detail shows how thin is the line that separates them. Both are a result of the struggle between law and power in the mind of the weaker party. An outcome of acquiescence means that power has won, or more specifically, the *rule of the anticipated reactions*[48], the individual does not complain out of fear of possible repercussions.

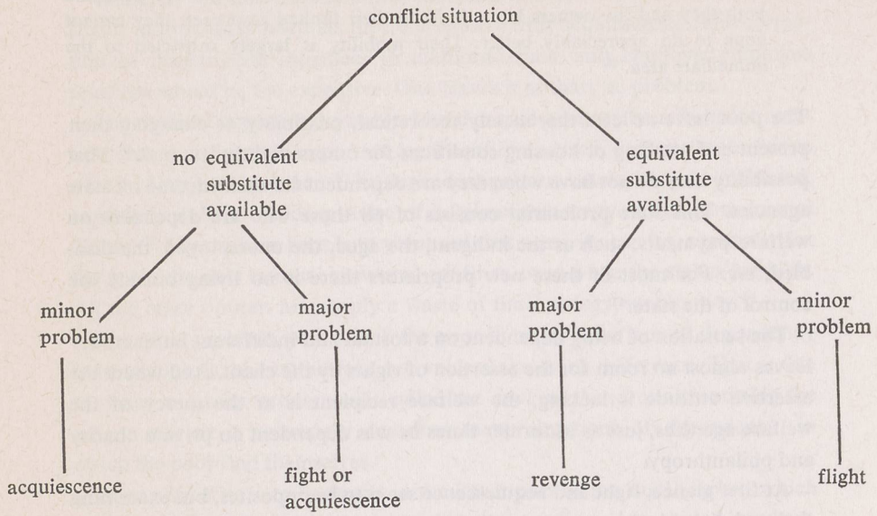
Conclusion for the consumer

The welfare state claims that it protects the weaker party in situations of dependency, by granting rights. We found that when he is faced with a conflict there are four options open to the consumer of welfare rights: flight, revenge, fight, and acquiescence. Only when fight is chosen are welfare rights used as the ideology of the welfare state supposes they will be used.

One practical result of the medical approach to welfare rights has been a whole bundle of booklets and leaflets about where you can find out what your rights are. That is because, according to the medical approach, the main problem with welfare rights is that people do not know about them. The practical contribution of the legal approach would be a guide as to *how* and *when* to use rights.

Here then, I offer you on behalf of the legal approach a first toy for your do-it-yourself kit on welfare rights. It is a decision-tree, that might serve as a guide in answering the question of what to do in case of a conflict with a stronger party (see fig. II):

Figure II: Directions for use of your welfare rights



As you see, only in a minority of conflict situations the assertion of rights is called for; the rational way of coping with your conflict will mostly lie outside the field of law. But I do not think you will use this decision-tree often. There is really nothing special about it, anyone with a little common sense engages in a simple cost-benefit analysis to decide whether or not to use his rights. Thus the answers that Mayhew *et al.* got to their question of how people settle their serious problems in dependency relations are hardly surprising:

> 'Very few answered that they sought justice or the recognition of their rights. Most said they sought resolution of their problems in some more or less expedient manner.'[49]

The proportion of justice seekers for welfare rights ranged from zero in landlord-tenant relations, to 2% for neighbourhood problems, to 4% with regard to expensive purchase, up to 9% for problems with public organizations.

Once again, there is nothing wrong with the consumers of the law, if they happen not to use their rights; the fault lies rather with the producers of law who have been delivering faulty merchandise – rights which, on the whole, are mostly unfit for their intended use.

Voice, exit, and justice

My first draft ended here, and reasoning from the perspective of the individual consumer I think it is the right place to conclude. Since the consumer cannot change the products of law there is nothing more to be said to him. He is free to choose his own way, of course, but that does not detract much from my argument, which was about the most preferable road in the given circumstances.[50] Nevertheless, producers of law might be interested in more assertion of rights, and one might wonder what would be the effects of easy flight on justice. As long as it is well understood that this is not the consumer's cup of tea, I don't mind talking about the implications of my analysis for the production of law.

