Foreward: Access to Justice as a Focus of Research

Bryant G. Garth
Indiana University School of Law - Bloomington

Mauro Cappelletti
European University Institute

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Comparative and Foreign Law Commons, and the Human Rights Law Commons

Recommended Citation
Articles by Maurer Faculty. 1131.
https://www.repository.law.indiana.edu/facpub/1131

This Response or Comment is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
Foreword

ACCESS TO JUSTICE AS A FOCUS OF RESEARCH

Mauro Cappelletti*
Bryant Garth**

We are very pleased to contribute to the first issue of the Windsor Yearbook of Access to Justice. The Yearbook has a unique potential, especially given that one problem with the study of access to justice is our limited access to information directly relevant to the topic. The study of access to justice necessitates the cooperation of a number of intellectual disciplines, but each discipline tends to write in its own specialized language, for its own narrow audience, and for journals of very limited circulation. Some interchange among disciplines takes place in the footnotes, but an outsider may be unable even to locate research, much less understand its implications. The Windsor Yearbook has the opportunity to reach out and bring together various disciplines in a way that can promote constructive dialogue and deepen our understanding of access to justice as a focus for research. In addition, the Windsor Yearbook can help overcome the problem of access to information about developments that are not widely reported or are simply unknown outside of one or two provinces, states, or countries. Comparative study provides an essential means for separating what may be unimportant, ephemeral national trends from more profound, lasting social phenomena shared by a number of similar societies. Thus, while we recognize the difficulties in starting a new publication and making it truly interdisciplinary and comparative, we applaud this effort and believe there is a strong demand for such a publication on access to justice.

This foreword will provide a brief, comparative perspective

---

* Professor of Law, European University Institute at Florence and Stanford University. Foreign Member of the British Academy and the Royal Academy of Belgium. Dr. jur. 1952, University of Florence; Dr. hon c., University of Aix-Marseille and University of Ghent.
** Assistant Professor, Indiana University School of Law.

(1981), 1 Windsor Yearbook of Access to Justice
on what we have called the "access-to-justice movement," highlight some of the issues that contributors to the *Yearbook* might consider, and examine access to justice both as a means to realize substantive political ends and as a means to what may be seen as primarily legal and procedural goals. One of our themes will be the inevitable tension between the procedural right of access to justice and the substantive goals of many access-oriented reformers. Another will be the importance of detailed research, such as may be included in this *Yearbook*. Such research is essential to understand the direction of the movement and how it responds and can respond to some of the underlying policy dilemmas.

I. Access to Justice as a Movement

We have characterized the access-to-justice movement as involving "waves" of reform aimed at the challenging problem of making rights effective. Legal sociologists have taught us that the most difficult rights to enforce are those which purport to benefit relatively isolated and poor individuals against powerful organizations and bureaucracies. The welfare state, especially as it emerged in the 1960s and 1970s, has been characterized by a proliferation of rights fitting precisely that pattern. Welfare, consumer, environmental, and a number of employee rights have been created, but they have been underenforced or even unenforced. As Bellow and Kettleson recently remarked about the United States, the situation is "what many observers . . . now recognize as an enforcement crisis."

A first response of reformers — "the first wave" — was to define the problem in terms of a relatively traditional view of law and the legal system: unenforced rights represent "unmet

---


2 *Id.*


4 Gary Bellow & Jeanne Kettleson, "From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice" (1978), 58 *Boston U.L. Rev.* 337.

legal needs" that can be met if lawyers are made more accessible. The focus here is on the procedural availability of lawyers to the poor, rather than specifically on the substantive goal of enforcing rights affirmatively. Major reforms toward judicare legal aid systems in Western Europe, Australia, and parts of Canada, thus sought to make lawyers available to those who could not afford them.5

In the United States the response was somewhat different, although still concerned primarily with the needs of the poor for legal services. Primarily because of historical reasons6 and its connection with the War on Poverty, legal aid reform took place through the proliferation of staff attorneys paid directly by the Federal Government and located in deprived urban and rural areas.7 The connection with the War on Poverty fostered a more substantive concern than was evident in judicare programs. Neighbourhood law firms were to reach out to clients, attract them to local offices, and facilitate the vindication of the new rights; and they were to take action that would expand and enforce on a large scale the rights of the poor. While judicare connoted a right of equal access to lawyers, the staff program in the United States implicated lawyers more in the substantive goals of the War on Poverty.

