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ACCESS TO JUSTICE: THE NEWEST WAVE IN THE WORLDWIDE MOVEMENT TO MAKE RIGHTS EFFECTIVE*

MAURO CAPPELLETTI** AND BRYANT GARTH***

The authors dedicate this essay to the memory of Professor Max Rheinstein, a master whose genius, world-wide experience, and sensitivity set the standards by which comparative scholarship will long be measured.

"But the just will live forever." (The Wisdom of Solomon 5:15.)

No aspect of our modern legal systems is immune from criticism. Increasingly it is asked how, at what price, and for whose benefit these systems really work; this type of fundamental question, already discomfiting to many lawyers, judges and legal scholars, is made all the more unsettling by an unprecedented invasion into the legal profession's traditional preserve by, among others, sociologists, anthropologists, economists, political scientists, and psychologists. We must not, however, resist our invaders; rather, we must respect their insights and respond to them creatively. By revealing the actual work-

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The present essay is one of the fruits of a four-year comparative research project entitled "Florence Access-to-Justice Project," sponsored by the Ford Foundation and, with a slightly more local focus, the Italian National Council of Research (CNR). The essay will serve as the General Report introducing the Project's forthcoming four-volume series. The volumes, being published by Sijthoff (Leyden and Boston) and Giuffrè (Milan) under the general editorship of Mr. Cappelletti are: Volume I. *Access to Justice: A World Survey* (edited by Messrs. Cappelletti and Garth); Volume II. *Access to Justice: Studies of Promising Institutions* (edited by Mr. Cappelletti and Mr. John Weisner); Volume III. *Access to Justice: Emerging Perspectives and Issues* (edited by Messrs. Cappelletti and Garth); and Volume IV. *Patterns in Conflict Management: Essays in the Ethnography of Law. Access to Justice in an Anthropological Perspective* (edited by Professor Klaus-Friedrich Koch).

Extensive references will be made in the present essay to the 23 national reports in the *World Survey* volume, as well as to essays and studies in the other Project volumes.

The approach of the present essay, in addition, is rooted in two earlier volumes published under the auspices of the Florence Project: M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (Milan/Dobbs Ferry, N.Y.: Giuffrè/Oceana 1975) and M. CAPPELLETTI & J. A. JOLOWICZ, *PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION* (Milan/Dobbs Ferry, N.Y.: Giuffrè/Oceana 1975). A pre-

(Footnote continued on next page)

ings of our legal systems, critics in the social sciences can in fact be our allies in the most recent phase of a long historical struggle—the struggle for “access to justice.” It is this struggle, as reflected in modern legal systems, that is the basic focus of this article and the comparative Access-to-Justice Project which has produced it.

The words “access to justice” are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system—the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just. Our focus here will be primarily on the first component, access, but we will necessarily bear in mind the second. Indeed, a basic premise will be that social justice, as sought by our modern societies, *presupposes* effective access.

The task in this Article is to trace the emergence and development of a new and comprehensive approach to access problems in contemporary societies. This approach, it will be seen, goes much beyond earlier ones. Originating, perhaps, in the breakdown of the traditional faith in the soundness of our legal institutions, and inspired by the desire to make the rights of ordinary people real, and not merely symbolic, it calls for far-reaching reforms and for new creativity. It refuses to accept as immutable any of the procedures and institutions that characterize our machinery of justice. Reformers have already ac-

liminary version of this essay was presented at the 50th Anniversary Celebration of the Max-Planck Institute of Comparative Law in Hamburg and published in 40 *RABELS ZEITSCHRIFT* 669-717 (1976). The authors wish to express their gratitude to Professor Nicolò Trocker of the University of Siena, who collaborated with them on that version and gave particular help with respect to German materials.

The authors would also like to thank the numerous persons who examined and made useful comments upon a draft of this second version, including most particularly Professors Adolph Homburger (Pace University, N.Y., and SUNY Buffalo, N.Y.) and David Trubek (University of Wisconsin) as well as Professor P. O. Bolding (University of Lund, Sweden), Judge Anders Bruzelius (Lund), Professor Jan Hellner (Stockholm University), Professor Yvette Lobin (University of Aix-en-Provence), Professor Maurice Rosenberg (Columbia University), Dr. G. D. S. Taylor (Canberra, Australia), and Dr. Philippe Thery (Paris University). Also of considerable help were the participants in the “Access-to-Justice Seminar” at the European University Institute, especially Mr. Kim Economides (London) and Ms. Régine Loosli (Marseille), and Mr. David Margolick, a Research Fellow at the Florence Center for Comparative Judicial Studies.

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complished much with this approach. We shall evaluate their basic accomplishments, ideas, and proposals, as well as the risks and limits of this necessary, but daring, method of legal reform.

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 of access to judicial protection meant essentially the aggrieved individual's *formal* right to litigate or defend a claim. The theory was that, while access to justice may be a "natural right," natural rights did not require affirmative state action for their protection.¹ These rights are prior to the state; their preservation required only that the state not allow them to be infringed 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 prosecute or defend them adequately. Relieving "legal poverty"—the incapacity of many people to make full use of the law and its institutions—was not the concern of the state. Justice, like other commodities in the laissez-faire system, could be purchased only by those who could afford its costs, and those who could not were considered the only ones responsible for their fate. Formal, not effective, access to justice—formal, not effective, equality—was all that was sought.

Until recent years, with rare exceptions legal scholarship was similarly unconcerned with the realities of the judicial system: "Such 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."² 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

1. For a more detailed treatment of this theme, see Cappelletti, *General Report*, in *FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION* 659, 726-40 (Milan/Dobbs Ferry, N.Y.: Giuffrè/Oceana; M. Cappelletti & D. Tallon eds. 1973).

2. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288 (1976).

hypothetical situations. Reforms were suggested on the basis of this theory of procedure, rather than actual experience. Scholarship, like the court system itself, was removed from the real 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 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.³ These new human rights, exemplified by the Preamble of the French Constitution of 1946, are above all those necessary to make *effective, i.e., actually accessible to all*, the rights proclaimed earlier.⁴ Among such rights typically affirmed in modern constitutions are the rights to work, to health, to material security, and to education.⁵ It has become commonplace to observe that *affirmative* action by the state is necessary to ensure the enjoyment by all of these basic social rights.⁶ It is therefore not surprising that the right of effective access to justice has gained particular attention as recent "welfare state" reforms have increasingly sought to arm individuals with new substantive rights in their capacities as consumers, tenants, employees, and even citizens.⁷ Indeed, the right of effective

3. See, e.g., M. CAPPELLETTI, *PROCESSO E IDEOLOGIE* 511-24 (Bologna: Il Mulino 1969); L. SCARMAN, *ENGLISH LAW—THE NEW DIMENSION* 28-50 (London: Stevens & Sons 1974); Häberle, *Grundrechte im Leistungsstaat*, in 30 *VERÖFFENTLICHUNGEN DER DEUTSCHEN STAATSRECHTSLEHRER* 76, 90, 99 (Berlin/N.Y.: de Gruyter 1972).

4. 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." CONSTITUTION, preamble (1946) (Fr.). See also, e.g., COSTITUZIONE, art. 3, para. 2 (It.); GRUNDGESETZ, arts. 20, 28 (1949, amended 1961) (W. Ger.).

5. See, e.g., the Preamble of the French Constitution of 1946.

6. See, e.g., P. CALAMANDREI, 3 *OPERE GIURIDICHE* 183-210 (Naples: Morano; M. Cappelletti ed. 1968); Claude, *The Classical Model of Human Rights Development*, in *COMPARATIVE HUMAN RIGHTS* 6, 32 (Baltimore: Johns Hopkins University Press; R. Claude ed. 1976), stating that "positive rights generally presuppose an affirmative commitment from the state."

7. 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 *ÖSTERREICHISCHE ZIVILPROZESSORDNUNG* (1895); Cappelletti, *Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe*, 69 *MICH. L. REV.* 847, 854-55 & n.38 (1971).

More recently, a modern trend has been to develop the "social right" of access out

access is increasingly recognized as being of paramount importance among the new individual and social rights, since the possession of rights is meaningless without mechanisms for their effective vindication.⁸ Effective access to justice can thus be seen as the most basic requirement—the most basic “human right”—of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all.

The focus on access—the means by which rights are made effective—now also increasingly characterizes modern civil procedural scholarship. Theoretical discussions, for example, 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 descriptions is the frequently unrealistic model of two (or more) equal sides in court, limited only by the legal arguments that the skilled advocates can muster. Procedure, however, should not be placed in a vacuum. Scholars must now recognize that procedural techniques serve social functions,⁹ that courts are not the only means of dispute resolution that must be considered,¹⁰ and that every procedural regulation, including the creation or encouragement of alternatives to the formal court system, has a pronounced effect on how the substantive law operates—how often it is enforced, in whose benefit, and with what social impact. A basic task of modern civil procedure scholars is to expose the substantive impact of various dispute processing mechanisms. They must consequently broaden their focus beyond the courts; they must utilize the insights of sociological, political, psychological, economic and other analyses; and they must learn from other cultures.

of the fundamental rights of action and defense. *See, e.g.*, COSTITUZIONE, art. 3, para. 2 & art. 24, para. 3 (It.); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6 213 U.N.T.S. 221 (1953); Corte Cost. Decision of Dec. 22, 1961, no. 70, [1961] *Giur. Ital.* III 1282.

8. As professor Richard Claude observes, “the enforcement of procedural protection is merely another side of the content of the right.” Claude, *Comparative Rights Research: Some Intersections Between Law and the Social Sciences*, *COMPARATIVE HUMAN RIGHTS*, *supra* note 6, at 382, 395.

9. 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.” F. KLEIN, *ZEIT- UND GEISTESSTRÖMUNGEN IM PROZESSE* 8 (Frankfurt am Main: Klostermann; 2d ed. 1958). *See also*, P. CALAMANDREI, *PROCEDURE AND DEMOCRACY* 76 (New York: New York University Press 1956).

10. Of course, the activities of courts help to determine what other means of dispute resolution are available, how they are utilized, and what the results will be. *See, e.g.*, Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & Soc’y REV.* 95 (1974).

"Access," therefore, is not only an increasingly recognized, fundamental social right; it is also necessarily a central focus of modern procedural scholarship. Its study presupposes both a broadening and deepening of the aims and methods of modern legal science.

II. THE MEANING OF A RIGHT TO EFFECTIVE ACCESS: THE BARRIERS TO BE 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 in the context of a given substantive law could be expressed as complete "equality of arms"—the assurance that the ultimate result depends only on the relative legal merits of the opposing positions, unrelated to differences which are extraneous to legal strength and yet, as a practical matter, affect the assertion and vindication of legal rights. This perfect equality, of course, is utopian, as we have already implied; the differences between parties can never be completely eradicated. The question is how far to push toward the utopian goal, and at what cost. In other words, how many of the "barriers" to effective equality of arms can and should be attacked? The identification of the barriers is thus the first task in giving meaning to "effectiveness."

A. Costs of Litigation

1. *In general.* Formal dispute resolution, particularly in the courts, is very expensive in most modern societies.¹¹ While the govern-

11. A number of recent studies, employing a variety of indicators, reinforce this point. In the German National Report for the Florence Project, for example, it is stated that a case involving two instances and an amount-in-controversy equal to about eight months' average salary in Germany (approximately 14,400 DM or, according to exchange rates in effect on January 1, 1978 (used through this Report) U.S. \$6,800) will entail costs of about one-half the amount in controversy. Bender & Strecker, *Access to Justice: Report on the Federal Republic of Germany*, Section IB, in Volume I of the forthcoming Florence Access-to-Justice Project (1978) [hereinafter cited as FLORENCE PROJECT]. See also G. BAUMGÄRTEL, *GLEICHER ZUGANG ZUM RECHT FÜR ALLE 2-5* (Cologne: Heymanns Verlag 1976); Redeker, *Bürger und Anwalt im Spannungsfeld von Sozialstaat und Rechtsstaat*, 26 NEUE JURISTISCHE WOCHENSCHRIFT 1153, 1159-60 (1973).

The United States report for the Florence Project cites a study of automobile accident litigation which found that the median recovery by a victim was \$3,000, of which 35.5% went to the lawyer and another 8% for other expenses. Johnson, Bice, Bloch, Drew, Kantor, Schwartz & Tucker, *Access to Justice in the United States: The Economic Barriers and Some Promising Solutions*, Section IB, in 1 FLORENCE PROJECT, *supra*.

A recent empirical study in England of personal injury litigation found that, "in

ment typically pays the salaries of judges and other court personnel and provides the buildings and other facilities necessary to try cases, the litigants must bear the great proportion of the other costs of settling a dispute, including attorneys' fees and some court costs.

This 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 high costs also serve as a powerful barrier under the more generally used "winner-takes-all" system,¹² where unless the prospective litigant is sure to win, which is 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. Furthermore, 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 vary widely.¹³ Finally, plaintiffs in these coun-

about a third of all contested cases, the total costs were greater than the amount in dispute." See M. ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM* 323 (London: Weidenfeld and Nicolson; 2d ed. 1976). A recent survey of French litigants found that for litigants earning less than 1,750 francs per month (about U.S. \$370), the average cost of litigation was at least 144% of their monthly incomes. Y. BARAQUIN, *LES FRANÇAIS ET LA JUSTICE CIVILE: ENQUÊTE PSYCHO-SOCIOLOGIQUE AUPRÈS DES JUSTICIABLES* 80 (Paris: La Documentation Française 1975). For Italy the best study of the high costs of litigation is still C. CASTELLANO, C. PACE, G. PALOMBA & G. RASPINI, *L'EFFICIENZA DELLA GIUSTIZIA ITALIANA E I SUOI EFFETTI ECONOMICO-SOCIALI* 81 (Bari: Laterza; 2d ed. 1970). It is reported there that in large cases (over U.S. \$1600) the average cost to the parties is 8.4% of the amount in controversy, while in cases of less than U.S. \$160 the percentage rises to 170%.

It must, however, be recognized that the socialist countries tend not to have such high cost barriers. See notes 158-60 & accompanying text *infra*.

12. The long list of the countries, which, with some variations, have winner-takes-all systems includes: Australia, Austria, Belgium, Canada, England, France, Germany, the Netherlands, and Sweden. Although adopting the winner-takes-all rule in principle, some countries, including Colombia, Italy, Spain and Uruguay give the judge wide discretion to allocate costs between the parties. The "American Rule," apparently followed only in the United States and Japan, has often been criticized. See, e.g., Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974). But see note 14 *infra*.

13. Attorneys' fees can vary greatly in any given case because they are set according to how much work is done, not according to the amount in controversy. 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

tries must sometimes post security for the adversary's expenses before bringing a lawsuit. For these reasons, one may well question whether the "winner-takes-all" rule does not erect cost barriers which are at least as substantial as those created by the American rule.¹⁴ At any rate, it is certainly clear that high costs, to the extent that one or both of the parties must bear them, constitute a major access-to-justice barrier.

The single most important expense to the litigant is of course attorneys' fees. In the United States and Canada, for example, attorneys' hourly rates range from about \$25 to \$300, and the charge for a particular service may well exceed the hourly rate.¹⁵ In other countries, attorneys' fees may be charged according to criteria which may make them more reasonable, but our data show that they comprise an overwhelming proportion of the high litigation costs in countries with private lawyers.¹⁶ Any realistic attempt to confront problems of access must begin by recognizing this situation: lawyers and their services are quite expensive.

2. *Small claims.* Claims involving relatively small sums of money suffer most from the barrier of cost. If the dispute is to be resolved by formal court processes, the cost may exceed the amount in controversy or, if not, may still consume so much of the claim as to make litiga-

means that no litigant can have the least idea of what he will have to pay if he loses the case.

[EVERSHED] COMMITTEE ON SUPREME COURT PRACTICE AND PROCEDURES, FINAL REPORT (1953) (quoted in M. ZANDER, *supra* note 11, at 324). See also Jolowicz, *Fundamental Guarantees in Civil Litigation: England*, in FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION, *supra* note 1, at 121, 152-56.

In countries such as Germany, where attorneys' fees are regulated strictly according to the amount in controversy rather than the amount of legal work done, litigants can at least predict the potential costs of litigation.

14. An important critical article in Germany is Bokelmann, *Rechtswegssperre durch Prozesskosten*, 1973 ZEITSCHRIFT FÜR RECHTSPOLITIK 164. See also Rehbindner, *Die Kosten der Rechtsverfolgung als Zugangsbarriere der Rechtspflege*, in ZUR SOZIOLOGIE DES RICHTSVERFAHRENS 395, 405-06 (Opladen: Westdeutscher Verlag 1976).

It is, of course, possible to follow different types of rules for the allocation of costs in different cases. See, e.g., Bender & Strecker, *supra* note 11, Section IE; Kojima & Taniguchi, *Japanese National Report on Access to Justice*, Section IIIB, in 1 FLORENCE PROJECT, *supra* note 11.

15. Johnson *et al.*, *supra* note 11, Section IA1; Cooper & Kastner, *Access to Justice in Canada: The Economic Barriers and Some Promising Solutions*, Section IB, in 1 FLORENCE PROJECT, *supra* note 11. The "contingent fee" device, of course, diverges somewhat from this system, but in fact lawyers still must, on the average, earn their hourly fee (or more) by balancing high fees in the cases won with the cases in which no fee is obtained.

16. See, e.g., Johnson *et al.*, *supra* note 11, Section 1B; Bender & Strecker, *supra* note 11, Section IB; Vigoriti, *Access to Justice in Italy*, Section I1, in 1 FLORENCE PROJECT, *supra* note 11; Cooper & Kastner, *supra* note 15, Section IB.

tion futile.¹⁷ The data assembled for the Florence Project show clearly that the ratio of cost to amount in controversy steadily increases as the financial value of the claim goes down.¹⁸ In Germany, for example, the cost of litigating a claim for about U.S. \$100 in the regular court system is estimated to be roughly U.S. \$150, even though only a court of first instance is involved, while the cost for a U.S. \$5,000 claim, involving two instances, would be about U.S. \$4,200—still very high but a substantially smaller proportion of the claim's value. Examples need not be multiplied in this area;¹⁹ clearly, small claims problems require special attention if access is to be obtained.²⁰

3. *Time.* In many countries litigants seeking a court remedy must wait over two or three years for an enforceable judicial decision.²¹

17. The problem arises largely because lawyers must be directly or indirectly compensated according to the time they work, and the cost of their time is very high. In the United States, for example,

[L]awyers must charge a minimum of twenty dollars per hour for their time in order to net before taxes an income of \$16,000, 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 AMERICAN ASSEMBLY, LAW AND THE AMERICAN FUTURE 116, 123-24 (Englewood Cliffs, N.J.: Prentice-Hall, Inc.; M. Schwartz ed. 1976). See also Franzen, *Ist der Zivilprozesssektor einer Anwaltspraxis noch rentabel?*, 26 NEUE JURISTISCHE WOCHENSCHRIFT 2054-57 (1973).

18. See, e.g., Vigoriti, *supra* note 16, Section I2; de Miguel y Alonso, *Access to Justice in Spanish Law*, Section IB, in 1 FLORENCE PROJECT, *supra* note 11; Fasching, *Access to Justice in Austria*, Section IB, in 1 FLORENCE PROJECT, *supra* note 11. G. D. S. Taylor reports for Victoria, Australia, that "the combined costs (which the loser must pay) of the parties to litigation in the Magistrate's Courts is more than 50 percent of any claim up to \$800." Taylor, *Special Procedures Governing Small Claims in Australia* 12, in 2 FLORENCE PROJECT, *supra* note 11. For some earlier data on this problem, see Cappelletti, *supra* note 7, at 872-73.

19. See Bender & Strecker, *supra* note 11, Section IC. See also G. BAUMGÄRTEL, *supra* note 11, at 3. One reason for the relatively high percentage for the large claims in Germany is that the attorneys' fees, as mentioned before, are set not by the amount of work done but rather by the value of the claim. For other countries the percentage for larger claims is lower.

20. See text accompanying notes 192-255 *infra*.

21. In Italy, for example, "it is seen 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." Vigoriti, *supra* note 16, Section I2. See also de Miguel y Alonso, *supra* note 18, Section IIA2, where it is stated that it takes five years and three months for trial, appeal and Cassation appeal in Spain.

According to Professor 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 Belgian *tribunal de première instance* 2.06 years, and before the Italian tribunal of first instance 2.33 years. A. Kohl, *La Procédure Ordinaire de Première Instance en Belgique, en France, en Italie, au Luxembourg et aux Pays-Bas*, at 76 (1976) (unpublished draft chapter 6 for 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, CIVIL PROCEDURE (M. Cappelletti ed.)). See also the discussion of delay statistics in Kojima & Taniguchi, *supra* note 14, Section IIC. For comparably better performances

The effect of this delay, especially given the prevailing rates of inflation, can be devastating; it increases the parties' costs and puts great pressure on the economically weak to abandon their claims or settle for much less than that to which they are entitled. As the European Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 6, paragraph 1, explicitly recognizes, justice that is not available within a "reasonable time"²² is, for many people, inaccessible justice.

B. *Relative Party Capability*

"Party capability," as shown by a recent and increasingly important line of research, is central to the provision or denial of effective access. This term, utilized by Professor Marc Galanter, rests on "the notion that certain kinds of parties . . . enjoy a set of strategic advantages."²³ The study of strategic advantages and disadvantages, it must be recognized, is just beginning, and it is difficult to evaluate them with any precision. Nevertheless, we can isolate some of the basic advantages and disadvantages for particular parties, as well as venture a few hypotheses on the basis of recent, and highly suggestive, sociological research.

1. *Financial resources.* Persons or organizations possessing considerable, or relatively considerable, financial resources that can be utilized for litigation have obvious advantages in pursuing or defending claims. In the first place, they can afford to litigate. They are, in addition, able to withstand the delays of litigation. Each of these capabilities, if in the hands of only one party, can be a powerful weapon; the threat of litigation becomes both credible and effective. Similarly, one of two parties to a dispute may be able to outspend the other and, as a result, present his argument more effectively. Passive decision-makers, whatever their other, more admirable, characteristics, clearly exacerbate this problem by relying on the parties for investigating and presenting evidence and for developing and arguing the case.²⁴

see Fasching, *supra* note 18, Section IB (Austria). Bender & Strecker, *supra* note 11, Section IID3 (Federal Republic of Germany). For the socialist countries, see note 160 *infra*.

22. See, e.g., Velu, *La Convention Européenne des Droits de L'Homme et les garanties fondamentales des parties dans le procès civil*, in FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION, *supra* note 1, at 245, 318-22.

23. Galanter, *Afterward: Explaining Litigation*, 9 LAW & Soc'y REV. 347, 360 (1975).

24. See, e.g., Cappelletti, *supra* note 1, at 746-52. On the generally inactive role

2. *Competence to recognize and pursue a claim or defense.* Personal "legal competence," while related to the advantages of financial resources and attendant differences in education, background, and social status, is a much richer concept of crucial importance in determining the accessibility of justice. It focuses on the many barriers which must be *personally* overcome before a right can be effectively vindicated through our judicial machinery. Many (if not most) ordinary people cannot—at least do not—overcome them for most types of legal claims.²⁵

At the first level is the problem of recognizing that a legally enforceable right exists. This fundamental barrier is especially serious for the underprivileged, but it affects not only the poor. It confronts the entire population in many types of conflicts that could be considered to involve legal rights. As Professor 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."²⁶ Even educated consumers, for example, realize only infrequently that having signed a contract does not mean that they must in all cases comply with its terms. They lack the basic legal knowledge not only to challenge such contracts, but also to realize that they are even subject to challenge.

In addition, people have limited knowledge about how to enforce a claim. The major English empirical study in this area concluded that: "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

of American judges in overseeing normal litigation, for instance, see Homburger, *Functions of Orality in Austrian and American Civil Procedure*, 20 BUFFALO L. REV. 9, 30-35 (1970); Kaplan, *Civil Procedure: Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409 (1960).

25. Among the important analyses of these barriers to the effective satisfaction of "legal needs" are the empirical studies by B. ABEL-SMITH, M. ZANDER & R. BROOKE, *LEGAL PROBLEMS AND THE CITIZEN* (London: Heinemann 1973); M. CASS, *LEGAL NEEDS OF THE POOR* (Canberra: Australian Government Printing Office, Law and Poverty Series 1975), and C. MESSIER, *LES MAINS DE LA LOI: UNE PROBLÉMATIQUE DES ÉCONOMIQUEMENT FAIBLES DU QUÉBEC* (Montreal: Commission des Services Juridiques 1975); and the more theoretical works by Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381 (1965); and R. Blom, *The Satisfaction of Legal Needs: Some Theoretical Ideas* (unpublished Research Report No. 6 of the Institute of Sociology and Social Psychology, University of Tampere, Finland 1974). For a helpful survey of recent developments in this field see Blankenburg, *Rechtsberatung als Hilfe und als Barriere auf dem Weg zum Recht*, 1976 ZEITSCHRIFT FÜR RECHTSPOLITIK 93.

26. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC'Y REV. 401, 406 (1975).

done to increase the extent of the public awareness of available facilities and how to use them."²⁷ A Quebec study similarly stated that "[l]e besoin d'information est primordial et prioritaire."²⁸ This lack of knowledge, in turn, relates to a third major barrier—the psychic willingness of people to resort to legal procedures. Even those who know how to find qualified legal advice may not do so. 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."²⁹ Aside from this outright distrust of lawyers, especially prevalent among low income classes, there are other obvious reasons why formal litigation is considered so unattractive. Complicated procedures, detailed forms, intimidating courtrooms and overbearing judges and lawyers make the litigant feel lost, a prisoner in an alien world.

All of these barriers, it must be pointed out, are more or less important depending on the types of parties, institutions and claims involved.³⁰ While we have related them to "personal competence," it is dangerous to personalize them excessively. Parties willing to see a lawyer in order to purchase a house or get a divorce, for example, probably would not consider legal action against a company allowing smoke to belch illegally out of a neighborhood factory.³¹ It is difficult

27. B. ABEL-SMITH, M. ZANDER & R. BROOKE, *supra* note 25, at 222.

28. C. MESSIER, *supra* note 25, at 495.

29. B. ABEL-SMITH, M. ZANDER & R. BROOKE, *supra* note 25, at 224. A recent European Community consumer poll, for example, inquired about the reaction of consumers who believed that they had been cheated by a merchant. Only 2 percent of the respondents complained to a consumer organization or publication, and a statistically negligible number took legal action. COMMISSION OF THE EUROPEAN COMMUNITIES, *EUROPEAN CONSUMERS: THEIR INTERESTS, ASPIRATIONS, AND KNOWLEDGE ON CONSUMER AFFAIRS* 29-33 (Brussels 1976).

30. According to Mayhew,

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 legal system and the 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.

Mayhew, *supra* note 26, at 404.

31. Typical are the survey findings in Australia as follows:

The pattern that emerged was a not unexpected one of respondents tending to obtain legal advice in areas traditionally associated with lawyers in private practice. Virtually everyone buying a house engaged a solicitor to complete the conveyancing work. Those experiencing problems of family breakdown usually found their way to a lawyer. . . . On the other hand, tenants en-

to "mobilize"³² persons to use the legal system to pursue non-traditional legal rights.

3. *"One-shot" litigants v. "repeat-player" litigants.* Professor Galanter has developed the distinction between what he calls "one-shot" and "repeat-player" litigants, based primarily on the frequency of encounters with the judicial system.³³ 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, according to Galanter, are numerous: (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 are indeed more effective than individuals.³⁴ There are clearly fewer problems in mobilizing organizations to take advantage of their rights, often against just those ordinary people who in their posture as consumers, for example, are most reluctant to seek the benefits of the legal system.

This gap in access can be most effectively attacked, according to Galanter, if individuals find ways of aggregating their claims and developing long-term strategies to counteract the advantages of the organizations they must often face. Some of the problems encountered in implementing this strategy are considered in the following discussion of "diffuse interests."

countering even quite serious problems with their landlord were reluctant to seek legal advice and, except in rare cases, did not take the step of asking a lawyer to represent them before entering into a lease. Consumers who found they had purchased defective products attempted to resolve the matter themselves and only rarely consulted a lawyer.

See M. CASS, *supra* note 25, at 89. See also C. MESSIER, *supra* note 25, at 487-501.

32. See Black, *The Mobilization of Law*, 2 J. OF LEGAL STUD. 125 (1973); Lempert, *Mobilizing Private Law: An Introductory Essay*, 11 LAW & SOC'Y REV. 173 (1976).

33. See Galanter, *supra* note 10; Galanter, *supra* note 23.

34. See Wanner, *The Public Ordering of Private Relations. Part II: Winning Civil Cases*, 9 LAW & SOC'Y REV. 292 (1975). According to Galanter, "We cannot escape the conclusion that in gross the courts in the United States are forums which are used by organizations to extract from and discipline individuals." Galanter, *supra* note 23, at 360.

C. *The Special Problems of Diffuse Interests*

"Diffuse" interests are collective or fragmented interests such as those in clean air or consumer protection. 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 or her to seek enforcement action. Professor Roger Perrot's recent statement about consumers aptly captures the problem of "diffuseness": "Le consommateur, c'est tout et c'est rien."³⁵

One simple illustration can show why this situation creates special access barriers.³⁶ Suppose a government authorizes construction of a dam which threatens serious and irreversible harm to the natural environment. Many people may enjoy the area jeopardized by the proposed dam, but few, if any, have any direct financial interest at stake. Even these few, moreover, are unlikely to have enough of an interest to bear the huge burden of a very complicated 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 in enforcing the law; the wrongdoer may not be deterred from continuing his conduct. Aggregation of claims is thus desirable—indeed often necessary—not only from Galanter's point of view, but also from the related viewpoint of the effective vindication of diffuse rights.

A further barrier relates precisely to the question of 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"—a person who does not contribute to the lawsuit but cannot be excluded from its primary benefit, *i.e.*, the halting of the dam's construction.³⁷ In short, we can say that even if per-

35. Perrot, *Les moyens judiciaires et para-judiciaires de la protection des consommateurs*, GAZETTE DU PALAIS, March 25, 1976, at 237.

36. See CENTER FOR PUBLIC REPRESENTATION, TOWARD FAIRER AND MORE RESPONSIVE ADMINISTRATION 26-27 (Madison, Wisconsin 1975).

37. The starting point for analyses of this problem and its implications for pluralist theory is M. OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (Cambridge, Mass.: Harvard University Press 1965).

sons in the aggregate have a sufficient interest in vindicating a diffuse interest, the barriers to organization may still prevent that interest from being aggregated and hence expressed.

Thus, while as a rule the private protection of diffuse interests requires group or concerted action, it is difficult to insure that such concerted action will take place if the government itself fails, as in the above example, 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 to continue instead to rely on *governmental* machinery to protect group and public interests. Recent comparative research, however, has amply proven the inadequacy of relying only on the state for the enforcement of diffuse rights.³⁸ It is profoundly necessary, but admittedly difficult, to mobilize private energy to overcome the weaknesses of the governmental machinery.

D. *The Barriers to Access: A Preliminary Conclusion and a Complicating Factor*

An examination of these barriers to access, it may be seen, has revealed a pattern: the obstacles created by our legal systems are most pronounced for small claims and for isolated individuals, especially the poor; at the same time, the advantages belong to the "haves," especially to organizational litigants adept at using the legal system to advance their own interests.

Reflecting on this situation, we would expect that individuals would have most trouble asserting their rights when the vindication of those rights entails legal actions for relatively small damages against powerful organizations. The new substantive rights which are characteristic of the modern welfare state have precisely these features: on the one hand, they involve efforts to bolster the power of citizens against governments, consumers against merchants, the populace against polluters, tenants against landlords, and employees against employers (and

38. The results of this research are given in detail in Cappelletti, *The Role of the Ministère Public, the Prokuratura, and the Attorney General in Civil Litigation—With a Glance at Other Forms of Representation of Public and Group Interests in Civil Proceedings*, in M. CAPPELLETTI & J. JOLOWICZ, *PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION* 7 (Milan/Dobbs Ferry, N.Y.: Giuffrè/Oceana 1975). A revised version of this study also appears as Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 MICH. L. REV. 793 (1975) [hereinafter cited as *Governmental and Private Advocates*]. See also text accompanying notes 88-137 *infra*.

unions); on the other hand, the monetary interest of any one individual—as plaintiff or defendant—is likely to be small. To turn these new and (for every modern society) very important rights into concrete advantages for ordinary people is evidently no easy task. Assuming the political will to mobilize individuals to enforce these rights—*i.e.*, assuming these rights were really meant to be enforced—the fundamental question is how it can be done. This problem will be a principal focus of this article and the reforms it will discuss.

Finally, as a complicating factor in the efforts to attack barriers to access, it must be emphasized that these obstacles cannot simply be eliminated one by one. Many access problems are related, and changes aimed at improving access in one way can exacerbate access barriers in another. For example, one approach to reducing costs is simply to ban legal representation in certain proceedings. Clearly, however, since relatively uneducated, low income litigants are more likely to lack the capacity to present their own legal cases effectively, they might suffer more than benefit from such a “reform.” Without some compensating factors, such as a very active judge or other forms of legal assistance, indigent plaintiffs could now *afford* to litigate but would lack the kind of help that may be essential for them to litigate *effectively*. The serious study of access to justice cannot neglect the interrelationship of access barriers.

III. THE PRACTICAL APPROACHES TO ACCESS-TO-JUSTICE PROBLEMS

The recent awakening of interest in effective access to justice has led to three basic approaches, at least in the Western-oriented countries. Since about 1965, these approaches emerged more or less in chronological sequence.³⁹ We can say roughly that the first access solution—the “first wave” in this new movement—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—and most recent—is what we propose to call simply the “*access-to-justice approach*,” since it includes, but goes

39. Note the chronological coincidence with the “student movement.” The development began somewhat later outside of the United States. In England, for example, much activity can be traced to the publication in 1968 of *SOCIETY OF LABOUR LAWYERS, JUSTICE FOR ALL* (London: Fabian Society 1968), even though some important developments must be traced back to the late 1940’s.

much beyond, the earlier approaches, thus representing an attempt to attack access barriers in a more articulate and comprehensive manner.