First of all, why are most producers of law interested in more assertion of rights? Quite often the literature begs this question, or assumes implicitly that it is better to have more assertion than less (and not only to keep the producers of law at work). There is at least one valid argument for the assertion of rights and that is its importance for justice. The assertion of rights is the raw material for the factory of law: claims of rights are articulated by lawyers, they are converted into endproducts by courts, and sold as justice to individual consumers. If this interconnection between the assertion of rights and the production of justice holds true, then injustices will remain without correction, when the consumer chooses for acquiescence or flight instead of voice. We could speak of a shortage of the demand for justice with the consequence of an underproduction of justice: the producers are ignorant of this latent need.

By the same token the access to justice movement attempts to make the assertion of rights more attractive to the consumer. Expressed in a simple formula it tries to assure that the costs involved are less than the expected value of assertion ($c < v.p.$). By diminishing the costs, or by increasing the value and/or the probability of getting the benefits, producers can influence the cost-benefit analysis of the individual consumer. I do not intend to go into this at great length, since I cannot think of anything original to say, but at least I can point out how the different efforts to make the assertion of rights more attractive in order to bring the people more justice are related to this formula.

– With respect to the costs involved, one could refer to the public funding of legal aid for the poor. Since free legal aid for all would be too expensive, there is at the same time a search for cheaper solutions. Costs can be shared collectively, thus lowering the price for the individual (class actions, for example), or the rules of the law can be simplified, thus lessening the need for legal expertise (do-it-yourself divorce, for example).[51] Also psychic and social

costs are partly transferable and/or sharable; I remind you of the above-mentioned examples of tenants' committees and workers' councils, where the risks of retaliation by the stronger party are shared collectively. In all these instances the access to justice is made cheaper for the individual consumer.

– The value-component at the other side of the equation is not that easy to manipulate. The problem here is that the individual often does not consider the issue important enough to undertake legal action. By setting up small claims courts producers of law try to lower the threshold of legal action; the small claims court delivers essentially cheap justice of an inferior quality. A slightly different version occurs in the case of diffuse interests. The issue itself may be important enough, but what is at stake individually is too small to tempt the consumer to legal action, or the rational consumer calculates that he can secure benefits without contributing to the costs ('free rider'). Answers have been found in the creation of a surrogate demand[52] on behalf of unwilling consumers (public interest law interest firms, and governmental agencies to protect diffuse interests, for example).

– The probability that you will get your rights, if you assert them, varies enormously from one right to another. At the one end of the scale (where p approaches 0) we find rights with a high insecurity risk, while at the other end (where p approaches 1) rights become almost self-executing. Rights are insecure, if they are open-ended, and contain ambiguous clauses such as decent housing, a fair rent, an adequate income, and social assistance, if needed. They give the producers of law room for discretion and make the consumers think twice before trying to assert them. Strict rules, on the other hand, such as everybody above a certain age gets a pension, make the application of rules mechanical and assure the consumer that he will get his rights on request. It goes without saying that the weaker party has an interest in this transformation of vague rules into strict regulations.

Making the assertion of rights attractive is only part of the story. Even if the conditions for voice were optimal quite often the injured party will remain silent: on the basis of a comparative analysis of costs and benefits he still prefers exit or acquiescence to voice. Hirschman, thinking of voice and exit as two competing alternatives, would advise the producers of law to make exit difficult or even impossible: when the consumers are securely locked in, they will protest.[53] According to my analysis that is not certain, because consumers in a pressure cooker have a psychological safety valve: acquiescence. Moreover, and more important, Hirschman's suggestion disregards any possible contribution to justice from the part of exit. The idea that exit is not only detrimental, but also beneficial to justice, might seem strange, but it follows logically from the foregoing analysis.

In order to understand the potentials of exit as a mechanism for justice let us take the no-exit situation as point of departure. Acquiescence is here the prevalent reaction.[54] Why? Just because there is no emergency exit the stronger party can neglect demands for justice and even appeals for mercy. In the absence of any action from the weaker party he is stimulated to continue his unjust behaviour. At the same time the weaker party has a low estimation of his own bargaining power, which would be considerably strengthened if an equivalent substitute were available.

