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ACCESS TO JUSTICE IN A WORLD OF EXPANDING SOCIAL CAPABILITY

Marc Galanter*

I. Access to Justice and its Companions	115
II. The Expanding Frontiers of Access to Justice	122

I. ACCESS TO JUSTICE AND ITS COMPANIONS

The phrase “Access to Justice” acquired its current meaning in the late 1970s. Earlier it had referred to access to the government’s judicial institutions.¹ In post-World War II legal discourse, it occasionally appears as a description of the goal and benefit of legal aid, or of the means to equality before the law.² In the late 1970s, however, the phrase acquired a new and broader meaning: the ability to avail oneself of the various institutions, go-

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1. Prior to 1970, the stock phrase “access to the courts of justice” was used, which dates at least as far back as 1840. See *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. 353 (1840); see also *Cary v. Curtis*, 44 U.S. 236 (1845). The phrase was occasionally abbreviated to “access to justice.” See *Ex parte Allis*, 12 Ark. 101, 102 (1851) (noting that “every citizen should have convenient access to justice”); *State ex rel. Clark v. Hillebrandt*, 154 So.2d 384 (La. 1963).

2. See William T. Gossett, *Access to Justice: The True Significance of Legal Aid*, 40 A.B.A. J. 111 (1954); Orison S. Marden, *Equal Access to Justice: The Challenge and the Opportunity*, 19 WASH. & LEE L. REV. 153 (1962); ACCESS TO JUSTICE SPECIAL ISSUE, 22(3) MCGILL L.J. (1976). Only in the last of these works does the phrase “Access to Justice” appear to be available as a fixed noun phrase. The term does not appear in Earl Johnson, Jr.’s 1974 history of the formative years of the legal services program, nor is it employed in the 1975 comparative survey of legal aid that was the first product of the Ford Foundation-sponsored Access to Justice Project. MAURO CAPPELLETTI, JAMES GORDLEY & EARL JOHNSON, JR., *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (1975). The Ford program began in 1973.

vernmental and non-governmental, judicial and non-judicial, in which a claimant might pursue justice.³

This vision of justice in many modalities and diverse institutional settings crystallized with the flourishing of the Florence Access to Justice Project. This project was sponsored by the Ford Foundation, the Italian Research Council ("CNR"), and the Italian Ministry of Education, under the direction of Mauro Cappelletti, a scholar of vast imagination and entrepreneurial energy. The work of the Florence project is embodied in the massive multi-volume series *Access to Justice*, published in 1978 and 1979⁴ and in a small library of satellite volumes and law review articles.⁵

Building on programs and experiments in many locations, the Florence Project codified a broadened notion of access beyond representation by lawyers and beyond courts as the site of justice-seeking. Looking back at the end of the decade, Cappelletti himself saw the development of the Access to Justice notion as comprising three "waves" exemplified by a series of institutional developments particularly marked in the United States:

The first wave, beginning in 1965 with the Office of Economic Opportunity's neighborhood law firms program, involved the reform of institutions for delivering legal services to the poor. The second wave sought to extend representation to "diffuse interests" such as those of consumers and environmentalists: it commenced in the United States with the development of foundation-supported "public interest law firms" in the 1970s. The third wave followed in the 1970s with a shift in focus to dispute-processing institutions in general, rather than simply on institutions of legal representation; less formal alternatives to courts and court procedures . . . emerged in bold relief. . . .⁶

3. For example, Thomas Ehrlich, President of the Legal Services Corporation, testified: "New dispute settlement mechanisms are needed that assure wide access to justice for all citizens Ombudspeople, arbitrators, mediators, and conciliators, all those and others can be effective means of dispute settlement in a range of cases—both complex and simple." The transition is visible in the hearings on *State of the Judiciary and Access to Justice: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice*, 95th Cong. 46 (1977) (statement of Thomas Ehrlich). The major theme is access to the federal courts for the poor, but some witnesses refer to the broader themes that animate the access to justice movement.

