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Access to Justice: Comparative General Report

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ACCESS TO JUSTICE
Comparative General Report

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The choice of the topic "access to justice" for the celebration of the semicentenary of the Max-Planck-Institute underscores the commitment of comparative law scholars to solve one of the most crucial problems and challenges of our epoch – making the law accessible to all. It is also highly appropriate that the access-to-justice panel has been joined here with panels on the consumer and on the environment, because the interests of consumers and environmentalists are among the essential interests too often denied access to justice. The movements toward their protection are significant components of the broader, more comprehensive "access-to-justice" movement (see section III 3 *infra*).

The present general report will examine the emergence and development of this "access-to-justice" trend. It will also attempt to show the direction

* *Abbreviated* literature: *Cappelletti*, Governmental and Private Advocates for the Public Interest in Civil Litigation – A Comparative Study: Mich. L. Rev. 73 (1974/75) 793–884; *id.*, Vindicating the Public Interest Through the Courts – A Comparatist's Approach: Buffalo L. Rev. 25 (1975/76) 643–690; Equal Justice = *Cappelletti/Gordley/Johnson, Jr.*, Toward Equal Justice – A Comparative Study of Legal Aid in Modern Societies (1975); Fundamental Guarantees of the Parties in Civil Litigation, ed. by *Cappelletti/Tallon* (1973). – Reports = unpublished materials for the Florentine project "Access to Justice" (see *infra* note 1 with accompanying text).

of modern thinking in this area. It is, however, at this stage simply a preliminary report, prepared largely within the framework of a world-wide comparative work in progress, the Florentine "Access to Justice Project"[1]. This Project, which is directed by this general reporter in collaboration with *Earl Johnson, Jr.*, commenced in the fall of 1973 under the sponsorship of the Ford Foundation and the National Research Council (CNR) of Italy. It has now involved about 100 experts from 27 countries in its work. It has already resulted in the publication of two books[2] and several articles[3]; at least three more books in this series will be published in the next few years[4]. This preliminary general report, after it is revised and greatly expanded on the basis, *inter alia*, of the discussions at the Hamburg Colloquium, will become the general report on Access to Justice, which will introduce the forthcoming books.

To be sure, the present report has fortunately not been limited to materials submitted to the Florentine Project. It has been helped considerably by the thoughtful studies presented by the distinguished access-to-justice panelists at the Hamburg Colloquium[5], to whom deep gratitude is expressed here by the general reporter and his collaborators.

I. The Changing Theoretical Conception of Access to Justice

The concept of access to justice has been undergoing an important transformation, corresponding to a comparable change in civil procedural scholarship and teaching. In the liberal, "*bourgeois*" states of the late eighteenth and nineteenth centuries, the procedures for civil litigation reflected the essentially individualistic philosophy of rights then prevailing. A right to ac-

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[1] Materials from this project that have not yet been published, particularly the national reports from about 20 countries, have been utilized for the present general report. These materials are in the files of the Florence Center for Comparative Judicial Studies, the headquarters of the Access-to-Justice Project.

[2] *Cappelletti/Gordley/Johnson, Jr.*, Equal Justice, and *Cappelletti/Jolowicz*, Public Interest Parties and the Active Role of the Judge in Civil Litigation (1975).

[3] *Cappelletti*, Governmental and Private Advocates; *id.*, Formazioni sociali e interessi di gruppo davanti alle giustizia civile: Riv. Dir. Proc. 30 (1975) 361; *id.*, La protection d'intérêts collectifs et de groupe dans le procès civil – Métamorphoses de la procédure civile: Rev. int. dr. comp. 27 (1975) 571.

[4] It is expected that there will be three more volumes in the Access-to-Justice Project series: (1) the "National Reports Volume"; (2) the volume containing "Field Studies and Other Detailed Reports on Special Procedures"; and (3) an essays volume "Perspectives on Access to Justice." The volumes are scheduled for publication in the order listed, beginning early 1977.

[5] *Bender, infra* p. 718–726; *Hellner, infra* p. 727–749; *Stalev, infra* p. 770–782; *Storme, infra* p. 759–769; *Zander, infra* p. 750–758.

cess to judicial protection meant essentially the aggrieved individual's *formal* right to litigate or defend a claim. The theory was that, while access to law and, more particularly, access to justice may have been a "natural right," natural rights did not require affirmative state action for their protection[6]. These rights were prior to the state; their preservation required only that the state did not allow their infringement by others. The state thus remained passive with respect to such problems as the ability, *in practice*, of a party to recognize his legal rights and to defend them adequately, for instance by retaining an able attorney and paying the other costs of litigation; these problems were simply not the state's concern. Preventing "legal poverty" – the incapacity of many people to make full use of the law and its legal and judicial institutions – was not the affair of the state. Justice, like other commodities in the laissez-faire system, could be purchased only by those who could afford it. Those who could not were considered the only ones responsible for their fate. Formal, not effective, access to justice was thus all that was sought.

Until recent years, with rare exceptions legal scholarship was similarly unconcerned with the realities of the judicial system: "[s]uch factors as differences among potential litigants in practical access to the system or in the availability of litigating resources were not even perceived as problems."[7] Scholarship was typically formalistic, dogmatic, and aloof from the real problems of civil justice. Its concern was frequently one of mere exegesis or abstract system-building; even when it went beyond this concern, its method was to judge the *rules* of procedure on the basis of historical validity and their operation in hypothetical situations. Reforms were suggested on the basis of this theory of procedure, not on the basis of actual experience. Scholarship, like the court system itself, was removed from the concerns of most people.

As the laissez-faire societies grew in size and complexity, the concept of human rights began to undergo a radical transformation. Since actions and relationships increasingly assumed a collective, rather than an individual character, modern societies necessarily moved beyond the essentially individualistic laissez-faire view of rights reflected in eighteenth and nineteenth century bills of rights. The movement has been toward recognizing the *social rights and duties* of governments, communities, associations, and individuals[8]. These new human rights, exemplified by the Preamble of the French Constitution of 1946, are above all those necessary to make *effec-*

[6] For a more detailed treatment of this theme see *Cappelletti*, Fundamental Guarantees 659, 726–740.

[7] *Chayes*, The Role of the Judge in Public Law Litigation: Harv. L. Rev. 89 (1975/76) 1041, 1048.

[8] See, *e.g.*, *Cappelletti*, Processo e Ideologie (1969) 511–524; *Scarman*, English Law – The New Dimension (1974) 28–50; *Häberle*, Grundrechte im Leistungsstaat (1972) 76, 90, 99.

tive, i.e., actually accessible to all, the rights proclaimed earlier[9]. Among such rights typically affirmed in modern constitutions are the rights to work, to health, to material security, and to education[10]. As has become commonplace to observe, *affirmative* action by the state is necessary to ensure the enjoyment of these social rights we now deem too important to consign to an impersonal marketplace[11].

The right of effective access to justice has emerged with the new social rights[12]. Indeed, it is of paramount importance among these new rights, since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection[13]. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system[14]. Effective access to justice can thus be seen as the most basic requirement – the most basic "human right" – of a system which purports to guarantee legal rights.

Modern legal scholarship must, and increasingly does, reflect this analysis of the role of the judicial system. Theoretical discussions of the various rules of civil procedure and how they can be manipulated in various hypothetical situations can be instructive, but hidden within such neutral de-

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[9] The Preamble of the French Constitution of 1946, which was explicitly incorporated in the Preamble of the present Constitution of 1958, acknowledges that the addition of new "social" and "economic" rights to the traditional civil rights is "particularly necessary in our time". See also, *e.g.*, art. 3 para. 2 of the Italian Constitution of 1948; arts. 20, 28 of the Fundamental Law of the Federal Republic of Germany (*Grundgesetz*).

[10] See note 9 *supra.*

[11] See, *e.g., Calamandrei,* Opere Giuridiche, ed. by *Capelletti,* III (1968) 183 to 210; *Claude,* in: Comparative Human Rights, ed. by *Claude* (1976) 6, 32, where it is stated, *inter alia,* that "positive rights generally presuppose an affirmative commitment from the state."

[12] Probably the first explicit recognition of the duty of the state to insure equal access to justice (at least once the parties were in court) came with the Austrian Code of 1895 and its provision of an active judge to equalize the parties. See *Cappelletti,* Social and Political Aspects of Civil Procedure – Reforms and Trends in Western and Eastern Europe: Mich. L. Rev. 69 (1970/71) 847, 854 f. and n. 38. More recently, a modern trend has been to develop the "social right" of access out of the fundamental rights of action and defense. See, *e.g.*, art. 3 para. 2 and art. 24 para. 3 of the Italian Constitution of 1948; art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[13] For *Claude* (*supra* note 11) 382, 395 "the enforcement or procedural protection is merely another side of the content of the right."

[14] "Judicial system" here is meant to include the numerous quasi-judicial or para-judicial mechanisms which resolve disputes with either the "essential" procedural safeguards or the outright review of the civil courts. In other words, a right to effective access to justice here is not synonymous with "the right to sue in court"; it means a right to have a dispute fairly and effectively resolved. For a discussion of the ramifications and problems of a right to "judicial" protection, see *Cappelletti,* Fundamental Guarantees 702–724.

scriptions is the frequently unrealistic model of two (or more) equal sides in court with equal resources, who are limited only by the legal arguments they can muster. Procedure, however, should not be placed in a vacuum; scholars must now recognize that procedural techniques and social realities are inseparable[15]. Every procedural regulation has a pronounced effect on how the substantive law operates – how often it is enforced, in whose benefit, and with what social impact. It should be clear, for example, that a right to clean air is a mere abstraction, unless procedural mechanisms are devised to make that right effective[16]. The modern task of civil procedural scholars is to expose the substantive impacts of civil procedure. They must, therefore, utilize the insights of sociological, ideological, psychological, economic and other analyses, and must learn from other cultures. "Access" is of critical importance as a focus of modern scholarship, as well as an increasingly recognized, fundamental social right; its study presupposes both a broadening and a deepening in the aims and methods of modern legal science.

II. The Meaning of a Right to Effective Access: the Essential Barriers to Overcome

Although effective access to justice has increasingly been accepted as a basic social right in modern societies, the concept of "effectiveness" is itself somewhat vague. Optimal effectiveness could be expressed as complete "equality of arms" – the assurance that the ultimate result depends only on the relative merits of the opposing positions, unrelated to the relative abilities or strengths of one party. This perfect equality, of course, is utopian; the differences between parties can never be completely eradicated. The question is how far to push toward the utopian goal. In other words, how many of the "barriers" to effective equality of arms should be attacked? The identification of the barriers thus is the first task in giving meaning to "effectiveness."

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[15] As the great Austrian scholar *Franz Klein* observed perceptively in 1906, "the squalid, arid, neglected phenomenon of civil procedure is in fact strictly connected with the great intellectual movements of peoples: and ... its varied manifestations are among the most important documents of mankind's culture"; *Klein*, Zeit- und Geistesströmungen im Prozesse[2] (1958) 8. See also *Calamandrei*, Procedure and Democracy (1956) 76.

[16] See section II 2 *infra*.

1. Costs of Litigation

a) In General

It is obvious, and the materials assembled for this general report amply demonstrate this point, that dispute resolution is very expensive in modern societies, particularly in the courts[17]. Typically, the government pays the salaries of judges and other court personnel and supplies the building and other facilities necessary to try cases, but the litigants must bear the great proportion of the other costs of settling a dispute, including attorneys' fees and court costs[18].

The high cost to the parties is particularly obvious under the "American rule," which does not oblige the losing party to reimburse the successful litigant for his lawyer's fees, but the barrier of high costs works also under the more generally used "winner-takes-all" system[19]. Under the "winner-takes-all" system, unless the prospective litigant is sure to win, which is

[17] See, *e.g.*, *Bender/Strecker*, German Report [1975] 4 f., where it is stated that a case involving two instances for an amount equal to about eight months average salary in Germany (approx. 14,400 DM or 6,300 U.S. dollars) will entail costs of about one half the amount in controversy. The recent modifications in the costs schedules in Germany, in fact, make the costs even higher, especially for claims of modest amounts. For a helpful discussion of these changes see *Baumgärtel*, Gleicher Zugang zum Recht für alle (1976) 2–5. *Johnson, Jr., et al.*, U.S. Report [1975] 6 f., cite a study which showed that, with respect to automobile accident litigation, the median recovery by a victim was 3,000 dollars, of which 35.3 percent went to the lawyer and another eight percent for other expenses. A recent empirical study in England of personal injury litigation found that, "in about a third of all contested cases, the total costs were greater than the amount in dispute"; *Zander*, Cases and Materials on the English Legal System[2] (1976) 323.

[18] For the *United States* it has been stated that, along with lawyers' fees, "court costs, witness' fees (especially for experts), investigation costs, court reporter fees, discovery costs, transcript costs, and the cost of any bond needed to secure opponents' damages, all make litigation an expensive task"; *Rothstein*, The Myth of Sisyphus – Legal Services Efforts on Behalf of the Poor: U. Mich. J. L. Reform 1974, 493, 506. For *Italian* data see *Castellano et al.*, L'efficienza della giustizia italiana e i suoi effetti economico-sociali[2] (1970) 81. For *Germany* see *Redeker*, Bürger und Anwalt im Spannungsfeld von Sozialstaat und Rechtsstaat: NJW 1973, 1153, 1159 f.

[19] The long list of the countries, which, with some variations, have winner-takes-all systems include: Australia, Austria, Belgium, England, France, Germany, the Netherlands, and Sweden. Some countries, including Italy, Spain and Uruguay, although adopting in principle the winner-takes-all rule, give the judge wide discretion to allocate costs between the parties. The "American Rule," apparently followed only in the United States and Japan, has recently been criticized in Comment, Court Awarded Attorneys' Fees and Equal Access to the Courts: U. Pa. L. Rev. 122 (1973/74) 636, and *McLaughlin*, The Recovery of Attorney's Fees – A New Method of Financing Legal Services: Fordham L. Rev. 40 (1972) 761. One notable example of earlier criticism is *Ehrenzweig*, Reimbursement of Counsel Fees and the Great Society: Calif. L. Rev. 54 (1965/66) 792.

very rare indeed given the usual uncertainties of litigation, he must face an even higher *risk* of litigation than a litigant in the United States. The penalty for losing in "winner-takes-all" countries is roughly twice as great – the costs of both sides. In addition, in some countries such as Great Britain the plaintiff frequently cannot even estimate how great the risk is – how much it will cost him to lose – since attorneys' fees can range widely[20]. Finally, plaintiffs in these countries must often post security for the expenses before bringing a lawsuit. For these reasons, in fact, one may question whether the winner-takes-all rule does not erect at least as substantial cost barriers as the American rule[21]. At any rate, it is certainly clear that high costs, to the extent that the parties, or one of them, must bear them, constitute a major access-to-justice barrier.

The most important item of costs to the litigant is, of course, attorneys' fees. In the United States, for example, the charge per hour by attorneys ranges from about 25 to 100 dollars, and the charge for a particular service may well exceed the hourly rate[22]. Attorneys' fees may be charged according to various criteria which may make them more reasonable in other countries, but our data show that the overwhelming proportion of litigation costs in countries with private lawyers is consistently the attorneys' fees, that many litigants are intimidated by these fees, and that some litigants are altogether prevented by such fees from having access to justice[23].