To guarantee justice in no-exit situations the usual answer has been to set up governmental agencies for controlling the stronger party in the interest of the passive weaker party (mentally ill, prisoners, etc.). The machinery of justice is set into motion by lodging the primary responsibility for voice in these inspection agencies. It is often found that this *proactive strategy of mobilization*[55] fails, because the disciplining force of its purpose[56] is not sufficient to keep the agency in the right track: it loses contact with the consumers, who suspect it – often true to the facts – of cooperating with, instead of controlling, the stronger party. Therefore, we cannot do without a consumer demand, we have to elicit some kind of voice from below.

The most effective way to get voice from below in situations where today acquiescence is the common reaction, is to open an exit. I expect a higher demand for justice by creating more opportunities to exit than by more control from above. If there is a way-out of dependency the weaker party feels himself much stronger to stand upon his rights. Furthermore, there is reason to believe that the exit-option will be used primarily for revenge and less for flight, because of the emotional involvement of the ex-consumer in what are mostly long-term relations. With a meaningful exit available the demand for justice can consist of constructive fight by consumer groups and of revenge actions by ex-consumers.

Thus, the exit-option has a positive influence on justice through its activation of the consumer demand: the more exit-options the more assertion of rights, in forms of both fight and revenge, however only up to a certain point. After that point, the exit-option hampers justice, since it will be used mainly for flight. As regards its influence on justice the situation where exit flourishes and flight is very easy corresponds with the no-exit situation, where acquiescence reigns. Here again justice has to be guaranteed through a proactive strategy of mobilization, since an equivalent substitute is too easily found and the happy leaver tends to forget injustices in the former relationship.[59a]

Last, but not least, apart from this indirect influence of exit on justice via voice, there is also a direct influence. But to become aware of this we need a broader concept of justice than was implied up to now. In one way or another, most definitions of law follow Hart's distinction between primary rules,

which are not really law, and secondary rules, which characterize a legal system.[57] By doing so the concept of law is in the first place of interest for the producers of law, and it results in a concept of law from above: justice is a product of the factory of law and made by lawyers. In line with Hart's terminology this official correction of wrong-doings could be called *secondary justice*, as against *primary justice*. According to the average consumer of law, justice is not principally a product of lawyers, but is a quality of life, the way people are treated, and a kind of social order, to describe it rather vaguely I admit. These primordial feelings of right and wrong make the individual sensitive to infringements of justice.

The exit-option exerts its influence on this primary ordering of things, namely by lessening the dependence of the weaker party. At one extreme there is the no-exit situation, in which the weaker party is completely dependent – primary justice is here at the mercy of the good will of the stronger party; at the other end the stronger party is on the verge of losing his power, since there are many equivalent or even better substitutes available to the weaker party – primary justice is here the result of perfect competition.[58, 59b]

The middle ground is the most interesting, since it enables us to compare exit, voice and justice in their different mixtures. One could think of the position of a qualified worker as against his employer. It is not unreasonable to suppose that there is a meaningful flight for this weaker party (although flight involves substitution costs) and a substitution problem for the stronger party. In this kind of labour relations the threat to exit, whether explicitly made or implicitly understood, can deter an employer from wrong-doing: self-interested behaviour forces the latter to primary justice. If not, the worker can fight for his rights in order to get secondary justice, but once again this fight presupposes the availability of flight.

I conclude by saying that exit should not be considered pernicious to justice. There is in fact a two-fold influence of exit on justice. A direct one, which forces the stronger party to refrain from abuses of power, to the extent that there are more exits open for the weaker party; and an indirect one, which stimulates the assertion of rights up to a certain point, and after that works counterproductive to voice, and thus to justice. As a consequence the decision tree for the consumers of law can be supplemented by a practical guideline for the producers of law. When there is a short demand for justice, due to the fact that the reasonable consumer decides not to voice, the medical approach to rights answers with a proactive strategy of mobilization, that is essentially voice from above. The legal approach, on the contrary, tries to make more noise from below, by giving the weaker party more chances to escape. The legal approach advises producers of law, in short: if you want more justice, try exit instead of relying on your own voice.

Notes

1. Harry K. Girvetz, 'Welfare State', in *International Encyclopedia of the Social Sciences* (1972) 512.

2. See for the main arguments from the part of the (extreme) left Claus Offe, 'Advanced Capitalism and the Welfare State' *Politics and Society* (Summer 1972) 479-488.