4. ACCESS TO JUSTICE (Mauro Cappelletti et al., eds. 1978-79).

5. See, for example, the volumes cited in notes 8 and 10, *infra*. See also Mauro Cappelletti & Bryant G. Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181 (1978); Mauro Cappelletti, *Alternative Dispute Resolution Processes Within the Framework of the Worldwide Access to Justice Movement*, 56 MOD. L. REV. 282 (1993); Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"*, 35 CATH. U. L. REV. 1 (1985).

6. MAURO CAPPELLETTI, ACCESS TO JUSTICE AND THE WELFARE STATE 4 (1981).

Access to Justice did not arrive on the legal scene unaccompanied. It was one of a set of intellectual triplets that appeared in the 1970s. Its siblings were the dispute perspective in legal studies and the Alternative Dispute Resolution (“ADR”) movement. At their start, the three infants were very close, almost inseparable, but as they grew they experienced a kind of big bang sending them in different directions. As they retreated from one another, they were adopted by different parents and matured in very different environments with different companions.

These triplets were the progeny, born late in life, of a remarkable movement of expansion of accountability and remedy fostered by courts and legislatures in the years between the end of World War II and the mid-1970s. An enlargement of remedies, an expansion of standing, abolition of old immunities, and the promotion of civil rights provided ordinary people with new occasions for using the courts and a greater likelihood of success when they did.⁷ Programs for affording legal representation to poor and unrepresented groups proliferated.⁸ An increasing number of legal professionals viewed such expansion as the test of professional achievement.⁹

The first of the triplets to gain prominence was the dispute perspective in legal studies. I refer to a body of work that holds that the study of law should focus on the construction of disputes as well as on rules and courts.¹⁰ This perspective envisioned adjudication in courts as only one of the various ways that society dealt with disputes—and a relatively infrequent one at that. The central intellectual construct of the dispute perspective was the dispute pyramid—the notion that any sector of the legal world can be envisioned as a pyramid in which a base of troubles or injuries underlies a layer of perceived injuries, which leads in turn to successively smaller layers of grievances (injuries for which some human actor is viewed as responsible), claims, and disputes. A portion of these disputes

7. LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985); ROBERT KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* (1969); Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability* 81 *TEX. L. REV.* 285 (2002) [hereinafter *The Turn Against Law*]; see also WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS AND IDEOLOGY IN NEW YORK 1920-1980* 185-87 (2001).

8. MAURO Cappelletti, JAMES GORDLEY & EARL JOHNSON, JR., *supra* note 2.

9. Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 *GA. L. REV.* 633, 640-42 (1994).

10. Richard L. Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 *LAW & SOC'Y REV.* 217 (1974); see generally *THE DISPUTING PROCESS—LAW IN TEN SOCIETIES* 9 (Laura Nader & Harry F. Todd, Jr. eds., 1978); Bliss Cartwright, *Conclusion Disputes and Reported Cases*, 9 *LAW & SOC'Y REV.* 163 (1975); Bliss Cartwright et al., *Introduction: Litigation and Dispute Processing*, 8 *LAW & SOC'Y REV.* 5 (1974).

are brought to lawyers and courts; successively smaller portions are the subject of trials, appeals, and published judicial opinions.¹¹ In one of the classics of the dispute literature, William L.F. Felstiner, Richard L. Abel, and Austin Sarat show how the lower layers of the pyramid are constructed: by naming (the recognition and identification of an injury); blaming (the identification of a human agent responsible for that injury); and, finally, claiming (the pursuit of a claim against that party).¹²

The dispute perspective provided a theoretical structure for depicting the range of access concerns and a powerful stimulus for the broadening of the access agenda. The pyramid model pointed to multiple possibilities of disconnection at every stage of the construction of adjudication. An injured party might fail to perceive injury, or might fail to attribute it to a human agency. Ignorance, intimidation, or cost barriers might inhibit a party from making a claim, pursuing a dispute, or obtaining legal help. Further, lack of resources and staying power might undermine effective use of the courts. Accordingly, Access to Justice was visualized as encompassing all of these linkages.