The drama of activist neighbourhood law firms attracted considerable attention, helping to stimulate innovation outside the United States. Other countries were attracted to this reform, partly because they were fighting their own wars or battles against poverty; and it also became clear that the American staff lawyers, more so than lawyers under judicare, were handling the kinds of issues characteristic of the welfare state and the "unmet legal need."8 Lawyers and other reformers, especially in England, Canada, and Australia, thus called for a staff component to be added to their existing judicare systems. Combined models of legal aid began to emerge.9

At the same time, although to a lesser extent, a movement toward combined models of legal aid developed in the United

---

6 See generally, Joel F. Handler, Ellen Jane Hollingsworth, and Howard S. Erlanger, *Lawyers and the Pursuit of Rights* (New York: Academic Press, 1978). One reason was that there already existed a network of legal aid societies financed by charitable contributions. Another reason suggested by these authors was that American "individualism" had led to an explicit rejection in the early 1950s of the "socialistic" English judicare model.


9 See Mauro Cappelletti et. al., *Equal Justice, supra* note 5, 525-628.
Windsor Yearbook of Access to Justice

States. There is now a growing acceptance in legal services circles of the virtues of a legal aid system combining judicare and staff components. This acceptance reflects partly the continuing belief, even in the United States, that there should be a basic legal right to a lawyer for those who cannot afford one, \(^{10}\) and partly it reflects a recognition that a combined system better serves the more substantive goals of legal aid. \(^{11}\) Legal aid reform, in short, has been characterized by the interaction of closely related substantive and procedural goals.

These twin concerns are evident also in what we have termed the second wave of access-to-justice reform — providing legal representation for diffuse interests. Examples include public interest law firms, class and organizational lawsuits, and new governmental agencies such as the consumer ombudsman institution. As Hein Kötz, a leading German comparativist, has stated, this wave is also part of a "general, worldwide effort." \(^{12}\) One source of this movement is the recognition that certain fragmented, diffuse interests tend to be underrepresented or unrepresented in our legal and administrative processes. Like the interests of the poor, those of consumers, environmentalists and certain other groups are unlikely to retain their own advocates under a market economic system or a political system responsive to organized interest groups. \(^{13}\) Reforms that correct the "imbalance" of advocacy by providing lawyers and other advocacy agencies can be seen as correcting a procedural flaw akin to the more strictly legal-procedural problem of providing lawyers to those who cannot afford them. Again, however, there is a substantive underpinning to these reforms. They tend to focus on the rights of the poor, tenants, consumers, and environmentalists, and the effort is to take those rights and enforce them in the

\(^{10}\) The staff model clearly cannot provide an entitlement to legal aid for all those who cannot afford a lawyer. See text, infra at notes 55-60.

\(^{11}\) See Legal Services Corporation, \textit{The Delivery Systems Study: A Policy Report to the Congress and the President of the United States} (Washington, D.C.: Legal Services Corporation, 1980). According to the President of the Corporation, Dan Bradley,

\begin{quote}
The Corporation, legal services programs, clients and the legal profession should concentrate . . . on finding and developing creative local delivery systems, which include combinations of staff attorneys and lawyers in private practice where such combinations are appropriate and possible. Such efforts are essential if this nation is ever to provide comprehensive service for persons unable to afford legal assistance.
\end{quote}

\textit{Id.}, iii.


interests of cleaner air, sounder products, better housing and the like.