3. The *General Report of the Florence Access-to Justice Project* describes this development as a succession of three waves: (1) legal aid for the poor; (2) representation of diffuse interests, in particular consumer and environmental protection; and (3) beyond legal representation: 'the full panoply of institutions and devices, personnel and procedures, used to process, and even prevent, disputes in modern societies' (p. 49). See Mauro Cappelletti and Bryant Garth, 'Access to Justice: the Worldwide Movement to Make Rights Effective, a General Report', in *Access to Justice* (1978) Vol. 1, 21 ff. In my view there is only one permanent wave, namely to help the poor to enforce their welfare rights, and I would not call this wave a worldwide movement.

4. Girvetz, 'Welfare State', op. cit., 512.

5. 'The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right.' (From: Charles A. Reich, 'Individual Rights and Social Welfare: the emerging legal issues', (1965) 74 *Yale Law Journal* 1256). See also Harold L. Wilensky, *The Welfare State and Equality* (1975) 1: 'The essence of the welfare state is government-protected minimum standards of income, nutrition, health, housing, and education, assured to every citizen as *a political right, not as charity*.' (Emphasis added).

6. Since people are not born in this kind of dependency relations, there is always an initial situation of 'take it or leave it'. In theory the weaker party can refuse, but in practise he has quite often to take, either because there is no alternative at all (in the case of welfare benefits, for instance), or because the other possibilities are not better (Marx scoffing at the freedom of labour, for instance; see *Karl Marx: Selected Writings* (ed. David Mc. Lellan, 1977) 154 and 250). It goes without saying that this lack of equivalent substitutes harms the bargaining power of the weaker party considerably.

7. Kees Schuyt, Kees Groenendijk, and Ben Sloot, 'Access to the legal system and legal services research', *European Yearbook in Law and Sociology* (eds. B. M. Blegvad, C. M. Campbell, C. J. Schuyt, 1977) 118; *id., De Weg naar het Recht* (1976) 341 ff.

8. As an aside, one may wonder in what respect this law of the weaker party differs from the law of the poor. They are not identical, as exemplified by the situation of the well-paid employee, the rich consumer and the higher-class patient. However, there is a large area of overlap between the two, as illustrated by the common situation of low-income people: *e.g.* the poor are mostly employees instead of employers and tenants instead of landlords. Being poor means being dependent, in more and in other ways than the rich are. Poverty is an intricate network of cumulating relations of dependency, in other words, a vicious circle. Those who are dependent on welfare benefits usually live in slums and need consumer credit to buy a television and a washing-machine. Moreover, the culture of poverty discourages the use of rights and we may generally assume that rich

people use their rights better than poor people do. Thus, the problem of non-assertion of welfare rights is more serious when the weaker party is also poor.

9. Jerome E. Carlin, Ian Howard, Sheldon L. Messinger, 'Civil Justice and the Poor; issues to sociological research' (1966) 1 *Law and Society Rev.* 69-70.

10. The best expression of this feeling is perhaps the following italian proverb: 'Dio protegga questa casa da guai; ne medici ne avvocati ci entrino mai'.

11. I am familiar with two articles, which stress the importance of the consumer perspective in general terms: Edmond Cahn, 'Law in the Consumer Perspective', in (1963) 112 *University of Pennsylvania Law Rev.* 1-21; and Kenneth M. Dolbeare, 'Law and Social Consequences: some conceptual problems and alternatives', in *The Limits of Law, Nomos XV*, (eds. J. Roland Pennock and John W. Chapman, (1974) 211-219.

12. This central tenet of 'might prevents right' is in itself not a fully fledged theory of law and power, since it disregards the other side of the coin; the duties of the stronger party. On the other hand, this model on the assertion of welfare rights is something more than a case-study in law and power, since it is concerned with a whole body of rights. Let's call it a case-theory in law and power.

13. Albert O. Hirschman, *Exit, Voice, and Loyalty*. Responses to decline in firms, organizations, and states, (1970) 30.