The dispute perspective provides not only a taxonomy of access choke-points but also the basis for critical assessment of legal arrangements. The dispute pyramid is useful for analyzing systems, like our own, in which much more is promised than delivered. Indeed, the legal systems of (most?) modern democracies are designed in a way that if everyone with a legitimate claim invoked them, the system would collapse. The viability of such systems depends on: (a) the efficacy of "general effects," i.e., exerting control through communication of information rather than actual enforcement;¹³ (b) the availability of informal proxies for legal action;¹⁴ and, final-

11. The virtues and vices of the dispute paradigm are analyzed in several of the papers in *Special Issue on Disputes Processing and Civil Litigation*, 15 LAW & SOC'Y REV., No. 3/4 (1980-81). See Robert L. Kidder, *The End of the Road? Problems in the Analysis of Disputes*, 15 LAW & SOC'Y REV. 717 (1980-81); see also David M. Trubek, *The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword*, 15 LAW & SOC'Y REV. 727 (1980-81).

12. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81).

13. JACK P. GIBBS, CRIME, PUNISHMENT AND DETERRENCE 39, 219 (1975); Marc Galanter, *Adjudication, Litigation and Related Phenomena*, in LAW AND THE SOCIAL SCIENCES 151, 215-20 (Leon Lipson & Stanton Wheeler eds., 1986); Marc Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 117, 124-27 (Keith O. Boyum & Lynn Mather eds., 1983); Jack P. Gibbs, *Punishment Deterrence: Theory, Research and Penal Policy*, in LAW AND THE SOCIAL SCIENCES 319 (Leon Lipson & Stanton Wheeler eds., 1986) (uses "general deterrence" terminology).

14. See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

ly, (c) the apathy, ignorance, cultural and cost barriers that inhibit the assertion of legal rights. Such systems are inherently tokenist and symbolic—rules are there to be celebrated and cherished, not to be applied in every instance that they presumptively cover. Real steak, or something approximating it, is served to those who can make the matching investments required for successful legal action; most others must content themselves with some combination of real hamburger and symbolic sizzle.

Informed by the dispute perspective, Access to Justice implies a rich agenda of reform. The same dispute perspective, however, warns us that the most visible and dramatic reforms may do little or nothing to reduce the disparity between proficient repeat users of the system and one-shotters. Felstiner, Abel, and Sarat point out that because of the vast disparities at the earlier stages, where injurious experiences are transformed into claims and disputes, programs that focus on promoting Access to Justice in the upper reaches of the pyramid (typically by facilitating the transformation of disputes into lawsuits) “may accentuate the effects of inequality at the earlier, less visible stages, where it is harder to detect, diagnose, and correct.”¹⁵

Access to Justice gained respectability and institutional presence very rapidly. By 1978, while the Florence project was still at work, Access to Justice was the “official theme” of the American Bar Association.¹⁶ Since then, Access to Justice has become an accepted corner of the legal world, inscribed in scholarly and practitioner publications and programs. For example, the Index to Legal Periodicals lists 443 books and periodical articles with “access to justice” in their titles, all but two since 1976.¹⁷ Access to Justice has become a program of foundations of non-governmental organizations (NGOs), bar groups, governments—in both domestic policy as well as in their foreign aid operations (e.g., the United States Agency for International Development, the United Kingdom’s Department for International Development)—and international organizations (e.g., the United Nations Development Project, the Asian Development Bank). For many of these sponsors, Access to Justice is coupled and/or merged with its transnational cousin, the Human Rights movement. Fiscal anxieties have led in many places to the curtailment of programs providing legal services on a

15. Felstiner et al., *supra* note 12, at 637.

16. Jimmy Carter, William B. Spann Jr., & Warren Burger, *President Carter’s Attack on Lawyers, President Spann’s Response, and Chief Justice Burger’s Remarks*, 64 A.B.A. J. 840, 844 (1978). Before the rights revolution and *Brown v. Board of Education*, 347 U.S. 483 (1954), such a theme would have been unimaginable.