A. *The First Wave: Legal Aid for the Poor*

Quite appropriately, the first major efforts to improve access to justice in Western countries focused on providing legal services to the poor.⁴⁰ In most modern societies the help of a lawyer is essential, if not mandatory, to deciphering the increasingly complex laws and arcane procedures encountered in bringing a civil claim to court. Methods of providing legal representation for those who cannot afford it are therefore vital. Until very recently, however, the legal aid schemes of most countries were fundamentally inadequate. They relied, for the most part, on services provided by the private bar without compensation ("*munus honorificum*").⁴¹ The right to access was thus recognized and given some support, but the state undertook no affirmative action to guarantee it. Quite predictably, such legal aid systems were ineffective.⁴² Lawyers in market economies, particularly those who were more experienced and highly skilled, tended to devote their time to remunerative work rather than to gratuitous legal aid. Moreover, in order to avoid having to provide too much charity, program sponsors tended to erect steep barriers to qualifying for free legal aid.

The flaws in these programs became increasingly apparent. Reforms were introduced relatively early in Germany and England, in both cases under a social democratic or labor regime. In 1919-1923 Germany began a system of state compensation for private attorneys providing legal aid; the aid was given as a matter of right to all eligible persons.⁴³ In England, the major reform began with the 1949 statute

40. See generally M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (Milan/Dobbs Ferry, N.Y.: Giuffrè/Oceana 1975).

41. 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. See generally Cappelletti, *The Emergence of a Modern Theme*, in *id.* at 3, 18-21.

42. *Id.* at 23-27.

43. The 1919 German statute allowed attorneys to recover their actual disbursements—not attorneys' fees—from the state. *Gesetz über Teuerungszuschläge zu den Gebühren der Rechtsanwälte und Gerichtsvollzieher* of December 18, 1919, [1919] Reichsgesetzblatt [RGBI] I 2113 (Ger.); Hagelberg, *Zur Reform des Armenrechts*, 49 JURISTISCHE WOCHENSCHRIFT 876 (1920). 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 February 6, 1923, [1923] RGBI I 103 (Ger.); Küster, *Erstattung von Rechtsanwaltsgebühren in Armensachen*, 52 JURISTISCHE WOCHENSCHRIFT 676 (1923).

creating the Legal Aid and Advice Scheme and entrusting it to the Law Society, the national association of solicitors.⁴⁴ This scheme recognized the importance of compensating private attorneys for providing legal consultation ("legal advice") as well as assistance in litigation ("legal aid"). These approaches were limited in several ways, but they commenced the move beyond the anachronistic semi-charitable, laissez-faire legal aid programs.

The dramatic activity in reforming legal aid has taken place in the last twelve years. The social consciousness which reawakened especially in the mid and late 1960's placed legal aid at the top of the law reform agenda. The contradiction between the theoretical ideal of effective access and the totally inadequate legal aid systems became more and more intolerable.⁴⁵

Reform began in 1965 in the United States with the Legal Services Program of the Office of Economic Opportunity (OEO),⁴⁶ and continued throughout the world in the early 1970's. In January 1972, France replaced its nineteenth century legal aid scheme, based on gratuitous service rendered by the bar, with a modern "*sécurité sociale*" approach in which the cost of compensation is borne by the state.⁴⁷ In May 1972, Sweden's innovative new program was enacted into law.⁴⁸ Two months later the English Legal Advice and Assistance Act greatly expanded the reach of the system set up in 1949, especially in the area of legal advice,⁴⁹ and the Canadian Province of Quebec established its

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

45. Several countries even experienced judicial challenges to archaic legal aid schemes. In Austria, the decision of the Constitutional Court on December 19, 1972, 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, Supplement (*Beilage*), OSTERREICHISCHES ANWALTSBLATT, Feb., 1973. Other examples of such judicial review can be found in Cappelletti, *supra* note 41, at 70-76.

46. Title I of the Economic Opportunity Act of 1964 (42 U.S.C. §§ 2701-981 (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 decided 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, 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 69-74 & accompanying text *infra*.

47. Law of Jan. 3, 1972, no. 72-11, [1972] *Journal Officiel de la République Française* [J.O.] 164 [1972] Dalloz, *Législation* [D.L.] 69 (Fra.). The law went into effect on September 16, 1972. See notes 62-66 & accompanying text *infra*.

48. Public Legal Aid Law of May 26, 1972, [1972] *Svensk Författningssamling* 429. See note 75 & accompanying text *infra*.

49. Legal Advice and Assistance Act, 1972, c. 50, rewritten and consolidated in the Legal Aid Act, 1974, c. 4. See notes 59-61 & accompanying text *infra*.

first government-financed legal aid program.⁵⁰ In October 1972, the Federal Republic of Germany improved its system by increasing the compensation paid to private lawyers for legal services to the poor.⁵¹ And in July 1974, the long-awaited Legal Services Corporation—an effort to preserve and extend the gains of the by-now-disbanded OEO program—was established in the United States.⁵² Also during this period both Austria⁵³ and the Netherlands⁵⁴ revised their legal aid programs to compensate private attorneys more adequately; several major reforms were enacted in Australia;⁵⁵ and Italy came close to changing its own anachronistic system, which was similar to the pre-1972 French scheme.⁵⁶

The legal aid systems of much of the modern world were thus dramatically improved. A movement was unleashed that has continued to grow and, as we shall see, has even overflowed the categories and constructs of legal aid reform. Before exploring further dimensions of the movement—and indeed to help clarify the logic of these further dimensions—we must survey the major accomplishments as well as the limits of this first great wave of reform.

1. *The judicare system.* The major accomplishment of the Austrian, British, Dutch, French, and West German legal aid reforms was the bolstering of what has been termed the “judicare” system of legal aid. Judicare is a system whereby legal aid is established as a matter of right for all persons eligible under the statutory terms, with the state paying the private lawyer who provides those services. The goal of judicare systems is to provide the same representation for low income litigants that they would have if they could afford a lawyer. The ideal is

50. Legal Aid Act, 21 Eliz. 2, c. 14 (Quebec, 1972). See note 76 & accompanying text *infra*.

51. *Gesetz zur Änderung der Bundesrechtsanwaltsordnung, der Bundesgebührenordnung für Rechtsanwälte und anderer Vorschriften* of Oct. 24, 1972, [1972] BGBl I 2013 (W. Ger.).

52. Legal Services Corporation Act of 1974, Pub. L. 93-355, 88 Stat. 378 (1974). See note 73 *infra*.

53. See H. FASCHING, KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN, ERGÄNZUNGSBAND (Vienna: Manzsche Verlags- und Universitätsbuchhandlung 1974); Kininger, *Der wirtschaftlich Schwache im österreichischen Zivilprozess*, 1976 OSTERREICHISCHE JURISTEN-ZEITUNG 9.

54. See Houtappel, *Access to Justice in Holland*, Section IIG, in 1 FLORENCE PROJECT, *supra* note 11. The Dutch reforms, as well as other recent European reforms, were recently surveyed in Gottwald, *Armenrecht in Westeuropa und die Reform des deutschen Rechts*, 89 ZEITSCHRIFT FÜR ZIVILPROZESS 136 (1976).

55. See Taylor, *Access to Justice in Australia*, Section III, in 1 FLORENCE PROJECT, *supra* note 11. See also note 77 *infra*.

56. See Cappelletti, *supra* note 41, at 33-39.

to make a distinction only with respect to the billing: the state, rather than the client, is charged the cost.

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.⁵⁷ The list is a long one, since the compensation for the legal aid attorney is sufficient to attract almost all practitioners.⁵⁸ Since legal assistance is often necessary to demonstrate formal qualification for legal aid, the 1972 reform enables the applicant to obtain up to £25 of legal services without the need for formal authorization;⁵⁹ these services can include helping to prepare the application for legal aid. The system thus goes far to provide the poor with the financial means to obtain a lawyer. While it has been criticized because its standard of need is too restrictive and because it does not provide assistance for proceedings before most special tribunals where, in fact, many of the "new rights" must be asserted⁶⁰ its results have been impressive: over the years aid has been given to a steadily increasing number of persons.⁶¹

The French system, as introduced in 1972 and modified by enactments of 1974 and 1975, also moves a long way toward an effective *judicare* system.⁶² A particularly important feature of the French sys-

57. Legal Aid Act, 1974, c. 4, § 12. See generally Jacob, *Access to Justice in England*, Section VIA-D, in 1 FLORENCE PROJECT, *supra* note 11.

58. See Legal Aid Act, 1974, c. 4, Schedule 2. An American study ten years ago found that 96% of English attorneys considered the fees to be adequate. Utton, *The British Legal Aid System*, 76 YALE L.J. 371, 376 (1966).

59. Legal Advice and Assistance Act, 1972, c. 50, rewritten and consolidated in the Legal Aid Act, 1974, c. 4, § 3. For divergent evaluations of this reform, see Samuels, *Legal Advice and Assistance Act 1972; The Scheme and an Appraisal*, 122 NEW L.J. 696, 697 (1972); Pollock, *Legal Advice and Assistance Act 1972; The Scheme and a Mis-appraisal*, 122 NEW L.J. 807 (1972).

60. See, e.g., *First Report of the Legal Aid Legislation Working Party*, in 25TH LEGAL AID ANNUAL REPORTS [1974-75] at 55 (London: H.M.S.O. 1975); S. POLLOCK, *LEGAL AID—THE FIRST 25 YEARS* 110-15, 117-19 (London: Oyez 1975); E. MOERAN, *PRACTICAL LEGAL AID* 12-14 (London: Oyez 1969); Dworkin, *The Progress and Future of Legal Aid in Civil Litigation*, 28 MOD. L. REV. 432, 444-46 (1965).

61. See S. POLLOCK, *supra* note 60, at 104-05. Also, "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." *Id.* at 103. Unfortunately, however, for a variety of reasons, including inflation, the eligibility standards have been becoming stricter since the Scheme's beginning so that fewer people are now eligible for legal aid than in the past. See 26th Annual Report of the Lord Chancellor's Advisory Committee on Legal Aid, in 26TH LEGAL AID ANNUAL REPORTS [1975-76] at 60-61 (London: H.M.S.O. 1976); Jacob, *supra* note 57, Section VIB.

62. Law of Jan. 3, 1972, no. 72-11, [1972] J.O. 167, [1972] D.L. 69 (Fra.); Financial Law (*loi de finances*) of Dec. 30, 1974, no. 74-1129, [1974] J.O. 13243,

tem since 1972 is that it is constructed to reach not only poor people, but also some people above the poverty level. Decreasing levels of aid are now available to persons with monthly incomes of up to 2950 francs (about U.S. \$640) for a family of four.⁶³ In addition, also since 1972, legal aid may be granted for a particularly important case regardless of the litigant's income.⁶⁴ The main problem with the French system is that despite a one-third increase in 1974 in the compensation paid to attorneys, the amount is still inadequate.⁶⁵ Nevertheless, France now provides an important model of a modern judicare system.

Despite the significant accomplishments of judicare schemes such as those in England and France, the judicare system itself has faced substantial criticism. It has become almost commonplace to observe that the attempt to treat poor persons like regular clients creates difficulties. Judicare solves the cost barrier, but it does little to affect the barriers caused by other problems typically encountered by the poor. For one thing, it relies on the poor to recognize legal claims and seek assistance;⁶⁶ it fails to encourage or even allow for efforts by individual practitioners to help the poor understand their rights and identify the areas where they may be entitled to legal remedies. It is indeed highly suggestive that the poor tend to utilize judicare systems mainly for legal problems with which they are already familiar—criminal and di-

13245 (Fra.); Decree of May 14, 1975, no. 75-350, J.O. 4909 (Fra.), *modifying* Decree of Sept. 1, 1972, no. 72-809, which applied the Law of Jan. 3, 1972. The initial reform was analyzed in Herzog & Herzog, *The Reform of the Legal Professions and of Legal Aid in France*, 22 INT'L & COMP. L.Q. 462 (1973). A thorough, recent description of the French system can be found in de Roussane, *L'aide judiciaire (Les aménagements récrement apportés au régime de l'institution)*, 95 RÉPERTOIRE DU NOTARIAT DEFRENOIS, I, DOCTRINE ET JURISPRUDENCE 1046 (1975). See also P. Thery, *Access to Justice in France*, at Section II, in 1 FLORENCE PROJECT, *supra* note 11.

63. Decree of May 14, 1975, no. 75-350, arts 4, 5, [1975] J.O. 4909 (Fra.), *modifying* the Decree of Sept. 1, 1972, arts. 66-68. Financial Law (*loi de finances*) of June 22, 1976, no. 76-539, [1976] J.O. 3739 (Fra.).

64. Law of Jan. 3, 1972, no. 72-11, § 16, [1972] J.O. 164, [1972] D.L. 69 (Fra.).

65. According to Thery, "the amount of compensation paid to lawyers has been deemed inadequate." See P. Thery, *supra* note 62, at Section II. The fees were set by the Decree of May 14, 1975, no. 75-350, arts. 7-10, [1972] J.O. 4909 (Fra.), *modifying* the Decree of Sept. 1, 1972, arts. 76, 77, 81 & 82; see the explanation by de Roussane, *supra* note 62, at 1055-56. Modifications in the fees were made again in mid-1976. At that point, 1000 francs (about U.S. \$200) was the maximum that could be received by an attorney for legal services rendered under the law. Financial Law (*loi de finances*) of June 22, 1976, no. 76-539, [1976] J.O. 3739 (Fra.). This raise, when inflation is taken into account, does not affect the conclusions given above.

66. The shortcomings of this reliance are suggested by the findings in B. ABEL-SMITH, M. ZANDER & R. BROOKE, *supra* note 25, at 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" See also notes 28-31 *supra* & accompanying text.

voice matters—rather than to pursue their new rights as consumers, tenants, and the like.⁶⁷ Moreover, even if they recognize their claim, poor people may be intimidated by the prospect of going to a law office and discussing it 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 vis-à-vis organizational litigants. Most importantly, *judicare* treats the poor as individuals to the neglect of the poor as a class. Neither the English, the French nor the German *judicare* system, for example, provides aid for “test cases” or group actions on behalf of the poor unless they can be justified by the interests of each individual involved. Given that the poor encounter many legal problems as a group, or class, and that the interests of any one individual may be too small to justify legal action, merely individual remedies are inadequate. *Judicare* systems, however, are not equipped to transcend individual remedies.⁶⁸

2. *The public salaried attorney model.* The public salaried attorney model of legal aid has a different objective than the *judicare* model, one which has its modern origin in 1965 in the Legal Services Program of the United States Office of Economic Opportunity—the vanguard of a “War on Poverty.”⁶⁹ Legal services were to be provided by “neighborhood law offices,” staffed with attorneys paid by the gov-

67. Under the English *judicare* system, for example, about 60% of the cases are matrimonial, and about 15% are criminal. See *Report of the Law Society*, in 26TH LEGAL AID ANNUAL REPORTS, [1975-76] *supra* note 61, at 18. For Australia, see COMMISSION OF ENQUIRY INTO POVERTY, SECOND MAIN REPORT, LAW AND POVERTY IN AUSTRALIA 41 (Canberra: Australia Government Printing Office 1975).

68. 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.” S. POLLOCK, *supra* note 60, at 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*, 20 BUFFALO L. REV. 583, 604 (1971). See also Johnson, *Further Variations and the Prospect of Future Themes*, in M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *supra* note 40, at 133, 184-95.

69. See note 46 *supra*. For a detailed history of the early years of the Legal Services Program, see generally E. JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (New York: Russell Sage Foundation 1974).

ernment, and charged with furthering the interests of the poor as a class.⁷⁰ As one commentator observed, "[t]he objective was to use taxpayers' money in the most cost-effective way—to obtain, in Department of Defense terminology, 'the most bang for the buck.'"⁷¹ To be sure, this goal did not preclude helping individual poor persons settle their grievances. In contrast to existing judicare systems, however, this system tended to be characterized by major efforts to make poor people aware of their new rights and willing to use lawyers to help pursue them. In addition, offices were small and typically located in poor communities to facilitate contact with the poor and to minimize the barriers of class. Attorneys were supposed to learn firsthand about these barriers and thus be able to attack them more effectively. Finally, and perhaps above all, the staff attorneys sought to extend the rights of the poor by test cases, lobbying, and other law reform activities on behalf of the poor as a class. 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 other barriers to individual access besides cost, particularly the problems of the personal legal competence of the poor. Further, it can support the diffuse, class interests of poor people. Staff attorney offices can secure for themselves the advantages of organizational litigants by acquiring expertise and experience with the problems that are typical of the poor. Private attorneys charged solely with servicing individuals are generally unable to secure such advantages. In sum, besides just handling the individual claims of the poor that are brought to lawyers, as in the judicare system, this American model (1) reaches out to the poor to help them vindicate their rights and (2) creates an effective advocate for the poor as a class.

The disadvantages or limits of the staff attorney approach stem mainly from its very aggressiveness and ability to create such advocates. It is apparent, first, that the more glamorous and seemingly cost-effective nature of test cases and law reform actions can in practice lead the staff attorney to neglect the interests of particular clients. Indeed, staff attorneys must every day decide how best to allocate their limited re-

70. See, e.g., Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967).

71. Huber, *Thou Shalt Not Ration Justice: A History and Bibliography of Legal Aid in America*, 44 GEO. WASH. L. REV. 754, 760 (1976).

sources between cases important only to individuals and cases important from a social perspective; there is always a chance that individuals will be ignored or given second-rate help. Second, many people feel, with some justification, that the notion of an attorney setting himself up as an advocate for the poor, and treating the poor as though they were 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 necessarily relies on government support for activities of an inevitably political nature which often are directed against the government itself. This reliance presupposes that a society has decided that any legal device to help the poor is desirable even if it means challenging governmental action and the actions of dominant groups in the society. The United States, for example, seemed to have committed itself to eradicate poverty, but in fact American legal aid attorneys, unlike private attorneys in England, France and Germany, have been under continual political attack.⁷² Only recently, after a very difficult legislative fight involving one Presidential veto, was the Legal Services Corporation made independent of 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.⁷³ In light of this recent history, it is not surprising that aggressive activity for the poor through staff attorney offices in other countries is exceedingly difficult.⁷⁴ While this system can break down many barriers to access, it is far from perfect.

72. As William Klaus noted, describing the United States experience, "It seems as though the programs fought with just about everyone and everything." Klaus, *Civil Legal Services for the Poor*, in AMERICAN ASSEMBLY, *supra* note 17, at 131, 132. For instance, Spiro Agnew, then-Vice President of the United States, criticized the system precisely for the reason many supported it: "We are dealing, in large 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*, 58 A.B.A.J. 930 (1972).

73. Legal Services Corporation Act of 1974, Pub. L. 93-355, § 1007 (a), (b), 88 Stat. 378 (1974). 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 be certain about the success of the new Legal Services Corporation as finally established. For some indications that lawyers will retain their aggressiveness on behalf of the poor as a class, see J. HANDLER, E. HOLLINGSWORTH & H. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* (Madison, Wis. forthcoming).

74. The most striking experience with this problem was the Indonesian staff attorney program, the Legal Aid and Public Defender Bureau, which was established in Jakarta in

The salaried staff attorney solution, if not combined with other solutions, is further limited in its utility by the fact that, it, unlike judicare systems utilizing the private bar, cannot guarantee legal aid as an *entitlement*. Realistically, there simply cannot be enough staff attorneys to give first-rate individual service to all the poor with legal problems. 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.

3. *Combined models.* A few countries have recently chosen to combine the two major models of legal aid systems, having recognized the limitations that exist in each of them and recognizing that the two can, in fact, be complementary. Sweden⁷⁵ and the Canadian Province of Quebec⁷⁶ were the first to offer clients the choice between representation by staff attorneys or by regular private attorneys, although, it should be noted, the programs do have different emphases. The Swedish system leans more toward the judicare approach since staff attorney offices are supposed to support themselves essentially 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 may have less of a tendency to focus only on individual claims, and are more likely to mobilize the poor and to be advocates for them as a group. The important point, however, is that the possibility of choice in both programs has opened up a new dimension in legal aid and advice. Ideally this combined model allows individuals to choose between the individualized services of a

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 Magavern, Thomas, & Stuart, *Law, Urban Development, and the Poor in Developing Countries*, 1975 WASH. U.L.Q. 45, 58-60. See also note 77 *infra*.

75. Public Legal Aid Law of May 26, 1972, [1972] *Svensk Författningssamling* 429. The statute is translated and annotated by Professors Bruzelius and Bolding in M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *supra* note 40, at 525-61. See Hellners, *Legal Services in Sweden for Deprived Persons*, in COUNCIL OF EUROPE, *LEGAL SERVICES FOR DEPRIVED PERSONS PARTICULARLY IN URBAN AREAS: PROCEEDINGS OF THE SIXTH COLLOQUY ON EUROPEAN LAW 84* (Strasbourg 1976); Bruzelius & Bolding, *An Introduction to the Swedish Public Legal Aid Reform*, in M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *supra* note 40, at 561; von Hoffmann & Siehr, *Recht des Schwächeren*, 39 *RABELS ZEITSCHRIFT* 522, 526 (1975).

76. Legal Aid Act, 21 Eliz. 2, c. 14 (Quebec 1972). The statute is set out in M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *supra* note 40, at 584-613. See also Cooper, *Report on the Quebec Legal Aid System*, in *id.*, *supra* note 40, at 614-19.

regular (private) attorney or the special expertise of staff attorneys closely attuned to the problems of the poor. Also ideally, both poor individuals and the poor as a group can benefit.

Recognizing these advantages, reformers in many countries, including Australia,⁷⁷ Holland,⁷⁸ and Great Britain,⁷⁹ have helped implement systems in which law centers supplement the established judiciary schemes. The increasingly important British "neighbourhood law centres" are particularly notable. These centres are located in poor areas, mostly around London; their salaried solicitors (and a few barristers) perform many of the tasks handled by the staff attorneys in the United States. They have increasingly sought to treat the disputes brought to them not merely as individual matters, but also as commu-

77. Australia's federal government established a salaried legal services agency in 1973 to supplement state judiciary systems. According to the Australian Report, however, the organized bar has sought to and succeeded in severely circumscribing this agency's activities. See Taylor, *supra* note 55, Section III. The status of the federal program is as of this writing at best uncertain, but it appears that the notion of a "combined model" is still prevailing.

78. Since 1970 there have been "law shops" (*Rechtswinkel*) throughout the Netherlands which supplement the judiciary system which has been in effect since 1957. These offices are primarily staffed by students, with some assistance by young attorneys, and they also attempt to provide services aimed at improving the position of the poor as a class. There is much discussion now in Holland about setting up more formal state-controlled salaried legal services offices. See Houtappel, *supra* note 54, Section IIG.

79. Recent British developments are described in Jacob, *supra* note 57, Section VID. In particular, there are now nearly 30 Law Centres. The first, in North Kensington, London, began its activities in 1970, and the rest have been formed since 1973. A typical office, as of the date of a recently published survey, had from one to four full-time lawyers, and a few even had a barrister working full time. The centres are funded by various sources, including local authorities, legal aid, private charitable foundations, and the Lord Chancellor's special law centres' fund. 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. See Zander & Russell, *Law Centres Survey*, 73 LAW SOC'Y GAZETTE 208 (1976); Lewis, *Legal Services in the United Kingdom for Deprived Persons*, in COUNCIL OF EUROPE, *supra* note 75, at 95, 100-02. Zander, *Who Should Control Legal Services*, at 12-13, in 3 FLORENCE PROJECT, *supra* note 11. For a history and detailed examination of the English law centre movement, see M. ZANDER, *LEGAL SERVICES FOR THE COMMUNITY* 59-115 (London: Temple Smith 1978).

It should be mentioned that the "staff system" also exists to a limited extent in the Federal Republic of Germany. In several urban areas, most notably Hamburg, Berlin, and Lübeck, for example, legal advice is given to poor persons, predominantly by volunteer judges. The most interesting of these agencies is the Hamburg Legal Advice and Mediation Center (Öffentliche Rechtsauskunft- und Vergleichsstelle: ORA), attached to the labor and social welfare authorities in Hamburg and consisting of a main office and 26 branch offices. The ORA gives legal advice in about 60,000 matters per year, and it also offers a conciliation service. For a detailed study of the ORA, see Falke, Koch, & Bierbrauer, *The Hamburg Legal Advice and Mediation Center: A Case Study*, in 2 FLORENCE PROJECT, *supra* note 11. See also Bender & Strecker, *supra* note 11, Section IIIB. For details on some current experiments in legal advice in the FRG, see Baumgärtel, *Legal Services in the Federal Republic of Germany for Deprived Persons*, in COUNCIL OF EUROPE, *supra* note 75, at 57, 63-64.

nity problems. Their work, despite some initial hesitation on the part of the Law Society, has become recognized as "an integral and essential branch of legal services."⁸⁰

Sweden has pioneered further important developments. First, it goes considerably beyond other countries, including France, in extending legal aid to the middle classes. As of mid-1977, for example, a person earning as much as 80,000 Swedish kronor per year (about U.S. \$17,400, is eligible to receive some legal aid.⁸¹ This figure is automatically adjusted to keep up with the cost of living. In addition, the combination of private insurance and legal aid presently available in Sweden has filled a major gap existing in most other European systems. In virtually all countries where the "winner-takes-all" system prevails, legal aid generally will not assume the obligation of reimbursing the unassisted winner for his costs, even if the loser is very poor. Thus, unable to recover his costs, the adversary of the poor litigant may incur considerable financial hardship.⁸² In Sweden, however, about eight-five percent of the population has legal insurance which covers, *inter alia*, most of the costs of *losing* a lawsuit.⁸³ Hence, the winner can easily recover his costs from a poor adversary if the latter is insured. Obviously this development has important implications for access to justice in Sweden; indeed, it reflects a move beyond the simple legal aid solution.⁸⁴

4. *The legal aid solution: strengths and limitations.* Very important measures have been enacted in recent years to improve legal aid systems; as a consequence, access-to-justice barriers have begun to come down. The poor are obtaining legal aid in ever-larger numbers, not only for divorces and criminal defense, but, increasingly, to vindicate

80. *Twenty-Sixth Annual Report of the Lord Chancellor's Advisory Committee on Legal Aid*, *supra* note 61, at 57, 71.

81. See Bolding, *Access to Justice in Sweden*, Section II, in 1 FLORENCE PROJECT, *supra* note 11. This figure, which was applicable for 1976, is reached by multiplying by eight the *basic amount*—a figure defined by law and reconsidered and changed by law each month—of October 1976, which was 10,000 Swedish kronor (SKr) (about U.S. \$2,250).

82. 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, 1974, c. 4, § 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 M. ZANDER, *supra* note 11, at 370-74.

83. The insurance covers expenses both in and out of court except for a deductible charge of 200 SKr (about U.S. \$45) plus 10% of costs in excess of that amount. It covers a litigant's own costs plus costs he might pay upon losing. See Hellners, *supra* note 75, at 85; Bruzelius & Bolding, *supra* note 75, at 566-67.

84. See text accompanying notes 138-46 *infra*.

their new, non-traditional rights, whether as plaintiffs or as defendants. It can be expected that the experiments in legal aid that are now taking place will further eliminate those barriers.

Legal aid, however, cannot be the only focus for access-to-justice reform. There are serious limitations on the legal aid approach. First, in order for the system to be effective, legal aid schemes require a very large number of lawyers, a number that may exceed the supply, especially in the developing countries. Second, even assuming there are enough lawyers in the country, they must be made available to help those unable to afford their services. This requires funding, which is the basic problem of legal aid schemes. Legal aid relies basically on the relatively expensive provision of legal services through lawyers who primarily utilize the regular court system. To obtain the services of a highly trained lawyer for litigation is an expensive proposition, whether the compensation is provided by the client or by 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 poor. Few lawyers will provide such services, and those who do tend to perform them in a substandard fashion. In view of the high 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 to bear.⁸⁵ Sweden, with relatively little poverty and yet perhaps the most expensive legal aid system *per capita* in the world, has been characterized by one observer as the only nation that has really attempted to offer legal aid to *anyone* who cannot afford legal services in a particular case.⁸⁶

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 (or risk losing) a small claim, government-paid attorneys are not usually given the uneconomic luxury of handling such

85. Indeed, the criticism often made of legal aid systems is their neglect of the members of the middle classes who may need legal aid. For Germany see, e.g., G. BAUMGÄRTEL, *supra* note 11, at 118-19, 159-60; Baur, *Armenrecht und Rechtsschutzversicherung*, 1972 JURISTENZEITUNG 75, 75-77. For the United States, see, e.g., Klaus, *supra* note 72, at 137-38. In England, as has been noted, inflation has made it increasingly difficult to qualify for legal aid. See note 61 *supra*.

86. See Johnson, *supra* note 68, at 233-34. The costs, according to Hellners, *supra* note 75, at 93-94, were 120 million SKr (about U.S. \$27 million) in 1975, of which about 66 million SKr were for non-criminal legal aid and 895,000 SKr were for legal advice.

cases.⁸⁷ Once again, the problem of small claims calls for special attention.

Finally, while the staff attorney model addresses the need to vindicate the diffuse interests of the poor as a class, other important diffuse interests, such as those of consumers and environmentalists, may be ignored. The recognition of this fact became the basis of the second important wave of reforms, discussed below.

B. *The Second Wave: Representation of Diffuse Interests*

The second major movement in the effort to improve access to justice has addressed the problem of representing group and collective—diffuse—interests other than those of the poor. In the United States where it is still probably most advanced, this newer movement followed the great quinquennium (1965-1970) of reform and concern in the area of legal aid. By focusing explicitly on diffuse interests, it should be noted, this second wave of reform has forced a rethinking of very basic traditional notions of civil procedure and of the role of the courts. Indeed, a real “revolution” in civil procedure is taking place, which we should examine briefly before describing more specifically the principal approaches that have emerged.⁸⁸

The traditional conception of civil procedure left no room for the private, non-governmental protection of diffuse interests. Litigation was seen as merely a two-party affair, aimed at settling a controversy between the parties about their own individual rights. Rights tending to belong to a group, to the public or to a segment of the public did not fit well into that scheme. The laws of standing, the rules of procedure, and the roles of the judges were simply not designed to facilitate private enforcement of the rights of diffuse interests.

87. For example, legal assistance tends to be unavailable for small claims in the English County Courts and the German *Amtsgerichte*, see Gordley, *Variations on a Modern Theme*, in M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *supra* note 40, at 77, 105-06 & nn.65-68. For the Swedish small claims courts (discussed in text accompanying notes 304-11 *infra*), see Bolding, *supra* note 81, Section IIIA; and for Australia, see, e.g., Harland, *Consumer Protection in Australia*, 40 *RABELS ZEITSCHRIFT* 631, 645 (1976). The only time legal aid becomes feasible is in systems where it is permitted for “test cases” or where claims are aggregated in “class actions,” but neither of these approaches could provide remedies for very many individuals with small claims.

88. For a more detailed comparative treatment of the basic themes discussed in this Section, see Cappelletti, *Vindicating The Public Interest Through the Courts: A Comparativist's Contribution*, 25 *BUFFALO L. REV.* 643 (1976) [hereinafter cited as *Vindicating the Public Interest*], and Cappelletti, *La protection d'intérêts collectifs et de groupe dans le procès civil (Metamorphoses de la procédure civile)*, 27 *REVUE INTERNATIONALE DE DROIT COMPARÉ* [R.I.D.C.] 571 (1975).

The reforms discussed below—under the headings of the “private attorney general” and the “organizational private attorney general”⁸⁹—are the evidence and results of the rapidly evolving changes which have characterized this second wave. There is a worldwide movement in the direction of what Professor Chayes has called “public law” litigation because of its concern with important public policy issues involving large groups of people.⁹⁰ First, with respect to standing, legislative reforms and important court decisions are increasingly allowing private individuals and groups to act as champions of diffuse interests.⁹¹ Second, the protection of such interests has made necessary a transformation of the role of the judge and of such basic concepts as “notice” and the “right to be heard.” Since often not every possessor of a diffuse interest—*e.g.*, all those interested in clean air in a region—can always be brought to court, 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 group, even though not all had 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 proceeding, exemplifies the striking dimensions of this change in civil procedure.⁹² The individualistic vision of procedural due process is steadily giving way to, or rather merging with, a social, collective conception; only such a transformation can assure that the increasingly vital adjudication of “public law” conflicts, involving diffuse interests, can take place.⁹³

1. *The governmental approach.* Although still the principal

89. See text accompanying notes 104-37 *infra*.

90. See Chayes, *supra* note 2.

91. For numerous examples, see *Vindicating the Public Interest*, *supra* note 88, at 660-64.

92. 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*, 1974 Wis. L. Rev. 801, 813.

93. See *Vindicating the Public Interest*, *supra* note 88, at 684-90; *Governmental and Private Advocates*, *supra* note 38, at 880-84.