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[20] Attorneys' fees can range greatly in any given case because the fees are set according to how much work is done. The Evershed Committee Report of 1953 stated that: "It is notoriously impossible to count the costs of litigation beforehand. It is difficult enough for either party to forecast what his own costs are likely to be, since much depends on the manner in which the other side conducts the case. It is utterly impossible to forecast what the other side's costs will be, and this means that no litigant can have the least idea of what he will have to pay if he loses the case." Final Report of the (Evershed) Committee on Supreme Court Practice and Procedures, 1953, quoted by *Zander* (*supra* note 17) 324; *cf. Jolowicz*, Fundamental Guarantees 121, 152–156. In countries such as *Germany*, where attorneys' fees are regulated strictly according to the amount in controversy rather than the amount of work done by lawyers, litigants can at least predict the potential costs of litigation.

[21] An important critical article in *Germany* is *Bokelmann*, Rechtswegsperre durch Prozeßkosten: Z. f. Rpol. 1973, 164. See also *M. Rehbinder*, Die Kosten der Rechtsverfolgung als Zugangsbarriere der Rechtspflege, in: *L. Friedman/M. Rehbinder*, Zur Soziologie des Gerichtsverfahrens (1976) 395, 405 f. *Japan*, in fact, decided to adopt the American rule, although it was modified so that in tort cases the successful plaintiffs are explicitly awarded damages to include attorneys' fees; see *Kojima/Taniguchi*, Jap. Report [1975] 26.

[22] *Johnson, Jr., et al.*, U. S. Report 4 f.

[23] See, *e.g., Johnson, Jr., et al.*, U.S. Report 4 f.; *Bender/Strecker*, German Report 5 f.; *Vigoriti*, Ital. Report [1976] 4.

b) Small Claims

Claims of a relatively small financial value present an even more serious economic problem, since the costs of resolving the dispute either exceed the amount in controversy or at least eat away so much of the claim as to make litigation not worth the trouble[24]. The barrier is thus not so much the inability of the party to raise or risk the amount of money necessary to litigate; it is the barrier of costs or risks exceeding the prospective benefits of victory. As is evidenced by the data assembled from many countries by the Florence Project, the ratio of costs as a percentage of the amount claimed in the courts steadily increases as the financial value of the claim goes down[25]. In Germany, for example, as indicated by Judges *Bender* and *Strecker* in their German Report for the Florence Project, the costs for a claim in the regular court system of about 100 dollars are estimated to be roughly 130 dollars, even though only one instance is involved, while the costs for a 5,000 dollars claim, involving two instances, would be about 2,800 dollars – still very high but substantially less[26].

c) Time

Late justice is bad justice; indeed, court delay or delay in other dispute-settling institutions can effectively cause a denial of justice. The importance of this barrier, which in many countries causes litigants seeking a court remedy to wait over three years for an enforceable judicial decision[27], is in-

[24] The problem arises largely because lawyers must be indirectly or directly compensated according to the time they work, and the cost of their time is very high. In the United States, for example, "... lawyers must charge a minimum of twenty dollars per hour for their time in order to net before taxes an income of 16,000 dollars a sum substantially below the average earnings of a private practitioner. On that assumption lawyers obviously cannot handle small monetary claims economically"; *Frank*, Legal Services for Citizens of Moderate Income, in: Law and the American Future, ed. by *Schwartz* (1976; cited from a draft edition). See also *Franzen*, Ist der Zivilprozeßsektor einer Anwaltspraxis noch rentabel?: NJW 1973, 2054–2057.

[25] See, *e.g.*, *Vigoriti*, Ital. Report 5; *de Miguel y Alonso*, Span. Report [1975] 8 f.; *Storme*, *infra* p. 763 f. (for Belgium). For some earlier data on this problem see *Cappelletti* (*supra* note 12) 872 f.

[26] See *Bender/Strecker*, German Report 22. The costs according to the 1976 schedules are even higher, particularly for claims above 5,000 DM (about 1,900 dollars); See *Baumgärtel* (*supra* note 17) 3.

[27] For *Italy*, for example, *Vigoriti*, Ital. Report 6, noted that (in 1973) the cases of first instance before the *pretore* last 566 days; those in the tribunal of first instance last 944 days; and those in the Court of Appeal, of second instance, last 769 days. See also *de Miguel y Alonso*, Span. Report 12, where it is stated that it takes 5 years and 3 months for trial, appeal and recourse in Cassation in *Spain*. According to *Kohl*, the average duration of the first instance of civil actions in 1969 before the *tribunal de grande instance* in *France* was 1.9 years, before the

creasingly recognized. Speed is becoming a fundamental requisite of justice. Indeed, Art. 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms explicitly recognizes the "reasonable time" requirement for both civil and criminal proceedings[28]. Delay should be seen as a cost because it forces the claimant to discount over a long period of time the amount of the expected recovery. It is a particularly burdensome cost for those claiming money in a highly inflationary society, and for those who need the recovery quickly – a need which is especially acute for the economically weaker party. Inexpensive, accessible justice, in short, cannot exist if justice is too slow.

2. Party Capability

A number of important barriers to access can be treated under the heading of "party capability." This term, utilized by *Marc Galanter,* rests on "the notion that certain kinds of parties ... enjoy a set of strategic advantages"[29]. Since the study of these strategic advantages is just beginning, it is difficult to know which, in fact, are particularly important in affecting access, but we can, at least, isolate what appear to be the main advantages and disadvantages for particular parties. In addition, a few hypotheses can be ventured on the basis of recent, and highly suggestive, sociological research.

a) Financial Resources

Of course, the ability to pay lawyers' fees and court costs, and to bear the burden of delay, depends mainly on the financial resources available to a party. Those with sufficient resources to litigate, as already noted, have an obvious advantage over those who cannot afford such expenses. Similarly, and equally obviously, one of two parties to a dispute may be able to outspend the other and, as a result, present his argument more effectively to the decision-maker. This advantage is especially salient when, as is frequently the case, the decision-maker is passive, relying on the parties for the investigation and presentation of evidence and for the initiative in developing and arguing the case[30].

Belgian tribunal de première instance 2.06 years, and before the *Italian* tribunal of first instance 2.33 years; *Kohl,* Ordinary Proceedings in First Instance – Belgium, France, Italy, Luxemburg and the Netherlands: Int. Encycl. Comp. L. VI Ch. 6/2 (unpublished draft chapter).

[28] See, *e.g., Velu,* Fundamental Guarantees 245, 318–322.

[29] *Galanter,* Afterword – Explaining Litigation: L. Society Rev. 9 (1974/75) 347, 360.

[30] See, *e.g., Cappelletti,* Fundamental Guarantees 746–752. On the generally inactive role of American judges, for instance, see *Homburger,* Functions of Oral-

b) Competence to Pursue a Claim

Differences in personality, based largely on differences in education, background and social status, are of obvious importance in determining how effectively a litigant or potential litigant pursues a legal claim. As *Michael Zander* and others have shown, there are many levels of barriers which must be personally overcome before a right can be effectively vindicated[31].

At the first level is the problem of recognizing a legally enforceable right. This problem is especially acute for the underprivileged sectors of society, even though it is now increasingly acknowledged that the problem is not limited to the poor. With respect to the general population, as *Leon Mayhew* has recently observed, "[t]here exists ... an aggregate of interests and claims and potential problems; some are well-understood by the members of the population, while others are perceived dimly or not at all."[32] Even educated consumers, for example, infrequently realize that their signature on a contract does not mean that in all cases they must comply with the contract. They lack the technical legal knowledge to challenge such contracts.

In addition, people differ in their knowledge about how to enforce a claim. The major English empirical study in this area concluded that this problem was a serious barrier for many people:

> "Insofar as knowledge of what is available is a prerequisite to any solution of the problem of unmet legal need, much more needs to be done to increase the extent of the public awareness of available facilities and how to use them."[33]

The lack of knowledge, in addition, relates to the psychic willingness of people to resort to legal procedures. The English study, for example, made the striking finding that "[a]s many as 11 per cent of our respondents said they would never go to a lawyer"[34]. Aside from this outright distrust of lawyers, especially apparent in the lower classes, we can certainly see

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ity in Austrian and American Civil Procedure: Buffalo L. Rev. 20 (1970/71) 9, 30 to 35.

[31] Among the important works analyzing these barriers to the effective satisfaction of "legal needs" are the empirical work by *Abel-Smith/Zander/Brooke*, Legal Problems and the Citizen (1973), and the theoretical works by *Carlin/Howard*, Legal Representation and Class Justice: UCLA L. Rev. 12 (1965) 381, and *Raimo Blom*, The Satisfaction of Legal Needs – Some Theoretical Ideas (Institute of Sociology and Social Psychology, University of Tampere, Finland, Research Reports 6 [1974]; unpublished). For a very helpful survey of recent developments in this field see *Blankenburg*, Rechtsberatung als Hilfe und als Barriere auf dem Weg zum Recht: Z. f. Rpol. 1976, 93.

[32] *Mayhew*, Institutions of Representation – Civil Justice and the Public: L. Society Rev. 10 (1975) 401, 406.

[33] *Abel-Smith/Zander/Brooke* (*supra* note 31) 222.

[34] *Abel-Smith/Zander/Brooke* at 224.

that complicated procedures, detailed forms, intimidating courtrooms and overbearing judges further increase the natural reluctance of many individuals to pursue a claim.

All these personal competence barriers, according to recent sociological research, are more less important depending on the types of parties, institutions and claims involved[35]. There is, in short, a complex relationship between the legal system and the "mobilization" of persons to pursue specific legal claims[36].

c) "One-Shot" Litigants v. "Repeat Player" Litigants

Galanter has emphasized the distinction between "one-shot" and "repeat player" litigants, based primarily on the frequency of encounters with the judicial system[37]. He has suggested that this distinction corresponds to a large extent to that between individuals, who typically have isolated and infrequent contacts with the judicial system, and ongoing organizations with a long-term judicial experience. The advantages of the repeat player are numerous, according to *Galanter*, including the following: (1) experience with the law enables better planning for litigation; (2) the repeat player has economies of scale because he has more cases; (3) the repeat player has opportunities to develop informal relations with members of the decision-making institution; (4) he may spread the risk of litigation over more cases; and (5) he can utilize strategies with particular cases to secure a more favorable posture for future cases. It appears that, because of these advantages, organizational litigants – generally repeat players – are indeed more effective than individuals, who tend to have little contact with the judicial system[38].

This gap in access requires that (one-shot) individuals find ways of aggregating their claims and developing long-term strategies to counteract the advantages of the organizations they must often face. This recently developed analysis, of course, has not been explicitly considered in any re-

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[35] According to *Mayhew* (*supra* note 32) 406 "We have a vast array of disputes, disorders, vulnerabilities, and wrongs, which contain an enormous potential for the generation of legal actions. Whether any given situation becomes defined as a 'legal' problem, or even if so defined, makes its way to an attorney or other agency for possible aid or redress, is a consequence of the social organization of the larger society – including shifting currents of social ideology, the available legal machinery and the channels for bringing perceived injustices to legal agencies."

[36] See *Black*, The Mobilization of Law: J. Leg. Stud. 2 (1973) 125.

[37] *Galanter*, Why the "Haves" Come Out Ahead – Speculations on the Limits of Legal Change: L. Society Rev. 9 (1974/75) 95; *id.*, *supra* note 29.

[38] See *Wanner*, The Public Ordering of Private Relations, Part II: Winning Civil Cases: L. Society Rev. 9 (1974/75) 292.

cent reforms. It deserves attention in this general report, however, because it suggests an important variable to be considered in evaluating procedural devices – the extent to which they facilitate, or substitute for, the organization of individuals. A similar need is especially apparent with respect to "diffuse" interests, as discussed in the next section.

3. The Special Problems of Diffuse Interests

"Diffuse" interests are collective or fragmented interests such as that in clean air or in the enforcement of consumer protection measures. The basic problem they present – the reason for their diffuseness – is that either no one has a right to remedy the infringement of a collective interest or the stake of any one individual in remedying the infringement is too small to induce him to seek enforcement action.

One simple illustration can show why this situation creates special access barriers[39]. Suppose that a dam is licensed which threatens serious and irreversible harm to the natural environment. Many people may enjoy the area which the dam's construction will harm, but few, if any, have any direct financial interest at stake. Even these few, moreover, would likely not have enough interest to bear the huge burden of a very technical lawsuit. Assuming such individuals have standing to sue (itself often a problem), they are in a position analogous to that of the small claim possessor for whom a lawsuit is uneconomical. An individual, moreover, may be able to collect only his own damages rather than damages approximating those actually caused by the wrongdoer to all. Accordingly, the individual suit may be completely ineffective; the wrongdoer may not be deterred from continuing his conduct. Aggregation of claims is thus desirable, indeed necessary, for the effective vindication of diffuse rights.

A further barrier, however, relates to aggregation. The various interested parties, even if allowed to organize and sue, may be widely dispersed, lack sufficient information, or simply be unable to agree on a common strategy. This problem is further exacerbated by the so-called "free rider" problem – a person who does not contribute to the lawsuit and yet cannot be excluded from its primary benefit, *e.g.*, the halting of the dam's construction[40]. In short, we can say that even if persons *in the aggregate* have a sufficient interest in the vindication of a diffuse interest, the barriers to organization may still prevent that interest from being aggregated and thus presented to the decision-makers.

It is thus apparent that, as a rule, private protection of diffuse interests

[39] See *Center for Public Representation*, Toward Fairer and More Responsive Administration (Madison, Wis. 1975) 26 f.

[40] See generally *Olson*, The Logic of Collective Action (1965).

requires group or concerted action, and that, on the other hand, it is difficult to insure that such concerted action takes place if the government itself, as in the above example, fails to act on behalf of the group. One approach taken historically, and still prevailing in many countries, is simply to provide no private remedy at all and instead rely on the *governmental* machinery to protect group and public interests. Recent comparative research, however, as discussed in section III 2 a *infra*, has amply proven the inadequacy of relying only on the state for the enforcement of the diffuse rights[41]. The profound need is to mobilize private energy to overcome the weaknesses of the governmental machinery, even though it is admittedly not easy to satisfy this need (see section III 2 b–c *infra*).

4. The Interrelationship of Barriers

The emerging concern for effective access to justice implies an eradication of these barriers or, at least, the most significant of them. In different cultures and in different situations, of course, different barriers are most important. Indeed, it is very difficult to be specific about other than cost-related barriers, since only cost-related barriers can be easily demonstrated and understood. The eradication of barriers, moreover, is more complicated than might appear from the above list. Many access problems are related to each other, and changes aimed at improving access one way can exacerbate access barriers another way. For example, one way to affect costs is simply to ban legal representation in certain proceedings. Clearly, however, since low income litigants are more likely to lack the capacity to present their own legal cases effectively, they might suffer more than benefit from the "reform". They may now *afford* to litigate, but the kind of help that may be essential for them to litigate *effectively* is unavailable. The study of access to justice must thus involve a concern with a number of barriers, and it should not overlook their interrelationships.

III. The Practical Approaches to Access-to-Justice Problems

The recent awakening of interest in effective access to justice has led to three basic levels of approaches, at least in the Western-oriented countries. These three approaches emerged more or less chronologically, particularly

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[41] The results of this research are given in detail by *Cappelletti*, in: *Cappelletti/Jolowicz* (*supra* note 2) 7. A revised version of this study is *Cappelletti*, Governmental and Private Advocates.

in the United States, since about 1965[42]. We can say roughly that the first access solution – the "first wave" in the new movement toward access – was *legal aid*; the second concerned the reforms aimed at providing *legal representation for "diffuse" interests,* especially in the areas of consumer and environmental protection; and the third is what we propose to call simply the *"access-to-justice approach,"* since it includes, but goes much beyond, the earlier approaches, thus representing an attempt to attack access barriers in a more articulate and comprehensive way.