14. William L. F. Felstiner, 'Influences of social organization on dispute processing' (1974) 9 *Law and Society Rev.* 76. See on avoidance, Felstiner, 9 *Law and Society Rev.* 70, 76, 79-80, 83-84; Richard Danzig and Michael J. Lowy, 'Everyday disputes and mediation in the United States: a reply to Professor Felstiner' (1975) 9 *Law and Society Rev.* 675-694; and Felstiner, 'Avoidance as dispute processing: an elaboration', (1975) 9 *Law and Society Rev.* 695-706. Felstiner defines avoidance as follows (1974) 9 *Law and Society Rev.* 70: 'By avoidance I mean limiting the relationship with the other disputant sufficiently so that the dispute no longer remains salient. Avoidance resembles Hirschman's (1970) notion of exit. But avoidance, unlike exit behavior, does not necessarily imply a *switch* of relations to a new object, but may simply involve *withdrawal* from or contraction of the disputeproducing relationship.' In this respect Felstiner misinterpreted Hirschman, who himself said: '(E)xit from a product means ordinarily "entry" into a competing product, whereas exit from an organization can mean simply passage from the set of members to the set of nonmembers.' (Hirschman, *op. cit.*, p. 89). Moreover, Felstiner's concept of avoidance remains unclear, since it does not differentiate between ending or restricting a relationship (exit) and what Felstiner has called (1974) 9 *Law and Society Rev.* 81-82: 'lumping it', that is ignoring the dispute without limiting the contacts. Marc Galanter, 'Why the "haves" come out ahead' (1974) 9 *Law and Society Rev.* 125-126, distinguishes the following 'alternatives to the official (litigation) system':

(1) Inaction – 'lumping it', not making a claim or complaint;
(2) 'Exit' – withdrawal from a situation or relationship by moving, resigning, severing relations, finding new partners, etc.;
(3) Resort to some unofficial control system.

15. Brian Barry, 'Review Article: "Exit, Voice, and Loyalty"' (1974) 4 *British Journal of Political Science*, 91-92: See for exit plus voice A. H. Birch, 'Economic Models in Political Science: the Case of "Exit, Voice, and Loyalty"' (1975) 5 *British Journal of Political Science* 75 ff.

16. From Stuart A. Scheingold, *The Politics of Rights, Lawyers, public policy*

and political change (1974) 85.

17. This resembles to the discussion in political science about the concept of nondecision-making by the powerful, in fact the counterpart of nonassertion by the weaker party. See Peter Bachrach and Morton S. Baratz, *Power and Poverty theory and practise* (1970) chap. 3. For a critical analysis of the concept of non-decision-making Richard M. Merelman, 'On the neo-elitist critique of community power' (1968) 62 *Am. Pol. Sci. Rev.* 451-461; a reply by Bachrach and Baratz and a comment by Merelman in (1968) 62 *Am. Pol. Sci. Rev.* 1268-9.

18. Max Weber, 'Über einige Kategorien der verstehenden Soziologie', in *id.*, Gesammelte Aufsätze zur Wissenschaftslehre (ed. J. Winckelmann 1973) 472-474 'Soziologische Grundbegriffe', in *id.*, 541-581, translated in english: 'The fundamental concepts of sociology in Max Weber: *The theory of social and economic organization* (eds. A. M. Henderson and Talcott Parsons 1964) 87-157.

19. Weber, 'Fundamental Concepts', *op. cit.*, p. 89. Weber himself about the application of this method in sociology of law: 'Die Soziologie hat es dagegen, soweit für sie das "Recht" als Objekt in Betracht kommt, nicht mit der Ermittlung des logisch richtigen *"objektiven"* Sinngehaltes von "Rechtssätzen" zu tun, sondern mit einem Handeln, als dessen Determinanten und Resultanten natürlich unter anderem auch *Vorstellungen* von Menschen über den "Sinn" und das "Gelten" bestimmter Rechtssätze eine bedeutsame Rolle spielen. Darüber, also über das Konstatieren des tatsächlichen Vorhandenseins einer solchen Geltungsvorstellung, geht sie nur in der Weise hinaus, dasz sie 1. auch die *Wahrscheinlichkeit* des Verbreitetseins solcher Vorstellungen in Betracht zieht, und 2. durch folgende Überlegung: dasz empirisch jeweilig bestimmte Vorstellungen über den "Sinn" eines als geltend vorgestellten "Rechtssatzes" in den Köpfen bestimmter Menschen herrschen, hat unter bestimmten angebbaren Umständen die Konsequenz, dasz das Handeln rational an bestimmten "Erwartungen" orientiert werden kann, gibt also konkreten Individuen bestimmte "Chancen". Dadurch kann deren Verhalten erheblich beeinfluszt werden. Dies ist die begriffliche soziologische Bedeutung der empirischen "Geltung" eines "Rechtssatzes".' From Weber, 'Über einige Kategorien der verstehenden Soziologie, *op. cit.*, p. 440.