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 “governmental approach” has not been very successful.⁹⁴ The sad fact is that in both common law and civil law countries the governmental institutions which, by virtue of their tradition, should protect the public interest, are by their nature unable to do so. The civil law *ministère public* and his analogues, including the German *Staatsanwalt* and the Soviet *Prokuratura*, are inherently bound to restricted traditional roles and incapable of fully assuming the defense of the newly emerged diffuse rights. They are too often susceptible to political pressure—a grave weakness given that diffuse rights frequently have to be asserted against political entities. Because vindication of the new rights frequently requires technical expertise in such non-legal areas as accounting, marketing, physics and urban planning, the *ministère public* and his analogues often lack the training and expertise necessary to be effective. Although there are signs that the common law attorneys general, at least in the United States, are assuming a greater role in protecting diffuse interests, they too have been unable to carry the burden alone;⁹⁵ for even more than the civil law *ministère public*, the attorney general is a political officer. While this political visibility may inspire him, it may also serve to inhibit his ability 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 highly-specialized public regulatory agencies to enforce certain rights of the public or other diffuse interests—are very important but themselves limited. Recent history suggests that they have, for a number of reasons, apparently unavoidable weaknesses.⁹⁶ Public agencies tend to be responsive to organized interests with a stake in the outcome of an agency’s decisions, and those interests tend to be predominantly those of the very entities which the agency is supposed to control. On the other hand, diffuse interests such as those of consumers and environmentalists tend, for reasons already mentioned, not to

94. See generally *Governmental and Private Advocates*, *supra* note 38, at 800-47.

95. See *Vindicating the Public Interest*, *supra* note 88, at 654-55 & n.40.

96. See *id.* at 657-58 & n.52; *Governmental and Private Advocates*, *supra* note 38, at 842-44; Kötz, *Klagen Privater im öffentlichen Interesse*, in A. HOMBURGER & H. KÖTZ, *KLAGEN PRIVATER IM ÖFFENTLICHEN INTERESSE* 69, 96-97 & n.60 (Frankfurt am Main: Metzner Verlag 1975); Stewart, *The Reformation of American Administrative Law*, 81 HARV. L. REV. 1669, 1685-86 (1975).

be organized into the coherent groups needed to influence these agencies.⁹⁷

Despite the discomfiting history of these solutions, the quest for an effective governmental mechanism is still continuing, as it must, and new institutions have been created that promise to remedy many of the errors of the past. A recent and important example of this experimentation in the United States is the new institution of the "public advocate."⁹⁸ The leading experiment, which began in 1974, is the New Jersey Department of the Public Advocate, which has the broad mandate to "represent the public interest in any such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest."⁹⁹ 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.¹⁰⁰

97. See text accompanying notes 35-38 *supra*. In the United States, for example, one should not overestimate the recent 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 spends only about 0.1 percent of the estimated \$1 billion 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 Public Interest*, *The Christian Sci. Monitor*, Oct. 10, 1975, at 18-19.

98. According to the U.S. Report for the Florence Access-to-Justice Project: 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.

See Johnson *et al.*, *supra* note 11, Section VIB2. For an excellent discussion of this reform, emphasizing how public advocates may, unless sensitive to their weaknesses and limitations, inhibit rather than promote reform, see Trubek, *Public Advocacy: Administrative Government and the Representation of Diffuse Interests*, at 13-19, in 3 FLORENCE PROJECT, *supra* note 11.

99. N.J. STAT. ANN. § 52:27E-29 (West Supp. 1977-1978). This law (N.J. STAT. ANN. §§ 52:27E-1 to 46 (West Supp. 1977-1978) established within the Department of the Public Advocate an "Office of Inmate Advocacy," a "Division of Citizen Complaints and Dispute Settlement," and the "Division of Public Interest Advocacy" whose jurisdiction is described in the just-mentioned statutory provision.

100. See CENTER FOR PUBLIC REPRESENTATION, *supra* note 36, at 10.

The basic aim, therefore, is to make the governmental agency represent interests that governments to date have tended to overlook, *i.e.* the diffuse interests with which we have been concerned.

The Consumer Ombudsman in Sweden,¹⁰¹ which now has analogues elsewhere,¹⁰² is another example of an institution explicitly created to represent the collective, fragmented interests of consumers. This institution, established in 1970, is empowered to bring lawsuits before the "Market Court" to prevent improper marketing and advertising practices. In addition, the Consumer Ombudsman, acting on behalf of consumers as a class, negotiates standard contract clauses with the Swedish business community. Individuals alone clearly could not afford and would not have the bargaining power to accomplish these tasks successfully.

As noted above, however, the *strictly* governmental solution seems to have inherent limitations even when functioning at its best.¹⁰³ Private energy and zeal must be added to the bureaucratic machinery of government, which too often becomes slow, inflexible, and passive in carrying out its duties.

2. *The "private attorney general" approach.* Allowing individual private actions for the public or collective interest is itself an important reform.¹⁰⁴ 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

101. *See, e.g.,* D. KING, CONSUMER PROTECTION EXPERIMENTS IN SWEDEN 3-18 (South Hackensack, N.J.: Fred B. Rothman & Co. 1974); Bernitz, *La protection des consommateurs en Suède et dans les pays nordiques*, 26 R.I.D.C. 543, 556-59, 573-76 (1974); Sternberg, *L'ombudsman suédois pour les consommateurs*, 26 R.I.D.C. 577 (1974).

102. Norway has had a consumer ombudsman since 1973. *See* Graetz, *Les chevaliers de la consommation*, JOURNAL D'EUROPE, 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, 1972 Karnovs Lovsamling 3423 (Supp. 1974). H. W. 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* G. Borrie, *The Work of the Office of Fair Trading*, in 3 FLORENCE PROJECT, *supra* note 11.

103. Further, the political independence of these activist governmental agencies remains a potential problem, just as it is for aggressive publicly-salaried legal aid lawyers. *See* notes 72-74 & accompanying text *supra*.

104. For a more detailed treatment of this subject, *see* *Governmental and Private Advocates*, *supra* note 38, at 848-56.

some "private attorneys general"¹⁰⁵ or "ideological plaintiffs"¹⁰⁶ to supplement governmental action. A typical modern reform in this direction is the acceptance of private actions to challenge and stop a particular governmental practice. Groups may finance such individual actions as test cases. There are a number of examples of such reform in the field of environmental protection, such as the acceptance of private actions in the United States to enforce the Clean Air Act of 1970.¹⁰⁷ The Italian law of 1967 which allows "anyone" to bring suit against municipal authorities for illegally granting building permits is a similar example.¹⁰⁸ 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.¹⁰⁹

3. The "organizational private attorney general" approach.

(a.) *A first level of reform: the recognition of groups.* A more sophisticated reform, "the organizational private attorney general" solution, recognizes the need to allow group actions in the public

105. Apparently, the now widely-used term "private attorney general" was coined by Judge Jerome Frank. See *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

106. This suggestive terminology was developed by Professor 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 "ideological" plaintiff brings aggregate or collective interests and concerns. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

107. Clean Air Act of 1970, 42 U.S.C. §§ 1857-1857l (1970). Any citizen may sue any polluter, including a governmental agency, for failure to comply with the Act. There is no need to show any direct personal harm to the plaintiff.

108. Law of Aug. 6, 1967, no. 765, art. 10, para. 9, [1967] Gazz. Uff. 4846 (It.). 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, Decision of June 9, 1970, no. 523, [1970] Foro Italiano [Foro Ital.] III 201, [1970] Giurisprudenza Italiana [Giur. Ital.] III 193 (Italy). See also Vigoriti, *supra* note 16, at Section VC2.

109. This citizen action was created by Bavarian Law of July 22, 1947, no. 72, § 54, *Bereinigte Sammlung des Bayerischen Landesrechts 1802-1956 I* 24, on the Bavarian Constitutional Court. For numerous other examples, see *Governmental and Private Advocates*, *supra* note 38, at 877-79 & nn.369-81; add Brazil, which allows citizen actions 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, 1976 *CÓDIGO DE PROCESSO CIVIL* 473.

interest.¹¹⁰ Given the possible abuses of more or less powerful groups organized on behalf of diffuse interests yet themselves effectively free from control, however, public (governmental) checks and controls over this form of representation have also been evolving.

France provides several typical illustrations. Recognizing the usual laxity of the *ministère public* in protecting newly-emerged group and public interests, France has recently enacted reforms of great significance. The December 27, 1973 statute, commonly known as the *loi Royer*, grants standing to associations of consumers when there are "facts directly or indirectly detrimental to the collective interest of the consumers."¹¹¹ In addition, the *loi* provides for a series of controls to insure that the associations authorized to bring suit in fact adequately represent the collective interest of consumers.¹¹² 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,¹¹³ and, finally, a *loi* of July 10, 1976 has made comparable provisions for the protection of the environment.¹¹⁴ The theory is now accepted that representative groups can enforce the collective rights that the *ministère public* has been ineffective in vindicating.

Similarly, the Swedish Consumer Ombudsman institution, discussed above, does not have the exclusive power to bring proceedings before the Market Court;¹¹⁵ consumer associations also have standing

110. This term refers to a private (non-governmental) organization that represents public or collective interests. See *Governmental and Private Advocates*, *supra* note 38, at 856-80.

111. Law of Dec. 27, 1973, no. 73-1193, art. 46, [1973] J.O. 14139, [1974] Dalloz-Sirey, *Législation* [D.S.L.] 30, 35, [1974] Bulletin Législatif Dalloz [B.L.D.] 30 ("*loi Royer*") (Fr.). An earlier Belgian law allowing actions to enforce the law by consumer associations is the Statute No. 415 of July 14, 1971, [1971] *Moniteur Belge—Belgisch Staatsblad* 9087. Only the French law, however, allows damage actions on behalf of consumers.

112. 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. Law of Dec. 27, 1973, no. 73-1193, art. 46, [1973] J.O. 14139, [1974] D.S.L. 30, 35, [1974 B.L.D.] 30 (Fr.).

113. Law of July 1, 1972, no. 72-546, "concerning the fight against racism." This statute 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." *Id.*, Art. 5-II.

114. See Law of July 10, 1976, no. 76-629, art. 40, [1976] J.O. 4203 (Fr.), concerning the "protection of nature."

115. Law of June 29, 1970, § 6, [1970] Svensk Författningssamling 412 (the Marketing Practices Act); Law of April 30, 1971 § 6, [1971] Svensk Författningssamling 112 (the Act Prohibiting Improper Terms of Contract). See also *Governmental and Private Advocates*, *supra* note 38, at 846-47.

to commence such cases. Thus even the Consumer Ombudsman can be supplemented and prodded by private groups acting for the public interest.

Most recently, in the Federal Republic of Germany, the Law on Standard Terms of Contract, effective on April 1, 1977, granted consumer associations standing to bring actions to declare particular contract terms invalid.¹¹⁶ The declaration may be published, and individual consumers can use the judgment to invalidate clauses in contracts into which they have entered.

Another significant method for allowing private groups to represent the public interest is the relator action, used especially in the common law countries of Great Britain and Australia.¹¹⁷ 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. This action is available to both individuals and groups, but for obvious reasons—mainly costs—groups seem to have been most active in using this device to enforce diffuse rights. Once the relator action goes ahead, it continues under the supervision and control (more theoretical than real) of the attorney general. It is at present an important institution, although its significance may be expected to diminish as standing requirements are relaxed in such areas as consumer and environmental protection.

(b.) *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 replacing the actions of governmental agencies. They still, however, do not address the problem of *organizing* and *strengthening* private groups to support diffuse interests.

116. Law of December 9, 1976, on Standard Terms of Contract, §§ 13, 18, 21. BGBl I 3317. See also Law of July 21, 1965, Against Unfair Competition, § 13(1a), [1965] BGBl I 625, as amended by Law of June 26, 1969, [1969] BGBl I 633, which in 1965 granted standing to consumer groups to sue for injunctive relief to stop unfair competition with adverse effects on consumers' interests. Consumer group actions are discussed in: Schricker, *Entwicklungstendenzen im Recht des unlauteren Wettbewerbs*, 1974 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 579; Hefermehl, *Die Klagenbefugnis der Verbände zur Wahrnehmung der Interessen der Verbraucher*, 1969 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 653. Cf. Bender & Strecker, *supra* note 11, Section VA3.

117. For more detail and some references concerning the relator action, see *Governmental and Private Advocates*, *supra* note 38, at 848-52. In addition, see Dickens, *Public Interest Litigation—Relator and Representative Actions*, 1974 LEGAL ACTION GROUP BULLETIN 273.

While certain interests, such as labor, are generally well organized, others such as those of consumers or environmentalists are not. The barriers pointed out above¹¹⁸ have too often not been surmounted. At best, it requires considerable money and effort to create an organization of sufficient size, economic resources and expertise, legal and otherwise, to represent a diffuse interest effectively.¹¹⁹ According to the Florence Project reports, in Sweden, for example, few consumer organizations have taken advantage of opportunities to initiate actions.¹²⁰ Further, the companies against which such lawsuits are to be brought are ongoing business organizations which not only tend to have substantial financial resources available, but also, as we have noted, have other characteristics that make them particularly formidable opponents.¹²¹ Solutions that *facilitate* the creation of effective organizational private attorneys general must therefore be found. This is no easy task. Our main focus here is on developments in the United States, since, for various reasons, such developments there appear to be the most advanced.¹²²

(i.) *Class actions, public interest actions, and the public interest law firms.* The devices of class actions and public interest actions, with their limitations and potentialities both inside and outside the United States, are discussed in some detail elsewhere,¹²³ but a few

118. See text accompanying notes 35-38 *supra*.

119. "[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, *Les reunions de l'association internationale des sciences juridiques*, 27 R.I.D.C. 920, 923 (1975) (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."). See also note 97 *supra*.

120. See Eisenstein, *The Swedish Public Complaints Board: Its Vital Role in a System of Consumer Protection* 20, in 2 FLORENCE PROJECT, *supra* note 11. On Germany, see von Falckenstein, *Wettbewerbsrechtlicher Verbraucherschutz in der Praxis*, in *GEWERBLICHER RECHTSSCHUTZ, URHEBERRECHT, WIRTSCHAFTSRECHT* 307 (Cologne, Berlin, Bonn: Heymanns Verlag 1973) (Festschrift für Eugen Ulmer). In Germany, as in several other areas, it is significant that consumer groups are already subsidized to an extent by the state. The importance and extent of subsidization requires further examination. Cf. Kojima, *Access to Justice in Japan*, Pt. II (*The Representation of Collective and Public Interests in Civil Litigation*), Section IVA3, in 1 FLORENCE PROJECT, *supra* note 11. For an interesting U.S. proposal, see Best & Brown, *Governmental Facilitation of Consumerism. A Proposal for Consumer Action Groups*, 50 TEMPLE L.Q. 253 (1977).

121. See text accompanying notes 23-34 *supra*.

122. See *Vindicating the Public Interest*, *supra* note 88, at 677-80.

123. *Id.* at 667-75. See also Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343 (1974), also published in A. HOMBURGER & H. KÖTZ, *supra* note 96, at 9-68.

particular traits will be highlighted here. First, the class action, by allowing a litigant to represent an entire class of persons in a particular lawsuit, saves 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 of the class members is greatly enhanced by the threat of a huge damage liability for the other party.¹²⁴ With the device of the contingent fee, where available, the work of organizing is financially encouraged for attorneys who may thus obtain substantial remuneration.¹²⁵ The class action device, therefore, aside from its other important functions, helps give the advantages of organizational litigants to group and public interest claims.

Class and, more generally, public interest actions, however, often require the expertise, experience and resources in specialized areas that only well staffed and wealthy ongoing groups possess. Many class action attorneys may be unable to provide such expertise themselves and may not have sufficient resources to purchase it elsewhere, while they may recover attorneys' fees after successful litigation, the risk of losing is a very substantial barrier; to be effective they must also engage in lobbying and other such non-litigation activities. For a number of reasons, ongoing groups can monitor public decisions far better than relatively ephemeral classes. These problems, together with the unavailability of the class action as a remedy for many harms suffered by consumers, make class action an imperfect means of vindicating diffuse rights.

The American institution of "public interest lawyers" is a further effort to give to diffuse interests the advantages of ongoing groups.¹²⁶ 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:

124. On the economic advantages of the class action device, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 348-51 (Boston: Little, Brown & Co. 1972); Note, *The Cost Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969).

125. See Johnson *et al.*, *supra* note 11, Section VB1. Professor Kötz, in fact, argues that the contingent fee system is essential to the utility of the class action device, and that, accordingly, class actions have no possibility of being adopted in Europe since the contingent fee system is unacceptable there. See Kötz, *supra* note 96, at 86-88. 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 *Governmental and Private Advocates*, *supra* note 38, at 875-76 n.365.

126. See generally COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* (Washington, D.C. 1976); S. JAFFE, *PUBLIC INTEREST LAW: FIVE YEARS LATER* (Chicago/New York: American Bar Association/Ford Foundation 1976); Johnson *et al.*, *supra* note 11, Section VI; Handler, *Public Interest Law Firms in the United States*, in 3 FLORENCE PROJECT, *supra* note 11.

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 safety, with consumer protection, whatever their class, are effectively excluded from key decisions affecting their interests.¹²⁷

These interests, as we have noted, have not been able to find representation in effective organizations. Several groups of (private) lawyers, then, have established "public interest law firms" to fill this need.

Public interest law firms vary greatly in size and type of case-load.¹²⁸ The most common type of firm is a non-profit organization funded by philanthropic contributions. The first such firms were funded in 1970 by the Ford Foundation. Although there were never more than 70 to 100 such firms, by early 1975 public interest lawyers had several hundred major cases in litigation; and many others had already been concluded.¹²⁹ These foundation-sponsored firms had also intervened in many administrative proceedings and other important non-litigative activities. By providing expert legal counsel and constant oversight on behalf of unrepresented, unorganized interests, public interest firms often act to bolster existing groups and substitute for groups not even formed.

Like their legal aid counterparts, public interest lawyers have been criticized for being unaccountable to the interests they represent. There is some validity to this charge.¹³⁰ There are also doubts about

127. Halpern, *Public Interest Law: Its Past and Future*, 58 JUDICATURE 119, 120 (1974).

128. The basic types of public interest law firms, their activities, and their fields of interest are described in COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 126, at 77-132; S. JAFFE, *supra* note 126, at 14-28; and Handler, *supra* note 126.

129. The number of public interest law firms depends, of course, on the definition utilized. The number of 70-100 is not restricted to the prototypical foundation-sponsored "public interest law firm"; it includes firms meeting the following criteria: "(1) an organization must have at least one salaried lawyer; (2) it must devote at least 30 percent of its effort toward legal work; and, (3) it must be engaged in law reform, or impact litigation." J. Handler, *supra* note 126, at 9.

130. In particular, they have been charged with having a "middle-class" bias and with being "unaccountable" for their self-determined actions. See, e.g., Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970). See generally S. JAFFE, *supra* note 126, at 28-32. One should not, however, conclude that there are no constraints on public interest lawyers' pursuing their ideological interests. As Professor Robert Rabin recently noted,

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

their long-term viability. Nevertheless, the public interest lawyers in the United States continue to do important work, and they have already accomplished much.¹³¹ The institution may or may not be exportable, but it is certainly important in providing effective access to justice for diffuse interests within the limits of available resources.¹³²

(ii.) *Public counsel.* The success of public interest lawyers in the United States, and the obvious financial constraints under which they must operate, have spurred new creativity in devising governmentally subsidized institutions to serve the public interest. The existing public advocate schemes, which we have already discussed, represent one such approach.¹³³ In between this public (governmental) solution and the private one of public interest lawyers is an important new American device which has been called the "public counsel."¹³⁴ The idea is to use government resources but rely on the energy, interest, and control of private groups.

The most successful example of this approach to date has been the Office of Public Counsel, established in the United States under the Regional Rail Reorganization Act of 1973 to assist communities and rail service users in articulating their concerns in public hearings.¹³⁵

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.

Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 231-32 n.77 (1976).

131. See, e.g., S. JAFFE, *supra* note 126, at 12-27. Indeed, the organized bar in the United States, the American Bar Association, has moved in recent years from a position of hostility to public interest lawyers to one of affirming a general responsibility of the legal profession "to provide public interest legal services." American Bar Association Special Committee on Public Interest Practice, Recommendations (adopted by ABA 1975). See *Federal Criminal Code, Amnesty, Gun Control, Bank Secrecy Are Debated by the House of Delegates*, 61 A.B.A.J. 1079, 1084 (1975).

132. See the insightful discussion of public interest law by Professor David Trubek, *Review of Balancing the Scales of Justice: Financing Public Interest Law in America*, 1977 WIS. L. REV. 303. Trubek again warns of some of the dangers of approaching the problem from a too "legalistic" point of view, whereby public interest law is seen as a substitute for social reform.

133. See text accompanying notes 98-100 *supra*.

134. The U.S. Report to the Florence Project gives 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. See Johnson *et al.*, *supra* note 11, Section VIB2. See also Note, *The Office of Public Counsel: Institutionalizing Public Interest Representation in State Government*, 64 GEO. L.J. 895 (1976).

135. 45 U.S.C. § 715(d)(2) (Supp. V 1975). For a detailed discussion of this office, see Bloch & Stein, *The Public Counsel Concept in Practice: The Regional Rail Reorganization Act of 1973*, 16 WM. & MARY L. REV. 215 (1974); Finkelstein &

This governmental office has organized communities to recognize and assert their legal rights; its task has been to seek, help, mobilize, and, at times, subsidize private groups which otherwise would be at best weak advocates for the interests of rail users. This public counsel reportedly has been quite effective because of the independent status of the office, an adequate budget, and a sensitive and well-trained staff. It remains to be seen, of course, whether other such institutions will be able to avoid political pressures and remain sufficiently independent, but the novel virtue of this institution is that it can help create ongoing groups able to assert their pressure and thus vindicate their own interests through administrative and judicial processes.

(c.) *The pluralistic (mixed) solution.* The idea of the public counsel has been integrated with several other approaches in what is to our knowledge 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, the authors recommend the adoption of the sort of public advocate discussed above, and they go farther. They accept the need—emphasized in a previous study within the framework of the Florence Project¹³⁶—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

Johnson, *Public Counsel Revisited: The Evolution of a Concept for Promoting Public Participation in Regulatory Decision-Making*, 29 AD. L. REV. 167 (1977). In accounting for the office's success, Finkelstein and Johnson noted that Public Counsel adopted a “Washington lawyer” approach: “That is, just as private lawyers utilize their talents to affect the political process on behalf of their clients, so too Public Counsel, within the constraints of federal law, advised communities and users of rail services as to the best means for presenting their case to elected representatives.” *Id.* at 185. Responding to the success of this temporary public counsel, Congress recently created a similar permanent institution, the “Office of Rail Public Counsel,” which may become another very important model. 49 U.S.C. § 27 (1977). See Finkelstein & Johnson, *supra* at 187-91. For some problems which this new institution encountered at the outset, see COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 126, at 157.

136. See *Governmental and Private Advocates*, *supra* note 38, at 880-84.

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.¹³⁷

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. What is important is to recognize and confront the basic problem in this area: to restate it simply, these interests require effective private group action whenever possible, but private groups are not always available and are often difficult to organize. Hopefully, combinations of such devices as class and group actions, the public interest law firm, the public counsel, and the public advocate can help overcome this problem and lead to the effective vindication of the rights of diffuse interests.

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

Progress in enacting legal aid reforms and finding mechanisms for the representation of the "public" interest is essential to providing meaningful access to justice. These reforms will succeed—and, in part, have already succeeded—in gaining judicial protection for interests too long left without it. Legal aid programs are finally making lawyers available to many who cannot afford them, and are increasingly making people aware of their rights; progress has been made toward vindicating the rights, both traditional and new, of the underprivileged. A further step, also of vital importance, has been the creation of mechanisms to represent the diffuse interests not only of the poor, but also of consumers, environmentalists, and indeed of "the public" at large in the aggressive enforcement of their new social rights.

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 or underrepresented. The emerging "access-to-justice approach" to legal reform, however, has a much wider range. This "third wave" of reform includes but goes *beyond advocacy*, whether inside or outside of the courts, and whether through governmental or private advocates. Its

137. CENTER FOR PUBLIC REPRESENTATION, *supra* note 36, at 15-16. See also Trubek, *supra* note 98.

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 method is not to abandon the techniques of the first two waves of reform, but rather to treat those reforms as only several of a number of possibilities for improving access.

This emerging access-to-justice movement, therefore, is growing out of the earlier movements concerned with legal representation. The earlier movements have also been aimed to a great extent at establishing and making effective rights of individuals and groups who were too long denied the benefits of equal justice. Indeed, these earlier movements have received impetus from recent welfare and other reforms which have, to some degree, altered the *formal* balance of power between individuals on the one hand and more or less organized litigants such as companies and governments on the other. For the poor, tenants, consumers, and the like, however, it has predictably been very difficult to make the new rights effective. As Galanter observed: "The system has the capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice or distribution of tangible advantages. Indeed, rule change may become a symbolic substitute for redistribution of advantages."¹³⁸ Legal representation—either of individuals or of diffuse interests—has not by itself proved sufficient to turn those rule changes into "tangible advantages" at the practical level. As recognized by the Brent Community Law Centre in London, "the problem of . . . enforcement of laws designed to protect and benefit the less powerful sections of society is massive."¹³⁹ It is neither possible nor desirable to solve this

138. See Galanter, *supra* note 10, at 149 (footnotes omitted). Galanter's observation applies also—perhaps especially—to law reform through the courts, such as that achieved by the law reform activity of public interest lawyers and legal services attorneys in the United States. See Handler, *Public Interest Law: Problems and Prospects*, in *THE AMERICAN ASSEMBLY*, *supra* note 17, at 99, 100-10. Professor Handler adds that "Symbols [such as test case victories, new laws, and new agencies] are used by the entrenched interests to assuage dissident groups, to give them the feeling that they have accomplished their objectives when in fact tangible results are withheld." *Id.* at 110.

139. The statement of the Brent Community Law Centre, one of the leading law centres in England, continues as follows:

So great is it [the problem] and so feeble the response by Government that it is questionable whether it is useful to go on making such laws, if, as at present, they are to go unenforced or largely unenforced. In these circumstances we are led to doubt that such laws are intended to be anything more than elaborate exercises in public relations.

BRENT COMMUNITY LAW CENTRE, *FIRST ANNUAL REPORT* 30 (London 1975).

problem with lawyers—and improved legal representation—alone. Among other things, we have now learned that these new rights often require new procedural mechanisms—indeed a new approach to procedures—to make them enforceable.¹⁴⁰ As Master Jacob affirms, “It is procedural rules which infuse life into substantive rights, which activate them to make them effective.”¹⁴¹ It is thus increasingly recognized that, while we must not neglect the virtues of legal representation, the access-to-justice movement requires a much more comprehensive approach to reform.¹⁴² One might say that the huge latent demand for methods to make the new rights effective has forced a rethinking of the system of supply—the judicial system.¹⁴³

140. See, e.g., Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 855 (1975) (stating, with respect to governmentally created entitlements, that “once new property rights are recognized, the search for complementary procedural rights to enforce them should begin”); Cooper & Kastner, *supra* note 15, Section IVA3 ([I]t is hard to separate the changes in the substantive rights of landlord and tenant on the one hand, from the appeal system on the other”); Harland, *supra* note 87, at 645 (“An increasing concern of those attempting to make consumer protection more effective has been to devise methods which ensure so far as possible that the consumer’s legal rights are available to him *de facto* as well as *de jure*.”); Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934, 938 (1976) (“[A]s the arsenal of consumer law protections has been strengthened, so attention has begun to shift from legislation to enforcement.”). The characteristics of the changes which are necessary for these “new” rights are discussed in the text accompanying notes 187-91 *infra*.

141. See Jacob, *supra* note 57, Section IX.

142. The “Wisconsin school” of legal sociology has been especially important in urging the need to go beyond legal representation. Marc Galanter, for example, has written *The Duty Not to Deliver Legal Services*, 30 U. MIAMI L. REV. 929 (1976), and his colleague David Trubek has echoed the call for “simpler or nonadversary dispute systems.” See Trubek, *supra* note 132, at 310. They point out that, in addition to the insufficiency of simply providing more lawyers, this focus on legal representation can even have socially harmful effects such as: (1) overemphasizing “formal, rather than substantive change”; (2) underemphasizing “less expensive forms of advocacy,” such as “lay or self advocacy”; (3) relying too much on strategies to promote advocacy, “thus missing opportunities for direct changes in government processes or policies that would eliminate the need for advocacy as such”; and (4) overestimating the effect of “litigation victories . . . , thus slighting the organizational efforts needed for political victories and follow-up on legal gains.” In short, energies may be diverted too much to “legalistic” strategies. In an important 1973 English study, Philip Lewis made a similar observation: “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.” Lewis, *Unmet Legal Needs*, in P. MORRIS, R. WHITE & P. LEWIS, *SOCIAL NEEDS AND LEGAL ACTION* 73, 95 (London: Martin Robertson 1973). The president of the U.S. Legal Services Corporation has recently echoed this sentiment: “I have said and will keep saying that increased legal services are essential, but that is only part of the solution of access to justice for the poor.” Ehrlich, *A Year in the Life . . . The Legal Services Corporation*, 34 NLADA BRIEFCASE 63, 67 (1976-1977). See also, e.g., Nader & Singer, *Dispute Resolution*, 1976 CAL. ST. B.J. 281, 284.

143. It is fitting that two of the founders of the modern legal aid movement in

The type of thinking promoted by this approach can be understood by a short discussion of some of the advantages which can be gained from it. First, as we have noted, this approach encourages the exploration of a *wide variety of reforms*, including changes in forms of procedure, changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms. This approach, in short, is not afraid of comprehensive, radical innovations, which go much beyond the sphere of legal representation.

Further, this approach 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 to access may be salient and different remedies effective. Disputes, for example, differ in their general complexity. It is generally much easier and less costly to resolve a simple issue of non-payment, for instance, than an issue of fraud. Disputes also differ greatly in amount in controversy, which often affects how much individuals (and the society) will expend for their resolution. Some problems are best "resolved" by the parties' choosing simply to "avoid"

the United States, Edgar and Jean Cahn, foresaw this new development as far back as 1966. Citing "the intensification of demand" created by the neighborhood law firm movement, they stated that this new "demand" could "cause a rejection of the old product, inducing people to turn to substitutes, and revealing a hitherto unsuspected cross-elasticity in demand for the particular form of redress in which the legal profession currently specializes." They proposed, therefore "the redesigning of what might be called 'the Justice Industry'—an industry which must offer a far more variegated line of products in far greater quantity than heretofore [and] an industry which must cater to a far greater variety of markets with a far greater consumption potential than previously appreciated." Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927, 941-42, 947 (1966).

144. Professor 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*." F. Sander, *Varieties of Dispute Processing* 21 (paper prepared for the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St. Paul, Minnesota, April 8, 1976).

Similarly, according to Judges Bender and Strecker, "[i]n 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." Bender & Strecker, *supra* note 11, Section IIB1.

For more detail on the procedures which must be applicable to the "new" rights, see text accompanying notes 187-91 text *infra*.

each other.¹⁴⁵ The perceived social importance of certain types of claims also affects how resources will be allocated to dispute resolution. In addition, some issues by their nature require a speedy determination, while others are suitable for lengthy deliberations.

As emphasized by modern sociological scholarship, the *parties* who tend to be involved in certain kinds of disputes must also be taken into consideration.¹⁴⁶ First, the parties may be in a long-term, complex relationship or may have only isolated contact with each other. It has been rightly suggested that mediation or other similar settlement devices are most appropriate for preserving the ongoing relationships found not only in traditional, immobile, and "primitive" societies but in modern societies as well.¹⁴⁷ In addition, parties may differ greatly in bargaining power, expertise, or other factors considered earlier in the present study under the heading of "party capability."

Finally, it should be reemphasized that disputes have *collective as well as individual* repercussions. It is conceptually and practically important to distinguish types of repercussions because the collective and individual dimensions must be addressed by different measures. For example, consider the advantages noted before of the powerful organizational litigant against an individual. At one level these advantages consist of his being able to recognize a legal right, to afford to litigate a small claim, and to be able to utilize the forum effectively to enforce a right or defend it from attack. These are concrete advantages *in individual cases*, which, it will be seen, can be attacked with some success *at the individual level*. At a second level are the advantages in being able to litigate test cases to secure favorable rules which will be advantageous in individual cases, to structure transactions in such a

145. For the development of the term "avoidance" and an important theoretical discussion of its use in modern societies, see Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & Soc'y REV. 63, 69-76 (1974).

146. See, e.g., V. GESSNER, RECHT UND KONFLIKT 202-35 (Tübingen, J. C. B. Mohr (Paul Siebeck), 1976); Galanter, *supra* note 10, at 97-114.

147. According to Professors Sarat and Grossman: "When relationships become as interdependent in the complex organization of postindustrialized societies as they were—or are—in primitive ones, the need for harmonious problem solving which preserves relationships is reasserted, with some resulting movement away from litigation." Sarat & Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 AM. POLITICAL SCI. REV. 1200, 1210 (1975) (footnote omitted). See also, e.g., V. GESSNER, *supra* note 146, at 233; Galanter, *supra* note 10, at 126-32. For some empirical support of this hypothesis in the context of small claims, see Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & Soc'y REV. 339, 357-58, 366-69 (1976).

manner as to take advantage of those rules, to monitor compliance with a given law where necessary, and to suggest and lobby for changes to strengthen favorable laws. Mechanisms such as those we have discussed for *protecting diffuse interests* are essentially designed to take care of these problems. Some devices, such as the class action, can sometimes be used both to give remedies to individuals and to enforce the collective rights of the class. Many very important devices, however, tend to serve only one or the other function.

It is necessary, in sum, 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. There is a growing recognition of the utility, and in fact the necessity, of this approach in the modern world.

IV. TRENDS IN THE USE OF THE ACCESS-TO-JUSTICE APPROACH

The access-to-justice approach has an immense number of implications; one could say it implies nothing less than the critical study and reform of the entire legal machinery. Obviously, any comparative project, even one benefitting from such a large amount of contributions as the Florence Project, cannot at the present stage of research in this field do much more than provide an overview. Nevertheless, some basic trends and ideas can be discerned, and a discussion of them will help show the achievements and potential—as well as some of the limitations and dangers—of this worldwide creative effort.

Before individual reforms are discussed, however, it should be emphasized that any type of reform is closely related to other reforms, potential or actual. A change in the law that gives tenants more rights, for example, may initially have little or no practical effect, but a subsequent change in the method of delivery of legal services might then alert tenants about their new rights and even lead to a burden on courts not accustomed to contested landlord-tenant litigation. The creation of a landlord-tenant tribunal might then ease that burden on the regular courts, and, if designed to obviate the need for lawyers, might reduce the need for legal services. The point is not that the progression would necessarily occur in this way; rather, it is that, despite our emphasis on certain especially notable *types* of reforms, we must not forget the need to consider the implications for and interrelationship with the workings of the entire dispute processing machinery.