17. H.W. Wilson, Index to Legal Periodicals Full Text, <http://www.hwwilson.com/databases/legal.htm> (last visited July 15, 2009).

routine basis, while programs for court reform, special forums, and legal literacy have proliferated, and judicial interventions to vindicate and extend rights have multiplied.

Just as Access to Justice has been institutionalized in an array of bar, NGO, and governmental programs, the dispute perspective has been institutionalized in academic programs and a research community that includes the flourishing law and society movement¹⁸ and institutions like the American Bar Foundation and the RAND Institute for Civil Justice (founded in 1979).¹⁹ The proliferating research output of law and society scholarship is found in dedicated publications²⁰ and increasingly in ordinary law reviews. It has infiltrated mainstream legal scholarship, so that work inspired by, and incorporating the dispute perspective, passes without challenge as real legal scholarship.²¹

In its beginnings, the third triplet, ADR, was so close to Access to Justice that it was sometimes hard to distinguish them. ADR was also close to the dispute perspective, from which it borrowed its intellectual bearings.²²

18. The Research Committee on the Sociology of Law was founded in 1962. The Law and Society Association was founded in 1964; its first national meeting was held in 1975. The Canadian Law and Society Association was founded in 1982; the [British] Socio-Legal Studies Association was founded in 1990.

19. Institute for Civil Justice, *A Report on the First Four Program Years April 1980-March 1984* (1984); see Richard C. Reuben, *Focus on the RAND Report: Perspectives on the RAND Report: The Dialogue Continues*, 4 DISP. RESOL. MAG. 3 (1997).

20. One may observe the development of such scholarship in, for example, the long-established LAW & SOCIETY REVIEW (1966-); [British] JOURNAL OF LAW AND SOCIETY (1974-); LAW AND SOCIAL INQUIRY (formerly the AMERICAN BAR FOUNDATION RESEARCH JOURNAL) (1976-); LAW AND POLICY (1979-); WINDSOR ACCESS TO JUSTICE YEARBOOK (1981-); CANADIAN JOURNAL OF LAW AND SOCIETY (1985-); recently joined by the JOURNAL OF EMPIRICAL LEGAL STUDIES (2003-); and the ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE (2005-).

21. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2002-03); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003); see also Michael Heise, *The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002). It is because of this widespread but unremarked infiltration that we should be skeptical of Richard Posner's triumphalist contrast of the glorious success of the law and economics movement with the modest accomplishments of the sociology of law (as he calls it). See Marc Galanter & Mark Alan Edwards, *Introduction: The Path of the Law And*, 1997 WIS. L. REV. 375 (1997); Richard A. Posner, *The Sociology of the Sociology of Law: A View from Economics*, 2 EUR. J.L. & ECON. 265 (1995).

22. The most influential paper in the ADR movement was Professor Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976) (The paper was presented to the Pound Conference in 1976). Prof. Sander remarked to me (in the late 1970s or early 1980s) that the paper was inspired by work in the *Law & Society Review*. The Pound Conference

Foundation support established the National Institute for Dispute Resolution in 1983. From the mid-1980s, the William and Flora Hewlett Foundation pursued a sustained program to build a base of academic “theory centers” and create “conflict resolution” as an academic field. The great flourishing of ADR, however, was outside the academy in the creation of new occupational groups of “neutrals”—mediators, arbitrators, and other dispute processors. Corporate actors embraced ADR to address some high-end disputes with their peers, but even more avidly to create in-house forums to cabin disputes with employees and customers.²³ Courts embraced ADR attached (“annexed” as they called it) to the courts as a way to control burgeoning caseloads and to divert cases they regarded as undeserving of their attention.²⁴ Additionally, courts have been broadly supportive of attempts by private parties to corral cases into ADR forums, some free standing but some captive.²⁵ A steady diet of the anabolic steroids of corporate and governmental support has made ADR not only far larger than its siblings, but increasingly distant from them.²⁶ As indicated by the fierce contention over the legitimacy and effects of mandatory arbitration²⁷ and by concerns about court-imposed mediation,²⁸ ADR no longer enjoys the assumption of facilitating Access to Justice. Rather, it has become an object of suspicion, and in some cases, a direct rival to access-to-justice programs.²⁹

has been credited with marking “the beginning of a concerted effort to stimulate court-connected mediation programs.” See Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545 (2002).