20. Vilhelm Aubert, Some social functions of legislation', in (1966) 10 *Acta Sociologica* (Contributions to the sociology of law, ed. Britt-Mari Persson Blegvad) 107.

21. Hirschmann, *op. cit.*, p. 40.

22. Marc Galanter, 'Why the "haves" come out ahead: speculations on the limits of legal change' (1974) 9 *Law and Society Rev.* 95-160, 'Afterword: Explaining litigation' (1975) 9 *Law and Society Rev.* 347-368 (quote p. 347-348). On p. 363: 'The distinction (between repeat-players and one-shotters, FB) overlaps, at least in the American setting, with two other distinctions – that between individuals and organizations and that between the poor and the wealthy.' It seems as if the haves and the have-nots differ only in this respect that the haves have organizations, which the have-nots do not. I doubt whether the class differences have been dissolved into a polarity between repeatedly playing institutions and once shooting individuals.

23. Commission of the European Communities, *European Consumers: their interests, aspirations, and knowledge on consumer affairs* (1976) 29-33.

24. David Caplovitz, *The poor pay more; consumer practices of low-income families* (1967) 171.

25. Galanter, *op. cit.*, p. 110.

26. Clyde Summers, 'Individual Rights in Collective Agreements: a preliminary analysis' (1960) 9 *Buffalo Law Review* 252.

27. Hartmut Koch and Gisela Zenz, 'Erfahrungen und Einstellungen von Klägern in Mietprozessen', in *Zur Effektivität des Rechts, Jahrbuch für Rechtssoziologie und Rechtstheorie*, Band 3 (1972) 517. On p. 520: 'Das Risiko der Kündigung mag also manchen Mieter daran hindern, seine Rechte im offenen Streit vor Gericht durchzusetzen, während umgekehrt das Risiko des Mieterwechsels für den Vermieter nicht annähernd die gleiche Bedeutung hat. Im Sinne dieser Hypothese kann man die Tatsache interpretieren, dasz in unserer Stichprobe Mieter überwiegend auf Rückzahlung von Kaution oder Miete klagten, nachdem das Mietverhältnis bereits beendet war und das Kündigungsrisiko keine Rolle mehr spielte.'

28. Charles A. Reich, 'The New Property', in (1964) 73 *Yale Law Journal* 778: 'As we move toward a welfare state, largess will be an ever more important form of wealth. And largess is a vital link in the relationship between the government and the private sides of society'; and on p. 785-786: 'The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance. . . . Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.'

29. Joel F. Handler, 'Controlling Official Behavior in Welfare Administration', in *The Law and the Poor* (ed. Jacobus tenBroek, 1966) 172, speaks about 'extreme "either-or" situations', in which there is no other option than the assertion of rights.

30. We assume here that revenge means exit first and voice afterwards, but the reverse order is also possible, of course. In conflict situations where voice is quickly followed by exit, fights are in fact revenge actions, since the weaker party took the decision to leave anyway and therefore does not care about retaliation by the stronger party.

31. V. Aubert, 'Courts and conflictresolution', in (1967) 11 *Journal of Conflictresolution*, 44.

32. Schuyt, *et al.*, compared a group of people, who litigated about certain new property rights, namely benefits for unemployment, disability, and illness, with a group of people who did not. Both groups differ in that the complainants saw litigation as the only possibility left, to do something about what they perceived as wrong, whereas those who abstained from litigation did so mostly on the basis of a simple cost-benefit analysis (pessimism about the outcome compared with the costs). See Kees Schuyt, Alex Jettinghoff, Eric Lambregts and Faas Zwart, *Een beroep op de rechter* (1978) chap. 5.