A. Reforming General Litigation Procedures

While the focus of modern reformers is more on alternatives to the regular courts than on the court systems themselves, it is important to remember that many basic conflicts involving the rights of individuals and groups will necessarily continue to be litigated in the regular courts. As averred by Master Jacob, "the formal judicial machinery of courts of law will, of course, remain necessary and vital to deal with important questions of law, including matters of constitutional significance, and also to deal with large and substantial claims affecting large and substantial interests."¹⁴⁸

Since at least the turn of the century, there have been important efforts to improve and modernize the courts and their procedures. On the European continent, for example, we can point to the well-known reform movements which were grouped under the name of "orality" and were essentially concerned with "the free evaluation of the evidence," "concentration" of the proceedings, and the "immediacy" of contact between judges, parties, and witnesses—as well as with the related use of active judges to seek the truth and help equalize the parties.¹⁴⁹ When implemented in Austria by the pioneering *Zivilprozessordnung* of 1895,¹⁵⁰ such reforms helped make civil proceedings, in the words of the noted proceduralist Franz Klein, "simple, inexpensive, quick, and accessible to the poor."¹⁵¹ In the United States, the excessively adversarial system has undergone considerable criticism at least since Roscoe Pound's famous address in 1906.¹⁵² It is now generally accepted that the use of a more active judge can be an aid, not

148. Jacob, *supra* note 57, Section X. Nader and Singer also agree that courts should be reserved "for a one-shot, win-lose type of dispute, such as the adjudication of guilt in the criminal law or test cases that attempt to define new legal rights and relationships." See Nader & Singer, *supra* note 142, at 318.

149. For a comparative analysis of the "orality movement," based on 18 national reports, see M. CAPPELLETTI, *PROCÉDURE ORALE ET PROCÉDURE ÉCRITE* (Dobbs Ferry, N.Y./Milan: Oceana/Giuffrè 1971) (general report submitted to the VIIIth International Congress of Comparative Law, held in Pescara in 1970). See generally Cappelletti, *supra* note 7, at 851-60.

150. *ÖSTERREICHISCHE ZIVILPROZESSORDNUNG* (1895).

151. 1 F. KLEIN, *REDEN, VORTRÄGE, AUFSÄTZE, BRIEFE* 87 (Vienna: Manzschke Verlags- und Universitätsbuchhandlung 1927). 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% in pre-reform cases to 48.2% in one district, from 3.4% to 68.7% in another and from 7.3% to 70% in a third. *Id.* at 88. See, e.g., F. KLEIN, *VORLESUNGEN ÜBER DIE PRAXIS DES CIVILPROZESSES* 7-9 (Vienna: Manzschke Verlags- und Universitätsbuchhandlung, 1900).

152. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1 (1956) (previously published in 40 AM. L. REV. 729 (1906)).

a hindrance, to a basically adversarial system of justice, since even in essentially two-party litigation¹⁵³ it maximizes the chance that the result will be fair, and not merely reflect inequalities between parties.¹⁵⁴

Reforms in these directions are in fact continuing, and they still have much to contribute. For example, in a dramatic effort to make access to the courts less expensive in France, the French Minister of Justice announced on September 1, 1977, that, beginning with the new year, all court costs would be eliminated.¹⁵⁵ A litigant with a claim for compensation after an accident, for instance, could save over U.S. \$200. While the costs of attorneys still remain, a significant financial barrier has been eliminated.

Another type of reform that should be mentioned in this context is the increasingly popular so-called "*Stuttgarter Modell*" of German civil procedure. This method of proceeding involves the parties, lawyers, and judges in an active, oral dialogue about the facts and the law; it not only accelerates the proceedings, but also tends to result in decisions that parties will understand and most frequently accept with-

153. On the necessarily active role of the judge in the increasingly important public interest litigation, as opposed to merely two-party litigation, see Chayes, *supra* note 2; Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 657-58 (1971); *Vindicating the Public Interest*, *supra* note 88, at 681-83.

154. Galanter, for example, suggests that overloaded and passive institutional facilities provide the setting in which repeat player advantages in strategic position and legal services can have full play. See Galanter, *supra* note 10, at 127, 140. Professor Fasching, in fact, argues as follows against the need for encouraging public interest lawyers in Austria:

According to the Austrian viewpoint, it is highly questionable whether such changes would bring about an improvement in legal protection, especially considering that the public interest is already very extensively taken into account by means of the active role played by the judge in civil proceeding. In those countries where civil proceedings are very largely controlled by the litigants and are the product of a far-reaching laissez-faire philosophy, however, such trends are not only understandable but also necessary to help remedy real deficiencies.

Fasching, *Access to Justice in Austria*, Section VD, in 1 FLORENCE PROJECT, *supra* note 11.

155. In particular, the parties in civil cases will no longer have to pay the following taxes: (1) *la taxe parafiscale*; (2) *le droit d'enregistrement*; and (3) *le droit de timbre*. The fees of attorneys, experts, and the like will continue to be paid. Law of Dec. 30, 1977, no. 77-1468, [1977] J.O. 6359 (Fr.). According to an article in *Le Monde*, an accident claim would cost 1,049 francs (about U.S. \$225) less, while a divorce by consent would save 510 francs (about U.S. \$110) and a disputed divorce twice that much. While it is estimated that the state will lose 158 million francs of revenue (about U.S. \$34 million) by this reform, the present cost of collecting the taxes, in fact, exceeds the amount recovered. Further, it is thought that the reform will free the clerks (*greffiers*) to spend more time recovering criminal penalties (*amendes pénales*), which, at the same time, may be augmented considerably. P. Boucher, *La Révolution et l'état*, *Le Monde*, Sept. 3, 1977, at 1, 21.

out appeal.¹⁵⁶ Certain basic characteristics of this heretofore optional model have become mandatory for all German *Landgerichte* under the Code of Civil Procedure in effect since July 1, 1977.¹⁵⁷

With respect to reforms reducing costs and, in a sense, extending the "orality" tradition, it is also appropriate to mention Socialist civil procedures.¹⁵⁸ Indeed, the East European and Soviet reporters for the Florence Access-to-Justice Project even question the need for the creation of special procedures outside the regular court system. Professor Stalev of Sofia, for example, states simply, "In Bulgaria, as in other socialist countries, there is no need for special procedures or mechanisms to reduce the costs of resolving disputes involving small or modest claims. This is because the normal judicial machinery is inexpensive and very accessible to the people."¹⁵⁹

156. See Bender & Strecker, *supra* note 11, Section IID. For a discussion of the *Stuttgarter Modell* in greater detail, see Bender, *The Stuttgart Model*, in 2 FLORENCE PROJECT, *supra* note 11. The striking feature of this procedure is that the judges, first after listening to the parties and again after hearing the witnesses, retire and return with a proposed decision. The parties and lawyers then discuss these proposed decisions with the judges or conclude a settlement between themselves. This very open procedure apparently results in only one-third as many appeals as in courts following the regular procedures. Additionally, approximately 75% of cases in *Stuttgarter Modell* courts terminate within six months, compared to about 40% in the regular courts.

157. Law concerning the Simplification and Acceleration of Judicial Proceedings (*Gesetz zur Vereinfachung und Beschleunigung gerichtlicher Verfahren*) of December 3, 1976, [1976] BGBl I 3281, provided that legal disputes should henceforth be resolved "in one, comprehensively prepared trial" new Zivilprozessordnung [ZPO] § 272(1), and that at the beginning of the trial the court should give a short account of the factual and legal situation from its point of view. The parties are supposed to be present and respond to the court's introductory remarks. Evidence is to be taken immediately if the parties do not settle at that point. It is especially interesting that the court is forbidden to rest its decision on a legal point to which the parties' attention was not explicitly directed.

158. On the relationship of the "orality" movement to these procedures, see M. CAPPELLETTI, *supra* note 149, at 81-85.

159. Stalev, *Access to Justice in Bulgaria*, Section I, in 1 FLORENCE PROJECT, *supra* note 11. See also Puchinskiy, *Access to Justice in the Soviet Union*, Section I (stating that "court costs are relatively minimal, with the result that they do not discourage or prevent anyone from enforcing his rights," in 1 FLORENCE PROJECT, *supra* note 11; Névai, *Access to Justice in Hungary*, Section IA, in 1 FLORENCE PROJECT, *supra* note 11; Los, *Access to the Civil Justice System in Poland*, Section IIA, in 1 FLORENCE PROJECT, *supra* note 11.

Professor Stalev attributes this accessibility to (1) the absence of formal limits on the "right of action, the right to be heard, and the right to appeal"; (2) the high number of courts, which makes them readily available to the people; (3) the absence of private attorneys ("the socialization of advocacy")—"a precondition for the accessibility of the advocacy and as a consequence for the accessibility of justice"; (4) informal, inexpensive, and speedy procedures—"all defects in the proceedings can be rectified"; (5) the active, "assistance" role of the court; and (6) the possibility for the *Prokuratura* to intervene in civil cases. Stalev, *Access to Civil Justice in the European Socialist States*, 40 RABELS ZEITSCHRIFT 770, 770-80 (1976).

The regular Socialist court procedures, as exemplified by those of Eastern Europe and the Soviet Union, doubtlessly do provide relatively informal, quick, and inexpensive dispute resolution.¹⁶⁰ Recognizing, however, that these procedures in the regular courts have evolved within a very different economic and governmental system than that existing in Western countries—with concomitant advantages and disadvantages—it is more appropriate to ask how far comparable reforms inspired by the criteria of “orality” can go in breaking down those barriers to access we find in the Western countries.¹⁶¹ Given the complexity of so many of our modern laws and the need for lawyers and judges to unravel and apply them, it seems clear that the idea of making regular courts very simple and inexpensive is unrealistic.¹⁶² If judges are to perform their traditional function of applying, moulding and adapting complicated laws to diverse situations with fair and just results, it appears that highly skilled adversary lawyers and highly structured procedures will continue to be essential; a more or less parallel dispute resolution system appears necessary as a complement if we are to attack, especially at the individual level, such barriers as those of costs, party capability, and small claims.

160. In the U.S.S.R. 80% of all first instance cases reportedly reach judgment within a month after filing. Puchinskiy, *supra* note 159, Section III. Professor Stalev reports that in Bulgaria, 70% of regional court cases and 64% of district court cases were terminated within a month; in the German Democratic Republic about 80% of cases in the regional courts terminate within three months; in the Hungarian regional courts about 69% of the cases are terminated within three months; and in Poland an average case remains in the regional courts for two months or in the district courts for three to eight months. See Stalev, *supra* note 159, at 778.

The cost figures are equally impressive. According to the Soviet Report, court expenses for a claim of 400 rubles (about U.S. \$440) would total about 29½ rubles, while the cost of retaining an attorney (although not required) would normally be another 20 rubles. Puchinskiy, *supra* note 159, Section II. Stalev, for Bulgaria, concludes that in a suit for 1,000 levas (about U.S. \$1,000), necessitating four witnesses and an expert, and involving a lawyer, the costs of the first instance would be about 125 levas. Stalev, *supra* note 159, Section IIE.

161. Aside from obvious systemic differences, it is well known, for example, that conflicts between state organizations are decided by state arbitration systems. In addition, it appears that the amounts in controversy tend to be very low in countries like the U.S.S.R. where, according to the Soviet Report, 90 to 95% of civil cases are for less than 500 rubles (about U.S. \$500). Puchinskiy, *supra* note 159, Section II. For a highly suggestive comparison of *litigation rates* between East and West Germany see Blankenburg, *Studying the Frequency of Civil Litigation in Germany*, 9 LAW & Soc'y REV. 307, 308-10 (1975).

162. Indeed, the role of the courts in dispute resolution, as opposed to routine administration such as undisputed debt collection, appears already to have declined considerably. As a recent study concluded, “No doubt courts are still very useful, in a number of ways; but they are almost totally unused by ordinary individuals to resolve personal problems.” Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & Soc'y REV. 267 (1976).

B. *Devising Alternative Methods to Decide Legal Claims*

The next several approaches tend to accept the limitations of regular court reform and, as a consequence, involve the creation of alternatives utilizing simpler procedures and/or more informal decision-makers. Reformers are increasingly employing arbitration, conciliation, and economic incentives for settling out of court. These techniques, it should be emphasized, can be made mandatory for some or all claims, or they can be made available at the option of parties. While, as we will see, the most important procedural reform activity is taking place with respect to *particular types of claims*, especially small and/or consumer claims, some *generally applicable* reforms also deserve attention and will thus be treated briefly here.

1. *Submission of a dispute to arbitration rather than adjudication.* Arbitration is an ancient institution characterized by relatively informal procedures, decision-makers with either legal or technical expertise, and binding decisions subject to very limited appeal. Its benefits have long been available to consenting parties. While arbitration may be a relatively quick and inexpensive *process*, however, it has tended to be very expensive to the parties, because they have had to bear the burden of the arbitrator's fees.¹⁶³ Not surprisingly, it has recently been proposed that the state pay arbitrators or allow judges to act as arbitrators.¹⁶⁴ In France, for example, parties have since 1971 had the option of referring cases to a judge presiding as a "friendly arbitrator."¹⁶⁵ Similarly, a 1971 voluntary experimental arbitration program in California was intended to save costs by using voluntary, unpaid lawyers as arbitrators. This system was so successful in reducing costs both to the state and to the parties that it was replaced in mid-1976 with a formal system of compulsory arbitration available at the request of the plaintiff.¹⁶⁶ Given the delays and expenses often characteristic of regular litigation, these alternatives can reduce cost barriers to the parties

163. See, e.g., Bender & Strecker, *supra* note 11, Section IIID; Bolding, *supra* note 81, Section VC; Thery, *supra* note 62, Section XI.

164. Although not yet implemented in these places, the idea has been proposed, *inter alia*, in Germany, see Bender & Strecker, *supra* note 11, Section IIID2, and Sweden, see Bolding, *supra* note 81, Section VC.

165. G. PRO. CIV. ARTS. 57-58, 793-96. See Thery, *supra* note 62, Section XI. The judge may act as arbitrator only with respect to rights which the parties may dispose of by settlement or contract.

166. On the previous system, the Attorneys' Special Arbitration Plan, see Johnson *et al.*, *supra* note 11, Section IIIA2a(2). The new plan, also involving voluntary, unpaid arbitrators, applies to actions in which the plaintiff does not seek more than \$7,500. It went into effect on July 1, 1976. CAL. C. CIV. PRO. § 1141.10 (West Supp. 1976).

and may, by utilizing more active, informal decision-makers, substantially benefit weaker parties.

Similar advantages are available from a system of *automatic* diversion to arbitration, as is most notably practiced in Philadelphia, Pennsylvania.¹⁶⁷ An additional complicating factor here, however, is that in order to maintain the constitutionality of mandatory diversion there must be a right to a *de novo* trial on appeal.¹⁶⁸ The danger is that dissatisfied parties, deterred by the burden of new costs and a new hearing, will not avail themselves of this right and may thus be unjustly deprived of the safeguards of the courts. But if setting up such a barrier can be avoided, and if the more fundamental problems of the slow and expensive regular court procedures are not solved, arbitration of this type may substantially improve access for many people.

2. *Encouraging fair settlements by conciliation of the parties.* There are obvious advantages to the parties and to the legal system if the dispute is settled fairly without the necessity of trial. The current court congestion and excessively high expenses of litigation can make quick, mediated settlements, like arbitration, particularly beneficial to the parties. Further, it appears that such settlements are more easily implemented than one-sided judicial decrees, since they are founded on compromise already agreed upon by the parties. Significantly, a process aimed at conciliation—unlike the process of adjudication, which generally declares one party “right” and the other “wrong”—offers the possibility that the deeper causes of a dispute can be probed, and a complex, long-term, relationship mended.¹⁶⁹

167. The compulsory system in effect in Philadelphia began with a jurisdictional ceiling of \$1,000, but since 1971 the ceiling has been \$10,000. Arbitration is by a panel of three attorneys taken from a list of 3,000 attorneys willing to serve as paid arbitrators (the chairman receives \$50 per case, while the others receive \$30). It appears that in the first two years after the jurisdictional limit was raised to \$10,000, the civil calendar backlog was reduced from 48 to 21 months. The backlog for arbitration was only three months. See E. JOHNSON, JR., V. KANTOR & E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* 41-43, 45-49 (Denver: National Center for State Courts 1977); Johnson *et al.*, *supra* note 11, Section IIIA1.

168. The basic reason for the requirement of a *de novo* right in Philadelphia is that arbitration deprives litigants of their constitutional right to trial by jury. Nevertheless, the Pennsylvania courts have allowed financial deterrents to the right to appeal to the regular courts. Application of Smith, 381 Pa. 223, 112 A.2d 625 (1955), *appeal dismissed*, 350 U.S. 858 (1955). At the present, the appellant must pay all costs of arbitration, including a nonrecoverable arbitrator's fee of \$110. See E. JOHNSON, JR., V. KANTOR & E. SCHWARTZ, *supra* note 167, at 43.

169. According to Torstein Eckhoff, the judge's task is “not to try to reconcile the parties, but to reach a decision about which of them is right.” In contrast, “The mediator should preferably look forward, toward the consequences which may follow from the

The Japanese legal system provides a prominent example of the widespread use of conciliation by respected third parties.¹⁷⁰ Conciliation boards, composed of two lay members and (at least formally) a judge, have existed for a long time throughout Japan to hear the parties informally and to recommend a fair solution. Conciliation may be initiated by one party, or a judge may refer a court case to conciliation. This conciliation process, despite a relative decline in its use and effectiveness, is still very important in Japan.¹⁷¹ Admitting the somewhat unique conditions favorable to conciliation in Japan, the following observation by Professors Kojima and Taniguchi must nevertheless be considered: "The fact that the institution was born and has been fostered in a society vastly different from Western and other non-Far Eastern counterparts should not hide its validity as a useful means of dispute resolution."¹⁷²

Western countries have not, as yet, instituted broad conciliation systems for all types of civil claims, but the virtues of conciliation are increasingly being sought, both generally and with respect to certain types of claims. The most notable recent example is a French experiment, beginning in February 1977, with the new institution of the *conciliateur*.¹⁷³ The aim is to set up a system of local, respected *conciliateurs* who can listen to disputants who choose to turn to them, even visit the location of the dispute, and propose thoughtful solutions. If this approach proves successful in the four *départements* in which it is being tried, it will be extended to all of France (containing ninety-

various solutions, and he must work on the parties to get them to accept a solution." Eckhoff, *The Mediator, the Judge and the Administrator in Conflict-Resolution*, 10 ACTA SOCIOLOGICA 148, 161 (1967). See also references in note 147 *supra*.

170. For more detail, see Kojima & Taniguchi, *supra* note 14, Section VA1.

171. According to the data in the Japanese Report, 111,459 conciliations—68,525 in family matters—were filed in 1974 with the three-member conciliation boards, and 48.8% of the conciliations were successful. These figures contrast with the 148,750 lawsuits that were filed in 1974. *Id.*

172. *Id.* Professors Kojima and Taniguchi suggest that automobile accidents and family matters have proven particularly well suited to conciliation in Japan, and may also be amenable to conciliation elsewhere.

173. *The conciliateurs* have jurisdiction over all types of civil disputes except those between private parties and the administration, disputes concerning rural leases, labor contract matters, and issues concerning the status of persons. Minor criminal matters involving the recovery of civil damages can also be handled by the *conciliateur*. *Conciliateurs* are appointed by the *Premier Président* of the relevant *Cour d'Appel* from among former judges and other respected local persons. For more detail, see Thery, *supra* note 62, Appendix.

five *départements*).^{173a} France may thus vindicate the observations of the Japanese reporters.

Aside from this very interesting and important French innovation, which relies on party initiative and the prestige of the *conciliateur* to promote settlements of claims, the Florence Project reports reveal a wide variety of voluntary and compulsory methods of encouraging party reconciliation.¹⁷⁴ In particular, it is common to allow the judge or judges either to suggest a settlement or, failing that, to refer the case to another judge or registrar. While detailed empirical research is necessary to evaluate this procedure, it would seem generally that the fairer method is that found in New York,¹⁷⁵ where a different judge tries the case than the one who attempted to settle it.¹⁷⁶ This obviates the problem of the parties acquiescing in a proposed settlement merely because they either assume it is the same as would result after trial, or because they fear incurring the blame or resentment of the judge.

173a. After this article went to press, this experiment was in fact extended to all of France. Decree of March 20, 1978, no. 78-381, [1978] J.O. 1265. Evidently the *conciliateurs* most often deal with neighborhood problems, landlord-tenant disputes, and consumer problems, including debt. See La lettre de la chancellerie, October 15, 1977, at 2.

174. Settlement attempts prior to or at the time of the commencement of the proceeding are required in a number of countries, but have not proven very effective. See, e.g., Thery, *supra* note 62, Section VIIA (France); de Miguel y Alonso, *supra* note 18, Section IIC1 (Spain). Cf. Vigoriti, *supra* note 16, Section IIC. As Thery observes, "It is an obvious truth that the beginning of a case probably is not the best moment to conciliate the parties. Unless one of their positions is patently absurd, each party will often have to hear his adversary's argument in order to realize the possible weakness of his own." Thery, *supra* note 62, Section VIIA.

Settlement attempts by the judge or judges are encouraged generally in a number of countries. In Austria, "At every stage of the litigation, the judge—in keeping with his active role—is clearly authorized to act as a 'peacemaker' (§ 204(1)ZPO)." Fasching, *supra* note 153, Section IIC. Other examples include France, although here too it does not appear very successful (see Thery, *supra* note 62, Section VIIB); Germany (see Bender & Strecker, *supra* note 11, Section IIC1); Italy (see Vigoriti, *supra* note 16, Section IIC); and Sweden (see Bolding, *supra* note 112, Section IVF). A basic aim of the German *Stuttgarter Modell*, in addition, is to bring the parties to a settlement, and it appears that many more settlements do result in chambers utilizing the *Stuttgarter Modell* than in chambers not utilizing it. See Bender, *supra* note 155, at 33.

175. The New York Conference and Assignment System began in New York City in 1970 in order to attempt to reduce the city courts' 137,000-case backlog. Judges take turns serving as "Conference Judge," whose task is to attempt to settle the cases scheduled to go to trial. If the case is not settled, it is referred to one of the trial judges for immediate trial. Approximately 60% of the cases are settled, and the court backlog was eliminated by the end of 1971. The basic method of the judges is to listen to both sides, point to the weaknesses in their cases, and emphasize the difficulties and expense of trial. See Johnson *et al.*, *supra* note 11, Section IIC.

176. See Eckhoff, *supra* note 169, at 165; Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. REV. 3, 26. There may, however, be countervailing considerations in many situations. Compare text accompanying note 244 *infra*.

As conciliation has increased in importance, the methods and styles of conciliation have become the subject of more accurate studies. Already there are indications as to which types of behavior by conciliators are most conducive to settling conflicts effectively.¹⁷⁷ Again, however, we must be careful. Conciliation is extremely useful for many types of claims and parties, especially as we learn the importance of mending long-term relationships rather than simply judging parties right or wrong. But when conciliation is designed mainly to reduce court congestion, we must ensure that the results represent truly fair outcomes, not merely responses to otherwise remediable failures of the courts.¹⁷⁸

3. *Encouraging fair settlements by manipulating the economic incentives of the parties.* Another general method for diverting cases away from court litigation is to encourage settlements by the selective use of economic incentives. It is certainly clear that such economic factors as the actual costs of trial, the methods by which costs are initially and ultimately allocated (including whether the "contingent fee" device is available), the rate of inflation, and delay, all affect parties' attitudes towards settlement, even though these factors may affect different types of parties differently.¹⁷⁹ Delay and high rates of inflation

177. Among other general insights presented in an interdisciplinary field study of the German *Schiedsmann*—an institution which has existed since the 19th century in several German *Länder* and provides for informal lay mediation, primarily in minor criminal cases—are the following: (1) *Schiedsmänner* preferred to mediate in cases when the legal standard was clear and they could easily understand it; (2) the more successful settlements involved arrangements and undertakings for future relations between the parties rather than the simple assessment of costs, declaration of legal rights, or provision of some remedial compensation; (3) the frequent calling of witnesses other than the parties seemed to correlate with a higher rate of settlement; (4) the settlement rate was higher for *Schiedsmänner* who were already acquainted with the parties to the dispute; (5) those *Schiedsmänner* who perceived their role positively and sought to explore the causes of conflicts were more effective than those who aimed less idealistically at preventing litigation; and (6) settlements were more likely when the parties were allowed to speak their minds thoroughly, even to the point of raising their voices, before the *Schiedsmann* proposed a solution. Bierbrauer, Falke & Koch, *Conflict and its Settlement: An Interdisciplinary Study on the Legal Basis, Functions and Performance of the Institution of the Schiedsmann*, in 2 FLORENCE PROJECT, *supra* note 11.

178. Indeed, it is worth emphasizing that one of the basic tactics of conciliators is to remind the parties about the delay and expense of court trial. *See* note 175 *supra*; Bolding, *supra* note 81, Section IVF. We must admit, at this stage, that we just do not know how many normal cases "should" be settled, and how such settlements "should" be evaluated. One possible problem, for example, is that while parties might themselves be content with a particular settlement, the pattern of settlements might prevent a technical legal norm, aimed at protecting a class of persons, from being implemented. *See* note 247 *infra*.

179. These factors, it should be noted, affect the willingness to bring a lawsuit as well as the willingness to settle a lawsuit after it is brought. As noted before, each method

make a plaintiff seeking money, especially an isolated individual, more anxious to settle with the defendant and get some measure of recovery at once. High court costs, especially (but not only) to the extent they are imposed exclusively on the losing party, also increase the risk of trial. Individual plaintiffs, again, are especially susceptible to these pressures, because they cannot spread their risk of loss among numerous lawsuits.

Recognizing the importance of economic factors, a few judicial systems have created incentives to settle cases out of court. The most well-known of these devices is the "payment into court" system, apparently used most prevalently in England,¹⁸⁰ but also employed in Australia¹⁸¹ and Canada.¹⁸² The basic idea of the system is to penalize a plaintiff who does not accept an offer of settlement, tendered to the court by the defendant, which after trial proves to have been reasonable. The penalty is the payment by the plaintiff of both his own and his opponent's ("party and party") costs.¹⁸³

It is clear that this system encourages settlements and, accordingly, reduces trial congestion, but, as Professor Michael Zander has demonstrated, it does so at the expense of fairness to plaintiffs, who in payment-into-court cases are usually the economically weaker individual parties, less familiar with litigation.¹⁸⁴ This method thus does not ap-

for allocating risks and costs causes and prevents somewhat different access problems (*see* notes 12-14 *supra*). Here, however, we are focusing more on the use of economic incentives to encourage fair settlements of cases already filed.

180. *See* Zander, *Is the Payment-Into-Court Rule Worth Copying?*, 40 *RABELS ZEITSCHRIFT* 750 (1976).

181. *See* Taylor, *supra* note 55, Section IIB3.

182. *See* Cooper & Kastner, *supra* note 15, Section IIC3. In addition, it appears that a similar, but unwritten, procedure is used in Sweden. *See* Letter of Judge Anders Bruzelius to M. Cappelletti, Sept. 29, 1977 (on file with M. Cappelletti). *See also* R. GINSBURG & A. BRUZELIUS, *CIVIL PROCEDURES IN SWEDEN* 370 (The Hague, Martinus Nijhoff 1965).

183. The system works essentially as follows: The defendant initiates the process by tendering a sum of money (the amount of which the judge trying the case is unaware) to the court as an offer to the plaintiff to settle the case. The plaintiff can accept that sum within a given period of time—21 days in England—and will get his costs if he accepts it. If the case is ultimately tried, however, and the plaintiff wins a verdict of less than or equal to the amount that was paid into court, he must pay his own costs (which as a victorious plaintiff he would normally have received) plus all the defendant's (party and party) costs incurred after the date of the payment into court. This penalty may well exceed the amount of the judgment granted to the plaintiff. On the other hand, if the plaintiff recovers *more* than the amount of the payment into court, the consequences are the same as if no payment had been made. *See* Zander, *supra* note 180, at 750-52.

184. According to Professor Zander: "[T]he system greatly favors the defendant, who is normally the economically stronger party. In personal injury cases, which probably

pear to be a promising one in our quest for fair solutions to access-to-justice problems. There are, however, possibilities for better utilizing this technique. It is instructive briefly to consider at this point the relatively new (1971) Michigan Mediation System, which, although limited to tort cases, remedies the two most serious defects of the English procedure.¹⁸⁵ First, the Michigan system penalizes the defendant, as well as the plaintiff, for refusing to accept a fair proposal for settlement. Second, the Michigan system provides for an impartial determination by experts of a fair settlement offer. This provides both parties with an objective estimate of the value of the claim, thereby remedying to some extent the plaintiff's lack of expertise. The Michigan system, in short, demonstrates that the payment-into-court principle may enhance access to justice.¹⁸⁶ Its general utility beyond tort cases, however, is at this point still questionable.

C. *Special Institutions and Procedures for Certain Types of Claims of Particular "Social Importance." A New Trend Toward Specialization of Judicial Institutions and Procedures.*

We have examined the approaches of *regular court* reform and the *general diversion* of cases from the courts. Both techniques, as we have noted, are increasingly important; yet the most important "access-to-justice" movement in procedural reform is characterized by *specialized diversion* and by the creation of *specialized courts*. The impetus for this new trend toward specialization can be clarified by returning our focus to the types of claims which to a great extent have promoted the "three waves" of access-to-justice reform.

The effort to create more egalitarian, just societies has focused attention on ordinary people—those traditionally isolated and powerless

account for most payments into the 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." Zander, *id.* at 756. See also Zander, *Payment Into Court*, 125 NEW L. J. 638 (1975).

185. The Michigan system operates as follows. Mediation takes place at the request of either or both parties, or by court reference. A panel of three experts then 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% of it as damages at trial, or he will be penalized the costs of trial, including payment of enough to pay his opponent's attorney's fees. In contrast to the English plan, however, the defendant, too, must bear a similar penalty if he will not settle and the recovery is more than 90% of the amount set by the mediation panel. See Miller, *Mediation in Michigan*, 56 JUDICATURE 290 (1973).

186. See Johnson, *A Typology of Access to Justice Reforms*, in 3 FLORENCE PROJECT, *supra* note 11.

in their dealings with strong organizations and governmental bureaucracies. Our modern societies, as we have noted, have in recent years gone some distance toward providing more substantive rights to the relatively weak—in particular, to consumers against merchants, the public against polluters, tenants against landlords, employees against employers (and unions), and citizens against governments. Although recognizing that these new rights need further substantive law development, procedural reformers have taken up the challenge of making effective the new rights that have been obtained. This challenge is at the heart of the access-to-justice approach.

Regular courts, it must first be reiterated, have a continuing—in fact, increasingly important—role in the enforcement and development of both new and old rights, especially in what has been called “public law litigation.”¹⁸⁷ Consumers, environmentalists, and the public are holders of “diffuse interests,” and the protection of these interests has, through such devices as liberalized standing requirements, consumer ombudsmen, public interest lawyers, and class actions, become an apparently indispensable task of modern courts.¹⁸⁸

It must be recognized, however, that some of the characteristics of regular court systems that make them suitable for public law litigation on behalf of diffuse interests in the *aggregate* often make them unsuitable for enforcing ordinary people’s rights at the *individual* level. Highly structured adversary procedures utilizing highly trained lawyers and expensive expert witnesses may serve vital functions in public law litigation, but they place severe limits on the accessibility of our courts for small claims made by ordinary people. The evident need is to preserve the courts while creating other, more accessible, forums.

Diversion, either general or specialized, is an essential method for improving the access of ordinary people, particularly if, as is usually the case, individuals do not thereby completely lose their right to go to the courts. General diversion techniques, discussed in the preceding section, help resolve cases more quickly and less expensively, while also relieving court congestion and delay. We must be careful, however, that the aim of relieving congestion does not cause the diversion of cases that *do* belong in the courts, such as many cases involving constitutional rights or the protection of diffuse and class interests. General diversion, in short, may go too far. On the other hand, general

187. See Chayes, *supra* note 2.

188. See text accompanying notes 104-37 *supra*.

diversion may not go far enough from our access-to-justice perspective; a more specialized approach than general arbitration or conciliation appears necessary to create truly effective forums for individuals to vindicate their rights.

The new substantive rights of ordinary people have been particularly difficult to enforce at the individual level. The barriers faced by relatively powerless individuals with relatively small claims against predominantly organizational litigants—primarily corporations or governments—have hindered enforcement of these new rights. Such individuals, with such claims, often do not know of their rights, do not seek legal aid or advice, and do not bring legal actions.¹⁸⁹ Neither the important and continuing movement on behalf of diffuse interests, nor general diversion techniques can sufficiently attack the barriers to the enforcement of these important new rights at the individual level. The great task of access-to-justice reformers, therefore, is to preserve the courts while *fashioning a special area of the justice system that will reach these individuals, attract their claims, and enable them to enjoy the advantages that progressive substantive laws have recently sought to confer on them*. As stated by Professor Kojima, "the urgent need is to focus on the ordinary man—one might say the little man—and to create a system that serves his needs. . . ."¹⁹⁰

The recognition of this urgent need reflects a fundamental change in the concept of "procedural justice." In the context of our formal courts and procedures, "justice" has essentially meant the application of the correct rules of law to the true facts of the case. This concept of justice was the standard by which procedures were measured. The new attitude toward procedural justice reflects what Professor Adolf Homburger has called "a radical change in the hierarchy of values served by civil procedure";¹⁹¹ the paramount concern is increasingly

189. See text accompanying notes 25-32 *supra*.

190. Kojima, *supra* note 120, Section II. This aim, of course, has been proclaimed before, but the recent activity described here goes far beyond the earlier efforts, which seemed to result only in further disadvantages to ordinary people. For the Japanese experience with Summary Courts created after the Second World War, see *id.*

The history of the English county court system set up in 1846 suggests that, despite the rhetoric of reform on behalf of the common man, such early small claims courts were in fact aimed mainly at facilitating debt collection. See B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965*, at 32-37 (London: Heinemann 1967). For the very similar U.S. experience, see Yngvesson & Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219, 221-28 (1975).