1. The First Wave: Legal Aid for the Poor

Quite naturally, and indeed appropriately, the first major access-to-justice efforts in Western countries focused on providing legal services to the poor[43]. In most modern societies a lawyer is essential, if not mandatory, for a person to decipher increasingly complex laws and typically arcane procedures in order to bring a civil claim to court. Until very recently, however, the legal aid schemes of most countries have been fundamentally inconsistent with the modern social right of effective access[44]. They have, for the most part, relied on a structure of services provided by the private bar with no compensation (*"munus honorificum"*)[45]. The natural right to access was thus supported somewhat, but the state undertook no affirmative action to assure access. The result, quite predictably, was that the legal aid system was ineffective, since lawyers in market economies, particularly the more experienced and highly skilled lawyers, tended to devote their time to remunerative work, not to gratuitous legal aid[46]. Also, in order to avoid providing too much charity, the programs tended to erect steep qualification or other barriers to the use of legal aid.

The flaws in these programs became increasingly recognized when measured by the modern access-to-justice standard. Reforms emerged relatively early in Germany and England. Germany in 1919–1923 began a system of state compensation for private attorneys providing legal aid, which was given as a matter of right to all eligible persons[47]. In England, the major

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[42] For Europe see, *e.g., Storme, infra* p. 762, who sees the point of departure of this development in the political and social turmoil of 1968.

[43] This discussion to a large extent summarizes material from *Cappelletti/Gordley/Johnson, Jr.,* Equal Justice.

[44] See *Cappelletti,* Equal Justice 3, 6–27.

[45] The French, German, Italian, and a number of other statutory schemes of the second half of the nineteenth century placed a duty on private attorneys to provide legal services gratuitously to the poor; Equal Justice 18–21.

[46] *Cappelletti,* Equal Justice 23–27.

[47] The 1919 German statute allowed attorneys to recover their actual disbursements – not attorneys' fees – from the state; *Gesetz über Teuerungszuschläge zu*

reform began with the 1949 statute that entrusted the administration of the program to the Law Society, the national association of solicitors, and recognized the importance of legal consultation ("legal advice") in addition to assistance in litigation ("legal aid")[48]. These approaches were limited in several ways, but they commenced the move beyond the anachronistic nineteenth century, semi-charitable, laissez-faire legal aid programs.

In the last ten years concern with legal aid has been growing tremendously, reflecting the social consciousness which reawakened especially in the late 1960's. The contradiction between the theoretical ideal of effective access and the totally inadequate legal aid systems has become more and more intolerable[49].

In the United States the Legal Services Program of the Office of Economic Opportunity (OEO) began in 1965[50], but the real sweeping world movement came in the early 1970's. In January 1972, France replaced her nineteenth century legal aid scheme, based on gratuitous service rendered by the bar, with a modern "*sécurité sociale*" approach in which compensation is borne by the state[51]. In May 1972, Sweden enacted a very interesting new legal aid law[52]. In July 1972, the English Legal Assistance and Advice Act greatly expanded the reach of the system set up in 1949, especially in the

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den Gebühren der Rechtsanwälte und Gerichtsvollzieher of Dec. 18, 1919, RGBl. I 2113; *Hagelberg*, Zur Reform des Armenrechts: JW 1920, 876. A 1923 statute allowed attorneys to recover their full fees from the state, although the amount was limited later in the same year; *Gesetz über die Erstattung von Rechtsanwaltsgebühren in Armensachen* of Feb. 6, 1923, RGBl. I 103; *Küster*, Erstattung von Rechtsanwaltsgebühren in Armensachen: JW 1923, 676.

[48] Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, c. 51. This Act was rewritten and its provisions consolidated in the Legal Aid Act of 1974, c. 4.

[49] Several countries with relatively modern constitutions explicitly recognizing social rights and providing mechanisms for judicial review of legislation experienced judicial challenges to archaic legal aid schemes. In Austria, the Constitutional Court declared invalid the Austrian scheme on the ground that it did not provide adequate compensation to lawyers acting for indigents; see Judgment of Dec. 19, 1972, Öst. Anwaltsbl., Suppl. (Beilage Feb. 1973). Other examples of such judicial review can be found in *Cappelletti*, Equal Justice 70–76.

[50] Title I of the Economic Opportunity Act of 1964, 42 U.S.C., §§ 2701–2981 (1970) (repealed in part, Act of Dec. 28, 1973, Pub. L. No. 93–203, 87 Stat. 833), authorized grants of federal funds to approved "community action" programs. The OEO shortly after found that legal services programs qualified as community action programs, and this interpretation was given clear statutory recognition in 1965. See Economic Opportunity Amendments of 1965, Act of Oct. 9, 1965, Pub. L. No. 89–253, § 12, 79 Stat. 973, amending Economic Opportunity Act of 1964, § 205 (a), 42 U. S. C. § 2785 (a) (1970). See notes 72–78 *infra* and accompanying text.

[51] Law of Jan. 3, 1972, no. 72–11, J. O. of Jan. 5, 1972. The law went into effect on Sept. 16, 1972. See notes 65–68 *infra* and accompanying text.

[52] Public Legal Aid Law of May 26, 1972, SFS 1972:429. See notes 79–80 *infra* and accompanying text.

area of legal advice[53], and the Canadian Province of Quebec boldly established its first government-financed legal aid program[54]. In October 1972, the Federal Republic of Germany made her system more adequate by increasing the compensation paid to private lawyers for legal services to the poor[55]. And in July 1974, the long-awaited Legal Services Corporation was established in the United States[56]. Also during this period both Austria[57] and the Netherlands revised their legal aid programs to compensate attorneys more adequately[58]; there were several major reforms enacted in Australia[59]; and Italy came close to changing her all too anachronistic system, essentially similar to the pre-1972 French scheme.

It is understandable that critics of the inaccessibility of the judicial system focused first on the reform of legal aid as their primary goal. The cogency of their criticisms is reflected in the fact that sweeping changes were rapidly made. Remarkable strides were made toward the goal of equal access. These great accomplishments of this first access-to-justice movement, as well as their limits in terms of the access-to-justice barriers, can be seen from the following brief survey of the types of legal aid reforms that were implemented.

a) The Judicare System

The major accomplishment of the Austrian, British, Dutch, French, and West German reforms was the bolstering of what has been termed the "judicare" system of legal aid. Judicare means that legal aid is established *as a matter of right* for all persons eligible under the statutory terms, and that *the state pays the private lawyer* who provides those services. The goal of judicare systems is to provide the same representation for low income litigants as they would have if they could afford to have a lawyer. The ideal is to make a distinction only with respect to the billing: the state, rather than the client, is billed.

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[53] Legal Advice and Assistance Act of 1972, c. 50, rewritten and consolidated in the Legal Aid Act of 1974, c. 4. See notes 62–64 *infra* and accompanying text.

[54] Legal Aid Act, 21 Eliz. 2, c. 14 (Quebec, 1972). See notes 78–80 *infra* and accompanying text.

[55] *Gesetz zur Änderung der Bundesrechtsanwaltsordnung, der Bundesgebührenordnung für Rechtsanwälte und anderer Vorschriften* of Oct. 24, 1972, BGBl. I 2013.

[56] Legal Services Corporation Act of July 14, 1974, Pub. L. 93–355, 88 Stat. 378. See note 75 *infra*.

[57] See *Fasching*, Kommentar zu den Zivilprozeßgesetzen, Ergänzungsband (1974); *Kininger*, Der wirtschaftlich Schwache im österreichischen Zivilprozeß: ÖJZ 1976, 9.

[58] See *Houtappel*, Dutch Report [1975] 21–23. The Dutch Reforms, as well as other recent European reforms, were recently surveyed in *Gottwald*, Armenrecht in Westeuropa und die Reform des deutschen Rechts: ZZP 89 (1976) 136.

[59] See *Taylor*, Austral. Report [1975] 20 f. See also note 80 *infra*.

In the modern English program, for example, an applicant meeting the financial and merit tests for his claim may choose his attorney from a list of lawyers who have agreed to provide such services[60]. The compensation for the attorney chosen is sufficiently attractive so that almost all practitioners have agreed to be on the list[61]. Of considerable importance is that before qualifying for legal aid, according to the 1972 reform, the applicant can obtain up to 25 pounds sterling of legal services with no need for any authorization[62]. These services can include helping to prepare a formal application for legal aid. Clearly, England's system is a well-designed judicare system; however, it still needs improvement to meet its goals. In particular, it has been criticized because its standard of need is too low and because it does not provide assistance for proceedings before special tribunals[63]. Nevertheless, this judicare system is most impressive, and aid has over the years been given to steadily increasing numbers of persons[64].

The French system, as introduced in 1972 and modified by enactments of 1974 and 1975, also moves a long step along the path toward an effective judicare system[65]. A particularly important feature of the French system since 1972 is that it allows legal aid not only to poor people, but also partial aid to some people above the poverty level. Decreasing partial aid is now available to persons up to monthly incomes of 2700 francs (about

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[60] Legal Aid Act of 1974, c. 4 § 12.

[61] One survey conducted by an American investigator thus found that 96 percent of the English solicitors surveyed felt the fees were adequate; *Utton*, The British Legal Aid System: Yale L. J. 76 (1966/67) 371, 376. See Legal Aid Act of 1974, c. 4, Schedule 2.

[62] Legal Advice and Assitance Act of 1972, c. 50, rewritten and consolidated in the Legal Aid Act of 1974, c. 4 § 3. For divergent evaluation of this reform, see *Samuels*, Legal Advice and Assistance Act 1972 – The Scheme and an Appraisal: N. L. J. 122 (1972) 696, 697; *Pollock*, Legal Advice and Assistance Act 1972 – The Scheme and a Mis-appraisal: *ib.* 807.

[63] See, *e.g.*, *Pollock*, Legal Aid – the First 25 Years (1975) 110–115, 117–119; *Moeran*, Practical Legal Aid (1969) 12–14; *Dworkin*, The Progress and Future of Legal Aid in Civil Litigation: Mod. L. Rev. 28 (1965) 432, 444–446.

[64] See *Pollock* (*supra* note 63) 104 f. and 103: "It has been estimated that about half the work dealt with by the Courts which could in principle fall within the scope of legal aid (*i.e.* excluding company litigation and the like) is conducted under the provisions of the Scheme, either free so far as the assisted person is concerned or on the basis of a contribution by him."

[65] Law of Jan. 3, 1972 (*supra* note 51); Financial Law *(loi de finances)* of Dec. 30, 1974, no. 74–1129, J. O. of Dec. 31, 1974; Decree of May 14, 1975, no. 75–350, J. O. of May 15, 1975, modifying the Decree of Sep. 1, 1972, which applied the Law of Jan. 3, 1972. The initial reform is analyzed in *Herzog/Herzog*, The Reform of the Legal Professions and of Legal Aid in France: Int. Comp. L. Q. 22 (1973) 462. A thorough, recent description of the French system can be found in *Laroche de Roussane*, L'aide judiciaire (Les aménagements récemment apportés au régime de l'institution): Rép. Defrénois 1975, art. 30 968, p. 1046; see also *Thery*, French Report 5–9.

540 dollars) for a family of four[66]. In addition, also since 1972, legal aid may be granted for a particularly important case regardless of the income of the litigant[67]. The main problem with the French system is that, despite a one-third raise in 1974 in the compensation paid to attorneys, the compensation is still quite inadequate[68]. Still, the French effort to broaden the availability of judicare is certainly important.

Despite the significant accomplishments of judicare schemes such as those in England and France, the judicare system itself has undergone fundamental criticism. Certain structural limitations caused by the system's attempt to treat a poor person like a regular client affect its usefulness as an access-to-justice device. Judicare solves the cost barrier, but it does little to affect the barriers caused by other problems typical of the poor. It relies on the poor to recognize their claims and seek legal assistance[69]. No effort can be made by individual practitioners to help the poor identify the areas where they are entitled to a legal remedy. Poor people, moreover, even if they recognize their claim, may be intimidated by the prospect of going to a normal law office and discussing their problems with a private lawyer. Indeed, in societies where the rich and poor live apart, there may be geographical as well as cultural barriers between the poor and the private bar. Further, it is clear that representation by private practitioners does not counter the disadvantages of a poor person as a "one-shot" litigant; most important, judicare treats the poor as individuals to the neglect of the poor as a class.

[66] See *Thery*, French Report 6 f.; Decree of May 14, 1975 (*supra* note 65), arts. 4, 5, modifying the Decree of Sept. 1, 1972, arts. 66–68. After this report was completed, the French eligibility limits were again raised. The limits are now 1,500 francs (about 300 dollars) per month income for full legal aid to an individual, with no dependents, as opposed to the prior 1,250 francs; and 2,500 francs (about 300 dollars) per month for partial legal aid to an individual without dependents, as opposed to 2,250 francs before. Financial Law *(loi de finances)* of June 22, 1976, no. 76–539, J. O. of June 23, 1976, 3739.

[67] See *Thery*, French Report 7; Law of Jan. 3, 1972 (*supra* note 51), art. 16.

[68] According to *Thery*, French Report 9, "the amount of compensation paid to lawyers has been deemed inadequate," since the absolute maximum is 800 francs – less than 200 dollars – and for a number of cases is considerably less. The fees are set by the Decree of May 14, 1975 (*supra* note 65), arts. 7–10, modifying the Decree of Sep. 1, 1972, art. 76; see the explanation by *Laroche de Roussane* (*supra* note 65) at p. 1055 f. New information received after this essay was completed indicates that the compensation paid to attorneys has also again been raised. Presently 1000 francs (about 200 dollars) is the maximum that can be received by an attorney for legal services rendered under the law. Financial Law of June 22, 1976 (*supra* note 66). This raise, when inflation is taken into account, does not affect the conclusions given above.

[69] The shortcomings of this reliance are suggested by the findings in *Abel-Smith/Zander/Brooke* (*supra* note 31) 219: "In total our 1,651 respondents told us of 1,022 cases where, in our view, legal advice was needed. Advice of any kind had been taken in only 450 cases, and in only 270 cases was a lawyer the main adviser. . . ."