The "third wave" of reform continues both the substantive focus on rights and the procedural concern with access. As we have described it, this approach looks beyond institutions of representation to the full panoply of institutions that participate in dispute processing. It is thus characterized by efforts not only to provide legal representation and process disputes through traditional judicial forums, but also by a willingness to experiment with new forms of representation and new dispute processing institutions. Perhaps the leading examples of this approach are relatively informal, often specialized institutions such as consumer complaint boards, landlord-tenant tribunals and "rentalsmen," small claims courts, and what in the United States are termed "neighbourhood justice centers." It may sometimes be misleading to portray these waves of the access-to-justice movement as an ideal chronology of reform. The chronology approximates reasonably well the pattern of developments in the United States, but movements elsewhere, especially on the European Continent, began earlier in this century and left an institutional legacy which anticipated and, to an extent, preempted some of the more recent trends. German and Austrian courts and procedures, for example, are much less formal than their American and English counterparts.

Nevertheless, the access-to-justice movement can best be understood if the various components are distinguished, and the above-defined waves do highlight the principal areas of reform. The separation of reform types facilitates comparisons

---

14 See, supra note 1.

15 Many examples are discussed in v. 1 & 2 of the Florence Access-to-Justice Project series. See Mauro Cappelletti and Bryant Garth, eds., World Survey supra note 1; Mauro Cappelletti and John Weisner, eds., Access to Justice: Promising Institutions (Alphen aan den Rijn/Milan: Sijthoff/Giuffré, 1979, v. 2 of Florence Access-to-Justice Project), [hereinafter cited as Promising Institutions]. Recent evidence of activity in the United States includes the enactment of the Dispute Resolution Act, Public Law 96-190, on February 12, 1980. The preamble of the Act, which is designed to encourage alternative dispute processing fora, states that "for the majority of Americans, mechanisms for the resolution of minor disputes are largely unavailable, inaccessible, ineffective, expensive, or unfair." See generally, Maurcie Rosenberg, "Second Class Justice", infra (1981), 1 Windsor Yearb. Access Justice 294.


across national boundaries, and it reminds us that access to justice implies a variety of approaches to law and legal institutions, each with different advantages and disadvantages. The impact of reform, however, depends on developments within all three waves of reform. Moreover, reforms can be inspired by groups with disparate motives. What some see as a cost-cutting reform, others may see as a means for controlling conflict, and still others may see in terms of the vindication of substantive rights.

II. Research Into Access to Justice — The Importance of Detail

We can not understand access to justice without focusing on the details. This requires among other things new research that can trace the impact of laws and institutions into the lives of those whose behaviour the law purports to affect. An accurate assessment of the access-to-justice movement and its particular manifestations requires an immersion into the details of the legal profession, court procedures, alternatives to the courts, and individual decision-making. Details are especially important because the access-to-justice movement, as we have suggested, contains several potentially disparate elements. There is a strong concern on the one hand with “access” for those who cannot avail themselves of lawyers, courts, and court-like machinery. Within this context, a focus on access may encompass a number of goals. The concern might be simply with enforcing access to lawyers and courts as a legal and procedural right. Or it might be to reduce barriers that prevent disputants from utilizing the services of dispute processing machinery generally. The main impetus for the creation of the U.S. neighbourhood justice centers, the French conciliateurs, and similar institutions, for example, seems to be a belief that disputants need to be provided with new, accessible institutions to resolve certain kinds of disputes. In either situation, the focus is on making the institution available as a practical matter to those who might want to use it.

On the other hand, we may choose to focus more on the justice that results from improved access. This justice might be defined simply as synonymous with a resolution of the dispute acceptable to both sides. The justice sought by access-to-justice reformers, however, tends to be rooted in the substantive concerns described before. Reforms are sought that will provide access to individuals and groups such that the rights of the poor, tenants, consumers, and the like will be vindicated. Furthermore, the idea is that these rights will not only be vindicated in the courts or court-like machinery, but they should also result in beneficial changes in the day-to-day lives of the groups for whom the rights were created.