33. Mancur Olsen, *The Logic of Collective Action, public goods and the theory of groups* (1965).

34. Bachrach and Baratz, *op. cit.*, 19.

35. Hirschman, *op. cit.*, 82 ff: The loyalist's threat to exit: 'The chances for voice to function effectively as a recuperation mechanism are appreciably strengthened if voice is backed up by the *threat of exit* whether it is made openly or whether the possibility of exit is merely well understood to be an element in the situation by all concerned.' As a result the weaker party can also choose fight, when there is an easy exit and a equivalent substitute. If the threat to exit has effect, fight approaches revenge in the way rights are asserted. See also ftn. 6 and

30, and *infra* text at *Voice, Exit, and Justice.*

36. Handler, *op. cit.*, 170. He continues: 'Reich is absolutely right in stating that case-workers in these situations have great power over their clients. What he fails to realize is that this *power largely nullifies a program of rights*' (emphasis added). And, following more or less the same line of argument as I do, on p. 171: '(B)efore rights can be made effective in this field, there has to be knowledge, ability or resources, *and clear, practical advantages for using* these rights.' (italics in original).

37. Galanter, 'Why the "haves" come out ahead', *op. cit.*, 130.

38. Erving Goffman, *Asylums, Essays on the social situation of mental patients and other inmates*, (1961, Penguin 1976). See for the application of this concept on the rights of inmates of the army and the prison, respectively N. D. Jörg, 'Militaire organisatie en legaliteit: de zijden draad tussen macht en recht', and C. Kelk, 'Het detentierecht en de macht der feiten', in *Recht, Macht en Manipulatie* (1976) 317 ff., and 448 ff.

39. That is why I do not believe in the close harmony of loyalty and voice, implied in Hirschman, *op. cit.*, chap. 7.

40. A modern variation on Marx' statement: 'The ruling ideas of any age are the ideas of its ruling class', in *Manifesto of the Communist Party*, in *Marx Engels; Basic Writings on Politics and Philosophy* (ed. Lewis S. Feuer, 1976) 31.

41. Philip Nonet, *Administrative Justice, advocacy and change in a government agency* (1969) 87. On p. 91: '(T)he assertion of a right is a form of moral criticism: besides the expression of a demand, it involves an appeal to the authority of principles in support of one's claims' (emphasis omitted).

42. Caplovitz, *op. cit.*, in 'Preface' 1967 ed., p. xxvi: 'I particularly regret the word "apathy" because it has been used often, and I believe mistakenly, to describe the poor's response to their situation. What is lacking is not so much the motivation of the poor to change their situation as meaningful courses of action for them to take in the face of unresponsive and frequently powerless community agencies.

43. Handler, *op. cit.*, p. 171.

44. John M. Orbell and Toro Uno, 'A Theory of Neighborhood Problem Sol ving: Political Action vs. Residential Mobility', in (1972) 66 *Am. Pol. Sci. Rev.* 473-474.

45. Ted R. Vaughan, 'The Landlord-Tenant Relationship in a Low-Income Area', in (1968) 16 *Social Problems* 214. See also Koch and Zenz, *op. cit.*, about the *Repressionsrisiko.*

46. I quote in passing from Caplovitz, *op. cit.*, p. xvii: 'Installment credit has thus been the door through which the poor have entered the mass consumption society, and they, more than any other group, have been victimized by the fraud and deception that have accompanied this method of selling. As I have tried to show in this book, the marketing system that has evolved in low-income areas is in many respects a deviant one in which exploitation and fraud are the norm rather than the exception.' And on p. 180: 'A close association probably exists between the amount of risk that merchants in this system are willing to accept and their readiness to employ unethical and illegal tactics. . . . Society now virtually presents the very poor risks with twin option: of foregoing major purchases or of being exploited.'