23. Lauren Edelman & Mark Suchman, *When the ‘Haves’ Hold Court: The Internalization of Disputing in Organizational Fields*, 33 LAW & SOC’Y REV. 941, 954 (1999).

24. James R. Holbrook & Laura M. Gray, *Court Annexed Alternative Dispute Resolution*, 21 J. CONTEMP. L. 1, 4 (1995).

25. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in the Age of Compelled Arbitration*, 1997 WIS. L. REV. 33.

26. For an account of the scale of ADR activity, see Thomas J. Stipanowich, *The Growth and Impact of ‘Alternative Dispute Resolution’ and Conflict Management Systems*, 1 J. EMPIRICAL L. STUD. 841 (2004).

27. See, e.g., Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37 (2007); Schwartz, *supra* note 25; Jean Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002).

28. See, e.g., Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399 (2004-05); Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367 (2001).

29. See, e.g., Judith Resnik, *Many Doors? Closing Doors Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995); Richard M. Alderman, *The Future of Consumer Law in the United States—Hello Arbitration, Bye-Bye Courts, So-*

II. THE EXPANDING FRONTIERS OF ACCESS TO JUSTICE

For the most part, access-to-justice programs have focused on filling “unmet legal needs.”³⁰ Legal needs are typically defined in terms of the entitlements conferred—and promised—in the going legal regime (possibly with some favored elaborations borrowed from other regimes). This has inspired programs to promote “legal literacy,” to make courts more user-friendly and more efficient, and above all to provide legal representation to the unrepresented.³¹ Although representation is typically visualized as culminating in judgment and trial, it more frequently proceeds by informal negotiation and/or a truncated invocation of the formal legal process; full-dress adjudication is an increasingly infrequent means of pursuing justice.³² In many instances, Access to Justice is afforded by mobilizing the legal apparatus to make or resist claims that are resolved through negotiation or in-action.

ADR has taken another tack. Focusing on reducing the transaction costs and externalities (including frustration and lack of fulfillment) that accompany recourse to formal legal justice, it proposes to establish alternative forums or procedures that deliver something better, or at least less costly and protracted. ADR may be promoted in terms of superior quality of process or results—increase in mutual satisfaction, achievement of win-win solutions, healing of ruptured relationships, and so forth. These features loom large in advocacy of ADR and they may occur in some programs, particularly up-market inter-corporate dispute resolution. Most programs, howev-

Long Consumer Protection, in *THE YEARBOOK OF CONSUMER LAW* (Deborah Parry et al. eds., 2009). For earlier critique of the ADR thrust to privatization, see *THE POLITICS OF INFORMAL JUSTICE* (Richard L. Abel, ed., 1982).

30. BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977); Edward A. Dauer, ed., *A Wider Notion of Unmet Legal Needs in American Bar Association* (paper presented to the Conference on Access to Justice in the 1990s, New Orleans 1989); *CIVIL JUSTICE: AN AGENDA FOR THE 1990S: PAPERS OF THE AMERICAN BAR ASSOCIATION NATIONAL CONFERENCE ON ACCESS TO JUSTICE IN THE 1990S* (1991); *CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 1* (1994) (presenting the major findings of the ABA's Comprehensive Legal Needs Study); William P. Quigley, *The Unmet Civil Legal Needs of the Poor in Louisiana*, 19 S.U. L. REV. 273 (1992); John C. Scully, *Mandatory Pro Bono: An Attack on the Institution*, 19 HOFSTRA L. REV. 1229 (1991).