Finally, we must recognize that another impetus for reform is simply the desire to reduce court congestion and the costs to the...
government of processing disputes. This concern has inspired some creativity, but obviously this is primarily a negative goal. Indeed, even those who wish primarily to cut costs tend to argue in terms of the procedural or substantive goals more central to the ideology of the access-to-justice movement.

In order to ascertain how a given set of procedures affects the new substantive rights characteristic of modern welfare states, we must encourage considerable empirical research. Very subtle institutional changes can make an enormous practical difference. In small claims courts, for example, such factors as the substantive law knowledge of judges, their approach to the parties and to the dispute, the availability and quality of assistance to litigants, and the general profile of the court in the community may determine what the court’s performance will be with respect to the implementation of, say, consumer or tenant rights.18 As Marc Galanter has recently noted, substantive law and dispute processing agencies send out signals affecting what he terms the “indigenous law” that regulates affairs among individuals and groups.19

The results obtained in court produce one set of signals, but other characteristics of dispute processing institutions — including speed, cost, formality — also determine how community activity is affected by the existence of that institution. Finally, it is necessary to study the community itself and its existing (or indigenous) methods of handling disputes.20 As a recent discussion of this problem concluded, “designing institutions of justice from the ‘top’ down without knowledge of what conditions hold in the neighbourhoods will risk creating ineffective and costly institutions with little prospect of dealing with the bulk of their potential clientele.”21

These detailed studies sometimes force us to revise our preconceptions about how rights are enforced. One might expect, for example, that a consumer will have a better chance of enforcing new, often complicated, legal rights by retaining a lawyer than by proceeding as an individual to an informal or conciliatory institution. Steward Macaulay, however, has

shown the fallacy of such a simple dichotomy in his recent study of lawyers and consumer protection law in Wisconsin.

Sometimes lawyers use their status as experts in the law, legal arguments, and express or implied threats of legal action... Often, however, a legal style of argument fades into the background. The attorney may not be too sure about the precise legal situation or may worry about seeming to coerce the other party. In such situations lawyers are likely to appeal to some mixture of the interest of the opponent and to standards of reasonableness apart from claims of legal right.22

Such lawyers, playing "nonadversary roles without great knowledge of the contours of consumer law,"23 are very similar to the mediators or conciliators one might find in an informal institution created as an alternative to lawyers and courts.

Studies of this nature provide an invaluable means to assess the actual impact of new rights and procedures — the practical meaning of access to justice. The Windsor Yearbook will contribute immensely to this field by providing a forum for these studies, which tend to be anthropological or sociological in approach. When we understand the details, however, we must place them into a more general framework. Many key issues, for example, can profitably be examined from an economic perspective.24 A psychological approach has also proved useful.25 A real understanding of access to justice, however, cannot avoid some political perspective. Access to justice necessarily implicates issues central to the politics of the modern welfare state.

III. Research Into Access to Justice — Political Aspects

Substantive goals inherent in the access-to-justice movement place it squarely within the tradition of welfare state politics. As mentioned before, the rights at the center of access-improving reforms are those typical of welfare state efforts to bolster the position of the weak — especially individuals in such

23 Id., 153.
capacities as consumers, tenants, or employees — against relatively powerful organizations. The welfare state has been characterized increasingly by the proliferation of such rights — rights that are designed to promote social change on behalf of the "have-nots". The existence of substantive rights representing broad social goals has helped to inspire the access-to-justice movement. It has promoted close critical scrutiny of the courts and the legal profession on the grounds that no social institutions — even the professions — can avoid being measured by the standards of important political and social goals. Thus, while the results of the English Royal Commission on Legal Services may have been disappointing in some areas, the Commission's existence and work illustrate the increasing tendency to ask how the profession and the courts serve what is defined as the public interest.

While the political impact of the welfare state on lawyers and courts is important, we must try to go beyond those issues to the politics of the welfare state itself. We must focus, for example, on the sources and tensions involved in the proliferation and implementation of welfare state rights. One assumption access reformers may make is that the legislative creation of a right implies a societal commitment to its full enforcement. The political reality is much more complicated.