47. There is of course a great overlap between this state proletariat, the new industrial proletariat and the industrial reserve army. Or to put it less abstractly:

Mr. Jones lost his hand in a factory accident, was dismissed with a small disability pension, and now he is too old to get a job, therefore he receives an unemployment compensation. Mr. Jones jr. completed his school two years ago, but there is no regular job for him. In the summer he is a dishwasher, and sometimes he is subcontracted for a fortnight. Since their income is not sufficient, the Jones get supplementary welfare benefits from the public assistance, especially to pay the rent. They would like to move out into a new house in the outskirts of the city, but the social agency fails to appreciate this idea.

48. C. J. Friedrich, *Man and his Government* (1963) chap. 11. On p. 203: '(T)he person or group which is being influenced anticipates the reactions of him or those who exercise the influence. The inclination of all persons exposed to influence to anticipate the reactions of him who has the power to issue commands, bestow benefits or inflict penalties of all sorts, constitutes a general rule of politics.' An example is to be found in Galanter, *op. cit.*, ftn. 5 on p. 98: 'Perhaps the most successful RPs are those whose antagonists opt for resignation.'

49. Leon H. Mayhew, 'Institutions of Representation, civil justice and the public', in (1975) 9 *Law and Society Rev.* 413.

50. Individuals differ in the assessment of the costs and benefits, attached to each course of action: heroes will more often choose to fight, while cowards commonly will choose flight. The same holds true for legal cultures in general.

51. Along these lines Guido Calabresi, 'Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class", in *Access to Justice*, *op. cit.*, vol. III, 169-190.

52. In this terminology David M. Trubek, Luise G. Trubek, and Jonathan Becker, 'Legal Services and the Administrative State', paper Berlin conference (June 1978) *Innovations in the Public Services*, 28 ff.

53. Hirschman, *op. cit.*, pp. 45, 79 ('the reason for the complication of divorce procedures'), 83.

54. However, the borderline between acquiescence and fight is fluid: even in no-exit situations the deep silence is from time to time interrupted by outbursts of violent fight, as can be seen from total institutions and slums, for example.

55. Donald J. Black, 'The Mobilization of Law', in (1973) 2 *Journal of Legal Studies* 125-149, compares two ways of mobilization of law, one in which the legal process is set into motion by a citizen's complaint (reactive), and another where a legal official acts with no prompting from a citizen (proactive).

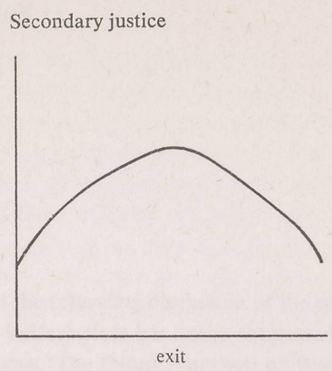
56. Optimistically about this disciplinary force Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (1978) 78-86

57. H. L. A. Hart, *The Concept of Law* (1961, ed. 1972), esp. chap. 5.

58. An example of the market producing justice can be found in Aubert, *op. cit., passim.* He concludes on the basis of his survey, that just working conditions were more the result of the labour market than of the Law on the Housemaids.

59a. Fig. III is the graphic expression of the relation between secondary justice (vertical axis) and exit (horizontal axis).

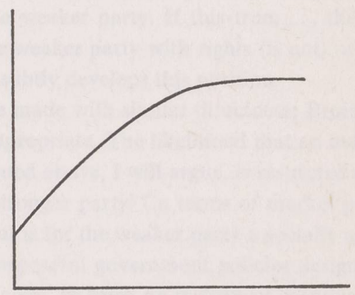
Figure III:



Thanks to proactive mobilization there is some justice to be found in no-exit situations. As the opportunities for exit increase, the assertion of rights increases too, till the point where more exit results mostly in flight. At the extreme end of maximum exit there is only justice brought about by proactive mobilization.

59b. Fig. IV is the graphic expression of the relation between primary justice (vertical axis) and exit (horizontal axis).

Figure IV:



Justice in no-exit situations is the result of the deterrent effects of inspection and control; for the rest it is dependent on the good intentions of the stronger party. Even one exit gives rise to much more deterrence, out of fear of revenge for instance. More exit strengthens the power of the weaker party, an at a certain point introduces the equalizing effects of the pure market.

The graphic expression of both curves in one figure, i.e. secondary and primary justice taken together in relation to exit, leads to the practical guideline for producers of law to further exit in order to get justice, at least to a large extent.