31. The beneficiaries of these programs don't necessarily formulate the process in terms of justice; many may think of this as problem-solving or achieving an appropriate adjustment (e.g., a divorce, a settlement) and may even reject the notion that they are seeking justice. See Leon Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC'Y REV. 401 (1974).

32. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459 (2004).

er, are adopted and justified because of factors of cost and control.³³ Whether the justification is in terms of quality or in terms of production, the justice that is to be equaled or surpassed is measured by the remedies presently prescribed (but frequently not delivered) by legal institutions.

Like ADR programs, access-to-justice programs hark back to the dispute perspective in a positivist fashion: naming is perceiving an injury of a sort remedied by the existing practices of institutions; blaming is identifying an agent of the sort held accountable by those practices; and claiming is seeking remedies afforded by those practices—or by incremental adjustments of them. Access to Justice has been concerned for the most part with removing the barriers to pursuing claims that were already recognized as entitlements. Since all legal systems contain regions or even vast continents of under-enforcement, this has left plenty of territory for expansionist ambitions.

As useful as it is in the short term, the conventional access-to-justice agenda is not adequate to the challenges that await us. We live in a society increasingly suffused with law.³⁴ As Gillian Hadfield observes, “Americans face a legal world that is thick with legal structure but thin on legal resources.”³⁵ It is, moreover, a world in which individuals contend increasingly not with other individuals but with corporate entities that enjoy formidable advantages in the use of legal processes. Not only do these entities tend to be winners in most legal encounters, but they are better prepared for legal contingencies *ex ante* the transaction or contest.³⁶ The superior legal agency of these artificial persons derives in good measure from the scale and continuity of their resort to legal services: they can plan transactions in advance by employing specialized legal services, utilizing advanced intelligence, developing expertise, cultivating facilitative informal relations with institutional incumbents. These artificial persons (corporations, associations, and governments) consume an increasing portion of legal services, disproportionately provided by elite practitioners, on a continuous basis.³⁷ Thus, it is routine for corporate entities to navigate the law-

33. Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 931-32 (2002).

34. Marc Galanter, *Law Abounding: Legalization Around the North Atlantic*, 55 MOD. L. REV. 1 (1992).

35. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 151 (2010).

36. See Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1385-98 (2006).

37. *Id.* at 1381-85.

thick world as capable legal agents. Gillian Hadfield spells out the contrast with the situation of ordinary individuals, which is especially acute in the case of the poor and friendless:

Most corporate work is before-the-fact, everyday advice on what contracts to sign, which regulations apply, how conduct is likely to be interpreted by enforcement authorities or, in the event of litigation, what the options are for modifying the extent of legal liability, how to manage a dispute before it comes a lawsuit, and so on. But for ordinary citizens in the U.S. there is almost no functioning legal system in this *ex ante* sphere.³⁸

Typically, legal needs tend to be defined in terms of representation of individuals in contested proceedings *ex post* critical transactions or encounters. Only rarely are legal needs viewed as including the use of “resources *ex ante* to decide what transactions and relationships to enter into, leave, modify, and so on.”³⁹

Consideration of the relative capacity for legal planning points to another neglected dimension of Access to Justice. In the setting of the present, achievement of the “justice” in that phrase entails the vindication of rights and entitlements set out in the existing law and its best institutional practice—no small thing! But when we add a temporal dimension, we render the notion of Access to Justice at once more capacious and more diffuse. Justice is no longer, if it ever was, stable and determinate, but fluid, moving, and labile. We move beyond pursuing (and defending against) claims and back to naming and blaming, to changing perceptions of injury, and to changing attributions of responsibility for causing injury and providing remedy. In the long run, the new ways of envisioning and understanding troubles and remedies are the hidden fount and engine of our expanding sense of justice.