The English, French, and German judicare systems, for example, do not provide aid for "test cases" on behalf of the poor, unless they can be justified according to the interests of the individual involved[70]. A small claim case, for instance one involving 100 dollars or less in damages for consumer fraud by a business, would most probably not be litigated and certainly not appealed by an individual protecting only his own interests. The costs would quickly exceed the 100 dollars in controversy. It may be, however, that many poor people in the area suffer from the same unfair business practice, and that a test case would succeed in having the practice declared illegal. Such a declaration would inure to the benefit of all those victimized by the practice. It would further the interests of the poor as a group. The same result would appear if an unconstitutional law took away a small sum in welfare benefits from all poor people. If one person challenges in court that statute, all would benefit. Under judicare systems, however, the exclusively individual perspective neglects the diffuse interest of the poor in general[71].

b) The Public Salaried Attorney Model

The public salaried attorney model of legal aid has a different aim than the judicare model. Its aim reflects its modern origin in the United States with the Legal Services Program of the Office of Economic Opportunity in 1965, which was itself the vanguard of a "War on Poverty"[72]. The legal services were to be provided by "neighborhood law offices", staffed with attorneys paid by the government, and the aim was to obtain the maximum impact in furthering the interests of the poor as a class[73]. To be sure, this essential characteristic did not preclude helping individual poor persons

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[70] As stated for England by *Seton Pollock*, former Secretary of the Law Society for Legal Aid and a leading authority in this field, "[test] cases are ... only supported where the applicant for legal aid has himself a case which, in relation to his own personal circumstances, is reasonable and one which he would be expected to take in his own interests if he were wealthy enough to do so on his own account." *Pollock* (*supra* note 63) 136. *Klauser* and *Riegert* have made the following observation about judicare systems, particularly in Germany: "Probably the most cogent objection to the judicare approach to legal aid is that judicare does nothing except give service to the individual client. It does not effectively provide for law reform, for community action, or for community education"; *Klauser/Riegert*, Legal Assistance in the Federal Republic of Germany: Buffalo L. Rev 20 (1970/71) 583, 604.

[71] See *Klauser/Riegert* (*supra* note 70), and *Johnson, Jr.*, Equal Justice 133, 184 to 194.

[72] See note 50 *supra*, and generally, *Johnson, Jr.*, Justice and Reform – The Formative Years of the OEO Legal Services Program (1974), for a complete and thorough history of the early years of the Legal Services Program.

[73] For a more detailed discussion, with references, see *Gordley*, Equal Justice 77, 114–128.

settle their grievances, but the American system sought to go much beyond that. Test cases, lobbying, and other law reform activities were essential components of this approach. Further, the offices were small and typically located in poor communities to facilitate contact with the poor and to minimize the barriers of class. Above all, attorneys were supposed to understand the culture of poverty and help the poor understand what their legal rights were. Indeed, attorneys often helped to organize the poor to present their interests more effectively inside and outside the courts.

The advantages of this approach over that of judicare are obvious. It clearly attacks the barriers to access other than simply that of costs. In particular, this system can attack the problems of the personal competence of the poor and can support their "diffuse," class interests as poor people. The staff attorney office, moreover, can secure for itself the advantages of repeat-player litigants since it can itself acquire the expertise and experience in those areas and problems which are typical of the poor. Of course, the poor as individuals would generally be unable to secure such advantages. In sum, besides just handling the individual claims of the poor, the American model creates an effective advocate for the poor as a class.

The disadvantages or limits of the staff attorney approach in fact stem mainly from its very ability to create such an advocate. It is apparent, first, that the more glamorous nature of test cases and law reform actions can lead the staff attorney to neglect the interests of a particular client. Indeed, staff attorneys must every day decide how best to allocate their limited resources between cases important only to individuals and cases important from a social perspective, and there is always a chance the individuals will be neglected. Second, many people feel that the notion of an attorney setting himself up as an advocate for the poor and, in fact, treating the poor as unable to pursue their own interests, is overly paternalistic. Treat the poor, they would argue, simply as normal individuals with less money.

Probably an even more serious problem of the staff-attorney, "war-on-poverty" approach to legal aid is that it relies on government support for activities often directed against the government. This reliance presupposes that a society has a basic agreement that any legal device to help the poor is desirable even if it means challenging governmental action and the actions of the dominant groups in the society. The United States, for example, seemed to have a basic agreement about the need to eradicate poverty, but, in fact, the American legal aid attorneys, unlike those in England, France and Germany, were under continual attack[74]. Only recently, after a very diffi-

[74] A recent commentator observed about the Legal Services Program: "It seems as though the programs fought with just about everyone and everything." *Klaus*, Civil Legal Services for the Poor, in: *Schwartz* (*supra* note 24). For instance, one vocal opponent, then Vice President of the United States *Spiro Agnew*, criticized the system precisely for the reason many supported it: "We are dealing, in large

cult legislative fight, was the Legal Services Corporation established as independent from direct governmental influence, but the new law contains many rules intended to forbid or limit law reform activity on the part of legal services attorneys[75]. In light of this recent history in the United States, it cannot be surprising that aggressive activity for the poor through staff attorney offices in other countries is exceedingly difficult[76]. Certainly, the ability of this system to break down many barriers to access makes it worth serious consideration as a model legal aid system, but it is far from being itself the perfect solution.

Indeed, the utility of the salaried staff attorney solution, if not combined with other solutions, is further severely limited by the fact that, unlike judicare systems utilizing the private bar, the staff attorney systems cannot guarantee legal aid as an *entitlement*. There simply cannot realistically be enough staff attorneys to give first-rate individual service to all the poor with legal problems[77]. Similarly, and no less importantly, there clearly cannot be enough staff attorneys to extend legal aid beyond the "poor" to the middle classes, a development which is a distinct, fundamental feature of the most advanced judicare systems.

c) Combined Models

Recognizing the limitations in both of the major models of legal aid systems, a few countries have recently chosen to combine them into a new system[78]. Sweden[79] and the Canadian Province of Quebec were the first to

part, with a systematic effort to redistribute societal advantages and disadvantages, penalties and rewards, rights and resources." *Agnew*, What's Wrong with the Legal Services Program: Am. B. Ass. J. 58 (1972) 930.

[75] Legal Services Corporation Act of July 14, 1974, Pub. L. No. 93–355, § 1007 (a), (b), 88 Stat. 378. For example, the Act states that no funds may be expended "to undertake or influence the passage or defeat of any [government] legislation"; no legal service lawyers may engage in "any political activity"; and no legal service lawyers may engage in activity to organize a group. Indeed, at the present time it is impossible to predict the success of the new legal services corporation as finally established. See *Klaus* (*supra* note 74).

[76] The most striking example of this problem is the Indonesian staff attorney program, the Legal Aid and Public Defender Bureau, which was established in Jakarta in 1970. As a result of its activities on behalf of the poor, the Director of the Bureau, *Adnan Buyung Nasution*, was imprisoned without charge from early 1974 until near the end of 1975. See also note 81 *infra*.

[77] One American commentator, for example, estimated in 1971 that "it would be necessary to provide 137,000 American attorneys for the poor, rather than the present just over 2,000, if legal representation were to be furnished at the level available to the general population"; *Downie, Jr.*, Justice Denied – The Case for Reform of the Courts (1971) 105.

[78] For a more detailed discussion, see *Cappelletti*, Equal Justice 525–628; *Johnson, Jr.*, *ib.* 233–236.

[79] Public Legal Aid Law of May 26, 1972 (*supra* note 52). The statute is trans-

offer clients the choice between representation by staff attorneys or by regular private attorneys[80]. These combined programs, it should be noted, differ somewhat in their structures. The Swedish system, in fact, leans heavily toward the judicare approach, since staff attorney offices must support themselves from attorneys' fees paid by the state on behalf of assisted individuals, while in Quebec the law offices are supported directly by the government regardless of how successfully they compete with private firms. In Quebec, therefore, the legal offices should have less of a tendency to focus only on individual claims, and more of a possibility to be advocates for the poor as a group. The possibility of choice in both programs, however, has opened up a new dimension in legal aid and advice. Ideally, this combined model can allow individuals to take advantage of the individualized services of a regular (private) attorney or to employ staff attorneys closely attuned to the problems of the poor. Also ideally, the poor as a group as well as poor individuals can benefit from these combined models.

Modern reformers are seeking these advantages in a growing number of areas, including Australia[81] and Great Britain[82]. The increasingly important British "Neighbourhood Law Centres" are particularly notable. The salaried solicitors locate in poor areas – mostly around London – and perform many of the tasks performed by the staff attorneys in the United States: "they have sought ways to see some of the problems that come to them not merely as individual problems but also as community problems."[83] This

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lated and annotated by *Bruzelius/Bolding*, Equal Justice 525–561. See also *von Hoffmann/Siehr*, Recht des Schwächeren: RabelsZ 39 (1975) 522, 526.

[80] Legal Aid Act, 21 Eliz. 2, c. 14 (Quebec 1972).

[81] Australia's federal government established a salaried legal services agency in 1973 to supplement the judicare system. According to *Taylor*, Austral. Report 20 f., however, the organized bar has sought to severely circumscribe this agency's activities.

[82] Recent British developments are described in *Parington*, The Development of Legal Services in Britain – Current Pressures for Reform (unpublished paper prepared for the October 1975 Bielefeld Conference on Sociological and Legal Developments in Legal Aid and Advice). In particular, there are now about 15 of the Law Centres. The first began its activities in 1970 and the rest have been formed since 1973. Each office has from one to four full-time lawyers, and a few even have a barrister working full time. The centres are funded by various sources, including local authorities, legal aid, private charitable foundatons, and the Lord Chancellor's special law centres' fund. See *Zander/Russell*, Law Centres Survey: Law Society's Gaz. 73 (1976) 208.

It can also be noted that since 1971 there have been "law shops" in many places in the Netherlands. These offices are primarily staffed by students and young attorneys, and they apparently attempt to provide services such as the American neighborhood law offices. See *Houtappel*, Dutch Report [1975] 23 f.

[83] See *Partington* (*supra* note 82) 10. It should be noted that, in order to reduce competition with solicitors, Law Centres are prohibited from becoming involved in matrimonial issues or issues involving the buying and selling of houses; *id.* at 5.

reform is thus an explicit effort to supplement the judicare system and remedy its most profound defect.

Sweden, in addition, has pioneered further important developments. First, she goes much beyond other countries, including France, in extending legal aid to the middle classes. As of October 1975, for example, a person earning 77,600 Swedish crowns per year (about 19,000 American dollars) would be eligible to get some legal aid[84]. This figure is automatically adjusted to keep up with the cost of living. In addition, a combination of private insurance and legal aid has filled a major gap existing in most European systems. In virtually all countries where the "winner-takes-all" system prevails, legal aid will not generally assume the duty of reimbursing the unassisted winner for his costs, even though the loser is very poor. Thus, the adversary of the poor litigant may incur financial hardship, since it is unlikely that he can recover his costs from his adversary[85]. In Sweden, however, about 85 percent of the population has legal insurance which covers, *inter alia*, most of the costs of *losing* a lawsuit[86]. Hence, the winner can easily recover his costs from the insured adversary, although the latter may be poor. Obviously, this is an important access development, which combines with Sweden's other innovations to make the legal aid system more effective.

d) The Legal Aid Solution: Strengths and Limitations

Admittedly, extremely important measures have been enacted in recent years reforming legal aid systems; access-to-justice barriers have begun to come down. New experiments in legal aid, which, as we have seen, are now taking place, can further diminish these barriers. Legal aid, however, cannot be the only focus for access-to-justice reform. The combination with legal insurance is already one indication of a movement beyond traditional legal aid.

There are serious limits to the legal aid approach. First, in order for the system to be effective, legal aid schemes (even when integrated with insurance) require that a large number of lawyers be available for legal aid

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[84] See *Bolding*, Swed. Report 4. This figure is reached by multiplying by eight the *basic amount* – a figure defined by law and reconsidered and changed by law each month – of Oct. 1975, which was 9,700 Swedish Crowns.

[85] This problem, however, is dealt with at least partially by some legal aid systems. In England, for example, according to a 1964 reform now embodied in the Legal Aid Act of 1974, § 13, a prevailing unassisted party may be given his costs out of the legal aid fund if, *inter alia*, it is shown that "the unassisted party will suffer severe financial hardship unless the order is made." See also *Zander* (*supra* note 17) 370–374.

[86] See *Bruzelius/Bolding*, Equal Justice 566 f.; *von Hoffmann/Siehr* (*supra* note 79) 526.

work. This problem is aggravated in developing countries, since not only do they have relatively few lawyers as a rule, but also a large proportion of the population is impoverished and would qualify for any legal aid scheme[87].

Second, legal aid relies basically on the quite expensive approach of providing legal services through lawyers who primarily utilize the regular court system. Attorneys are highly trained individuals, and to obtain their services for litigation requires a relatively high compensation either by individuals or the state. In market economies, as we have noted, the inescapable fact is that without adequate compensation, legal services for the poor tend to be in fact poor. In view of the cost of lawyers, it is not surprising that, to date, very few societies have even tried to meet the goal of providing an adequate attorney to anyone for whom the cost is too heavy an economic burden[88]. Sweden, with probably the most expensive legal aid system *per capita* in the world, has been characterized by one observer as the only system that really attempts to give legal aid to anyone who cannot afford legal services in a particular case although he does not qualify as poor[89].

Third, legal aid even at its best can hardly solve the problem of small claims brought by individuals. Not surprisingly, since even an individual who can afford an attorney's services often cannot economically prosecute a small claim, government-paid attorneys are not usually given the uneconomic luxury of handling small individual claims[90]. Once again, the problem of small claims calls for special attention.

Finally, while the staff attorney model is capable of vindicating the diffuse interests of the poor as a class, other important diffuse interests such as those of consumers and environmentalists may be ignored. Creating mechanisms to represent such interests, in fact, became the basis of another important wave of reforms, discussed below.

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[87] This problem is especially critical in Africa. See *Johnson, Jr.*, Equal Justice 643, 644–648.

[88] Indeed, the criticism often made of legal aid systems is their neglect of the members of the middle classes who may need legal aid; see, *e.g.*, *Baumgärtel* (*supra* note 17) 118 f., 159 f.; *Baur*, Armenrecht und Rechtsschutzversicherung: JZ 1972, 75, 75–77; *Bender/Strecker*, German Report 8; *Klaus* (*supra* note 74).

[89] See *Johnson, Jr.*, Equal Justice 233 f.

[90] For example, legal assistance tends to be unavailable for small claims in the English county courts and the German *Amtsgerichte*. See *Gordley*, Equal Justice 105 f. and nn. 65–68. It is also unavailable for the Swedish small claims courts, discussed *infra* at section III 3 b (4). See *Bolding*, Swed. Report 5. The only time legal aid becomes feasible is when small claims are used by poverty lawyers as "test cases".

2. *The Second Wave: Representation for Diffuse Interests*

A second movement toward access-to-justice reforms addressed the problem of the representation of group and collective – "diffuse" – interests other than merely those of the poor. In the United States, in fact, where these newer reforms are still probably most advanced, this movement followed chronologically the great quinquennium (1965–1970) of reform and concern in the area of legal aid.

Unlike the movement for the reform of legal aid, however – which, even though it might ultimately aim at the poor as a class, focuses primarily on the provision of attorneys to *individuals* – the movement in the Western world for the protection of diffuse rights has increasingly forced a rethinking of the very basic traditional notions of civil procedure. Indeed, a real "revolution" in civil procedure is taking place, which we should examine briefly before describing more specifically the principal approaches which have emerged from this second wave of reforms[91].

The traditional conception of civil procedure left no room for the private, non-governmental protection of diffuse rights. Litigation by private parties was seen as merely a two-party affair, aimed at settling a controversy between the parties about their own individual rights. Diffuse rights, on the other hand, cannot be fit into that scheme; they tend to belong to no one or to everyone. Thus, under the traditional scheme, no one or, at the most, only the government was entitled to seek the enforcement of a diffuse right; certainly no private party had standing to sue on behalf of a group which collectively experienced the diffused harm.