26 See, e.g., Luhmann, "The Legal Profession: Comments on the Situation in the Federal Republic" in D. MacCormick, ed., Lawyers in their Social Setting (Edinburgh: W. Green & Son, Ltd., 1976), 98, 113. ("[T]he mutations of law can no longer be controlled by means of the hitherto existing dogmatic methods").
28 An example would be the recommendations for the community law centres. See, e.g., Bryant Garth, "The Benson Report: A Reactionary View of Community Law Centres" (1980), 5 Legal Services Bulletin 147.
32 See, e.g., Stuart A. Scheingold, id.; M. Edelman, id.
At one extreme new rights may represent political symbols enacted by those who wish to mollify dissent without effecting any serious change. At the other extreme would be rights that policymakers wish to have enforced at virtually any cost. The typical situation is that legislators proliferate rights with an understanding that they will be enforced at a certain level and impose a more or less predictable burden on those against whom they are enforced.

Access reforms may drastically affect that level of enforcement, and that in turn may lead to a strong political reaction manifested in hostility to the underlying substantive law or to the procedural reform. The practical result of reaction may be a retreat from the promise implied in the creation or expansion of a right. That is not the necessary result, however. It might be that the partially “symbolic” right cannot be easily withdrawn. The creation of the right may set in motion forces that enlarge its political constituency. We must explore these connections between rights and the mobilization of political power. The role of the legal profession here merits particular attention. If lawyers are inclined to take the position that, in an optimally functioning legal system, rights should not go unenforced because of procedural barriers to access — and the profession has tended toward that position — then that will add to the political momentum in favour of the rights. A consideration of these kinds of issues — the relationship of new rights and access reforms to the distribution of national and local political power — will lead us, moreover, to a better understanding of the role of law in the welfare state.

A few brief examples can illustrate the need to consider these issues of political power. First, there is a growing body of literature showing that, despite the achievements resulting from legal aid reforms, public interest law, and other institutions that act as advocates for underrepresented interests, there are serious limits as to what they can accomplish on their own. Strong arguments, even if coupled with victories in courts and administrative agencies, do not necessarily produce lasting

33 According to Joel F. Handler, “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.” Joel F. Handler, “Public Interest Law: Problems and Prospects”, in The American Assembly, Law and the American Future, M. Schwartz, ed., (Englewood Cliffs, N.J.: Prentice Hall, 1976), 99, 110.
34 See Stuart A. Scheingold, supra note 31.
35 A typical example is the following article by a former American Bar Association President: S. Shepherd Tate, “Access to Justice” (1976), 65 American Bar Association Journal 904. See also, e.g., Society of Labour Lawyers, Legal Services for All (London: Fabian Society, 1978).
change for underprivileged groups. Lawyers and courts lack the resources and ability to see that victories are brought to the attention of potential beneficiaries and to monitor enforcement on a large scale. Implementation tends to require the active participation of private organizations able to educate their members, monitor the enforcement of rights, and, where necessary, lobby in political forums on the strength of more than just the persuasiveness of their arguments. Recognizing this situation, leaders in the legal services and public interest movement are now urging that legal representation be seen as a means to preserve and strengthen private initiatives, not as a substitute.37

A second example of the significance of issues concerning political power can be taken from the “third wave” of reform — in particular the trend toward the creation of informal dispute processing institutions. To the extent that such institutions are concerned with disputes involving parties with unequal power, their effectiveness may be seriously limited. Outcomes may resemble what would have resulted from negotiations, and that may favour the more powerful party at the expense of enforcement of rights. Consumer and tenant rights, for example, have not fared well in most U.S. small claims courts.38 Laura Nader has pointed this out recently:

The fundamental problem that constrains the performance of alternative complaint mechanisms today derives from their inability to compensate adequately for the ineffective bargaining position of the individual who confronts large corporations and government bureaucracies.39