The justice to which we seek access is the negation or correction of injustice. But there is not a fixed sum of injustice in the world that is diminished by every achievement of justice. The sphere of perceived injustice expands dynamically with the growth of human knowledge, with advances in technical feasibility, and with rising expectations of amenity and safety.⁴⁰ The domain of unvindicated and unremedied injustice is growing because it is indissolubly linked to the expanding realms of human knowledge and technical feasibility and to the elevated expectations that they generate.

38. Hadfield, *supra* note 35, at 132.

39. *Id.* at 154.

40. FRIEDMAN, *supra* note 7, at 70-72.

The search for justice is driven by the production of injustice. The discomforts and risks of everyday life have declined dramatically for most people over the past century and there is a widespread sense that science and technology can produce solutions for, at least, many of the remaining problems. Even so, we will not approach a problem-free world, for people are capable of identifying or inventing new problems as quickly as the old ones are solved. This is not a cynical observation about an insatiable appetite for a 'risk free world.' Rather, it is premised on the notion that the very same human capabilities that create solutions for existing problems—by fulfilling existing needs and wants—discover or create new needs, new wants, and new problems. But in the process, as more things are capable of being done by human institutions, the line between unavoidable misfortune and imposed injustice shifts. The realm of injustice is enlarged. For example, at one time having an incurable disease was an inalterable misfortune; now a perception of insufficient vigor in pursuing a cure or distributing ameliorative medications can give rise to a claim of injustice. As the scope of possible social interventions broadens, more and more terrible things become defined by the incidence of possible intervention. Thus, famine, or social subordination, or a flawed appearance is not an inalterable fate, but an occasion for appropriate intervention. What *was* seen as fate may come to be seen as the product of inappropriate policy.⁴¹ Advances in human capability and rising expectations result in a moving frontier of injustice.⁴² These advances seem to be accelerating. A group of leading bio-ethicists observe:

As the possibilities for significant and large-scale genetic interventions on human beings come closer to becoming actualized, we may be forced to expand radically our conception of the domain of justice by including natural as well as social assets among the goods whose distribution just institutions are supposed to regulate.⁴³

There is another dimension to the moving frontier. Not only does concern about justice move to include new kinds of troubles, but it moves to the troubles of sorts of people who were previously held to little or no account—people with disabilities and sexual minorities, for example. Chang-

41. JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 51-82 (1990).

42. This process may not be unidirectional. If the ambit of the realm of injustice/justice tracks the expansion of human social capacity, what might we expect if that capacity were to shrink, for example, due to the massive demands of climate change? Might a contraction of the social capacity for remedy and protection be accompanied by shrinkage in the perceived realm of injustice and justice?

43. ALLEN BUCHANAN ET AL., *FROM CHANCE TO CHOICE: GENETICS AND JUSTICE* 63 (2000).

ing sensibilities among the advantaged and the spread of resources for mobilization to less advantaged groups, both closely linked with changing communication technologies, bring new injustice claims onto the social agenda.

What are the implications of recognizing the moving frontier? First, that increases in justice do not imply a corresponding decrease in the amount of injustice. In an expanding social and legal universe, justice/injustice is not a zero-sum game, rather both grow together. Paradoxically, the overall amount of injustice is not something we can reduce or should want to reduce, because injustice grows with the advance of human inventiveness, knowledge, and capability—and very possibly faster than we can institutionalize justice. Hence symbolic acknowledgment of entitlements is likely to arrive before social arrangements change to make their vindication routine and ordinary.