The reforms discussed below – under the headings of the "private attorney general" and the "organizational private attorney general" (see *infra* sections III 2 b and c) are the evidence and results of the rapidly evolving changes which have characterized this second wave. With respect to standing, legislative reforms taking place tend to allow private individuals and groups to act as champions of diffuse interests. Indeed, the courts themselves are also increasingly recognizing, and even fostering, this development, as evidenced by a number of decisions in the 1970's in the United States (despite a recent backlash by the Burger Supreme Court)[92], by the

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[91] For a detailed comparative treatment of the themes discussed in this section, see *Cappelletti*, Vindicating the Public Interest; *id.*, La protection d'intérêts collectifs (*supra* note 3).

[92] See, *e.g.*, *United States* v. *SCRAP*, 412 U.S. 669 (1973), holding that a group of Washington, D. C. students had standing to challenge a regulatory order upholding a surcharge on railroad freight weights affecting the transportation of recyclable materials. The backlash is evident in such cases as *Warth* v. *Seldin*, 95 S. Ct. 2197 (1975), denying standing to groups challenging a zoning law on the ground that they were excluded from living in the community by the law's provision.

widely-heralded 1973 "*Italia Nostra*" decision in Italy[93], and by the important 1973 decision of the administrative court of Bavaria granting standing to an environmental association that requested a court order to stay the construction of a hotel[94].

Besides radical changes in the doctrine of standing, the protection of diffuse interests has made necessary a transformation of such basic concepts as "notice" and the "right to be heard". Since often not every possessor of a diffuse interest can be brought to court – for instance, all those interested in clean air in a region – there must be an "adequate representative" to act on behalf of the collectivity, even though the members of the collectivity are not individually "served". Also, to be effective, the decision must usually be binding for all the members of the collectivity, even though not all are given an actual opportunity to be heard. Thus, another traditional notion, that of *res judicata*, must be modified in order to allow the effective judicial protection of diffuse rights. The American class action device, discussed below, which under certain circumstances allows an action to bind absent members of a class despite the fact that the members were never given individual notice of the action, exemplifies the striking dimensions of the change in civil procedure[95]. The individualistic vision of procedural due process is steadily giving way to, or merging with, a social or collective conception of due process; only such a transformation can assure the judicial vindication of diffuse interests[96].

a) The Governmental Approach

Although still the principal method for representing diffuse interests – largely because of the traditional reluctance to give standing to private individuals and groups acting on behalf of those interests – the "govern-

[93] Consiglio di Stato, March 9, 1973, no. 253, Foro It. 1974 III, 33, 49 = Foro Amm. 1973 II, 261. The decision gave Italia Nostra, a group formed "to contribute to the protection of the historical, artistic, and natural patrimony of the nation," standing to challenge the lawfulness of an administrative act of the province of Trento, on the ground that the act authorizing construction of a road through a park was illegal. In Italy, however, there may also be a retreat by the courts. See Consiglio di Stato, Nov. 13, 1973, no. 829, Foro It. 1974 III, 262–264, denying standing to the Association of Venician Gondoliers to challenge the closing of several canals in Venice.

[94] BayVerwGH, Feb. 2, 1973, BayVerwBl. 1973, 211.

[95] For example, even in such a conservative decision as *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), the U.S. Supreme Court held that individual notice was required only to the members of the class identifiable through "reasonable effort." This mandate would still have left four million members of the class without individual notice. See *Bennett*, Eisen v. Carlisle & Jacquelin – Supreme Court Calls for Revamping of Class Action Strategy: Wis. L. Rev. 1974, 801, 813.

[96] See *Cappelletti*, Vindicating the Public Interest 45–49; *id.*, Governmental and Private Advocates 880–884.

mental approach" has been nowhere very successful[97]. The sad fact is that in both common law and civil law countries the governmental institutions which, according to their traditional role in protecting the public interest, should assume that burden, are by their natures unable to do so. The civil law *ministère public* and his analogues, including the German *Staatsanwalt* and the Soviet *Prokuratura*, are unable to expand their traditional roles and incapable of fully assuming the defense of the newly emerged diffuse rights. They are too susceptible to political pressure, whereas diffuse rights frequently have to be vindicated against political entities. Also, the *ministère public* and his analogues are unable by training or expertise to vindicate effectively the new rights, which frequently require technical expertise in such non-legal areas as marketing and urban planning, accounting and banking, chemistry and construction. Although there are signs that the common law attorneys general, at least in the United States, are assuming a greater role in protecting the diffuse interests, they too have been unable to carry the burden in a satisfactory way[98]. Even more than the civil law *ministère public*, for example, the attorney general is a political officer, severely limited in his ability (and often his will) to adopt the independent role of a "people's advocate" against powerful components of the "establishment" and against the state itself.

Other governmental solutions to the problem – in particular, the creation of public agencies highly specialized in such areas as those previously mentioned, to enforce the rights of the public or other diffuse interests in those areas – are very important but themselves limited. Recent history suggests that they have, for a number of reasons, apparently unavoidable weaknesses[99]. Public agencies tend to be responsive to organized interests with a stake in the outcome of an agency's decision, and those interests tend to be predominantly those of the very entities which the agency is supposed to control. The diffuse interests, on the contrary, such as the interests of consumers and environmentalists, for reasons already mentioned (section II 3 *supra*), tend not to be organized into the coherent groups needed to influence these agencies[100].

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[97] For detailed treatment of this subject see *Cappelletti*, Governmental and Private Advocates 800–847. The discussion in this section is largely based on that research.

[98] See *Cappelletti*, Vindicating the Public Interest 14 f. and n. 40.

[99] See *Cappelletti*, Vindicating the Public Interest 18 f. with n. 52; *id.*, Governmental and Private Advocates 842–844; *Kötz*, in: *Homburger/Kötz*, Klagen Privater im öffentlichen Interesse (1975) 69, 96 f. and n. 60; *Stewart*, The Reformation of American Administrative Law: Harv. L. Rev. 88 (1974/75) 1667, 1685 f.

[100] In the United States, for example, one should not overestimate the recent great increase in the number and strength of "lobbies" for the public (diffuse) interest. "The advances made by public interest and consumer lobbies should ... be kept in perspective. The best financed and staffed of the lot, Common Cause, still

Given the limitations of governmental protection of diffuse interests, the need, which will be analyzed in the next sections, has been to supplement governmental action with the initiative of private parties, especially organized private groups, acting for the public interest. It must be recognized, however, that even reforms which make governmental agencies and institutions more effective are helpful. The most notable of these reforms are those that can be characterized as the "specialized governmental attorney general solution"[101].

A most recent example of experimentation with specialized governmental agencies in the United States is the new institution of the "public advocate"[102]. The leading experiment, which began in 1974, is the New Jersey Department of the Public Advocate, which is mandated, *inter alia*, to "represent the public interest in any such administrative and court proceedings ... as the Public Advocate deems shall best serve the public interest"[103]. A most interesting proposal for a similar reform in Wisconsin, discussed in more detail below, reveals the theoretical basis for these reforms:

> "[T]here is an imbalance in advocacy which, in many cases, can only be corrected by government paid lawyers representing the unrepresented interests of consumers, the environment, the elderly, and other similarly unorganized interests. A 'public advocate' must speak for these interests if they are to be heard at all."[104]

The basic aim, therefore, is to make the specialized governmental agency represent interests that governments to date have tended to overlook.

The Consumer Ombudsman in Sweden[105], which now has analogues else-

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spends only about 0.1 percent of the estimated 1 billion dollars expended by all Washington lobbies, and employs less than 0.2 percent of the combined 50,000 persons employed by Washington-based trade associations"; *Stuart*, The New Lobbyists – Persuaders in the Pubic Interest: Christian Science Monitor of Oct. 10, 1975, 18 f.

[101] See *Cappelletti*, Vindicating the Public Interest 15–19.

[102] According to *Johnson, Jr., et al.*, U. S. Report 14, "Some of the most effective of these [agencies] are located in Connecticut (Office of Consumer Counsel), New Jersey (Office of the Public Advocate), Maryland (Office of the People's Counsel), and the District of Columbia (Office of the People's Counsel). But California, New York, Indiana, Montana, Missouri, and Vermont all have variations on the theme of small offices of consumer or public counsel."

[103] N.J. Stat. Ann. § 52: 27E–29 (Supp. 1975). This law (N. J. Stat. Ann. § 52: 27E–1 to 52:27E–27; Supp. 1975) establishes within the Department of the Public Advocate an "Office of Inmate Advocacy," a "Decision of Citizen Complaints and Dispute Settlement," and the "Division of Public Interest Advocacy," whose jurisdiction is described in the quoted statutory provision.

[104] See *Center for Public Representation* (*supra* note 39) at 10.

[105] See *King*, Consumer Protection Experiments in Sweden (1974) 3–18; *Bernitz*, La protection des consommateurs en Suède et dans les pays nordiques: Rev. int. dr. comp. 26 (1974) 543, 556–559, 573–576; *Sternberg*, L'ombudsman suédois pour les consommateurs: *ib.* 577.

where[106], is another example of an advanced "specialized attorney general" device, with the aim to represent the collective, fragmented interests of consumers. This institution, created in 1970, is empowered to bring lawsuits before the "Market Court" to prevent improper marketing and advertising practices. In addition, the Consumer Ombudsman, also acting on behalf of consumers as a class, negotiates standard contract clauses with the Swedish business community. This action clearly fills a function individuals alone could not afford and would not have the bargaining power to accomplish successfully.

As noted before, however, and discussed at some length elsewhere, the strictly governmental solution seems to have inherent weaknesses even at its best[107]. Governmental approaches, especially when utilizing specialized agencies, are very helpful, but they still do not entirely solve the access-to-justice problem of diffuse interests. Private energy and zeal must be added to the bureaucratic machinery of government, which too often becomes slow, inflexible, and unaggressive in furthering the diffuse rights.

b) The "Private Attorney General" Approach

It should be noted briefly that the allowance of individual private actions for the public or collective interest is itself an important reform[108]. Even if, for one reason or another, the barriers to group or class standing are left intact, it is an important first step to allow some "private attorneys general"[109] or "ideological plaintiffs"[110] to supplement governmental action.

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[106] *Norway* has had a consumer ombudsman since 1973; see *Graetz,* Les chevaliers de la consommation: J. D'Europe of Nov. 6, 1973, at 26. *Denmark* too has recently created a consumer ombudsman very much like that of Sweden. See the Danish Marketing Practices Act, No. 297 of June 14th, 1974; *Pederson,* Les moyens judiciaires de la protection des consommateurs au Danemark, at 2, 9–11 (unpublished paper prepared for the Dec. 10–12, 1975, Colloquium in Montpellier, France, on "Les moyens judiciaires et para-judiciaires de la protection des consommateurs").

Also of interest is the somewhat analogous *British* Director-General of Fair Trading, whose office was established in 1973. See *Borrie,* New Developments in Procedures for the Protection of Consumers in England, at 7 f. (unpublished paper prepared for the Colloquium in Montpellier).

[107] See note 97 *supra.* Further, the political independence of these activist governmental agencies remains a potential problem, just as it is for aggresive publicly-salaried legal aid lawyers. See notes 74–76 *supra* and accompanying text.

[108] See for more detailed treatment of this subject, *Cappelletti,* Governmental and Private Advocates 848–856.

[109] Apparently, the now widely-used term "private attorney general" was coined by Judge *Jerome Frank;* see *Associated Industries* v. *Ickes,* 134 F. 2d 694, 704 (2d Cir. 1943).

[110] This suggestive terminology was developed by *Louis Jaffe* to contrast these plaintiffs with "Hohfeldian" plaintiffs. A "Hohfeldian" plaintiff – the traditional civil plaintiff – brings to court discrete and individualized rights, while an "ideolog-

Typical modern reforms in this direction have been the allowance of citizen actions to challenge and stop a particular governmental practice. Groups may in fact be involved to finance such individual actions as test cases. There are a number of examples in the field of environmental protection, including the allowance of citizen actions to enforce the Clean Air Act of 1970 in the United States[111]. The Italian law of 1967 which allows "anyone" to bring suit against the illegal granting of a building permit by municipal authorities is another example concerning the environment[112]. The same approach is evident in the German *Land* of Bavaria, where a *Popularklage* (citizen action) can be brought by anyone before the Bavarian Constitutional Court against *Land* legislation violative of the Bill of Rights contained in the 1946 Bavarian Constitution[113].

c) The "Organizational Private Attorney General" Approach

(1) A First Level of Reform: The Recognition of Groups

The more sophisticated reforms, however, recognize the need to allow group actions in the public interest – "the organizational private attorney general solution"[114]. Further, given the possible abuses of more or less powerful groups organized on behalf of diffuse interests which may not themselves be able to control those groups, public (governmental) checks and controls over this form of representation have been evolving.

Recognizing the usual laxity of the *ministère public* in protecting newly-emerged group and public interests, *France* has recently enacted reforms of

ical" plaintiff brings aggregate or collective interests and concerns; *Jaffe*, The Citizen as Litigant in Public Actions – The Non-Hohfeldian or Ideological Plaintiff: U. Pa. L. Rev. 116 (1967/68) 1033.

[111] U.S. Clean Air Act of 1970, 42 U.S.C. § 1857 *et seq.* (1970). Any citizen may sue any polluter, including governmental agencies, for a failure to comply with the act. There is no need to show any direct personal harm to the plaintiff.

[112] Art. 10 para. 9 of the Law of Aug. 6, 1967, no. 767. A restrictive judicial interpretation has weakened the broad mandate of the law, but nevertheless anyone in the area of the illegal conduct has standing to sue; see Consiglio di Stato, June 9, 1970, no. 523, Foro It. 1970 III, 201 = Giur. It. 1970 III, 193. See also *Vigoriti*, Ital. Report 36.

[113] This citizen action was created by § 54 of the Bavarian law of July 22, 1947, No. 72, on the Bavarian Constitutional Court, BayGVBl. 1947, 147. For numerous other examples, see *Cappelletti*, Governmental and Private Advocates 877–879 and nn. 369–381; add Brazil, which allows citizen action to challenge conduct of the public administration or publicly-financed institutions which causes damage (either property, economic, aesthetic, artistic, or historic damage) to the public welfare; Law of June 29, 1965, no. 4717, Código de Processo Civil 1976, 473.

[114] This term refers to a private (non-governmental) organization that represents public or collective interests. See *Cappelletti*, Governmental and Private Advocates 856–880.

great significance. The December 27, 1973 statute, commonly known as the *loi Royer*, granted standing to associations of consumers to sue in case of "facts directly or indirectly detrimental to the collective interest of the consumers"[115]. In addition, the *loi* provided for a series of controls to insure that the associations authorized to bring suit in fact adequately represent the collective interest of consumers[116]. Such controls are in part entrusted to the *ministère public* itself. France has also recently taken a very similar approach for the protection of racial minorities[117]. Again, the theory is that representative groups can enforce the collective rights that the *ministère public* has been ineffective in vindicating.

Similarly, the *Swedish* Consumer Ombudsman institution, discussed *supra*, does not have the exclusive power to bring proceedings before the Market Court[118]. Consumer associations also have standing to commence such cases. Thus even the Consumer Ombudsman can be supplemented and prodded by private groups acting for the public interest.

In the *Federal Republic of Germany*, pursuant to the Law Against Unfair Competition, consumer associations have been granted standing since 1965 to sue for injunctive relief to stop unfair competition with adverse effects on consumers' interests[119].