Thus, the efforts of these third wave reforms depend largely on the success of reforms in waves one and two. Legal aid and public interest law can strengthen bargaining positions because of the possibility of court action (and, with class actions, the possibility of aggregating claims). A plausible threat to litigate is one source of power. Beyond litigation, however, we are returned to the need for organizations that can add greater political strength.40 To quote Nader again, for dispute-processing reform “to have any likelihood of yielding more than symbolic victories, an active and vital grass-roots citizen and consumer movement must be encouraged.”41

37 See the sources, supra note 3.
38 See the sources, supra note 1.
40 Among other things, organizations can help enact and protect favourable laws, make members aware of their rights, provide resources to take legal or other action, and monitor the quality and results of the dispute processing institution. The leading analysis of this is Marc Galanter, supra note 3.
41 See Laura Nader, supra note 39, 1021.
Access to justice thus requires close attention to the politics of the welfare state. The movement to enforce rights on behalf of the underprivileged is an effort to realize the promises of the welfare state. Hostility to access reforms may evince a more profound hostility to social reform. Indeed, even some of the supporters of access reforms may be interested in curbing the so-called "explosion of welfare rights" by channeling disputes into non-adversary, conciliatory proceedings where demands are moderated and there is less of an emphasis on rights. As Harry Street observed about access to justice, "[t]here is one big enveloping issue: justice in the Welfare State."

That overriding issue requires us to examine another political dimension of the access-to-justice movement. Access to justice, as noted before, is closely connected to the welfare state proliferation of rights associated with groups having inherently weak statuses — consumers, tenants, debtors, unemployed. We must be willing to discuss the issue of whether the best way to benefit such groups is to create new legal rights and try to find means of enforcing them. There are, after all, some subtle costs — economic and otherwise — of this legalistic solution to social problems. First, it is obvious that the law must be involved in individuals' daily lives to an unprecedented degree. Recent attacks on law in the welfare state, in fact, tended to focus on "overregulation" and excessive legalism.

Less attention has been paid to the problems of dependency and accountability that inhere in any large scale effort at rights enforcement. The problem of dependency stems from the effort to make ordinary people aware of their rights and persuade them to invoke the law. That means convincing people that many everyday problems that individuals would otherwise handle in their own way are legal problems requiring for their solution the intervention of a lawyer, judge, or other legal actor. From one perspective we can say that "legal needs" are being met, but from another we might complain that individuals are being deprived of their autonomy and being coerced, directly or indirectly, to follow the decisions of legal professionals — indeed, that "legal needs" are artificially created.

---

Similarly, to the extent that professionals define and promote the satisfaction of "legal needs" according to their own priorities, there is a problem of accountability. Given the vast array of potential problems, we must face the issue of who should decide which ones should be made into priorities for active intervention. One of the central dilemmas of the access-to-justice movement is how rights can be enforced without promoting a dependency to a professional group unaccountable in this area to the public it is supposed to serve. Experiments in lay participation and control offer some potential, but we must admit that results thus far have been mixed.\footnote{See, e.g., the study by Diane Deschamps in Commission des services juridiques, 1977 Annual Report (Montreal: Commission des services juridiques, 1977) 103. See generally, Bryant Garth, supra note 8, 203-217.}

The troubling political question remains that of "what price rights?" The effort to realize the substantive goals of welfare state legislation raises a number of complicated issues involving important tradeoffs among competing goals. Nevertheless, these complications should not lead us to retreat from the modern promise of access to justice. As Andr{é} Tunc observed, "[e]conomic regulation is a poor substitute for social ethics; social security, a poor substitute for spontaneous community solidarity. But both are unavoidable for the protection of man in our present societies."\footnote{See P. Nonet, supra note 31.} Welfare state methods are surely imperfect, but they do offer some way to improve the position of the disadvantaged. If we believe that those methods are "unavoidable" in our present societies, we must take seriously the substantive political goals implicit in the access to justice movement.