Second, in a world of expanding capabilities and rising expectations, where claims of injustice proliferate, we cannot avoid the necessity of rationing justice. Justice is not free. It uses up resources—money, organization, and not least, the limited supply of attention. Every expenditure of these involves corresponding opportunity costs. And justice is not the only thing we want. Few would argue that the lowest priority claim for justice should enjoy a lexical priority over every other goal. Some grievances can be addressed but not all grievances. In deciding which are worthy candidates for expending access-to-justice resources, we cannot rely on common sense, for common sense is an unstable residue of understandings being compromised by advancing technology and changing perceptions. What once were frivolous claims are now considered serious and legitimate—for example, emotional injury or sexual harassment. A frivolous claim is one that is clearly outside the boundaries of claims recognized under existing theory. But the moving frontier suggests that many such claims that are presently seen as beyond the pale will eventually be located within the boundary of recognized claims. Consider such “outlandish” claims as a right to an attractive appearance; a right to have my rare disease researched; a right to protection from the seductions of fast and fattening food; a right to genetic manipulation to resist these seductions; a right to pleasant weather; a right to fashion “designer children”; a right to a remedy for the dishonor and deprivation inflicted on one’s ancestors.⁴⁴ Which of

44. On the growing prevalence of such claims, see Marc Galanter, *Righting Old Wrongs*, in *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* 107 (Martha Minow & Nancy L. Rosenbaum, eds., 2002); see also *WHEN SORRY ISN'T ENOUGH: THE*

these do we think will be reached by the moving frontier? Which do we feel safe in predicting will not? Contrariwise, are there cases where the present frontiers of protection and remedy will recede?⁴⁵

These new cutting-edge claims, many at the high end in terms of the affluence of those who assert them and the high cost of vindicating them, will not supplant the staple claims of the most vulnerable—claims for protection from abuse, representation in criminal proceedings, remedies for work injuries, and remedies for consumer fraud. The staple access-to-justice claims will multiply while the new territories of complex and problematic claims are added to the agenda at an ever-increasing pace.

In these new territories, the problems of equal equipage and competence may be accentuated. The moving frontier of justice multiplies the number of contests in which the conditions of equal participation are not present.⁴⁶ For the most part, the advances in human capability and control that drive the justice frontier are located in or managed by artificial persons (“AP”s)—corporations, governments, organizations—not by natural persons. These actors produce new injustice not because they are bad guys, but in many cases because they are good guys doing their thing. Thus, the aspiration to Access to Justice leads us to the problem of contending with corporate actors, whom we know are generally more proficient players of the law game than natural persons.⁴⁷

Curiously, this vast horizon for Access to Justice unfolds just as law, lawyers, and legal institutions are the object of suspicion and disdain by many elite groups (business, political, academic, media), who are persuaded that society is suffering from “too much law.”⁴⁸ Optimism about

CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks, ed., 1999).

45. There may be contractions in the realm of injustice, or at least of that zone of it regarded as eligible for remedy by public institutions. Thus we have seen the elimination of remedies for breach of promise to marry, alienation of affections, and so forth, and a decline in protections against violations of the sense of honor.

46. Gillian Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

46. We like to think of the legal system as a site of remedies and protections for the injured and disadvantaged. But the creation of specialized remedial institutions brings in its train different levels of capacity to use them and thus amplifies differences at the same time that it overcomes them.

47. Galanter, *supra* note 36.

48. Galanter, *supra* note 7, at 303. Curiously, while everything else in the legal world is growing and the world is becoming judicialized, as Cappelletti taught us—rights and court-like forums and hearings are everywhere—the core and quintessentially judicial activity, the conduct of determinative adjudication through trials in courts that wield the authority of the

solving problems as well as a great flowering of interest and energy in innovative schemes for corrective justice (international prosecution of war criminals and brutal dictators, righting old wrongs, compensating victims of terrorism), exists side by side with pessimism about forward-looking distributive justice (deterioration of a universal safety net). Although Access to Justice began as a matter of the enlargement of opportunities for corrective justice, the moving frontier collapses the distinction between corrective and distributive justice. The choice of which corrective initiatives to pursue is a distributive “political” decision. The rationing and prioritizing of opportunities for distributive justice dissolves the illusion that justice exists in a realm of technical legality that is distinct from the political. Politically diverse and competing institutions and agendas are already a familiar feature of the world of public interest law. We should be neither surprised nor unhappy to see a similar diversity of access-to-justice programs.

state, is shrinking and occupying a smaller part of that expanded legal world. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7 (2006).