Another significant institutional device for allowing private groups to act for the public interest is the relator action, used especially in the common law countries of Great Britain and Australia[120]. This action, it should be noted, is available to both individuals and groups, but for obvious rea-

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[115] Loi no. 73–1193 of Dec. 27, 1973, art. 46, J. O. 1973, 14139 = D. S. Lég. 1974, 30, 35 = B. L. D. 1974, 30 (*"loi Royer"*). – An earlier *Belgian* law allowing actions to enforce the law by consumer associations is the Loi no. 415 of July 14, 1971, Mon. Belge 1971, 9087.

[116] Before such authorization under the *"loi Royer"* is granted – to a duly certified association whose charter expressly declares its purpose of protecting consumers – an opinion of the *ministère public* must be considered, as well as the association's representativeness at the local and national level.

[117] Loi no. 72–546 of July 1, 1972, "concerning the fight against racism." Art. 5 II grants standing to act as *partie civile* to "every association that has been duly certified at least five years before the time of the facts, whose purpose, as set out in its charter, is to fight against racism."

[118] § 6 of the Marketing Practices Act of June 29, 1970, SFS 1970:412, and § 3 of the Contract Terms Act of April 30, 1971, SFS 1971:112. See also *Cappelletti*, Governmental and Private Advocates 846 f.

[119] See Law Against Unfair Competition, § 13 (1a); *Schricker*, Entwicklungstendenzen im Recht des unlauteren Wettbewerbs: GRUR 1974, 579; *Hefermehl*, Die Klagebefugnis der Verbände zur Wahrnehmung der Interessen der Verbraucher: GRUR 1969, 653; *Bender/Strecker*, German Report 66.

[120] For more detail and some references concerning the relator action, see *Cappelletti*, Governmental and Private Advocates 848–852. Also see *Dickens*, Public Interest Litigation – Relator and Representative Actions: Legal Action Group Bull. 1974, 273.

sons groups seem to have been most active in using this device to protect diffuse rights. To summarize briefly, the relator action is an action brought by a party who otherwise would have no standing to sue but who obtains the permission, or "*fiat*," of the attorney general to do so. Public interest actions by private groups are thus allowed under the (more theoretical than real) supervision and control of the attorney general.

(2) A Second Level of Reform: Beyond Existing Groups

The reforms just mentioned go far in recognizing the important, indeed essential role of private groups in supplementing, catalyzing, and even substituting for the actions of governmental agencies[121]. They still, however, do not address the problem of *organizing* effective groups to support diffuse interests.

While certain interests, such as labor interests, are generally well-organized, others such as those of consumers or environmentalists are not. The barriers pointed out earlier[122] have too often not been surmounted, especially in the poorer countries. At best, it costs considerable money and effort to create an organization of sufficient size, economic resources and (legal and other) expertise to represent effectively a diffuse interest. In Sweden and Germany, for example, according to the Florence Project reports, few consumer organizations have taken advantage of opportunities to initiate actions[123]. Further, the companies against which such lawsuits are to be brought are repeat players, ongoing business organizations which not only tend to have more financial resources available, but also, as we have noted, are the most effective advocates for their interests[124]. It remains, therefore, to find solutions which *facilitate* the creation of effective organizational private attorneys general. Our main focus here is on developments in the United States, since, for various reasons, such developments there appear to be most advanced[125].

(I) Class and Public Interest Actions, and the Public Interest Law Firms. – The devices of class and public interest actions, with their limits and

[121] See section II 3 *supra*.

[122] "[T]hese associations (when they exist) lack the necessary means, as much material and scientific as juridical, to undertake serious and lasting actions and to make their voices heard by polluters and by the administration"; *Blanc-Jouvan/Zajtay*, Rev. int. dr. comp. 27 (1975) 920, 923 (summarizing the London Colloquium of Aug. 28–31, 1975, on the subject of, *inter alia*, "The Participation of Citizens in Designing and Enforcing a Policy for the Protection of the Environment").

[123] See *Hellner/Eisenstein*, Swed. Report [1976] 20. On Germany, see *von Falckenstein*, Wettbewerbsrechtlicher Verbraucherschutz in der Praxis, in: Gewerblicher Rechtsschutz, Urheberrecht, Wirtschaftsrecht, Mitarbeiterfestschrift Eugen Ulmer (1973) 307; *Bender/Strecker*, German Report 67.

[124] See section II 2 c *supra*.

[125] See *Cappelletti*, Vindicating the Public Interest 31–38.

potentialities inside and outside the United States, are discussed in some detail elsewhere[126], but a few of their particular traits will be highlighted here. First, the class action enables a group to organize for one particular lawsuit, thus saving the costs of creating an ongoing organization. The economies of scale from the aggregation of small claims are thus available, and clearly the bargaining power is strengthened greatly for members of the class by the threat of a huge damage liability for the other party[127]. With the device of the contingent fee, where available, the work of organizing is encouraged financially for attorneys, who may thus obtain large attorneys' fees[128]. The class action device, therefore, aside from its other important functions, helps organize public interest claims to give them effective access to justice.

Class and, more generally, public interest actions, however, often require the expertise, experience and resources in specialized areas that only well-staffed and wealthy groups possess. Many class action attorneys may be unable to provide such expertise and may not have sufficient resources to purchase it. Moreover, the monitoring of public decisions can be done by ongoing groups far better than one-shot classes. These are the main reasons for the insufficiency of the class action device.

The new American institution of "*public interest lawyers*" goes far to supplement the class action device to insure that public and group interests are given the same representation that is available to interests supported by well-organized ongoing groups[129]. The theoretical justification for the emergence and growth of public interest law firms in America since 1970 is precisely that which we have been addressing:

> "The public interest lawyers believe that the poor are not the only people excluded from the decision-making process on issues of vital importance to them. All people concerned with environmental degradation, with product safe-

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[126] *Cappelletti*, Vindicating the Public Interest 27–32. See also *Homburger*, Private Suits in the Public Interest in the United States of America: Buffalo L. Rev. 23 (1974) 343 = *Homburger/Kötz* (*supra* note 99) 9–68.

[127] On the economic advantages of the class action device, see *Posner*, Economic Analysis of Law (1972) 348–351; Note, The Cost Internalization Case for Class Actions: Stan L. Rev. 21 (1968/69) 383. See also *Calabresi*, The Costs of Accidents – A Legal and Economic Analysis (1970) 205.

[128] See *Johnson, Jr., et al.*, U. S. Report 88 f. *Kötz* (*supra* note 99) 86–88, in fact, argues that the contingent fee system is essential to the utility of the class action device, and that, accordingly, since the contingent fee system is unacceptable in Europe, class actions will never there be favored. This suggestion, however, is not persuasive since, even without a contingent fee system, there can be other financial inducements to a class suitor and his lawyers. See *Cappelletti*, Governmental and Private Advocates 875 f. n. 365.

[129] See generally *Ford Foundation*, Public Interest Law: Five Years Later (1976); *Johnson, Jr., et al.*, U. S. Report 100–111.

ty, with consumer protection, whatever their class, are effectively excluded from key decisions affecting their interests."[130]

These interests, as we have noted, have not been able to find representation in effective organizations. Several groups of (private) lawyers, then, have organized themselves into "public interest law firms" to fill the need for such effective organizations and to become the advocates of those interests.

Public interest law firms vary greatly in size and type of caseload[131]. The most common type of firm is a non-profit organization funded by philanthropic organizations. The first such firms were funded in 1970 by the Ford Foundation; by early 1975, although there were never more than a few dozen such firms, public interest lawyers had several hundred major cases in litigation, and many others had been concluded. These firms had also intervened in many administrative proceedings and other important non-litigative activities. This institution, by providing expert legal counsel and constant oversight on behalf of unrepresented, unorganized interests, acts to bolster existing groups and substitutes for groups not even formed.

Public interest lawyers have been criticized, with some justice, as unaccountable to the public[132]. There are also serious doubts about this institution's long-term viability[133]. Nevertheless, the public interest lawyers in the United States continue to do their important work, and have already accomplished much[134]. The institution may or may not be exportable[135],

[130] *Halpern,* Public Interest Law – Its Past and Future: Judicature 58 (1974) 119, 120.

[131] The basic types of public interest law firms, their activities, and their fields of interest are described in *Ford Foundation* (*supra* note 129) 14–28.

[132] In particular, they have been charged with having a "middle-class" bias and with being unaccountable for their actions; see, *e. g., Cahn/Cahn,* Power to the People or the Profession? – The Public Interest in Public Interest Law: Yale L. J. 79 (1969/70) 1005. See generally *Ford Foundation* (*supra* note 129) 28–32. One should not, however, conclude that there are no constraints on public interest lawyers pursuing their ideological interests. See *Rabin,* Lawyers for Social Change – Perspectives on Public Interest Law: Stan. L. Rev. 28 (1975/76) 207, 231 f. n. 77: "The foundation-funded firm must articulate its policy and clear its cases with a board of trustees that typically consists of prestigious establishment lawyers who are not very far removed from the political mainstream of the practicing bar. Similarly, foundation officers are highly sensitive to criticism that they are promoting causes that lack any meaningful amount of public support. ... Finally the public interest firms are sensitive to media criticism, recognizing that their greatest vulnerability is to publicity that tarnishes the populist image they strive to maintain."

[133] *Rabin* (*supra* note 132) 260 f.

[134] See, *e.g., Ford Foundation* (*supra* note 129) 13–27. Indeed, the organized bar in the United States, the American Bar Association, has moved from a position of hostility to public interest lawyers in recent years to one of affirming a general responsibility of the legal profession "to provide public interest legal services"; see Am. B. Ass. J. 61 (1975) 1084.

[135] Interestingly, the "Research Center for the Defense of Public Interests" in

but certainly its functions are very important, within the limits of available resources, in providing effective access to justice for diffuse interests.

(II) Public Counsel. – The success of public interest lawyers in the United States, and the obvious resource limitations of the institution, have spurred new creativity in devising governmentally-subsidized institutions to serve the public interest. The existing public advocate schemes – already discussed as examples of "specialized governmental attorneys general" – represent one such approach[136]. In between this public (governmental) solution and the private solution of public interest lawyers is an important new American solution which has been called the "public counsel"[137]. The idea is to use government resources but rely on the energy, interest, and control of private groups.

The most successful public counsel to date has been the Office of Public Counsel established in the United States under the Regional Rail Reorganization Act of 1973, which was set up to assist communities and rail service users in articulating their concerns in public hearings[138]. This governmental office actually organizes communities to recognize their legal rights. Thus the essential function has been to seek, help, mobilize, and at times subsidize, private groups which otherwise would be, at best, weak advocates for the diffuse interest of consumers of rail services. This public counsel has been quite effective because of the independent status of the office, its adequate budget, and its sensitive and well-trained staff. It remains to be seen, however, whether other such institutions will have their effectiveness limited by political pressures. The novel virtue of this institution, nevertheless, is that it can help create ongoing groups able to vindicate their own interests in the adminstrative and judicial processes.

(3) The Pluralistic (Mixed) Solution

The idea of the public counsel has been integrated with several other approaches in the best-presented American reform proposal yet made in this area. In a study prepared for the Department of Administration of the State of Wisconsin by the Wisconsin Center for Public Representation[139], the authors recommend the adoption of a public advocate as discussed above,

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Bogotá, Columbia, has recently been set up on an experimental basis. See *Ford Foundation* (*supra* note 129) 16 f.

[136] See notes 101–104 *supra* and accompanying text.

[137] *Johnson, Jr., et al.*, U.S. Report 113 f., give a number of examples of such institutions, including those in the following federal agencies: Interstate Commerce Commission, Civil Aeronautics Board, Postal Rate Commission, and the Small Business Commission.

[138] U.S.C. § 715 (d)2 (Supp. 1975). For a detailed discussion of this office, see *Block/Stein*, The Public Counsel Concept in Practice – The Regional Rail Reorganization Act of 1973: Wm. & Mary L. Rev. 16 (1974) 215.

but they also go farther. They accept the need – emphasized in a previous study within the framework of the Access-to-Justice Project[140] – for a "mixed solution," and explain this recognition as follows:

> "We have stressed, as a cardinal principle, that private representatives are the best advocates for underrepresented interests. Where there are existing private groups which are truly representative but lack the resources for effective advocacy, the proper government response is to support and develop these groups and make it as easy as possible for them to participate . . ."
>
> "On the other hand, training and assistance to citizen groups may not always serve the needs. Some interests are not, nor will they be, represented by any private group. The interest may be too diffused to allow even a small group to be organized, or there may be no existing group that can fairly be deemed representative. In such cases, public advocacy will be the preferred response."[141]

There must indeed be a "mixed" or "pluralistic" solution to the problem of representing diffuse interests. Such a solution, of course, need not be embodied in a single reform proposal. It is important to recognize, however, that, on the one hand, diffuse interests require effective private group action whenever possible, and that, on the other hand, such private groups are not always available. Hopefully, combinations of such devices as class and group actions, the public interest law firm, the public counsel, and the public advocate can go far towards giving the optimal level of access to diffuse interests.

3. The Third Wave: From Access to Legal Representation to a Broader Conception of Access to Justice: The "Access-to-Justice Approach"

The progress in enacting legal aid reforms and finding mechanisms for the representation of diffuse interests is essential to providing meaningful access to justice. These reforms will succeed – and, in part, have already succeeded – in gaining judicial protection of interests too long left without it. Recognizing the importance of these reforms, however, should not prevent us from seeing their limits. Their concern is chiefly with finding effective *legal representation* for interests otherwise unrepresented.

The "access-to-justice" approach, however, has a much wider range, although it certainly grew out of the earlier movements[142]. The "access-to-justice" approach shares the earlier concern for representation but includes it within a broader perspective; it goes *beyond advocacy* whether inside or

[139] *Center for Public Representation* (*supra* note 39).
[140] See *Cappelletti*, Governmental and Private Advocates 880–884.
[141] See *Center for Public Administration* (*supra* note 39) 15 f.
[142] *Cf. Storme, infra* p. 759s.

outside of the courts, and whether through governmental or private advocates[143]. Its focus is on the full panoply of institutions and devices, personnel and procedures used to process, and even prevent, disputes in modern societies. We call it the access-to-justice approach because of its overall scope; its aim is to examine comprehensively the multi-faceted means for the practical implementation of the basic social right to access.

a) Advantages of this Approach

The type of thinking promoted by the "access-to-justice" approach can be understood by a short discussion of some of the advantages which can be gained by it. First, as we have noted, this approach encourages the exploration of a wide variety of reforms, including, *inter alia*, changes in forms of procedure, changes in the structures of courts or the creation of new courts, the use of lay persons and paraprofessionals both in the bench and in the bar, modifications in the substantive law intended to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms. Another advantage of this approach is that it recognizes the need to relate and adapt the civil process to the type of dispute[144]. There are a number of characteristics that may distinguish one dispute from another; in particular, different barriers may be salient and different remedies effective.

By their nature disputes differ, for example, in their general complexity. It is generally much easier and less costly to resolve a simple issue of nonpayment, for instance, than an issue of fraud. Disputes differ greatly also in amount, which often affects how much individuals (and the society) are willing to expend for their resolution. Some disputes are better "avoided"

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[143] The need to go beyond representation has recently been expressed by *Lewis*, in: *Morris/White/Lewis*, Social Needs and Legal Actions (1973) 73, 95: "It is said that if we give people rights we are acting in vain unless we give them the ability to enforce them. I sympathize with this, but representation by lawyers may not be the best way of doing it."