Here we are thrust again into questions of detail that require the close attention of those with an interest in access to justice. It may be that reforms can strengthen local initiative and individual autonomy at the same time they facilitate rights enforcement. Only serious study can provide a credible answer to that important question; it is clear that one goal of many within the access-to-justice movement has been to find ways of avoiding activities that produce debilitating dependencies on legal professionals.\footnote{André Tunc, "The Quest for Justice", in M. Cappelletti, ed., Welfare Law, supra note 12.} Success in that venture, of course, will not resolve all the problems of the welfare state, nor will it transform the powerless into the powerful, but it can provide
considerable help to the disadvantaged; we clearly have not yet exhausted this potential avenue of social change.

IV. Legal Aspects of Access to Justice

The discussion of the political aspects of access to justice has led us to focus almost exclusively on the substantive goals of access reformers and how those goals relate to the welfare state. Earlier, however, we emphasized that the movement has received considerable impetus also from a concern with issues that are more procedural than substantive — especially the right of effective access to courts and administrative agencies for individuals and groups who have traditionally been unable to obtain the advantage of those forums. This right, in fact, is given special status in modern constitutions such as those of the Federal Republic of Germany and Italy; and the right of access is enforceable among the signatories of the European Convention for the Protection of Human Rights.

There are potential contradictions between this procedural aspect of the access-to-justice movement and the substantive goals discussed before. In the first place, a right to access to courts may inhibit experimentation and reform, especially that which results in the creation of alternative institutions to process disputes. In Italy, for example, a law requiring that access be to an alternative institution instead of a court would clearly be unconstitutional.

This emphasis on lawyers and courts makes it all the more difficult to make justice available to large numbers of persons, and it also creates obstacles to the legal realization of substantive rights on a very large scale. The inescapable fact is that no society is likely to provide a lawyer and a formal judicial proceeding to anyone with a tenable legal claim, and it is even less likely that a society will encourage lawyers to reach out affirmatively to mobilize rights-enforcing litigation among all such individuals. Even if that were a desirable goal, it would be inconceivable to commit enough resources to provide "Rolls Royce Justice" to everyone and every legal claim. Thus, to the extent that a right of access channels limited resources toward lawyers and formal courts, it may preclude the kind of reforms that can mobilize more people to assert rights and obtain their enforcement.

53 Art. 6. See id., 237-249.
The potential trade-off may be seen in the contrast between judicare and staff legal aid systems. Judicare systems — or at least combined systems with a judicare component — are associated with the granting of a civil right to counsel. This system can do that partly because it makes the resources of the private bar available to help those who cannot afford legal services. In contrast, a staff system inevitably lacks a sufficient number of lawyers to respond fully to the demand for legal services. There are other reasons, however, for this contrast. First, the judicare lawyers tend to be reactive, waiting passively for clients to seek their services. The lawyers, as in England, may not be permitted as a rule to handle small claims, and they clearly do not reach out affirmatively to all who could use their services. As a practical matter, they could not do that and still handle all cases as a matter of right. The result is that judicare systems tend to be dominated by matrimonial matters and criminal defense.

In contrast, staff systems have sought to reach beyond matrimonial matters and criminal defense (where criminal defense is not assigned to another agency) to tenant, welfare, consumer, and other problems that are not generally brought to a law office. That requires a policy of going out into the community. The problem is that this affirmative behaviour makes it still more difficult to guarantee the provision of legal aid as a matter of right. Staff offices are drowned in work, and they must set priorities. Those priorities for the most part reflect an emphasis not on handling every claim possible, but rather on enforcing the new substantive rights typical of the welfare state.

It can be argued, therefore, that the kind of affirmative legal aid required to vindicate welfare state rights is inconsistent with a right of access to counsel. Staff and judicare systems can of course be combined, making it possible to guarantee legal aid as a matter of right to a greater number of people, but there remains the inconsistency between that right and the need to...