191. Letter from Adolf Homburger to M. Cappelletti, August 11, 1977 (on file with M. Cappelletti).

with "social justice," *i.e.*, with finding procedures that are conducive to the pursuit and protection of the rights of ordinary people. While the implications of this change are dramatic—for instance, insofar as the role of the adjudicator is concerned, it is worth emphasizing at the outset that the core values of the more traditional procedural justice must be retained. "Access to justice" must encompass both forms of procedural justice.

A system designed to serve ordinary people, both as plaintiffs and defendants, must be characterized by low cost, informality, and speed, by active decision-makers, and by the utilization of both legal and technical expertise. It should have, in addition, the capacity to handle disputes involving complex, ongoing relationships, such as those between landlords and tenants. These characteristics, it will be seen, emerge in the most promising specialized procedures discussed in this section, and they offer the possibility of attracting people and enabling them to vindicate their rights effectively against their more sophisticated and powerful opponents.

The effort to design specialized courts and procedures for certain socially important types of claims is, of course, not new. It has often been found in the past that special procedures and especially sensitive decision-makers are necessary when the substantive law is relatively new and rapidly evolving.¹⁹² Regular judges may lack the expertise and sensitivity necessary to adjust the new law to a changing social order, and judicial procedures may be too cumbersome to be trusted with the task of enforcing and, to a degree, adapting and moulding, important new laws. What is novel in the recent effort, however, is the large scale attempt to give effective rights to the "have-nots" against the "haves": the unprecedented pressure to confront and attack the real barriers faced by individuals. More than simply the creation of specialized courts has been found to be necessary; new approaches to civil procedure must also be devised.

1. *Special procedures for small claims.* The violation of ordinary people's newly obtained rights, such as those in the fields of consumer and landlord-tenant law, tends to give rise to a great number of relatively small claims against (*inter alia*) businesses or landlords.¹⁹³ The

192. See B. ABEL-SMITH & R. STEVENS, *supra* note 189, at 258-60; Jacob, *supra* note 57, Section VIIA; Thery, *supra* note 62, Section I.

193. The definition of "small claim" used for Australia by G. D. S. Taylor is as follows:

One obvious measure is the amount of money sought by the plaintiff or the value

growing concern with making those rights effective, therefore, leads to the special procedures and devices for resolving these "little injustices" of great social importance.

Relatively small claims have long been treated differently from larger claims. Single judges (as opposed to three-judge panels),¹⁹⁴ less formally qualified judges,¹⁹⁵ restrictions on appeal,¹⁹⁶ and—at least on paper—more of the characteristics of "orality"¹⁹⁷ have been used to reduce the costs to the state and to the parties of resolving disputes in-

of any property in question. But there is a philosophically qualitative element as well. The recent growth in new procedural mechanisms for small claims has centered on consumer legal problems as the most pressing of those legal problems in which ordinary people commonly become involved. Most such problems are met with also by privileged members of the community, but the general orientation is towards making justice available to the underprivileged who, it is thought, are most likely to be "ripped off" without having the resources and means to seek legal protection. Hence, when one speaks of "small claims," disputes concerning breaches of contract (consumer contracts or otherwise), motor vehicle accidents causing limited damage, eviction from rented premises, and detinue (the unlawful holding of another's goods) are clearly included, while actions such as those on wills or intestacy are not.

Taylor, *supra* note 18, at 1. The Small Claims Court Study Group in the United States emphasized the importance of landlord-tenant disputes in U.S. small claims courts, stating that "the theft of rent security deposits by landlords constitutes the largest single cause of consumer-initiated actions . . ." SMALL CLAIMS COURT STUDY GROUP, *LITTLE INJUSTICES: SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER* 152 (Washington: The Center for Auto Safety 1972).

194. This is true, for example, for the Austrian *Bezirkogerichte*, the French *Tribunal d'instance*, the German *Amtsgerichte*, the Dutch *Kantongerecht*, the Italian *pretore*, and the Japanese "Summary Courts." See, e.g., Fasching, *supra* note 154, Section IC (Austria); Bender & Strecker, *supra* note 11, Section IIA1 (Germany); Houtappel, *supra* note 34, Section I (Holland); Kojima & Taniguchi, *supra* note 14, Section IVA3 (Japan).

195. See, e.g., Taylor, *supra* note 55, Section ID (Australia); Kojima & Taniguchi, *supra* note 14, Section IVB1 (Japan).

196. See, e.g., from the national reports to be published in Volume I of the Florence Project series, Taylor, *supra* note 55, Section IVA1 (Australia); Fasching, *supra* note 154, Section IIA1 (Austria); Cooper & Kastner, *supra* note 15, Section IIB1k (Canada); Thery, *supra* note 62, Section IVA (France); Bender & Strecker, *supra* note 11, Section IIA1c (Germany); Houtappel, *supra* note 54, Section I (Holland); Ovalle Favela, *Access to Justice in Mexico*, Section IIA1, in 1 FLORENCE PROJECT, *supra* note 11; and Bolding, *supra* note 81, Section IIIA4 (Sweden). Most of these limitations provide that only claims for above a certain amount of money are subject to appeal.

197. See, e.g., Fasching, *supra* note 154, Section IIA1 (Austria); Brañes, *Access to Justice in Chile*, Section IIA1, in 1 FLORENCE PROJECT, *supra* note 11; Fernández, *Access to Justice in Colombia*, Section IIA1, in 1 FLORENCE PROJECT, *supra* note 11; Thery, *supra* note 62, Section IVB (France); Houtappel, *supra* note 54, Section I (Holland); Vigoriti, *supra* note 16, Section IIA1 (Italy); Kojima & Taniguchi, *supra* note 14, Section IVA1 (Japan); Ovalle Favela, *supra* note 196, Section IIA1 (Mexico); Vescovi, *Access to Justice in Uruguay*, Section IIA1, in 1 FLORENCE PROJECT, *supra* note 11. Typical simplified procedures in common law countries are described in Taylor, *supra* note 55, Section IVA (Australia); Cooper & Kastner, *supra* note 15, Section IIB1 (Canada); Ginossar, *Access to Justice in Israel*, Section IIIC, in 1 FLORENCE PROJECT, *supra* note 11; Johnson *et al.*, *supra* note 11, Section IIB1 (U.S.A.).

volving relatively small amounts of money. Indeed, the proclaimed purposes of such reforms have often been to create courts and procedures that will be quick and accessible to "ordinary people." Such reforms, however, even when aimed at promoting citizen access and not simply at cutting costs, have undergone severe criticism lately.¹⁹⁸ First, many small claims courts have become almost as complex, expensive, and slow as the regular courts (due, in particular, to the continued presence of lawyers and the unwillingness of judges to abandon their traditional formal, aloof, styles of behavior). Second, where small claims courts have become efficient, they have served creditors in the enforcement of debt claims more often than ordinary individuals in the vindication of their rights.¹⁹⁹ Quicker, more informal, streamlined procedures, it is argued, primarily facilitate wholesale trampling on the rights of debtor-individuals. Small claims, after all, are not necessarily simple or unimportant;²⁰⁰ they may involve complex laws in claims of vital importance to low or middle income litigants. The question then is why should they be treated by arguably second class procedures.

There is, however, a real need for accessible and effective small claims remedies, and without massive (and highly improbable) state subsidies, it is clear that as a rule small claims will not be brought to the regular courts to be handled by regular procedures; among other things it is simply not economically feasible.²⁰¹ The result, therefore, is that without some special small claims procedures the rights of ordinary people will often remain symbolic. The challenge is to create

198. As the Japanese Report noted about the Summary Courts in Japan, "Despite . . . specific simplifications, the actual practice tends to be as formal as in District Courts, mainly because of psychological inertia and the traditional sense of procedural fairness on the part of judges, other court staff, and lawyers when they are involved." Kojima & Taniguchi, *supra* note 14, Section IVB1. Similarly, Professor Vigoriti observes that, "in practice the proceedings before the *pretore* function little better than that in the other courts." Vigoriti, *supra* note 16, Section IIA1. As Terence Ison pointed out, "If justice is ever to be done in small claims, the approach must be far more iconoclastic." Ison, *Small Claims*, 35 MOD. L. REV. 18, 27 (1972).

199. This claim is very well documented, given that small claims courts have apparently been subject to more empirical research than any other legal institution. See especially the summary in Yngvesson & Hennessey, *supra* note 190, at 235-43. See also Cooper & Kastner, *supra* note 15, Section IIB1b. The problem is discussed at notes 227-40 & accompanying text *infra*.

200. See Yngvesson & Hennessey, *supra* note 190, especially at 256-62. Taylor states simply, "Size, it is submitted, is not an appropriate test of the complexity or importance of a claim." Taylor, *supra* note 55, Section IIE. See also Thery, *supra* note 62, Section IIIC5.

201. See text accompanying notes 17-19 *supra*.

forums that will be so attractive to individuals, not only economically but also physically and psychologically, that they will feel comfortable and confident in using them, despite the resources and sophistication of those they tend to oppose. Indeed, it appears that the power of the criticisms mentioned above has not discouraged small claims reformers; rather, it has sparked a striking new effort—utilizing what we have called the new access-to-justice approach—at meaningful small claims reform.

The most promising examples of this new effort emphasize many of the traits found in the best designed arbitration systems—speed, relative informality, an active decision-maker, and the possibility of litigating effectively without attorneys. In addition, the relative positions of the litigants and the character of their relationships tend to be more carefully considered. Recognizing that important reform activity is progressing in numerous places, we shall discuss briefly the exemplary recent reforms in certain areas of Australia (especially the small claims tribunals in New South Wales, Queensland, Victoria, and Western Australia, 1973-1976),²⁰² in England (the county court system for the arbitration of small claims, 1973),²⁰³ in Sweden (small claims procedure, 1973),²⁰⁴ and in the United States (especially the New York small claims courts, 1972).²⁰⁵ Some characteristics of these

202. Jurisdiction of the Consumer Tribunals (New South Wales), and the Small Claims Tribunals (Queensland, Victoria, Western Australia) is limited to small consumer complaints (under \$1,000). The Victoria and Western Australia tribunals also have some landlord-tenant jurisdiction. See generally Taylor, *supra* note 55, Section IVA.

203. If the sum in issue is not over £100 (originally £75) and one party so requests, or if both parties agree, the county court registrar has the power to order that the case be decided by informal arbitration. The arbitration is conducted in private, usually by the registrar himself. See County Court Rules 1936, Order 19, rule 1(2), inserted by the County Court Rules 1973 (Amendment No. 3). This system is studied in some detail in Applebey, *Small Claims in England and Wales: A Study of Recent Changes in the County Courts and the Development of Voluntary Arbitration Schemes*, in 2 FLORENCE PROJECT, *supra* note 11. Also very interesting in England are the Manchester and London experimental small claims courts, which have jurisdiction over certain small claims only when both parties agree. They are marked by a higher level of informality and simplicity than the county court schemes. See *id.* at 76-88. Jacob, *supra* note 57, Section VIB-E.

204. The Swedish simplified procedure for small claims applies to non-family matters where the value of the plaintiff's claim is less than one-half the basic insurance amount (*i.e.*, at present less than SKr. 5,000 or about U.S. \$1100), where the parties agree to small claims jurisdiction, or where the controversy is one that has been dealt with by the Public Complaints Board. Although this procedure is not handled by special courts, Swedish terminology speaks, perhaps improperly, of "small claims courts." Act Concerning the Procedure in Civil Actions Relating to Small Claims, [1974] *Svensk Författningssamling* 8. See Bolding, *supra* note 81, Section IIIA. For more detail, see Eisenstein, *supra* note 120.

205. See generally Johnson *et al.*, *supra* note 11, Section IIB1; Note, *Small Claims Courts: An Overview and Recommendation*, 9 MICH. J.L. REF. 590 (1976). The

reforms, as well as some features of important Canadian experiments (1974),²⁰⁶ may serve to illustrate the activity that is now occurring. We focus, therefore, on four related aspects of these new reforms—(a) promoting general accessibility, (b) striving to equalize the parties, (c) changing the style of decision-making, and (d) simplifying the law that is applied. This list of issues is certainly not exhaustive, but it covers the main areas of reform activity.²⁰⁷

(a.) *Promoting general accessibility.* The reduction of the cost and duration of litigation is of course a prime aim of recent reforms.²⁰⁸ Filing fees, for example, are kept very low for virtually all small claims courts. The major cost, or major risk of litigation in winner-takes-all countries is, however, attorneys' fees;²⁰⁹ hence, steps are being taken either to actively discourage or to prohibit attorney representation. This type of reform recognizes that it is probably not enough to allow a party to appear without an attorney, because the

small claims courts in New York are notable because they offer litigants the choice of informal arbitration, which is essentially non-appealable, or adjudication, which is much more formalized. Jurisdiction is available for claims by adult *individuals* (not business partnerships, associations or corporations) for money damages up to \$500. See Sarat, *supra* note 147.

206. The Canadian report to the Florence Project details the results of a very interesting 1974 Pilot Small Claims Project in Vancouver, British Columbia, which ended on August 30, 1975. It was most notable for its use of paralegals and a mediation service, discussed at text accompanying note 250 *infra*. Also of considerable interest are the Quebec small claims courts. See Cooper & Kastner, *supra* note 15, Section IIB1.

207. The difficult problem of the enforcement of small claims judgments, in particular, is now receiving considerable attention by scholars, although not many reforms have yet been enacted which attempt to remedy it. See, e.g., Kosmin, *supra* note 140, at 971-74; Yngvesson & Hennessey, *supra* note 190, at 254-55. Many of the reforms discussed in the text *infra* can, however, by offering various services to individuals, help alleviate the problem. It should also be noted that one reason for so many uncollected judgments is that a high proportion are obtained by default. See notes 227-31 *infra*.

208. To be sure, duration depends in practice on many factors, but the available data suggest that it has been kept low in the best designed small claims courts. For the British Columbia experiment, 90% of undisputed cases and 70% of disputed cases were completed with six months. See Cooper & Kastner, *supra* note 15, IIB1k. One U.S. study found that the median interval time from filing to trial was generally one month. See THE SMALL CLAIMS COURT STUDY GROUP, *supra* note 193, at 85; Johnson *et al.*, *supra* note 11, Section IIB1d. Eisenstein reports that in the Swedish small claims courts, 76% of the cases are terminated within two months. See Eisenstein, *supra* note 120, at 83. For the English arbitration scheme, Applebey reports that 72% of the cases were concluded in less than eight weeks from the date arbitration was requested. See Applebey, *supra* note 203, at 49.

209. See text accompanying notes 17 & 18 *supra*. Even if lawyers are often not formally required in the courts with jurisdiction over small claims, they are in fact frequently necessary. As Houtappel observed about the Netherlands, "Even in canton courts, as a practical matter, legal assistance is necessary to a party who is not legally trained. This is not surprising; ignorant of the notions of substantive and procedural law, and inhibited by the barrier of a refined legal language, a layman cannot formulate the grounds for his claims or defense, choose the proper jurisdiction, or follow the appropriate judicial procedure." Houtappel, *supra* note 54, Section IIA.

other party may still obtain an attorney and gain a potentially decisive advantage.²¹⁰ Thus, for example, in Sweden and England the new reforms discourage attorney representation on both sides by normally not permitting the winning party to obtain reimbursement of his attorney's fees;²¹¹ and in Australia representation by attorneys is usually not allowed in most jurisdictions.²¹² The prohibition of attorney representation is, of course, a controversial measure and has often been attacked as preventing legal assistance to poor, presumably inarticulate litigants who must often face articulate, experienced businessmen. There are methods, discussed in the next sections, of addressing this problem, and it should also be added that individuals in informal settings may not be so inarticulate as is often thought.²¹³

Accessibility is further promoted by changes that bring the courts closer to ordinary people. To begin with, it is helpful to make courts as physically accessible as possible, and one approach is to keep them open at night so that working people will not be deterred by the need to miss work. The East Harlem, New York, small claims court allows the filing of complaints every Thursday night, and in a further attempt to promote access, also utilizes paraprofessional community advocates

210. See, e.g., Sarat, *supra* note 147, at 366-68; Yngvesson & Hennessey, *supra* note 190, at 250-51. Cf. Cooper & Kastner, *supra* note 15, Section IIB1d.

211. In Sweden the losing party is required to pay only certain minimal legal fees of his opponent, corresponding to the fee for one "legal advice" under the Legal Aid Act. Nevertheless, it appears that in about half the cases, at least one party has a lawyer. See Eisenstein, *supra* note 120, at 81. 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. (In addition, a reform of August 1975 now permits successful personal injury plaintiffs to obtain their full "party and party" costs.) See Applebey, *supra* note 203, at 56-57. The approach is similar in many small claims courts in Canada. See Cooper & Kastner, *supra* note 15, Section IIB1d.

212. Except in the Australian Capital Territory, legal representation is permitted only if all parties agree to allow representation and if, in the opinion of the referee (the decision-maker), it will not disadvantage the unrepresented party. Attorney representation has, however, thus far been permitted in only one case. See Taylor, *supra* note 18, at 42. In Canada, Quebec is alone in forbidding the use of lawyers. See Cooper & Kastner, *supra* note 15, Section IIB1d. In the U.S., according to a recent study, small claims courts in California, Idaho, Kansas, Michigan, Minnesota, and Nebraska prohibit attorney representation. See Note, *supra* note 205, at 603 n.94. This does not raise U.S. constitutional problems since these states provide for a *de novo* review on appeal.

213. According to Taylor, "The intervention of the adjudicator overcomes the possibility that a party may be too inarticulate to tell his own story and, indeed, it is surprising how articulate parties are once they have relaxed and become absorbed in the proceedings." Taylor, *supra* note 18, at 44. Over two-thirds of the registrars questioned by Applebey in England similarly felt that "legal representation was not an advantage in arbitration." Applebey, *supra* note 203, at 51.

in a particularly novel manner.²¹⁴ According to some social scientists who have examined the problems of small claims courts:

The work of community advocates, who publicize the court and explain its use, by talking to civic groups, political groups, and others in the Harlem area, is of particular importance since accessibility involves a cultural as well as a physical dimension. The court must not only *be* in the community, but must be perceived by community members as a serious option when they are considering ways of handling a grievance.²¹⁵

Filing a claim is also made much easier in modern small claims courts. Forms are simplified, formalities eliminated, and court clerks are typically available to assist the parties.²¹⁶ In Sweden, for example, the court clerk guides the parties in drawing up their pleadings (and may even fill out the complaint) and helps them determine what proof will be needed. While the clerk is not supposed to furnish tactical or legal advice, this can be obtained from a lawyer through Sweden's liberal legal advice system.²¹⁷ This type of advice by court clerks and, more generally, by court personnel is especially necessary when legal representation in court is not permitted, since, like other reforms to be discussed, it helps equalize the parties.

(b.) *Striving to equalize the parties.* Active decision-makers can do much to help litigants unrepresented by lawyers. Even critics of active judges in general acknowledge the need for activism in small claims adjudication.²¹⁸ Modern reforms also tend to promote judicial activism by relaxing rules of evidence and by permitting, for example in Sweden and England, great discretion in matching procedures to the types of claims.²¹⁹ Taylor reports for Australia that parties and adjudicator often sit around a coffee table, and that it is not unusual for the

214. See Yngvesson & Hennessey, *supra* note 190, at 269-70.

215. See *id.* at 270.

216. See, e.g., Taylor, *supra* note 18, at 32, 45 (Australia); Applebey, *supra* note 203, at 25 (England); Eisenstein, *supra* note 120, at 78-80 (Sweden); Note, *supra* note 205, at 604-05 (U.S.A.). The Vancouver experiment in Canada utilized "procedural assistants" to specialize in advice about preparing documents and how to conduct the proceeding. See Cooper & Kastner, *supra* note 15, Section IIB1n(1).

217. See Eisenstein, *supra* note 120, at 78-80. Those who qualify for legal aid and advice are allowed one legal advice session. See text accompanying note 75 *supra*.

218. See Jolowicz, *The Active Role of the Court in Civil Litigation*, in M. CAPPELLETTI & J. JOLOWICZ *supra* note 38, at 155, 251-53.

219. See Bolding, *supra* note 81, Section IIIA2 (Sweden); Eisenstein notes that in Sweden this has resulted in about 49% written proceedings and about 47% proceedings terminated after only one oral meeting. See Eisenstein, *supra* note 120, at 83. For England see Applebey, *supra* note 203, at 39-40.

adjudicator to telephone someone who can confirm a party's story.²²⁰ The active, less formalistic judge has become a basic feature of modern small claims litigation.

The judge's role in facilitating party equality can also be promoted through pretrial conferences, as is done in England. The English county court procedure for the arbitration of small claims is in other ways closely linked to the county court pretrial procedure. At the pretrial proceeding the court registrar (who generally hears the small claims which are submitted to arbitration) can, *inter alia*, offer the parties considerable help in preparing for the later arbitration hearing.²²¹ The only practical problem, not easily resolved, is that this procedure forces litigants to submit to two court appearances.

Beyond these significant reforms, there has been an increasing reliance on personnel linked to small claims courts who may aid parties not only in pleading, but also in preparing for litigation. Of course, depending on qualifications and training, such personnel may be costly, but when available they help take some of the pressure off active judges. There was, for example, a Legal Advice Clinic included in the 1974-75 Vancouver (British Columbia, Canada) "Small Claims Pilot Project."²²² The potential for developing expertise and providing valuable help to litigants is also being successfully developed in the community services program of the Harlem (New York City), small claims court.²²³ In addition to providing valuable assistance, these paraprofessionals, most of whom reside in Harlem, even attend proceedings to support and assist shy litigants.²²⁴

220. See Taylor, *supra* note 18, at 46 (for the Queensland use of a coffee table) & 55 (for the Victoria use of the telephone).

221. These pretrial sessions began in March 1972, before the adoption of the arbitration scheme. The registrar is required to "consider the course of the proceedings and give all such directions as appear to him necessary or desirable for securing the just, expeditious and economical disposal of the action." It appears, unfortunately, that most registrars feel bound only to recommend that parties obtain legal advice. Applebey, *supra* note 203, at 20-26.

222. Its purpose, according to the Canadian Report, "was to give substantive and procedural legal advice to litigants as well as to prepare documents, organize the litigant's case for a particular cause of action and prepare the case for trial." Because of the need for this service and the widespread system of referrals, the clinic was "heavily used and won widespread support." This support resulted in the establishment, despite the termination of the pilot project, of a volunteer Legal Advice Clinic, supervised by the Vancouver Community Legal Assistance Service. Cooper & Kastner, *supra* note 15, Section IIB1n(2). On this use of court assistants, see generally the recent discussions in Kosmin, *supra* note 140, at 961-64 and Note, *supra* note 205, at 604-05.

223. See text accompanying note 214 *supra*.

224. See Kosmin, *supra* note 140, at 961-63.

Court machinery can also help equalize the parties by aiding them in obtaining low cost expert opinions and testimony.²²⁵ In Sweden, for example, the court may solicit an expert's opinion at no cost to either party, with the state paying the expert's fees.²²⁶ Given that small claims are not necessarily simple claims, the provision of an expert can help considerably in obtaining fair results in difficult cases.

While the techniques discussed above have considerable potential, they must come to grips with the problem to which small claims courts are most susceptible—their tendency to become "collection agencies," particularly when an experienced merchant or governmental litigant is seeking to enforce an ostensible debt obligation against an inexperienced, presumably less articulate individual defendant.²²⁷ Complicating the matter is the fact that small claims courts tend to be overburdened with debt collection claims and that individual debtor-defendants tend not even to respond to the allegations—they simply default.²²⁸ The first problem is most obvious in common law small claims courts because debts in civil law areas are normally enforced through other channels, namely, special summary *ex parte* procedures, such as the French *procédure d'injonction*,²²⁹ the German *Mahnverfahren*²³⁰ and the Italian *procedimento d'ingiunzione*,²³¹ however, it is becoming increas-

225. In addition to the Swedish example cited in the text *infra*, reference can be made to Australia, where small claims adjudicators in New South Wales, South Australia and Western Australia use Consumer Affairs Department officers as experts. See Taylor, *supra* note 18, at 54. Cf. Applebey, *supra* note 203, at 54-56.

226. The court may also send matters to the Public Complaints Board for an expert opinion, but this has not been done yet. See text accompanying notes 304-09 *infra*.

227. See note 199 *supra*. This problem and the Canadian efforts to remedy it have been most recently discussed in Axworthy, *Controlling the Abuse of Small Claims Courts*, 22 MCGILL L.J. 480 (1976).

228. Yngvesson and Hennessey found, on the basis of an exhaustive review of the literature, that in all but two of fourteen small claims courts studied at least 47% of the victories were won by default. See Yngvesson & Hennessey, *supra* note 190, at 243-44. Also for the United States, Kosmin found that "the default judgment rate averages 60 percent but is often higher." See Kosmin, *supra* note 140, at 950. The Canadian report suggests that the default rate is about 30% in the Canadian small claims courts that allow default. See Cooper & Kastner, *supra* note 15, Section IIB1i. Applebey notes that in about two-thirds of cases initiated in the county courts in England the creditor plaintiff wins by default. See Applebey, *supra* note 203, at 13.

229. This procedure, described in detail by Thery, is applicable to all contractual debts. See Thery, *supra* note 62, Section VIA.

230. 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. Bender & Strecker, *supra* note 11, Section IIA2.

231. Approximately half a million judicial decrees were rendered on the basis of a *procedimento ingiuntivo* in a typical recent year. See, e.g., M. CAPPELLETTI, GIUSTIZIA E SOCIETÀ 225 (Bologna: Il Mulino 1972). According to Professor Vigoriti, only about

ingly clear that the problems and prospects of these summary procedures are closely related to the issues of equality and access in small claims courts.

In common law small claims courts the first approach to this crucial problem of debt collection and default has been to try to exclude business plaintiffs. The aim is to let the consumer choose when to use these forums. This approach has been taken in the Australian Tribunals and, with some modification, in New York.²³² There is, however, nothing intrinsically wrong with the efficient enforcement of debt obligations, as long as the defendants really are given an opportunity to present their defenses.²³³ Furthermore, small business claimants may often be the kind of "ordinary people" who ought to use small claims courts, and to deny them this right may subject them to serious financial hardship.²³⁴ Finally, closing small claims courts to actions by businessmen may serve only to channel such actions to other forums, possibly less favorable to the consumer.

Many consumer-oriented reformers, therefore, recommend that small claims courts allow debt collection but that default judgments be scrutinized very carefully,²³⁵ or even that an investigative arm of the court ascertain whether any defense might be raised.²³⁶ It is un-

10% of these proceedings are opposed. See Vigoriti, *supra* note 16, Section IIA3. Available figures for such procedures in other countries, it can be added, are similar. See, e.g., de Miguel y Alonso, *supra* note 18, Section IIA2 (Spain); Ovalle Favela, *supra* note 196, Section IIA3 (Mexico).

232. See notes 202 & 205 *supra*.

233. At present, it appears that such opportunities are not adequate. One U.S. study found that 35% of over 1,000 debtors surveyed suggested that default was at least partly a protest against creditors' actions. See D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 91 (New York: Free Press 1974). See also Bender & Strecker, *supra* note 11, Section IIA2 (Germany).

234. Yngvesson & Hennessey, *supra* note 190, at 267; Note, *supra* note 205, at 599-601.

235. See, e.g., the discussion of Canadian proposals in Axworthy, *supra* note 227, at 491-95:

There emerge four possible ways of dealing with default judgments. The *status quo*, as it exists in most provinces, can be maintained: no proof is required for liquidated debts. Or, as in Alberta, discretion may be given to the judges either to award a default judgment or require the claimant to prove his claim. More radical yet, would be a statutory provision requiring the claimant to prove his claim, whether or not the defendant makes an appearance. To preclude default judgments being awarded where the defendant does not appear is clearly unacceptable; no defendant would ever appear under such circumstances.

Id. at 492. See also Kosmin, *supra* note 140, at 951-53; Note, *supra* note 205, at 611-12.

236. This proposal, for example, has been made recently in: Rubinstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.—C.L. L. REV. 48, 82 (1976) and Jones & Boyer, *Improving the Quality of Justice in the Market-*

clear whether such an investigative arm, which could be very expensive, would still be necessary if defendants were given clear, understandable notices that legal help is available.²³⁷ Unfortunately, under the prevailing systems such notices do not appear to be given. At any rate, it is certainly desirable to try to turn small claims courts into effective forums for the defense of consumers. Consumers are increasingly buying goods on credit, and they ought to be given the opportunity to refuse to pay and assert their defenses in a forum amenable to their needs.²³⁸ Sweden, for example, provides that whenever individuals wish to dispute a summary *ex parte* debt collection action, the action will be placed in the small claims court rather than in the regular court.²³⁹ The result is that a large number of the small claims plaintiffs turn out to be merchants, but this is not to be feared.²⁴⁰ It may indeed be an indication of the courts' success.

Equalizing the consumer and the merchant in small claims disputes requires at a minimum that undisputed claims not be allowed to congest the courts and, at the same time, that consumers be mobilized to litigate effectively those cases in which they do dispute the existence of a debt. This must continue to be a central task of small claims reformers.

(c.) *Changing the style of small claims decision-makers.* Small claims reforms have recently come to emphasize conciliation, as

place: *The Need for Better Consumer Remedies* 40 GEO. WASH. L. REV. 357, 404-05 (1972). Professor Ison even proposed that the judge investigate claims himself: "the *modus operandi* of a small claims judge should approximate more closely to that of a police detective . . ." Ison, *supra* note 198, at 28.

237. Defendants should also have the opportunity for counseling and perhaps judicial help in working out a formula to pay off admitted debts. The counseling services linked to several small claims courts in Canada are good examples. See Cooper & Kastner, *supra* note 15, Section IIC.

238. As Taylor points out, "the concept of a Small Claims Tribunal as a consumer court assists only the active and intelligent consumer. A procedure aimed at making the court process intelligible to the layman defendant and positively suggesting to him how to defend may be a more just solution." Taylor, *supra* note 55, Section IVA2.

239. This option results in a particular savings to defendants, since they would otherwise—as is still the case, for example, with respect to the German *Mahnverfahren* and the Italian *procedimento ingiuntivo*—have to defend in the regular courts and risk paying both their own and their opponents' costs. In Sweden, of the 1,297 consumer controversies (out of a total of 5,408 cases) in the small claims courts in 1975, the merchant was plaintiff in 74% of the actions. See Eisenstein, *supra* note 120, at 75-76. Similarly, in Quebec, where business plaintiffs are excluded from the small claims courts, an individual defendant in a lawsuit brought by a business in the higher court may elect to transfer the case to a small claims court. See Axworthy, *supra* note 227, at 490-91.

240. See Hellner, *The Consumer's Access to Justice in Sweden*, 40 RABELS ZEITSCHRIFT 727, 745 (1976).

opposed to adjudication, as the major technique for dispute resolution. The informal, low-key, often nonpublic conciliation process seems well adapted to litigants without lawyers, and it has the advantage already described of helping preserve long-term, complex relationships.²⁴¹ Although they are not without dangers, conciliation techniques are increasingly being combined with the power to make a binding decision. In Sweden, for example, the small claims judge is directed to attempt conciliation of the parties "unless there are special reasons to the contrary,"²⁴² and conciliation is the primary aim of all Australian small claims tribunals.²⁴³ A recent sociological study of the informal arbitration system available to small claims litigants in New York²⁴⁴ shows that, all other things being equal, "one shot" litigants tend to do relatively better against "repeat player" litigants under this system than they do in the normal adjudicatory small claims courts. According to the author of the study, Professor Sarat, "the advantages of experience appear to be diluted in the informal, compromise-oriented atmosphere of arbitration and highlighted in processes of adjudication."²⁴⁵

Such compromise-oriented arbitration thus has obvious advantages, but the problems it raises must also be considered. Most obvious is the problem that the decision-maker may, by confusing the roles of adjudicator and conciliator, fail to fulfill either role satisfactorily.²⁴⁶ As conciliator, he may unwittingly impose a "settlement" by the implicit threat of his ultimate power to decide. As adjudicator, he may let his conciliation effort subvert his mandate to apply the law.²⁴⁷ The

241. See Sarat, *supra* note 147, at 368-71.

242. See Bolding, *supra* note 81, Section IIIA2.

243. See Taylor, *supra* note 18, at 10. Approximately 25% of the cases result in court-induced settlements. *Id.* at 63.

244. Litigants make the choice between arbitration and adjudication at the beginning of each small claims court session. The choice is made after a court clerk explains essentially that arbitration will permit an immediate trial but will not be subject to appeal. Both parties must agree to arbitrate for the case to go to an arbitrator—which results in about 65% of the actions. See Sarat, *supra* note 147, at 352-53, 356.

245. *Id.* at 366.

246. See, e.g., Yngvesson & Hennessey, *supra* note 190, at 261-62, & authorities cited in note 176 *supra*.

247. This problem has recently been emphasized by Rubinstein:

As rights expand into opaque and technical areas such as the disclosure of finance charges in the consumer credit system and statutory prerequisites to a rent increase when rent control is in effect, the individual has a strong interest in enforcing the letter of the law. In an informal setting, such "technical rules," which are designed with a larger regulatory purpose in mind, would probably be the first to be overlooked as irrelevant to the substance of the particular dispute.

See Rubinstein, *supra* note 236, at 81 (footnotes omitted). This problem, which is not limited to conciliation proceedings, is attenuated when the decision-makers are expert

New York study, in fact, lends empirical support to these criticisms.²⁴⁸

A second problem, closely related to the first, is that conciliation proceedings for small claims seem to be most effective when held in private. For example, in Australia and New York the compromise-oriented decision-making takes place in private rather than in open court.²⁴⁹ Such privacy has been found to promote informality, openness, and honesty, thus creating an atmosphere conducive to conciliation, but it may also make it more difficult to control the quality of the adjudicatory proceeding. In short, by combining conciliation and adjudication, the long-recognized value of public scrutiny of adjudication may be lost.