[144] *Frank Sander* has recently described this need by distinguishing it from the general American use of administrative agencies and specialized courts: "These were essentially *substantive* diversions, that is, resort to agencies having substantive expertise. Perhaps the time is now ripe for greater resort to an alternative primary *process*." (Unpublished paper prepared for the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St. Paul, Minn., April 8, 1976.)

Similarly, according to *Bender/Strecker*, German Report 25, "in addition to the rationalization effect resulting from the division of labor and specialization, the establishment of special judicial branches has the advantage of enabling the adaptation of the procedural provisions to the particular area of the law." See also *Thery*, French Report 6.

than resolved[145]. Of course, the perceived social importance of certain types of claims also affects how resources will be allocated to dispute resolution. In addition, some disputes, by their nature, require a speedy determination, while others are suitable for lengthy deliberations.

As emphasized by modern sociological scholarship[146], the parties who tend to be involved in certain disputes ought also to be taken into consideration. First, the parties may be in a long-term, complex relationship or may only have isolated contact with each other. It has been suggested that mediation or other similar settlement devices are most appropriate to preserve ongoing relationships[147]. Parties also may differ greatly in bargaining power, expertise, or other factors listed earlier under the heading of party capability. Finally, certain types of disputes have collective as well as individual repercussions. It is necessary to see the role and importance of the different factors and barriers involved in order to design effective machinery and institutions to cope with them. The access-to-justice approach is intended to take into account all of these factors. Indeed, there is a growing recognition of the utility, and in fact the necessity, of this approach in the modern world.

b) The Use of this Approach

As already mentioned, this preliminary general report is based on a world-wide research project embodying the access-to-justice approach. It is, however, too early to detail all the types of mechanisms and reforms which have been uncovered from this comparative research. Rather, all that can be presented here is an outline of some important types of reforms being enacted, with brief examples based on successful or promising institutions actually in use in some countries and with particular reference to papers submitted to this Colloquium.

(1) Reforming General Litigation Procedures

We shall begin with a brief mention of the large number of reforms being made which apply generally to all claims brought to the normal courts.

Certainly, access to justice has been greatly furthered by reforms on the European continent in the direction of more "orality" – free evaluation of the evidence, "concentration" of the proceeding, and the "immediacy" of

[145] For the term "avoidance" and an important theoretical discussion of its use in modern societies, see *Felstiner,* Influences of Social Organization on Dispute Processing: L. Society Rev. 9 (1974/75) 63.

[146] See *Gessner,* Recht und Konflikt (1976), especially 202–235.

[147] See, *e.g., Sander* (*supra* note 144) 13; *Gessner* (*supra* note 146) 233.

contact between judges, parties, and witnesses – and the related use of active judges to seek the truth and help equalize the parties[148]. When implemented in Austria by the pioneering *Zivilprozeßordnung* of 1895, such reforms contributed to make civil proceedings (in the words of *Franz Klein*) "simple, inexpensive, quick, and accessible to the poor."[149] To descend to more recent times, the so-called *"Stuttgarter Modell"* is a fine example of involving the parties, lawyers, and judges in an active, oral dialogue which takes less time than other procedures in German courts and which leads to decisions which apparently the parties tend to understand and accept without appeal[150]. Certain aspects of the Socialist civil procedures, discussed in some detail by *Zhivko Stalev* (*infra* p. 770 s.) are also very much in this tradition of "orality," which has led to the enactment of basic access-to-justice reforms[151].

(2) Devising Alternative Methods to Decide Legal Claims

Another general way to approach legal disputes is to provide alternatives to the regular court system, which may, for example, involve a different decision-maker and/or a different style of procedure.

One such alternative is for the parties to submit their claim to an arbitrator or panel of arbitrators. Whereas arbitration is an ancient institution, an interesting access-to-justice adaptation of it has been to have the arbitrators (like the judges) paid by the state[152]. Even without that, arbitra-

[148] For a comparative analysis of the "orality movement," based on 18 national reports, see *Cappelletti*, Procédure orale et procédure écrite (1971) (general report submitted to the VIIIth International Congress of Comparative Law, Pescara 1970).

[149] *Klein*, Reden, Vorträge, Aufsätze, Briefe I (1927) 87. In 1898, for example, there was a sharp increase in the number of cases terminating in the court of second instance within six months after filing in the court of first instance. The percentage went from 1.9 percent in pre-reform cases to 48.2 percent in one district, from 3.4 percent to 68.7 percent in another, and from 7.3 percent to 70 percent in a third; *id.* at 88. See also, *e.g.*, *id.*, Vorlesungen über die Praxis des Civilprocesses (1900) 7–9 .

[150] See *Bender/Strecker*, German Report 36–44, for a discussion of the *Stuttgarter Modell* in some detail. This procedure apparently results in only one-third as many appeals as there are from judgments in courts following the regular procedures; *id.* at 41. Also, approximately 75 percent of cases in *Stuttgarter Modell* courts terminate within six months, compared to about 40 percent in the regular courts; *id.* at 44.

[151] On the relationship of these reforms to the "orality" movement, see *Cappelletti* (*supra* note 148) 81–85.

[152] This idea has been suggested seriously in Germany (see *Bender/Strecker*, German Report 51–55) and in Sweden (see *Bolding*, Swed. Report 20), and is being experimented with in France, with the new institution of the *juge-arbitre* (see *Thery*, French Report 68), and in the United States (see note 153 *infra*). The point is that the high cost of arbitration today results primarily from the fact that, unlike judges, arbitrators must generally be paid by the parties.

tion procedures, though varying widely, are often characterized by informality, speed, and (possibly) inexpensiveness. In a system in effect in Los Angeles, for example, parties may agree to submit their cases at a very low cost to a simplified, fast arbitration by volunteer lawyers[153]. Apparently, an increasing number of parties are agreeing to do so in order to save the time and expense of general litigation.

Another method to avoid the costs and time of litigation, is to encourage fair settlements of claims. One obvious and frequent way to encourage settlement is for a judge or another judicial officer to attempt to mediate between the parties[154]. This method, of course, requires that the judge remain unbiased, or, even better, that another judge does the mediating, as is done in a successful system in effect in New York State[155]. The danger if the same judge both mediates and tries the case is that the parties may feel compelled to settle rather than incur the potential hostility of the judge.

Settlements can also be encouraged by the direct manipulation of the economic factors that tend to induce settlement. The English "payment-into-court" system[156], described and severely criticized by *Zander* (*infra* p. 750 s.) certainly contributes to relieve court congestion, but it apparently does so at the expense of fairness to the plaintiffs, who are usually the economically weaker parties in payment-into-court cases[157]. We may still,

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[153] The Los Angeles system, adopted in 1971, is called the "Attorneys' Special Arbitration Plan". Its success is measured by its growing use by litigants, which has now reached 450 cases per year. See *Johnson, Jr., et. al.*, U.S. Report 59 f.

[154] Of course, this suggestion is not new, and indeed, for various reasons it has become merely an ineffective formality in many areas. See, *e. g.*, *Vigoriti*, Ital. Report 17; *de Miguel y Alonso*, Span. Report 18.

[155] The New York Conference and Assignment System, in effect since 1970, results in the settlement of about 60 percent of the cases prior to trial. The regular judges take turns trying to arrange settlements of all the cases which are ready for trial by listening to the parties and then telling them the weaknesses in their cases. If the judge does not succeed in obtaining a settlement, the case is referred to another judge for trial. See *Johnson, Jr., et al.*, U. S. Report 42–48.

[156] The "payment-into-court" system operates essentially as follows: The defendant offers a sum of money to settle the plaintiff's claim. Acceptance by the plaintiff ends the lawsuit. If the plaintiff does not accept, however, and recovers at judgment of less than the sum paid into court, the plaintiff must normally pay both his own and the defendant's (party and party) costs from the date of the "payment-in." If the plaintiff recovers more than the amount paid into court, the consequences are the same as if no payment into court had been made. See *Zander, infra* p. 750s.

[157] According to *Zander* (*infra* p. 756) "the system greatly favours the defendant who is normally the economically stronger party. In personal injury cases, which probably account for most payments into court, the plaintiff, by definition, is a private citizen. The defendant is usually an employer or an insurance company. For the plaintiff the outcome is critical; for the defendant it is normally of little account save that financial institutions are concerned to see that over a year as a whole they make a profit." See also *id.*, Payment Into Court: N. L. J. 1975, 638.

however, devise effective economic incentives which will operate to promote fair settlements. Indeed, the relatively new Michigan Mediation System operates on the same principle as the English payment into court, but it remedies the two most serious defects of the English device[158]. First, the Michigan system provides a penalty on the defendant, as well as on the plaintiff, if he refuses to accept a fair offer of settlement. Second, the Michigan system includes a mechanism for an arbitration decision, which helps both parties to rely on an objective estimate of the value of a claim. In England, in contrast, the plaintiff must rely only on his own assessment of the value of the claim, and he may be intimidated by a contrary estimate by, for example, a defendant insurance company. Thus the Michigan system is one important advance over its English counterpart.

Arbitration, mediation, and the use of economic incentives to settle are important devices to encourage or enable parties to avoid the regular court system. The advantage of these alternatives is especially clear when parties can choose them freely – or reject them. This choice preserves one's right to go to court, and the "competition" with the regular courts can help both the alternative and the regular court system to function better. Disadvantages vary greatly from alternative to alternative, and space permits no elaboration here, but some of the main general problems will be treated at the close of this section. At present, it will suffice to note that there are a growing number of experiments both in reforming procedures and in avoiding the expense and time of litigating a claim through the civil court systems.

(3) Reforming the Systems for the Delivery of Legal Services

The various new procedures and devices being used can be helped greatly by innovation in the method of delivery of legal services. The most notable reforms in this direction are the use of paraprofessionals in lieu of lawyers and the emerging systems of pre-paid and group legal services.

The use of paraprofessionals has the obvious advantage that it can reduce fees that must otherwise be paid to lawyers[159]. Similarly, pre-paid plans for legal services – in particular, legal insurance offered by private insurance

[158] The Michigan system operates as follows: In tort cases where liability is not in dispute, a panel of three arbitrators holds a hearing and reaches a conclusion as to the correct amount of damages. If the plaintiff will not settle for that amount, he must receive at least 110 percent of it as damages at trial or he will be penalized the costs of trial, a sum which includes enough to pay his opponent's attorneys' fees. In contrast to the English plan, however, the defendant must pay a similar fee if he will not settle and the recovery is more than 90 percent of the amount set by the mediation panel. See *Sander* (*supra* note 144) 24.

[159] There has recently been much discussion of paraprofessionals in the United States. See, *e.g.*, *Johnson, Jr., et at.* U.S. Report 48 f.

companies – already reduce the costs of obtaining legal services for a wide range of claims in Europe, most notably in Germany, Switzerland, and Sweden[160]. In the United States, in addition, there has been much experimentation with a slightly different system of pre-paid and group plans that will reach out to the middle classes to locate their legal problems, instruct them as to preventive measures and available remedies, and in general minister to their "legal needs"[161]. This idea – still to be tested definitively – would, if successful, go beyond the limitations of the private European legal insurance systems, which, of course, aim more for commercial success than social justice. At present, however, the stable, viable European systems have still done the most to improve access to legal services in the more or less limited areas in which they operate.

(4) Special Institutions and Procedures for Certain Types of Claims of a Particular "Social Importance": A New Trend Toward Specialization of Judicial Institutions and Procedures

These and other techniques for handling disputes and reforming the delivery of legal services can be – and are increasingly being – used to give specialized treatment to certain categories of disputes. In particular, certain especially important classes of disputes, and certain types of parties

[160] See *Pfennigstorf*, Legal Expense Insurance – The European Experience in Financing Legal Services (1975) 21, 25; *Bruzelius/Bolding*, Equal Justice 566 f. On the coverage offered by these plans, *Pfennigstorf* at 47 notes: "There has never been a desire to provide coverage for all the legal services that a person might need. Rather, the emphasis has been, as in other lines of insurance, to protect the insureds from the financial consequences of uncontrollable and infrequent damaging events involving losses or expenses of a magnitude that cannot be absorbed in the average family or business budget. For a long time coverages were limited to criminal prosecutions, to enforcing damage claims resulting from automobile and similar accidents, and to enforcing insurance claims – all based on events that for practical purposes could be considered beyond the control of the insured and therefore manageable under accepted insurance principles. Coverages concerning other matters, especially those of a contractual nature, have been introduced only recently on a limited basis, after careful and extended studies had suggested adequate techniques for controlling the risk. Matters within the control of the insured are specifically excluded and so are matters pertaining to domestic relations, succession, and real estate." It must be noted, however, that there is a trend to enlarge steadily the coverages of these insurance schemes. See *Baumgärtel* (*supra* note 17) 30–33.

[161] See *Pfennigstorf* (*supra* note 160) 44–46; *Gasperini*, Prepaid Legal Services – The Long Veiw: Am. B. Ass. J. 61 (1975) 1348. The most promising American experiments concern so-called "closed panel" plans, in which the client may select a lawyer only from a specific group of lawyers. This type of plan promotes specialization and economies of scale not available to "open plans," including the European legal insurance schemes. See, *e. g.*, *Baron/Cole*, Real Freedom of Choice for the Consumer of Legal Services: Mass. L. Q. 53 (1973) 253, 257.

concerned with resolving these disputes, have been found recently to have inadequate remedies under the existing legal structures.

Some types of claims, of course, have long been afforded specialized treatment, particularly the claims of business against individual debtors. Two widely-known examples in this field are the German *Mahnverfahren*[162] and the Italian *procedimento ingiuntivo*[163], both of which greatly simplify the collection of liquidated debts. The trend now, however, is to extend the focus both on the poor and on diffuse interests, *i.e.*, to focus on other individuals and groups whose legal needs have too often, and for too long, been neglected. Creditors as a class certainly do not fit that description. We now seek to provide more help – more special treatment – for the types of grievances which are today being seen as having a particular social significance.

Perhaps the most obvious problem, and one now receiving considerable attention, is again the problem of small claims. The recent approach to this problem continues to be – despite severe criticism of the operation of many small claims courts[164] – the creation of specialized courts and/or specialized procedures for claims of less than a fixed economic value. The most promising small claims approach is to emphasize many of the same traits sought from arbitration of general claims: speed, informality, an active decision-maker[165], and the actual possibility of litigating without attorneys.

The Swedish small claims courts established in 1974[166], the new English county court system for the (compulsory, in part) arbitration of small

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[162] See, *e.g.*, *Bender/Strecker*, German Report 14–16. The importance of the *Mahnverfahren* in Germany is evidenced by the fact that, according to the German Report, there are approximately four million *Mahnverfahren* annually in Germany, as opposed to one million regular civil cases.

[163] Approximately half a million judicial decrees were rendered on the basis of a *procedimento ingiuntivo* in a typical recent year – more than twice as many as the number of final judgments rendered in ordinary civil cases; *Cappelletti*, Giustizia e società (1972) 225; *Cappelletti/Merryman/Perillo*, The Italian Legal System (1967) 122–124; *Cappelletti/Perillo*, Civil Procedure in Italy (1965) 150, 344–348.

[164] See, *e.g.*, *Yngvesson/Hennessey*, Small Claims Complex Disputes – A Review of the Small Claims Literature: L. Society Rev. 9 (1974/75) 219.

[165] Indeed, even scholars generally opposed to judicial activism tend to favor active judges in small chlaims cases. See, *e.g.*, *Jolowicz*, in: *Cappelletti/Jolowicz* (*supra* note 2) 157, 251–253.