56 See, e.g., L. Bridges, B. Sufrin, J. Whetton, and R. White, Legal Services in Birmingham (Birmingham: Institute for Judicial Administration, 1975), 159 (criticizing the English plan for that reason).
57 "If all the lawyers in the country worked full time, they could not deal with even the articulated legal problems of the poor. An even if somehow lawyers could deal with those articulated problems, they would not change very much the tangle of unarticulated legal troubles in which poor people live," Stephen Wexler, "Practicing Law for Poor People" (1970), 79 Yale Law Journal 1049, 1053. See generally, Leon H. Mayhew, "Institutions of Legal Representation: Civil Justice and the Public" (1975), 9 Law and Society Rev. 401.
58 See B. Garth, supra note 8, 145-70.
59 See id.
60 See id.
pick and choose among clients and claims if the aim is to reach
the new rights and help promote their vindication.

The tension between access as a procedural right and the
substantive goals of welfare state access reformers, however,
can be resolved partly through a more flexible definition of a
right of access. An important recent decision of the European
Court of Human Rights in Strasbourg illustrates a trend toward
a more expansive view of what is meant by a right of access to
justice. In the Airey case decided October 9, 1979, the Court
held that Ireland deprived Mrs. Airey of her right of effective
access because it provided neither a lawyer at the state’s
expense nor a simplified proceeding which would have enabled
her to obtain a matrimonial separation without the need of a
lawyer. 61 This kind of flexibility suggests that the procedural
dimension of a right to access can be modified to favour less
expensive, less formal procedures rather than access only to
lawyers and formal courts. 62 The legal and procedural sources
of the access-to-justice movement may be able to merge with
the political and substantive goals which have also motivated
reform.

The potential for merger raises another issue that must be
confronted: how far do we want to go toward encouraging such
a merger? The answer is not simple. On the one hand, the
purpose of a constitutional or otherwise “entrenched” right of
access is to place it above political struggles — to allow
individuals or groups to demand and obtain a full hearing in an
independent court on their grievances and a reasoned decision
based on the law. It does not matter whether their claims are
politically popular or extremely controversial. On the other
hand, if we modify that right of access such that some persons
and claims are coerced, directly or indirectly, into an informal
alternative proceeding, we may be subjecting that right to
prevailing political priorities. Access limited to such a
proceeding may mean that unpopular legal rights are deprived
of an institution for their effective vindication.

If access reformers trust prevailing political priorities, they
may be willing to run that risk in order to facilitate the
widespread enforcement of welfare state rights, but they must
be wary of what might happen if the political climate changes.
The problem is not merely academic. Hostility to the welfare
state has grown tremendously as a political force of the last few
years, both in Western Europe and North America. If that
represents a reassertion of the power of the large organizational
interests against the ideal of a welfare state, then we must be

61 European Court of Human Rights, Airey Case, Judgment of 9 October
1979, Series A No. 32.
62 This possibility is suggested also in the evolution of administrative law in
the United States. See Paul R. Verkuil, “The Ombusman and the Limits of
the Adversary Process” (1975), 75 Columbia L. Rev. 845.
especially careful. An entrenched right of access may limit the widespread enforcement of the rights of disadvantaged groups, but it does ensure that political expediency will not prevent those rights from obtaining a full legal hearing by diverting all potential claimants to what could be a less than satisfactory alternative. We have said before that the political priorities embodied in the access-to-justice movement must not cause us to “sell our soul” in legal procedures. We must be aware that the weakening of formal procedural rights will not always promote the kind of substantive goals we seek.

Conclusion

Ambiguities and pitfalls pervade the access-to-justice movement. It is the task of interdisciplinary and comparative scholarship and empirical research to clarify these problems, monitor developments relevant to access to justice, and facilitate creative efforts to respond to the social problems that to a great extent inspired the access-to-justice movement in the first place. The *Windsor Yearbook of Access to Justice* can be a leading forum for that kind of scholarly interchange. As we have suggested in the preceding pages, the great mass of work remains to be done.

---

63 See Mauro Cappelletti and Bryant Garth, eds., *World Survey*, supra note 1, 123.