There are thus good reasons for separating the adjudication stage from a pretrial or conciliation proceeding, and keeping the conciliator and the adjudicator distinct. The 1974 Canadian experiment in British Columbia, for example, initiated a voluntary mediation service which was staffed by persons trained by governmental consumer agencies and available to any litigant. According to the Canadian report, this service fulfilled a dual function: "Although reaching a settlement was given highest priority, the explanation function became increasingly important and seemed to reassure unrepresented litigants, reduce trial time, and generally ensure that litigants were well prepared for the court appearance."²⁵⁰ The conciliation hearing prior to adjudication may thus also serve the goal of equalizing the parties for a subsequent adjudication proceeding.²⁵¹ This kind of two stage decision-making is certainly appealing, even though it requires litigants to make two appearances instead of one, and it is thus understandable that it has attracted wide support. Nevertheless, as Taylor points out, it is too early to decide whether this system necessarily works better than the theoretically

in the substantive law relevant to the disputes which they hear. *See also* text accompanying notes 253-55 *infra*.

248.

When compromise fails, arbitration shifts from mediation to adjudication. Frequently, arbitrators use the threat of judgment to try to induce the parties to agree to settle their own troubles. From comments of litigants involved in arbitration, it would appear that this type of inducement and the mix of mediation and adjudication cause some confusion and resentment

Sarat, *supra* note 147, at 354.

249. *Id.* As Taylor notes, "[i]t is for the benefit of the conciliation and not the adjudication that privacy prevails." Taylor, *supra* note 18, at 47.

250. Cooper & Kastner, *supra* note 15, Section IIB1n(3).

251. *Cf.* text accompanying note 221 *supra*. The English pretrial proceeding in the county court, however, is often used by registrars to attempt to induce a settlement despite the fact that the registrar proposing a settlement might later arbitrate the case. *See* Applebey, *supra* note 203, at 26.

less neat compromise-oriented adjudication approach.²⁵² Much depends on the quality of decision-makers and court personnel.

(d.) *Simplifying the substantive rules for small claims decision-making.* One idea propounded by many small claims reformers is that adjudicators be allowed to make decisions based on "fairness" rather than the strict letter of the law. Two of the Australian small claims tribunals, for example, are required to ensure that their orders are "fair and equitable."

It is indeed appealing to try to keep "people's" courts from becoming forums in which technical rules, rather than "justice," are the subject of debate. Dispensing with technicalities, however, will not automatically enhance the quality of the court decision. First, people obviously should be able to plan their behavior in accordance with the law and rely on that law if challenged in court. Clearly, we cannot completely dispense with legal norms. Further, there is a danger that a relaxation of substantive standards will permit decisions contrary to the strict law at the expense of important new (and often technical) rights.²⁵³ Decision-makers may be more sympathetic to "haves," or may resist the enforcement of technical rules which, since designed to construct a new social order, seem "unfair" in particular cases to merchants, landlords, and the like. The danger is magnified if small claims adjudicators, who may not be aided by lawyers in finding the substantive law, fail to develop their own expertise.²⁵⁴

In Australia's experience, however, these dangers appear not to have materialized. Rather, small claims adjudicators have developed considerable legal expertise, and the slight relaxation of the substantive law "is being used to counteract abuse rather than to deny protection of law to persons properly acting within the law."²⁵⁵ It appears,

252. Taylor's observations of small claims tribunals, in fact, persuaded him that "Conciliation . . . would appear most appropriately to be an integral part of the proceedings and be merged with adjudication." See Taylor, *supra* note 18, at 63. In addition, Taylor's research shows the reluctance of many parties to extend the proceeding to more than one hearing. *Id.* at 32, 57.

253. See, e.g., the statement of Rubinstein at note 247 *supra*.

254. Perhaps in order to develop such expertise, Australia has limited the jurisdiction of the small claims tribunals to consumer and (generally) landlord-tenant claims. See note 202 *supra*.

255. See Taylor, *supra* note 18, at 66. Taylor also makes the argument that the fact that "one of the parties (*i.e.*, the merchant or landlord) has such overwhelming factual power over the other," *i.e.* can document its case much more easily, makes this "fair and equitable" provision helpful. *Id.* at 65. Jones and Boyer, citing empirical studies of commercial arbitration, also suggest that the "actual risks . . . that could result from giving the initial decision-maker wide latitude to 'do equity' may not be great . . ." See Jones & Boyer, *supra* note 236, at 391.

therefore, that this type of reform can indeed help ordinary people prosecute and defend their rights. Although not a panacea, it is one significant tool available to serious small claims reformers.

(e.) *Small claims reforms and access to justice: some conclusions.* These small claims reforms—although still very recent—in many ways epitomize the access-to-justice movement, for they show a comprehensive, multifaceted, creative effort to restructure the legal machinery concerned with these claims. They are responding to the crucial challenge to create effective forums for enforcing the rights of ordinary people, *i.e.*, to ensure that the important new rights of individuals—especially, in this instance, consumers and tenants—are moved from the statute books to the real world. We find here inexpensive, informal, and accessible forums that offer the best chance of attracting individuals whose rights have been infringed; and we find procedures that offer the best chance of enforcing these often new, technical laws on behalf of individuals against powerful, sophisticated, and experienced adversaries. The successes of these new remedies, which, as we have noted, can also be utilized in conjunction with reforms aimed at protecting the rights of consumers as a class, can have the further result of alerting people of their rights and convincing their opponents that these rights can no longer be ignored.

Small claims courts are specialized, since they tend to deal with an essentially narrow range of parties and claims; but further specialization can be undertaken. Small claims judges, for example, may be (or become) expert in consumer *law*, but a specialist consumer tribunal may be better able to judge the technical *quality* of a consumer *product*. There are some advantages to be gained by further specialization according to types of claims, and many reformers—perhaps, in some cases, losing faith too soon in small claims courts of general jurisdiction—are seeking those advantages.

2. *“Neighborhood” or “social” courts for resolving community disputes.* A component of the movement to establish or reform small claims courts has been, as we have emphasized, the desire to set up courts for ordinary people and their claims. Before turning to more specialized institutions, it is interesting to examine another aspect of that desire—the recent move to set up “neighborhood mediation courts” to handle the day-to-day disputes, mainly minor criminal and property damage matters, which arise between individuals in a fairly stable living or working environment. As a prominent example of this movement, the United States Department of Justice has recently an-

nounced the commencement of an 18-month experiment with three pilot "Neighborhood Justice Centers."²⁵⁶ The emphasis of these institutions is on community involvement, on facilitating mediated settlements of local disputes, and, in general, on patching up ongoing relationships and restoring harmony to the neighborhood.²⁵⁷ In one sense such proposals—and the experiments now being undertaken in this area²⁵⁸—are simply aimed at diverting certain minor disputes from the courts, but in another sense they are more ambitious than this.

They aim, in the words of two prominent U.S. reform advocates, at reducing "the extraordinary costs that the members of our society are now paying because of the paucity of interpersonal dispute resolution mechanisms"²⁵⁹ In other words, a principal aim is to create a forum that will attract ordinary people burdened with relatively minor—but personally costly—conflicts which they are unable to resolve by themselves and which either would not or could not be brought to the regular courts. Further, it is hoped that this decentralized, informal, participatory dispute resolution approach will prompt "*community discussion* about situations in which community relations are on the verge of breaking down."²⁶⁰ This discussion could also serve to educate the neighborhood about the nature, sources, and remedies for the conflicts that beset them.

While the analogy might not be a perfect one, it is worthwhile to note the resemblance of these new reforms and experiments to the

256. Each Center should be "an office in a community to which people could go with a wide variety of problems. The Center will offer to provide mediation or, where that fails, arbitration, through a panel of members of the community trained in mediation and arbitration. . . ." Mediation—and arbitration when mediation fails—will be available "to matters presented by individuals relating to criminal and civil neighborhood, family, housing, and consumer problems." See U.S. Dept. of Justice, Neighborhood Justice Center Program 1, 5 (July 11, 1977). This program is reported to be "high on the priorities list of Attorney General Griffin B. Bell." See *Neighborhood Justice Centers Ready for Debut*, 63 A.B.A.J. 1062-63 (1977).

257. See generally Danzig, *Toward the Creation of a Complementary Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973); Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675 (1975); Comment, *Community Courts: An Alternative to Conventional Criminal Adjudication*, 24 AM. U.L. REV. 1253 (1975). In Germany, Professor Gottfried Baumgärtel has also called for "conciliation boards for everyday matters." See Baumgärtel, *supra* note 79, at 65.

258. The various experiments are described by Professor Frank Sander and listed in Appendix C to his ABA report on "minor dispute resolution." F. SANDER, REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTE RESOLUTION (Chicago: ABA 1977). See also Danzig & Lowy, *supra* note 257, at 685 n.9.

259. Danzig & Lowy, *supra* note 257, at 691.

260. *Id.* at 688.

now well established "social courts" of China,²⁶¹ Cuba,²⁶² and most of Eastern Europe,²⁶³ as well as to the institution of the *Nyaya Panchayat* in India.²⁶⁴ Western reformers are indeed looking at these institutions in their search for effective dispute resolution mechanisms, and it is instructive to consider briefly what can be learned, for example, from the experience of the East European social courts described in the Access-to-Justice Project Reports, including the Bulgarian and Soviet "Comrades' Courts"²⁶⁵ and the Polish "Social Conciliatory Commissions."²⁶⁶

These courts might well have their ultimate theoretical justification in the Marxian doctrine of "the withering away of the state," but their explicit primary purpose is the educational one "of shaping proper interpersonal relations."²⁶⁷ Typically, they are located either in the neighborhood or at the workplace, are staffed by locally-elected lay persons, are cost-free to the parties, and have non-exclusive jurisdiction over a number of minor crimes and property disputes (the occupa-

261. The Chinese reliance on mediation, and its relationship to Chinese ideology and history, is summarized in Li, *Access to Justice: The Peoples' Republic of China*, in 1 FLORENCE PROJECT, *supra* note 11. See also Lubman, *Mao and Mediation*, 55 CALIF. L. REV. 1284 (1967); V. LI, *LAW WITHOUT LAWYERS* (Stanford: Stanford Alumni Association 1977).

262. See generally Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317 (1969).

263. These social courts can be located according to residence or to occupation, and vary significantly in importance throughout Eastern Europe and the Soviet Union. See Kurczewski & Frieske, *The Social Conciliatory Commissions in Poland*, in 2 FLORENCE PROJECT, *supra* note 11, at 68. On recent reforms in the occupation-centered conciliation devices in Poland, see Los, *supra* note 159, Section IIG.

264. The institution of the *Nyaya Panchayat* is examined in detail in Baxi & Galanter, *Panchayat Justice: An Indian Experiment in Legal Access*, in 3 FLORENCE PROJECT, *supra* note 11.

In addition, the relevance of informal dispute resolution mechanisms derived from certain so-called "primitive societies" in Africa and generally from the less-developed world should be considered in this context. See generally Bush, *A Pluralistic Understanding of Access to Justice: Developments in Systems of Justice in African Nations*, in 3 FLORENCE PROJECT, *supra* note 11. See also Cappelletti, *Foreword* in 4 FLORENCE PROJECT, *supra* note 11.

265. According to Professor Puchinskiy, there are about 250,000 comrades' courts in the Soviet Union, of which 150,000 are in urban areas. He cites as a typical example the city of Saratov, which in 1969 had 118 comrades' courts for its 120,000 inhabitants. The courts resolved 835 cases. See Puchinskiy, *supra* note 159, Section III. For Bulgaria, however, Professor Stalev reports that only 3,124 cases were heard in Bulgaria's comrades' courts in 1974. See Stalev, *supra* note 159, Section IVA.

266. The Polish Social Conciliatory Commissions (SCC's), which were formally authorized in 1965, have been studied in great detail by Kurczewski & Frieske, *supra* note 263. As of 1973, there were 6,161 SCC's which handled over 86,000 claims. See *id.* at 55-56; Kos-Rabcewicz-Zubkowski, *Conciliation Commissions in Poland*, 24 AM. J. COMP. L. 319 (1976).

267. See Kurczewski & Frieske, *supra* note 263, at 257.

tionally located courts dealing, *e.g.*, primarily with breaches of labor discipline). The Soviet and Bulgarian Comrades' Courts may also handle other types of small civil claims if both parties consent to jurisdiction.²⁶⁸

Because of their wider criminal and civil jurisdiction and their power to issue enforceable verdicts and impose a variety of punitive measures such as fines,²⁶⁹ the Soviet Comrades' Courts have more formal power than their Polish counterparts, which must rely exclusively on persuasion. The Polish Commissioners cannot, for example, compel a party to appear or to adhere to their decision, although a signed conciliation agreement does at least have the force of a contract.²⁷⁰

These differences are significant both in Eastern Europe and for access-to-justice reformers elsewhere.²⁷¹ The authors of the recent field study of the Polish Social Conciliatory Commissions for the Florence Project, emphasize that there are three models of social courts:²⁷² (1) the "self-government in the dispensation of justice" model, under which "members of the community, acting on a voluntary basis, deal with cases voluntarily presented to them by other community members"; (2) the "social order agency" model, under which the emphasis is placed on controlling behavior to achieve harmony among local residents; and (3) the "pretrial diversion" model, according to which the principal role of the social courts is to assist the official state administration of justice, mainly the regular courts. While all three models represent aspects of existing social courts in Poland, these

268. For the Soviet Union, if all parties agree, a comrades' court can hear and settle any civil dispute between private citizens where the amount in controversy does not exceed 50 rubles (officially, a ruble equals U.S. \$1.10). *See* Puchinskiy, *supra* note 159, Section III. In Bulgaria either party may bring a small claims action for less than 80 levas (officially, a leva equals U.S. \$1.00), whereas both must agree to jurisdiction if the action is between 80 and 100 levas. *See* Stalev, *supra* note 159, Section IVA. In Poland, such monetary claims are not entertained by the SCC's.

269. Enforcement can be obtained by a court order, issued by the regular courts after considering the proceeding in the comrades' court. Thus, also unlike the Polish SCC's, the decisions of the comrades' courts are in effect controlled by the regular courts. *See* Puchinskiy, *supra* note 159, Section III.

270. *See* Kos-Rabcewicz-Zubkowski, *supra* note 266, at 327. It is reported that over 60% of the claims brought to the SCC's are resolved by agreement or reconciliation of the parties, and that 80-90% of these agreements prove to be stable and effective. *See id.* at 329; Kurczewski & Frieske, *supra* note 263, at 57-59.

271. For the U.S., Richard Danzig, for example, stated that "the community institutions recommended here are designed to conciliate, comprehend, reintegrate and help community disputants, deviants, delinquents, and just those with problems." Danzig, *supra* note 257, at 54. His approach, however, was criticized by one commentator, who insisted on "the authority to impose sanctions." *See* Comment, *supra* note 257, at 1287.

272. *See* Kurczewski & Frieske, *supra* note 263, at 275-87.

scholars conclude that the most novel, important, and successful component of the Social Conciliatory Commissions is the self-government model.²⁷³ They note that further development of either the social order agency model (which would require, *inter alia*, that more sanctioning and socialization powers—perhaps akin to those available in the U.S.S.R. and Bulgaria—be given to the social courts) or the pre-trial diversion model (which would suggest, *inter alia*, more formality and greater enforceability of the social courts' decisions) would be inimical to the self-government model. This Polish experience thus teaches us to examine carefully the goals and tactics of recent reform proposals. Aims such as the effective diversion of disputes from the courts, the enforcement of state laws, and the construction of a truly neighborhood justice, are not necessarily in harmony with each other.²⁷⁴ Relationships with the neighborhood, with the formal judicial system, and with institutions like the police must be carefully worked out, or the reform may end up satisfying no one.

Notwithstanding some initial experimentation, the potential of these kinds of reform in our Western societies remains unclear. It may still be, as one author has suggested, that most Western individuals are too mobile for such neighborhood forums to be useful in personal disputes.²⁷⁵ In addition, it may be that proposals for neighborhood

273.

[M]odifications—by law or by practice—in the operation of the SCC's should be made only with an understanding of how they will affect the various social functions of the SCC's. This is particularly important where the change might affect the capacity of the SCC to fulfill the self-government in justice model, for it is this social function which the SCC's are *uniquely* suited to perform. And, arguably, it is this model which has been affirmed by the Polish public in their positive assessment of the SCC's—since the present functioning of the SCC's (which was so assessed) corresponds much more closely to this model than to either of the others.

Id. at 290-91.

274. The study by Professors Baxi and Galanter of the *Nyaya Panchayat* (NP) experiment in India, in finding that the institution has not been very successful, reaches a similar conclusion:

Although the evidence is indirect, it all points unmistakably to severe institutional attrition. This unhappy condition seems to reflect the basic ambivalence surrounding the very conception of NP. Earlier governmental policy never decided whether they were to be accessible local organs of official justice or community-based dispute resolution institutions promoted by the state. The pathos of the NP is that they have achieved neither the impartiality of the regular courts (at their best) nor the intimacy, informality and conciliation potential of traditional panchayats (at their best).

Baxi & Galanter, *supra* note 264, at 40.

275. According to Professor Felstiner,

Unfortunately, many of the conflicts to which Danzig and Lowy would respond with mediation may cut across racial, generational, ethnic, religious and atti-

"moots" or mediators do not address the main problems that people experience, for the individual's most serious problems may involve encounters with institutions and businesses outside of the neighborhood context.²⁷⁶ Nevertheless, it is possible that these novel reforms will add a new dimension to our neighborhoods. There are, after all, stable areas even in our urban centers, and clearly there is in many places a renewed interest, reflected for example in the French experiment with the local *conciliateur*, in developing and preserving neighborhood communities.²⁷⁷ Well organized neighborhood tribunals, staffed principally by neighborhood lay people, may help to enrich community life by creating a justice that will be responsive to local needs.

3. *Special tribunals for consumer complaints.* Even more directly related to the small claims movement are reforms—privately or publicly initiated—creating special organs and procedures for consumer complaints.²⁷⁸ The perceived failure of most small claims courts to

tudinal lines. To that extent, it is likely that conflicting values and perceptions of reality will be involved rather than who is disturbing the peace or damaging the property or threatening the interests of people that all of the disputants recognize as important. When this is the case, mediation may be futile because people are reluctant to bargain away principles and cannot compromise on issues that they cannot cooperatively define.

Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 LAW & SOC'Y REV. 695, 704 (1975). Indeed, there is some support for this view in the Polish SCC study. The authors suggest that a certain amount of basic agreement on values is essential.

The efficacy and indeed the viability of the actions taken by the SCC, then, rely on the common acceptance by the disputants and the SCC of norms and values superior to those which caused the dispute. Efficacy and viability will thus tend to be greater in communities that are culturally homogeneous, such that agreements may be reached on the basis of common intuitive legal experience.

Kurczewski & Frieske, *supra* note 263, at 298-99.

276. See, e.g., Galanter, *Delivering Legality: Some Proposals for the Direction of Research*, 11 LAW & SOC'Y REV. 225, 241 (1976). It is interesting to compare the proposal for a neighborhood court made in 1966 by the Cahns, which was designed to recognize that "some conflicts and grievances are primarily *internal*—and can be handled quite well as intraneighborhood disputes, while other grievances are *external* and require that consumers be equipped with the means necessary to the battle with interests and groups outside the neighborhood." Cahn & Cahn, *supra* note 143, at 948; see also *id.* at 950-55.

277. See text accompanying note 173 *supra*. The German institution of the *Schiedsmann* is also concerned with mediating certain types of minor civil and criminal matters at the local level. See note 177 *supra*.

278. We cannot discuss here the numerous governmental agencies which, more or less as a complement to their broad regulatory work, seek to resolve administratively certain individual consumer disputes. It should be noted that useful methods have been designed to improve the efficiency of such complaint processing, such as the "Box 99" scheme in Canada according to which all complaints sent to that address are channeled to the correct regulatory agency. See Cooper & Kastner, *supra* note 15, Section IIIB3.

provide an effective remedy for aggrieved consumers has sparked much of this recent activity. Needless to say, there are numerous possibilities for structuring consumer complaint machinery; only a few basic approaches will be mentioned here.

(a.) *Mechanisms relying on persuasion rather than coercion—media resolution of consumer grievances.* A recent, privately-implemented consumer reform of major interest is what can be called “media resolution of consumer grievances.”²⁷⁹ Many television and radio stations and some newspapers in (among other places) Canada, England, and the United States, receive consumer complaints, refer some of them to other agencies, investigate others themselves, and attempt to use the weapon of adverse publicity to obtain remedies for consumers found to have been wronged. The U.S. Report for the Florence Project states that ideally, “by balancing parties’ bargaining power, the power of the press dilutes corporation/business advantage over the consumer.”²⁸⁰ In practice there have indeed been notable successes with this method, despite some obvious limitations.²⁸¹ While certainly not a substitute for more systematic public remedies, these programs have great potential for helping consumers.

(b.) *Privately-sponsored consumer complaint arbitration.* Consumer arbitration schemes are also proliferating in response to the demands of consumers for accessible dispute resolution machinery. Many of the most important of these schemes are business-sponsored, relying for their efficacy “on businessmen’s own self-interest, in terms of prosperity and reputation among others in the business community.”²⁸²

Some empirical studies, however, suggest that there are inherent weaknesses limiting the possibility of this administrative approach to resolve individual disputes fairly and systematically. See Whitford & Kimball, *Why Process Consumer Complaints? A Case Study of the Office of the Commissioner of Insurance of Wisconsin*, 1974 WIS. L. REV. 639; Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107 (1975).

279. Johnson *et al.*, *supra* note 11, Section IIIB2b. See generally Cooper & Kastner, *supra* note 15, Section IIID5; Jacob, *supra* note 57, Section VIIE.

280. See Johnson *et al.*, *supra* note 11, Section IIIB2b.

281. The dangers are that these programs will limit themselves to newsworthy, rather than important, consumer disputes, and that they will neglect large numbers of complaints and thus disappoint numerous consumers. Also, it is possible that the publicity sanction may be too severe a threat in some instances. See generally Note, *Nontraditional Remedies for the Settlement of Consumer Disputes*, 49 TEMPLE L.Q. 385, 418-20. Nevertheless, according to the U.S. Report, some programs, notably one in Los Angeles and one in Seattle, are attempting to “screen, investigate, follow up and seek relief for all legitimate claims, irrespective of newsworthiness.” Johnson *et al.*, *supra* note 11, Section IIIB2b. The Canadian Report, in addition, describes a Toronto action line column which handled 50,000 complaints in one year, most without any publicity. See Cooper & Kastner, *supra* note 15, Section IIID5.

282. See Johnson *et al.*, *supra* note 11, Section IIIB2a.

Within this category, for example, are the new United States and Canadian Better Business Bureau programs, established in 1972 and 1974 respectively,²⁸³ the German arbitration system for automobile repair disputes (*Schiedsstelle für das Kraftfahrzeughandwerk*),²⁸⁴ and the U.S. Major Appliance Consumer Action Panel.²⁸⁵ Other more or less privately-sponsored schemes include the Dutch dispute commissions of the Consumers' League (*Consumentenbond*)²⁸⁶ and the con-

283. The U.S. Better Business Bureau's (BBB) system of arbitration, which was initiated in 1972, provides for *binding* arbitration (subject to a very limited judicial review) if both parties agree to it. The arbitrators are selected from a pool of volunteers, most of whom are lawyers. As of mid-1975, 92 of the 134 Better Business Bureaus in the U.S. offered this system (with variations in speed, cost, and availability), and in some areas, such as Seattle, business members of the Bureau were required as a condition of membership to agree in advance to allow consumers to submit claims to arbitration. See Johnson *et al.*, *supra* note 11, Section IIIB2a; Simison, *Arbitration for Consumers is Spreading as Better Business Bureaus Offer Service*, Wall St. J., April 21, 1975, at 30, col. 1.

The Canadian system, in effect since late 1974, involves formal *mediation* hearings by voluntary mediators if the bureau itself is unable to resolve the problem informally. According to the Canadian Report, "Both parties must agree to the mediation, and at least the businessman is precommitted by membership in the BBB office offering the service to abide by the mediator's recommendations." Cooper & Kastner, *supra* note 15, Section IIID1-3. The only sanction for non-compliance by the businessman, however, is the "overly harsh" one of expulsion from the BBB. *Id.*

284. According to Professor Eike von Hippel, the Hamburg Bureau is the leading example of this institution in Germany. 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, does not allow attorney assistance at its oral hearings, and involves decisions by a panel composed of a neutral judge, a representative of the automobile repair trade, and a representative from the motorists' organization. Both sides must agree in writing to submit a dispute to the Bureau. Decisions are not enforceable as judgments, but as a rule they are strictly complied with by the automobile repair trade. E. von HIPPEL, *VERBRAUCHERSCHUTZ* 97-99 (Tübingen: Mohr 1974). See also Bender & Strecker, *supra* note 11, Section IIID3.

285. The U.S. Major Appliance Consumer Action Panel (MACAP), sponsored by three trade associations for sellers of large home appliances, was set up in 1970. It denied redress by the seller-company, consumers may submit the dispute by letter to MACAP in Chicago. The dispute must be with a member of one of the trade associations. There is no charge for the service. In Chicago, a panel of consumer experts tries to mediate the complaints. This process may involve having a third-party volunteer, such as a home economist, visit the consumer at home. If the resulting MACAP recommendation is not complied with by the seller, which happens in 26% of the cases according to the U.S. Report, MACAP advises the consumer of his legal options. See Johnson *et al.*, *supra* note 11, Section IIIB2a.

In recent years the Office of Consumer Affairs in Washington, D.C., has sought to encourage other industries to follow the MACAP model. At varying stages of implementation are the automobile industry's AUTOCAP, the carpet and rug industry's CRICAP, and the furniture industry's FICAP. See generally Note, *supra* note 281, at 398-401.

286. According to the Dutch Report for the Florence Project, there are now five dispute commissions set up by the Consumers' League (which reported a membership of 450,000 in 1975), covering, *inter alia*, dry cleaning, laundry, recreation, and furniture. Only consumers can initiate the proceedings, and jurisdiction over companies is obtained

sumer arbitration systems negotiated by the English Director-General of Fair Trading.²⁸⁷

These plans vary considerably both in the style of decision-making procedures (written or oral, mediation or arbitration) and in the type of decision-maker they utilize; these differences can be very important, but need not be treated in detail here. Also notable is that all of these plans are very inexpensive or even costless to the consumer and are very quick and informal, and they frequently offer the possibility of decisions by trained experts.²⁸⁸

One basic general limitation, termed a "congenital weakness" by a French commentator,²⁸⁹ is that these schemes require both parties either to agree to submit a dispute to arbitration or to abide by a decision which has no binding effect.²⁹⁰ For example, the U.S. Major Appliance Consumer Action Panel can offer only a recommended solution to a consumer complaint,²⁹¹ and the German arbitration system is available only if the parties agree in writing to its use.²⁹² Nevertheless, ways are

"either by general agreements between the legal foundation for consumer disputes (to which the commissions belong) and the concerned enterprises, or by special request of the parties." The commissions issue a "binding advice" with the legal effect of a contractual obligation. The cost is between 25 and 50 Dutch guilders (U.S. \$11-22) and is reimbursed to the party if the complaint is found to be justified. In 1975 the commission, decided 1,180 disputes. *See* Houtappel, *supra* note 54, Section IIE.

287. The English Director General of Fair Trading is empowered by the Fair Trading Act of 1973, § 124(3), c. 41, to encourage trade associations to adopt voluntary codes of practice in the interests of consumers, and also to encourage the creation of detailed complaints machinery to make the codes enforceable. The trade association typically seeks to resolve disputes by mediation, but if mediation fails, the customer may under certain codes submit the dispute to arbitration by an independent arbitrator, appointed generally from a list approved by the Office of Fair Trading. Arbitration is conducted on the basis of simplified written documents. The award is binding on both parties and the maximum liability for a consumer (as a result of subsidization by the trade associations) is about £10 in costs. *See* Borrie, *supra* note 102, at 4-5, app.; Jacob, *supra* note 57, Section VIIC.

288. *See* notes 283-87 *supra*.

289. According to Professor Perrot: "Toutes ces expériences méritent d'être étudiées et approfondies avec le plus grand soin. Mais en l'état actuel des choses, il faut bien convenir que toutes ces institutions souffrent d'une faiblesse congénitale que rejaillit inévitablement sur la force contraignante des décisions rendues." *See* Perrot, *supra* note 35, at 240.

290. The problem has both practical and constitutional dimensions. The practical difficulty is to have the parties either agree to submit themselves to binding arbitration conducted by private groups or to go along voluntarily with the results of the private system's decision. In addition, as noted before, if the state tries to compel submission to systems lacking the procedural safeguards of courts, there may be objections, often based on constitutional provisions, that the defendants are being deprived of basic rights of defense. *See* Perrot, *supra* note 35, at 240; Yngvesson & Hennessey, *supra* note 190, at 268.

291. *See* note 285 *supra*.

292. *See* note 284 *supra*.

being found to minimize the importance of this weakness. For instance, on behalf of the public the English Director-General of Fair Trading urges industries to adopt codes of practice enforced by arbitration schemes that the industry members will agree *in advance* to accept as binding.²⁹³ Thus, any consumer may at his own option take advantage of the arbitration system. Similarly, with respect to the Dutch dispute commissions and the U.S. and Canadian Better Business Bureau schemes, general agreements may make binding arbitration available at the request of any consumer.²⁹⁴

A second general criticism, related to the legitimacy of these programs, raises still more serious problems, although in theory they too are not insurmountable. With the exception of the Dutch commissions, all the above arbitration programs are sponsored and operated by the industries involved. Despite monitoring by impartial observers and results which appear quite successful,²⁹⁵ skepticism about the programs is therefore understandable and to a great extent unavoidable. As the U.S. Report observed about the Better Business Bureau scheme, "consumers are instinctively skeptical about whether it *can* be committed to the public interest, controlled and administered as it is by self-interested members of the 'opposition'."²⁹⁶ Bias is feared not only in individual decisions, but also in the general standards which will be applied to businessmen's conduct.

Effective programs may, in time, overcome this mistrust, but programs that prove truly effective in equalizing the parties and vindicat-

293. See note 287 *supra*.

294. See notes 283 & 286 *supra*.

295. The German system, for example, is rated very highly by von Hippel (see E. VON HIPPEL, *supra* note 284), although Judges Bender and Strecker appear less optimistic (see Bender & Strecker, *supra* note 11, Section IIID3). Similarly, Gordon Borrie, the English Director-General of Fair Trading, is optimistic about the schemes which his office negotiates and monitors (see Borrie, *supra* note 102, at 4-5), although Applebey notes some consumer skepticism (see Applebey, *supra* note 203, at 89-92). The fairness of the Better Business Bureau and the MACAP systems have also been praised for objectivity, despite the hesitancy noted in the text. See Simison, *supra* note 283; Note, *supra* note 281, at 399-401.

296. See Johnson *et al.*, *supra* note 11, Section IIIB2a (about the BBB). Two other commentators observed about MACAP:

[I]ts organization as an industry creation dependent on its sponsors for funds and staff inevitably limits MACAP fact-finding to the efforts of its part-time board through correspondence, or by the trade association staff in addition to their regular association responsibilities. MACAP's industry orientation ultimately must raise questions about the credibility of its recommendations in the minds of consumers whose complaints have been rejected, regardless of how impartial the MACAP board's actions were in fact, and also may deter some potential claimants from resorting to the panel in the first instance.

See Jones & Boyer, *supra* note 236, at 371-72.

ing consumers' rights are likely to be limited to the very few well-organized industry groups which typically agree in advance to submit to these schemes.²⁹⁷ As one commentator recently stated, "[u]nfortunately, aggressive consumer protection programs chill effective merchant support."²⁹⁸ To the extent this is true, the potential of this type of consumer remedy is necessarily limited. Still, in the framework of a pluralistic system of remedies, these private schemes, like the media dispute resolution devices, have something to contribute to the enforcement of consumers' rights.

(c.) *Governmentally-sponsored consumer complaint resolution.*

Recent consumer protection experiments show that governmentally-sponsored consumer complaint arbitration may avoid the basic problems of the private programs—those related to legitimacy and to the degree of participation by business—while securing the advantages of low cost, speed, and expertise in consumer problems. The advantages of public involvement are, in fact, already recognized in the private schemes just mentioned. Governmental agencies encourage and, to some extent, monitor private schemes in (at least) Canada, England, and the United States.²⁹⁹ Of the purely public programs, special mention should be made of the French "Departmental Conciliation Commissions," which began operating experimentally in late 1976,³⁰⁰ and of the more established institution of the "Public Complaints Board," which, as recent Swedish³⁰¹ and Danish³⁰² experiments

297. According to the Canadian report, for example, acceptance of the new Better Business Bureau program "has been slow." See Cooper & Kastner, *supra* note 15, Section IIID1. More important, Better Business Bureau members are "by definition organizations of responsible businessmen, and thus offer scant hope of resolving the substantial body of disputes between consumers and marginally ethical, indifferent, or dishonest enterprises." See Jones & Boyer, *supra* note 236, at 377. Similarly, as Applebey comments about the English arbitration schemes under the auspices of the Office of Fair Trading, "Only members of the trade association submit to the jurisdiction of the arbitrator, and a significant proportion of traders may be outside the scheme." See Applebey, *supra* note 203, at 91; cf. Borrie, *supra* note 102, at 4.

298. Willner, *More Justice Under Law*, 55 ORE. L. REV. 183, 184 (1976) (footnote omitted).

299. In Canada, for example, we can refer to a 1974 experimental program by which the BBB cooperated with the Ontario government to resolve consumer complaints. See Cooper & Kastner, *supra* note 15, Section IIID3. For the role of the Director-General of Fair Trading (a governmental agency) in England, see note 287 *supra*. A similar role by the U.S. Office of Consumer Affairs is described in note 285 *supra*.