[166] The Small Claims Act of Jan. 4, 1974, SFS 1974:8. In particular, these courts utilize legally-trained persons (court clerks) to help a party prepare the necessary forms; even more significantly, these courts are designed for a very active role by the judge. According to *Hellner/Eisenstein*, Swed. Report 81, "[the judge] is to assist the parties in producing the necessary evidence to substantiate their claims and will, thus, try to find out whether they have failed to produce any proof of importance in the controversy. He may also point out to them that they must prove certain issues, or that the evidence they have assembled is insufficient."

claims[167], and a number of new procedures in Australia[168] provide excellent examples of important reforms in this direction. All emphasize judicial activism and control, informal decision-making, and, of course, low costs. Significantly, for example, both the Swedish and English plans do not award attorneys' fees to victorious plaintiffs except under special conditions[169]. This reform both keeps the financial risk of litigation low and discourages the use of attorneys. Other promising reforms have been adopted in the United States, especially by the Harlem, New York, small claims court[170]. Community persons attached to that court even provide a sort of paraprofessional help to the litigants, and the litigants may also choose to have their case decided by a very informal arbitration. Both this informality and this system of paraprofessional aid help strongly to break down the special barriers faced by individuals who are prosecuting or defending small claims.

The proliferation of special courts and procedures to eradicate the barriers associated with small claims is important, and it is continuing. It has been argued, however, that since small claims are not necessarily simple claims, we should not treat them as a class of disputes which ought to be handled separately[171]. This argument, even though based on a correct premise, appears to go too far[172], but it does point out that some of the advantages of the access-to-justice approach require a further effort at classification. In other words, instead of focusing on such unilateral categories as "general" claims and "small" claims, one should adopt a functional and

[167] Under the system adopted in 1973, a County Court judge may refer any case within the court jurisdictional limit – 1000 pounds sterling – to an informal arbitration on his own volition or at the request of a party. The registrar of the county court, too, may refer a claim to arbitration if it is for not more than 100 pounds sterling and one party requests arbitration. In addition, within the 1000 pounds sterling limit, the parties can always agree to submit the case to arbitration. See *Borrie* (*supra* note 106) 10–12.

[168] See *Taylor*, Austral. Report 26–29. Most notable appear to be the procedures adopted in the Australian Capital Territory and in South Australia. The latter procedure, according to *Taylor*, "is the first in Australia which makes express the active role of the judge in small claims" (at 29).

[169] In *Sweden* the losing party is required to pay only certain minimal legal fees of his opponents, corresponding to the fee for one "legal advice" session under the Legal Aid Act. See *Hellner/Eisenstein*, Swed. Report 77. – In the new *English* system, costs (including attorneys' fees) are awarded only if the registrar considers the case to have been very complicated or if the losing party behaved unreasonably. Also, an August 1975 reform allows personal injury plaintiffs to win their attorneys' fees if successful in the action. See *Borrie* (*supra* note 106) 11.

[170] See *Johnson, Jr., et al.*, U.S. Report 26 f.; *Yngvesson/Hennessey* (*supra* note 164) 269 f.

[171] See *Yngvesson/Hennessey* (*supra* note 164), especially at 256–262. As *Taylor*, Austral. Report 17, observes, "Size, it is submitted, is not an appropriate test of the complexity or importance of a claim."

[172] It may still be, in particular, that a well-designed small claims court can

multifaceted approach focusing on claims that face particular types of barriers, involve particular types of parties, and cover certain areas of substantive law.

The national reports of the Florence Access-to-Justice Project reveal numerous arrangements of procedures especially designed for disputes in several major areas, in view of the particular types of parties and barriers involved: in particular, individual labor disputes, landlord-tenant disputes, consumer disputes with producers and merchants, and disputes by individuals with the government administration. The scope of possible reforms in these areas is great, including the possibility of reductions in costs for certain types of parties, the creation of private mechanisms for dispute resolution, the adoption of new methods to conciliate parties in long-term relationships, and the official creation of new procedures and/or courts to handle certain categories of disputes.

In the consumer area, for example, we find *private* forums which purport to be neutral and specialize in resolving certain types of consumer disputes, such as the American Better Business Bureaus[173] and the German Arbitration Bureau for the Motor Vehicle Trade *(Schiedsstelle für das Kraftfahrzeughandwerk)*[174]. These types of forums may have some prob-

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be effective in solving complex as well as simple disputes. Indeed, if simplified but effective procedures cannot be designed, one wonders whether any society would be willing to subsidize small claims to the extent that they would be economically feasible in the regular court system. Certainly none has to date taken this latter approach.

[173] The Better Business Bureau's system of arbitration, which was initiated in 1972, is described by *Johnson, Jr., et al.*, U.S. Report 70 f. See also *Simison*, Arbitration for Consumers Is Spreading as Better Business Bureaus Offer Service: The Wall Street Journal, April 21, 1975, at 22. This system (like the German one mentioned in the text accompanying note 174 *infra*) is available only if both parties to a dispute agree to submit the case to arbitration. The arbitrators are selected in the Better Business Bureau system from a pool of arbitrators – mostly lawyers but also other volunteers. The decision of that arbitration panel is generally binding subject to a very limited judicial appeal. As of mid-1975, 92 of the 134 Better Business Bureaus in the United States offered this program (with variations in time, cost, and availability). The program is especially useful when the business members of the Bureau – as in the Seattle area – agree in advance to allow any consumer to submit his claim to arbitration.

[174] According to *E. von Hippel*, Verbraucherschutz (1974) 97–99, the Hamburg Bureau is the leading German example of this institution. It was established in 1970 and has inspired the creation of other such bureaus in at least 61 other towns. The Hamburg system is costless to the consumer, prohibits lawyers from its oral hearings, and involves decisions aimed at conciliation by a panel composed of a neutral judge, a representative of the automobile repair trade, and a representative from the motorists organization. Decisions are not enforceable as judgments, but as a rule are complied with strictly by the automobile repair trade. See also *Bender/Strecker*, German Report 55 f., and note 173 *supra*.

lems, especially that of bias[175], but they nevertheless can be helpful because, unfortunately, in most countries – with Sweden perhaps the most notable exception – consumers still have no more effective place to seek a remedy for their grievances.

The Swedish approach, described in some detail by *Hellner*[176], merits particular attention. The Swedish did empirical studies in the early 1960's on the "legal needs" of and available remedies to consumers in that country, and they found that consumers had in effect no remedy except for the very weak one of turning privately to the merchant or the producer with their complaint[177]. In order to create an effective system of consumer protection, the Swedish then analyzed the particular components of consumer disputes. The result is still experimental, but, to date, Sweden has adopted, *inter alia*, the following sophisticated combination of remedial devices: first, there is the new system of small claims courts mentioned before, which is designed to help both consumer plaintiffs and consumer defendants[178]; second, a Public Complaints Board was created to help consumers as plaintiffs to inexpensively resolve technical consumer disputes[179]; and finally, as *Hellner* points out, it was recognized that an effective, coherent group was necessary to further the interests of consumers as a class, but that such a group did not exist in Sweden and would have been difficult to form. The Consumer Ombudsman, therefore, and several other in-

[175] Consumers "are instinctively skeptical about whether it [the Better Business Bureau Program] can be committed to the public interest, controlled and administered as it is by members of the 'opposition' [*i.e.*, business interests]"; *Johnson, Jr., et al.*, U.S. Report 71. Similar apprehensions about the German system have been expressed by *Bender/Strecker*, German Report 56. *E. von Hippel* (*supra* note 174) 97–99, however, appears confident that the Hamburg Bureau is free of bias.

[176] See *Hellner, infra* p. 727–749.

[177] The study showed that only 42 percent of those consumers who had a grievance sought a correction, and, of this 42 percent, almost all turned to the seller or manufacturer. See *Hellner/Eisenstein*, Swed. Report 39.

[178] See notes 166–169 *supra* and accompanying text. The novel feature designed to help consumer defendants is that, if a merchant brings a summary collection procedure against a consumer debtor, the debtor's objection to the debt automatically transfers the case to a small claims court. Thus, the consumer debtor receives the help of clerks and of an active judge in an informal setting, and the amount of court costs he risks for losing is kept low. See *Hellner/Eisenstein*, Swed. Report 75 f.

[179] The Public Complaints Board began operations on a much smaller scale in 1968. It now has ten departments, dealing with various types of goods and services, which are available only at the request of the consumer. The consumer, with the help of the Board's Secretariat, submits written materials (no oral testimony is permitted) for a hearing conducted by a department composed of from 6–10 members – half representing business and half representing consumers – and a presiding judge-chairman. The decision of the department is only advisory, but for various reasons about 80 percent of the recommendations are followed. See *Hellner, infra* p. 741–744.

stitutions as well, were adopted to perform "the role of an organization representing consumers"[180]. Sweden, in short, has tried to create an interrelated set of specialized institutions and procedures geared to the particular characteristics of consumer disputes. Sweden recognizes that for labor-management and landlord-tenant issues powerful groups exist in Sweden on both sides. Thus for these conflicts it was deemed safer to create procedures recognizing the essential role of such groups – indeed, even to protect individuals from groups when necessary – while for consumers other special devices had to be designed.

(5) Legal Simplification

Advances in special procedures, such as those in the new Swedish consumer protection laws, are an important, but again not the only way to find means of handling disputes effectively. Another important tool to settle certain types of disputes effectively is simply to change the substantive standards which apply to the dispute. The move toward "no-fault," evident particularly with respect to rules governing divorce and determining compensation for accidents, exemplifies this approach. Numerous countries, for example, have recently adopted "no-fault" divorce. This substantive change at a minimum saves considerable court time and expense, since it eliminates the need to assess blame. In California, for instance, it has already been shown, according to the United States report for the Florence Project, that the reduction in time necessary to determine no-fault divorce proceedings accounts for 2.6 percent of the judicial resources needed by the California Superior Courts[181].

Furthermore, there is potential for legal simplification in areas where it has not yet been tried. One imaginative proposal made in the United States, for example, was to create a "Department of Economic Justice," which would itself give consumers financial relief automatically for very small claims against merchants without the need to prove the merits of such claims[182]. The aim would be to avoid the disproportionate expense of investigating and deciding these claims, while deterring consumer cheating by the use of spot-checking and severe sanctions. Indeed, *Maurice Rosenberg*, the proponent of this idea, suggested further that the Department could also act, much like the Consumer Ombudsman, to protect the rights of consumers as a class[183]. This idea may or may not prove to be workable, but

[180] *Hellner, infra* p. 734.

[181] See *Johnson, Jr., et al.*, U.S. Report 71.

[182] See *Rosenberg*, Devising Procedures that Are Civil to Promote Justice that Is Civilized: Mich. L. Rev. 69 (1970/71) 797, 813–816.

[183] *Rosenberg* (*supra* note 182) 814: "Through a national network of offices, the Department of Economic Justice would learn quickly if a manufacturer has

it certainly provokes thought. The access-to-justice approach aims at promoting such experimentation and imaginative creativity with all the institutions and devices which make up our systems of dispute-resolution. Only a beginning has been made so far in this direction.

c) Limitations and Risks of this Approach: A Warning Conclusion

It is necessary to recognize, however, that despite the appeal of specialization and of the creation of new institutions, legal systems cannot introduce specially tailored forums and procedures for *every* type of dispute. The first serious difficulty is that jurisdictional boundaries may become confusing. As noted in the Israeli report for the Florence Project:

> "It should be quite easy to find one's way to the proper court. ... But not infrequently the limits of jurisdiction will be difficult to locate. ... In case of doubt – and doubt increases with every new type of court that is created – the plaintiff has to be all the more careful because he may be certain that, whatever his choice, the defendant will take another view. In any event, a great deal of time will be spent arguing the preliminary point, and the power to transfer the case is but little compensation."[184]

Clearly the proliferation of special courts can itself become a barrier to effective access, resulting in what the French report for the Florence Project calls "a parasitic litigation"[185].

A specialized judge or other decision-maker may also become too isolated, developing too narrow a perspective. As the German report observes, the judge may "lose sight of the viewpoints and problems lying outside of his special area of the law"[186]. In addition, there is always the danger that "tinkering" with procedures will have serious unintended effects[187]. As we have noted, reforms aimed at one or another barrier may at the same time erect new barriers to access.

The greatest danger, however, is the risk that streamlined, efficient procedures will abandon the fundamental guarantees of civil procedure – essentially, those of an impartial adjudicator and of the parties' right to be

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been making defective television tubes or components on a grand scale; or thousands of unsafe break linings; or too many permeable raincoats. Then it would be able to take the legal action appropriate to the situation – including wholesale (and hence, economically worthwhile) suits to recover amounts it had already paid out administratively, along with costs, interest, and other economic sanctions; or cease and desist orders; or sterner sanctions if appropriate."

[184] *Ginossar*, Isr. Report [1975] 19.

[185] See *Thery*, French Report 4.

[186] See *Bender/Strecker*, German Report 25. To combat this problem in Japan, judges serving specialized departments apparently are shifted to new departments at regular intervals; see *Kojima/Taniguchi*, Jap. Report 27.

[187] See section II 4 *supra*.

heard[188]. While this danger is reduced where submission to a particular dispute resolution mechanism is done voluntarily, either before or after the dispute arises, by parties having equal bargaining power, we must still recognize that our complex, highly specific laws and our highly technical procedures have been so molded through many centuries of efforts to prevent arbitrariness and injustice. These traditional technical laws and procedures, however, are unfortunately rather expensive – often too expensive if their benefits are to be accessible to all. Moreover, since a tremendous and growing number of previously unrepresented individuals, groups, and interests are now being given access to the courts through the reforms discussed earlier, the pressure on the legal system to find cheaper procedures increases dramatically. And yet, this pressure must not be allowed to subvert the fundamentals of fair procedure. These fundamentals are to an extent flexible, and may be of somewhat different importance in different areas of the law, but their core principles ought not to be neglected. Under no circumstances shall we be prepared to "sell our soul".

We conclude, therefore, by recognizing that there are indeed dangers in enacting or even proposing imaginative access-to-justice reforms. Our judicial system has been aptly described as follows:

> "[A]dmirable though it may be, [it] is at once slow and costly. It is a finished product of great beauty, but entails an immense sacrifice of time, money and talent."[189]

This "beautiful" system is frequently a luxury; it tends to give a high quality of justice only when, for one reason or another, parties can surmount the substantial barriers which it erects to most people and to many types of claims. The access-to-justice approach tries to attack those barriers through manipulation of the full array of institutions, procedures, and persons that characterize our judicial systems. The risk, however, is that rapid and inexpensive procedures will make a cheap and unrefined product. This risk must continually be kept in mind.

The enactment of thoughtful reforms, mindful of the risks involved, and with a full awareness of the limits and potentialities of the regular courts, regular procedures, and regular attorneys, is what is really meant here by the access-to-justice approach. Its goal is not to make justice poorer, but to make it accessible to all – including the poor. And, if it is true that effective, not merely formal, equality before the law is the basic ideal of our epoch, the access-to-justice approach can only lead to a judicial product of far greater "beauty" – or better quality – than that we now have.

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[188] An organized, world-wide effort to discover and analyze the basic safeguards of the parties in civil litigation is Fundamental Guarantees.

[189] This comment, referring specifically to the British judicial system, was made by *Hooper*, The Law of Civil Procedure in Iraq and Palestine I (1930) (cited by *Ginossar*, Isr. Report 25).