300. See Thery, *supra* note 62, app.

301. See generally Eisenstein, *supra* note 120.

302. The Danish Consumer Complaints Board, which is very much like that of Sweden, was established by Law No. 305 of June 14, 1974, 1972 Karnors Lovsamling 3418 (Supp. 1974), which went into effect on June 1, 1975. See generally H. W. Pederson, *supra* note 102, at 13-26 & app. (where the law is translated into English).

show, can contribute much to a comprehensive system of consumer protection.

The French Conciliation Commissions for Consumer Complaints were established experimentally in only six of France's ninety-five *départements*, but the results have been so successful that as of November 1977, the system has been extended to all of France.³⁰³ It involves a series of simple procedures beginning with a letter to "post office box 5000," and culminating, if necessary, in a hearing before a commission composed of the Departmental Director of Competition and one representative each from consumer and professional organizations. The commission seeks to assess the technical aspects of the problem and to propose an appropriate solution, and while the solution need not be adopted by the parties, experience suggests that it is generally accepted. This development is clearly one which will need to be watched closely.

The Public Complaints Board in Sweden,³⁰⁴ which now has non-exclusive jurisdiction over virtually all consumer complaints against merchants relating to goods and services, grew out of the Swedish experience with private complaint boards similar to those discussed in the preceding Section. The basic features of the private boards—the reliance on written materials and the non-binding nature of the decisions—were retained, but the funding, control, scope of operation, and composition of the board of decision-makers were significantly changed. At present, there is one publicly-financed and controlled Public Complaints Board, located in Stockholm and composed of ten specialized departments.³⁰⁵ Each department consists of between six and ten members and has an equal number of members from business and consumer interests, as well as a neutral judge-chairman. Decisions are by

303. After complaint letters are received, they are distributed either to the appropriate departmental administration (if the complaint charges an infraction of a law or regulation) or, according to local voluntary agreements, to professional or consumer organizations. These organizations then seek to resolve the disputes informally and, if not successful, bring them to the relevant departmental conciliation commission. See Thery, *supra* note 62, app.

The extension was announced in late October by Cristiane Scrivener, the French Secretary of State for Consumer Affairs. See *Consommateurs: la boîte postale 5000 étendue à tous les départements*, LE FIGARO, Oct. 28, 1977. According to this article, "The results obtained in the six test *départements* are encouraging not only from the point of view of consumers, but also by the fact that the system automatically creates a constructive dialogue between the different partners that must respond to the complaints and requests for information." *Id.*

304. Eisenstein, *supra* note 120. The following, unless otherwise noted, is based on that study.

305. The present departments are footwear, furs, laundry, travel, motor vehicles, textiles, electrical appliances, pleasure craft, insurance, and general matters within the Board's jurisdiction.

majority rule, although in practice they tend to be unanimous. It was hoped that the composition and procedures of the Board would avoid the biases which tend to creep not only into individual decisions of private boards, but also into the substantive standards applied by these boards. Indeed, the Board should be able to evolve a body of rules about merchant conduct and product standards that will be both technically feasible and fair.³⁰⁶

In addition, the Board is equipped with a Secretariat, also located in Stockholm and presently composed of twenty-five persons (most of them with legal training). The Secretariat advises parties (and the general public) and attempts to settle claims brought to the Board. Both the advisory and the conciliatory roles are of considerable and growing importance.³⁰⁷

The Public Complaints Board resolves disputes relatively quickly and very inexpensively; it is especially notable for its ability to use its expertise both to help consumers informally and to examine impartially consumer disputes that may be very complex and highly technical. Furthermore, even though its decisions are not binding, there has been full compliance with them in about eighty percent of the cases.³⁰⁸ Compliance is facilitated by the Board's publicizing a "black-

306. One Swedish commentator earlier assessed this type of arrangement's effect on the substantive law as follows:

[The use of experts representing various interests] must be regarded as a great advantage, particularly in fields where organizational changes are taking place. It makes it possible to create norms which are in harmony with the requirements of the development, both in its technical, commercial and social aspects. Experience from Sweden shows that the creation of the kind of norms now in question is less likely to get locked than the courts' making of precedents.

Tengelin, *The Solution of Disputes by Organs Other than Courts and Arbitrators*, in SWEDISH NATIONAL REPORTS TO THE VIII INTERNATIONAL CONGRESS OF COMPARATIVE LAW 20, 24-25 (Uppsala: Almqvist & Wiksell; A. Malström & S. Stromholm eds. 1970).

Eisenstein lists three reasons for this type of tripartite board: (1) lay persons can use their expertise to evaluate complex technical issues; (2) the presence of representatives of groups and a neutral judge assures that decisions will be fair; and (3) the participation of organizations gives each interest "the opportunity to convey its views and contribute toward the development of legal norms which it considered desirable." Eisenstein, *supra* note 120, at 87-90.

307. From 1973 to 1975, telephone contacts with the Secretariat for advice increased from about 13,000 to about 20,000. Of the 6,662 written applications submitted in 1975, about 20% were settled by the Secretariat (and about 25% rejected as outside of the Board's competence).

308. This rate is based on a 1974 survey and ranged from 96% for footwear to 64% for electrical appliances to 33% for pleasure craft. Compliance often was achieved only after post-decision negotiation by the National Swedish Board for Consumer Policies, which threatens to publish the names of non-complying parties on a "black list." It is notable that the vast majority of enterprises which do not comply with the decision are relatively small and often not members of a trade association. Thus, the problem seen

list" of those merchants who fail to comply within six months of the ruling.

The advantages of the Public Complaints Board are clear, but there are also some notable apparent limitations. It is centralized in Stockholm, relies completely on written procedures and so cannot hear oral testimony to resolve matters of credibility, and cannot enforce its decisions.³⁰⁹ The Swedish policy-makers, however, recognized—indeed, planned for—these limitations and designed the institution not to live in isolation but rather to complement the newly established "small claims courts."³¹⁰ A consumer who obtains a favorable recommendation from the Board, for example, may go to a small claims court regardless of the amount in dispute, and the Board's decision will be considered as evidence. Although they have not done so frequently in practice, the small claims courts may, in addition, seek opinions on technical questions from the Board. More importantly, as noted before, the small claims courts are available to help *consumer defendants*, and can also be used to decide claims that involve credibility issues or may otherwise be ill-suited for resolution by written procedures. Significantly, the Secretariat of the Public Complaints Board is available to help the consumer decide whether or not his claim can usefully be resolved through the Board's written procedures.

The idea of public complaints boards, therefore, is most promising as part of an integrated system of consumer protection. Indeed, Sweden's innovative experiments in the creation of effective tribunals and procedures for individual consumers are also closely related to the Swedish Consumer Ombudsman's mandate to protect the diffuse interest of consumers as a class.³¹¹ By considering both individual and group consumer interests, as well as the particular characteristics of consumer-merchant disputes, Sweden's carefully-tailored system excellently illustrates the potential of the access-to-justice approach to consumer claims.

before for private consumer complaint mechanisms is not entirely absent here. See text accompanying note 297 *supra*.

309. The nature of these limitations is important, because they may be necessary to make the Public Complaints Board viable. It would, in particular, be extremely difficult to obtain enough personnel for time-consuming oral hearings or for a wide network of tribunals each composed of a judge and representatives of consumer and trade organizations. See, e.g., Jones & Boyer, *supra* note 236, at 391-94. Nonenforceability, of course, helps promote flexibility, although it has been suggested that the decisions could nevertheless be made binding. A Reform Commission is presently studying this and other possible reforms in Sweden.

310. See note 204 *supra*.

311. See text accompanying note 101 *supra*.

4. *Specialized machinery to enforce "new" rights in other areas of the law.* The discussion of small claims courts, social courts, and consumer forums underlines the basic issues—and covers much of the recent reform activity—involved in the effort to devise special new machinery for the kinds of claims that have become the focus of the access-to-justice movement. The emphasis has been, it will be recalled, on making effective the relatively new substantive rights that traditionally powerless people now possess (at least in theory) against merchants, polluters, employers, landlords, and governmental bureaucracies. Much attention has been directed to small claims courts and consumer tribunals as means of promoting these new rights. What has increasingly emerged is a new approach to civil procedure, designed both to attract individuals who would not otherwise act, and to give them a real opportunity to assert their rights in a forum that is informal but sensitive to evolving substantive laws. The approach has led, in addition, to the creation of means of reconciling parties who find themselves in long-term relationships which would otherwise be jeopardized.

A number of highly specialized approaches are emerging for other types of disputes between individuals with relatively small claims on the one hand, and powerful organizational litigants on the other. Without trying to be exhaustive, and relying principally on the national reports prepared for the Florence Project, a few of these promising specialized approaches will be described briefly. The aim here will be to indicate some of the important procedural reforms that continue the quest to support the ordinary individual in his dealings with businesses, governmental bureaucracies, and other more or less powerful and organized entities.³¹²

(a.) *Environmental disputes—the 1970 Japanese experiments.*

As the Japanese report for the Florence Project observes:

Environmental pollution disputes are among the most difficult kinds of disputes to settle in court under the traditional procedure. They

312. "Specialization" is not of course limited to the types of legal claims with which we have mainly been concerned in this study. While the focus on new rights seeking to give more power to ordinary people has characterized the access-to-justice movement from its legal aid "wave" to the present, the important recent efforts to create special courts for family disputes should also be mentioned. Of particular interest are the "family court" established in Germany on July 1, 1977 (see Bender & Strecker, *supra* note 11, Section IIA4), the conciliation procedures for family disputes in Japan (see Kojima & Taniguchi, *supra* note 14, Section VA1), and some family courts in the United States, such as the Los Angeles Conciliation Court (see Johnson *et al.*, *supra* note 11, Section IIB3).

involve a large number of people and difficult scientific issues. Ordinary court litigation has proved inadequate because of the time, money, and special knowledge which this kind of case usually requires.³¹³

Environmental disputes, of course, clearly have both a collective—"diffuse"—and an individual dimension, and both dimensions have been addressed in general terms in this article. The remedies applicable to diffuse interests—characteristic of the "second wave" of access-to-justice reforms—have particular relevance to environmental problems,³¹⁴ but devices and remedies applicable to small claims can be quite important to individuals harmed by polluters because their individual damage, if any, is likely to be small.

The highly technical nature of environmental issues, however, can lead to further specialization. In Japan, in particular, new and imaginative methods have been created to handle both the diffuse and the individual aspects of environmental problems. The 1970 Japanese Law for the Settlement of Environmental Pollution Disputes adopted several interesting reforms, only a few of which can be discussed here.³¹⁵ Most importantly, it gave an aggrieved individual the right to bring his complaint at very low cost to a central or local "Commission for the Settlement of Environmental Disputes." These Commissions conduct expert technical investigations at no cost to the parties and use their findings in a wide range of dispute resolution alternatives, including conciliation, arbitration, and a form of quasi-judicial adjudication.³¹⁶ Further, the Central Commission's investigative resources can be invoked by a court on its own motion whenever the causal relationship between a plaintiff's damages and the defendant's activities

313. See Kojima & Taniguchi, *supra* note 14, Section VA3a.

314. See text accompanying notes 88-137 *supra*.

315. The Law mentioned in the text created in late 1970 an independent "Central Commission" in Tokyo and "Local Commissions" attached to local governments. Members of the Commissions are recruited from judges, government officials, lawyers, doctors, and the like. See generally Kojima & Taniguchi, *supra* note 14, Section VA3a, on which the following discussion is based.

316. The Central and Local Commissions may intervene—since 1974—on their own initiative as mediators in a dispute. Upon a petition for conciliation, the Commission may form a Conciliation Board which conducts investigations, holds hearings, and prepares a settlement plan which, if neither side opposes it, is deemed binding as a contract. It is possible, also, for "Adjudication Boards" to be formed on behalf of one or more victims of pollution claiming damages, although the adjudication is not technically binding on the parties. According to the Japanese reporters, only the former type of proceeding—conciliation—had been utilized as of March 1974. From April 1973 to March 1974, for example, 32 conciliation cases were brought to the Central Commission and 29 to the Local Commissions. All these types of proceedings are much less expensive and much quicker than proceedings in the regular courts.

becomes an issue in environmental litigation. According to the Japanese Report, the availability of this procedure can alter the character of environmental litigation: "first, the plaintiff is relieved from the high costs of producing scientific evidence; and second, the Commission's investigatory powers and facilities can be fully utilized, thus providing power and facilities usually lacking on the victim's side."³¹⁷ Finally, the Japanese environmental protection system includes methods for representative actions, comparable to class actions, and provides for advice by local "Environmental Pollution Counselors."³¹⁸

The result is that ordinary people are given a number of forums in which to challenge polluters, and inexpensive access to advice and expertise to aid them in that challenge. Further, as is particularly important for environmental problems, individuals are not necessarily treated in isolation from others similarly situated. Of course, it is not yet clear whether an elaborate new structure along the Japanese lines is essential for the protection of environmental rights, but this creative Japanese experiment certainly deserves to be watched carefully by access-to-justice reformers.

(b.) *Landlord-tenant disputes—the Canadian Rentalsmen.* In the landlord-tenant area several recent innovations, designed to insure that the rapidly changing landlord-tenant legal order is implemented in practice, deserve special mention.³¹⁹ First is the Canadian office of the "Rentalsman," created in 1971 in Manitoba³²⁰ and in 1974 in Brit-

317. See Kojima & Taniguchi, *supra* note 14, Section VA3a.

318. In adjudication proceedings involving a large number of claimants, the Adjudication Board has the power to appoint one or more representatives of the class of claimants.

The Environmental Pollution Counselors informally receive complaints from citizens, undertake necessary investigations, and try to redress grievances. In 1973, 86,777 complaints were received, of which 80% were reported solved.

319. In addition to the Canadian and American examples discussed in text accompanying notes 320-25 & 326-29 *infra*, mention should be made of the Swedish Leasehold and Rent Tribunals, established in 1973, see Bolding, *supra* note 81, at Section VA, and the specialized procedures in Austria providing preliminary conciliation attempts presided over by special local officials, see Fasching, *supra* note 154, Section IIIA, and procedures in Holland adding two specialists in housing matters to the single judge in the Canton Courts, see Houtappel, *supra* note 54, Section I. The emphasis placed by reformers on specialized courts for these disputes is also apparent, e.g., in a recent English proposal. See Arden, *A Fair Hearing? The Case for a Housing Court*, LAG BULL. June 1977, at 127. The author, citing recent English empirical studies of landlord-tenant conflicts, calls for a new informal housing court able to combine "lay experience insisting on a realistic interpretation of circumstance, legal expertise lending comprehension of the law." *Id.* at 129.

320. The Manitoba Rentalsman Office, located in Winnipeg, has non-exclusive jurisdiction over a wide range of matters, most often concerning security deposits, repairs, and essential services. To obtain jurisdiction one party must elect to bring the

ish Columbia³²¹ with the aim of devising an effective, accessible, and inexpensive forum for landlord-tenant disputes. The Rentalsmen are individuals appointed by the lieutenant governor upon the advice of the executive councils of each province. In British Columbia, where the position is especially important because of the wide, exclusive jurisdiction conferred on the Rentalsman, he serves a five-year term and presides over an office in Vancouver with a staff of over thirty persons.

Recognizing the need both for expertise in the new landlord-tenant laws and for sensitivity to the ongoing landlord-tenant relationship, the emphasis of the Rentalsman offices is on expert advice and mediation, as opposed to adjudication. Trained Rentalsman officers and investigators provide information in response to telephone inquiries, conduct investigations of the facts underlying disputes, and seek to persuade parties to settle their disputes amicably. For the few cases that are not settled amicably, the hearing officer may, like certain small claim adjudicators we have discussed, hold hearings and make binding decisions (appealable in British Columbia to the Rentalsman).³²² The entire process is quick and inexpensive, and lawyers, while allowed, are rarely utilized. As the Canadian report observes, the low cost and informality encourage persons "who would not normally go to court" to vindicate their rights through this new process.³²³

The increasing use and popularity of these offices is strong evidence of their practical importance. During the first twenty months of the system's operation (October 1974 to June 1976) in British Columbia, about 400,000 inquiries were answered and about 19,000 disputes were settled under the auspices of the office.³²⁴

matter to the Rentalsman Office. The Office emphasizes its role in supplying information about the law and in mediating disputes that are brought to it.

The discussion of Rentalsmen in Manitoba and British Columbia is based on Cooper & Kastner, *supra* note 15, at Sections IIIA & B, and on E. Rothfeld, Specialized Landlord-Tenant Dispute Resolution Mechanisms: American Housing Courts and Canadian Offices of the Rentalsman, at 47-65 (May 4, 1977) (unpublished paper on file with the Florence Access-to-Justice Project).

321. British Columbia Landlord and Tenant Act, 1974, 22-23 Eliz. II, c. 45, §§ 49-57. The British Columbia Rentalsman Office has exclusive jurisdiction to adjudicate all landlord-tenant disputes concerning, *inter alia*, security disputes, termination of residential leases, and repairs.

322. Decisions, which can be based on any evidence and need not follow legal precedent, were made in only 703 of the 14,283 cases for which files were opened during the period October 1974 to December 1975.

323. See Cooper & Kastner, *supra* note 15, Section IIIA1.

324. In Manitoba, 76,525 telephone calls were received in 1975, resulting in 3,345 files being opened.

While systematic evaluation of this compromise-oriented institution requires more study, it seems clear that this type of informal, specialized mechanism has considerable potential for landlord-tenant disputes. This and similar institutions in Canada have gone very far both in teaching landlords and tenants their rights and duties and in providing them with a forum where they can settle their disputes inexpensively and fairly. These institutions have sought to preserve the ongoing landlord-tenant relationship while making the new, relatively complex landlord-tenant laws—which are much more favorable to tenants than were prior laws—a reality. According to the Canadian report, “the new redress mechanisms have effectively re-oriented the landlord-tenant relationship.”³²⁵

(c.) *Landlord-tenant disputes—the New York City Housing Court.* The Canadian Rentalsmen’s emphasis on active, expert decision-makers and on conciliation as opposed to arbitration and adjudication is shared by the very interesting New York City Housing Court, established in late 1973.³²⁶ Although its jurisdiction is non-exclusive (meaning that one party may have the case removed to the regular courts), with the parties’ agreement it possesses the power to resolve virtually all the types of disputes that plague landlords and tenants in New York.

Hearing officers—lawyers chosen for their knowledge of the housing industry—handle most of the cases. Their active approach is evident from the fact that they carefully scrutinize summary eviction proceedings brought by landlords—a majority of the cases in the Housing Court—and often thereby uncover tenant defenses based on housing code violations. They thus serve to make tenants aware of the new rights they have to a certain standard of housing. The emphasis on conciliation, the second basic characteristic shared with Rentalsman officers, is obvious from the fact that decisions are necessary in only about 20 percent of the cases.³²⁷

325. See Cooper & Kastner, *supra* note 15, Section IVA3.

326. CITY CIV. CT. ACT § 110 (McKinney 1972). The Housing Court is technically called the New York City Housing Part, since it is “part” of the New York City civil court system. It is presided over by rotating civil court judges, but adjudication is generally referred to specialized hearing officers. For more detail see Johnson *et al.*, *supra* note 11, Section IIB2, and E. Rothfeld, *supra* note 320, at 1-46 (partially based on observations of the Housing Court and interviews with its personnel). Also of major interest in the United States is the Boston Housing Court, established in 1971. See *id.* and NATIONAL CENTER FOR STATE COURTS, A STUDY OF THE BOSTON HOUSING COURT (Boston 1974).

327. According to housing court statistics given in E. THOMPSON, A PRIMER: THE HOUSING COURT 7 (5th ed. 1977) cited in E. Rothfeld, *supra* note 320, at n.257, in the first 37 months of operation the court settled 122,813 of the 154,782 cases heard.

The New York Housing Court has not yet been the subject of intensive empirical research, but its potential has already been demonstrated. Its powers, according to the U.S. report to the Florence Project, resulted in the rehabilitation of over 7,000 sub-standard housing units in its first six months of operation, and the demand for its services is evident from the fact that at its opening in 1973, 550 cases already awaited the court.³²⁸ While there have been some problems, such as coordination with city officials,³²⁹ this institution's contribution to improving the extremely complex housing situation in New York is notable. It helps demonstrate the increasingly recognized potential of specialized housing tribunals.

(d.) *Administrative law disputes—the continuing proliferation of the ombudsman institution.* Disputes between individuals and the government about such issues as entitlement to certain social benefits are of obvious concern in the "welfare state."³³⁰ These issues often raise the problem of "discretionary justice": how to regulate the conduct of administrators and provide remedies to victims of abuses of administrative discretion. Governing the range of discretion is one of the basic challenges of our time.³³¹

The Florence Project reports show widespread recognition of the need to adapt the administrative machinery to disputes which, as Judges Bender and Strecker emphasize, involve "parties who . . . are in principle unequal—namely, on the one side individuals, and on the other side the bearers of public power."³³² It is also notable that, beyond the various national systems of administrative courts and administrative review,³³³ the complementary institution of the ombudsman (more or less modeled on the Swedish Ombudsman established in 1809) is being used effectively in a growing number of countries.

328. See Johnson *et al.*, *supra* note 11, Section IIB2b.

329. See E. Rothfeld, *supra* note 320, at 44-46, referring to the court's lack of independence from the regular civil courts, its need for increased funding, its lack of exclusive jurisdiction, and the difficulty of coordinating its efforts with New York City housing officials.

330. See, e.g., Reich, *The New Property*, 73 YALE L.J. 733 (1964).

331. See generally DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (Chicago: University Of Illinois Press; K. Davis ed. 1976).

332. See Bender & Strecker, *supra* note 11, Section IIB4. See also Taylor, *supra* note 55, Section VB5 (discussing the new Federal Administrative Appeals Tribunal set up in 1975 in Australia).

333. Some basic attributes of these systems are discussed in Cappelletti, *supra* note 1, at 691-724. On the exemplary French system of *Tribunaux Administratifs*, see Remington, *The Tribunaux Administratifs: Protectors of the French Citizen*, 51 TUL. L. REV. 33 (1976).

The ombudsman's well-known activities need not be described here,³³⁴ but it is significant that ombudsmen or ombudsman-like institutions have recently been established in Australia,³³⁵ Austria,³³⁶ Canada,³³⁷ France,³³⁸ Great Britain,³³⁹ Israel,³⁴⁰ and the United States.³⁴¹ In Canada, in fact, there also has been a very successful Canadian Broadcasting Company Ombudsman since 1974 whose television program is appar-

334. The most established ombudsmen are those in Sweden (1809), Finland (1918) and Denmark (1955). *See generally* W. GELLHORN, *OMBUDSMAN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* (Cambridge, Mass.: Harvard University Press 1966); M. LERHARD, *THE DANISH OMBUDSMAN 1955-1969* (Copenhagen 1977) (analyzing 75 cases dealt with by the ombudsman); *THE OMBUDSMAN: CITIZEN'S DEFENDER* (Toronto: McClelland & Stewart; D. Rowat ed. 1968). According to Rowat, the ombudsman institution can be defined as follows:

- (1) The Ombudsman is an independent and non-partisan officer of the legislature, usually provided for in the constitution, who supervises the administration;
- (2) He deals with specific complaints from the public against administrative justice and maladministration, and
- (3) He has the power to investigate, criticize and publicize, but not to reverse, administration action.

Id. at xxiv. The ombudsman is more concerned with correcting administrative misconduct than remedying individual grievances, but the institution also provides an important supplementary remedy to individuals who have no other place to turn.

335. According to the Australian Report to the Florence Project, five states now have ombudsmen and there is a chance that a federal ombudsman will soon be created. Ombudsman Act (1974) (New South Wales); Ombudsman Act (1972) (South Australia); Ombudsman Act (1973) (Victoria); Parliamentary Commission Act (1974) (Queensland); Parliamentary Commission Act (1971) (Western Australia). *See* Taylor, *supra* note 55, Section VA.

336. The bill creating the Austrian Ombudsman (*Volksanwalt*) was passed in February 1977. *See* Neue Zürcher Zeitung, Feb. 26, 1977, at 3. *See also* F. SCHÖNHERR, *VOLKSANWALTSCHAFT* (Vienna: Manzschke 1977).

337. Between 1967 and 1975, eight Canadian provinces—Alberta, Manitoba, New Brunswick, Nova Scotia, Newfoundland, Ontario, Quebec, and Saskatchewan—created ombudsmen. *See* Cooper & Kastner, *supra* note 15, Section IIIA2.

338. The French *Médiateur* was set up by the Law of Jan. 3, 1973, no. 73-6 (Fra.). *See, e.g.*, Brown and Lavirotte, *The Mediator: A French Ombudsman?*, 90 LAW Q. REV. 211 (1974). Both its jurisdiction and its powers to compel cooperation in its investigations were recently augmented by the Law of Dec. 24, 1976, no. 76-1211, [1976] J.O. 7493 (Fra.), *modifying* the Law of Jan. 3, 1973. *See* the very detailed *RAPPORT DU MÉDIATEUR AU PRÉSIDENT DE LA RÉPUBLIQUE ET AU PARLEMENT*, 1976 (Paris 1977).

339. The Parliamentary Commissioner was established in 1971. *See, e.g.*, R. GREGORY & P. HUTCHESON, *THE PARLIAMENTARY OMBUDSMAN* (London: George Allen & Unwin, Ltd. 1975). In addition, since 1974 there have also been Commissioners for Local Administration, so-called "local ombudsmen." Local Government Act, 1974, Part III, §§ 23-34; Chinkin & Bailey, *The Local Ombudsman*, 54 PUB. AD. 267 (1977).

340. The Israeli ombudsman, officially entitled the "Commissioner for Complaints from the Public," began operating in 1971. *See* Ginossar, *supra* note 197, Section IIIF.

341. While there is no national ombudsman or ombudsman-like institution in the United States, "[t]he ombudsman idea in America is flourishing on many levels and in many forms." *See* Verkuil, *supra* note 140, at 846. Universities have been particularly active in setting up ombudsmen. *Id.* at 850. *See generally* Johnson *et al.*, *supra* note 11, Section IIA2b.

ently watched by ten percent or more of the adult population in that nation.³⁴² It is clear, therefore, that the idea of an independent protector of the public, armed with the tools of investigation and publicity, is gaining increasing acceptance and adding an important method of protecting individuals and the public at large against abuses by government administrators.

(e.) *Individual labor law disputes—the 1973 Italian reform.* As in administrative law, there is a renewed attention in a number of countries to the problem of enforcing individuals' rights in the labor field, whether against a company, a government, or even a union. While the various approaches, discussed in a number of national reports for the Florence Project,³⁴³ cannot be treated here,³⁴⁴ it is appropriate to mention the important 1973 Italian labor reform, because—in contrast to the difficulties encountered in enacting other reforms in Italy, notably in the fields of legal aid and general civil procedure³⁴⁵—it illustrates a dramatic effort to improve the access to justice of individuals in one area of the law.³⁴⁶ This reform contrasts with normal civil procedure in that it concentrates on a single-instance proceeding,

342. See Cooper & Kastner, *supra* note 15, Section IID5b. The program began in January 1974. In its first three years it received 30,000 complaints and processed 10,000 of them. According to Mr. Cooper, the current ombudsman, "[p]eople's problems with government are often problems of communication. Since television is communication the CBC ombudsman gives the ordinary citizen access to a powerful medium through which to clarify and even resolve disputes." *Id.*

343. Individual labor issues are of course made more complicated by the presence of labor unions who generally help, but may at times hinder, individual actions. The social importance of labor disputes, whether from the point of view of governments, unions, or employees, is apparent in the specialized treatment for labor disputes described in nearly all the national reports to the Florence Project. See, e.g., Stalev, *supra* note 159, Section IVB (Bulgaria); Thery, *supra* note 62, Section VB4 (France); Bender & Strecker, *supra* note 11, Section IIB3 (Federal Republic of Germany); Nasution, *Access to Justice in Indonesia*, Section II, in 1 FLORENCE PROJECT, *supra* note 11; Ginossar, *supra* note 197, Section IVA (Israel); Vigoriti, *supra* note 16, Section IIA2 (Italy); Los, *supra* note 159, Section IIG (Poland); de Miguel y Alonso, *supra* note 18, Section IIB1 (Spain); Bolding, *supra* note 81, Section IVD (Sweden); Vescovi, *supra* note 197, Section IIB2 (Uruguay).

344. For an excellent study of this subject, see LABOR COURT AND GRIEVANCE SETTLEMENT IN WESTERN EUROPE (Berkeley, Los Angeles, London: University of California Press; B. Aaron ed. 1971).

345. See text accompanying note 56 *supra*; M. CAPPELLETTI, GIUSTIZIA E SOCIETÀ (Milan: Comunità 1972).

346. Law of Aug. 11, 1973, no. 533, [1973] Gazz. Uff. 6282 (It.). See generally M. CAPPELLETTI, *Per una nuova "giustizia del lavoro,"* in GIUSTIZIA E SOCIETÀ, *supra* note 345, at 305-31 (the author acted as advisor to the Italian Ministry of Labor in the preparation of the 1973 statute); V. Denti, *Il nuovo processo del lavoro: Significato della riforma*, 28 RIVISTA DI DIRITTO PROCESSUALE 371 (1973); Vigoriti, *supra* note 16, Section IIA2.

utilizes a one judge court (the *pretura*), gives the judge broad powers, and simplifies the proceedings. Further, there are provisions for legal aid at state expense as well as special measures to ensure that appeals—the scope of which has been restricted—will not delay the payment of sums owed to an employee. While a complete evaluation has yet to be made, this new procedure appears already to have moved a step toward making “the right of access to justice concrete and effective for workers.”³⁴⁷

D. *Changes in the Methods for the Delivery of Legal Services*

The same philosophy that is apparent in the creation of specialized procedures to help ordinary people enforce their new rights—against merchants, employers, polluters, landlords, governmental bureaucracies, and the like—also underlies the reforms to be discussed in this section. These reforms recognize that, despite efforts (prompted by economic necessity and other reasons) to minimize the need for lawyers to enforce ordinary people’s rights, legal assistance and representation will continue to be important and helpful for many complicated cases. Moreover, legal assistance means more than simply representation in court. It implies help in making people aware of their rights in order to plan their important transactions; indeed, at its best it helps people to participate more effectively in the basic private and governmental decisions that affect their lives. Hence, the basic question of how to make high-quality legal assistance available to everyone has understandably become a key focus of access-to-justice reformers. As Charles Baron, former Director of the U.S. Resource Center for Consumers of Legal Resources, has noted, “it may now fairly be said that there is an active consumer movement in legal services in the United States which is interested in issues pervading all aspects of the legal profession.”³⁴⁸ To mention but another prominent example: the recently created Royal Commission on Legal Services in England—directed, *inter alia*, to consider if any changes “are desirable in the public interest in the structure, organisation [and] training” of the legal profession—demonstrates clearly this new willingness to question the meth-

347. Vigoriti, *supra* note 16, Section IIA2.

348. Baron, *Delivery of Legal Services to Low and Middle Income Consumers in the United States and the Need for International Exchange of Information* at 14, in PROCEEDINGS OF THE FIRST INTERNATIONAL COLLOQUIUM ON LEGAL AID AND LEGAL SERVICES, 25-28 OCTOBER 1976 (Palo Alto, California: International Common Law Exchange Society 1977).

ods, organization, and even the control of the legal profession and its work.³⁴⁹

Two basic approaches to the reform of the delivery of legal services have already been discussed in this article. One approach, increasingly evident in the specialized procedures we have discussed, is to develop less expensive, more specialized substitutes for individual lawyers. Many small claims courts, for example, seek to provide means of giving legal advice that make lawyers unnecessary.³⁵⁰ An important phenomenon represented by this tendency—the proliferation of para-professional or “paralegal” personnel—merits further attention. A second approach, apparent already in the discussion of the Swedish system of legal aid and legal insurance, is to find new ways of making high-quality legal professionals accessible to ordinary people.³⁵¹ These methods include prepaid and group legal service plans. Clearly, these two approaches (sometimes complemented by other important activities aimed at reforming the delivery of legal services, such as the relaxation of restrictions on legal advertising³⁵² and the effort to create “legal clinics” in the United States³⁵³) can be combined in an effort to realize the advantages of both.

349. The Royal Commission, set up in February 1976, is presently composed of 15 members, only four of whom are practicing attorneys. According to Michael Zander, “[t]he inquiry [being undertaken by the Commission] is the broadest of its kind ever established in any country. Every aspect of the work of the profession is being scrutinised.” Zander, *supra* note 79, at 10-12. See also ROYAL COMMISSION ON LEGAL SERVICES, REPORT ON PROGRESS APRIL 1977 (London: HMSO 1977).

350. See text accompanying notes 215-17 & 222-23 *supra*.

351. See text accompanying notes 81 & 83 *supra*.

352. The United States Supreme Court in June 1977 for the first time overturned certain state bar restrictions on advertising by lawyers. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). See the discussion in *Supreme Court Holds Lawyers May Advertise*, 63 A.B.A.J. 1092 (1977). In England, the Monopolies and Mergers Commission suggested that private lawyers be allowed to advertise to a limited extent, but the Law Society has declined to follow that recommendation. MONOPOLIES AND MERGERS COMMISSION REPORT, SERVICES OF SOLICITORS IN ENGLAND AND WALES 557 (London: HMSO 1976). Jacob, *supra* note 57, Section VIK.

353. “Legal clinics” are an increasingly important phenomenon in the United States, even though there have been some conflicts between them and the organized bar. Legal clinics have been described as follows:

Most clinics are groups of lawyers and paralegals who work in storefront offices located in suburban neighborhoods and open on evenings and weekends when local residents are not at work. Through a combination of standardized practices, use of paralegal interviews, and review by lawyer-specialists, some of these law offices have been able to undercut substantially the prevailing rate for legal services in an area.

See Frank, *supra* note 17, at 120. According to a comprehensive recent study, there are now between 40 and 60 such clinics, and the number is increasing rapidly. THE RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, LEGAL CLINICS: ANALYSIS AND SURVEY (Washington, D.C., 2d ed. 1977). See also Metzger, *Legal Clinics: Getting into the Routine*, TRIAL, June 1976, at 32.

1. *The use of "paralegals".* "Paralegals"—legal assistants with various amounts of legal training—have assumed new importance in the effort to improve access to justice. It is increasingly evident that many legal services do not necessarily have to be supplied by highly-trained, costly lawyers. The German *Rechtspfleger*, for example, is a paraprofessional judge-clerk who, *inter alia*, has an important role in giving legal advice to those needing it to prepare their legal claims;³⁵⁴ since about 1970 paralegals have been increasingly utilized, particularly in the United States, to do legal research, interview clients, investigate claims, and prepare cases for trial.³⁵⁵ In addition, as was noted in the discussion of small claims courts, "lay advocates"—where not forbidden by "unauthorized practice of the law" statutes—are becoming very significant in many areas of the law. The well-known "McKenzie men" in England, for example, certainly reflect this trend.³⁵⁶

The potential of paralegals can be further demonstrated by a prominent German example. The German Federation of Labor Unions (*Deutscher Gewerkschaftsbund*: DGB) utilizes paralegals in a legal service program designed to serve its seven million members.³⁵⁷ Legal clerks (*Rechtssekretäre*), specially trained in an eleven month program at a college located in Frankfurt and operated by the DBG, provide legal services to union members in employment, social security, veterans' benefits, and income tax matters. In addition to legal advice and similar services, the clerks, when necessary, even represent union members in the labor courts (*Arbeitsgerichte*).³⁵⁸ This effective

354. See generally R. Bender, H. Eckert, K. Schmucker, and I. Stein, *Der Rechtspfleger in der Bundesrepublik Deutschland* (unpublished paper, May 1977, submitted to the Florence Access-to-Justice Project). (A shortened version of this paper, by R. Bender and H. Eckert, will be translated and published in Volume II of the Florence Project series.)

355. This attention to paralegals grew out of the OEO legal aid movement and efforts to make the staff offices as efficient as possible. See Huber, *supra* note 71, at 765. See generally Brickman, *Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 COLUM. L. REV. 1153 (1971); Frank *supra* note 18, at 121-22; Johnson *et al.*, *supra* note 11, Section IID1.

356. The term "McKenzie Men" comes from the case of *McKenzie v. McKenzie*, [1970] 3 W.L.R. 472, in which the Court of Appeals held that a non-barrister could sit near and assist an otherwise unrepresented litigant in conducting the case, framing questions, and making cross-examination. Paraprofessionals who now serve regularly in this fashion are called "McKenzie Men." See M. ZANDER, *supra* note 11, at 358-60.

357. See W. PFENNIGSTORF, *LEGAL EXPENSE INSURANCE: THE EUROPEAN EXPERIENCE IN FINANCING LEGAL SERVICES* 48-50 (Chicago: American Bar Foundation 1975).

358. As pointed out in Bender & Strecker, *supra* note 11, Section IIB3, this service has particular significance since for disputes involving less than DM 300, lawyers can appear only if given permission by the presiding judge; union representatives, in contrast, can appear without restriction.

utilization of paralegals, specially permitted by the German statute dealing with the unauthorized practice of law,³⁵⁹ demonstrates how paralegals can contribute to the access-to-justice movement.³⁶⁰ There are, of course, many questions related to such matters as standards, training, and accreditation that must be resolved before the full potential of paralegals can be realized, but it is clear that many functions traditionally limited to lawyers need not be.

2. *The development of prepaid and group legal service plans.* Developments in prepaid and group legal service plans in recent years are among the most far-reaching access-to-justice reforms discussed in this article. In this area we find bold proposals and plans to make lawyers accessible at reasonable costs to the middle and lower class individuals whose rights and interests have been our principal focus. Indeed, since, our highly-developed, essentially adversary systems must remain the setting for a growing number of legal conflicts, this attempt to promote effective access to lawyers may actually complement reforms which dispense with the need for lawyers;³⁶¹ both types of reforms are essential to vindicate the "new" rights of individuals and groups effectively.

While the terminology is not yet clearly defined, "prepaid legal service plans" can be described roughly as mechanisms by which individuals pay something akin to a membership fee or insurance premium for the opportunity to obtain, at no cost or at a reduced cost, certain specified legal services when the need for them arises. The objective is to spread the risk of incurring legal costs among all who pay this premium or fee.³⁶² "Group" plans may be "prepaid" in the sense that they too may involve risk spreading, but they may simply involve a

359. Law for the Prevention of Abuse in the Area of Legal Advice of December 13, 1935, [1935] RGB1 I 1478, § 7.

360. The English experience is similar. See Latta & Lewis, *Trade Union Legal Services*, 12 BRIT. J. INDUS. REL. 56, 58-62 (1974). Trade union legal services in Europe are an important, but not well studied, means of helping members of unions to pursue their rights against both employers and the government. See note 375 *infra*.

361. See text accompanying notes 187-347 *supra*. Small claims, for example, are not usually covered by legal insurance. See W. PFENNIGSTORF, *supra* note 357, at 62.

362. See Pfennigstorf & Kimball, *Legal Service Plans: A Typology*, 1976 AM. BAR FOUNDATION RESEARCH J. 411.

[T]he term "prepaid" has been adopted to replace the term "insurance" whenever the total cost is distributed among the group. The important advance payment is *by or on behalf of* the client, not necessarily *to* the lawyer, and the amount of the prepayment is related to risk, not to fees. Prepaid legal service plans are consistently distinguished from group legal service plans . . . in which each member pays his own fees.

Id. at 462 (footnotes omitted) (emphasis in original).

relationship whereby legal services are made available at a reduced fee to members of a particular group.³⁶³

The potential of such plans is enormous, coming from "economies of scale, use of lawyer services in a preventive as well as a remedial sense, risk-sharing among all members of the group and, depending upon the client group involved, leverage in the process of negotiating the benefits and costs of a plan."³⁶⁴ A basic distinction among these plans—and the source of much debate—concerns the participant's ability to choose his own lawyer. The "open panel" system generally connotes a relatively free choice of an attorney, who is then paid by the plan, while "closed panel" plans in varying degrees restrict that choice to a certain group of lawyers. There are, of course, numerous gradations between free choice and no choice at all.

The European countries have had a long and increasingly positive experience with "legal expense insurance," *i.e.*, prepaid, essentially open panel legal service plans operated by commercial insurance companies.³⁶⁵ This kind of insurance emerged primarily as a concomitant to automobile accident insurance policies in the early twentieth century, and automobile coverage is still the most important component, but wide ranges of coverage are now available in various countries, most notably in Germany and Switzerland.³⁶⁶ For a relatively low premium, a typical employee and his family in Germany, for example, can be insured for legal expenses relating to the ownership and operation of an automobile, the ownership of an interest in real property, the prosecution of damage claims, the defense against criminal charges, the prosecution of employment and social security claims, the prosecution of contractual rights, and the resolution of succession and family law matters.³⁶⁷

363. The definition of group legal services given by Pfennigstorf and Kimball is as follows:

They have two principal distinguishing elements: (1) an agreement between an organized group of potential clients on one side and one or more attorneys on the other; and (2) a benefit pattern that typically includes a certain amount of "free" consultation, with the provision of other services at individual fees based on a predetermined schedule that is usually (but not always) lower than the normal fee levels for individual clients.

Id. at 457.

364. See Frank, *supra* note 17, at 119.

365. See generally W. PFENNIGSTORF, *supra* note 357.

366. *Id.* at 21.

367. *Id.* at 51-59. According to the figures given by Pfennigstorf for late 1974, the annual premium for such coverage would be about DM 162 or U.S. \$75. *Id.* at 73.

A study on behalf of the German Federal Government Press and Information Office, conducted in August and September 1975, found that 39% of blue collar workers, 50%

The growing importance of legal insurance is evident from the rapidly increasing volume of business being transacted,³⁶⁸ as well as from the fact that in 1974 Lloyd's of London chose to enter the field and make such insurance available for the first time in Great Britain.³⁶⁹ Further, these schemes have become the focus of many concerned with access to justice. Since broadened coverage at relatively low premiums clearly helps to make the legal machinery more accessible to those who obtain such insurance,³⁷⁰ it is understandable that discussion about the potential of legal expense insurance in Europe has recently become an important aspect of the access-to-justice movement taking place there.³⁷¹

It has been suggested, however, that the European style of private, for profit, open panel legal expense insurance may not be the most effective type of prepaid or group legal service plan; the argument, reminiscent of that between *judicare* and staff attorney systems of legal aid,³⁷² is that open panel plans rely too much on individuals to recognize when legal action is desirable, when the services of a lawyer are helpful, and which lawyer is the best choice. In addition, it is asserted that insurance profitability depends on the insurer being able to predict and plan for the number of claims that will be made. Normally, this predictability requires that coverage be for "fortuitous" acts, not for the intentional actions of claimants. Thus, if these legal service plans do not want to undermine or destroy their financial viability, they can hardly seek to educate people as to their legal rights, encour-

of self-employed persons, 52% of senior public and private employees, and 45% of other public and private employees were covered by legal insurance in Germany. See Grunsky, *Gutachten A*, in W. GRUNSKY & N. TROCKER, *EMPFEHLEN SICH IM INTERESSE EINER EFFEKTIVEN RECHTSVERWIRKLICHUNG FÜR ALLE BÜRGER ANDERUNGEN DES SYSTEMS DES KOSTEN- UND GEBÜHRENRECHTS?* 60 n.147 (Munich: Beck 1976).

368. The volume of premiums in Germany for specialized legal insurers has gone from DM 9.4 million to DM 677 million in the period 1953-1973, while the number of specialized legal insurance companies has grown from 2 to 23. See Isola, *Espansione Internazionale, Esperienze e Prospettive dell'Assicurazione di Difesa Legale*, in *STUDIEN ZUR RECHTSSCHUTZVERSICHERUNG IN EUROPÄISCHEN LÄNDERN UND IN DEN VEREINIGTEN STAATEN* 13, 17 (Karlsruhe: Verlag Versicherungswirtschaft E. V.; H. Moller ed. 1975). See also W. PFENNIGSTORF, *supra* note 357, at 23-27.

369. See Cockerell, *Legal Protection Insurance in Great Britain*, in *STUDIEN ZUR RECHTSSCHUTZVERSICHERUNG IN EUROPÄISCHEN LÄNDERN UND IN DEN VEREINIGTEN STAATEN*, *supra* note 368, at 332, 335-36; W. PFENNIGSTORF, *supra* note 357, at 58-59.

370. In Sweden, as we have noted, approximately 85% of the people have a policy with coverage comparable to that described for Germany. See text accompanying note 83 *supra*.

371. See Isola, *supra* note 368, at 32-35; Baur, *Armenrecht und Rechtsschutzversicherung*, 1972 *JURISTENZEITUNG* 75; Bender & Strecker, *supra* note 11, Section IE1; W. PFENNIGSTORF, *supra* note 357, at 21-22.

372. See text accompanying notes 66-74 *supra*.

age them to have legal check-ups, and in general *stimulate* purposeful legal activity—which presumably would help considerably to break down party capability barriers to effective access in the areas with which we have been concerned.³⁷³

Many reformers believe that closed panel plans can avoid, or at least minimize, these problems. Closed panels of lawyers can develop specializations, which can allow reduced costs for many legal transactions. Paralegals can be effectively utilized to handle the routine aspects of certain types of legal problems. Further, in return for the assurance that the legal business will all go to a certain group of lawyers, the plan may be able to negotiate for a lower per item fee. It is hoped, therefore, that despite the stimulation of legal demand, closed panel plans will be able to keep participants' fees low.³⁷⁴

Despite initial opposition from the organized bar the emerging U.S. preference is in the direction of closed panel plans, which are operated on a non-profit basis or by groups subsidized by the dues of labor union members.³⁷⁵ These closed panel plans imply a greater re-

373. Mayhew thus asserts: "Insurance cannot easily and quickly adapt to a rapidly changing body of legal rights and avenues of redress. I suspect the massive institutionalization of prepaid legal insurance would be a conservative influence, tending to limit our sense of the redressable grievance and deny the attorney's creative role." See Mayhew, *supra* note 26, at 420. See also W. PFENNIGSTORF, *supra* note 357, at 46, arguing that "[f]or such [open panel] plans increased use resulting from increased sophistication among insureds will inevitably force premiums into ranges where they are no longer competitive"

374. See, e.g., Ashe, *Group Legal Services—Equal Justice in Fact, A Prognosis for the Seventies*, 23 SYRACUSE L. REV. 1167, 1170-73 (1972).

375. See, e.g., NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, *LEGAL SERVICES & THE LABOR MOVEMENT* (Washington, D.C. 1977); Ashe, *supra* note 374; Baron, *supra* note 348, at 6-7; Bartosic & Bernstein, *Group Legal Services as a Fringe Benefit: Lawyers for Forgotten Clients Through Collective Bargaining*, 59 VA. L. REV. 410 (1973).

The close relationship of labor unions to the group and prepaid legal services movement in the United States is suggestive of the labor union, group legal services provided throughout Europe. The European plans, however, which vary widely in quality and organization, generally provide services only in labor matters, while the American plans have a much wider coverage. Pfennigstorf suggests that differences between recent U.S. and European prepaid and group legal service developments are partially explained by the fact that in Europe the more limited plans have long been in existence. Thus, while unions in the United States spearheaded the move to have closed panel plans, despite the opposition of the organized bar, unions in Europe have been content with their own long-established plans. In "the absence in Europe of the special pressure exercised by the labor unions in the United States," the European attorneys' organizations have been able to prevent broad closed panel plans beyond simply labor matters. W. PFENNIGSTORF, *supra* note 357, at 48. See also text accompanying notes 357-60 *supra*, & note 376 *infra*.

The Hungarian Report to the Florence Project describes a new effort (since January 1, 1975) to systematize and expand trade union legal aid and assistance in Hungary. According to Professor Névai, "Lawyers . . . render legal assistance to the

organization of the delivery of legal systems than open panel plans, since their adoption challenges the traditional idea that a lawyer who is paid a salary by an organization on behalf of an individual litigant will not be sufficiently independent to provide his full devotion to the interests of the individual member he represents.³⁷⁶ In addition, closed panel plans—emphasizing specialization—are taking the lead in utilizing paralegal personnel to handle routine work.³⁷⁷

Numerous experiments are now taking place in the United States with various types of plans (including some open panel plans), and it appears that, after at least a decade of uncertainty, prepaid and group legal services have finally begun to fulfill their potential to improve access to justice for the American middle and lower middle class.³⁷⁸

workers free of charge and receive fees for their work from the trade union committee. The committee covers the cost of maintaining legal assistance from the money given to it by the enterprise on the basis of the collective bargaining agreement." Névai, *supra* note 159, Section IID4. Cf. Houtappel, *supra* note 54, Section IIG5 (Holland); Cassese, *Legal Services in Italy for Deprived Persons*, in COUNCIL OF EUROPE, *supra* note 75, at 71, 76-77.

376. This traditional view has generally been shared by the organized bar associations in the United States and in Europe. See, e.g., W. PFENNIGSTORF, *supra* note 357, at 42-43; Note, *Group Legal Services and the Organized Bar*, 10 COLUM. J.L. & SOC. PROB. 228 (1974). The view has been manifested in opposition to closed panel plans. See also note 375 *supra*. Despite much discussion about "freedom of choice," the basic concern of that opposition has been that attorneys in closed panel plans are paid on a salaried basis by the organization. See Pfennigstorf & Kimball, *supra* note 362, at 466-67; Baron, *supra* note 348, at 9. The bar's opposition in the United States, expressed in the code of ethics applicable to lawyers, was overcome at the national level by a series of Supreme Court decisions, the last of which was *United Transp. Union v. Michigan State Bar*, 401 U.S. 576 (1971), stating that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id.* at 585-86. The organized bar, however, still favors open panel plans. The North Carolina bar, for example, is still attempting to limit closed panel plans. See Delk, *The Advent of Prepaid Legal Services in North Carolina*, 13 WAKE FOREST L. REV. 271, 287-88 (1977).

377. The largest program in the United States, the District Council 37 Municipal Employees Legal Service Plan, established in August 1977 and serving over 90,000 of New York City's municipal employees, utilizes a number of paralegals (and even social workers). See NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL RESOURCES, *supra* note 375, at 12. See also note 379 *infra*.

378. According to Baron:

In 1969, it is estimated that there were three hundred such [prepaid and group] programs in the United States. In 1974 estimates reached 3000. In 1975, they reached 5000—over 1000 group or prepaid programs had registered (as law requires them to in a few states) in California alone. So far, the vast majority of these are group programs with no significant prepaid feature. However, there are probably a few hundred prepaid plans, and that number is growing rapidly.

Baron, *supra* note 348, at 6. See also Frank, *supra* note 18, at 119, referring to estimates that in the United States, "in 1975 about 833,000 members were covered or potentially covered under the seventy-five best known plans."

A prominent example of a labor union, closed panel, prepaid plan is that of

In contrast to European legal insurance plans, these emerging plans tend to emphasize "preventive law" and education in legal rights.³⁷⁹ It has even been suggested that these plans will be able not only to provide representation for individuals but also to promote the diffuse rights of the group.³⁸⁰ Certainly, such reforms may effectively mobilize

Laborer's Local 423 in Columbus, Ohio, which employs a four-attorney law firm to cover a union membership of 2,000-2,500 persons. The plan was established in 1972. According to its chief administrator, it provides coverage for all legal services except claims against the union, certain claims against the employer, personal injury lawsuits, and personal business ventures. There is no limit as to the number of hours of legal services permitted, and the cost per person—financed by taking \$0.10 per hour out of each employee's compensation—averaged about \$100 per year. Interestingly, in May 1975 the plan's administrator expressed the hope "ultimately to add to our staff of lawyers a social worker, because indeed we believe that many of the problems that our people encounter are of a social nature . . ." See TRANSCRIPT OF PROCEEDINGS OF 5TH NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES, NEW ORLEANS MAY 8-10, 1975 at 79 (Chicago: American Bar Association 1975) (speech by David Clayman); Bartosic & Bernstein, *supra* note 375, at 434-35. For descriptions of other plans see Pfennigstorf & Kimball, *supra* note 362; NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, *supra* note 375, at 11-16; Roberts, *Union Group Legal Services: An Experiment in Group Legal Practice*, 48 WASH. L. REV. 597 (1973); Note, *Controlling the Marketing and Cost of Prepaid Legal Services*, 12 WILLAMETTE L.J. 355, 370-73 (1976).

379. Harriet Thayer, Directing Attorney of the Berkeley Consumers' Group Legal Services, recently stated: "We try to help members stay out of trouble by educating, making it easy to consult lawyers, and providing information on how to handle daily transactions to avoid legal problems." Thayer, *A Look at a United States Cooperative Legal Services Plan* at 5, in PROCEEDINGS OF THE FIRST INTERNATIONAL COLLOQUIUM ON LEGAL AID AND LEGAL SERVICES, *supra* note 348. (This Berkeley consumer plan, as reported by Thayer, charges \$30 in annual dues, which cover two free consultations. Otherwise, consultations are available for \$10 and other services are billed on a per unit basis. Costs are kept down by "paralegal service units" for divorces, bankruptcies, adoptions, name changes, and wills.) See also Pfennigstorf & Kimball, *supra* note 362, at 419-20; NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL RESOURCES, *supra* note 375, at 12, 14, 16 (examples of emphases on preventive law in prominent plans).

380. Bartosic & Bernstein, *supra* note 375, at 440 n.82, assert:

[t]he individual interests of all citizens with moderate incomes are not necessarily congruent with their interests as an overall group. But a union GLS [Group Legal Service] program will provide not only a lawyer for a member in a particular case but also advocates for union members as a class. GLS will add another dimension to an otherwise legally ineffective and relatively unsophisticated class's desire to aid and protect itself.

The Columbus Plan described in note 378 *supra*, for example, employs a law professor "to take part in seeking judicial and legislative aid in the fashioning of laws that are beneficial to workers." TRANSCRIPT OF PROCEEDINGS OF THE 5TH NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES, NEW ORLEANS, MAY 8-10, 1975, *supra* note 378, at 79. Similarly, the Legal Services Plan (LSP) of the Laborers' District Council of Washington, D.C., established in 1973 (in which 85% of the cases are handled by a team of eight staff lawyers), is seeking, in the words of its director, "to advance the legal interests of LSP members as a group." NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, *supra* note 375, at 12. See also Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 LAW & SOC'Y REV. 247, 252-53 (1976); COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 126, at 324-31.

individuals—at least those who in one capacity or another participate in groups which can set up legal service plans—to pursue their rights.³⁸¹ We must, however, be wary at this stage of exalting the prospects of the United States' style of group legal services. As Professor Mayhew recently wrote, "[w]e should reserve the right to be skeptical as to the achievements of these programs until they have been carefully studied."³⁸² The fact is that the European experience, despite its limitations, has a proven record of expanding coverage and expanded use. The European style, characterized by profit-making, open panel insurance, may prove more lasting than the United States' experimentation with plans aimed more directly at social justice. This is not to say that the European system can, or should be, transferred to the United States' legal environment, but it underscores the need not to overstate the accomplishments of the still experimental American plans.

E. *Simplifying the Law*

Our laws are generally complicated in many, if not most, areas and will necessarily remain that way, but we must recognize that there remain large sectors where simplification is both desirable and attainable.³⁸³ A more understandable law is often more accessible to ordi-

381. According to Pfennigstorf & Kimball:

Legal service plans are potential instruments for social change. The group members whose legal needs are met for the first time become aware of the existence and enforceability of legal rights that profoundly affect their position in society. Systematic enforcement of those rights may lead to dramatic changes in the social fabric.

Pfennigstorf & Kimball, *supra* note 362, at 421. See also Mayhew, *supra* note 26, at 421.

382. Mayhew, *supra* note 26, at 421. Some problems which are presently unsolved are quality control and the extent of regulation that is desirable over these plans. Moreover, a problem for voluntary (non-employee-sponsored) plans, as Pfennigstorf & Kimball point out, may be "that most individuals will spend only limited amounts for legal coverage, certainly not nearly the amount necessary for comprehensive coverage of all the legal assistance thought desirable." Pfennigstorf & Kimball, *supra* note 362, at 500. This issue returns us to the problem discussed earlier of how to ensure that diffuse groups such as consumers will organize to advance their collective interests. The problem is that in order to realize the maximum benefits of group legal services—as was the case for the benefits of legal representation of diffuse interests (discussed in Section IIIC *supra*)—we must somehow overcome the profound barriers to the organization of diffuse interests. For some innovative U.S. proposals related to group legal services, see Nader, *supra* note 367, at 250-54. Galanter also focuses on this problem—that of "upgrading parties." See Galanter, *supra* note 276, at 225, 231-40 (1976).

383. Professor Halbach, for example, has stated that

A key element in solving problems that range from the workload of courts to the delivery of lawyer services must be a concerted, self-conscious effort by the legal profession itself, as well as by others, to find ways of eliminating some and simplifying other lawyer work. In short, startling as it may sound, the legal profession should strive to do away with some of its own business.

Halbach, *Toward a Simplified System of Law*, in AMERICAN ASSEMBLY, *supra* note 17, at 143.

nary people. In the context of the access-to-justice movement, however, simplification is also concerned with making it easier for persons to satisfy the standards for a given legal remedy. The most prominent examples of a simplified remedy are the widespread move to "no-fault" divorce³⁸⁴ and, at least in a number of places, the move to "no-fault" accident compensation.³⁸⁵ Substantive standards are changed so that issues of fault or guilt need no longer be litigated; they become irrelevant to the outcome of the claim, with the result that costs are lowered to the parties, the duration of litigation is reduced, and the burden on the courts is relieved.³⁸⁶ It will suffice to show the virtues of this approach by citing a recent assessment of the first two years of the widely-known pioneer New Zealand no-fault accident compensation plan. According to Professor Geoffrey Palmer:

The overwhelming impression to be gleaned from reading the decisions is how simple it all is. There are few cases that cannot be disposed of in two or three typed pages. The whole panoply of the Westminster type trial has been stripped away. There is no mystique and precious little drama about the new accident law. But a lot of people who received nothing under the old [tort] system are being compensated and compensated quickly.³⁸⁷

384. Examples from the national reports to the Florence Project could include Australia, *see* Taylor, *supra* note 55, Section VIB, Bulgaria, *see* Stalev, *supra* note 159, Section VA3, England *see* Jacob, *supra* note 57, Section IX, France, Thery, *supra* note 62, Section IX, the Federal Republic of Germany, *see* Bender & Strecker, *supra* note 11, Section IIA4, Hungary, *see* Névai, *supra* note 159, Section IVA, Japan *see* Kojima & Taniguchi, *supra* note 14, Section VB, Poland, *see* Los, *supra* note 159, Section IIE3, Sweden, *see* Bolding, *supra* note 81, Section VIA, and several states of the United States, *see* Johnson *et al.*, *supra* note 11, Section IVA. It must be recognized, of course, that changing standards of family behavior and morality, rather than access motives, provide the main impetus for divorce reform.

385. The no-fault automobile accident compensation plans in the United States are described in Johnson *et al.*, *supra* note 11, Section IVC. The authors inform us that there are presently 17 states with no-fault compensation plans of one type or another. *See also* Cooper & Kastner, *supra* note 15, Section IVC1, for some Canadian development toward no-fault. Australia, it should be noted, recently came very close to adopting a very comprehensive social insurance scheme to some extent modeled on the New Zealand no-fault accident compensation scheme. *See* Taylor, *supra* note 55, Section VII.

386. As several essays for the Florence Project have emphasized, there are costs in terms of precision associated with an approach characterized by "bright lines broadly applied," as opposed to the "individualized rules" which make it more difficult and time consuming for a person to satisfy the standard for a given legal remedy. *See* Calabresi, *Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class*, in 3 FLORENCE PROJECT, *supra* note 11. Friedman, *Access to Justice: Social and Historical Context* 14-21, in 2 FLORENCE PROJECT, *supra* note 11.

387. Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1, 3 (1977).

The advantages of simplified standards for a given remedy may not be limited to divorce claims and accident compensation; legal simplification may indeed have relevance to consumer rights. One imaginative proposal made in the United States, for example, was to create a "Department of Economic Justice" which would itself give consumers automatic financial relief for very small claims against merchants without the need to prove the merits of such claims.³⁸⁸ 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, Professor Maurice Rosenberg, the proponent of this plan, suggested further that the Department could also act—much like the Swedish Consumer Ombudsman—to protect the rights of consumers as a class.³⁸⁹

This idea may or may not prove to be workable, but it certainly provokes thought and is gaining attention.³⁹⁰ Indeed, a recent Dutch experiment in environmental protection has taken a remarkably similar approach to compensation for air pollution damage.³⁹¹ Moreover, these ideas need not be isolated from other approaches.³⁹² The point to be made is that creativity and bold experimentation—even to the extent

388. See Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797, 813-16 (1971).

389.

Through a national network of offices, the Department of Economic Justice would learn quickly if a manufacturer has been making defective television tubes or components on a grand scale; or thousands of unsafe brake 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.

Id. at 814.

390. See, e.g., E. JOHNSON, JR., V. KANTOR & E. SCHWARTZ, *supra* note 167, at 79-82; Jones & Boyer, *supra* note 236, at 365-66; Kosmin, *supra* note 140, at 979-81.

391. According to the Dutch national report, the Fund for Air Pollution (*Fonds Luchtverontreiniging*), created in 1970, "allows parties who have been damaged by air pollution to claim indemnification if they 'should not reasonably have to bear the damage'." The request is made to the governing board of the Fund, which is supported by contributions from private enterprises and the government. The purpose of the Fund "is to allow access to compensation for people who, because of problems in producing evidence and in proving causation, might not succeed in a court action." At present, however, the Fund has not been utilized significantly by the public. See Houtappel, *supra* note 54, Section IIB4.

392. See, e.g., Note, *supra* note 281, at 425-26, where the proposal is made that after a small claims court judgment in favor of a consumer, regardless of whether the merchant takes advantage of a right to appellate review of the decision, the consumer be paid the judgment from a "consumer center fund" which then receives the right to proceed against the merchant. The aim is to save consumers from the expense and delay of collecting a judgment.

of doing away with the need to prove every claim—characterize what we have termed the access-to-justice approach.

V. LIMITATIONS AND RISKS OF THE ACCESS-TO-JUSTICE APPROACH:
A WARNING CONCLUSION

The emergence in so many countries of the “access-to-justice approach” is reason for some optimism about the ability of our modern legal systems ultimately to meet the needs of those so long left without the possibility of vindicating their rights. Sophisticated, inter-related reforms such as those characterizing the Swedish system of consumer protection reveal the great potential of this approach. Potential, however, must be translated into reality, and it is not easy to overcome traditional opposition to innovation. It is necessary to emphasize that, while remarkable achievements have already been attained, we still are only at the beginning. Much work remains to be done to make the rights of ordinary people truly effective.

Moreover, in welcoming the emergence of bold access reforms, we must not neglect their risks and limitations. We may be skeptical, for example, about the potential of access-to-justice reforms in fundamentally unjust societal orders. Judicial and procedural reforms, it must be recognized, are not sufficient substitutes for political and social reform. Professor Brañes, the Chilean reporter (now exiled in Mexico City), states—paraphrasing Bentham—that under the present government “to speak of ‘access to the courts’ in Chile is nonsense, nonsense upon stilts.” Similarly, for the very poor, he notes, “the problem of access to justice is simply not relevant, since they have no claims and are outside the institutional system, however ‘accessible’ the system may be. To this extent, access to justice in Chile is thus more an economic or political than an institutional problem.”³⁹³

393. See Brañes, *supra* note 197, at Author's Note. This point is made generally in the criticisms by Professors Galanter and Trubek of certain aspects of the “law and development” movement. Trubek & Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062, 1078.

Professor Steward Macaulay, noting that “real access for all citizens . . . might require reform in the very style of government itself,” added that “a careful examination of the real options open to the less privileged members of a society ought to prompt an examination of who might oppose reforms to widen those choices. This, of course, would bring us back to questions about the distribution of power in society.” S. MACAULAY, *ACCESS TO THE LEGAL SYSTEMS OF THE AMERICAS: INFORMAL PROCESSES* 9, 3 (Madison, Wis.: Center for Law and Behavioral Science 1976). See also J. Paul & C. Dias, *Law and Resource Distribution* (unpublished paper, International Legal Center, New York, June 1977). A correct “access” approach, therefore, is not inconsistent with a realistic political viewpoint.

An equally obvious point—long familiar to comparativists—is that reforms cannot (and should not) be simplistically transplanted outside their legal and political systems. Even if “successfully” transplanted, in fact, an institution may operate very differently in practice in a different environment.³⁹⁴ It must be our task, aided by the rapidly increasing volume of empirical and interdisciplinary research, not only to diagnose the need for reforms, but also to monitor their implementation and effects carefully.

It is also necessary for reformers to recognize that, despite the obvious 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 confused. 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.³⁹⁵

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 “parasitic litigation.”³⁹⁶

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.”³⁹⁷ In addition, there is always the danger that “tinkering” with procedures will have unintended, but serious effects.³⁹⁸ As we have noted, reform aimed at

394. See, e.g., the discussion of “transplantation” in Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Friedman, *supra* note 386, at 33-40.

395. See Ginossar, *supra* note 197, Section IVB.

396. See Thery, *supra* note 62, Section I. Taylor writes that “[f]ragmental justice is often injustice, and often an individual simply gives up when he is passed from pillar to post for a body to determine his case.” Taylor, *supra* note 18, at 30.

397. See Bender & Strecker, *supra* note 11, Section IIB1. To combat this problem in Japan, according to the Japanese Report, judges serving in specialized departments apparently are shifted to other departments at regular intervals. See Kojima & Taniguchi, *supra* note 14, Section IVA1.

398. See Section IID *supra*.

eliminating one or another barrier to access may at the same time erect new barriers of its own.

The greatest danger, one which we have tried to consider throughout this discussion, 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 heard.³⁹⁹ While this danger is reduced where submission to a particular dispute resolution mechanism is done voluntarily, either before or after the dispute arises, and the values involved are to some extent flexible, we must still recognize the potential problems. Important as innovation can be, we should not forget the fact that, after all, highly technical procedures have been so moulded through many centuries of efforts to prevent arbitrariness and injustice. And while formal procedures, unfortunately, are not well designed for enforcing "new" rights, especially (but not only) at the individual level, they do serve some important functions that cannot be ignored.

Furthermore, since a tremendous and growing number of previously unrepresented individuals, groups, and interests are now being given access to court and court-like machinery through the reforms discussed earlier, the pressure on the legal system to reduce its burden and find *still cheaper* procedures increases dramatically. This pressure, which is already being felt, must not be allowed to subvert the fundamentals of fair procedure. In this study, we have spoken of a change in the hierarchy of values in civil procedure—of a shift toward the value of accessibility. A change toward a more "social" meaning of justice must not mean, however, that the core values of traditional procedural justice are to be sacrificed. Under no circumstances should 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."⁴⁰⁰ This "beautiful" system is frequently a luxury; it tends to give a high quality of justice only when, for one

399. An organized, world-wide effort to discover and analyze the basic safeguards of the parties in civil litigation—the fundamentals of procedural fairness—is found in *FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION*, *supra* note 1.

400. This comment, referring specifically to the British judicial system, was made by HOOPER, *THE LAW OF CIVIL PROCEDURE IN IRAQ AND PALESTINE* 1 (Basrah: The Times Printing & Publishing Co. 1930), *cited in* Ginossar, *supra* note 197, Section VC.

reason or another, parties can surmount the substantial barriers that it erects to most people and to many types of claims. The access-to-justice approach tries to attack those barriers comprehensively, questioning the full array of institutions, procedures, and persons that characterize our judicial systems. The risk, however, is that the use of rapid procedures and inexpensive personnel will produce a cheap and unrefined product. This risk must continually be kept in mind.

The reforms we enact must be thoughtful ones, reflecting an appreciation of the risks involved, as well as a full awareness of the limits and potentialities of the regular courts, regular procedures, and regular attorneys. This is what is really meant here by the access-to-justice approach. The 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.